The External Dimensions of the EU Area of Freedom, Security and Justice
A Constitutional Perspective

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The External Dimensions of the EU Area of Freedom, Security and Justice
A Constitutional Perspective
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A Constitutional Perspective
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Prof. Dr. R.A. Wessel (University of Twente)
Foreword

This study was carried in the framework of the Chair of International and European Law and Governance held by Prof. Dr. R.A. Wessel at the Department of Public Administration of the University of Twente as well as in the framework of the Centre for the Law of EU External Relations (CLEER) and the T.M.C. Asser Instituut. The manuscript is scheduled to become a monograph by the end of 2016 for T.M.C. Asser Press/Springer and follows the author guidelines of this publishing house.

The manuscript includes ideas and a couple of excerpts taken from the following publications I authored in the years 2011-2014 while working at the T.M.C. Asser Institute in The Hague:

Another parochial decision? The Common European Asylum System at the crossroad between IHL and refugee law in Diakité, in Questions of International Law, QIL, Zoom-in 12 (2015), 3-20

Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements, in Revista de Derecho Comunitario Europeo, Vol.47, n.3, (with Ramses A. Wessel), pp. 1047-1064


Much ado about op-out? The Impact of variable geometry in the external dimension of the AFSJ in S. Blockmans (ed.), Differentiated Integration in the EU. From the Inside Looking Out, Brussels, 2014, pp. 75-102


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The author of this manuscript also wishes to thank Prof. Dr. Steven Blockmans: without his direct involvement and help – at a time in which he was not supposed to act as mentor or supervisor, this project would have never begun. Together with Ramses Wessel he was the first to trust and believe in my ideas and worked with me on the development of the research proposal; anyone working in the academic environment knows how important this is. Thanks to him I started to work in the framework of the activities of the Centre for the Law of EU External Relations (CLEER).

I would also like to thank Prof. Dr. Maurizio Arcari from the Università Degli Studi di Milano-Bicocca, Italy: albeit from a long distance he has involved me in many research initiatives and conferences and I am very grateful for the friendship that we’ve established over the years. And I should also thank Prof. Dr. Marta Cartabia, Professor of European Constitutional Law back at my University in Milan and now judge at the Italian Constitutional Court: she introduced me to the works of authors that made me want to work in research.

I also wish to thank all the kind colleagues I met at T.M.C. Asser, the ICCT-The Hague, the Max Planck Institute in Heidelberg and the University of Twente. A special thanks goes to Dr. Tamara Takács who had the herculean task of sharing an office with me in The Hague for quite some time. Last but not least, I thank my many long-distanced friends from Varese to Ramatuelle, from Geneva to Exeter, from Bruges to Brussels and from the Netherlands to NYC, Lisbon and Cape Town; and, of course, my family back home in Varese, Italy.
**List of abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AFSJ</td>
<td>Area of Freedom, Security and Justice</td>
</tr>
<tr>
<td>CDE</td>
<td>Cahiers de Droit Européen</td>
</tr>
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<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>CFHR</td>
<td>Charter of Fundamental Rights of the EU</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>CMLRev</td>
<td>Common Market Law Review</td>
</tr>
<tr>
<td>DUE</td>
<td>Il Diritto dell’Unione Europea</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EEAS</td>
<td>European External Action Service</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<tr>
<td>EFARev</td>
<td>European Foreign Affairs Review</td>
</tr>
<tr>
<td>EJMLae</td>
<td>European Journal of Migration and Law</td>
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<tr>
<td>ELJ</td>
<td>European law Journal</td>
</tr>
<tr>
<td>ELRev</td>
<td>European Law Review</td>
</tr>
<tr>
<td>DG</td>
<td>Directorate General</td>
</tr>
<tr>
<td>GC</td>
<td>General Court of the European Union</td>
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<tr>
<td>JHA</td>
<td>Justice and Home Affairs</td>
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<tr>
<td>NYR</td>
<td>Not Yet Reported</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>PJCC</td>
<td>Police and Judicial Cooperation in Criminal Matters</td>
</tr>
<tr>
<td>RCDIPriv</td>
<td>Revue critique de droit international privé</td>
</tr>
<tr>
<td>RMUE</td>
<td>Revue du Marché Unique Européen</td>
</tr>
<tr>
<td>RTDEur</td>
<td>Revue Trimestrielle de Droit Européen</td>
</tr>
<tr>
<td>SBC</td>
<td>Schengen Border Code</td>
</tr>
<tr>
<td>TEC</td>
<td>European Community Treaty</td>
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<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
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<tr>
<td>TEUaL</td>
<td>Treaty on the European Union before the Lisbon Treaty</td>
</tr>
<tr>
<td>TEUM</td>
<td>Treaty on the European Union Maastricht version</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
</tr>
<tr>
<td>USA</td>
<td>United States of America</td>
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PART ONE

An External Dimension of the Area of freedom Security and Justice?
“The theory of law which has been presented here is a juristic theory, allowance being made for the tautology. (...) Its object is norms, general and individual. It considers facts only insofar as they are in some way or other determined by norms. The statements in which our theory describes its object are therefore not statements about what is but statements about what ought to be. In this sense, the theory may also be called a normative theory”.

Chapter 1

Introduction

1.1 Preliminary Remarks

‘External relations’ is the term used for all relations the European Union (EU) entertains with non-EU member states (‘third states’) and other international organizations. During the past decade in particular the external relations of the EU have not just concerned the classic areas of international cooperation (‘external action’) of the EU such as trade (Article 205 TFEU), development cooperation (Article 208 TFEU) and foreign security and defence policy (Title V TEU), but have also concerned the sensitive policy terrains covered by the Area of Freedom Security and Justice (hereinafter AFSJ) inter alia related to external border controls, asylum, immigration and the prevention and combating of crime.

In contrast to many other competences of the EU, the AFSJ domain covers fields “at the heart of State sovereignty”. Following the entry into force of the Lisbon treaty in 2009, the AFSJ concept is codified in Article 3 TEU and Article 67 TFEU. In the light of the

---

1 Kelsen 1999, p.162
2 Jacobs 2006, p.vii
3 Article 2 TEU: The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. OJEU C115, 9/05/2008, p.17
4 Article 67 TFEU: 1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals. 3. The Union shall endeavour to ensure a high
combined reading of Article 3 TEU with the provisions of Title V Part III of the TFEU and the existing acquis\(^5\), the AFSJ includes six main policies: border checks, asylum, immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation.

While the policies and the specific provisions of the AFSJ are largely inward looking,\(^6\) the establishment of the EU as an AFSJ has been challenged by the emergence of certain external factors such as illegal immigration, international terrorism and organised crime. The emergence of these external factors is directly affecting the EU as a polity: thus, the pressure constituted by illegal migration and asylum seekers as well as human trafficking and other forms of transnational organised crime demand a coordinated and common response for the management of the external borders of the EU as a consequence of the abolishment of the internal ones. Indeed, these external factors constituted and still constitute today a prominent push factor for the development of internal AFSJ measures within the Member States.\(^7\) Likewise, because of these external factors and events, the EU and the Member States agreed that the development and the establishment of the EU as an AFSJ couldn’t be achieved without allowing the EU to become a global actor that should seek the cooperation of third countries in order to maintain public order and security internally as well as within its neighbourhood.\(^8\)

Therefore, not only has the EU developed its own internal AFSJ, but it has also developed the external dimension, which constituted 19.1 % of the legislative output of the whole AFSJ in 2012.\(^9\) Awareness amongst Member States of the existence of certain externalities that could jeopardise their integration into an AFSJ, albeit somehow present in the Tampere conclusions,\(^10\) really emerged in the aftermath of the terrorist attacks of

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\(^6\) Infra, Part One, Chapter 3

\(^7\) Monar 2013

\(^8\) Cremona and Hillion 2006

\(^9\) No official update has been published, the source of the 2012 can be found in Monar 2013, p. 1

\(^10\) Paragraph 59 of the Tampere conclusions: “The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities”. Section D. Of the conclusions is dedicated to the external action in the domains of the AFSJ, but other references to the external dimension
9/11. As a result of the strong external pressure in relation to policies such as countering terrorism, illegal migration and transnational organised crime, the Council called for the EU “to make JHA [Justice and Home Affairs] a central priority in its external relations and ensure a co-ordinated and coherent approach” 11 because “[t]he development of the area of freedom, security and justice can only be successful if it is underpinned by a partnership with third countries”. 12

It appears from the foregoing that the internal development of the EU qua AFSJ has been affected at a very early stage by external challenges that have led to the development of the so-called ‘external dimension of the AFSJ’ and that such external dimension is considered by Member States and EU institutions as a strategic feature of the Area. As a result of this, the European Union has faced these challenges by making use of the different types of powers that the treaties have conferred upon it.

Consequently, the Union has not only made the external dimension of the AFSJ a ‘central priority’, but has been striving to integrate AFSJ elements and objectives in the different external policies of the Union such as Association Agreements concluded in the context of the European Neighbourhood Policy (ENP). To this date the EU has concluded a number of agreements, participated in a number of conventions and adopted a number of unilateral acts with an external impact that, either partially or totally, belong to the AFSJ. For example, the EU concluded a number of bilateral agreements that belong in their entirety to an AFSJ policy domain such as readmission agreements 13 and has participated in the adoption of conventions concluded in the framework of the Hague Conference in Private International Law. 14 Similarly, the EU has also pursued AFSJ objectives simultaneously to the exercise of other external powers and instruments: this is the case for instance of Partnership and Cooperation agreements or plain Association Agreements concluded in the framework of the European Neighbourhood Policy or the case of the conclusion of the EU-Central America Political Dialogue and Cooperation instrument signed in 2003. 15 Lastly, it should also be borne in mind that the the EU is bound to respect and abide by the Geneva Convention of 28 July 1951 and the Protocol

of the AFSJ can be found in other sections of the conclusions, for instance the one dedicated to migration. The conclusions can be found at http://www.europarl.europa.eu/summits/tam_en.htm.

http://register.consilium.europa.eu/pdf/en/05/st14/st14366-re03_en05.pdf (last access June 2014)
12 Idem.
13 Infra, Part Four and Five, Chapters 10 and 11
14 Infra, Part Five, Chapter 14
15 Infra, Part Four Chapter 10
of 31 January 1967 relating to the status of refugees, on the sole basis of its primary law, i.e. without having acceded to the said convention and protocol.

Moreover, EU institutions increasingly promote the combination of AFSJ objectives and instruments with initiatives and measures pursued in the context of the Union’s Common Foreign and Security Policy (CSFP) as well as its Common Security and Defence Policy (CSDP). As a result of this, the EU has envisaged and executed measures anchored in the CFSP and CSDP with a strong AFSJ component: this is the case, for instance, of ‘smart-sanction’ in the context of the fight against terrorism or the conclusion of bilateral agreements for the transfer and trial of suspected pirates arrested in the framework of operation Atalanta. Furthermore, policies belonging to the AFSJ are also connected with some of the actions that the EU undertakes in the framework of its CSDP missions such as in the case of EULEX Kosovo or EUJUST Iraq. This underlines that AFSJ cannot be approached in isolation, but is clearly connected to other policy areas, in particular those related to external security.

1.2 The multidimensional nature of the external AFSJ

It appears from the foregoing that the external dimension of the AFSJ was developed by following two parallel paths: the first path consists in the conclusion of bilateral agreements and multilateral conventions with a view to complement the internal objectives of the AFSJ with external initiatives; and the second path is characterised by the integration of AFSJ-related objectives into the different instruments of external action available to the EU. Notwithstanding this distinction, the European Council has made clear that the external projection of the AFSJ as a whole should contribute to the development of a single, coherent, external policy of the Union:

The European Council considers that the policies in the area of freedom, security and justice should be well integrated into the general policies of the Union. The adoption of the Lisbon Treaty offers new possibilities for the Union to act more efficiently in the external relations. The High Representative of the Union for foreign affairs and security policy, who is also a Vice President of the Commission, the European External Action Service and the Commission will ensure better coherence between traditional external...

16 Article 78 TFEU and 18 EU Charter on Fundamental Rights
17 Matera 2013, p.269-296
18 The AFSJ component in relation to the conclusion of extradition agreements for the surrender of suspected pirates in the framework of operation Atalanta has been discussed in the case C-658/11 European parliament v Council, Judgment 24 June 2014 NYR, see Part III, Chapter 9.
19 See infra, Part Three, Chapter 9
20 Cremona 2008
policy instruments and internal policy instruments with significant external dimensions, such as freedom, security and justice.\textsuperscript{21}

As a result, the external dimension of the AFSJ presents itself as a multidimensional phenomenon. First, the AFSJ is intrinsically multidimensional: this is because the AFSJ is a nomen iuris attributed to a general policy of the UE that contains a plurality of autonomous policies; secondly, the external dimension of the AFSJ is multidimensional because it goes beyond the boundaries of Title V of Part III of the TFEU and influences other types of external relations powers of the EU, namely the whole Part Five of the TFEU and its different instruments and policies.\textsuperscript{22} However, while the combined reading of Article 216 (1) TFEU on the conclusion of international agreements with the different AFSJ provisions does not pose immediate questions concerning the constitutional legitimacy of the AFSJ’s external projection, this does not appear so clear cut in relation to the combination of AFSJ elements and objectives with other instruments of the EU’s external action. For instance, this could be argued in relation to the combination of AFSJ competences with CFSP-based initiatives since the decision-making procedures of the two policies involved – the AFSJ and the CFSP – differ considerably.\textsuperscript{23}

Furthermore, the multidimensional nature of the external dimension of the AFSJ goes beyond the EU framework and is woven within the international community and, as a consequence, with public international law. Indeed, the external action of the EU in the AFSJ domain necessarily produces the intertwining of EU law with public international law in its broadest sense. This means that the expansion of the competences conferred upon the Union on the one side and the expansion of its external activities also mean that actions and measures conducted and adopted by the EU in the AFSJ context increasingly fall within the scope of application of international norms. This may happen whenever the external dimension of the AFSJ is directly linked to an international norm – such as the Geneva convention relating to the status of refugees, but it may also happen in other cases where international provisions are not immediately linked, like in the case of the UN Convention on the Law of the Sea (UNCLOS) and the patrolling of the high seas in the fight against illegal immigration and human trafficking.

\textsuperscript{21} The Stockholm Programme, An Open And Secure Europe Serving And Protecting Citizens, OJ 04.05.2010 C 115, p.1
\textsuperscript{22} These two points are elaborated further in Part Four of this study
\textsuperscript{23} See Case C-658/11 European Parliament v Council, judgment 24 June 2014 as well as case C-263/14 European Parliament v. Council, pending. For a detailed analysis of these aspects see Part Four, Chapter 9
Lastly, the multidimensional nature of the external dimension of the AFSJ is also due to the coexistence of EU competences with the ones of Member States. Indeed, not only the AFSJ domain is one of shared competences, but some characteristics of the AFSJ such as the role left to the Member States in relation to enforcement ex Article 72 TFEU, the emergency breaks of Articles 82 and 83 TFEU and the express exclusion of external pre-emption ex Declaration 36 to the Treaties not only make the role of national authorities essential for the execution of most initiatives, but protect the position of Member States with a considerable capacity to act independently in these domains.

It follows from the foregoing that the plurality of policies falling within the sphere of the AFSJ is coupled by a panoply of instruments at the disposal of the EU to act in the external dimension of the AFSJ. From a policy perspective this is presented as a system of interlocking pieces: the different and connected components of the AFSJ have to be integrated in the different ambits of other EU policies and construed within the scope of the different instruments at the disposal of the EU in its external relations. This multifaceted scenario already suggests that the expression commonly used “external dimension of the AFSJ” should be replaced by the expression “external dimensions of the AFSJ”. This mantra, omnipresent in Commission proposals, endorsed by the Council and promoted by the European Council is reflected in all the major documents that have shaped the external dimension of the AFSJ in the past sixteen years and in the section that follows the legal significance of this policy ambition will be further analysed.24

1.3 Sturm und Drang: The Development of the External Dimension of the AFSJ25

In the previous sections it emerged that the development of an external dimension of the AFSJ came into being as a result of two main factors: first, a number of push factors such as migratory flows, transnational organised crime and international terrorism and, secondly, the political will, especially of the European Council, to project externally the AFSJ so as to complement the internal policies and secure the European space. One can further summarize these elements and affirm that the external dimension of the AFSJ

24 For an excellent and still relevant analysis of the (legal) significance of the policy texts see Cremona 2008
25 Sturm und Drang literally means “Storm and Drive” and was a cultural and literal movement in Germany that existed in the late 18th century. The movement considered rationalism as imposed by the Enlightenment as a constraint to subjectivity and emotions which became the centre of attention for the authors who adhered to the movement. Goethe and Schiller were, at the beginning, two prominent members of the movement. This section largely builds upon and goes back to my co-authored publication “The External Dimension of the EU’s Area of Freedom, Security and Justice” with R.A. Wessel and L. Marin in 2011
gained momentum as a result of three events. The first is represented by the Tampere European Council of 1999 and initiatives/actions taken thereafter. The second is the terrorist attacks of 9/11 in New York and Washington, which had an impact on the overall strategy of the AFSJ, namely in respect of external relations and the fight against terrorism. Thirdly, we may point to ‘The Hague Programme’ of December 2004, and the new impulse it gave to the domain, resulting in a new strategic and programmatic plan for the external AFSJ, which was presented to and endorsed by the Council in December 2005.

The first time the external AFSJ emerged was at the time of the adoption of the Tampere meeting in 1999. At that time, only a few months after the entry into force of the Amsterdam treaty the European Council prepared a manifesto in which not only the broader policy choices for the whole AFSJ were explained, but also more technical aspects were decided so as to guide the legislative activities of the Commission, the EP and of the Council. On this occasion the external dimension of the AFSJ received the political attention of the highest political forum of the EU. Because the AFSJ was replacing the old reference to Justice and Home Affairs as introduced with Maastricht, the European Council made a general call for attention to Justice and Home Affairs (JHA) issues, affirming the need to integrate JHA concerns into the definition and implementation of other Union policies and activities; secondly, the European Council invited the Council to draw up – in close cooperation with the Commission – a proposal to define policy priorities, objectives and measures in order to feed the newly formulated external action of AFSJ. In relation to the first point, this can be explained not only as a call to integrate JHA in the broader spectrum of EU activities, but firstly as a call for integration and complementarity within the AFSJ since, at that time, the AFSJ was scattered amongst the third and first pillars of the treaties. In relation to the second point, it is important to look at the text itself.

The last section of the Tampere conclusions of 1999, section D, contained 3 paragraphs on the external AFSJ under the heading “Stronger External Action”. In the first paragraph – paragraph 59 of the document, the European Council wrote a policy indication that has influenced the whole development of the external AFSJ and that keeps on being reiterated every time the EU must address the external AFSJ:

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26 See the Presidency conclusions of the Tampere European Council (15-16 October 1999).
27 This is the mandate of the Tampere European Council: see paragraph 61 of the Conclusions of the Presidency, and more generally paras. 59-62.
The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities.

The purpose of this paragraph was clearly twofold. Firstly, it wished to emphasise that the different competences of the EU should contribute to create the AFSJ with the express inclusion of external relations powers. Secondly, because of the said multidimensional nature of the AFSJ and because of the fragmented (or multidimensional) nature of EU external relations, the European Council called upon the different actors involved (albeit implicitly) to integrate in a consistent manner the different policies. To do so, the European Council also made some suggestions on how the EU should proceed in paragraph 60 of the Tampere document:

*Full use must be made of the new possibilities offered by the Treaty of Amsterdam for external action and in particular of Common Strategies as well as Community agreements and agreements based on Article 38 TEU.*

Coherently with the paragraph previously analysed, in the latter section the European Council made references the EU’s external powers under both the TEU and the (then) TEC, but failed to explain how, in practice this should work. Additionally, the Tampere conclusions did actually contain two more paragraphs dedicated to the external dimension of the AFSJ in which the the European Council further elaborated on two the elements of the external AFSJ: the first procedural and the second more substantive. In paragraph 61 the European Council held that the external dimension of the AFSJ needed a strategic policy vision and more concrete guidelines; to do this, it asked the Council and the Commission to co-operate and adopt a joint document. From a more substantive perspective, the European Council called upon all the institutional actors concerned to pay special attention to the neighbourhood of the EU when developing the external dimension of the AFSJ.

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28. 61. Clear priorities, policy objectives and measures for the Union’s external action in Justice and Home Affairs should be defined. Specific recommendations should be drawn up by the Council in close co-operation with the Commission on policy objectives and measures for the Union’s external action in Justice and Home Affairs, including questions of working structure, prior to the European Council in June 2000.

29. 62. The European Council expresses its support for regional co-operation against organised crime involving the Member States and third countries bordering on the Union. In this context it notes with satisfaction the concrete and practical results obtained by the surrounding countries in
With a view to implement the Tampere remit, before the Feira European Council of June 2000, the European Council approved a strategic document adopted by the Council in close cooperation with the Commission upon a proposal by Coreper, on the EU’s priorities and policy objectives for external relations in the field of Justice and Home Affairs. This document may be seen as a first input to the definition of the external action in the domain of JHA. After acknowledging the multidimensional nature of the AFSJ itself, the document further affirms the following central points: the primary purpose of the external AFSJ is to contribute to the establishment of the AFSJ itself and not to develop an autonomous foreign policy; the external dimension of the AFSJ should form part of the Union’s overall external strategy by using a cross pillar approach and a adoption cross pillar measures. This meant that whilst the external AFSJ had to serve the internal objective of creating the AFSJ, this had to be done by integrating this internal goal into the external action of the EU.

Moreover, the document also indicated three main additional criteria for establishing priorities in the external AFSJ domain:

- internal objectives and the existence of (adopted) internal measures is the key parameter justifying the need for external action (complementarity);
- with a view to respect the subsidiarity principle, the EU should act only to its actions provide added value to bilateral action by MSs (subsidiarity);
- the external dimension of the AFSJ should contribute to the attainment of the general external objective of the EU.

Lastly, the document adopted at Feira also identified a number of substantive priorities. Regarding the fields of action, the European Council of Santa Maria da Feira upheld the decision to give priority to a number of (‘horizontal’) policy areas: the external migration

the Baltic Sea region. The European Council attaches particular importance to regional co-operation and development in the Balkan region. The European Union welcomes and intends to participate in a European Conference on Development and Security in the Adriatic and Ionian area, to be organised by the Italian Government in Italy in the first half of the year 2000. This initiative will provide valuable support in the context of the South Eastern Europe Stability Pact. See the Presidency conclusions of the Santa Maria da Feira European Council (19-20 June 2000), www.europarl.europa.eu/summits/fei1_en.htm, para. 51.


32 It is interesting to note the ambivalence of denomination in the institutions’ documents. The label ‘external JHA’ is usually employed by the Council and related actors in their documents. Cf. Doc. No. 7653/00 of 6.6.2000.

33 idem, point A (1)

34 idem, points A92) and (3)
policy, the fight against organised crime and terrorism, against specific forms of crime, drug-trafficking and the development and consolidation of the rule of law in countries on the road to democracy.\textsuperscript{35} In this last respect the Feira document is perplexing: whilst the first policy areas mentioned can be considered as complementary to the attainment of the AFSJ objective and can be considered directly related to the provisions of Title V of Part Three of the TFEU, the last two aspects mentioned do not seem to directly reflect internal AFSJ objectives; rather, “the development and consolidation of the rule of law in countries on the road to democracy” resemble a classic objective of foreign policy and, more specifically, related to Article 21 TEU.\textsuperscript{36} Thus, it can be inferred from this last element that since the early days of the external dimension of the AFSJ the institutions were confusing the AFSJ as a set of specific competences attributed to the EU to complement the internal integration process with the AFSJ understood as a a single competence field related to “justice and home affairs” in a very broad sense.

A step further in the development of the AFSJ and its external dimension was taken by the Hague Programme,\textsuperscript{37} which called for the development of a coherent external dimension of the JHA cooperation. The programme itself, dealing with external issues in many fields, including security, asylum and migration, and counter-terrorism,\textsuperscript{38} invited the Commission and the Secretary-General/High Representative of the CFSP to present an overall strategy on the external dimension of the AFSJ, prioritizing some countries or groups of countries or regions, as well as on the specific need for the EU to establish JHA cooperation with these groups of countries.

The political impulse given by the European Council became visible in a number of subsequent policy documents, both from the Commission and from the Council, on the basis of the mandate received in The Hague Programme. In its Communication on the Hague Programme\textsuperscript{39}, the Commission focused on identifying and elaborating policy projects in order to fulfil the political targets put forward by the European Council. The Commission identified ten priorities for the new multi-annual plan for the AFSJ. Secondly, the Commission elaborated its strategy on the external dimension of the AFSJ,

\begin{itemize}
  \item \textsuperscript{35}Ibid., pp. 7-8.
  \item \textsuperscript{36}Article 11 (1) TEUaL.
  \item \textsuperscript{37}OJ C53, 3 March 2005.
  \item \textsuperscript{38}The Hague Programme, points 1, 1.6 and 2.2.
\end{itemize}
fulfilling the mandate received in the Hague Programme, in a specific policy document, as did the Council. In its programmatic document for the development of the external dimension of the AFSJ, the Commission distinguishes between two perspectives, one related to the AFSJ as such and the other more generally within the broader framework of EU external relations and in this respect the document confirmed the approach developed at the time of Tampere with a strong emphasis on internal security.

At this point in history it was already possible to see the ambiguity underpinning the external AFSJ. On the one side the rationale of the external dimension was to complement the realisation of the internal AFSJ and, on the other side, the external AFSJ should serve the EU’s external relations in general. Yet, the two ambitions can hardly go hand-in-hand all the time. Whilst one can argue that the conclusion of readmission agreements is for the benefit of the internal AFSJ, it is more difficult to argue that such type of external agreement equally supports the development (lato sensu) of the EU’s neighbours and their security. Rather, it should be argued that the influence of external security threats led the EU to seek cooperation with third countries on AFSJ matters meaning that other external policies had to be moulded so as to include a strong AFSJ component.

All of the characterising elements present in the Tampere, Feira and the Hague documents were also included in the multi-annual programme adopted at the end of the Swedish presidency of the Council and known as the the Stockholm Programme. The programme foresees several actions with an external dimension, but the external

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41 Council Document No. 14366/3/05 on strategy for the external dimension of JHA affairs: global FSJ.
42 “The projection of the values underpinning the area of freedom, security and justice is essential in order to safeguard the internal security of the EU. Menaces such as terrorism, organized crime and drug trafficking also originate outside the EU. It is thus crucial that the EU develop a strategy to engage with third countries worldwide.” COM (2005) 491, p. 3.
43 “The purpose of this Communication is to demonstrate how the external dimension of justice and home affairs contributes to the establishment of the internal area of freedom, security and justice and at the same time supports the political objectives of the European Union’s external relations, including sharing and promoting the values of freedom, security and justice in third countries. Although the instruments covering the external aspects of the EU’s policies on freedom, justice and security are in place, the EU is for the first time organizing them around defined principles and guidelines into a strategy. This strategy must form an integral part of the EU’s external relations policy but within it, the justice, freedom and security aspects should be reinforced. […] Freedom, security and justice issues lie at the heart of maintaining international stability and security both outside and inside the European Union.” COM (2005) 491, p. 3.
44 In this respect see infra, Part Five
dimension of AFSJ is also addressed in a specific chapter on Europe in the globalized world. In terms of thematic priorities, two main issues are relevant: 1. controlling *migration* flows, strengthening cooperation with countries of origin and transit and working on some convergence in asylum policies across Member States; and 2. improving *security* in Europe, by controlling the serious criminal phenomena threatening it, both inside and outside.46

In spite of a clear continuity with regard to the ultimate goal of achieving the internal targets of the AFSJ, the Stockholm Program also displays a stronger attention for the protection of rights, and for the dissemination of the Union’s values. The plan reveals the ambition of a comprehensive strategy for a system of structured actions in function of the needs of the Union. This is a consequence also of an increased activity of the Union in these policies, and also of the higher number of institutional actors, namely the plethora of agencies with external competences. The ambition laid down in the Stockholm Program is that the external dimension of the AFSJ becomes an *organized* framework policy, ever more integrated in the main policies of the AFSJ, keeping in mind the strong complementarity between the internal and external aspects of this policy field. However, also on that occasion the European Council failed to go beyond the codification of vague good intentions. Indeed, section 7.1 of the Stockholm programme contained and list of guiding principles that built upon the Feira document, but failed to clearly establish how such single external AFSJ voice had to be expressed.47

In spite of the institutional importance gained by the programmatic documents of the AFSJ with the entry into force of the Lisbon treaty by virtue of Article 68 TFEU, also the

47 Section 7.1 of the Stockholm Programme held: The European Council has decided that the following principles will continue to guide the Union action in the external dimension of the area of freedom, security and justice in the future:
— the Union has a single external relations policy,
— the Union and the Member States must work in partnership with third countries,
— the Union and the Member States will actively develop and promote European and international standards,
— the Union and the Member States will cooperate closely with their neighbours,
— the Member States will increase further the exchange of information between themselves and within the Union on multilateral and bilateral activities,
— the Union and the Member States must act with solidarity, coherence and complementarity,
— the Union will make full use of all ranges of instruments available to it,
— the Member States should coordinate with the Union so as to optimise the effective use of resources,
— the Union will engage in information, monitoring and evaluation, inter alia, with the involvement of the European Parliament,
— the Union will work with a proactive approach in its external relations.
Stockholm programme missed the opportunity to clarify how the integration of AFSJ objectives with other external relations instruments had to take place. Moreover, the programme also paid little attention to the working methods of AFSJ agencies and their powers to conclude agreements. In other words, whilst the external dimension of the AFSJ as such was strengthening its position within the realm of EU external relations, the legal implications of such policy ambition remained undiscussed.

The last chapter of the policy programme saga analysed in this section concerns the Strategic Guidelines of 2014, the policy strategic document that replaces the Stockholm programme for the AFSJ. Again, also this time, albeit more succinctly, the European Council wished to emphasise the importance of improving the link between the AFSJ, its external dimension and other policies. However, also this time the document fails to reflect upon the legal challenges occurred and merely reiterates the need to mainstream AFSJ matters into the whole range of EU external powers with a special focus on borders, terrorism and migration.

All in all, it can be concluded that a number of push factors have led the European Council to devote a lot of attention to the development of the external dimension of the AFSJ. Since the Tampere conclusions of 1999 the different policy programmes have called upon the EU to cooperate with third countries and international organisations in AFSJ matters so as to complement internal developments. At the same time, the different policy documents have also promoted the mainstreaming of AFSJ matters into the whole range of external instruments of policies: from the CFSP to the ENP and Development cooperation. In this last respect, however, the policy documents never attempt to clarify how, form a legal perspective this should occur and in this respect it should not surprise that precisely on the latter aspects of the external AFSJ a number of agreements were at the centre of legal disputes brought in front of the CJEU.

Taking into account of the complexity of the international context, the multidimensional nature of the AFSJ and of its externalities and, finally, taking also into consideration the internal constitutional changes that occurred between 1999 and the adoption of the Stockholm Programme of 2010, the “Sturm und Drang approach” used by the European Council to guide the development of the external AFSJ is comprehensible. However, precisely because of the three factors just mentioned, the approach used has partially

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48 European Council doc. EUCO79/14
caused and partially aggravated a number of constitutional tensions that, still today, negatively affect the external AFSJ.

1.4 Identification of the Legal Problems Connected with the External Dimension of the AFSJ

On the 3rd of September 2008 the Court of Justice of the European Union (CJEU) annulled EU Regulation 881/2002\textsuperscript{49} that was implementing a United Nations resolution on the fight against Al Qaeda and the Taliban for breach of fundamental rights. In that judgement the CJEU held that an international obligation, even in the case of a UN resolution, “cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights”.\textsuperscript{50} More recently, on the 18\textsuperscript{th} of July 2013, the same court was called to assess once more the compatibility between the re-cast of that regulation and the EU treaties.\textsuperscript{51} Similarly to the judgement of 2008, the CJEU held that the implementing measures adopted by the EU were in violation of fundamental rights such as the right of defence and of the right to effective judicial protection.\textsuperscript{52} The example of the \textit{Kadi} cases shows how the internal-external nexus in relation to security initiatives within the EU may cause legal disputes and challenges not only pertaining to the relationship between international law and the EU legal system, but also to the compatibility between those initiatives and fundamental rights.

More recently the fight against international terrorism has also spurred other disputes with a view to understanding the extent to which sanctioning systems such as the one at stake in \textit{Kadi} could be adopted under the umbrella of the CFSP rather than under the one of the AFSJ.\textsuperscript{53} This last issue is linked to another source of institutional tensions and legal problems: the relationship between the TEU and the TFEU. Indeed, the external projection of the AFSJ on the one side and the political ambition to develop this dimension in combination with other foreign relations instruments on the other have led to other disputes pertaining to the choice of the proper legal basis in the context of the existing dichotomy between the TEU and the TFEU and, in particular the meaning of

\textsuperscript{49} OJEU, 29.05.2002, L139, p.9
\textsuperscript{50} Joined cases C-402/05 P and C-415/05 P \textit{Kadi and Al Barakaat}, judgement 8 September 2008, ECR I-6351, paragraph 285.
\textsuperscript{51} Joined Cases C-584/10 P, C-593/10 P and C-595/10 P \textit{European Commission, United Kingdom et al. v Kadi}, 18/07/2013.
\textsuperscript{52} Joined Cases C-584/10 P, C-593/10 P and C-595/10 P \textit{European Commission and United Kingdom v Kadi Judgement} 18 July 2013 NYR, paragraphs 135-150.
\textsuperscript{53} Case C-130/10 \textit{European Parliament v Council}, judgment of 19 July 2012.
Article 40 TEU. The first example of this type of disputes was raised by the European Parliament against the Council in the context of the fight against international terrorism with a view to determine which, between Articles 75 TFEU and Article 215 TFEU constitute the appropriate legal basis to implement within the EU legal system, measures adopted within the UN context. The second dispute about the relationship between the TEU and the TFEU in the context of the external dimension of the AFSJ came into being in relation to the Atalanta mission for the purpose of concluding bilateral agreements with a view to surrender for trial suspected pirates. In this case The European Parliament contested that such type of a measure could be concluded with a third country on the sole basis of the CSDP pillar and argued that an AFSJ or a development cooperation legal basis were also necessary to legitimise such act.

Similar disputes had occurred prior to the entry into force of the Lisbon Treaty. Indeed, already back in 2004 at the beginning of the external developments of the AFSJ the European Parliament and the Council confronted each other in front of the CJEU in relation to the choice of the proper legal basis in relation to the conclusion of the Passenger Name Record agreement with the United States of America (USA). While in this case the CJEU was asked to determine the demarcation between the different founding Treaties, this case pertained to the identification of criteria determining whether such type of measure could be adopted on the basis of Article 95 TEC rather than on the basis of the provisions on Police and Judicial Cooperation in Criminal Matters. Whilst in this case the legal question brought in front of the CJEU touched upon the choice of the proper legal basis to be used for the conclusion of an agreement relating to the policies of the AFSJ, it also touched upon, albeit indirectly, the question concerning the relationship between the protection of fundamental rights with the conclusion of agreements relating to public security and the fight against transnational forms of criminal activities.

Other than cases in which the choice of the proper legal basis was at stake, the external dimension of the AFSJ was at the centre of two other disputes brought in front of the CJEU. More specifically, these cases concerned the distribution of powers in relation to

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54 Infra, Chapter 9
55 Ibid.
56 Case C-658/11, European Parliament v Council, judgment 24 June 2014
58 At the time the TEU in its pre-Lisbon version and the Treaty on the European Community (TEC)
59 Joined Cases C-317/04 and C-318/04 European parliament v Council, 30/05/2006, I-4795
the implementation of adopted measures. This was the case in the dispute between the European Parliament and the Council concerning the scope of powers of the Council in relation to the adoption of implementing additional rules to the Schengen Borders Code with a view to regulate the patrolling of the maritime borders of the EU; an issue that has important external reverberations because of its links with the Geneva convention relating to the status of refugees and to UNCLOS. The second case, also raised by the European Parliament, but against the European Commission, concerned the adoption of implementing measures on border controls and countering terrorism in the framework of Regulation 443/92 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America.

All in all, if we read the above mentioned cases against the backdrop of the policy programmes on the AFSJ it emerges that the policy ambition of mainstreaming the AFSJ into the external relations of the EU appears, from a legal perspective, an extremely controversial task.

1.5 The External Dimension of the AFSJ as a Controversial Facet of the EU’s External Action

In the landmark judgement of Kadi reported at the beginning of this chapter the CJEU held that an international obligation “cannot have the effect of prejudicing the constitutional principles of the EC Treaty”. More specifically, in that very judgement the CJEU seems to have expressly reiterated a series of principles belonging to the “very foundations of the Community” that the Court had already had the occasion of affirming in its precedents. More specifically, the Court referred to the following constitutional principles: judicial review, the allocation of powers established by the EC treaty, the autonomous character of the EU legal order and human rights protection. Moreover, the CJEU took the occasion to emphasise that the protection and respect of human rights within the EU legal order amount to general principles of the EU legal system and that they constitute a condition of validity for all acts of the institutions; however, since the

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60 Case C-355/10, European Parliament v Council and Commission, Judgment 5 September 2012, NYR
64 Kadi, supra note 25, paragraph 285
65 Kadi, supra note 25, paragraph 282.
Court delivered that judgement this last issue has been absorbed with the entry into force of the Lisbon Treaty and the EU Charter of Fundamental rights.\textsuperscript{66}

The cases mentioned in these introductory reflections demonstrate that the will to develop the external dimension of the AFSJ has triggered a number of disputes on the legitimacy and legality of certain specific initiatives in this field. More precisely, what emerges from those cases is that the political and policy impetus to develop the external dimension of the AFSJ led the institutions and the Member States to overlook the constitutional framework in which the external development of the AFSJ should have been developed from. At the same time, it is important to emphasise that the disputes pertaining to the external development of the AFSJ emerged at a time of hectic developments: this is to say that the AFSJ and its internal and external dimensions were affected by a number of events. Firstly, and from an institutional perspective, one must bear in mind that the external AFSJ had to be developed in a period of time that has been described as a ‘semi-permanent treaty revision process’\textsuperscript{67} during which the powers of, and the relationship between, the institutions of the EU were considerably reshuffled. Secondly, one must also bear in mind that outside the institutional sphere of the EU, historical events such as the raise of international terrorism, maritime piracy in the Gulf of Aden and massive migratory flows have also put on the EU an enormous pressure to develop policies to attain the EU objectives and act as a global player in the AFSJ. In many ways, these cases attest that the coming of age of the external AFSJ has been a process in which the EU was challenged both from within and outside and that the CJEU continues to play a decisive role in framing the EU integration process.

However, the reality is more nuanced than this and the cases also touch upon other questions about the AFSJ and its external dimension; questions that go beyond the mere request for clarifications of provisions at a time of treaty reforms. For instance, cases such as \textit{Kadi} and \textit{European Parliament v Council} (Transfer of pirates)\textsuperscript{68} beg the question circa the significance of Article 31 (1) TEU where it is affirmed that, for the purpose of conducting the CFSP, the Union can adopt ‘decisions’, but with the caveat, ex Article 24 TEU, that these \textit{cannot} be ‘legislative acts’.\textsuperscript{69} Furthermore, another issue emerging from the cases is the question concerning the extent to which different internal and external policies can be merged into a single foreign policy while respecting the wording of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{66} \textit{Kadi}, supra note 25, paragraphs 280-285; for the relationship between human rights and the AFSJ see infra, Part II
\item \textsuperscript{67} De Witte 2002, pp. 137-160
\item \textsuperscript{68} C-658/11 \textit{European Parliament v Council}, judgement 24 June 2014, NYR
\item \textsuperscript{69} But the question is valid, mutatis mutandis, also for the CSDP.
\end{itemize}
\end{footnotesize}
Article 40 TEU on the relationship between the TEU and TFEU treaties. Lastly, all these cases were linked to fundamental issues such as the level of democratic transparency and accountability in the decision-making process and the level of protection of human rights when cooperating with third countries in the fields of the AFSJ.

On the basis of the case law mentioned above, it is possible to identify a number of characteristics of the EU legal order that were at the basis of the above mentioned disputes. More specifically, the following four main features can be identified:

- The scope of the EU competences pertaining to the external dimension of the AFSJ;
- The horizontal distribution of competences between the TEU and the TFEU;
- The balance of powers between the institutions in the context of the external dimension of the AFSJ;
- The maintenance of EU standards of protection of human rights in the external activities of the EU.

The characteristics mentioned above have a special position and constitutional significance. This is because the above mentioned characteristics are regulated at primary law level and relate to the distribution of governmental tasks and human rights. Respectively, these issues are directly related to constitutional principles and rules of the EU legal order: the principle of conferral (Articles 5 TEU and 2 TFEU), the principle of mutual cooperation among the institutions (Article 15 (2) TEU), the horizontal distribution of competences between the TEU and the TFEU (Article 40 TEU) and the respect of fundamental rights (Article 6 TEU).

Furthermore, the external dimension of the AFSJ is also connected to other constitutional principles and rules of the EU legal order. A first issue in addition to the four identified that has not yet expressly emerged, pertains to the exegesis of the competences conferred to the EU in the different AFSJ fields. Indeed, while the internal and external acquis on AFSJ have rapidly evolved, there has not been sufficient analysis devoted to the exact scope of the AFSJ provisions and the added value that these may have for EU external relations. A second additional issue pertains to the identity of the institutions in charge of developing the external dimension of the AFSJ. Of course this is connected to the issue of the horizontal distribution of competences between the TEU and the TFEU, but it goes beyond the notion of ‘institution of the EU’ ex Article 13 TEU and it also concern

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70 See Chapter 5.2 and Chapter 9
the role of other bodies such as the AFSJ agencies. In this respect, one issue that has recently garnered attention and that poses questions of legitimacy concerns the scope of the Agencies’ powers and the possibility to envisage their participation in the context of CSDP and CSFP missions.

Furthermore, it should be borne in mind that the AFSJ fields are fields in which Member States play a strategic role: not only because of the shared nature of the AFSJ competence, but mostly because Member States retain the executive powers associated to the AFSJ and are the actors responsible for the maintenance of law and order and the safeguarding of internal security. Therefore, the third additional issue concerns the vertical distribution of competences between the EU and the Member States and, more precisely, the extent to which the external dimension of the AFSJ may restrict the powers of the Member States.

Lastly, an issue that emerges from the Kadi case pertains to the responsibility of the EU in the external dimension of the AFSJ the powers of and the relationship between the institutions of the EU (including the decisions of the judiciary). Potentially, this does not only concern situations such as the Kadi one, where Member States were supposedly faced with two contradicting obligations stemming from two different international organisations and relating to the same situation, but also situations in which it is necessary to establish the responsible authority for the execution of tasks such as border control operations in the high seas in the framework of Frontex (the EU’s border control agency) operations, or, in the future, the division of responsibility between the EU and MSs in managing the so called ‘hotspots’ for asylum applicants outside the borders of the EU.

Table 1.1 below summarises graphically how the constitutional characteristics identified above have been challenged, put into question or otherwise violated in the different cases analysed above.

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71 Europol, Eurojust, Frontex and the EASO. See infra Part IV
72 On this point see the Commission Staff Working Paper SEC (2011) 560 final, 05.05.2011, “Strengthening the ties between CSDP and FSJ actors. Proposal for a way forward”.
73 Article 72 TFEU
74 See paragraph 61 of the Kadi judgement delivered on the 18.07.2013. However, recent academic contributions have rebutted this opinion: Larik 2014
75 In this respect case C-355/10, European Parliament v Council, judgement 5 September 2012, NYR
76 The establishment of hotspots for asylum seekers outside the EU has come once again in the EU debate in the context of the current exceptional flow of asylum seekers coming to the EU from the Middle East.
<table>
<thead>
<tr>
<th>Constitutional challenges for the externalisation of the EU’s security agenda ex Kadi decision</th>
<th>Four Constitutional Features of the EU Legal System Challenged by the External Dimension of the AFSJ</th>
<th>Other questions with constitutional relevance relating to disputes on the AFSJ and its external dimension</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allocation of powers established by the Treaties</td>
<td>The scope of the EU competences pertaining to the external dimension of the AFSJ</td>
<td>What is the legitimate scope of EU’s external powers in the AFSJ fields?</td>
</tr>
<tr>
<td>Judicial review of acts</td>
<td>The horizontal distribution of competences between the TEU and the TFEU</td>
<td>What are the challenges linked to the ‘agencyfication’ of the AFSJ’s external dimension?</td>
</tr>
<tr>
<td>The autonomous character of the EU legal order</td>
<td>The balance of powers between the institutions in the context of the external dimension of the AFSJ</td>
<td>What is the impact of the external dimension of the AFSJ on the vertical distribution of competences between member States and the EU?</td>
</tr>
<tr>
<td>Human rights protection standards</td>
<td>The maintenance of EU standards of protection of human rights in the external activities of the EU</td>
<td>How does the external dimension of the AFSJ impact the relationship between international law, EU law and national law?</td>
</tr>
</tbody>
</table>
It appears from this first synthesis that the principles at stake in the *Kadi* judgment of 2008 represent a judicial qualification of some of the four constitutional features identified in Table 1. Therefore, it is possible to affirm that the external projection of the AFSJ poses constitutional challenges within the EU legal system; and while some of these challenges pertain to constitutional features and characteristics of the EU legal order such as the distribution of competences between the TEU and the TFEU and between the EU and its Member States, other challenges relate to principles such as the protection of human rights and other principles that belong, using the expression of the CJEU, to the ‘*very foundations*’ of the EU legal order. In addition to the four main constitutional characteristics of the EU legal system that seem to be challenged by the external dimension of the AFSJ, the Table above also shows that other constitutional questions also emerge. Therefore, it appears that the external dimension of the AFSJ has indubitably put into question core elements of the EU *Rechtsgemeinschaft*.

In conclusion, these introductory reflections reveal that the EU has entered into a considerable number of initiatives and actions at the international level in a relatively short period of time, in a relatively new policy domain, in a period of semi-permanent treaty reform process and within the context of growing security concerns. As a result of these factors and under a strong political pressure to mainstream AFSJ into the realm of EU external relations, the external dimension of the AFSJ has proved to be a highly controversial field of EU action characterised by a plurality of policies, actors and norms that have often clashed; and it is precisely against such background that the present study was developed in order to clarify the position and boundaries of the external AFSJ within the EU constitutional framework. More specifically, the *Kadi* judgement discussed in this Chapter suggests that the EU legal order is built upon certain constitutional foundations that cannot be negatively affected or changed by international commitments of the EU; at the same time, the EU seems to have undertaken a path in which the institutions are externalising the AFSJ even though the measures adopted have often conflicted with the Treaty.
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Chapter 2

Research Question and Body of Knowledge

2.1 Research Question and Research Sub-Questions

In the light of the *problematique* raised in the previous Chapter this study was conceived to provide an answer for the following research question:

*To what extent is the development of the external dimension of the European Union’s Area of Freedom, Security and Justice compatible with the constitutional foundations of the EU?*

In addition to this part (Part One) covering the introduction to this research, this study has been divided in five other parts so as to answer the main research question.

Firstly, Part Two (Chapters 5 and 6) of the research investigates the first two central elements of this study: the constitutional rules and principles related to the AFSJ and the EU external relations:

- *What is the constitutional framework of the EU’s AFSJ?*

- *Which are the constitutional principles of EU external relations as identified by the CJEU and/or codified by the Treaties that are applicable in the context of the external dimension of the AFSJ?*

Chapter 5 will analyse the AFSJ, its primary law provisions, their scope and internal boundaries whereas Chapter 6 will provide an outline of the constitutional provisions and principles regulating the external action of the EU with a view to focus on those provisions and principles that are applicable to the external dimension of the AFSJ. As a consequence, these chapters will focus on the exegesis of the relevant provisions and academic writings in order to construe the first two elements of this research.

Part Three (Chapters 7 and 8), on the other hand, investigates the third central element of this research: the constitutional foundations of the EU legal order in order. This part of the research builds upon the findings of the previous Chapter and the notion of constitutional foundations that was used in the Kadi judgement by the CJEU. While a thorough analysis of the distinction between principles and foundations will emerge later
in this Chapter and in the next one, suffice here to say that the expression ‘constitutional foundations’ refers to those core elements of the EU legal system that the CJEU identified: allocation of powers established by the Treaties, judicial review of acts, the autonomous character of the EU legal order, human rights protection standards. Part Three will answer the following research questions:

-What are the constitutional foundations of the EU legal system?

-What is the function of the constitutional foundations of the EU legal system?

The two chapters of Part Three identify and analyse the constitutional foundations and principles of the EU legal system. To do so, Chapter 7 of Part two will look into provisions of the Treaties that have a particular constitutional significance whereas Chapter 8 will analyse the case law of the CJEU.

Part Four, Five and Six of this study are dedicated to the external projection of the AFSJ in a more substantive sense. The purpose of these parts is to map out and analyse the international agreements that the EU has concluded in the fields of the AFSJ against the backdrop of the constitutional framework identified in Part Two and Three. As the material scope of this study is potentially very broad it must be emphasised that this study only focuses on a number of guiding questions and does not aim at providing the reader with a handbook on the different agreements linked to the AFSJ.

For the purpose of this research five main guiding questions have been identified:

a) To what extent does the content of the agreement/provision directly fall within the scope of the provisions of Title V Part III TFEU?

b) What are the relevant legal provisions on external relations applicable in this context, including obligations stemming from the international community?

c) Which are the institutions and bodies involved in the negotiation conclusion and execution of the agreement?

d) What do the external initiatives concluded tell us on the vertical distribution of competences between Member States and the EU?

e) To what extent do the agreements and initiatives respect human rights and guarantee judicial review?

1 Chapter 9 will also look at some examples of unilateral initiatives and CSFP missions that are not, form a formal perspective, international agreements, but that have a significant role in the externalization of the AFSJ.
These five questions were framed so as to guide the analysis of the bulk of agreements on the external dimension of the EU and to reflect the constitutional challenges emerged from the case law of the CJEU and shortly highlighted in the introductory remarks of this study. These questions were phrased so as to reflect the eight constitutional paradigms and point of tensions individuated in section 1.5) above. However, the different Chapters of Part Four will not be structured on the basis of these questions.

On the basis of the existing acquis, Part Four, Five and Six have been divided in the following manner:

- Part Four will map out analyse the main ways in which the AFSJ is linked to the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) of the EU;
- Part Five will map out and analyse the main ways in which AFSJ elements, actions and objectives inform other external policies and instruments of the EU anchored to the TFEU. Consequently, Chapters 10 and 11 will look in to policies such as the European Neighbourhood Policy (Article 8 TEU) or the Development Cooperation (Articles 208-211 TFEU) and legal instruments such as Association agreements (Article 217 TFEU);
- Part Six, finally, will analyse the main agreements concluded by the EU under the different AFSJ policies, including the external activities of the AFSJ agencies. Chapter 12 will analyse the the external dimension of border controls, migration and asylum policies whereas Chapter 13 will analyse the the external dimension of judicial and operational cooperation.

2.2 Sources and Design of the Research

Because of the multidimensional nature of the AFSJ and the lack of existing databases on the matter, the first steps of this research were dedicated to the individuation and collection of AFSJ-related agreements. In order to collect all the relevant texts and then divide them in the three different categories three main sources were used: the “Treaties Office Database” of the European Union, the website of the relevant Directorate General of the European Commission, SEMDOC – the database of AFSJ legislation maintained by Statewatch, and literature. The division in five main parts seemed the most appropriate method in the light of the existing documentation, EU acquis and policy programmes for the AFSJ.

2 http://ec.europa.eu/world/agreements/default.home.do
3 Especially DG Home, DG Justice, the website of the External Action Service and the website of the Council
4 http://www.statewatch.org/semdoc/
Overall, this study has taken into consideration more than 100 international agreements that the EU has concluded in the past twenty years: ranging from the “Agreement between the European Community and the Republic of Peru on precursors and chemical substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances”\(^5\), concluded in 1995 to the “Joint Declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union”\(^6\), concluded in June 2013.\(^7\) It includes agreements concluded in 2014 and, to some extent provides some reflections on the deal between the EU and Turkey on asylum and readmission concluded at the beginning of 2016.

The research upon which this dissertation was written has covered all the agreements concluded by the EU since 1999 and the creation of the AFSJ. However, because this is not a handbook on the externalisation of the AFSJ, the manuscript discusses only some of the most significant agreements concluded thus far and, where possible, analyses the most recent agreements. Even though the externalisation of the AFSJ is a very dynamic field of EU external relations, the study tries to cover the latest developments occurred in relation to the ongoing refugee crisis of 2015–2016.

In order to categorise the different agreements and divide the body of measures to pursue the analysis, a positivist criteria was used: the choice of the legal basis made by the Council at the moment of deciding on the authorisation to sing the different agreements.

The approach chosen of combining the collection of relevant data (the various external agreements) with constitutional analysis to study the external dimension of the AFSJ was chosen for two main reasons. The first reason is connected with the existing body of knowledge: while specific elements of this new external policy have been analysed,\(^8\) no systematic and/or comprehensive study of the external dimension of the AFSJ exists to date; similarly, no systematic collection and analysis of the existing agreements has ever been compiled; and in this respect this study will provide scholars and practitioners with a first overview of this field of external action.

\(^5\) OJ L 324, 30.12.1995, p.27
\(^7\) A complete list of the Agreements taken in to consideration for the purpose of this study is available in the Annexes at the end of the manuscript
\(^8\) For instance, the external dimension of EU’s criminal law by Mitsilegas in 2004 and 2009
The second reason pertaining to the structure is connected to the legal nature of this study. As reported in epitaph to this chapter, the object of this study is norms and it will assess the external dimension of the AFSJ with a view to understand the extent to which the external ambitions of the EU in the AFSJ fields are compatible with EU constitutional norms. As a legal study this research was designed to combine the development of the external dimension of the AFSJ with legal scholarship. Therefore, the research and manuscript were designed so as to focus on a more traditional, positivist approach of legal scholarship rather than adopting a ‘law in context one’.

The choice was not made for dogmatic beliefs. Rather, the choice was made because the development of the external dimension of the AFSJ appeared to be (and still is today) under the pressure of two conflicting interests: the first one being the policy impetus to develop the external AFSJ as emphasised by the European Council and the numerous programmatic documents on the AFSJ; and the second being the existing constitutional framework of the EU that, well before the Kadi case exploded, was at odds with the ‘Sturm und Drang approach’ chosen by the said institution. Therefore, in order to assess the extent to which the development of an external dimension of the AFSJ could be compatible with the constitutional framework of the EU, this research purposively chose a legal approach whereby the existing agreements would be analysed against the backdrop of EU primary law.

The following section will review the existing body of knowledge first and will then turn to elaborate further on the methodology adopted in this study.

### 2.3 Existing Body of Knowledge

#### 2.3.1 The Evolution of AFSJ Studies

The AFSJ has become a topic at the centre of legal EU research in Europe. The domains of the AFSJ officially entered the EU discourse with the entry into force of the Maastricht treaty under the Justice and Home Affairs pillar (JHA). The JHA pillar first became the object of academic analysis especially in relation to the architecture of the EU legal order. This discourse is best exemplified by a classic of EU law: Deidre

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9 Kelsen 1999, p.162
10 van Gestel and Micklitz 2013
11 I acknowledge, of course, that the foundations of what later became JHA and then the AFSJ are to be traced back to the TREV meetings of the mid-seventies. For an historical overview on the evolution of the JHA/AFSJ fields within the EU integration process see Peers 2012
Curtin’s *The Constitutional Structure of the Union: a Europe of Bits and Pieces*. As for the third pillar as such, contributions ranged from Mueller-Graff’s *The Legal Basis of the Third Pillar and its Position in the Framework of the Union Treaty* of 1994, to Monar and Morgan’s *The Third Pillar of the European Union, Cooperation in the Fields of Justice and Home Affairs of 1994* and Monar’s *Justice and Home Affairs in the European Union, the Development of the Third Pillar of 1995*. In French, the first contributions on the topic were published by H. Labayle: *La cooperation européenne en matière de justice et affaires interieures et la Conference intergouvernementale* and his *Un espace de liberté sécurité et justice* for the Revue Trimestrielle de Droit Européen—the latter publication focusing on the end of the third pillar in the Maastricht sense and the passage to the Amsterdam one. Because these contributions appeared at an early stage, each one paid particular attention to the following main points: institutional aspects such as the distribution of powers among the institutions, the distribution of competences between the EU and the Member States, the democratic deficit and the limited jurisdiction of the CJEU.

It was not until 2000 that an overall monograph dedicated to JHA was published. It was the first edition of Prof. Steve Peers’s *EU Justice and Home Affairs Law* book, which has been subsequently edited in 2005 (hardback) and in 2011 (hardback, with a paperback revision in early 2012). While Peers’s book provides the only comprehensive treatise of institutional and substantive law of the AFSJ, other influential publications have focused on the constitutional significance of the AFSJ: for instance Jörg Monar’s ‘The Area of Freedom Security and Justice’ in Armin von Bogdandy and Jürgen Bast’s *Principles of European Constitutional Law* and Neil Walker’s *In Search of the Area of Freedom Security and Justice: A constitutional Odyssey*.

As for the different domains of the AFSJ, scientific contributions have grown exponentially over the past 15 years and it would go beyond the scope of this study to provide an exhaustive literature review. Suffice here to say that today each sector-specific domain of the AFSJ has been at the centre of numerous articles, edited volumes and

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12 Curtin 1993, p.17-69
13 Mueller-Graff 1994, p.493-510
14 Monar and Morgan 1994
15 Monar 1995
16 Labayle 1997, p.1-37
17 Labayle 1997, p.105-173
18 Peers 2000
19 Peers 2006
20 Peers 2012
21 von Bogdandy and Bast 2009
22 Walker 2004, p.5
single-author books; and in this vast horizon of publications a number of publications have been used as point of reference for this study. In relation to the field of migration and asylum, leading academic contributions in English have been written or edited by Professors E. Guild,23 V. Mitsilegas24 and S. Peers25 whereas in the field of criminal law three authors have emerged over the past years J.A.E. Vervaele,26 A. Klip27 and V. Mitsilegas,28 but the field is attracting the attention of emerging scholars, an example of which are the monographs of Herlin–Karnell,29 the volume authored by M. Fletcher, R. Löff and B. Gilmore30 and the edited volume by Eckes and Konstadinides.31 Moreover, and other than in English, Flore32 published a monograph in French on European criminal law in 2009 and Sicurella has published a monograph in Italian.33 In the field of external borders the first dedicated study was Groenendijk and Guild’s In Search of Europe’s Borders of 200234 and, since then, the topic has been mainly dealt with in relation to immigration policy, but a recently published book provides an interesting analysis of new developments linked to external borders: extraterritorial border management.35 The case is somehow different in respect of judicial cooperation in civil law. In this field the literature has developed outside the umbrella of the EU due to the Brussels’ Convention of 1968, making the volume of literature particularly vast.36 Finally, common to all of the AFSJ fields is the issue of data protection and the sharing of data among Member States, among agencies and, lastly, between agencies and Member States which has constituted the object of a monograph by Boehm in 2013.37

2.3.1 The External Dimension of the AFSJ

The external dimension of the AFSJ as a policy and, consequently, as an object of academic research came into being in the aftermath of 9/11. Although the institutional machinery started to work on this topic soon after the adoption of the Tampere conclusions of 1999, legal literature dedicated to this side of the AFSJ coin is, albeit

23 Guild et al. 2007
24 Mitsilegas 2015 and Ryan and Mitsilegas 2010
25 Peers et al 2012
26 Vervaele 2005
27 Klip 2011
28 Mitsilegas 2009
29 Herlin Karnell 2012
30 Fletcher et al 2008
31 Eckes and Konstadinides 2011
32 Flore 2009
33 Sicurella 2005
34 Groenendijk and Guild 2002
35 Ryan and Mitsilegas 2010
36 For bibliographical references see Peers 2012
37 Boehm 2013
developing, rather scarce whereas the policy aspects of this phenomenon has been analysed rather thoroughly.\textsuperscript{38}

Thus, while from a policy perspective the publications of Monar remain among the most influential,\textsuperscript{39} the first general publication on the topic appeared in 2008 as a EUI Working paper by Prof. Marise Cremona: ‘External Action in the JHA Domain: A Legal Perspective’. The first book directly concerned with the external dimension of the AFSJ including a legal perspective, is ‘Justice, Liberty, and Security New Challenges for EU external relations’ edited by Professors B. Martenczuk and S. van Thiel and published by Brussels University Press VUB.\textsuperscript{40} Even though this book touches upon the main elements and policies of the external dimension of the AFSJ, it focuses on a number of selected themes and mostly deals with the impact of the Lisbon treaty on the field. In other words, this book adopts a bottom-up sort of approach: it builds upon the developments occurred in the different fields of the external AFSJ with a view to discussing future developments. Moreover, while the book does take into consideration the entry into force of the 2009 Lisbon treaty, many of the legal aspects touched upon by this volume focus on pre-Lisbon elements and because of this some of the contributions have lost their significance in the meantime.

Other than a broad constitutional approach to the study of the external dimension of the AFSJ, it is possible to look at specific dossiers and sectors. An example of this are the publications of Mitsilegas who has covered all aspects of EU criminal law cooperation with foreign partners. In relation to criminal law and policing a great deal of attention was given to the right of data protection and initiatives such as the PNR agreements.\textsuperscript{41} The challenges linked to the external dimension of the EU criminal policy had also been the object of a volume edited by G. de Kerchove and A. Weyembergh titled ‘Sécurité et justice: enjeu de la politique extérieure de l’Union européenne’ which appeared at the end of 2003 and looked at the very first early developments while also considering cooperation mechanisms with the Schengen associated states and the pre-accession phase for candidate countries.

More recently other publications dedicated to the external AFSJ emerged. The first is a volume edited by Cremona, Monar and Poli titled ‘The External Dimension of the European Union’s Area of Freedom Security and Justice’, that provides an analysis of

\textsuperscript{38} Ex pluribus, Wolff et al. 2010
\textsuperscript{39} Monar J 2004 and 2013
\textsuperscript{40} Martenczuk and van Thiel 2008
\textsuperscript{41} See Peers S 2012 and Mitsilegas V 2009
the external dimension of the AFSJ with an interesting emphasis on the policy interconnections and governance of this external policy of the EU.\textsuperscript{42} Furthermore, Monar, recently elaborated further on this topic with two linked publications: the first appeared as a Swedish Institute for European Policy Studies (SIEPS) paper and the second appeared as an article for the Cambridge Review of International Affairs.\textsuperscript{43}

The other two volumes have been published in French and they resulted as a product of a joint research project of the universities of Bologna, Brussels and Rennes. M. Dony edited the first volume and its approach was to look at the external dimension of the AFSJ under the prism of the Stockholm programme and its external agenda\textsuperscript{44}; the second volume that celebrated the end of the research is titled ‘\textit{La dimension extérieure de l’espace de liberté, de sécurité et de justice de l’Union européenne après le Traité de Lisbonne}’ and was edited by L. S. Rossi and C. Flaesch-Mougin. This second volume focuses on the impact that the Lisbon Treaty has had for the external dimension of the AFSJ but it leaves out the analysis on the constitutional rationale of this facet of the EU’s external relations.

This short overview of key publications on the topic has had a double objective. First it wished to identify a set of works to be used as references in this study. The second objective was to identify the publications of the sector and evaluate the extent to which these could, partially or totally, already answer the research question in the present study. However, while the existing body of knowledge contributes to the understanding of the legal implications of aspects of the external AFSJ, this does not appear to answer the research question elaborated in the previous section. One striking feature of the existing body of knowledge is the common methodology used thus far to study the external dimension of the AFSJ. Indeed, the majority of the works thus far published use, as a central tool for the study of the external AFSJ policy programs and other documents published by the institutions. As a result of this, the existing body of knowledge contributes to the understanding of the legal significance of policy programs and their impact on specific AFSJ polices; however, the existing publications on the field do not address the constitutional legal challenges that have emerged through the case law of the CJEU and that seriously question the compatibility of the EU’s policy ambitions with the foundations of the legal system. And while some sector specific publications do touch upon the relationship between the external AFSJ and constitutional norms of the EU

\textsuperscript{42} Cremona et al. 2011
\textsuperscript{43} Monar 2013, pp.1-20
\textsuperscript{44} Dony 2012
system, to this state no volume attempts to provide a comprehensive study of this phenomenon.

More specifically, the existing body of knowledge on the external dimension of the AFSJ does not seem to take into consideration the relevance that the founding principles of the EU legal system – as considered in the *Kadi* judgement mentioned above – may play in the development of this policy. Therefore, in order to develop an answer to the research question of this work a new approach to the study of the external dimension of the AFSJ had to be elaborated.
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Chapter 3

Methodology

3.1 The Necessity to Depart from Methods of Analysis Based on the Programmatic Documents and Strategies

“This Chapter presents the methodological elements that have influenced and characterised this study; the first methodological element of this research is linked to the approached followed to address the legal constitutional challenges that the external dimension of the AFSJ seem to bring.

In his opus magnum of 1949 ‘The Mediterranean and the Mediterranean world at the time of Philip II’ the French historian Fernand Braudel introduced a tripartite methodology in the study of history; indeed one of his scientific achievements was to introduce the notion of ‘histoire de longue durée’. Parallel to other notions and methodologies used in historical studies such as the ‘histoire evenementielle’ and the ‘histoire de conjuncture’, Braudel argued for the introduction and use of the ‘histoire de longue durée’ with a view to introduce the analysis of long-term structures in history. According to Braudel, the flaw of the ‘histoire evenementielle’ was to focus too much on the immediate causal factors of events; whereas in relation to the ‘histoire de conjuncture’, Braudel argued that this was not capable of individuate and take into consideration factors –societal, anthropological, geographical, that also influenced events and hence should be included in the work of historians. Braudel considered societal, anthropological and geographical factors as ‘long-term structures’, i.e. factors that have an influence on events and that are not mutable in the short and medium term.

Braudel did not argue for the suppression of the other methods of conducting research in his discipline, he believed that the three methodologies needed to coexist –and so they

1 Braudel 1969, p.12
2 Braudel 1949
did in his work; rather, his argument was that long-term structures were mistakenly neglected from scientists and that this created a gap in the understanding of past events.\(^3\)

The existing body of knowledge on the external AFSJ is characterised for its attention to the evolution of the policy documents on the external projection of the AFSJ on the one side, and for its attention to the different sectors of the AFSJ on the other side. Thus, in spite of the number of disputes that have characterised the implementation of the external dimension of the AFSJ, relatively little has been said about the constitutional dimension of this phenomenon. Indeed, the collection of the existing body of knowledge on the topic reveals that most studies have been carried out with a view to analyse either ongoing policy developments (e.g. the impact of the Stockholm programme on the AFSJ and its external dimension)\(^4\), legislative developments, or to analyse the case law and the disputes stemming from the external activities of the Union within the different AFSJ fields. Therefore, the existing body of knowledge is not only fragmented, but also mostly concerned with developments related to the external dimension of the AFSJ rather than with its foundations. In other words, the analysis of the external dimension of the AFSJ has been focusing on ‘events’ – to paraphrase Braudel – and, as a consequence, the external dimension of the AFSJ still lacks a comprehensive and systematic study construed in the light of the EU’s constitutional structure and principles, i.e. its foundations.

As recently observed by Van Gestel and Micklitz, there is an increasing ‘instrumentalisation’ of EU law in legal scholarship whereby sociological, political and policy concerns have taken over more traditional – if not appropriate – legal questions pertaining to legality, legitimacy and access to justice; at the same time, the other trend is that the works of EU scholars are increasingly running the risk of turning into ‘case-law journalism’.\(^5\) Indeed this aspect also applies to the study of the AFSJ and its external dimension.

\(^3\) The argument put forward by the French historian not only pertains to the tripartite methodology of conducting historical research, but also concerns the factors that must fall within the scope of historical research: i.e. he was one of the first to bring within historical research elements such as geography, the environment, anthropology, economics, etc. It can thus be argued that not only he promoted a tripartite vision on methodology in history, but also that he promoted a multidisciplinary approach within his discipline. Braudel 1958. He was also critic of the fact that his peers did not adopt a multidisciplinary approach; Braudel 1958

\(^4\) For instance: Dony 2012

\(^5\) van Gestel and Micklitz 2013, pp. 6-10. Interestingly also Braudel accused the school of the ‘histoire evenementielle’ of adopting the approach of journalist, see Braudel (1969) pp.44-61 and (1958), pp. 725-753, at p.728
Among the characteristics of the AFSJ there is its strong link with programmatic documents. Article 68 TFEU affirms that the European Council “shall define the strategic guidelines for legislative and operational planning” within AFSJ. This is particularly interesting since this provision goes beyond the general role that Article 15 TEU defines for this institution since the latter provision affirms that the European Council “shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof”. Therefore, Article 68 TFEU carves out of the Treaties a pivotal role for the heads of State and Government of the EU in relation to the development of the AFSJ; a role that the European Council does not expressly have in other domains.

As a result, it is clear that the programmatic documents on the AFSJ have the utmost importance in shaping legislative proposals and the works of the Commission, the Council and the different AFSJ agencies. However, and contrary to what has been argued by others, it is submitted here that the policy guidelines and programmes on the AFSJ and its external dimension should not influence the approach of legal scholars when analysing legislation and agreements. Indeed, while it has been argued that the policy–centred approach to the study of the AFSJ is helpful both internally and externally because it elucidates “the actual scope and meaning of EU constitutional law” and because “at least in part, reasoning about constitutional law in this domain develops more from the interests at stake, declared objectives and institutional practice, than the abstract and systematic consideration of the relevant legal provisions and case law”, this research adopted a top-down approach, aiming to affirm the primauté du droit in the AFSJ.

The influence of the programmatic documents of the European Council has been considerable even prior to the entry into force of the Lisbon Treaty. Indeed policy documents have influenced the EU legislator in this domain since the early days of the AFSJ with the adoption of the Tampere Conclusions of 1999 and The Hague Programme

6 Emphasis added
7 Emphasis added
8 Indeed taking into consideration two sectors in which the European Council plays a central role such as the Economic Policy of the Union and the CFSP, it is only in relation to the AFSJ that this institution defines the strategic guidelines for legislative and operational planning whereas it only identifies ‘strategic interests and objectives’ in relation to the CFSP (Article 22 TEU) and it merely impacts the broad (emphasis added) guidelines on the economic policies of the EU’s Member States (article 121 TFEU). On the role of Article 68 TFEU for the development of the AFSJ see Pascoau 2014
9 Monar 2009, p.554
10 Monar 2009, p. 554.
of 2004, i.e. before article 68 TFEU was introduced. An example is formed by the Tampere Conclusions of 1999 that served as a propeller for the application of mutual recognition in judicial cooperation in criminal affairs that eventually led to the adoption of the European Arrest Warrant. However, a policy document such as the Stockholm Programme on the AFSJ cannot mould the interpretation and application of legal provisions; rather policy programmes must be based on the constitutional framework of the Treaties and legislative proposals and agreements have to respect the provisions of the Treaties: not only the sector-specific provisions on the AFSJ, but also the founding provisions of the EU legal system.

Ultimately, it is submitted here that the policy impetus on, for instance, combating terrorism whereby “[a]ll the instruments available to the European Union should be used in a consistent manner” as emphasised in The Hague Programme of 2004 cannot rescind from the application of constitutional provisions of the EU legal order. Indeed, as the CJEU has affirmed in the *Kadi* decision reported earlier in this introductory chapter, international objectives and obligations -as well as policy objectives and priorities “cannot have the effect of prejudicing the constitutional principles of the [EU] [Treaties], which include the principle that all [Union] acts must respect fundamental rights”.

It appears from these observations that this study will use a diametrically opposite method to the one suggested by other academics and mentioned earlier in this section. As it was argued in the previous sections of this chapter, the external dimension of the AFSJ has been characterised by a number of disputes that were all pertaining to constitutional rules of the EU legal system: some disputes concerned the constitutional prerogatives of the Institutions in the decision-making process, others concerned the fundamental rights of individuals affected by legislative initiatives. In the light of these developments, and by taking into consideration the perils of an excessive ‘instrumentalisation’ of law and legal studies, this study uses a constitutional approach to analyse the external dimension of the AFSJ. While Section 3.3 will elaborate further on the understanding of the adjective *constitutional* used here, the next section will elaborate further on the material scope of the research.

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12 Supra, paragraph 1.2
13 Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* ECR I-6351, paragraph 285.
3.2 The Material Scope of this Research

The external dimension of the AFSJ comprises a number of material dimensions. Not only the AFSJ itself is composed by a plurality of policies and Treaty provisions, but also its external projection covers a number of other policies and aspects of the role that the EU plays in Europe. A first specific context in which the EU plays a role as an external actor in AFSJ matters is enlargement. Indeed, in this context the EU is an influential actor and in many ways the EU enlargement policy has been labelled as the most successful tool of EU external relations. Naturally, because in the context of enlargement the EU figures as a rule generator whereby candidate countries have to adopt and implement EU law within their legal orders, this process also covers the acquis of the AFSJ.\(^\text{14}\) However, because the ultimate goal of the enlargement process is accession to the EU, this dimension of the external AFSJ has not been considered in this research since it follows the specific rules and timetables that have more to do with acceding to the EU than with the AFSJ itself.\(^\text{15}\)

Another specific context in which the AFSJ has developed externally is the Schengen system and the existence of European countries that, albeit not members of the EU are associated to the Schengen Area and apply a number of Schengen and AFSJ norms. This is the position of Norway, Iceland, Switzerland and Liechtenstein. In order to maintain the Nordic Passport Union, Norway and Iceland have become associated to the Schengen system already prior to the entry into force of the Amsterdam Treaty in 1999.\(^\text{16}\) Since then, the two countries in question participate to a number of provisions that are a result of the evolution of the Schengen system and they now have accepted most measures covering visas, border controls, irregular migration and certain measures on police and criminal law cooperation.\(^\text{17}\) Similarly, Switzerland has signed an agreement in 2004 concerning the application of Schengen and other AFSJ rules such as the many provision of the Common European Asylum System (CEAS),\(^\text{18}\) and also Lichtenstein has signed a number of agreements to this end, although these have not yet entered into force. Moreover, both countries have signed agreements with Frontex, but do not take part in measures on mutual assistance in criminal matters, surrender of persons or police

\(^\text{14}\) In relation to the specific context of EU criminal law see Mitsilegas 2009, p.281-287
\(^\text{15}\) Van Vooren and Wessel, 2014, pp.516-535
\(^\text{16}\) Council doc 11780/97, 28 October 1997
\(^\text{17}\) Peers 2012, p. 91
\(^\text{18}\) OJ L53/13
cooperation. Also the relations with Norway, Iceland, Lichtenstein and Switzerland are not considered in this study. This is because in the light of the special participation of these countries to the internal market via the European Economic Area and their participation to the European Free Trade Area.

Taking into consideration the specific purpose of this research as mentioned in the previous Chapter, it must be emphasised once more that in the light of its constitutional approach, the study was designed to address fundamental questions related to the very constitutional legitimacy of the external AFSJ. Because of the exponential growth of the external AFSJ, the reader should be warned that this study does not claim to provide a substantive analysis of all the different external facets of the AFSJ; the present manuscript would have been three times the size of this one. Moreover, as the section on the existing body of knowledge has revealed, there a number of publications that cover different aspects of the external AFSJ. Rather, this study claims a place upstream of those sector specific studies: by mapping and analysing the different ways in which the external AFSJ has been developed, this study wishes to clarify the ambiguities surrounding the external AFSJ and, perhaps, contribute to new research ideas and approaches on the externalisation of the AFSJ.

3.3 The Constitutional Law Approach Used in this Study

“La combinaison de la diplomatie et du droit peut donner naissance a d’etrange enfants.”

Because this study is a constitutional analysis of the external dimension of the AFSJ rather than an analysis of the AFSJ as an external policy of the EU, it seems appropriate in this part dedicated to the methodology used to clarify the use of the constitutional law vocabulary in this text.

The constitutional nature of the treaties has long been debated, especially in the context of the adoption of the Treaty establishing a Constitution for Europe. However, scholars have argued that it is possible to “understand European primary law as constitutional law”, and that such a scholarly concept “does not require the blessing of politics”.

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19 Peers 2012, p.92  
20 Maus 2004, p.180  
21 An analysis of the academic debate concerning the constitutional nature of the EU Treaties would go beyond the scope of this study; for a collection of European essays on the constitutional nature of the EU Treaties see Zagrebelsky 2004  
22 von Bogdandy 2010, p.96
Moreover, the use of the adjective ‘constitutional’ to describe the legal status of the EU founding treaties has been repeatedly affirmed by the CJEU in its case law. Therefore, while it is true that the EU legal system, as a product of the combination of law and diplomacy is sui generis as Maus suggested in one commentary to the EU constitutional treaty, this does not exclude the EU legal system to be a constitutional system.

However, it should be emphasised that to consider, as we do here, EU primary law as constitutional law does not solely refer to the formal and normative acceptation of the term, i.e. describing the hierarchically superior status of the Treaties within the EU legal system. Indeed, in this study EU primary law is considered to be constitutional law not only because the Treaties represent the highest norms of the European Union, but also because the Treaties reflect two other principles that characterise constitutional legal orders and constitutionalism:

- the ‘liberal principle’ according to which constitutions establish the rule of law and the separation of powers (Articles 2 TEU and Articles 13 to 19 TEU) and;
- the ‘democratic principle’ according to which the constitutions set up a ‘government of the people, by the people and for the people’ (Articles 9 to 12 TEU).

In the light of these observations, and because this study is an analysis of the constitutional implications of the external dimension of the AFSJ and not an analysis of the external dimension of the AFSJ as policy of the EU, an additional clarification on the use of the adjective ‘constitutional’ in this context is still needed; especially because the substance of the constitutional traits of the EU legal system have been developed by the CJEU and were only subsequently – but not entirely – codified in treaties’ provisions.

This study uses the adjective constitutional in a plurality of ways that reflect the different elements of modern constitutionalism. First, from a normative perspective, the adjective constitutional refers to the superior position of primary law within the EU legal system, including the relationship between the Treaties and secondary norms, i.e. acts of the

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23 Idem
25 Schütze 2012, p.2
26 Idem.
27 See Ward 2009, pp.75-81. An example of the codification of constitutional principles by the Treaties is Article 2 TEU which encapsulates principles and values that were elaborated by the CJEU in Parti Ecologiste Les Verts v European Parliament, [1986] 1339 Case 294/83 (1986) ECR 1339; other principles that have constitutional significance such as supremacy and direct effect on the other hand were never codified within the Treaties and remain the result of the works of the CJEU.
institutions and bodies of the EU that are adopted on the basis of primary law provisions. This normative understanding thus absorbs ‘descriptive’ and ‘formal’ acceptations since the normative force of the adjective means that primary law is not only a collection of provisions that define the EU as a legal person. Moreover, it follows form this normative understanding that EU constitutional law is not only hierarchically superior, but also that EU constitutional law legitimises initiatives and legislations adopted by EU institutions thus constituting the primary source of law within the EU legal system.

Furthermore, following the liberal and democratic principles of modern constitutionalism mentioned above, the adjective constitutional in this study refers to the fact that the EU treaties have established a legal order based on the rule of law, the separation of powers and the democracy. Indeed, as it will be analysed in more in detail in the following chapter, the EU legal system is premised upon the same founding principles of liberal and democratic States.

It follows from the foregoing that the Treaties possess the main features that, according to modern constitutionalism, a constitution should have. And while state-centred theories on constitutionalism still object the ‘constitutional’ nature of the EU legal system, the case law of the CJEU supports the view that the EU legal system is a constitutional one. Indeed, if we were to understand and define the above-mentioned principles of modern constitutionalism in their formal acceptations and expect the EU legal system to mirror the provisions of national constitutions in these domains, then the EU would not have a constitution. However, as argued by Schütze, such an understanding would be a ‘reductionist’ one.

28 In Italian the relationship between primary law (the treaties) and secondary law (Regulations Directives, Decisions, and any other act with binding force adopted on the basis of primary norms) is described using the expressions ‘diritto primario’ (primary law) and ‘diritto derivato’ (derivative law).
29 Schütze 2012, p.2
30 Infra, Part Two, Chapters 5 and 6
31 Modern constitutionalism considers the liberal and democratic principles as essential and indispensable features that any constitution must have. Italian doctrine speaks in this respect of constitutionalism as ‘what a constitution ought to have’, ‘what a constitution ought to be’: il dover essere delle costituzioni. Morbidelli 2003
32 For an analysis and criticism of state-centred understandings of constitutionalism see Schütze 2012, pp.66-79
34 Idem
Opposed to the reductionist, and State-centred, understanding lays the ‘self-understanding’, or autonomous, understanding of the EU legal system as a constitutional legal order. Prior to the entry into force of the Lisbon Treaty the understanding of the EU Treaties as constitutional norms relied on the jurisprudence elaborated by the CJEU as stated in its Opinion 1/91:

“the [EU] Treaties, albeit concluded in the form of an international agreement, none the less [constitute] the constitutional charter of a [Union] based on the rule of law. As the Court of Justice has consistently held, the [European] Treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the [EU] legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves”.

Today, we have a number of provisions that clarify the meaning and scope of these principles. In this respect, Article 2 TEU plays a pivotal role since it codifies the constitutional foundations of the EU legal system:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”

It appears from the foregoing that a systematic reading of Article 2 TEU in combination with other provisions of the Treaties that anchor the EU legal system to the rule of law, democracy and human rights, it can be concluded von Bogdandy that the constitutional understanding of the EU Treaties is justified because “primary law justifies the exercise of public power, it legitimises acts of the EU, it creates a citizenship, it grants

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35 Opinion 1/91 ECR 1991 I-06079, paragraph 21
36 Title II Provisions on Democratic Principles, Articles 9-12 TEU and Title III Provisions on the Institutions, Articles 13-19 TEU
This section on the approach used in this study wished to present the methodological elements that have influenced and characterised this work. First, it argued that taking into consideration the disputes that have been brought in front of the CJEU, the external dimension of the AFSJ seems to pose a number of legal questions that pertain to the scope and interpretation of primary law provisions. Secondly, this Chapter also argued that the existing body of knowledge on the external AFSJ focuses on analysing the developments of the AFSJ without making reference to the underpinning constitutional provisions at stake in each case. As a result of these two preliminary observations, in the last part of this section it was argued that in order to clarify the legitimacy and the scope of the externalisation of the AFSJ, a stronger attention should be given to constitutional approaches to the analysis of EU law.

In conclusion, after the entry into force of the Lisbon Treaty the EU Treaties remain highly complex ‘framework treaties’; as such, the two legal documents provide for objectives, confer powers, rights and obligations to a number of natural and legal persons. And in order to attain those objectives, the EU Treaties have established a number of institutions and decision-making processes. As a result of these elements, the Treaties have a constitutional nature and a regulatory one. And the constitutional approach used in this research claims that legal research should take the distinction into account and separate the legal analysis of secondary law instruments from the analysis over the legitimacy of those same instruments. This study attempts to operate such distinction by using the notion of ‘constitutional foundations’ as used by the CJEU in the Kadi case.38

3.3.1 Terminology

In the light of the observations above a last clarification may be needed. In the text a number of expressions such as constitutional principles and constitutional foundations will be used.

Because scholars do not use these expressions univocally, it is preferable to clarify in this section how a number of key expressions will be used. The book refers to the expression of constitutional law of the EU whenever it refers to the Treaties. In this respect a choice

37 von Bogdandy 2010
38 See Chapter 2 above and Part Two, Chapters 7 and 8, infra.
was made to refer to the Treaties as the constitutional laws of the EU. Within this relatively broad notion, we can further distinguish constitutional foundations and constitutional principles.

With constitutional foundations we consider the core principles of modern constitutionalism as developed by the CJEU in Opinion 1/91 and Kadi and now codified in Article 2 TEU discussed Part Three. The expression constitutional principle, on the other hand, will be used in relation to norms “that serve as guidelines for the acts of the (state) organs”\(^{39}\) and do not create substantive rights and obligations.\(^{40}\) In this sense constitutional principles are also different from the general principles of law as developed by the CJEU and that include proportionality, fundamental rights, legal certainty, legitimate expectations equality and the precautionary principle. These general principles are often used as foundations in court actions based on Articles 263 and 267 TFEU.\(^{41}\)

### 3.4 On the Legal Approach Used

In the previous sections dedicated to the scientific approach used in this book it was argued that a number of factors suggested that such study on the external dimension of the AFSJ should be developed within two axes: the first being Article 2 TEU and the second being the different primary law provisions and principles regulating the AFSJ and EU external relations. In other words, the approach chosen is one that prefers primary legal sources to secondary sources, soft law instruments and other policy documents. Moreover, the approach chosen considers that a constitutional approach and narrative to analyse the externalisation of the AFSJ is necessary so as to distinguish the political sphere of discretionary powers and policies from the one of constitutional law, which is concerned with the fundamental framework in which institutions and political actors have to play.

It was argued, in support of this choice, that the number of disputes pertaining to the external dimension of the AFSJ on the one side, and the delicate relationship between the EU’s AFSJ with the rights of individuals and Member States’ responsibilities on the other side, called for a scientific approach that would give precedence to founding legal principles and rules.

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\(^{39}\) Wessel 1999

\(^{40}\) Literature on the nature of principles is very broad. See, in general Bengoetxea 1993 and Dworkin 1977

\(^{41}\) Craig and de Búrca 2015
It should be added, with a spirit of intellectual honesty, that the approach followed is also a result of the legal school of thought received (and perhaps preferred) by the author. Indeed, having received his primary legal education in Italy, the author is also affected by a certain hermeneutic strategy that privileges the interpretation of law through the use of analogy and legal formalisms typical of certain civil law countries. Francesco Messineo has described this as a tendency to look at legal systems as “closed conceptual frameworks of Kelsenian hierarchical beauty trapped inside a Leibnizian monad”.

However, it cannot be said that this research followed such an approach dogmatically or ‘à la lettre’; rather, the peculiar circumstances in which the external dimension of the AFSJ is being developed suggested to the author that, as a complement to those approaches that use policy documents to dynamically study the external dimension of the AFSJ, the doctrinal debate could benefit from the insights brought by an approach founded upon the relationship between founding constitutional principles and the external AFSJ. After all, many scholars analysing the AFSJ argue that rights and rules should be taken more seriously.

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42 Messineo 2010, p.87. The author refers, in fact, to the approach that characterizes the hermeneutical process of Italian Courts. However, and to a lesser degree, this approach also characterizes Italian literature since this approach is, among other things, a result of the general rules on interpretation as codified in the preliminary provisions on law in general attached to the Italian civil code.
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Chapter 4

The External Dimensions of the AFSJ

Part One of this study had the objective of identifying the legal problem that it wishes to analyse and the research question that it wishes to answer. In the first Chapter it was argued that the external projection of the EU’s AFSJ has raised a number of disputes pertaining to primary law. More specifically, that Chapter showed that the AFSJ is a multidisciplinary field of EU competences and that its external projection has an ambivalent, perhaps ambiguous objective: complement the internal AFSJ and cooperate with third countries and international organisations to fight against security threats such as international terrorism. Subsequently it was argued that the institutions have followed a Sturm und Drang approach to develop the external projection of the AFSJ; however, it was noted that the European Council has still not managed to explain how these policy ambitions can be reconciled with the constitutional framework of the EU. Indeed, as it was highlighted in the subsequent chapters, the externalisation of the AFSJ opens a number of constitutional questions and has been at the centre of a number of disputes. Chapter 1 also revealed that because the multifaceted nature of the the AFSJ, and because of the plurality of ways in which the AFSJ is projected externally, the expression ‘external dimension of the AFSJ’ should be replaced with ‘external dimensions of the AFSJ’.

By making reference to the Kadi judgment of 2008, it was argued that the external dimension of the AFSJ appeared to pose legal problems in terms of constitutional compatibility. In this respect it was argued that the external dimension of the AFSJ as a policy appeared to raise numerous conflicts pertaining to the respect of primary law provisions that belong to the foundations of the EU legal system and in the light of those observations the following research question was put forward (To what extent is the development of the external dimension of the European Union’s Area of Freedom, Security and Justice compatible with the constitutional foundations of the EU?)

Subsequently, after an excursion through he existing body of knowledge relating to the external dimension of the AFSJ, Chapter 3 presented the approach used to address the research question previously identified. In this respect it was argued that since this study pertains to the relationship between EU constitutional law and the external AFSJ it would not follow a ‘law in context’ approach as used by Monar and others. Rather, the second part of Chapter 3 argued that, on the basis of theories and works of leading scholars such
as Schütze and von Bogdandy as well as on the basis of the case law of the CJEU (*Les Verts, Opinion 1/91 and Kadi*), this study would analyse the external dimension of the AFSJ by making reference to the constitutional foundations of the EU legal system.
Conclusions Part One

Having addressed the three introductory fundamentals of this research – legal problem, research question and methodology – these lines close Part One of this study. As a constitutional analysis of the external dimension of the AFSJ, the next part – Part Two – will focus on identifying and discussing the main traits of the AFSJ (Chapter 5) and these are related to the acquis on EU external relations law (Chapter 6). Subsequently, Part Three will be dedicated to the identification and analysis of primary law provisions and case law that constitute the foundations of the EU legal system. To do so, Chapter 7 will first identify the provisions of the Treaties and Chapter 8 will look into the precedents in which the CJEU made reference to ‘the foundations’ of the EU legal system. Once the first four sub-questions will be addressed in the Part Two and Three, the study will turn to substantive aspects of the external dimensions of the AFSJ.
PART TWO

The Area of Freedom, Security and Justice and the Existing Acquis Related to EU External Relations
Chapter 5

The European Union as an Area of Freedom, Security and Justice: Competences, Principles and Challenges

5.1 Introduction

The purpose of Part One was to identify the legal problems that characterise the development of the external dimension of the AFSJ and to formulate a research question. This first Chapter of Part Two is dedicated to the analysis of the main characteristics of the AFSJ. This Chapter is not an analysis of the different sector-specific measures adopted within each field of the AFSJ, nor it aims at formulating a theory on the whole AFSJ; rather, this chapter as a narrower focus that aims at clarifying the main traits of the different AFSJ provisions. Also in the light of the many reforms of the Treaties, this specific field of EU competences has been rapidly evolving and, as a consequence, this Chapter plays a key role in the broader context of this research. Indeed, because external EU competences are founded upon internal ones under the doctrine of implied powers, this Chapter needs to map out the scope of powers attributed to the EU within the AFSJ before turning to the external dimension thereof.

Since the establishment of the AFSJ as a Treaty objective in 1999 the Treaties’ provisions on the AFSJ have empowered the EU to develop a voluminous set of measures of the most diverse nature: from enforcement orders in civil and commercial matters1 to the mutual recognition of expulsion orders,2 from smart sanctions against presumed terrorists3 to the harmonisation of rules concerned with the crossing of the external borders of the Member States.4 These developments were legitimised in the first place by Article 2 TEUaL that affirmed: “The Union shall set itself the following objectives: (...) to maintain and develop the Union as an area of freedom, security and justice, in which the movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime, (...)”. In the pre-Lisbon era, Treaty objectives had a

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3 Council Regulation 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 [2002] L 139, p.9
particular importance. First, in the absence of provisions setting the distribution of competences between Member States and the EU, Treaty objectives contributed to frame the legitimate action of the Union. In other words, treaty objectives indicated in a broad sense the fields in which the Member States authorised the Union to act. Secondly, and as a consequence of the role mentioned above, Treaty objectives served to support the choice of a certain legal basis in contrast of another one. The latter normative use of Treaty objectives was thus linked to the idea that they also served as provisions defining the scope of the powers attributed in concreto to the Union to the detriment of Member States’ powers. At the same time, Treaty objectives could also serve to safeguard the prerogatives of Member States because, by virtue of the principle of conferral, competences not attributed to the Union by the Treaties were reserved by Member States. Another crucial function that treaty objectives had was their role as interpretative parameters in controversies dealing with the legitimacy of an act of the institutions: in case a certain act could not immediately be anchored to a more specific provision, a Treaty objective could serve as an interpretative parameter of last resort to test the legitimacy of a certain act. In this sense it is clear that Treaty objectives as such cannot be immediately invoked in an action for annulment because the first parameter in these cases is always the legal basis used by the legislator, but it is indisputable that treaties’ objectives may well serve as interpretative parameters in law courts. In other words, and from a legal perspective, Treaty objectives served as tools to support or to deny the legitimacy of an act in the frame of what is technically called teleological interpretation.

The objective to maintain and develop the Union as an AFSJ, however, was considered not to possess the qualities to be used as a hermeneutical tool or as a parameter of legitimacy. In this respect it was generally observed that the concept AFSJ lacked a clear meaning; in other words, the nomen iuris agreed upon by the ‘masters of the Treaties’ did not allow a definition of the actual scope of the Treaty objective. In relation to this discourse, the most poignant observation still is the one offered by Walker who deconstructed the concept of AFSJ to point out that “unlike many of the major domains of European law, whether core domains such as the internal market, competition, agriculture of fisheries, or flanking domains such as employment or the environment or social policy, the subject matters assembled under AFSJ do not form a ‘natural’ unity in terms of a clearly defined overall project”.  

Walker 2004, p.5
In light of ten years of legislative action in the domain, the criticism does not appear fully convincing. First, if indeed the concept of AFSJ is not per se particularly enlightening as for its content, Article 2TEUaL clearly identified the material scope of the objective: namely “measures with respect to external border controls, asylum, immigration and the prevention and combating of crime” and although the provision did not contain a precise account of the scope of powers, it gave an idea of what the Union was called upon to achieve. At the same time, it is also true that the provision did not identify all the AFSJ fields since, for instance, judicial cooperation in civil matters was not mentioned in the text. Secondly, the criticism in respect of the lack of a clear ‘unity’ of the subjects falling within the AFSJ was also disputable in relation to the – false – assumption that, on the other side, the internal market constituted a less challenging objective to decrypt. However, the ‘internal market’ is a notion stemming from the European integration process with little significance outside the ambit of the Treaties. Which sovereign state, after all, proclaims itself an internal market? Contrary to expressions such as ‘zollverein’ that acquired a legal, constitutional, meaning since the process of unification of the German Empire in the eighteen hundreds, the internal market expression has always been a product of the Monnet-Schuman project that has evolved with time. Lastly, it is submitted that by virtue of the autonomy of the EU legal order an independent meaning to the AFSJ expression in question could have been found by the means of a systematic interpretation of the specific Titles and provisions that the EC Treaty and the EU Treaty dedicated to the AFSJ. More precisely, it is submitted by the present author that Article 2 TEUaL with the AFSJ expression indicated the attainment of a number of specific goals that were conceived as components of the overall AFSJ project. The overall project – Article 2 TEUaL – therefore, had to be construed in light of Articles 61 TEC and 29 TEUaL; and such equation had to lead to the conclusion that the Union’s objective of Article 2 TEUaL was to support the safeguard of public order, public security and civil liberties in the context of the powers attributed to the EU. Accordingly, this constituted and still can be considered as an objective implicit and inherent to modern constitutionalism that no European constitution codifies explicitly, and that needed to be codified in the context of the EU, i.e. in the context of a ‘legal order of a new kind’.

However, because of the ambiguity of the AFSJ notion, and instead of using a legal systematic approach, the study and the understanding of what the AFSJ consisted of was influenced by other sciences, notably political sciences, and paradoxically by the policy

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6 For a critique of this way of reasoning see Wessel et al (2011)
7 Mortelmans 1998
documents of the EU institutions. Therefore, instead of focusing on whether a certain measure was legitimate (or not) in relation to the overall scope of the Union as an AFSJ in light of Articles 2 TEUaL, 29 TEUaL or 61 TEC, the whole approach to the AFSJ was focused on the political side of the AFSJ coin. Thus, the choice made by some scholars to understand Article 2 TEUaL as a self-sufficient provision lead to meta-legal debates on the correct balance between freedom, security and justice instead of using existing normative parameters to adjudicate a measure or a set of measures approved by the institutions. Undoubtedly, this debate was emerging within a context of policy programmes with ambitious goals and within a historical moment in which “security” was forced into the political agenda due to, for instance, the 9/11 events, but the structure given to the debate was not wholly satisfactory.

Yet, different legal approaches going beyond Walker’s criticism were also possible. As clearly pointed out by Peers, the ‘area’ concept served the purposes of bringing together policies falling within the different pillars of the Union and of including the Schengen acquis and countries in the context of the AFSJ, while being respectful of the different modalities of participation of some of the Member States. The two verbs ‘maintain’ and ‘develop’ served, firstly, as a non-regression clause and, secondly, as a purposive tool. Lastly, ‘freedom’, ‘security’ and ‘justice’ clearly referred to three specificities, three parallel dimensions of the area: the EU was and is an area of freedom both in relation to the internal market acceptation and in relation to civil liberties; the EU was and is an area of ‘security’ (police cooperation) in which public order and public safety are preserved and, thirdly, ‘justice’ (judicial cooperation in civil and criminal matters) could be interpreted as both a reference to the rule of law and to the right to a legal remedy. In other words, it emerged clearly from the provision itself that: (i) the ‘area’ concept was introduced as an expression relating to the territory without internal borders that ambiguously – but voluntarily – included the Schengen associated countries in the light of the incorporation of the Schengen acquis and that simultaneously allowed the opt-in/opt-out status of some of the Member States; (ii) the term ‘freedom’ had to be read in the light of the subordinate phrase of the same provision in which it is stated that within the AFSJ free movement of persons is assured and as a commitment to civil liberties in connection to Article 6 TEU; (iii) the terms ‘security’ and ‘justice’ referred to security

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8 On this aspect see supra Part I, Chapter 3)  
9 Peers 2006, p.8  
10 Labayle, 1997
and justice as public goods, as legal goods that are protected within the EU system and that constitute the object of the competence conferred to the EU.\(^{11}\)

This understanding of the AFSJ concept, together with the idea that the provision constituted a mandate to the EU institutions, would have allowed to downscale the issue of the true objective of the AFSJ and it would have allowed researchers to approach the AFSJ in its traditional sense, i.e. justice and home affairs matters. A normative constitutional analysis of the AFSJ competences of the Union did not require, and still does not require, meta-legal acceptations of the terms ‘freedom’, ‘security’ and ‘justice’. In particular, it seems that understanding those terms as expressing values could be misleading because values express “fundamental ethical convictions”\(^ {12}\) and, as such, value discourses can easily “acquire a paternalistic dimension”.\(^ {13}\) Rather, as it was argued ‘freedom’, ‘security’ and ‘justice’ represent three public goods but in the context of a constitutional programmatic provision. Thus, the three public goods in question do not represent three conflicting objectives to achieve, but three coexisting features of the EU legal order which need to be safeguarded. And it is in this perspective that Article 67 TFEU must be read, i.e. as a specification of the actual role that the EU is demanded to play for the safeguard of the three public goods in question.\(^ {14}\)

Prior to investigating the new architecture of Justice and Home Affairs law within the EU legal order after the entry into force of the Lisbon Treaty, it is necessary to pursue in one last digression. A systematic reading of the Treaties suggests that citizenship of the EU and fundamental rights fall within the scope of the AFSJ. Indeed, Council and Commission documents treat citizenship and human rights issues within the context of the AFSJ, but what is necessary to distinguish is the role that these two prominent aspects of the European integration process might play in the political agenda on the one side, and the role these play within this book. Citizenship and human rights are two of the dossiers constituting the portfolio of the Justice DG in Brussels. In other words, they are objects of administrative and legal action in respect of the Commission’s powers. This study, however, will treat the two as subjects of the EU legal order. And indeed the relation between the individual (citizen and non-citizen), his or her rights and the AFSJ is of preeminent importance for this study. To address citizenship and human rights as an aspect of the AFSJ in the administrative sense would be reductive: citizenship and human rights are core features of the EU legal system that permeate the interpretation and

\(^{11}\) See the work of Gibbs (2011)
\(^{12}\) von Bogdandy 2009
\(^{13}\) von Bogdandy 2010
\(^{14}\) On Article 67 TFEU see infra paragraph 4
application of EU law in general and as such they do not belong to one policy domain or the other. Therefore, there is no separate section on citizenship or human rights in this study. This approach could have been considered controversial in the past: human rights protection did not have a specific legal basis other than Article 6 TEUaL and citizenship was anchored in the EC pillar only. With the entry into force of the Lisbon Treaty, citizenship and human rights protection acquire a new dimension within the Treaties’ system and must be considered as affecting the dynamics of both the internal and external dimensions of Justice and Home Affairs law.

The entry into force of the Lisbon Treaty implies significant structural changes in the overall architecture of the AFSJ. This Section will deal with the overall scope of AFSJ within the European integration process (7.2) and will then turn to the constitutional foundations of the AFSJ (7.3). Subsequently, attention will be paid to the division of competences between Member States and the Union (7.4), will then turn to the institutional and decision-making changes affecting the AFSJ (7.5), will introduce the specific policies composing the AFSJ (7.6), will then consider the relationship between citizenship and fundamental human rights (7.7) and will conclude with some residual aspects of the AFSJ (7.8).

5.2 The Overall Scope of the AFSJ: Does the Emperor Have New Clothes?

The Lisbon Treaty has not modified the constitutional dichotomy of the EU legal system: the legal order is still founded upon a Treaty on the European Union and the ‘old’ EC treaty has been renamed Treaty on the Functioning of the European Union. The system is therefore based on two treaties having equal legal force, but the two legal documents serve different purposes.

The first Treaty, the TEU, now contains four Titles dedicated to general issues (Common Provisions, Provisions on Democratic Principles, Provisions on the Institutions and Provisions on Enhanced Cooperation), one Title named ‘Final Provisions’ regulating the amendments procedure, accession and exit from the Union, and one Title on the Union’s external action and CFSP, i.e. the old second pillar. The intention to go beyond the cumbersome two-treaty structure that had been codified with the Treaty Establishing a Constitution for Europe was not preserved. Yet, in the light of the existing acquis this does not affect the unity of the system, as the latter is clearly proclaimed in Article 1 paragraph 3 TEU. Still, retaining the CFSP in a distinct context from other policies

15 This is soundly repeated in Article 1(3) TEU and in Article 1(2) TFEU.
confirms the idea that the CFSP must be understood as a special genus within the ambit of the species ‘EU policies’; and these peculiarities, as it will emerge, do affect the external dimension of Justice and Home Affairs.\textsuperscript{16} Overall, the TEU is a Treaty with a diverse nature: it contains founding provisions, static provisions in which principles are enunciated, but also contains dynamic provisions such as the ones on the CFSP and its relation with the whole of the EU’s external action on the one hand, along with the rules on amendment, accession and exit from the EU system. On the other hand, as the nomen iuris suggests, the TFEU regulates the dynamics of the EU legal system: “(t)his Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences”.\textsuperscript{17} The TFEU is thus the Treaty where the engineering of the system really resides and is also the Treaty where the different ambits of EU action are explained. Logically then, if the ‘incipit’ and foundations of Justice and Home Affairs law are to be found in the TEU, the actual scope of the AFSJ’s provisions are contained in the TFEU.

A first striking feature of the current TEU is that Title I thereof has abandoned the enunciation of the Union’s objectives, and no trace of objective-setting provisions can be found in the TFEU either. Because of the decision on the deletion of the expression “objectives”, and in light of the maturity of the European integration process, it is submitted that Article 3 TEU must be construed as a programmatic provision of the Treaties. This acceptance serves the purpose of a constitutional discourse on the EU legal order and better serves another novelty introduced by the Lisbon reform. In the past, because the Treaties were lacking a set of provisions regulating the division of competences between Member States and the Union, the objective-setting provisions of the Treaties had a multiple constitutional significance: not only were these ‘orienting provisions’ that, together with the specific provisions of the single policies, founded and limited the scope of powers attributed to the Union\textsuperscript{18}; but these provisions were also provisions – albeit implicitly and lato sensu – on the distribution of competences between the EU and the Member States.

Today, the role of objective-setting provisions as those that regulate the division of competences between Member States and the EU has ended in the light of Articles 2-6 TFEU. As the implicit role of competence division has been taken from Article 3 TEU and placed in Article 2-6 TFEU, the former provision has lost some of its normative force and is better understood as programmatic. It is submitted that the latter

\textsuperscript{16} See infra Part Four and Part Five
\textsuperscript{17} Article 1 TFEU
\textsuperscript{18} In this respect, supra, Section 1 of this Chapter.
understanding does not amount to a mere matter of semantics and that it serves the constitutional maturity of the EU legal system and discourse more convincingly.

Programmatic norms are commonly found in many constitutions of the Member States. They serve the purpose of indicating a societal or political aim that the legislative power must pursue. However, because of their syntax these provisions are usually considered as not being directly enforceable, unless a clear precept is identifiable. Similarly, having abolished the concept of objective as an index of legitimacy and boundary of EU action, Article 3 TEU now identifies general policy duties that the EU legislative bodies must pursue in their action. In other words, Article 3 TEU is now to be read as a political manifesto based upon the will of the Member States on the one side, and as a base for the system of attributed competences enshrined in Articles 2-6 TFEU, on the other. The difference, albeit nuanced, is historical. With the abolition of objectives in the Common Provisions’ Title of the TEU, EU action does not need a policy justification (the objectives) because the legitimisation is implied within the system. It is therefore submitted that: i) the EU integration process has attained and passed an objective-related integration process in its strict sense; and that by consequence ii) programmatic norms have replaced objectives. In respect of objectives-setting provisions, programmatic norms have a weaker normative force for they mainly serve as argumentative means in exegetic processes but do not serve as legal, normative parameters in the identification of the division of competences between Member States and the Union.

Beyond the consequences stemming from the deletion of any reference to the objectives of the EU, the substance of the AFSJ provision has been significantly changed in the programmatic context explained above. Article 3 paragraph 2 TEU now affirms that “(t)he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

The first change in respect of the old AFSJ objective relates to the choice of verbs. In the Amsterdam version the EU was given the task to maintain and develop itself as an AFSJ. The choice of the verbs probably expressed the idea of the historical shift of powers: the Member States were delegating -within the boundaries of the specific provisions of the Treaties- to the Union powers in relation to external borders, asylum, immigration and the prevention and combating of crime in order to maintain and develop, in the context of

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19 For an analysis on the techniques of interpretation of constitutional texts see Guastini 2004
free movement of persons, the EU area as a territory of freedom, security and justice. Although that idea of an AFSJ has not been modified as such, the entry into force of the Lisbon amendments means that the Union shall now offer its citizens an AFSJ. The choice of the imperative form “shall offer” marks the change in the scope of the Union’s action in these domains: whereas in the past version ‘maintenance’ and ‘development’ echoed the link Member States-European Union in the construction of the AFSJ; the new choice of verbs places emphasis on the role of the EU, that the Union is directly called to safeguard public goods such as freedom, security and justice for its citizens. In other words, it is submitted here that the Lisbon Treaty directly confers to the Union responsibilities to safeguard the three public goods in question whereas in the past the mandate vested upon the Union was rather focusing on the idea that the EU was there to facilitate cooperation among Member States. The new role of the Union in these domains is, after all, now legitimised in light of the role of the European Parliament in the decision making process on the one side, and on the full jurisdictional competence conferred to the CJEU on the other. The new wording used in Article 3 TEU, therefore, makes of the AFSJ concept a strong purposive and teleological tool of interpretation that cannot be ignored in the exegesis of the specific AFSJ provisions.

The idea that the Union offers an AFSJ to its citizens appears even more far reaching if one takes into consideration that the same Article of the TEU in paragraph 3 affirms, in a surprisingly weak manner, that the EU shall establish an internal market. The difference is striking: whereas in the case of the AFSJ the Union must offer an AFSJ, thus portraying the idea of something that is identified and materially deliverable, placing a heavy burden on the Union whereas the internal market, the ‘enfant prodige’ of European integration, has yet to be established. And the differences in the tune of the two key paragraphs of Article 3 TEU become even more manifest if one takes into consideration that the link between EU action and the EU citizen appears only in relation to the AFSJ and not in the context of the internal market, the actual birthplace of the very concept of this Union’s citizenship since the famous expression of AG Jacobs in the Konstantinidis case: “civis europaeus sum”.20

What emerges from Article 3 TEU, however, is that the AFSJ, the most contested and problematic field of action of the Union to which three Member States have opted out, appears as the field of EU action with the strongest mandate conferred by the Member States to the Union, a mandate that commits, for the first time in the history of the EU

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legal system, the Union to act for its citizens. The preceding paragraphs have focused on
the strong programmatic mandate that the Lisbon Treaty has introduced for the AFSJ
side of the European integration process. The Sections that follow will investigate
whether such a strong mandate is reflected in the specific provisions on the AFSJ.

5.3 The Vertical Tensions: Distribution of Competencies and the AFSJ

One of the greatest achievements of the Lisbon reform is to have introduced a clearer
definition and distribution of competences between the EU and the Member States.
Articles 3, 4 and 6 TFEU now furnish an indicative list of the Union competences and
their nature, i.e. exclusive or shared. Article 2 TFEU defines the notion of the types of
competences and refers to the specific provisions of the TFEU in relation to the actual
scope and arrangements concerning the exercise of competences by the Union.

Article 4 TFEU gives a substantive, material overview of what constitutes a shared
competence. Article 4 (1) TFEU affirms that the Union shares a competence with the
Member States when such competence is not referred to in Article 3 TFEU – a provision
that itemizes exclusive competences of the Union – or in Article 6 TFEU – a provision
that itemizes competences to support, coordinate or supplement the actions of the
Member States. Article 4 (1) is a criterion *ad excludendum*, but does not mean that *all*
competences that do not fall in either Article 3 or 6 TFEU fall within the family of shared
competences. First, by virtue of the principle of conferral codified in Article 5 TEU,
“competences not conferred upon the Union in the Treaties remain within the Member
States; and secondly, Article 4 (2) contains a list of shared competences. The AFSJ
belongs to this category. 21 Paragraph (2) of Article 4, however, is ambiguously phrased.
Before listing the domains of shared competences between the MS’s and the Union, it
affirms that the rules on shared competences apply “to the following principal areas”. 22
Taking into consideration the affirmation of the principle of conferral in Article 4 TEU
on the one side, and considering the nature *ad excludendum* that Article 4(1) TFEU gives
to the category of shared competences on the other side, it is difficult to imagine how the
phrase of Article 4(2) can, *in concreto*, become the basis to extend the fields of shared
competences of the Union. Surely this cannot be interpreted as legitimising the passage
from other types of competences – exclusive ones or supportive ones – to the field of
shared ones; nor can this be interpreted as legitimising an increase or decrease of the
Union’s competences outside the amendments procedure contained in Article 48 TEU.

21 Letter (j), paragraph (2) Article 4 TFEU.
22 Italics added.
Possibly, the only significance that the nuanced phrase of Article 4(2) can legitimately claim to have concerns the relation of the list of fields contained in Article 4(2) and the other two types of shared competences listed in paragraphs 3 and 4 of the same Article: “principal” therefore seems to apply not to the number of policies falling within the family of shared competences, but rather to the *modus operandi* of the exercise of shared competences, distinguishing a general category (the fields of the list) from the categories in the fields of research, technological development and space on the one hand (paragraph 3), and competences in the area of development cooperation and humanitarian aid (paragraph 4) on the other.

The subsequent step to the identification of the nature of a given competence – exclusive, shared or supportive – is to understand what the given characteristic entails *in concreto*. According to Article 2 (2) TFEU, “when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area”. This rule of principle is supplemented by two more rules: first, Member States can exercise their competence to the extent that the Union has not exercised its competence; and second, Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence”. Shared competences are *dynamic* competences in which the faculty to exercise legislative power depends on the intensity of the legislative measures adopted by the Union; intensity that can, accordingly, change with time. This dynamism characterises shared competences as opposed to exclusive ones – where the Union maintains its primacy – or to supportive competences enshrined in Article 6 TFEU.

It follows that action of the Member States depends on the extent of the legislative acts that the EU has taken; and, of course, the parameter will not consist in the field of the Union’s competence broadly understood – “the AFSJ”, “the internal market” – but will have to be made in relation to the material scope of each AFSJ provision that contains a mandate to act for the Union. This understanding fits squarely with the content of Protocol No. 25 to the Treaties on the exercise of shared competences. This Protocol holds that action of the Union in a certain field for the purposes of investigating the quantum of the competence that rests within the Member States covers only the elements governed by the acts in question and not the whole field of policy.

The nature of a competence conferred to the Union, however, does not merely relate to a static separation of powers. Taking into account the definitions of exclusive and shared competences given by Article 2 TFEU, the dividing line between the two types of
competences would only be temporal: for with the exercise of the powers conferred upon the Union, any competence could, within time, become an exclusive competence. This eventuality is averted by two factors. First, the broad competences given to the Union are not the ones referred to, as a manifesto, in Articles 3, 4, 5, 6 TFEU, but are really the ones of the specific legal basis spread in the Treaties. Secondly, two dynamic principles control the exercise of power by the Union since the entry into force of the Maastricht Treaty. According to Article 5 TEU, the exercise of powers by the Union is further governed by the principles of proportionality and, for non-exclusive competences, the principle of subsidiarity. Taking into consideration the shared nature of the AFSJ competences, subsidiarity holds a preliminary position in respect of proportionality in our analysis: for the relation between the two principles is the one between the *ante* and the *quantum*. However, because of their dynamic nature the scope of these two principles in the field of Justice and Home Affairs will be addressed in relation to the different substantive fields that will be considered in the Second Part of this book. Having identified an understanding of the AFSJ and having placed it in the context of the vertical relations between Member States and the Union, the next paragraphs will turn to substantive aspects of the AFSJ starting from institutional issues (5) to substantive provisions (6).

### 5.4 The AFSJ in the Frame of the Treaty: Substantive Aspects

#### 5.4.1 General Provisions

Title V TFEU on the AFSJ opens with nine provisions of general application. Article 67 TFEU[^23] builds upon the programmatic provision of Article 3 TEU and codifies the scope of the three public goods in question within the European integration process. This provision, therefore, is not a mere specification of the general vision enshrined in Article 3 TEU, but contains the constitutional obligations of the European Union in relation to ‘freedom’ in paragraph 2, ‘security’ in paragraph 3 and ‘justice’ in paragraphs 3 and 4.

[^23]: Article 67 TFEU: 1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals. 3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws. 4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.
Each of the public goods considered refers to a number of policies and disciplines which, in their turn, found the different Chapters that constitute Title V on the AFSJ. These matters will be addressed in the Sections that follow.

Prior to an analysis of the different domains of the AFSJ as the Lisbon Treaty has codified them, it is necessary to consider the whole of Chapter 1 of Title VI of the TFEU. These provisions are of general application and thus maintain their purposes for all the different fields of the AFSJ. This Section on general provisions is of course a novelty brought by the merge of the old third pillar with the other policies of the AFSJ that were contained in the EC treaty. Most of these provisions are therefore new to the EU system.

First, Article 68 TFEU codifies the key role that European Council developed for itself during the last years when it affirms that the latter institution defines “the strategic guidelines for legislative and operational planning within the AFSJ”. This is of course a reference to the system of *quinquennial* programmes developed since the Tampere conclusions of 1999.24 It is interesting nonetheless that this provisions not only refers to strategic guidelines in relation to legislative planning, but also refers to operational planning, something which *prima facie* seems at odds with the prerogatives of other European institutions such as the Council and, most notably, the Commission. However, this seems one of the many pawns that with the passage to the *méthode communautaire*, the AFSJ had to concede.

Article 76 TFEU holds that acts and measures related to judicial cooperation in criminal matters, police cooperation and, by virtue of Article 74 TFEU, administrative cooperation among the relevant departments of the Member States and between the Commission and those departments in those fields of the AFSJ are adopted either on a proposal from the Commission or on the initiative of a quarter of the Member States. This means that the Commission does not hold a monopoly on initiative in respect of police cooperation and judicial cooperation in criminal matters, but the Lisbon Treaty nonetheless marks the passage from a system in which the Council and Member States had the most important role in initiating and pursuing legislative measures, to a system in which only the Commission or Member States in coalition can initiate the legislative process. The cancellation of the Council in this respect is no doubt tempered -albeit politically- by the prerogatives recognised to the European Council in drawing the legislative and operational agenda of the overall AFSJ. Concerning Chapters 2 and 3 of the AFSJ Title, but save from specific rules, one must conclude that the general rules on

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legislative initiative apply: the Commission holds the lead plus the possibility of a Citizens’ initiative.

The Lisbon Treaty further revised the role of what was known as the K.4 committee first established with the Treaty of Maastricht. Article 71 TFEU holds that the standing committee shall ensure the promotion and strengthening of operational cooperation; moreover, but in the tradition of the role played by the K.4 committee, the standing committee is also meant to facilitate the coordination among the Member States in relation to the activities of the Coreper, but without prejudicing the activities and prerogatives of the latter organ of the Union.

With the entry into force of the Lisbon Treaty there has been greater emphasis given to operational cooperation and other forms of administrative cooperation. Thus, other than the provision of Article 74 TFEU relating to EU measures which aim at fostering administrative cooperation and Article 71 TFEU on the role of the standing committee to ensure operational cooperation, there are two more provisions relating to this issue: Articles 72 TFEU and 73 TFEU. While Article 73 TFEU leaves unprejudiced the possibility for Member States to enhance between themselves other forms of cooperation and coordination to safeguard national security, Article 72 TFEU reproduces, just like Articles 33 TEUaL and 64 TEC did, the limitation clause in respect of responsibility for the maintenance of law, order and internal security, i.e. Member States retain their responsibilities in these domains.

The General provisions on the AFSJ do not bring innovations in relation to the role that national parliaments are to play. Other than the general tasks national assembly’s exercise, because of the shared nature of this Union competence, and other than the role national assemblies are called to play in relation to specific ambits of the AFSJ, the only provision that contains a link to national parliaments is Article 70 TFEU.

Article 70 TFEU brings to the centre of attention an issue that has caused many discussions at Council level: the evaluation of implementation of AFSJ measures within the Member States. In the era of the Amsterdam Treaty and, more specifically, in relation to Framework Decisions this issue raised many problems. Because the Commission was

25 The Coreper is the Permanent Representatives Committee of the Member States within the Council (in French “Comité des Représentants Permanents”, CoRePer). The composition and functions of the Coreper are expressly envisaged by Article 240 TFEU. This committee is responsible for preparing the work of the Council and it consists of the Member States’ ambassadors to the European Union.

26 Article 81(3) last paragraph allows national Parliaments to exercise a veto in relation to the harmonization of family law with cross-border implications.
not granted the power of bringing infringement actions against Member States, the correct implementation and application of EU measures could attain the same level of internal market measures. Certainly, the Commission was asked to conduct surveys and publish reports on implementation that did effectively lead to improvements, but the overall results left much to be desired.\(^{27}\) Thus, by virtue of Article 70 TFEU the Council, on a proposal of the Commission - but without prejudice to the traditional infringement procedure that is now applicable for the whole of the AFSJ\(^ {28}\), will be able to adopt “measures lying down the arrangement whereby Member States conduct objective and impartial evaluation of the implementation of Union policies”.\(^{(footnote)}\) According to the last sentence of Article 70 TFEU, the European Parliament and national parliaments are to be kept informed of the content and results of the evaluation. Therefore, a *prima facie* reading of this provision suggests that, following a proposal from the Commission, the Council may adopt measures whereby Member States’ authorities, in collaboration with the Commission, conduct an evaluation of the implementation of AFSJ policies and that the EP and national parliaments must be kept informed of the content and results of this evaluation mechanism. However, this participation *de minimis* as envisaged by Article 70 seems to contrast the wording of Article 12 c) TEU. The latter Article clearly affirms that national parliaments *take part “in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union”.* The wording of Article 12 c) TEU couldn’t be clearer: national parliaments take part in the evaluation mechanism, and yet Article 70 TFEU merely envisages a duty to keep the EP and national parliaments informed. Moreover, Article 12 c) TEU insinuates doubt on the actual role of national parliaments also in respect of their involvement in relation to the political monitor of Europol and the evaluation of Eurojust. However, leaving aside the part of Article 12 on Europol and Eurojust, it seems plausible to understand Article 12 and 70 in a systematic manner thus suggesting that the involvement of national parliaments with a report means that they participate in the evaluation, but not that they set the rules on the evaluation itself: otherwise, national parliaments would become judges as well as being judged at the same time.

\(^{27}\) In relation to the EAW system, for instance, the Framework Decision itself contained a provision in this respect. Since the entry into force of the Framework Decision the Commission has published several reports on its implementation. The latest is of 2011: COM (2011) 175 final.\(^{28}\) Protocol 36 on Transitional Provisions holds at Article 10 that acts adopted before the entry into force of the Lisbon reform and falling within Title VI of the TEUaL will maintain their effects and that the powers of the Commission under Article 258 will not be applicable to pre-Lisbon acts on police and judicial cooperation in criminal matters unless the acts are amended, for a period of 5 years since the entry into force of the Lisbon treaty.
In the Sections that follow a general overview of the different fields of the AFSJ will be presented. The different Chapters of the Treaty in relation to the domains of the AFSJ present the following structure: each provision contains an opening paragraph that defines the policy objectives and further contains other provisions indicating the legislative measures that the competent institutions can adopt in order to achieve the first. In the light of this structure, our understanding of Article 3 TEU as a mere programmatic rule seems strengthened and that provision will return to play a role in relation to the founding principles, in Part III of this research.

**5.4.2 Borders, Asylum and Immigration**

Chapter 2 of Title V TFEU contains primary law provisions on border checks (Article 77 TFEU), asylum (Article 78 TFEU) and immigration (Article 79 TFEU). Each of these three Articles are related to one of the policies of the Chapter and, as mentioned in the previous Section, each provision follows the following path: the identification of a policy and of its objectives followed by the identification of the legislative measures that the legislative bodies of the EU can take for the purposes of reaching those objectives.

Thus, Article 77 paragraph 2 TFEU dedicated to internal and external borders mandates the EU to adopt measures on: i) a common policy on visas and other short stay permits, ii) the checks at the external borders of the EU, iii) the establishment of the conditions upon which third country nationals can move freely within the EU, iv) the establishment of an integrated management system of the external borders and, finally v) the absence of controls at the crossing of the internal borders of the EU. Consequently, Article 78 TFEU on asylum, subsidiary protection and temporary protection mandates the Union to develop a common policy in these domains in paragraph 1 and identifies the different specific legal basis in paragraph 229; and an identical structure is followed in Article 79.

29 Measures in relation to Article 78’s objectives are: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.
where, in relation to the development of a common immigration policy, the second paragraph of this provision identifies five legal bases for legislative action.  

A first difference amongst the varying Articles of Chapter 2 is the use of the expression common policy that is used, only in Articles 78 and 79. Article 77 TFEU on internal and external borders, i.e. a policy in which the legislative action of the Union has led to a high degree of harmonisation because of the Schengen acquis and its developments, such an expression is not used. The expression ‘common policy’ is in fact used only in relation to paragraph 2 letter a) of Article 77 TFEU, that is the provision on short stay visas and short stay residence. However, there is no reference to a common policy in relation to, for instance, the checks at the external borders and in relation to the integrated management system for external borders. What is to be made of these discrepancies? Is it possible to interpret these differences by affirming that only where the expression ‘common policy’ is present the EU can engage in the approximation of national laws? As pointed elsewhere in this research there has been a strong emphasis given to the use or no use of the expression ‘common policy’ in relation to the action of the Union. The use of such an expression has been traditionally understood as an indicator justifying a strong and broad interpretation in favour of the Union’s competences to the detriment of national ones. This way of reasoning, can be appropriate also within the new context of the Treaties provided that this is not interpreted to the detriment of those policies which currently are characterised by a high level of harmonisation, but that are not considered as a common policy within the framework of the new Treaties. Arguably, it can be said that a common policy may exist either on the basis of an express provision within the Treaties or it may as well emerge on the basis of legislative harmonisation, which is ‘a posteriori’ evidence of the willingness to create a common approach and common rules on a certain policy field.

Article 80 TFEU codifies the principle of solidarity and fair sharing of responsibility in relation to the policies disciplined in this Chapter. With the entry into force of the Lisbon Treaty, therefore, the principle of solidarity in relation to border checks, asylum and immigration enters the realm of primary law: this should have a considerable impact not

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30 Article 79 2 TFEU: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; (d) combating trafficking in persons, in particular women and children.  
31 See supra, Chapter 2 of Part I.
only in relation to the interpretation of norms, but on the overall behaviour of Member States.

With the applicability of the infringement procedure in these domains, the principle of solidarity has now become enforceable in front of the Union’s law courts. As the solidarity principle is a governing principle its force permeates through the whole of this Chapter, but is likely to have a greater role only in some of the policies that are examined in this Section. Moreover, the new solidarity approach can be seen also in Article 78 (3) TFEU in relation to emergencies. In general, it can be observed that whilst there are instruments that appear to implement the solidarity principle such as Regulation 516/2014 establishing the Asylum, Migration and Integration Fund, other legislative instruments such as the so called ‘Dublin System’ ignore the principle almost completely. During the so called ‘refugee crisis’ of 2015 a number of Decisions have been adopted to compensate the rigidity of the Dublin system and implement the principle of solidarity; however such initiatives were promptly attacked by a number of Member States arguing that emergency measures based on the combined reading of Articles 78(3) and 80 TFEU were adopted in violation of the ordinary legislative process and in disrespect of institutional prerogatives.

The fields of migration (legal and illegal), border controls and visa policy, probably constitutes the kernel of Europe’s AFSJ. Although inexorably linked to one another, these different fields of the AFSJ have strong autonomous characteristics which play a role in their external projection. For example, whilst the objective of the EU’s asylum policy is (supposed) to foster the uniform application of the Geneva Convention of 1951 and thus its object is the protection of individuals within the EU context, visa and borders relate to the the control of the EU’s territory in order to balance movement with public


33 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31–59. Other than in the preamble, the Regulation refers to solidarity only in relation to crisis management whereby the European Parliament and the Council may propose solidarity measures in times of crises, see Article 33.

safety. Another element of that possesses a special character that should be taken in to consideration in the Treaties is Frontex, the specialised agency on the integrated management of the EU borders; yet, contrary to similar cases such as the ones of Eurojust and Europol, Frontex does not have a dedicated Treaty provision.

In the sector specific analysis of EU external action of the AFSJ the different fields of border checks, migration and asylum will be analysed together and only specificities will be isolated whereas in relation to broader external relations instruments the study will pinpoint any clause specifically linked to any of the policies founded upon the first chapter of Title V of Part Three of the TFEU.

5.4.3 Civil Law

Article 81 TFEU on judicial cooperation in civil law is structured like other provisions: a first paragraph on objectives and a second one on substantive measures. The latter part of the provision now contains eight fields of competence for the EU that go from cross border services of judicial and extra-judicial documents to the training of the judiciary of the Member States and their staff. Moreover, paragraph (3) of Article 81 contains, as mentioned previously, a mandate for action in the field of family law but in this case the institutions will have to follow the special legislative procedure and the Council will have to act unanimously.

Judicial cooperation in civil matters, together with judicial cooperation in criminal matters and police cooperation, distinguishes itself for the role the EU is called upon to exercise. Contrary to the mainstream cases of the EU integration process, where the EU is called to substitute, to lead or to support Member States in the decision making process, in this case the Union is called upon to create the instruments necessary for national judicial authorities of the Member States to enter in a direct discourse without requiring either the technical and administrative support of the central administration, or special procedures such as the exequatur.

The history of judicial cooperation in civil law however, does not solely rely on the principle of mutual recognition but is built upon the successful history of negative integration that we can trace back to the Brussels Convention of 1968. Since then, the EU has adopted many instruments on judicial cooperation in civil matters. These measures, focusing on civil and commercial issues were construed as a corollary to the

35 OJ [1998] C 27, p.1, for the consolidated version after the accession to the EU of Austria, Finland and Sweden.
integration process necessary to strengthen the internal market. This was evident in the wording of Article 65 TEC when it affirmed that measures in the field of judicial cooperation in civil matters having cross-border implications could be adopted “in so far as necessary for the proper functioning of the internal market” whereas the mandate to act in this domain codified in the TFEU does not demand this requisite as a ‘conditio sine qua non’. As a confirmation of the fact that judicial cooperation in civil matters has gone beyond its instrumental role in relation to the internal market one can take the example of family law issues, which explicitly entered the realm of EU competences with the entry into force of the Lisbon Treaty.

Not only do the rules on judicial cooperation in civil matters precede the Treaties, but the international aspects thereof have emerged very early on, with the conclusion of the first Lugano Convention in 1988. Since then, the external activities of the Union in the field of rules on jurisdiction have been declared as falling within the exclusive competence of the EU upon the conclusion of the second Lugano Convention. Thus, bearing in mind the internal developments on mutual recognition instruments in the field of civil law and commercial law, it is likely that other international agreements could fall, like the Lugano Convention, under the exclusive competence of the EU. However, this should prove more difficult when the international agreement in question should further affect the substantive part of material provisions of civil law and commercial law, but especially in the case of links with family law.

### 5.4.4 Judicial Cooperation in Criminal Matters

The provisions on judicial cooperation in criminal matters present more nuances than those concerned with civil justice cooperation and they best portray the ambivalent role that ‘judicial cooperation’ is really invited to participate within the European integration process. Chapter 3 of Title V on the AFSJ contains both bridging norms, aimed at creating direct dialogue between national legal systems and provisions reflecting the “intérêt general” of the EU, thus allowing the EU to develop a genuine European policy in criminal law and in criminal procedural law. In this perspective, it is possible to refer to the objectives and measures envisaged in Article 82 (1) second paragraph TFEU as bridging measures aimed at establishing cooperation based on mutual recognition; whereas in paragraph (2) of the same Article, the EU is recognised with the powers to

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36 Compare Article 65 TEC with Article 81 TFEU.
37 Opinion 1/03, [2006] ECR I-1145
38 For an analysis on recent developments since the adoption of the Commission Communication ‘Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law’ Com (2011) 573 final see Herlin-Karnell 2014
introduce some degree of (instrumental) approximation in order to supersede the short
comings of the application - *sic et simpliciter* - of mutual recognition. Thus, the EU as a
polity will inevitably engage in a discourse concerned with the general principles of
criminal procedural law.

The Lisbon Treaty does not recognise a mere instrumental interest of the EU to act in the
field of criminal law. The EU is explicitly called upon to defend, through the means of
criminal law, some general public interests which are henceforth recognised as belonging
to it: this is not only the case of the financial interests of the Union considered in Article
86 TFEU, but it is also the case of Article 83 TFEU and the identification of certain areas
of crime which are considered to be falling within the competence and general interest of
the EU as a polity. In both cases the EU is called upon to indicate *how and to what extent*
criminal law has to protect the legal goods that the Treaties have indicated as worthy of a
common protection. In relation to the latter type of competence of the EU, it is necessary
to understand whether Article 83 (1) and (2) TFEU affect the authority of judgments
such as the one on the protection of the environment through criminal law and the one
on ship pollution. Despite the fact that the last paragraph of Article 83 (1) TFEU
affirms that amendments to the list included therein must be approved with a unanimous
vote by the Council, the second paragraph of the same provision affirms that ‘if essential
to ensure the effective implementation of a harmonised Union policy’, a Directive may
establish minimum rules with regard to the definition of criminal offences and sanctions
in the area concerned. Therefore, it seems that Article 83 TFEU contains an explicit
mandate for the EU to adopt measures in relation to certain types of criminal activities on
the one side, and a mandate that covers developments such as the one which has emerged
in the case of the protection of the environment through criminal law. At the same time,
it does not seem that these provisions contradict other aspects of the Union’s *acquis* in
relation to criminal law: the power to impose on Member States the criminalisation *-or
quasi-* of certain conducts, as it was held by the CJEU in the Greek maize case can
continue to coexist with the new norms.

Judicial cooperation in criminal matters constitutes a rich portfolio for EU action. In the
analysis on the external dimension of this policy we will distinguish, as others have done
in the past, three types of international action that the EU can carry: mutual legal
agreements and extradition agreements (criminal procedure law), adhesion to

41 Case C-68/88, Commission v. Greece, ECR 1989 p. 2965
42 Mitsilegas 2010
international conventions on substantive criminal law (approximation of substantive criminal law) and the international activities of Eurojust, the specialised agency of the EU for judicial cooperation in criminal matters.

5.4.5 Police Cooperation

EU law on policing and security has developed as a tool to enhance cooperation between police offices and to establish a legal framework for operational cooperation among Member States’ authorities. At the same time, Europol was created in order to foster the exchange of information among national authorities, to develop analysis and investigative methods and to support the work of national authorities. The general legal basis in the field of police cooperation is Article 87 TFEU and the latter provision does not depart far from old Article 30 TEUaL. Again, the provision in question indicates a general objective in the first paragraph and in the second one clarifies the scope of the Union’s powers.\(^43\) Thus, Article 87 allows the Union to adopt measures concerning (a) the collection, storage, processing, analysis and exchange of relevant information; (b) support for the training of staff and (c) common investigative techniques in relation to serious forms of organised crime. In this respect, as the provision has not radically changed in its substantive aspects it is probably the shift from unanimity to qualified majority that will allow developments to occur in the abovementioned domains.

In relation to operational cooperation under Article 87 (3) TFEU, the Treaty imposes the special legislative procedure and unanimity for the adoption of measures just like the Constitutional Treaty did. However, Article 87 (3) on operational cooperation does not clarify the scope and boundaries of measures adopted on the basis of this provision but focuses on the decision making process instead. Thus, with the exception of measures on operational cooperation building upon the Schengen acquis, Article 87 TFEU holds that in case unanimity cannot be reached at Council level, the matter is to be referred to the European Council as a preliminary step that Member States must take prior to pursue the path of enhanced cooperation as regulated by Articles 20(2) TEU and 329 (1) TFEU.

Article 88 TFEU is concerned with Europol. Article 88 (1) TEFU contains the mandate of Europol. In relation to Article 30 TEUaL the mandate codified in Article 88 TFEU appears clearer and broader than the previous one, but the mandate of Europol’s mission

\(^43\) Article 87 TFEU: 1. The Union shall establish police cooperation involving all the Member States’ competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.
had already been widened by the adoption of the Europol Regulation in May 2009.\(^{44}\) Article 88 TFEU holds that Europol’s mandate may include: (a) the collection, storage, processing and analysis of data on the one side and (b) the coordination, organisation and implementation of investigative and operational action carried out either with the authorities of the Member States or in the context of Joint Investigation Teams. Overall, Article 88 TFEU appears to be construed widely enough to include all the types of measures included in Article 87 TFEU plus one advantage: under Article 87 TFEU measures on operational cooperation must be through the special legislative procedure and with unanimity at Council level whereas operational actions organised, coordinated or implemented by Europol together with the Member States need to be foreseen by the Europol Regulation which is adopted under the ordinary legislative procedure, i.e. with a qualified majority voting system at Council level.

Police cooperation at EU level is divided into two fields: the first one is related to border controls, Schengen and Frontex;\(^{45}\) and the second one consists of the powers attributed to the EU and to Europol\(^{46}\) in Articles 87 and 88 TFEU. In relation to the second dimension of police cooperation, the focus of this book with regards to the external dimension of police law within the EU will be on Europol and its powers to act at the international level.

### 5.5 The AFSJ, Citizens and the Charter on Fundamental Rights

#### 5.5.1 Link with Citizenship

The development of the Union as an AFSJ in the past eleven years has been pointed as scarcely concerned with, and respectful of, the rights of individuals. First, criticisms arose in relation to the standard of protection for fundamental rights and liberties contained in the legislative acts passed. Criticisms in this respect have touched all the main legislative measures adopted in the AFSJ framework. Thus, measures to fight illegal migration were accused of not respecting the rights connected with refugee law and asylum seekers; the fight against terrorism was successfully attacked for violating fundamental rights, the EAW system allegedly posed issues in relation to the principle of fair trial and the increasing exchange of personal data by public authorities with regards to actions to fight crime which was also accused of being in breach of privacy related

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\(^{45}\) See infra, Part II, Chapter 1.  
\(^{46}\) See infra, Part II, Chapter 4.
rights. Moreover, similar criticisms have affected international engagements of the Union in relation to the AFSJ: other than the example given by the Kadi case, the PNR and SWIFT cases surfaced problems in relation to the right to a private life and the protection of personal data; and readmission agreements whereby criticisms were raised in relation to the respect of the non-refoulement principle and other rights as protected by the ECHR and other international instruments.

Moreover, from a citizens’ perspective the situation left much to be desired. The intergovernmental pillar on police and judicial cooperation in criminal affairs was outside the scope of powers of the European Parliament and the jurisdiction of the CJEU was, for the first time since the beginning of the European integration process, neither mandatory nor complete. As for the EC part of JHA, the situation, after the first five years since the entry into force of the Treaty of Amsterdam, was closely comparable to the mainstream EC system. Yet, differences remained in relation to the scope of powers attributed to the European Parliament in respect to certain policies and the jurisdiction of the CJEU was restricted to give preliminary rulings in cases emanating from national courts of last instance. Finally, in respect of the Union’s citizenship, the link between the EC Treaty provisions and the AFSJ was very weak. Although the broad scope of application that the CJEU gave to this institute could have had implications for the AFSJ, in practice this has not always happened. However, there is one field of the AFSJ in which the citizenship provision and the citizenship directive have had an important impact: migration law linked with family issues. Albeit indirectly, the citizenship provisions have had an effect on the application of migration law at national and at EU level as the Chen and Metock case illustrate. Therefore, immigration policy -including long visa policy- and instruments to fight illegal migration do relate to citizenship insofar as third county nationals are members of the family of a Union’s citizen.

With the entry into force of the Lisbon amendments, the Union shall offer to its citizens an AFSJ. From a constitutional perspective the significance of this innovation looks to the future as a systematic interpretative tool, but marks the present as a clear sign of the qualitative shift operated by the Lisbon treaty now that the whole of Justice and Home Affairs falls within, *grosso modo*, what used to be called “la méthode communautaire”. As the new phrasing clearly states the political *finalité* underpinning the AFSJ-related

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47 List with Articles highly critical for these measures.
50 For a recent overview of the EU citizenship institute and its connection to migration policy see de Waele 2010
project, it is nonetheless difficult to imagine how this change will affect the interpretation of the citizenship provisions or the specific provisions of the AFSJ.

However, the Lisbon Treaty has introduced a change that will bring qualitative changes in the interpretation and application of AFSJ law: the introduction within the EU legal system of the Charter of Fundamental Rights of the EU.

5.5.2 The Charter on Fundamental Rights of the EU: General Aspects

The entry into force of the EU Charter of Fundamental Rights is arguably one of the most welcomed innovations brought in with the Lisbon reform. While the rules on the application of the Charter are set out in the last Title of the Charter, Article 6 TEU anticipates the fundamental principles concerning the scope and function of the document and clarifies the role that, respectively, the European Convention for the Protection of Human Rights and Fundamental Freedoms and national constitutional traditions on fundamental rights have within the EU legal system.

According to Article 51 of the CFHR51 the provisions of the Charter ‘are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’. The fact that the provisions of the Charter are addressed to the Union’s institutions, bodies, offices and agencies does not need to be emphasised as such: after all this bill of rights came to be precisely because of the human rights protection deficit that characterised the EU legal order and that was de facto compensated by the old version of Article 6 TEUaL and, even prior to that, by the case law of the CJEU52 What appears as the most interesting part of the provision is however the part related to the Member States’ duty to comply with the Charter ‘when they are implementing Union law’. This duty too has long been established by the CJEU and was probably inspired by the system introduced in the U.S. with the XIV amendment to the U.S. constitution: the so-called doctrine of incorporation of rights.53 The system that emerged, therefore, is a system of multilevel protection and adjudication of human rights in which national courts; the CJEU and the

51 Article 51CFHR, Field of application: 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.
52 Case 29/69 Stauder v Stadt Ulm, ECR 1969 p. 419
53 Weiler 1985
ECTHR come into play a role.\textsuperscript{54} What is most interesting, however for our purposes, is that the CJEU has applied a broad understanding of the incorporation doctrine, thus imposing the Member States to comply with the Union’s standards of human rights protection each time their action comes within the sphere of application of EU law.\textsuperscript{55} On the other side, the codified version that came into force with the Lisbon Treaty seems to suggest that such a duty only applies in respect of the application of EU measures implemented at national level.

Prior to drawing some points of reference in the relation between the CFHR and the AFSJ another general provision of Title VII of the Charter needs to be taken into consideration. Article 52 CFHR\textsuperscript{56} relates to the scope and interpretation of the Charter. The first paragraph of the provision contains a limitation clause: it holds that restrictions on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of the rights and freedoms enshrined therein. The subsequent paragraphs of the provision in question contain rules of linkage between the Charter and other norms: paragraph 2 holds that the rights and freedoms recognised by the Charter, but for which a provision is codified within the Treaties, shall be exercised under the conditions and within the limits defined by the EU Treaties; paragraph 3 codifies the parallelism of some of the Charter provisions with some provisions of the ECHR and holds that the meaning and scope of the EU Charter provision shall be the same as the one of the ECHR; paragraph 4 holds that the provisions of the Charter which

\textsuperscript{54} Lenaerts 2000, and Pernice 1999

\textsuperscript{55} Cartabia 2010

\textsuperscript{56} Article 52 CFHR, \textit{Scope and interpretation of rights and principles}: “1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties. 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. 4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions. 5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality. 6. Full account shall be taken of national laws and practices as specified in this Charter. 7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States”.

\textsuperscript{5} A classic example is the one on citizenship and active and passive electoral rights for the EP and for local administration in relation to the relevant Articles of the TEU.
are inspired by national constitutional provisions of the Member States shall be interpreted in harmony with those constitutional traditions.\textsuperscript{58}

The entry into force of the Charter as a legal text with equal binding force as the Treaties did not come free of charge: many of the conditions present in Article 52 were not present in the pre-Lisbon text. Yet, the limitations that Member States have tried to impose on the CJEU with the amendments of Article 52 of the Charter do not seem capable of imposing a clear shift from the legal reasoning that the CJEU usually takes.\textsuperscript{59}

Rather, it seems that with the entry into force of the Charter the protection of human rights within the context of the AFSJ has found new, explicit, sources of legitimisation.

5.5.3 The Charter on Fundamental Human Rights: Specific Provisions Related to the AFSJ

The Charter contains fifty material provisions and four regulative ones. Amongst the fifty substantive provisions of the Charter there are a number of provisions that appear particularly interesting in respect of the AFSJ. The purpose here is to identify and present the importance that these provisions have in relation to the AFSJ whereas the substantial scope of these provisions will be dealt with in the following Sections of the book. A first set of Charter provisions that emerge as having a particular importance for the AFSJ in general, but that are also pertinent for the external dimension thereof, is composed of Article 6 on the right to liberty and security,\textsuperscript{60} Article 7 on the respect for private and family life,\textsuperscript{61} and Article 8 on the protection of personal data.\textsuperscript{62} Secondly, Title VI on Justice is of particular importance in respect of the activities concerning judicial cooperation within the AFSJ and in relation to the conclusion of operative agreements with third countries. Title VI contains three provisions: Article 47 on the right to an effective remedy and to a fair trial, Article 48 on the presumption of innocence and the right of defence, Article 49 on the principles of legality and proportionality of criminal offences and, lastly, Article 50 on the \textit{ne bis in idem principle}. Thirdly, two provisions

\textsuperscript{58} A good example in this respect is probably Article 1 of the Charter and Article 1 of the German Basic Law on human dignity.

\textsuperscript{59} Douglas-Scott 2006

\textsuperscript{60} Article 6: Everyone has the right to liberty and security of person.

\textsuperscript{61} Article 7: Everyone has the right to respect for his or her private and family life, home and communications.

\textsuperscript{62} Article 8: 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.
immediately relate to immigration policy: Article 18 on the right of asylum and Article 19 on protection in the event removal, expulsion and extradition.

With the codification of a direct link between citizens and the AFSJ the Lisbon treaty has marked the beginning of a new phase for Justice and Home Affairs law within the EU: other than reminding that citizens are the beneficiaries of the Justice and Home Affairs dimension of the European integration process, the new AFSJ clothes must be contextualised in a system now comprising a bill of rights. The case law of the European Court of Human Rights in Strasbourg (ECtHR) has had the occasion to affirm, in a number of cases, that obligations stemming from the Charter are applicable also to the external relations and activities of a state by giving a broad acceptation of what qualifies as ‘jurisdiction’ of a State party to the Convention.\(^{63}\) This has resulted, inter alia, in the application of the ECHR to facts occurred in the high seas.\(^{64}\) Taking into consideration that the EU Charter is inspired by the ECHR, and that Article 52 CFHR calls upon the case law of the ECtHR in order for the CJEU to interpret its own human rights instrument, it is possible to argue that similar standards in human right protection will be applicable at EU level.

Moreover, it is important to recall that, precisely in the context of international obligations and their effects on human rights, the ECtHR has already had the opportunity to present its view on the relation between the standards of human rights protection by the EU and by the ECHR. In the Bosphorus case the ECtHR affirmed that the presumption on the equivalent protection of human rights by the EU “can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a “constitutional instrument of European public order” in the field of human rights”.\(^{65}\) In light of Article 52 CFHR on the one hand and of the Bosphorus judgment on the other, there should be no doubt that the CJEU will have to abide by the principles established by the ECtHR in relation to the standards of protection established by the latter court. Moreover, this seems even more plausible in the light of the intention of the EU to accede the ECHR.

\(^{63}\) This goes beyond the case-law in relation to extradition and the so-called Soering doctrine [case Soering v UK, Application no. 14038/88, Judgment of the 7th of July 1989]. For an analysis of extraterritorial obligations stemming from human rights conventions: Kaelin and Kuenzli 2009, p.132-142

\(^{64}\) The ECtHR has considered applicable the Convention in cases in which action of the defendant State party occurred in the high seas, see Medvedyev v. France, Application 3394/03, judgment 29/03/2010 and in Xhavara v Italy and Albania, application 39473/98, decision of 11/01/2001.

\(^{65}\) ECtHR, Case Bosphorus v. Ireland, Application 45036/98, judgment of 30/06/2005, paragraph 156.
Article 51 and 52 CFHR imply that the rights protected by the Charter must be respected in the interpretation and application of EU measures and national measures that fall within the scope of EU ones, including international agreements. The entry into force of the Charter, therefore, brings another normative piece to the multidimensional jigsaw identified in the introductory observation of this book. At that time, however, also another element was identified: à la carte participation in the AFSJ. The next, final Section of this Chapter is dedicated to territorial applicability of AFSJ law, an issue which has consequences for human rights protection and international agreements just as it has for purely internal measures.

5.6 The AFSJ in the Frame of the TFEU: Territoriality and the AFSJ

Prior to drawing some conclusive remarks, there is still one aspect that requires to be addressed. As we noticed in Section 3 of this Chapter, the entry into force of the Lisbon reform and the shift to the méthode communautaire resulted in a diluted entry into force. Furthermore, the entry into force of the Lisbon Treaty accentuates even further the fragmentation of the ‘area’ in respect of another issue: the territorial application of AFSJ law and the special position of the United Kingdom (UK), Ireland and Denmark. The special status of the three countries, however, is not the only factor affecting the territorial applicability of AFSJ: just as one must take those three Member States out from the equation, four other countries must be included: Norway, Iceland, Switzerland and Lichtenstein. This last paragraph is dedicated to the legal implications of the subtraction of three Member States from the AFSJ equation.

5.6.1 Territorial Applicability of AFSJ Law in the UK and in Ireland Prior to the Lisbon Reform

Before the entry into force of the Lisbon treaty the United Kingdom and the Irish republic were participating in the EC pillar part of the AFSJ – immigration, visa, asylum and civil law – ad hoc. Moreover, special rules were governing the relation of these two countries in respect of the Schengen acquis. Conversely, the two countries participated fully to the third pillar, i.e. on police and judicial cooperation in criminal matters. Overall, the relations between JHA law and these two countries were regulated by three different protocols.

In respect of the Schengen acquis, the relevant protocol of the Amsterdam treaty allowed these two countries to participate in the whole or in part of the Schengen acquis on the condition that at the condition of the unanimous approval of the other participating
countries was given. Since 2000, the UK participates in the *acquis* relating to irregular migration, police and criminal law cooperation.\(^6^6\) Moreover, since 2005 the UK has been allowed to participate in the criminal part of the Schengen Information System (SIS). Since 2002 Ireland has asked and obtained permission to participate in the same parts of the Schengen acquis to which the UK participates in. In both cases the UK and Ireland took part in the developments concerning the parts of the *acquis* in which they were already participant in. In relation to border controls, the UK and Ireland had obtained a declaration in which it was stated that nothing prevented them from maintaining their border union. In respect of migration, asylum and civil law, the UK and Ireland participated *à la carte*. In practice, this meant that prior to the entry into force of Lisbon the two countries could, within three months from the proposal of a legislative measure, decide whether to take part in the decision-making process or not. If their participation leads to stagnation at the negotiating table, the other Member States were given the right to proceed without the UK and Ireland. Still, according to the same Protocol, once the other Member States had adopted the act, the two countries were entitled to ask to opt-in and the Commission was responsible to decide on the matter.

Over the past few years, the UK and Ireland stayed out of border controls measures, took part only in some measures relating to asylum and legal migration, but adhered to a large number of measures against irregular migration and participated in all the measures adopted thus far in the field of civil law.\(^6^7\) However, the opt-out/opt-in position of the two countries has created some tensions within the decision making process in respect of the interpretation of the Schengen Protocol and, more specifically, in relation to the notion of “measure building upon the Schengen *acquis*”.\(^6^8\)

### 5.6.2 Territorial Applicability of the AFSJ Law in the UK and Ireland

With the entry into force of the Lisbon reform, the participation *à la carte* of the United Kingdom and Ireland has been extended to the whole of Justice and Home Affairs, i.e. including police and criminal law. Protocol 19 and 21 bring interesting developments in relation to the position of the UK and Ireland *vis-à-vis* the AFSJ.

Article 4 of protocol 19 on the Schengen *acquis* maintains the opportunity for the UK and Ireland to take part to some, or all, of the measures of the Schengen *acquis*. Article 5,

\(^{66}\) With the exception of ‘hot pursuits’.

\(^{67}\) Peers 2009 and Fahey 2010

itself, deals with the participation of the two countries to measures building upon the Schengen acquis. In this respect the Protocol now envisages that the two countries can opt-out from the measures they had previously opted-in to. In other words, when one or both of the two countries is participating in a measure or has asked and obtained permission to participate in the adoption of a measure, but that Member State(s) subsequently chooses to (i) bail out of an existing measure, (ii) not participate in the adoption of an amendment proposal to a measure in which the country is participating or (iii) simply changes opinion in respect of its participation to the adoption of a proposed measure to which initially they had decided to participate in, the country in question is allowed to do so. This procedure is disciplined by paragraphs 3 to five of Article 5 of the Protocol with the aim to soothe any possible conflict of norms emerging from the change in the legal relations of the EU, the Member State in question and individuals.

Article 2 of Protocol 21 on the position of Ireland and of the UK in respect of the AFSJ affirms that the two countries do not participate in, and are not bound by, any measure, CJEU decision or international agreement based upon Title V TFEU. Article 2 of the Protocol therefore leaves open the possibility of a UK and Irish participation to international agreements containing AFSJ clauses, but having a non-AFSJ legal basis. Article 3 regulates the participation of the two countries in the adoption or the simple ‘accession’ to measures of the AFSJ, i.e. the right to opt-in. Moreover, as in the case of the Schengen Protocol, the two countries in question are given the right to choose whether they wish to participate in the amendments of existing measures by which they are bound. Thus, in case one of the two Member State wishes to opt-out, a procedure has been created to ensure legal consistency within the EU legal order. Finally, it must be mentioned that whereas Ireland is given the faculty to abandon the Protocol system and join the other Member States, the Protocol does not envisage such a procedure for the UK; moreover, according to Article 9 of Protocol 21 on the AFSJ, Ireland will participate as a fully-fledged Member State to counterterrorism measures based on Article 75 TFEU (smart sanctions system) whereas the UK has obtained the right of choosing whether to do so under the general opt-in/opt-out regime created by the Protocol.

5.6.3 The AFSJ and Denmark

At present, Denmark is a country which participates in the Schengen system and a country that participates in Justice and Home Affairs law. Contrary to the UK and Irish position, the Danish one is regulated by a single Protocol that includes Schengen issues and AFSJ ones. It is well known that, in the aftermath of the difficulties related to the
ratification of the Maastricht Treaty in 1992, Denmark chose to participate in the policies related to Schengen, immigration, civil law and, as of now, to all of the AFSJ measures from the angle of public international law, and not as a Member State of the EU.

The innovations of the Lisbon Treaty in relation to the Danish position can be summarised as follows. First, Denmark now enjoys a general opt-out from Justice and Home Affairs law. This means that the possible participation (opt-in) of the country to AFSJ measures follows an à la carte system similar to the one concerning the UK and Ireland. Second, Protocol 22 gives Denmark the possibility of abandoning the Protocol system and instead participating under general EU rules provided for in Title V TFEU; thirdly, the Protocol allows Denmark not to be bound by the Union’s data protection rules in respect of Police and Judicial Cooperation in Criminal Affairs and, last, the Protocol allows Denmark to maintain, as internal measures, all the Police and Judicial Cooperation in Criminal Matters measures adopted prior to the entry into force of the Lisbon Treaty, even in the case that those measures are amended by the other Member States. In this last respect it therefore seems that the future modifications of acts such as the European Arrest Warrant will either see the opt-in of the Danish Kingdom or will presumably contain bridging measures between the EAW-based Danish measure and the subsequent EU measure in order to maintain a level of cooperation between the parties.

5.6.4 The Relationship Between Variable Geometry and the External Dimension of the AFSJ: The Normative Framework

A common trait of the different Protocols containing the rules on the AFSJ’s opt-outs is the wording chosen to assert the actual opt-out. 69 The different provisions affirm:

“[N]one of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the [United Kingdom / Ireland/ Denmark]; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way

69 Article 2 of protocol 22 on Denmark and Article 2 of protocol 21 on the Ireland and the U.K.
Therefore, each protocol expressly includes in the opt-out international agreements concluded on the basis of a provision contained in Title V Part Three TFEU. As a consequence, the protocols could be understood to cover only external action in the AFSJ field and do not mention any other type of external action instrument. Thus, because of this silence one could wonder what is the real scope of the opt-outs in relation to the external dimension of the AFSJ; should the opt-outs cover any clause (no matter how broadly phrased) of any agreement that is related to a policy of the AFSJ? Moreover, while this issue poses the question concerning the extent to which the three Member States can benefit from the opt-outs in the context of external relations, the situation in relation to Ireland and the UK poses additional questions. Indeed, because these countries have also obtained the right to opt-in one could wonder how in concreto the opting-in could work in relation to external relation instruments.

From a material perspective, the opt-in possibilities for the UK and Ireland cover internally and externally police cooperation, judicial cooperation in criminal matters and judicial cooperation in civil matters as well as migration policies and asylum. In relation to border controls, the position of the UK and Ireland has to be read in light of the judgements delivered by the Court of Justice in the Frontex and Visa Information System (VIS) cases in which the CJEU indicated how to distinguish measures that constitute a development of Schengen and measures that do not constitute a development of Schengen. This is relevant because the UK and Ireland can opt-in a measure (including international agreements) that constitutes a development of the Schengen acquis only if the two countries are already participating in the relevant pre-existing internal measure(s). An immediate consequence of this is that Ireland and the UK do not take part in any VISA-related agreement such as VISA facilitation agreements and VISA waiver agreements; whereas Denmark, in spite of its participation in the Schengen system has adhered only to minor instruments such as VISA waiver agreements for holders of diplomatic passports and maintains its independent approach to VISA-related agreements.

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70 Article 2 Protocol No 21 and similarly, article 2 Protocol 22
71 Supra note 7
72 For an in-depth analysis see Garcia Andrade 2013, p.100 and Vernimmen-Van Tiggelen 2012
73 See for instance the Agreement with Brazil on short-stay visa waiver for holders of diplomatic, service or official passports OJ 12.03.2011 L 66, p.21
From a procedural perspective, Article 3(1) of Protocol 21 affirms that the opt-in declaration from either the UK or Ireland must be made within three months from the day in which a legislative proposal has been presented within the Council; moreover, Article 4 of Protocol 21 affirms that Ireland and the UK can ‘any time after the adoption (...) notify the intention to accept a measure’. However, the opt-in mechanisms valid internally cannot be applied *sic et simpliciter* in relation to international agreements. For instance, even though the procedure for the conclusion of international agreements codified in Article 218 TFEU is composed by three main steps\textsuperscript{74}, reasons of legal certainty and public international law should not allow the two member states to manifest their intention to opt-in at the moment of the conclusion without expressing their interest at the time of the opening of negotiations; conversely, the two member states should not be able to withdraw from the ‘opt-in’ after the conclusion of the agreement. Moreover, reasons of legal certainty and good faith run against the interpretation provided by the British government and according to which, because of the distinct function of the three steps of Article 218 TFEU, the intention to participate can be manifested at any of the three stages, and with the last being ‘the binding one’.\textsuperscript{75} Although there is no consistent praxis on the matter\textsuperscript{76} it seems preferable to interpret the opt-in right of Ireland and the UK as having to be manifested at the time of the opening of the negotiation and definition of the mandate (so as to clarify the territorial application of the agreement *ab initio*) and subsequently confirmed (at the moment of signature).

The observations conducted in the previous paragraphs reflect the complexity of the regimes of variable geometry present in the AFSJ; and the complexities pertain not only to material aspects of the AFSJ, but also in relation to procedural ones. While the external dimension of the AFSJ is almost absent from the different AFSJ Protocols, it emerges nonetheless that the there may be difficulties for the EU in preparing and conducting negotiations for agreements with third countries because the ambitions of the EU will have to be balanced with the intentions of the two countries benefiting from the opt-in regime. Yet, recent examples in relation to which the EU has managed to find procedural solutions respectful of the third countries involved as well as of the member

\textsuperscript{74} Opening of negotiations ad definition of the mandate; decision authorising the signature of the agreement; decision concluding the agreement.

\textsuperscript{75} The U.K. government however, thinks otherwise: “The UK notifies the Council of its opt-in to JHA elements of certain third country agreements (i.e. agreements between the EU and another non-EU country such as Korea). (...)For the purposes of this report such agreements are counted as a single opt-in decision, with the final decision on UK participation in such agreements being the one which counts toward the total”; from “Report to Parliament on the Application of Protocols 19 and 21” available \url{http://www.official-documents.gov.uk/document/cm80/8000/8000.pdf} (May 2013)

\textsuperscript{76} For an analysis see Martenczuk 2008 and Garcia Andrade 2013
states benefitting from differentiation exist: thus, for instance, the readmission agreement with Georgia\textsuperscript{77} contains a provision that allows the subsequent \textit{opt-in} by Ireland and extends the agreement to Irish-Georgian relations by the means of a unilateral declaration that the EU would send to Georgian authorities.\textsuperscript{78}

All in all, while recent developments could suggest that the material and procedural hurdles associated with variable geometry in the AFSJ can be overtaken by coordination in the spirit of the loyal cooperation principle\textsuperscript{79}, the effects of variable geometry may nonetheless hinder the global approach that the EU has chosen to fight transnational security threats. This is because even though the policy objective of enhancing security within the EU calls for the admixture of AFSJ elements into all the instruments available for the external action of the Union, variable geometry requires the EU to act with a case-by-case approach so as to accommodate all the different instances of the three Member States benefitting from derogations.

On the basis of the analysis on territoriality and the AFSJ, we can EU constitutional law allows for differentiation, and not only in the fields of the AFSJ. This affects the interpretation and application of norms internally. However, it also affects the external dimension of EU action and, therefore has an impact upon doctrines such as the theory of parallelism between internal and external competences. Moreover, differentiation is also likely to affect the position of individuals. Consequently, taking into consideration the scope of AFSJ norms and the applicability \textit{a` la carte} of some of these provisions, the nature of the AFSJ dimension within the European constitutional order and within the European integration process is still challenging.

In July 2013 the UK notified the intention to make use of Article of Protocol 36 to the Treaties. Under this provision the UK has the option to opt-out of all the former third pillar measures, i.e. police cooperation and judicial cooperation in criminal matters. Subsequently, and as provided by the said Protocol, the UK transmitted a list with the instruments it wished to opt back in.\textsuperscript{80} The process was finalised with the adoption of Council Decision 2014/857/EU at the end of the same year.\textsuperscript{81} In relation to the external implications of the opt-out/opt-in regime applicable to the UK, the House of Lords published a report. From the report the it emerges clearly that the UK would like to

\begin{itemize}
\item \textsuperscript{77} Agreement between the European Union and Georgia on the readmission of persons residing without authorisation, OJ L 52 25.2.2011
\item \textsuperscript{78} \textit{Ibid.}, articles 21(2) and 23(3)
\item \textsuperscript{79} Herlin-Karnell and Konstandinides 2014
\item \textsuperscript{80} Council doc.10168/14, 16 June 2014
\item \textsuperscript{81} OJ L345/1, 1.12.2014
\end{itemize}
obtain an opt-out option whenever an international agreement is, also in an ancillary manner, connected to the AFSJ. However, the report highlighted that, on the basis of consistent case law of the CJEU, such an approach was inapplicable. ⁸² Since then, however, general elections took place in the UK and the newly elected Parliament has decided to call a referendum on the membership of the UK to the EU to be held in June 2016; for this reason, the position of the UK in the externalisation of the AFSJ remains on hold and in this study the issue of the UK’s participation will only be addressed when specifically relevant for a determined topic.

5.7 The Temporal Applicability of the Old AFSJ Measures

The Intergovernmental Conference of 2007 in this respect agreed on a set of rules concerning the passage from the old system to the new. Of particular sensitiveness were, *inter alia*, issues such as the passage from the third pillar to the new system of measures adopted during the Amsterdam Treaty era: what was to be the destiny of, for instance, Framework Decisions?

Title VI of Protocol 36 on transitional provisions regulates these delicate aspects. Article 9 of the Protocol clearly affirms that the legal effects of the acts adopted prior to the entry into force of the Lisbon Treaty maintain their effects until those acts are repealed, annulled or amended by other measures adopted in implementation of the (new) Treaties. This rule, Article 9 of the Protocol further explains, is also valid for third pillar agreements and that it equally covers acts of bodies and agencies of the EU. ⁸³ This means that, for example, Framework Decisions will keep on not being liable to have direct effect as this was expressly excluded by the EU treaty at the time of their adoption.

Article 10 of the Protocol provides that measures adopted before the entry into force of the Lisbon Treaty and stemming from Title VI of the TEUaL (i.e. measures on Police and Judicial Cooperation in Criminal Matters) the Commission will not be capable of bringing enforcement actions against Member States under the infringement procedure, and that the jurisdiction of the CJEU will still be limited under the rules of Article 35

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⁸³ Article 9 of the Protocol: The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.
However, the second paragraph of the same Article holds that an amendment to an existing Police and Judicial Cooperation in Criminal Matters (PJCCM) measure will mark the end of the applicability of the transitional provisions in relation to the Commission and the CJEU. Hence, any amendment to a PJCCM act would bring the act under the realm of the current Treaties. This, accordingly, has to be read in conjunction with the special rules on PJCCM applicable to the UK, Ireland and Denmark. Therefore, paragraph 2 of Article 10 of the Protocol clearly allows for the characteristics of measures stemming from Title VI TEUaL in relation to infringement procedures, jurisdiction of the CJEU and legal effects to survive future amendments, in case any of these three countries decides not to participate in the adoption of the new amending measures (opt-out). Finally, paragraph 3 of the same Article of the Protocol affirms that in any case the transitional provision concerning PJCCM measures adopted prior to the entry into force of the Lisbon treaty will cease to apply five years after the entry into force of the Lisbon Treaty. In this latter case, therefore, if no amendment to an old PJCCM measure is proposed and adopted, the old rules and limitations connected to the PJCCM measure in question will cease to apply on the 31st of December 2014 at the latest.

The transitional regime discussed here, from an historical perspective follows somehow the approach that was taken when in 1997 some of the bits and pieces of the third pillar in the Maastricht version were brought under the umbrella of the EC pillar with the entry into force of the Amsterdam Treaty. Yet, legal explanations for these kinds of choices are hard to be found. Indeed, in respect of Framework Decision one could argue that such type of transitional measure is required because these measures have ceased to exist.

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84 Article 10 (1) Protocol 36: 1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

85 Article 10 (2) and (3) Protocol 36: 2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply. 3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

86 An interesting Declaration annexed to the Treaties, Declaration 50, affirms: The Conference invites the European Parliament, the Council and the Commission, within their respective powers, to seek to adopt, in appropriate cases and as far as possible within the five-year period referred to in Article 10(3) of the Protocol on transitional provisions, legal acts amending or replacing the acts referred to in Article 10(1) of that Protocol.
However, if this were the case, the argument for transitional rules is not convincing: taking into account that the new regime for the old Third Pillar measures would have operated *ex nunc*, and taking into consideration the similarities of Framework Decisions with Directives, an automatic passage would have not created technical difficulties as such. The choice is therefore linked with to the exclusion of direct effect, infringement actions and full jurisdiction of the CJEU. Moreover, the same considerations can be made in respect of Decisions *ex Article 34 (2) b TEUL*, whereas the choice to maintain pre-Lisbon effects for Common Positions seems more convincing as these measures have no equivalent in the new Treaties. However, even in the latter case the choice is criticisable if one considers that it is precisely through instruments such as Common Positions that the EU has adopted measures interfering directly with the life of individuals, as the *Gestoras*\(^88\) case previously discussed demonstrates. With the entry into force of the Lisbon Treaty, however, and without having to advance *contra legem* interpretations it is possible to argue that the restrictions connected to judicial review of Common Positions have to be read systematically, thus allowing fundamental rules such as the right to a remedy enshrined in Article 47 of the CFHR of the European Union.

Overall, the rules concerning the transitional period, especially where they don’t differentiate between types of acts which have disappeared with the entry into force of the Lisbon Treaty from other acts which have been affected to a lesser extent by the Lisbon reform, are to be critiqued for they further run against the integrity of the legal system and the principle of equal application of the law. Moreover, from a systematic perspective one cannot but conclude that there are irreconcilable contradictions within the Treaties: how to interpret the exclusion of the CJEU’s jurisdiction -especially in PJCCM- together with Article 47 of the CFHR that provides for the right to an effective remedy? At the time of writing this Chapter, there are two possible interpretative solutions to these issues: one, restrictive, favours the will of the ‘masters of the treaties’ and maintains the restrictions as they were prior to the entry into force of the Lisbon reform. The other interpretative solution on the other hand reads the EU legal order systematically, and concludes that the constitutional norms and principles of the system do not allow for an interpretation of transitional rules which leads to a breach of other constitutional rules and notably of provisions on human rights.

The complexity of the rules stemming from this Protocol is augmented by the special rules on the United Kingdom. Paragraph 4 of Article 10 of the Protocol affirms that if the

\(^{88}\) Case C-354/04P, Gestoras Pro Amnistía & C-355/04P Segi, judgment 27 February 2007, ECR I-01657
UK, at least six months before the expiry of the transitional period, notifies the Council that it does not accept the shift to the Lisbon treaty regime, the act in question will cease to apply to the UK with the expiry of the transitional period; yet, paragraph 5 of the same provision maintains that such eventuality does not jeopardise the possibility for the UK to act by virtue of either Protocol 21 or Protocol 22 and consequently participate in the adoption and or application of an act adopted under Lisbon rules and for which, consequently, the Commission and the CJEU can exercise all the powers conferred upon them. Again, the contradicting signals codified in this protocol have to be read systematically with the overall difficult infrastructure of the AFSJ. From a legal perspective, however, this patchwork of temporary solutions could raise problems when interfering with other principles related to the applicability of norms and the succession of norms in fields such as criminal law and criminal procedural law, including extradition procedures. At the same time, it is nonetheless possible to argue that such potential problems could also be smoothed over by interpretative means, as the present author has previously argued.89

5.8 Conclusions

The main purpose of this Chapter was to present an overview of the constitutional framework of the AFSJ. What I have tried to argue is that the AFSJ is concerned with the safeguarding of three public goods that the EU constitutional discourse identifies as ‘freedom’, ‘security’ and ‘justice’ and that in national discourses these are commonly referred to as public order, public security and civil liberties. Furthermore, I have tried to argue that these three public goods are not themselves the objectives of the AFSJ, but instead the object of the EU activities within the AFSJ domain. Accordingly, this means that the EU is not concerned with realising ‘freedom’, ‘security’ and ‘justice’; rather, its tasks focus on safeguarding and developing the public goods in question at the EU level by establishing transnational mechanisms of cooperation on the one side and adopting common policies on the other; and this appears to confer to the AFSJ a rather reactive connotation, more than a proactive one.90

It appears from the analysis carried out that the wording of the AFSJ provisions codified in the TFEU does not repudiate the cooperative logic that underpinned the Justice and Home Affairs project since its inception and that has characterised the evolution of this field of EU competences. Thus, key AFSJ provisions such as Articles 81, 82, 85 and 87 TFEU have as an objective the adoption of legislation aiming at facilitating cooperation

89 Matera 2014
90 On the reactive/proactive debate concerning the nature of the AFSJ see Walker 2004
amongst Member States and do not aim to take over Member States’ responsibilities. In this respect the current AFSJ constitutional framework does not differ from the pre-Lisbon one. The EU does not aim at creating harmonising the administration of justice within the Member States and as a result of this we should bear in mind that the scope of internal provisions does impact the extent of external powers according to the Treaties. At the same time, the EU does have a tremendous impact on national systems because it has to approximate national systems in order to make the cooperation work. This is a new form of instrumental harmonisation in order to facilitate the application of mutual recognition within the Member State. Exceptionally, the AFSJ does confer some enforcement functions and powers to EU bodies: this is the case of the European Public Prosecutor (EPPO) ex Article 86 TFEU or the establishment of the European Border Guards system.\footnote{Commission Communication COM/2015/0673 final, \textit{A European Border and Coast Guard and effective management of Europe's external borders.}}

Because the policies that fall within the AFSJ are strongly linked to national sovereignty – and the opt-out positions of Denmark, Ireland and the UK exemplify this; and because of the existence of strict national constitutional rules such as the principle of legality in criminal law that may obstacle EU initiatives;\footnote{Lupo and Piccirilli 2015} the AFSJ remains a field in which the EU struggles to legitimise its work even now that the European Parliament and the European Court of Justice are fully associated from an institutional perspective to this policy. This is because the integration of the EU qua AFSJ does affect Member States in fields in which the legislative framework is often anchored to constitutional rules, thus making Member States’ systems less prone to integration; thus resulting in controversial disputes – for instance in relation to the establishment of the EPPO.\footnote{Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor's Office (EPPO) - "Yellow card", Council Doc 16624/13 See}

Therefore, what this Chapter has argued is the fact that the broad mandate and objectives codified in Article 3 TEU must be downscaled to the specific mandates contained in the different provisions of Title V TFEU. Taken in turn, these provisions have emerged to be very diverse: while some provisions set ambitious objectives requiring thorough legislation that will deeply interfere - if not completely replace - national rules such as in the cases of Articles 77 (2) d on the creation of an integrated border management system and Article 86 TFEU on the creation of the European Public Prosecutor; the Treaties only confer in Article 82(2) TFEU the powers necessary to the establishment of minimum rules and only to the extent that these are necessary to facilitate mutual
recognition, i.e. a system that inherently advocates negative integration, not positive one.\textsuperscript{94} It appears therefore that the AFSJ consists of a plurality of disciplines that contribute to the safeguarding of three public goods that are common to the Member States and to the EU.

As it was argued in the conclusions of Part One, the analysis conducted in this Chapter strengthens the argument according to which it is preferable to address the externalisation of the AFSJ in the plural form. Indeed, this Chapter confirms that the plurality of disciplines that compose the AFSJ and the strict rules of the EU on competences argue, from a constitutional standpoint, as separate domains that contribute to a broad general objective. As a consequence, the Treaties prevent from considering external initiatives based or linked to the AFSJ as a single policy with an external dimension of its own. Therefore, taking into consideration the peculiar constitutional framework of the AFSJ one could ponder the extent to which the existing acquis on EU external relations law is applicable, mutatis mutandis, to the different fields of the AFSJ in which member States maintain a strong –and not merely residual or implementing – the role and the scope of EU powers are hardly comparable to the ones connected with the establishment of the internal market. This also means that establishment of exclusive external competences is likely to be more difficult in the AFSJ context.

Other than the relationship between the Member States and the EU, also the one between public authority and the individual poses a number of questions. This Chapter showed that from a formal constitutional standpoint, the entry into force of the Lisbon treaty has solved many of the pre-existing weak points: the level of participation of the European Parliament, the role of the Court of Justice and the entry into force of the EUCFR. However, the existing AFSJ acquis reveals that the measures adopted have predominantly focused on repression and security and little has been done in order to counter-balance human rights and civil liberties against the securitization of the European space. In this respect, and taking into consideration the ‘\textit{Sturm und Drang}’ approach followed by the institutions to fight internationally against new security threats, it is probable that the existing acquis on the external AFSJ also lacks sufficient means to protect individuals from undue action by public authorities.

As a consequence of these observations, the analysis that will follow in Part Four, Part Five and part Six will take in due account these afore mentioned peculiarities of the AFSJ. Because of the diverse nature and purpose of the AFSJ sub-policies, it seems

\textsuperscript{94} Article 82(2) TFEU
difficult to adhere, from a legal point of view, to the policy objective of creating a single external dimension of the different AFSJ fields such as the one purported in the various AFSJ programmes. However, prior to analysing the different external dimensions of the AFSJ, the next chapter will assess whether the AFSJ provisions contain an external dimension of their own and will consider the extent to which the existing acquis on EU external relations law is applicable in the AFSJ context.

95 See supra, Part One
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Chapter 6

The Constitutional Provisions on External Relations and the AFSJ

‘You say yes, I say no
You say stop and I say go, go, go
Oh no
I say high, you say low
You say why, and I say I don’t know
You say goodbye and I say hello
Hello, hello
I don’t know why you say goodbye
I say hello
Hello, hello
I don’t know why you say goodbye
I say hello’

(‘Hello Goodbye’, J. Lennon and P. McCartney)

6.1 Introduction

In the introduction to this book, it was argued that the ruling of the Court of Justice in the Kadi case was an indicator of the tensions generated by the external activities of the Union related to the maintenance of public order and security against transnational security threats. This Chapter has the purpose of deepening the analysis of the rules and principles on the EU external action and to put them in the perspective of the AFSJ. However, before turning to the identification of the point of tensions and conflicts that may arise from the external dimension of the AFSJ it is necessary to look into the legal principles governing the external relations of the EU in general.

This chapter aims to assess the general constitutional rules and principles which discipline the external action of the EU and to place them in the perspective of the AFSJ. Thus, like the previous chapter, this chapter will look at primary law rules related to external relations competences and will not provide an in-depth analysis of the substantive aspects of external policies. As pointed out by de
Witte, the EU legal system is afflicted by an overabundant set of primary law dedicated to external relations _qua_ TFEU and TEU.¹

This Chapter deals essentially with questions on external competences in the fields AFSJ. Consequently, this chapter aims to understand whether the doctrines of implied external powers, exclusive external competence as well as the democratic principle and human rights protection as they are understood and applied within the general discourse of EU external relations are legitimately applicable to the AFSJ. In other words, prior to analysing the different types of external actions of the EU within the different fields of the AFSJ (Part Four and Five of this book), it is necessary to understand _where_ the external action by the EU in these fields is rooted; and this is necessary to understand _the extent_ to which this external dimension is legitimate and, finally, to understand the extent to which the existing acquis is transposable in the fields of the AFSJ from a theoretical perspective to a practical one.

Underpinning this question, which might appear to be implicitly answered in a positive manner at first sight, is the issue on whether the distinctive features of the AFSJ allow such transposition of rules and doctrines _sic et simpliciter_. In other words, it is submitted by the present author that the emerging external action of the AFSJ and its analysis have been, thus far, focused upon the contingent political interests and needs demanding for actions to be taken rather than focusing on the constitutional foundations and boundaries of such type of action. For these reasons, and in consonance with the understanding of the AFSJ domain discussed in the previous chapter, this chapter will consider the specific provisions of the AFSJ and will not consider the general manifesto contained in Article 3 TEU.

Moreover, on the basis of the analysis previously carried out, this chapter will undertake a study of the EU external relations form the perspective of the AFSJ and will critically assess the applicability of the _acquis_ on external competences in the AFSJ. This does not imply, _a priori_, that the applicability of those rules and principles are rejected in this context, nor it aims to propose, _de iure condendo_, new and abstract rules for the external dimension of the AFSJ. Rather, this analysis aims to start afresh, on the basis of the existing constitutional rules, the analysis of the _an_ and the _quantum_ of this type of EU external action bearing

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¹ de Witte (2008)
in mind the distinctive features of the EU’s AFSJ: first and foremost, its bridging function between the existing plurality of legal systems, and (ii) its function to approximate the norms of the Member States in the context of a series of disciplines directly related to the delicate balance between States’ prerogatives and duties in relation to the maintenance of public order on the one side, and respect of human rights and civil liberties on the other.

As a consequence of this, and in order to do so, this chapter will move from some of the general rules of the Treaties relating to the external action of the EU, and focus on the analysis of the express external competences of the EU, the issue of implied external competences and finalise this inquiry on the thorny issues of exclusive external competence and mixed agreements.

6.2 Foundations of the EU External Action: Express and Implied Competences

According to Article 3 (5) TEU, the Union shall, *inter alia* “uphold and promote its values and interests and contribute to the protection of its citizens”. Read in conjunction with paragraph 2 of the same Article, it is clear that the Union is given an obligation to offer its citizens an Area of Freedom, Security and Justice and that this mandate is also projected externally inasmuch as external action by the Union contributes to the protection of the Union’s citizens and inasmuch as it promotes the Union’s interest in establishing such an Area of Freedom, Security and Justice. The nexus justifying the external projection of the Union’s action in the sphere of the AFSJ emerges in a clearer manner in Article 21 (2) TEU where it is affirmed that the Union “shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to – *inter alia* – safeguard its values, fundamental interests, security, independence and integrity”.

This political manifesto, however, must be read in conjunction with the powers actually conferred to the Union both in relation to the AFSJ first, and in relation to the actual powers conferred to the Union to implement its foreign policy and external action, second. Leaving the scope and ambit of the interconnections between the CFSP and the AFSJ aside for the moment,\(^2\) suffice it here to say that the principles and the objectives contained in Article 3 TEU must be

\(^2\) *Infra, Part Four, Chapter 9*
considered, as Article 205 TFEU affirms, as ‘guiding principles’ of the Union’s action in the international scene. However, because the scope of Article 3(2) TEU is not determinable, clearer guidelines on the external action by the Union could, presumably, be found in the specific AFSJ provisions of Title V Part II of the TFEU.

Indeed, there are a number of strong reasons arguing in favour of anchoring our inquiry to specific AFSJ provisions rather than accepting the link amongst the different macro-aims contained in Article 3 TEU. First, the principle of conferral topped by its corollary element concerning the choice of the proper legal basis demand, as the Court of Justice has had the occasion to say, that this choice must be objective and as such amenable to judicial review. In this respect, it seems rather difficult to make such an argument in relation to the dispositions contained in Article 3 TEU which, as noted, serves political and programmatic purposes. It is rather straightforward in this respect to understand that the broad narrative used in Article 3 TEU cannot amount to, cannot be interpreted as, legitimising external action beyond the scope of the actual powers conferred to the Union internally, as this would constitute a breach of the conferral principle. Secondly, it seems that an external AFSJ solely based on the interconnections between Article 3(2) and 3(5) would, other than being to the detriment of the specific provisions of the AFSJ, pose problems to the principles of subsidiarity and proportionality which have been given a renewed importance with the entry into force of the Lisbon Treaty.

The arguments thus far presented principally relate to the maintenance of the right balance among the institutions and the Member States from a multilevel, quasi-federal perspective. However, taking as a prime example the principle of the choice of the right legal basis, this does not only relate to the federal structure of the EU, but also relates to democratic legitimacy and accountability. Indeed, despite the fact that the Lisbon Treaty has brought to a close the thorny issue of democratic legitimacy, transparency and accountability in the AFSJ, those matters are still particularly delicate in relation to the mandate that Member States have given the EU in these domains.

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3 Article 205 TFEU of Part Five of the Treaty on the Union’s external action affirms: The Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter I of Title V of the Treaty on European Union.
Because of the inadequacy of Article 3 (2) paired with 3(5) to legitimise external action of the EU in the AFSJ domains, the first step to be taken is to analyse the specific provisions of the AFSJ. In this respect a first issue relates to the identification of the meaning one must give to the expression ‘external’, and in this manner one could argue that the AFSJ competences of the EU have a solid ‘external’ component inherent to their nature. As an example of this, it suffices here to refer to the Treaty provisions relating to the external borders, visa policy and immigration. Indeed, these Treaty provisions refer to policies and normative measures which relate to issues and situations arising at the border of the EU and its Member States, relating to individuals that are not EU citizens, and thus presenting features that are ‘external’ to the EU system as such. From a political sciences perspective these characteristics of the aforementioned policies present specific features that relate to actions and measures closely linked to third countries and third country nationals. This however, does not amount to an external legal basis in the normative sense. An interpretation that would consider, because of their external political implications, Articles 77 to 79 TFEU as legal bases conferring external express competences would constitute an excessively broad mandate, possibly entering into conflict with the principles of subsidiarity and conferred powers.

Therefore, it is submitted that from a legal perspective the issue of defining the external powers of the Union constitutes a crucial element in this research. Therefore, the next paragraphs will assess the existence of express and implied external competences and put them in an AFSJ discourse. Starting from the next paragraph with the issue of express external powers, therefore, it will be argued first that only those provisions containing an actual mandate for the EU to conclude international agreements in a given field can be understood as conferring the Union with external competences, whereas in the case of implied external powers a classification of AFSJ provisions will be necessary.

6.2.1 Express External Competences and the AFSJ

With the entry into force of the Lisbon Treaty the Union is given two express competences for external action in the fields of the AFSJ; yet, the nature of one of these is a controversial.

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4 Articles 77-79 TFEU.
The first (almost) express competence is enshrined in Article 78 TFEU and relates to asylum, subsidiary protection and temporary protection. Letter (g) of paragraph 2 of this Article holds that the Union can, amongst others, engage itself in “partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection”. This provision seems to confer the Union with the necessary powers to conclude agreements on partnerships and cooperation having as an object the problematic issue of external processing of asylum claims and other resettlement-related measures in line of the pilot Regional Protection Programmes reminiscent of those established in East Africa and in the Western ex-Soviet States.5

However, scholars have argued that the provision at hand is not, strictly speaking an express power; possibly because this provision is oddly phrased. Indeed, De Baere and Garcia-Andrade, have argued that Article 78 (2) (g) TFEU does not amount, strictly speaking, to an express external competence since paragraph (2) (g) of Article 78 is a subordinate of the following provision:

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.6

As it appears from the excerpt of Article 78 TFEU above, subparagraph (g) is structured in the same manner as provisions on the adoption of internal measures, even though it clearly refers to external action since the mandate to the EU is on establishing partnership and cooperation with third countries for the purpose of managing flows of people applying for asylum or subsidiary or temporary protection; and how could the EU establish partnership and cooperation with third countries but through the conclusion of an international agreement?

Possibly this provision should be read as a bridge to Article 209 TFEU and the adoption of “measures necessary for the implementation of development

6 De Baere 2010, p. 37 Garcia-Andrade 2014, p. 60
cooperation policy, which may relate to multiannual cooperation programmes with developing countries or programmes with a thematic approach”. However, also this reading is not fully convincing since the management of asylum seekers (lato sensu) as well as border management are solely linked to the objective of reducing, and ultimately eradicating, poverty ex Article 208 TFEU; even if the recent decision of the CJEU in Case C-377/12 Commission v Council (EU-Philippines PCA) suggests that there might be a relation after all. Moreover, also other specialized provisions such as the one on Economic, Financial and Technical Cooperation ex Article 212 TFEU and the one on Humanitarian Aid ex Article 214 TFEU contain ad hoc provisions on the adoption of internal instruments defining the framework within which these two policies should be implemented. Lastly, to read Article 78 (2) (g) as a purely internal measure it would amount to render the provision nugatory: taking into consideration the doctrine of implied powers, and taking into consideration that international agreements and internal policies always imply the adoption of financing instruments and implementing measures, then the Article 78 (2) (g) would not have any particular raison d’être. Although the provision has not been used yet, it seems preferable to consider this as an indirect express external power: the treaty provision clearly identifies a specific group of activities (the managing inflows of people applying for asylum or subsidiary or temporary protection) that can be the object of an international agreement, clarifying for institutional actors and researchers alike, that an international agreement on the externalisation of asylum is indeed allowed. As this provision has not yet been used, it remains to be seen how the Institutions will interpret and use it, especially in the EU–Turkey controversial deal on asylum closed at political level in between the end of 2015 and the beginning of 2016.

The other express external competence of the EU relates to readmission agreements. Article 79 TFEU, as we have seen deals essentially with the establishment and development of a common immigration policy and confers the Union with the powers to adopt measures dealing with the definition of the conditions of entry and residence within the EU on the one hand, and measures aiming to fight against illegal entry and residence and the combatting of human trafficking, on the other. Lastly, Article 79 (3) TFEU holds that the EU “may conclude agreements with third countries for the readmission to their countries

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7 See infra, Chapter 10
8 De Baere has called this provision a “clearly implied external power”. However, the
of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States”. This external power of the Union codifies *ex post* the praxis of inserting, since the late nineteen-nineties, ‘readmission clauses’ in other types of agreements such as ENP partnerships and Stabilisation and Association Agreements.9

Prior to the entry into force of the Lisbon Treaty, the AFSJ had a third express external power: Article 38 TEUaL. Indeed, the portion of the old Justice and Home Affairs pillar dedicated to police and criminal justice did contain a *general* express mandate to conclude international agreements. More specifically, article 38 TEUaL held that the mandate contained in article 24 TEUaL in relation to the CFSP pillar was valid to also conclude agreements having as their object matters falling within old Title VI TEUaL on Police and Judicial Cooperation in Criminal Matters and this legal basis, despite some initial doubt as to the scope of the powers conferred to the Union, has been largely used by the Union.10 Because Article 38 TEUaL was a mere deferment to Article 24 TEUaL, its immediate scope was solely to affirm the external competence of the EU in the PJCCM field without establishing *ad hoc* rules. However, the fact that the external dimension of the PJCCM and of the CFSP were disciplined in the same manner served, albeit with some ambiguities,11 as a catalyst for the conclusion of agreements that pursued both CFSP and PJCCM objectives. However, the abrogation of this provision together with the transition of the PJCCM from the TEU to the TFEU probably impedes the combination of CFSP and PJCCM objectives in one act.12

Thus, in the absence of other express competences, the external dimension of the AFSJ will have to be legitimised and limited by the doctrine of implied external powers. This makes the development of the external AFSJ a more sensitive act because the depth of internal integration impacts the extent to which the EU can work externally.

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9 Matera 2011 and Schieffer 2008
10 This type of external power of the Union has inspired many scholars in relation to the legal personality of the pre-Lisbon EU, in relation of the nature of the agreements thus concluded by the EU, in relation to substantive issues of criminal law and policing and, finally, on the thorny issue of cross-pillar agreements. Wessel et al 2011, Mitsilegas 2010
11 Wessel 2010, infra Chapter 9
12 See infra Part II Section I
6.2.2 Implied External Powers and the AFSJ

As it has been noted by De Baere, the doctrine of implied powers ‘can be inferred from the broader principle of effectiveness’.\(^\text{13}\) On the basis of this, it is assumed that, by means of a teleological reasoning, the EU Treaties must be intended as conferring those powers necessary to achieve the envisaged objectives, including the powers to conclude international agreements even where the Treaties do not foresee this possibility explicitly.\(^\text{14}\) As it became clear in the previous section and its conclusion, this type of external power is the main type of external power that the EU possesses to develop the external AFSJ. At the same time the fact that this type of external power is not pre-defined expressly, the political and legal tensions concerning the exercise of implied external powers make this type of external action a controversial one from the perspective of the vertical distribution of powers between the Member States and the EU.

This broad acceptation of the implied powers doctrine is best exemplified by Opinion 2/94 delivered by the Court of Justice in relation to the accession to the European Convention on Human Rights of 1996 where it held that: ‘it is settled case-law that the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. The Court has held, in particular, that, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect’.\(^\text{15}\)

The broad scope given to implied powers by the Court in that opinion, however, does not amount to indisputable authority. Arguably, Opinion 2/94 was anchored to some of the obiter dicta of the ERTA case. In the latter judgement, the Court had indeed affirmed that:

\[^{13}\] De Baere 2009
\[^{14}\] Hartley 2003 p. 106, Craig and de Burca 2008, p.90 and, de Baere 2009
(i) “to determine in a particular case the Community’s authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than its to its substantive provisions”, that

(ii) “such authority arises not only from express conferment by the Treaty – as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements- but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions”, and that

(iii) ‘with regard to the provisions of the Treaty the system of internal Community measures may not be separated from that of external relations”.

However, it wasn’t until the judgement in Kramer that the Court of Justice first applied what Dashwood identified as the ‘principle of complementarity’; i.e. the principle according to which the conferral of a given competence internally equally confers the competence to conclude international agreements on the basis of the principle of effet utile. In these terms, the case law of the Court of Justice could be interpreted as aiming to strengthen the position of the Union by construing the existence of external powers as a necessary corollary of the internal ones. This perspective is precisely the one emerging from Opinion 1/76 where the Court of Justice held that

(i) “inter alia, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international agreement necessary for the attainment of that objective even in the absence of an express provision in that connexion” and that

(ii) “this is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies”.

The Court furthermore added that implied external powers could subsist also when, in the absence of pre-existing internal measures, the international

17 Dashwood 2000, p.127-132
agreement absorbed the internal regulation of a policy, thus making it coincide with the exercise of internal and external powers.

The use of the *effet utile* principle as the rationale underpinning the existence of implied external powers as it appears from the case law commented thus far, however, seems somehow at odds with the principle of conferred powers. Of course, external action was anchored to internal provisions conferring the power to act to the Union, but the actual extent of the external power was potentially limit-less, thus feeding the political tensions between the Commission on the one hand, and the Member States on the other. The tensions at the centre of the question concerning the implied external powers of the Union came to its peak at the time of *Opinion 1/94*, which represents a landmark decision for the purposes of our investigation.

*Opinion 1/94* essentially dealt with the existence and the scope of the Community’s power to conclude the GATS and the TRIPS. At that time the Commission had argued, in light of the existing case law, that the Community was competent, and exclusively competent, to conclude those agreements on the basis of the powers conferred to it in relation to the right of establishment and the freedom to provide services. The Court of Justice however replied negatively and anchored its decision to the provisions of primary law that were at stake at that time. Firstly, the Court of Justice held that ‘unlike the Chapter on transport, the Chapters on the right of establishment and on freedom to provide services do not contain any provision expressly extending the competence of the Community to relationships arising from international law. As has rightly been observed by the Council and most of the Member States which have submitted observations, the sole objective of those Chapters is to secure the right of establishment and freedom to provide services for nationals of Member States’. Secondly, having affirmed that those provisions did not contain any reference to external elements connected to the right of establishment or the freedom to provide services for third country nationals or third country services providers or recipients, the Court of Justice held that the attainment of the internal objectives on establishment and services were not, contrary to the specific facts surrounding *Opinion 1/76*, ‘inextricably linked’ to the external matters covered by the agreement that were
at stake in the pending case.\(^{19}\) Quite simply, as paraphrased by de Baere, ‘the Community - and now the Union - cannot be said to be competent to act internationally with regard to every single policy for which it has internal legislative competence’.\(^{20}\)

In spite of the fact that the case at the time concerned both the \textit{an} and the \textit{quantum} of the external competence of the Community to conclude GATS and TRIPS, the reported paragraphs of \textit{Opinion 1/94} are particularly significant because they bring the discourse of implied external powers to the exegesis of primary law provisions. In other words, the Court of Justice implicitly referred to the necessity of distinguishing the external capacity of primary law norms; a distinction that Dashwood did when he divided primary law norms into two categories: ‘open provisions’ and ‘internal provisions’.\(^{21}\) According to this author, primary law provisions are to be considered as ‘open provisions’ each time the nature of the subject encapsulated in a provision contains an external projection whereas the ‘internal provisions’ category covers those primary law provisions that are essentially internal in nature and that can be projected internationally only as a result of the exercise of that competence. An example of the former category is the competence that was at stake in the \textit{ERTA} judgement whereas an example of the latter can be the provision on establishment.

It follows from the foregoing that the distinction operated by the Court of Justice, and as elaborated by Dashwood subsequently, furnishes a solid base from which the external dimension of the AFSJ can be analysed. With this in mind, therefore, it can be argued that ‘open provisions’ can be understood as directly yet only implicitly conferring the Union with the power to conclude an agreement for the attainment of a given objective by virtue of the principles of complementarity and \textit{effet utile} even in the absence of internal legislation on the matter. On the other side, ‘internal provisions’ of primary law will furnish implied external powers to the Union only if (i) internal legislation has been adopted and (ii) there is a link between the scope of the internal legislation and the content of the international instrument. Finally, but on a residual basis, ‘internal provisions’ should also be considered has implying external powers

\(^{20}\) De Baere 2009, p.27
\(^{21}\) Dashwood, 2000 p. 131
whenever, in the absence of internal rules, an international agreement is inescapably connected with the objective that the Union has to attain so that the incapacity of the Union to act externally would jeopardise the attainment of that objective.

Bearing this distinction in mind, it seems necessary to place this fundamental distinction in the context of the AFSJ. The first sector of the AFSJ to take into consideration is the one on border checks, asylum and immigration. In relation to border checks and visas, there are three types of competences which seem to adhere quite directly to the category of ‘open provisions’: letter (a) of Article 77 TFEU (2) dedicated to the common policy on visas and other short-stay residence permits, letter (b) of the same Article on the checks to which persons crossing the external borders are subject and, finally letter (d) on the gradual establishment of an integrated management system for the external borders. Prior to turning to the asylum policy provision, one more issue needs to be addressed in relation to the external borders policy, the external powers of Frontex, the EU agency for the management of operational cooperation at the external borders of the Member States. Articles 13 and 14 of the Frontex Regulation expressly foresee two main categories of external powers for the Agency, thus bringing the scope of the external powers of Frontex outside the ‘open’ and ‘internal’ dichotomy.

In relation to Article 78 (1) TFEU on asylum, subsidiary and temporary protection the ‘open’ nature is marked by the express reference to the Geneva Convention of 1951 to which the Union is not a party. However, the different measures foreseen by this Article quite explicitly refer to the internal establishment of a common policy on these matters. Thus, because of the general inward looking phrasing of Article 78 TFEU this provision does not appear to contain a mandate to act internationally and, therefore, with the exception of the express external powers conferred to the Union in letter (g) of Article 78 (2), the remaining paragraphs of this Article are better understood as ‘internal provisions’. Yet, one could also argue that Article 78 (1) TFEU, where the respect of the Geneva Convention is established, could be interpreted as implicitly conferring the necessary powers for the EU to join the Geneva

23 The Convention affirms that signature is open for States only: either as members of the UN or by invitation — but this last provision has lost the significance it had in 1951.
Convention. Prima facie, this issue could be immediately set aside: as Article 78 (1) is not a conferring-powers type of provision, it could be argued that there is no need to establish whether this provision is ‘open’ or ‘internal’. However, because the whole legislative system connected to asylum, subsidiary and temporary protection ‘must be in accordance with the Geneva Convention’ by virtue of this very provision, it is reasonable to argue differently.

The question at stake in relation to Article 78 (1) TFEU does not relate to the external competence of the Union to conclude international agreements on these subjects: taking into consideration the existing acquis in the field, and in light of the ‘common policy’ nature of this field affirmed by the Treaty, there can be no doubt that, for agreements falling outside the scope of letter (g) of Article 78 TFEU, the Union is implicitly competent to conclude international agreements related to the scope of the powers conferred to it. The interesting question here is to understand whether Article 78 (1) TFEU can be interpreted as implicitly granting the Union the competence to adhere, if possible, to the Geneva Convention on the status of refugees. It is submitted by the present author that, from a static perspective, accession of the Union to the Geneva Convention and Protocols is not necessary for the attainment of the Union’s objective. As the Union is bound to observe the Convention by means of its own internal (municipal) law, accession is not necessary to attain its goals. Should, however, the Geneva Convention be modified or a new Protocol being added, the question could become fundamental because: (i) as the TFEU only refers to the Convention of 1951 and the Protocol of 1967 any change in that system would create some level of discrepancy with the Union system in relation to sources of law and, (ii) if the changes would be acceded only by some Member States and not the Union, a potential conflict of norms could affect the existing legislation within the Union, and the municipal duty to respect the Convention could be jeopardised. Therefore, in the light of these considerations it seems that the reference to the Geneva Convention of 1951 and its Protocol of 1967 in Article 78 TFEU and in Article 18 of the Charter of Fundamental Rights demands to be interpreted purposively, thus granting to the Union, if needed and if the Convention would allow it, the competence to accede.

The openness that characterises Articles 77 and 78 TFEU seems also to mark Article 79 TFEU on immigration policy. As noted above in this Section, Article 79 contains one of the two express external competences of the AFSJ in relation
to the conclusion of readmission agreements in its third paragraph. Moreover, within paragraph 2 of the same provision there are two paragraphs that can be considered ‘open provisions’. The first is letter (c) of Article 79 on illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation whereas the second is letter (d) of the same Article that deals with combating trafficking in persons. In both cases there are essential features that implicitly refer to either cooperation with third countries – the repatriation of unauthorised residents-, or other international obligations such as is the case for human trafficking and the Protocols of the UN Convention on transnational organised crime.  

Contrary to Articles 77, 78 and 79, Article 81 TFEU on judicial cooperation in civil matters having cross-border implications does not contain ‘open provisions’. This does not come as a surprise if one bears in mind that this field of Union competences was introduced as a corollary to the four freedoms of the internal market. Indeed, the first steps taken by the EU in the field of judicial cooperation in civil matters were first conceived to enhance and protect the different outputs and benefits stemming from the four freedoms by facilitating access to, and cooperation amongst, the judicial authorities of the Member States competent for civil law. Yet, it is precisely in relation to the expansion of the internal market to the EEA countries that the fields of civil justice first lead the Member States to conclude conventions covering judicial cooperation in civil matters first, and in matters covering substantive law with the so called Rome regulation second. Moreover, it was in this particular field of the AFSJ that the Court of Justice, not only confirmed the implied external competence of the Union, but further affirmed its exclusive nature in Opinion 1/2003. Therefore, the Treaty’s ‘internal provisions’ on judicial cooperation in civil matters come as a striking example of how an internal provision may well develop into an exclusive external competence by means of internal harmonisation also within the AFSJ.

Similar general observations in relation to the ‘open’ or ‘internal’ nature of the AFSJ provisions can be drawn in relation to judicial cooperation in criminal matters. From a systematic perspective, it is interesting to notice that prior to the

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Lisbon reform this field of the AFSJ benefitted from a general express competence to conclude international agreements whereas this has not been reproduced in the new Treaty. However, it must also be observed that Article 38 TEUaL, conferring external powers to the Union in PJCC did not amount to an express external competence properly understood: that provision merely served the purpose of legitimising external action by the Union within the different types of action envisaged at that time in Title VI of the TEU; it did not codify a common external policy with specific objectives to be attained, nor did it indicate a specific field in which the external competence was granted for. The rationale for the codification of such a type of provision is to be found in the thorny issue of legal personality and capacity of the Union which, at that time, was at the centre of political and doctrinal debates.\textsuperscript{26} With the entry into force of the Lisbon Treaty, the provisions on Police and Judicial Cooperation in Criminal Matters fall back to the sphere of application of the implied powers doctrine, thus making the distinction between ‘open’ ones and ‘internal’ ones important.

In this respect, there can be no doubt that Articles 81, 83 and 85 TFEU fall within the category of ‘internal provisions’. At the same time, however, it must be borne in mind that the Eurojust decision\textsuperscript{27}, foresees, like in the case of Frontex, an express competence to conclude international agreements. Article 26 a) of that decision holds that ‘in so far as is required for the performance of its tasks, Eurojust may establish and maintain cooperative relations’ with third States, international organisations and Interpol and, as we shall see, the agency in question has made use of this express mandate.

A similar dichotomy is present in relation to Police Cooperation, for whereas Article 87 TFEU falls within the category of ‘internal provisions’, Council Decision 2009/371/JHA establishing the European Police Office (Europol)\textsuperscript{28} contains in Article 23 an express competence to conclude agreements with third countries and international organisations formulated exactly like the one valid for Eurojust. Other than this reference therefore, the reminder of Chapter 5 on Police Cooperation is internally-oriented and thus does not go beyond ‘internal provisions’.

\textsuperscript{26} Wessel 1999 and the opposite view of Denza 2002
\textsuperscript{28} OJ L121, 15.05.2009, p.37
6.2.3 The Codification of Implied External Powers

The overview of the different AFSJ competences and their external orientation permits us to move towards bringing a close to the issue of implied competences with the analysis of Article 216 (1) TFEU which states:

“The Union may conclude an agreement with one or more 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, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope”.

Article 216 (1) thus seems to codify the broad applications of external implied powers used by the Court of Justice in ERTA, Kramer and Opinion 1/76: the Union is indeed competent, according to the provision here at stake, to conclude agreements beyond the cases of express external competence when (i) the conclusion of an agreement is necessary for the attainment of an objective of the Union, (ii) when the conclusion of an agreement is provided for in a legislative act and (iii) whenever the affectation or alteration of common rules is at stake. In this respect, Craig has argued that “he EU will always have power to make an international agreement” 29 because, in practice, one of the conditions legitimising external action will always be present, even by simply anchoring external action to either Article 3 TEU with its broad objective or to Article 21 TEU. 30

This interpretation, however, does not seem completely satisfactory. First, it seems difficult to envisage any implied external action justified on Article 3 TEU: as this provision amounts to a programmatic provision, a ‘manifesto provision’ as we have seen, this provision does not possess the requirements necessary to satisfy the rules concerning the choice of legal basis and cannot satisfy the subsidiarity rationale that is supposed to underpin every legislative measure in the fields of shared competences, including external action.

29 Craig 2010, p.399
30 Craig 2010, p.399
Secondly, the interpretation offered by Craig does appear as problematic from another perspective. Craig’s interpretation of Article 216 TFEU foresees almost an automatic external projection of any EU competence by virtue of the ‘effet utile’ principle linked to the objectives of the Treaties. This, however, neglects the diverse nature of the Union’s competences and, more precisely, of the diverse nature of every single power-conferring provision codified in the Treaties. In this study, we have already had the opportunity to argue that the AFSJ provisions are, in their vast majority, inside-looking provisions, aiming to set up an internal area of public order and justice in which civil liberties and free movement are ensured. This, we have argued, is reflected in all those provisions which confer powers to the Union in order to “prevent and settle conflicts of jurisdiction between Member States” (Article 82 TFEU), adopt measures ‘for the approximation of the laws and regulations of the Member States’ in relation to civil law (Article 81 TFEU), measures necessary for the gradual establishment of an integrated management system for external borders (of the Member States) in Article 77 TFEU, measures to establish “a uniform status of asylum for nationals of third countries, valid throughout the Union” (Article 78 TFEU), measures to define “the rights of third-country nationals residing legally in a Member State” (Article 79 TFEU), measures to establish minimum rules concerning the definition of criminal offences (Article 83 TFEU), measures in relation to the coordination of the cooperation among national judicial and police authorities (Article 85 and 88 TFEU) and, finally, measures for instance, on the collection, analysis and exchange of police information (Article 87 TFEU).

In light of the actual content and scope of the AFSJ provisions, it thus seems difficult to argue in favour of the automatic external complementarity suggested by Craig in his reading of Article 216 TFEU. At the same time, it is submitted by the present author that, with the exception of ‘open provisions’, the crucial element of Article 216 TFEU to affirm or deny external implied competence by the Union is to be found in the last caveat of that provision, where it affirms the existence of such competence in relation to the affectation or alternation of common rules. Therefore, as the developments in relation to the external dimension of judicial cooperation in civil matters suggest, the crucial factor is to determine the scope of the internal legal integration among the Member States to assert the implied external competence of the Union.
It follows from the foregoing that the AFSJ is a domain of mostly implied external competences and that, when taken individually, these implied external powers of the Union belong to the category of ‘internal provisions’ rather than to the one of ‘open provisions’. This finding means that the implied external projection of the AFSJ will have to take into consideration more strictly issues such as (i) the specific objectives enshrined in each AFSJ provision and, (ii) the level of harmonisation or approximation envisaged and obtained by the Union internally. These findings do seem to conflict with the generous wording of Article 216 TFEU. However, it has been submitted that (i) the generous acceptation of Article 216 TFEU proposed by Craig does not seem properly fitting for the nature of the AFSJ and that, (ii) this provision cannot be construed as to broaden the competences expressly conferred to the Union to the detriment of the principle of conferral. Rather, it has been argued that a stricter interpretation of Article 216 TFEU is preferable. Because Article 216 TFEU codifies the case law on implied external powers, the interpretation of this Article cannot disregard the different substantial situations that have generated this provision. Therefore, in the second part of this book the analysis of the external action of the Union in the fields of the AFSJ will pursue the ‘true construction’ doctrine elaborated by Dashwood\(^\text{31}\) as an alternative manner to analyse the external dimension of the AFSJ as opposed to the analysis made through the policy papers of the European Council and of the Commission. In this manner, our analysis should also satisfy the normative claim made in the introductory Section of the book.

Having discussed the existence of the external projection of the AFSJ, the next paragraph of this Section will turn to study the exclusivity of this external projection. In other words, having assessed the extent to which one can talk about an external dimension of the AFSJ, the next paragraph will thus turn to analyse whether and to what extent the Union can claim exclusive external competence in the domains of the AFSJ. This is the second most important aspect to take into account since this other element of EU external action is also linked to the vertical distribution of powers between the EU and the Member States and thus related to the the foundations of the EU legal order.

\(^{31}\) Dashwood, 1996, p.125 and Dashwood, 2000, p.137
6.3 Exclusivity and the AFSJ

The verses reproduced in the epigraph to this Section reflect well the dichotomy inherent to the debate on the relation between the existence of external competence and the strength thereof, i.e. its exclusive nature. The story on the respective powers of the Union and the Member States to conclude international agreements is, indeed, a story with several twists.\(^{32}\) It is generally accepted, and confirmed by the case law of the Court of Justice, that the question of the existence of external competence and the question of its exclusive nature are, albeit linked, separate. Thus, it is possible for the EU to have an express external competence but to share it with the Member States just as it is possible for an implied external competence to be exclusive, i.e. not allowing Member States to act independently or collectively on the international plane. Which is particularly relevant here because within the AFSJ there is one generally accepted express external power (on readmission agreements) and one controversial provision that we have called indirect express external power in relation to asylum. At the same time, the possibility to identify exclusive external powers in the context of the AFSJ is a particularly controversial issue: as it was argued and showed in Chapter 5, the AFSJ expressly leaves enforcement tasks to Member States together with the tasks of maintaining public order and security with the result that it appears more difficult to identify fields in which the EU could claim exclusivity. These issues thus bring us once more back to the foundations of the EU constitutional order and the distribution of competences between the Member States and the union.

The complexity of the issue probably derives from the fact that the different judgements of the Court of Justice never claimed to propose a general theory on the matter; rather, those judgements focused on the different facts at stake in each of the case, though often merging the arguments on implied powers with the ones on exclusivity. Nonetheless, it is possible to individuate two main axes upon which the Court of Justice has built the exclusivity of the Union’s external powers: pre-emption and the protection of the Union’s acquis.

It was first held in paragraph 17 of the ERTA judgement that, where common rules have been adopted, Member States were no longer allowed – individually or collectively – to undertake international obligations with third countries where

\(^{32}\) O’Keeffe 2000 p.179
the conclusion of an international agreement was to affect the existing rules at Union’s level. The pre-emptive effect of internal rules was subsequently found applicable, other than in relation to common policies, whenever complete harmonisation had been attained internally\textsuperscript{33} or even in the case of internal legislation covering a policy to a large extent.\textsuperscript{34} Moreover, even in the absence of internal measures the Court of Justice had already had the occasion to affirm the Union’s exclusive competence when the conclusion of an international agreement was the only way for the Union to exercise its competence.\textsuperscript{35} Parallel to the discourse related to the complementarity between the internal exercise of a Union’s competence and the exclusive international projection thereof, the Court of Justice judgements where also anchored to the protection of the Union’s acquis. As a matter of fact, since the ERTA judgment the Court had affirmed that the exclusive external competence of the Union was necessary to prevent the affectation, the fragmentation of internal rules that could derive from allowing Member States to act on the international plane independently from the EU.

The relation between pre-emption on the basis of adopted measures and the protection of such acquis from a fragmented external action of the Member States was, once again, at stake in the ‘Open Skies’ cases and in Opinion 1/2003, and these two judgements of the early 2000s can be said to clarify the grounds upon which exclusive external competence by the Union may rise. First in Open Skies the Court of Justice held that according to its case law, exclusivity on the basis of pre-emption occurs where an ‘international agreement falls within the scope of the common rules, or in any event within an area which is already largely covered by such rules’, even if there is no contradiction between the commitments of an envisaged agreement and the common rules adopted.\textsuperscript{36} The Court of Justice in Opinion 1/2003 subsequently made clear that what is decisive to affirm the exclusive competence of the Union is the preservation of the effectiveness of Union law and the proper functioning of the systems established by its rules\textsuperscript{37} and that, in order to establish whether the EU possesses exclusive competence ‘account must be taken not only of the area covered by the Union

\textsuperscript{34} Opinion 2/91, [1993] Convention No.170 ILO on Safety in the use of Chemicals at work, ECR I- 1061
\textsuperscript{35} Opinion 1/76, [1977] Draft Agreement Establishing a European laying-up fund for inland waterway vessels, ECR, 741
\textsuperscript{36} Case C-476/98, Commission v Germany, judgment 5 November 2002 ECR I-09855, paragraph 108
\textsuperscript{37} Opinion 1/2003, 30 November 2009, ECR I-11129, paragraph 131
rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Union rules and the proper functioning of the system which they establish. 38

In a nutshell, the debate on the exclusive nature of an external competence of the Union essentially depends on the type of policy concerned, the degree of harmonisation existing internally, the relation between the scope of an international agreement and the competence of the Union and, finally, the relation between the content of the international agreement and the internal rules established at Union level. In this perspective, these questions are valid for the external dimension of the AFSJ as well, but prior to bringing this paragraph to a close it is necessary to undergo a few more specifications.

With the entry into force of the Lisbon Treaty, the narrative on the exclusive external competences of the Union has been codified in Article 3(2) TFEU, a provision that takes from the existing case law and indicates the different factors that lead to exclusive external competence. Article 3(2) TFEU reads as follows: ‘the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope’. As it has been noted by Craig, there is a significant overlap with Article 216 TFEU which is formulated this way: ‘The Union may conclude an agreement with one or more 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, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope’.

According to Article 216 TFEU the Union has the competence to conclude an agreement with one or more third countries and international organisations:

(i) where the Treaties so provide;

38 Ibid, paragraph 133
(ii) where the conclusion is necessary in order to attain one of the Treaties’ objectives
(iii) where (the conclusion of an international agreement) is provided for in a legally binding act of the Union;
(iv) where (the content of the international agreement) is likely to affect common rules or alter their scope.

With regards to Article 3(2) TFEU, it holds that exclusive external competence of the Union shall subsist when:

(i) its conclusion is provided for in a legislative act of the Union;
(ii) the conclusion is necessary to enable the Union to exercise its internal competence;
(iii) the content of an international agreement may affect common rules or alter their scope.

Therefore, the combined reading of the two provisions suggests that (i) where the conclusion of an international agreement is necessary in order to attain one of the specific objectives of the Treaties, this external competence would also be exclusive in case the conclusion of the international agreement in question is necessary to enable the Union to attain that objective and (ii) where the content of an international agreement is related to common rules adopted internally, and that the conclusion of such agreement by the Member States (individually or collectively) is likely to affect or alter the scope of the common rules, the Union would be exclusively competent to conclude such an agreement. Finally, (iii) where the conclusion of an international agreement is provided by a legally binding act of the Union, and if the legally binding act in question is a legislative act, then the Union would also possess exclusive external competence.\textsuperscript{39}

\textsuperscript{39} The Treaty of Lisbon distinguishes legislative and non-legislative acts. The criterion used by the Treaties to distinguish the different categories of act is formal and relates to the procedure for adoption. It follows from this observation that Article 216 TFEU seems to allow non-legislative acts such as implementing acts and delegated acts to confer the competence to conclude international agreements. On the hierarchy of norms as established by the Lisbon Treaty see Craig 2010, p246-284.
of these three juxtapositions between Article 216 TFEU and Article 3(2) TFEU, it has already been argued that Article 3(2) TFEU ‘conflates the two separate questions of the existence of implied external competence and the exclusivity of that competence’\(^{40}\) and that this convergence of the two questions suggest that implied shared competences are likely to disappear\(^{41}\) because the juxtapositions between the two provisions can be interpreted in manner according to which the Union would have to always exercise its external implied powers exclusively, including the fields of the AFSJ.

The symbiosis between implied external powers with exclusivity thus departs from the case law of the Court of Justice, but does not seem to automatically bring an end to the era of shared external competences: in fact, the solution codified in the Treaties demonstrates the difficulty of translating ‘highly complex case law in the form of a Treaty Article’\(^{42}\) and actually turns the problematic issue of the relation between implied powers and exclusivity back to from whence it came, i.e. the Court of Justice. At the same time, it seems plausible to interpret those three cases of juxtaposition restrictively by means of the existing case law. Thus, for instance, the necessity test in relation to the conclusion of an agreement and the attainment of a Treaty objective can be narrowly construed in the sense of *Opinion 1/76*; similarly, the relation between internal common rules and the international agreement can be interpreted as determining exclusive competence only where common rules developed in relation to *common policies* are at stake. This distinction allows to affirm that, for instance, only Articles 77(2) a) TFEU, 78 and 79 are affected by this symbiosis and not the remainder of the AFSJ.\(^{43}\) Lastly, it appears preferable to interpret the combination of Article 216 and 3(2) as to imply that exclusive external competence can spring from *legislative* acts only, as Article 3 (2) TFEU holds, whereas implied external powers can spring from the broader category of *legally binding* acts.

In light of the interpretation proposed here, the outcome of the combination of Articles 216 and 3(2) TFEU, should not necessarily bring to an end the category of implied shared competences; what *is* certain however, is that the broad call for

\(^{40}\) Cremona 2009, p.61  
\(^{41}\) Ibid, p.62  
\(^{42}\) Craig 2010 p.167  
\(^{43}\) Articles 81, 82, 83, 85, 86, 87 TFEU do not contain any reference to either ‘common policies’ or ‘common rules’.
exclusivity contained in Article 3(2) TFEU must be read in conjunction with other provisions of the Treaties, and that besides the peculiar scope of the powers attributed to the Union in the fields of the AFSJ, in Title V TFEU, other provisions within the Treaties apply.

The verses reproduced in the epigraph to this Part are reminiscent of the implied and exclusive competences discourses that mark the rules on external action of the Union. At the same time, those verses are also reminiscent of another side of the same coin: the difficulty to tune and build legal harmony to a system where the external relations acquis was developed in a policy context different from the one of the AFSJ. This is the case not only because of the different nature of the AFSJ policies in their internal and external aspects; this is also because there are a number of other provisions and declarations inserted within the Protocols to the Treaties that deal with the external dimension of the AFSJ. And it is, thus, as a corollary of these last provisions and declarations that the automatism between Articles 216 TFEU and 3(2) TFEU does not appear to be applicable within the AFSJ context.

Firstly, Declaration no. 36 on Article 218 TFEU concerning the negotiation and conclusion of international agreements by Member States in relation to the AFSJ affirms that ‘Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters 3, 4 and 5 of Title V of Part Three in so far as such agreements comply with Union law’. Therefore, the High Contracting Parties to the European Union do not allow to interpret Articles 216 TFEU and 3(2) TFEU as permitting the external pre-emption of their prerogatives in relation to judicial cooperation in civil law, criminal law and police cooperation. The most surprising and interesting development in this respect should come in relation to judicial cooperation in civil law matters: as the Court of Justice has already had the occasion to declare, the conclusion of one convention falling within this field of EU law as belonging to the exclusive competence of the Brussels’ institutions in Opinion 1/2003, it will be difficult to reconcile the two opposing views. Of course one could argue that strictly speaking the declaration simply allows for Member States to act externally in this field, but should the case arise in a matter covered at present by the Lugano Convention, the Court of Justice will have, to some extent, revise its understanding of exclusive external competence in order to accommodate this Declaration. The scope of Declaration 36 in relation to the other two fields of EU
competences mentioned, on the other hand, doesn’t pose, at first sight, particular problems. As we have noticed, the provisions on judicial cooperation in criminal matters and the provisions on police cooperation do not contain express external competence provisions, nor do they contain provisions that can be considered as ‘open provisions’; moreover, taking into consideration that the EU’s mandate in these two fields is only to approximate, often with minimum rules, the laws of the Member States, it is possible to conclude that, de iure condito, conflicts, in relation to the exclusive nature of the external competence, should not emerge.

On the other side, Declaration no. 36 to the Treaties does not mention Chapter 2 of Title V of the TFEU, i.e. the part of the AFSJ Title that disciplines border checks, asylum policy and immigration policy. One possible interpretation for this omission is to argue a contrario that Member States accept the exclusive external competence of the Union in these fields. And, indeed, this interpretation can be anchored, from a teleological perspective, with the number of ‘open provisions’ and the two express external competences present in this Chapter of the AFSJ. This reading would reconcile the external nature of those policies with (i) the different ambits in which the Treaty calls for the establishment of common policies and with, (ii) Article 216 TFEU and its partial overlap with Article 3(2) TFEU. This conclusion, however, must also be reconciled with another Annex to the Treaties: Protocol 23 on the external relations of the Member States with regard to the crossing of external borders.

Protocol 23 affirms that ‘the measures on the crossing of external borders included in Article 77(2)(b) of the Treaty on the Functioning of the European Union shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements’. This provision means that despite the full harmonisation existing on the matter of border checks by virtue of the Schengen acquis and subsequent measures44, the Union cannot be considered as exclusively competent on the matter. The impact on substantive terms of this provision will be studied elsewhere in this book, but a few general considerations on the basis of Declaration 36 and Protocol 23 can be made at this point.

44 On the acquis see infra, Part II Section I and the Table of legislation at the end of the book.
First, Protocol 23 seems to confirm the tensions in relation to the AFSJ and its external dimension and, secondly, it confirms that the transposition of the doctrines and principles elaborated in relation to the external projections of other EU policies are ill-fitted to describe the complex architecture of the AFSJ. After all, bearing in mind the degree of harmonisation occurring in the field of external borders, the exclusive external competence of the Union could have been presumed rather straightforwardly. At the same time, this caveat on external borders checks reflects one special feature of the AFSJ, i.e. the strategic role that Member States’ authorities have to play, by virtue of the Treaties, in the maintenance of public order and public security.

The general overview of rules and principles on external relations discussed in this Section thus far have confirmed that, similarly to the verses reproduced in the epigraph, the external dimension of the AFSJ is contentious and is at the centre of pull and push factors that need clarification. The evolution of the EU legal system, however, offers a solution to the conflicting views on external competences and exclusivity. In fact, the contradictory instances presented thus far seem to project quite naturally the external dimension of the AFSJ in the large category of so called ‘mixed agreements’ and to other, previously unexplored, means for the EU and its Member States to act internationally.

**6.4 Mixed Agreements, Regulated, and Delegated External Competence**

In case the Union does not possess exclusive external competence, an agreement with a third country or an international organisation will have to be concluded, *jointly*, by the EU and its Member States. Taking into account the level of internal integration of the different AFSJ policies on the one side, and taking into account the the fact that Member States retain enforcement powers as well as the duty to maintain public order and security, it can be inferred that mixed agreements (lato sensu) are probably the preferred type of external action for the AFSJ fields. Mixity implies co-ownership and coordination whilst respecting the division of competences as a consequence the constitutional foundations of the Union.
The category of so-called mixed agreements describes precisely this situation and it represents the majority of agreements concluded within the EU system. Mixed agreements are anchored upon the principle of conferral, thus imposing that whenever the object of an agreement falls partly within the Union’s competence and partly within the competences of the Member States, such type of agreement will have to be concluded. Rosas has convincingly divided mixed agreements into different types of categories and, according to this author mixed agreements can be ‘facultative’ where the EU and the Member States have concurrent or parallel competences, or they will be ‘obligatory’, where the scope of the envisaged agreement is connected to a variety of policies (horizontal coexistent competences), or where the object of the envisaged agreement is, for the purposes of EU law, vertically divided between the Member States and the EU. In spite of the silence of the Treaties in this respect, mixed agreements are deeply rooted within the EU system. In fact, the first mixed agreement was the first Association Agreement concluded with Greece in 1961 and since then other general types of agreements such as Partnership and Cooperation Agreements and Trade, Development and Cooperation Agreements have been developed on the basis of the experience acquired. Mixed agreements such as Association Agreements are, of course bilateral, but there can be also multilateral mixed agreements such as the ones in relation to the WTO or other international conventions such as UNCLOS.

Moreover, whilst the entry into force of the Amsterdam Treaty brought with it a mixity, described as the interaction between the CFSP with the PJCCM and the interactions between the old EC pillar with the CFSP, today mixity continues to refer to the conclusion of agreements by the EU and the Member States jointly but it also could refer to the conclusion of international agreements touching upon EU competences belonging to different pillars of the EU legal system.

In relation to the AFSJ, a first type of mixed agreement is exemplified by the EU-USA extradition and mutual legal assistance agreements, which were the first agreements on criminal law signed by the EU and its Member States. Since then, other agreements related to police and criminal law have been concluded

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45 Hillion and Koutrakos 2010
46 Rosas 2000, p. 203-207
47 For a recent study of mixed agreements in relation to the type of policy and objective pursued see Maresceau 2010 and see Rosas 2010
48 Wessel 2010
49 See Chapter 9
with the USA and, more recently, with Japan. Another type of mixity that has emerged in recent years is the one that was at stake in the ECOWAS case, i.e. CFSP pillar objectives and EC pillar ones merged in one treaty signed by the EU and its Member States. Lastly, prior to the entry into force of the Lisbon Treaty, mixity was also referred to agreements such as Partnership and Cooperation Agreements falling within the ENP that included issues falling into each of the EU pillars and at the same time, on matters falling within the shared competences of the EU and its Member States. In all these cases mixed agreements trigger other legal questions such as the affectation that AFSJ clauses in ENP agreements have on the vertical distribution of competences between Member States and the Union.

Another development in relation to mixity that falls within the purposes of this inquiry is another type of coexistence between EU and Member States in the field of external relations. The starting point is represented by the EU-USA extradition and mutual legal assistance agreements. The EU-USA agreements can be considered as umbrella agreements. This means that the agreements concluded by the EU do not preclude the conclusion of bilateral Member State-USA agreements; rather, the EU-USA agreements constitute a benchmark for the conclusion of bilateral agreements between Member States and the USA: Article 18 of the Extradition Agreement and Article 14 of the Mutual Legal Assistance condition the legitimacy of bilateral agreements to the consistency of those agreements with the main EU-USA one. How this works in practice will be analysed in a subsequent Section of the book, but it suffices here to note that this phenomenon leads the EU beyond the shared versus exclusive competence dichotomy, and that it imposes new duties and obligations on the EU and its Member States; and that this phenomenon is emerging precisely in the fields of the external AFSJ.

Similar systems have also been developed in the fields of cross border checks and judicial cooperation in civil law. In the case of external borders checks, under the Schengen Code adopted in 2006, the Regulation foresees explicitly a

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50 See infra Section 2 Part II
51 See infra, Part Four Chapter 9
52 These types of agreements will be studied in the different parts of his book. For an analysis of all these types of mixity: Wessel 2010
53 Mitsilegas 2003
54 L181, 19/07/2003, p. 34 and L 181, 19/07/2003, p. 27
new type of external action for the Union and its Member States that we could call ‘regulated external competence’. Article 16 of the Schengen Code establishes a special regime for ‘Local Border Traffic’ and holds that rules in derogation to the Schengen Code are allowed in relation to small and local border traffic at the external borders of the Member States. By way of implementing that provision, Regulation 1931/2006 on Local Border Traffic was adopted with the objective of (i) establishing the derogatory regime of local border traffic and (ii) setting the rules that Member States have to follow if they intend to conclude such type of agreements with a third country, including an obligation to notify the Commission, prior to its conclusion, the text of the envisaged agreement in order for the Commission to check the compatibility with the founding Regulation. The substantive elements of this phenomenon will be studied in Section I Part II, but it is unquestionable that this development reshuffles, once again, the relationship between claims to exclusivity and Protocol 23 to a new legal reality of external relations law.

In a different field, in the aftermath of the far-reaching Opinion 1/2003 of the Court of Justice, there was a growing dissatisfaction amongst Member States as to the limitations imposed on them in relation to their external ambitions in the fields of civil justice and civil law. In order to find a solution to accommodate the interests of both the Union and the Member States, two Regulations were adopted to install a mechanism that, in practice, results in another system of delegated external powers from the EU to its Member States on the issues of the applicable law relating to contractual matters and on conflicts of jurisdiction in relation to matrimonial matters.\(^\text{56}\)

It follows from the foregoing that the fields of the AFSJ are at the centre of what could be described as a third system of distribution of external competences within the EU legal order. Partly because of the peculiar, normative, nature of the AFSJ and partially because of the federal tensions between Brussels and the Member States, the new creative way to manage the external projection of the AFSJ will be at the centre of our analysis in the next Sections. As opposed to exclusive external competence of the Union, the effectiveness and efficiency of mixed agreements rely on the application of the duty of loyal cooperation. The

new approach to external relations emerging from the ‘Local Border Traffic’ and from Regulations 662 and 664 of 2009 in the field of civil law seem to have the advantage of establishing a better system of control and consistency that gives the central authority more ways to control how the Member States behave whilst, at the same time, allowing them to safeguard and protect their municipal interests internationally.

6.5 Conclusion

This chapter was construed in order to consider the extent to which the constitutional principles and rules on EU external relations are relevant for, and applicable to, the external AFSJ. We have seen that the holistic approach chosen by the European Council to build the external dimension of the AFSJ requires a teleological approach for the identification of external implied powers. This seems particularly important if we consider that the phrasing of many AFSJ provisions are inward looking and that a simple literal interpretation of those provisions does not make a strong argument in favour of implied external powers. Although the ERTA doctrine has been codified in Article 216 TFEU with the Lisbon Treaty, any external projection needs to be justified in relation to the attainment of the AFSJ as an objective of the integration process ex Article 3 TEU, and this is a highly political issue which is relevant for most of the AFSJ since the only undisputable express external power provision is Article 79(3) TFEU. The second and following aspect that was considered in this chapter was the ‘exclusivity potential’ that the external implied powers of the EU may have. This aspect is of special significance since, contrary to other fields of EU competences, the treaties leave in the hands of the Member States the maintenance of public order and security as well as law enforcement powers in a highly fragmented scenario in which “no single pair of member states hav[e] the same organisation of law enforcement and judicial authorities”.

Whilst procedural questions pertaining the conclusion of international agreements and the specific choice of legal bases will be dealt in the various chapters that look at substantive issues, a number of conclusions can be drawn. A first result of the analysis carried out in this chapter is related to the identification of the correct legal basis to legitimise external action. In this respect, it has been argued that the use of general objectives in order to

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57 Monar 2015 p.617
appreciate the vertical distribution of competences is unsatisfactory and that the examination must be carried out on the specific legal basis contained in the Treaties. This was also found to reflect better the complex case law on external relations which is strongly connected to the different fields of Union competence.

Secondly, because of the peculiar features of the AFSJ legal basis, it was argued that the transposition of the doctrines which have emerged in relation to the external dimensions of other EU policies were ill fitted to clarify the founding elements of the AFSJ’s external action. In this respect, it flows rather naturally from the claim of autonomy and specificity of the AFSJ made in the first Section that the shared versus exclusive discourse needed to be balanced with the different provisions of the AFSJ, and it is in this perspective that the distinction between open and internal provisions was made.

Thirdly, it has emerged that the newly codified provisions on external relations – Articles 216 TFEU and 3 (2) TFEU – were also of little help to clarify the distribution of competences, not only because of Declaration no. 36 and Protocol 23, but also because recent developments on the external projection of the AFSJ such as the Local Border Traffic Regulation and the two Regulations on civil law demonstrate that a new method to discipline external action is emerging.

Fourthly, the key issue of mixed agreements was considered. This type of agreement constitutes a consolidated way to exercise external action within the EU system where neither the EU nor the Member States are capable to conclude independently an international agreement; a situation that seems to fit the complex legal reality of the AFSJ. Mixity, however, poses problems in relation to the protection of the Union’s acquis and the unity of representation on the international plane. In order to solve this issue, ‘on the basis of the general principle of loyal cooperation, the Court of Justice has articulated a specific duty of cooperation to foster harmony between the Union and the Member States when acting jointly on the international scene’58, but the recent developments related to the external AFSJ seem to suggest that the typology of mixed agreements traditionally used within the EU system is being taken over by new typologies of mixed agreements characterised by a high level of regulatory powers left to the EU.

58 Hillion 2010
All in all, it seems that two salient features have emerged from the analysis carried out in this Section. First, is the principle of conferral. The scope of the distribution of competences between the Union and the Member States and the respect of the conferral principle is at the heart of the external relations discourse, but because of the changes that have occurred in the AFSJ on the one hand, and because of the relative novelty that the AFSJ represents on the other, it is still difficult, in general and abstract matters, to understand how this concretely applies in the external AFSJ. Therefore, the analysis of the different substantial fields of the external AFSJ should provide the grounds to answer this first constitutional question.

Secondly, is the issue of the integrity of the Union’s acquis. It has emerged from the analysis of the relevant case law that the preservation of the internal rules of the EU legal order has played a central role in the vertical distribution of external competences. In this respect, where exclusivity could not apply, the Court of Justice has made use of the duty of loyal cooperation to prevent or sanction those Member States that, because of their activities on the international scene, presented to the integrity of the EU legal order. In a way, by means of abstraction, the Kadi judgment could be traced back to this legal principle. At the same time, the recent innovations emerging within the external dimension of external border controls and civil law demonstrate that a more incisive system of protection for the acquis than the one offered by the mere application ex-post of the loyal cooperation duty was sought to be necessary.

Moreover, the principles of conferral and loyal cooperation are federal constitutional principles, for they protect the prerogatives of the Member States and the prerogative of the EU. However, the existing mechanisms to uphold and protect the two principles do not seem to fit the external dimension of the AFSJ; therefore, the extent to which these two principles are applied and effective in the external dimension of the AFSJ will have to emerge in Part IV and V of this study where the different dimensions of the external projection of the AFSJ is analysed.

Lastly, mixity brings into the arena national parliaments into the arena. For the AFSJ fields this means that national parliaments can strengthen the democratic control of the externalisation of the AFSJ that has been particularly controversial in relation to privacy and data protection. From this perspective it could be
argued that mixity and the role of national institutions can increase the level of protection of constitutional guarantees, including human rights. Yet, it remains to be seen for national authorities to intervene to protect asylum seekers and migrants in the recent negotiations.
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General Conclusion of Part Two

In Chapter 2, Part One it was argued that in order to answer the main research question the first necessary steps were to identify the legal framework of the AFSJ as a whole and to identify the constitutional principles of EU external relations that are applicable to the external dimension of the AFSJ. Part Two was divided accordingly with Chapter 5 analysing primary law provisions – their scope and internal boundaries, and Chapter 6 providing an outline of the constitutional provisions and principles regulating the external action of the EU with a view to focus on those provisions and principles that are applicable to the external dimension of the AFSJ.

Chapter 5 argued that the AFSJ role in the European integration process is to safeguard a number of public goods: freedom, security and justice. To do so, the EU is tasked with the establishment of transnational mechanisms of cooperation between public authorities, including enforcement organs of the Member States and judicial authorities. Against this backdrop, the EU’s role in relation to civil liberties and fundamental freedoms is not only to make sure that as cooperation amongst the Member States grows, the level of protection of human rights is not negatively affected, but also to enhance those rights and liberties as the European integration process progresses.

The specific role of the EU in the fields of the AFSJ, which for the time being still ignores enforcement bodies and mechanisms, is rooted in the field of shared competences and this means that the vertical distribution of powers is a constitutional element that may create tensions between the Union and the Member States also in relation to the external projection. This is particularly true because, to a great extent, the AFSJ provisions and policies are inward looking and hence do not make the case for the external projection of the different AFSJ fields. This should mean that there should be greater attention to the respect of the subsidiarity principle in the fields of the AFSJ, both as a unit to measure the distribution of competences between the Member States and the Union and as a unit to measure substantive initiatives internally and internationally.

On its turn Chapter 6 took its cue from the findings of Chapter 5 and looked at the relationship between the constitutional principles and rules on EU external relations and the AFSJ. In that context it became clear that the EU external
action in the fields of the AFSJ should pay special attention to the principle of subsidiarity. Because the AFSJ is predominantly composed by ‘internal provisions’ the subsidiarity or ‘added value’ test to legitimise external action will only be passed if the the conclusion of agreements with international partners becomes a necessary instrument to achieve internal goals, but for many provisions this is –to this date– difficult to imagine. At the same time, EU external action as a complement to internal and national external activities in the AFSJ domains may prove less difficult to justify from a subsidiarity perspective. The key role of the European Council in setting the agenda in the AFSJ ex Article 68 TFEU should guarantee that the principle of subsidiarity is respected when it come to the justification for EU external action the AFSJ domains.

Another sensitive issue pertains to the nature of EU external action. In this respect it was showed that the Treaties seem to distinguish between the fields of EU action related to visas, borders, asylum and migration from those linked to other AFSJ policies: in the latter case the Treaties expressly affirm that member States maintain their prerogatives to conclude agreements whether in the former the Treaties seem to exclude independent action. This makes the framework fuzzy and likely to raise constitutional disputes between the EU and Member States. Yet, because the Treaties clearly safeguard a role for the Member States in relation to the maintenance of public order and security on the one side, and because of the function of the EU in the AFSJ domains as a hub for national systems on the other, the externalisation of the AFSJ could benefit from the tool provided by mixed agreements with the additional benefit of including a role for national parliaments and public fora so as to make initiatives more respectful of the democratic principle and, possibly, more keen to safeguard and enhance human rights and civil liberties.

All in all, this part showed that EU action in the externalisation of the AFSJ should occur only to the extent that such action is either instrumental to internal objectives or to complement the internal acquis. It also argued that the existing acquis on EU external relations as elaborated in the context of policies connected with the internal market cannot sic et simpliciter be transposed to the AFSJ – even though there are some exceptions such as the one connected to Opinion 1/03 or some aspects of the Union’s visa policy. All these elements suggest that the external AFSJ should be characterised by specific means of carrying out
external action in which member States and the EU coordinate their action and
preserve their prerogatives.

In addition to issues related to the vertical distribution of competences, the
externalisation of the AFSJ poses another main question, namely the one
pertaining to human rights protection standards and judicial review. In this
respect Chapters 5 and 6 show that since the entry into force of the Lisbon
Treaty the Treaties do provide, form a formal perspective, sufficient mechanisms
to make sure that human rights and access to justice are guaranteed: the
‘communitarisation’ and the entry into force of the Lisbon EUCFR are the two
elements that have made this possible. Yet, this does not mean that, concretely,
the externalisation of the AFSJ does not leave the question open. Whilst it is true
that the democratisation of the AFSJ with the prominent role gained by the EP
means that there is sufficient democratic scrutiny over AFSJ activities, it remains
difficult to exclude a priori that the implementation and enforcement of
international agreements may pose a number of problems. In this respect it will
be crucial to ascertain if the different instruments of EU external relations in the
fields of the AFSJ provide specific means for the democratically elected
assembly to assess the human rights implications of the different actions.
Similarly, and at least on paper, the widening of the CJEU’s jurisdiction in
relation to AFSJ matters operated by the Lisbon treaty should guarantee that
individuals have access to justice in case their rights are violated by the EU or its
Member States in the implementation and enforcement AFSJ-related agreement.

This being said, it is difficult to develop positive arguments in relation to some
elements of the external dimensions of the AFSJ when it comes democratisation,
human rights protection standards and access to justice. Firstly, and as
anticipated in Part One, this is the case of the integration of the AFSJ with the
CFSP and the CSDP. In relation to this aspect, Chapter 9 in Part Four will
thoroughly assess the extent to which the externalisation of the AFSJ still poses
problems that, at least from a systematic perspective, have been solved when the
AFSJ is integrated within the existing acquis of EU external relations law under
the TFEU. The second problem that can be flagged already at this stage is the
role of the AFSJ agencies: here, the democratic scrutiny of the EP is not as
immediate as when it comes to in relation to the conclusion of international
agreements ex Article 218 TFEU and even though the treaties expressly allow
individuals to attack acts of the agencies ex Article 263 TFEU, this clearly is a
mere remedy in the context of an externalisation of the activities of the AFSJ agencies that is expanding to the the CFSP and CSDP pillars too.

The findings of Part Two confirm the doubts raised in Part One over the compatibility of the externalisation of the AFSJ with the foundations of the EU legal system. In this respect it was showed that in spite of the improvements brought by the Lisbon treaty the external dimensions of the AFSJ still pose a number of questions both in relation to the vertical distribution of competences and in relation to the respect of the democratic principle and human rights protection. Before addressing the different dimensions of the external AFSJ from a substantive perspective, the next Part will look into the notion of constitutional foundations of the EU legal order.
PART THREE

AFSJ and the Foundations of the EU Legal Order
Chapter 7

The Constitutional Foundations of the EU Legal System

7.1 Introduction

This Chapter investigates the notion of ‘constitutional foundations’ that was identified in Part One as the prism through which the externalisation of the AFSJ should be analysed. The purpose of this first Chapter of Part Three is to understand what the notion means and whether the references made by the CJEU to constitutional foundations can be anchored to one or more provisions of the Treaties.

Since the first steps of the integration process were mostly anchored to economic recovery in the aftermath of the Second World War, any reference to the foundations of the integration process and its objectives was essentially economic.¹ A first tentative attempt to codify the founding principles and norms was the draft Treaty on the European Union elaborated by the European Parliament in 1984. Here, not only the preamble referred to principles such as pluralist democracy, respect for human rights and the rule of law, but it also codified, in Article 4, a provision on the protection of human rights.²

However, it was only with the adoption of the Maastricht Treaty and the conclusion of the Treaty on the European Union that the integration process acquired a certain political connotation that went beyond mere economic factors thanks to the codification of a human rights clause and the introduction of the Union’s citizenship. Thus, while the preamble referred to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law, Article F of that Treaty inserted the first human rights protection clause in the history of the European integration process, but without any reference to founding principles.³ However, still after the entry into force of the Maastricht Treaty the core constitutional principles of the EU legal system were not stemming expressis verbis from the Treaties, but were an elaboration of the CJEU: first, when it affirmed that respect for fundamental rights formed an integral part of the general principles of the EU⁴ legal system in Internationale Handelsgesellschaft⁵ and,

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¹ Rossi 2013, p.7
² OJ C 77, 14.2.1984
³ OJ C 191, 29.7.1992
⁴ The Community legal system at the time.
secondly, when it held in *Parti Ecologiste ‘Les Verts’* that the then Community was “based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.”

It was only in 1999 with the entry into force of the Amsterdam Treaty that the EU acquired a *clearer* political and constitutional connotation. Indeed, Article 6 (1) TEU affirmed for the first time that the Union was *founded* on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Clearly, while Article F was intended to expressly condition the activities of the EU by imposing an obligation to respect human rights and fundamental freedoms, Article 6 TEU had a constitutive significance, wishing to anchor the EU integration process to “the core of liberal-democratic constitutionalism”. Therefore, with the entry into force of the Amsterdam Treaty, Article 6 TEU acquired constitutive and restrictive significance: for it anchored the EU to the principles of liberal-democracies and, at the same time, it conditioned the exercise of the EU’s competences to the respect of human rights as protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (EUCHR) and the constitutional traditions of the Member States.

Today, with the entry into force of the Lisbon treaty the EU has an even stronger set of rules that denote the constitutional nature of the legal system codified in the Treaties. As affirmed at the end of the Introductory Part of this study, the Treaties possess a number of provisions that reveal the constitutional nature of the EU legal system. This Chapter will identify analyse and classify those provisions with a view of extrapolating the *founding norms* that constitute a parameter to assess the legitimacy of the EU’s external projection of the AFSJ. In doing so, this Part will look into two aspects: first it will analyse the scope and meaning of Article 2 TEU that codifies the founding elements of the EU legal system (this Chapter) and, secondly, this part will look into the case law of the CJEU in order to complement and deepen the analysis of the constitutional foundations of the EU legal system (Chapter 6). However, this study will address

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7. von Bogdandy 2010, p.22
8. von Bogdandy 2010, p.22
9. The current text builds upon Article I-2 of the Treaty Establishing a Constitution for Europe. For an analysis see Dony 2012, pp. 38-41
10. Supra, Part I, Chapter 3
founding principles as codified in the Treaties and as developed by the CJEU only and will not look into the broader category of “general principles of EU law”. This is because while the category of general principles of EU law has been thoroughly studied, analysis on the external action of the Union through the prisms of founding principles is still lacking and likewise in relation to the AFSJ.¹¹

7.2 Article 2 TEU: The Codification of the Constitutional Foundations of the EU Legal System

Article 2 TEU affirms that

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”

This provision has a constitutive and normative function since it declares the founding elements of the EU legal system. While the wording chosen draws inspiration from the phrasing of the previous version of the TEU, this provision codifies the value-oriented identity of the European Union. Indeed, it has been observed that while Article 6(1) of the TEU referred to liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law as principles, Article 2 TEU now speaks of values and thus represents “an expression of ethical convictions” rather than representing fundamental propositions (of law) as the use of the noun ‘principles’ would have.¹² Possibly, the choice to use values rather than principles relates to the wording of the second sentence of Article 2 where other political values such as solidarity and tolerance are mentioned.¹³

¹¹ I refer to studies on the general principles of the EU legal order. For an analysis Tridimas 2007
¹³ Unfortunately, other symbolic provisions of the Treaties do not help in understanding the extent to which the choice of ‘values’ instead of ‘principles’ should have legal implications. For instance, the preamble of the EU Charter of Human Rights seems to suggest that human dignity and freedom should be considered as values whereas democracy and the rule of law are principles. The text of the preamble reads as follows (excerpt): “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by
Taking into account the different components of Article 2 TEU and bearing in mind the choice of wording operated, Article 2 TEU emerges as a provision with a plurality of functions: firstly, Article 2 TEU constitutes the ‘essential kernel of the European integration process’ and in this sense this provision can be interpreted as a solemn manifesto of the EU; secondly, Article 2 TEU adds to the formal, legal foundation of the European integration process – the EU is founded upon two Treaties ratified according to national constitutional law, a value-related foundation that increments the moral and political relevance of the Treaties.\(^\text{14}\) Thirdly, Article 2 TEU is also a normative provision for it creates obligations for Member States and the EU’s institutions just as it confers rights to individuals.\(^\text{15}\)

For the purposes of this study the Article 2 TEU will be considered in its normative function. The fact that Article 2 TEU refers to ‘values’ rather than ‘principles’ does not present an obstacle to this function. Thus, while it is true that the use of the expression ‘values’ links the concepts enshrined in Article 2 TEU to expressions of ethical convictions that may relativize the notions linked to Article 2 TEU,\(^\text{16}\) it seems preferable to retain that the normativity of Article 2 TEU resides in the reference to the foundation of the Union. Moreover, the arguments presented by Von Bogdandy favouring the use of the ‘principles’ concept to the ‘values’ one is not fully convincing since the former concept is not characterised by either immutability or certainty. In other words, while it is true that qualifying the content of Article 2 TEU as ‘values’ rather than ‘principles’ makes the different elements of the provisions (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights) emerge in their political acceptations as expressions of modern constitutionalism, the normativity of Article 2 TEU resides in the constitutive role as foundations of the EU, i.e. in its function. Furthermore, as it will emerge later in this Chapter, the normative function of Article 2 TEU is confirmed by a systematic analysis of the Treaties since Article 2 TEU is considered as a parameter of legitimacy on a number of occasions.

All in all, Article 2 TEU identifies the constituent elements of the EU legal order upon which the different attributions and powers of the Union as a polis are founded; and for

\(^{14}\) Fumagalli 2014, pp. 11-14
\(^{15}\) Article 2 TEU is considered more and more as black-letter law by scholars. Ex pluribus, D Kochenov 2014, von Bogdandy and Ioannidis (2014) and Herlin-Karnell 2013, p.89
\(^{16}\) von Bogdandy 2010, p.22
this reason Article 2 TEU is neither a manifesto, nor an objective of the European Union, but a constitutive norm that designs the fundamental characteristics of the legal order.

Therefore, as a provision on the foundations of the legal system, Article 2 TEU is not only constitutive but also hierarchically superior. Indeed the apex positioning of this provisions is not only connected to its founding, constitutive role but also to its role as a normative benchmark. Indeed, since it identifies the constitutional foundations of the legal order, Article 2 TEU represents the norm that contains the values and precepts that cannot be crossed. The pivotal role of Article 2 TEU as a normative provision emerges from a systematic analysis of provisions that have a particular constitutional role. This emerges for instance in relation to membership of the EU, notably Article 49 TEU which maintains that only European States who respect and apply the values contained in Article 2 TEU may join the European Union. Moreover, Article 2 TEU comes into play as a normative parameter for EU initiatives in a number of contexts. Firstly in relation to the manifesto of the European integration process as codified in Article 3 TEU where it is held that the EU’s aim is to promote, inter alia, its values at home (paragraph 1) and in its relations with the wider world (paragraph 5). Furthermore, Article 2 TEU emerges as a normative parameter in relation to the suspension procedure codified in Article 7 TEU when a Member State seriously and persistently breaches the EU’s constitutional foundations. Lastly, the specialised provisions on the Union’s external action codified in Article 21 TEU refer to the founding elements of the EU legal system as a guiding element (paragraph 1) and as an objective (paragraph 2, letter (a)).

17 Rosas and Armati 2011, p.43
18 Article 49 TEU: “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.”
19 Article 3(1) TEU: The Union's aim is to promote peace, its values and the well-being of its peoples; Article 3(5) TEU: In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens.
20 Article 7 TEU: On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2” (omissis).
21 Article 21 (1) TEU: “The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and
As emerges from the provisions mentioned above, Article 2 TEU not only represents the founding political values of the EU, but also serves as a normative parameter that codifies the fundamental propositions that legitimise membership and the activities of the EU: respect for human rights, democracy, freedom and respect for the rule of law. It becomes clear that Article 2 TEU has an ambivalent role since, inevitably, constitutive propositions in constitutional texts need to codify the political and ethical foundations as well as the fundamental (legal) principles of a given community and legal order; and because of this ambivalent role it seems preferable not to emphasise the differences between values and principles. Rather the two terms emerge as two sides of the same token.

Taking into account these elements, it seems that the foundations of the EU legal system as codified in Article 2 TEU should be understood as being ‘values’ inasmuch as they reflect ethical and political characteristics of the EU and should be considered as ‘principles’ inasmuch as the founding elements of Article 2 TEU are considered in their normative acceptations. This study, being a legal study, considers the elements composing Article 2 TEU as ‘principles’ and considers Article 2 TEU in its normative acceptation; and the works of academics in the legal field reinforces this understanding since the elements of Article 2 TEU are usually referred as principles.\textsuperscript{22}

7.3 The Constitutional Foundations of the EU Legal System: The Content of the Article 2 TEU

7.3.1 Introduction: The Prescribing and the Safeguarding Functions of Article 2 TEU

In Chapter 3, Part One of this study it was held that the EU legal order is a constitutional legal order since it justifies and regulates the exercise of public power, it legitimises acts of the EU, and it recognises and protects fundamental rights. Indeed, it was argued that the EU legal order complies with all the principles of modern constitutionalism: the normative, the liberal and the democratic one. However, the principles enshrined in Article 2 TEU serve different purposes and need to be contextualised in order to specify

\textsuperscript{22} Oeter 2013, Herlin-Karnell 2014
the different functions they bear and the different rules that these principles represent. As noted earlier, in relation to the AFSJ this is particularly important because the integration process of the AFSJ on the one side and the simultaneous externalisation of this facet of EU integration directly touch upon a number of constitutional foundations of the EU legal order, as the numerous disputes brought in front of the CJEU and analysed in Part One demonstrate. This Chapter looks more in detail at the Treaty provision that refers to foundations of the EU in order to consider the impact that this may have on the externalisation of the AFSJ.

Article 2 TEU is divided in two sentences. First it affirms that the EU is ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. Secondly, it holds that the aforementioned values ‘are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. It emerges that while the first sentence enunciates the founding principles of the legal order, the second sentence of Article 2 TEU contextualises the founding principles and relates them to the two constituting elements of the European Union: Member States and the individuals that compose the ‘society’. While both aspects have legal and systematic implications for other provisions of the Treaties and for the EU Charter on Fundamental Rights, this section only considers the first sentence of Article 2 TEU in which the founding principles are enunciated. The first sentence of Article 2 TEU individuates six constitutional founding principles: human dignity, freedom, democracy, equality, the rule of law and respect for human rights (including the rights of persons belonging to minorities).

The European Union has two constitutional components: the first is the compound of the Member States. Their participation to the European integration process is mirrored in a plurality of provisions and the key role of Member States is prominently reflected in the European Council (Article 15 TEU) and the Council (Article 16 TEU). The second component is the societal compound made of citizens that, at the EU level, are represented by the European Parliament (Article 14 TEU). Both components have different prerogatives, rights and obligations related to the European legal order, but both recognise and share the attachment to the founding values of the EU legal order (Article 2 TEU). In relation to the normative force of Article 2 TEU, however, it is possible to further specify the scope of the founding principles of the EU legal system and the relationship that these have with the two constitutional components of the EU legal system.
In relation to the institutions that represent the two constitutional components of the EU legal system, Article 2 TEU is the ultimate parameter of the legitimacy of their actions and works. In other words, not only do all actions and acts of the institutions have to be inspired and abide by the different and specific provisions of the treaties that regulate their activities, but the institutions of the EU must also consider the founding elements of Article 2 TEU as the first threshold to assess the legality of their work. In this respect Article 2 TEU contains a positive obligation upon the institutions to abide by its wording. Moreover, the normative function of Article 2 TEU as the *ultimate* threshold of legitimacy within the EU context is confirmed by the Article 7 TEU system according to which a serious breach of the values referred to in Article 2 TEU may lead to the suspension of a Member State. Conversely, from the perspective of the individual citizen of the European Union Article 2 TEU represents the ultimate guarantee that their rights as individuals and as citizens of the Union must be protected and should not be violated.

With the aforementioned preliminary remarks in mind, it is possible to affirm that Article 2 TEU has i) a *prescribing* acceptation that serves as the ultimate parameter sanctioning the legitimacy of the actions of EU institutions and Member States and, ii) a *safeguarding* acceptation that serves as the ultimate shield for citizens against the activities of the institution. Furthermore, if we consider that principles pertaining to institutional activities (democracy, equality and the rule of law) are connected to the different prerogatives of the institutions and the Member States, then we can conclude that the safeguarding function of Article 2 TEU is also applicable to them.

Moreover, the principles codified in Article 2 TEU can be distinguished between *organising principles* of the legal order [democracy, and the rule of law] and *substantive principles* (human dignity, freedom [as a principle of liberal constitutionalism], equality, and human rights). Organising principles are those that govern the structure and the functioning of the legal system, including the Institutions of the EU. *Substantive principles* on the other hand relate to the fundamental rules pertaining to the status of individuals within the legal order and relate to their subjective spheres. In the sub-sections that follow, the content of Article 2 TEU will be analysed on the basis of the later distinction between *organising* and *substantive* principles. In the following sections the different elements which make up Article 2 TEU will be analysed while the

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23 For an analysis of the relationship of Articles 2 and 7 TEU see Kochenov 2014 von Bogdandy and Ioannidis 2014
prescribing and substantive acceptations of Article 2 TEU will be discussed in relation to the different fields of EU external action in the AFSJ domains in Part III of this study.

7.3.2 Organising Principles

7.3.2.1 Democracy

The first relevant organising principle mentioned in Article 2 TEU is ‘democracy’. While the essential features of democracy as a principle can be easily anchored to the aspects of modern constitutionalism mentioned in Chapter 3 of the Introductory Part of this study, it suffices here to remind the reader that the concept of democracy within the EU context has emerged on a number of occasions, from the declaration adopted by the European Council of 1978, to the Preamble of the Draft Treaty of the European Union adopted by the European Parliament in 1984. Moreover, the CJEU has had the opportunity to address the principle in a number of occasions in which the scope of powers attributed to the European Parliament was called into question and in which it consistently held that the democratic principle means “people should take part in the exercise of power through the intermediary of a representative assembly”. However, the use made by the CJEU of the democratic principle is hardly rhetoric; rather, the CJEU systematically made reference to the democratic principle whenever it had to protect the prerogatives of the European Parliament in the decision-making process. Moreover, it should also be emphasised that that the definition developed by the CJEU had to accommodate the different settings in which the European Parliament exercised its functions: from the simple consultation procedure in the decision-making process to the former co-decision procedure; thus opting for a broad and somehow vague definition of the democratic principle.

Indeed, as academics have pointed out, the democratic principle in EU constitutional discourses has been mostly associated with the evolution of the powers attributed to the European Parliament. This is because, unlike the Commission and the European Council, EU citizens directly elect only the European Parliament. However, it should be borne in mind that the democratic principle in EU constitutional discourses is to be

25 OJ C 77, 14.2.1984
27 For an analysis of the evolution and scope of the different powers of the European Parliament, Craig and de Búrca 2011 pp. 54-55
28 Ibid, p.150
understood as protecting and upholding the two constitutional components of the EU legal system mentioned above, i.e. the citizens and the Member States. Therefore, the democratic principle should be contextualised and the meaning of Article 2 TEU when it refers to democracy should be interpreted as a principle which aims at preserving the roles and prerogatives of the two constitutional components of the EU. This means that the democratic principle should be understood as an autonomous notion of EU constitutional law and one that does not simply mirror the acceptance according to which the democratic principle solely refers to the representation of citizens in the decision making process and other governing structures.

The latter interpretation, that the democratic principle emerges as an expression of the peculiar constitutional components of the EU legal order is supported by the wording of Article 10 (2) TEU which affirms that citizens are directly represented at Union level in the European Parliament whereas Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments. This means that while the functioning of the EU is founded on the principle of representative democracy (Article 10(1) TEU), Article 10(2) TEU suggests that within the EU context the adjective ‘representative’ refers to both components: Member States and citizens. This solution reflects the federal nature of the EU legal system where both components are sources of democratic legitimacy, hence the expression of ‘dual legitimacy’ used by Schütze to assess the meaning of the democratic principle within EU constitutional discourses. All in all, as an *organising principle* with a *prescribing* and *safeguarding* function, the principle of democracy emerges here as the ultimate parameter to assess the scope of powers of the different institutions in relation to the different decision-making procedures established by the Treaties.

The above arguments serve to highlight that the democratic principle within the EU context cannot be understood, *sic et simpliciter*, as a safeguard for the prerogatives of the European Parliament and as an expression of the will of the EU’s citizens. Rather, it is submitted here that the interpretation of this principle must take into account the constitutional prerogatives that the Treaties assign to the two constituent elements of the Union. As a result of this, while it is true that the CJEU used *indirectly* the democratic principle to confirm the use of Article 308 TEC in combination with Articles 60 TEC and 301 TEC to adopt Council Regulation 881/2002 imposing restrictive measures in the

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29 Article 10 TEU:
30 Schütze 2012, p.74-78
context of the fight against terrorism,\textsuperscript{31} the CJEU has recently held that the respect of the democratic principle within the EU law context cannot modify the choices made by “the framers of the Treaties”\textsuperscript{32} thus confirming the position expressed by AG Bot in its Opinion delivered for the case \emph{C-130-10 European Parliament v Council} when he affirmed – following the Council – that the legal basis determine procedures and prerogatives “and not the other way round”.\textsuperscript{33}

Furthermore it is apparent from the above that in the context of the AFSJ (and its external dimension) the democratic principle is at present understood and used as a tool to preserve procedural prerogatives attributed by the Treaties to the institutions as it appears from the authority of cases such as Case 138/79 \textit{Roquette Frères v Council}\textsuperscript{34} and Case \textit{C-300/89 Commission v Council ‘Titanium Dioxide’}.\textsuperscript{35} Therefore, while the decision of the CJEU in case \textit{C-130/10 European Parliament v Council} confirms the pre-existing case law in the context of the AFSJ, it also opens up a number of other questions for discussion. More specifically, it is submitted here that interpreting the democratic principle as codified in Article 2 TEU as a mere rule safeguarding prerogatives is reductive for a number of reasons that are particularly important in the context of the AFSJ: a context in which institutions and agencies of the EU have access to a growing range of personal data; and a context in which the decisions and acts of the EU and of its agencies may have direct consequences for the enjoyment of fundamental rights and civil liberties.

Whilst we shall see in depth further on the impact of this narrow interpretation of the democratic principle in the context of the linkages between the CFSP and AFSJ,\textsuperscript{36} suffice here to emphasise that there is a main reason related to Article 2 TEU suggesting for another interpretation of the democratic principle. More specifically, if one takes into consideration that the European Parliament represents the second constituent element of the EU legal system -\textit{i.e.} citizens, it should be possible to affirm that any act, whatever the nature or form, that is intended to have legal effects on individuals and, more precisely, capable of affecting the enjoyment of their fundamental rights and civil

\textsuperscript{31} Case 402/05 P and 415/05 P Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Judgement 3/08/2008, paragraph 235
\textsuperscript{32} Case \textit{C-130/10 European Parliament v Council}, Judgement 19/07/2012, ECR, paragraphs 81-82
\textsuperscript{33} Case \textit{C-130/10 European Parliament v Council}, Judgement 18/07/2012, Opinion of Advocate general Bot, 31/12/2012, paragraph 70
\textsuperscript{34} Case 138/79 \textit{Roquette Frères v Council} [1980] ECR 3333, paragraph 33
\textsuperscript{35} Case \textit{C-300/89 Commission v Council}, (Titanium Dioxide), paragraph 20
\textsuperscript{36} Infra Chapter 9
liberties should be adopted by a procedure in which the will of citizens is somehow reflected and protected. This issue is of key importance in the context of the AFSJ and its external dimension since the actions and measures adopted in this context are expressly envisaged to potentially affect fundamental rights and civil liberties; yet, the proposed understanding of the democratic principle should also be applied in contexts that are related to other fields of competences attributed to the EU and that could affect individuals. Moreover, the democratic principle and its crucial role in the context of policies in which the rights and liberties of individuals are at stake, emerges in relation to other substantive principles such as the principle of legality in criminal law.

Yet, contrary to the existing case law of the CJEU, it is preferable in this context to consider the democratic principle as an organising principle that is not only capable of safeguarding prerogatives of the institutions [static acceptation of the democratic principle], but also as a principle capable of safeguarding the citizens’ prerogative of taking part in any decision capable of restricting the enjoyment of fundamental rights and civil liberties [dynamic acceptation of the democratic principle]. At the same time, other principles of Article 2 TEU could complement the static acceptation of the democratic principle that emerges from the case law of the CJEU; notably the rule of law principle that is analysed in the next section. Lastly, there is another aspect of the democratic principle that relates to the external dimension of the AFSJ that will be discussed later in this study and that needs to be mentioned here: accountability. Indeed, as it will emerge in Part Four if this work, the growing powers and prerogatives of the AFSJ agencies to conclude agreements with third countries and international organisations pose questions surrounding the accountability of their initiatives to the European Parliament since the object of the actions of the agencies touch upon fundamental rights of individuals.

7.3.2.2 The Rule of Law

The second organising principle referred to in Article 2 TEU is the rule of law. As recently observed by Murphy, the principle of the rule of law is often ‘reduced to the idea of obedience to the law’, whereas civil society invokes this principle ‘as a principle constraining government action and protecting individual freedom’. From a legal

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37 See infra Part four and Six
38 Infra, Part III.
39 Infra, 5.3.2.2)
40 For an analysis Craig (2011), pp. 13-41
41 Murphy 2012, p.34
scholarship perspective, the principle has a formalistic and a substantive acceptation.\footnote{Also known as ‘thin’ and ‘thick’. The rule of law principle is, at the moment, at the centre of attention in relation to the application of Article 7 TEU. See, amongst many, von Bogdandy and Ioannidis 2014, Kochenov 2014, Gosalbo Bono 2011 and Pech 2010} According to the first, the principle bears little more than the idea of ‘rule by law’; according to the second the principle is related to the protection of individual freedom and therefore it incorporates various other principles such as legal certainty, the right to judicial review and the protection of human rights in their conceptions.\footnote{Idem.} All in all, the notion must be understood as an expression of the different constitutional traditions of the Member States expressed in the concepts of Rechtsstaat and Etat de droit, ultimately representing the “common values that underpin theories of justice based in the constitution”.\footnote{Supranote 38, p.35} In any case, as correctly emphasised by von Bogdandy and Ioannidis, “[t]here is only rule of law if the law is generally and widely observed and is effective in actually guiding the conduct of persons, both in their official capacities (if they have them) and as private persons”.\footnote{von Bogdandy A and Ioannidis M 2014, p.63} 

The rule of law has played a pivotal role in the development of the integration process.\footnote{Pech 2010, von Bogdandy A and Ioannidis M 2014} Prior to the express reference to the principle established by the Treaties, the principle emerged from the case law of the CJEU: in this respect the principle has been used to assert the respect for EU law. Academics have individuated two main functions of this principle in the context of the EU integration process.\footnote{Notably the works of von Bogdandy 2009} First the rule of law has emerged as a principle “concerned with the effective enforcement of the law, but also with safeguards for individual freedoms”.\footnote{Idem.} Consequently, as argued by Murphy the rule of law in the EU context has two roles: a constitutive role and a safeguarding role.

\subsection{The Constitutive Role of the Rule of Law Principle}

From the constitutive perspective the rule of law principle is an expression of the fact that the EU is a community governed through law.\footnote{For a reconstruction of how the different national understandings have influenced the EU notion see Gosalbo Bono, 2011} This aspect of the rule of law principle first emerged with the \textit{Van Gend en Loos}\footnote{Case 26/62 \textit{Van Gend en Loos} [1963] ECR 1} and \textit{Costa v Enel}\footnote{Case 6/64 \textit{Costa v Enel} [1964] ECR 585} judgements whereby the CJEU protected and upheld the normative function of the Treaties against the arguments
of Member States wishing to protect their sovereignty from the enforcement of EU rules. Today, the constitutive function of the rule of law is not only related to the enforcement of EU law, but also to the rules pertaining to the horizontal and vertical distribution of competences, i.e. the principle of conferral codified in Articles 4 and 5 TEU as well as Articles 1 to 6 TFEU.

In light of the foregoing the rule of law principle in its constitutive acceptation will play an important role in this study in order to discuss the existence and nature of the EU’s external powers in relation to the AFSJ. Moreover, as a constitutive principle the rule of law principle will not only play a pivotal role in relation to the vertical axis, i.e. in relation to the distribution of competences between Member States and the Union. Indeed, the rule of law as a constitutive principle will also play a central role in analysing the horizontal distribution of competencies on external relations between the TEU and the TFEU.

7.3.2.2.2 The Safeguarding Role of the Rule of Law Principle

On the other hand, the rule of law has played a pivotal role in relation to the enforcement of EU rules. In this respect the case law of the CJEU has been developed in the sense that the rule of law principle demands that “neither [the] Member States nor [the] institutions [of the Union] can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions”. Therefore, in this respect, the rule of law principle plays a safeguarding role with a view to guarantee access to justice and the judicial review of acts adopted by the EU.

In the light of the aforementioned, it must be borne in mind that the rule of law principle should not be interpreted as absorbing the safeguarding role that fundamental rights provisions have for individuals against acts of the institutions. Indeed, while the substantive notion of the rule of law principle mentioned above advocates for a broad scope of application of the principle, it seems preferable to distinguish the role that the principle plays as to safeguard access to justice from the specific substantive provisions aiming at protecting human rights.

52 Ex pluribus, Case 402/05 P and 415/05 P Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Judgement 3/08/2008, paragraph 281
Therefore, while the protection of specific fundamental rights should be left to the different specific provisions applicable within the EU legal order, the safeguarding role of the rule of law “requires accountability processes that are capable of considering the lawfulness of legislative action and that include vindicating human rights” as it results from the consistent case law of the CJEU which systematically upholds, on the basis of the rule of law principle, the right to have EU action reviewed by a court of law, even when this possibility is not expressly envisaged by the Treaties.

All in all, the rule of law principle within the EU legal system was developed by the case law of the CJEU and later codified within the Treaties. However, the acceptations emerging from the case law of the CJEU do not significantly diverge from those suggested by academics. Firstly, the principle has a constitutive role. In this respect the rule of law is an organising principle that relates to the basic rule that action of the Union must be governed by law and legitimised by the Treaties. As a result of this the principle in question comes in to play whenever it is necessary to apply and interpret the principle of conferral and the vertical and horizontal distribution of competences between the EU institutions and its Member States as well as between the different institutions of the EU in relation to the distinct fields of actions envisaged by the TEU on the one side and by the TFEU on the other.

However, as recently observed by Pech, the two dimensions of the rule of law principle has also a particular and important role in external relations. Firstly, this is because the external action of the EU must respect article 2 TEU. Furthermore, the rule of law principle plays an important role in the external action of the EU because Article 21 TEU affirms that the EU external action must promote the rule of law; making the rule of law a both a “benchmark and a guiding principle”.

7.3.3 Substantive Principles

The first substantive principle codified by Article 2 TEU is the respect for human dignity. A systematic reading of the Treaties suggests that this principle should be considered as a cornerstone of the Union’s constitution since the Treaties mention it on a

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53 Murphy 2012, p. 44
54 In relation to this last aspect, i.e. the obligation to guarantee judicial review even when the Treaties have not expressly envisaged such possibility see cases C-294/83 Parti Ecologiste ‘Les verts’ v European Parliament, [1986] ECR 1339 and C-355/04 P, Segi and Others v. Council [2007] ECR I-1657.
55 Pech 2012 on a similar
plurality of occasions. Firstly, human dignity figures as Article 1 of the Charter of Fundamental Rights of the European Union (CFREU): from this provision it emerges that human dignity is *inviolable* and *universal*. Firstly, it is *inviolable* since it is the CFREU itself that expressly affirms the inviolability of human dignity and this should be understood as affirming that, contrary to other rights and civil liberties, human dignity “reflects the idea that every individual human being is considered to be endowed with inherent and inalienable rights”. Secondly, human dignity is *universal* because the concept itself refers to the human person and not to nationals of Member States or otherwise citizens of the EU; thus the Treaties impose the respect of the dignity of any person that may fall within the scope of application of EU law, including foreigners and stateless persons. As AG Stix-Hackl has argued in the *Omega* case, human dignity expresses the “underlying basis and starting point for all human rights distinguishable from it”. The pivotal role of this fundamental principle goes beyond internal constitutional discourses of the EU and is also relevant to discuss and analyse in the context of the external projection of the EU since Article 21 (1) TEU affirms, inter alia, that the Union’s action in the international scene is guided by and aims at developing its founding principles, including the respect for human dignity.

The respect of human dignity within the EU legal system, however, is only the first founding principle that makes reference to the rights of individuals and imposes on the EU a duty to protect and respect these. Indeed, Article 2 TEU itself refers to other founding principles of the EU that have substantive implications and that are connected to other other provisions of the Treaties. Thus, *freedom* is to be understood as a principle of liberal constitutionalism that defines the relationship between public authority and the individual sphere and that, moreover, acquires a specific remit in relation to the AFSJ and the fundamental rights and civil liberties protected by the EUCFR. Similarly, the principle of *equality* is to be understood as possessing two roles that are linked with other provisions of the Treaties. First, equality is linked to the principle of non-discrimination on grounds of nationality of Article 9 TEU as well as the equality between men and

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56 AG Stix-Hackl in her Opinion for the case C-36/02 *Omega Spielhallen un Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECR [2004] I-9611, paragraph 77 and 93 where the AG argues that human dignity was already considered as being a ‘constitutional principle’ and a ‘fundamental right’ that could not be limited by other rules or Treaty provisions by virtue of its position as general principle of (then) Community law. See also Mangiameli 2013, p.119

57 Ibid, paragraph 76.

58 *Supra*, Part I, Chapter 3)

59 The “freedom” principle is also linked with the four fundamental freedoms of movement that are at the basis of the internal market. However, the constitutional evolution of the legal system of the EU goes beyond the mere economic meaning of the expression analysed. See also Molinier 1998, p.442
women codified in Article 8 TFEU; and both connotations are now reflected and protected by the EUCFR in Articles 20 and 23. Secondly, equality also refers to the equality of Member States as codified in Article 4 TEU. Lastly, Article 2 TEU refers to human rights, including the rights of minorities. In this respect, the provision examined here does not seek to address the different rights protected, rather it wishes to place human rights at the foundations of the EU’s constitutional system since the discipline of human rights is contained in Article 6 TEU and in the EUCFR.

7.4 Conclusion

This Chapter had as an objective the analysis of the constitutional foundations codified in Article 2 TEU in order to be able to calibrate the AFSJ’s external relations later on in this study. From this analysis it emerged that a number of principles stem from this provision and that this provision has a normative force. Moreover, it was held that the founding principles contained in Article 2 TEU influence the exercise of the Union’s external action. However, it was also held at the beginning of the Chapter that the inclusion of Article 2 TEU in the Treaties codifies principles and norms elaborated by the CJEU throughout the European integration process and before the Lisbon treaty was adopted. Therefore, the next Chapter will look into constitutional foundations of the EU as emerging from the case law of the CJEU.

Indeed since the research question of this study seeks to evaluate the extent to which the external dimension of the AFSJ is compatible with the constitutional principles of the EU, and having analysed the content of Article 2 TEU which codifies the founding constitutional principles of the EU legal order, the next chapter will look at analysing the case law of the CJEU in order to understand the circumstances in which the external action of the EU has raised conflicts pertaining to constitutional principles.
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Chapter 8

The Constitutional Foundations of the EU’s Legal System in the Case Law of the CJEU

8.1 Introduction

In the introduction of this study and in the previous chapter it was argued that the number of disputes relating to the external dimension of the AFSJ had constitutional significance because the range of allegations at the heart of the different affairs were connected to founding principles of the EU system and, as a consequence, had constitutional relevance. In order to identify the varying founding constitutional rules that legitimise EU initiatives and that could nonetheless come into conflict with the ambitions of the EU to become a global security actor in the fields of the AFSJ, the previous Chapter took into consideration Article 2 TEU, a provisions that was introduced with the Lisbon Treaty and that codifies the constitutional foundations of the EU. As a founding constitutional provision, Article 2 TEU was held to be one that legitimises and limits the exercise of public powers as well as constituting the threshold for accession to the EU.¹

However, prior to the introduction of Article 2 TEU by the Lisbon Treaty, the CJEU had already had the occasion to identify some constitutional principles of the legal system. Indeed, in this respect it is possible to distinguish two sets of core elements that have been enunciated by the CJEU through its case law: the first constitutional paradigm is the one of “the general principles of law” that has been largely analysed and discussed;² the second is the more restricted and less used category of the “very foundations of the Community” (hereinafter “very foundations of the Union”).³

As the objective of this study is to individuate those principles considered to belong to the foundations of the EU legal system in order to analyse the external dimension of the AFJ, this Chapter will look at the case law of the CJEU in which the Court has made use of the concept “very foundations of the Union” with a focus on the significance of this expression in cases pertaining to the external relations of the EU. After an analysis of the

¹ Garrido-Muñoz 2013, p.379
² Tridimas 2007
³ See, inter alia, the references made by the CJEU to the “very foundations of the Community” in the Kadi judgement of 2008 in paragraphs 282, 290 and 304.
cases in which the CJEU has made reference to the “very foundations of the Union” (paragraph 6.3), this Chapter will argue that the CJEU decision in the Kadi case of 2008 marked a fundamental shift in the approach used by the CJEU (paragraph 6.4) that should influence the study and the critical assessment of the external dimension of the AFSJ (paragraph 6.5). However, a preliminary specification is still required (paragraph 6.2).

8.2 The Emergence of the Constitutional Foundations of the EU Legal Order: From the “Foundations of the Union” to the “Very Foundations of the Union”

In the early phases of the integration process the expression “foundations of the Union” was not the hermeneutic product of the works of the CJEU, but was expressly used in the Treaty instead. Indeed, Part Two of the 1957 EEC Treaty was titled ‘Foundations of the [then] Community’ and contained the discipline pertaining to the creation of the internal market, i.e. four titles devoted respectively to the free movement of goods, agriculture, the free movement of persons, services and capital and, finally, transport.

As a result of this reference, which lasted until the entry into force of the Maastricht Treaty in 1993, the CJEU has made use of the expression on a number of times and always in relation to cases pertaining to the internal market. More specifically, the CJEU referred to the “foundations of the Union” whenever it had to emphasise the scope and/or the context of a given provision. Thus, when in 1962 the CJEU had to examine a complaint that Germany had brought against the Commission in relation to the establishment of the customs union, the Court used the reference to the “foundations of the Union” to emphasise the importance of then Article 9 of the EEC Treaty establishing the customs union so as to link it within the broader European integration process. Similarly, the Court made reference to the “foundations of the Union” in joined cases 194 and 241/85 Commission v Greece when it held that the rules pertaining to the abolition of quantitative restrictions contained in the act of Accession of Greece to the

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European Economic Community had to be interpreted in light of the relevant Treaty provisions on the foundations of the then Community, i.e. Part Two of the EEC Treaty.\(^5\)

However, the CJEU has not developed a coherent pattern concerning its references to the “foundations of the Union”. For instance, in *Defrenne*\(^6\) the Court considered Article 119 of the EEC Treaty on the principle of equal pay between men and women to belong to the foundations of the Community even though the said provision was placed in Part Three and not Part Two of the Treaty\(^7\) whereas in *Simmenthal* the Court referred to the “foundations of the Union” generically and only to support its arguments to protect the principle of direct effect of EU law.\(^8\) From these two cases, it is perhaps possible to individuate an insinuation of constitutional adjudication of certain principles and rules as possessing a special status within the EU legal context. However, since the vast majority of the CJEU decisions that use the reference to the foundations of the Union do so without hinting at anything beyond the descriptive, static, approach used in *Germany v Commission* and *Commission v Greece*, the decisions in *Defrenne* and *Simmenthal* do not provide sufficient evidence to elaborate a theory indicating the constitutional, normative, function of the expression ‘foundations of the Union’; nor is it possible to distinguish more principles and rules in relation to which the expression “foundations of the Union” has been associated with. Other than in the contexts mentioned in this paragraph, this possibly means that the CJEU has never considered having to develop the concept of ‘foundations’ and, similarly, the lack of academic writings on the topic suggests that the reference to the ‘foundations of the Union’ has had little significance for the European integration process.

Also, in more recent judgments of the CJEU, the reference to the “foundations of the Union”, has been made on a plurality of contexts but for rhetorical purposes rather than for normative ones. This is the case, for instance, of a strand of decisions pertaining to the interpretation and application of Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations\(^9\) in which the CJEU merely affirms that the said instrument of secondary law aims at protecting the

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\(^5\) Joined cases 194 and 241/85 *Commission v Greece*, judgment of 25 February 1988, paragraph 20

\(^6\) Case 43/75 Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne SABENA, Judgement 8 April 1975

\(^7\) The CJEU referred to the principle of equal pay codified in Article 119 of the EEC Treaty, now Article 157 TFEU

\(^8\) Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal, Judgement of 9.03.1978, paragraph 18, ECR

free movement of goods, which is a foundation of the Union. Similarly, whenever the CJEU has made reference to the “foundations of the Union” it has done so to bring attention to and emphasise the context in which a dispute emerged, e.g. the free movement of goods or the free movement of persons. However, the CJEU has neither elaborated on the significance of this expression and nor explained the normative consequences that the individuation of the “foundations of the Union” should produce.

All in all, it appears from the foregoing that the reference to the “foundations of the Union” in the context of the internal market merely mirrored the historic, economic and political importance that the creation of the internal market has had and still has for the European integration process; however, this reference lacked normative significance in the sense that no identification of a rule can be traced to the use of the expression by the CJEU. Thus, the use of the expression “foundations of the Union” did not contribute to the development of EU constitutional law and its doctrines, the same cannot be said about the similar expression “very foundations of the Union” used by the CJEU in the 2008 Kadi judgement,10 and first used by the CJEU in Opinion 1/91.11 As it has been argued by Lavranos this last expression has a strong constitutional significance. Indeed, as this last author has argued:

“this term indicates that there exists something more fundamental than primary EC law. [With this term the CJEU] emphasised that there is a ‘core’ of [Union] law that contains such fundamental values that even the [EU] Member States as Masters of the Treaties cannot abrogate or modify this core of [Union] law.”12

The paragraphs that follow will analyse the strand of case law with a view to demonstrating that, contrary to the first expression mentioned in this paragraph, the reference to the “very foundations of the Union” has played an important role to better identify the constitutional founding principles of the EU prior to the codification of Article 2 TEU.

10 Joined cases C-402/05 P and C-415/05 P Kadi and Al Barakaat ECR I-6351, paragraphs 282 and 304
11 Opinion 1/91 Re European Economic Area [1991] ECR I-6079
12 Lavranos 2010 p. 269
8.3 The Emergence of the Constitutional Foundations of the EU Legal Order from the Case Law of the CJEU on External Relations

In the previous section it was argued that prior to the entry into force of the Lisbon Treaty and the introduction of Article 2 TEU on the founding principles of the EU legal order it was possible to speak about the “foundations of the [then] Community”. However, it was also highlighted that the use of the expression was anchored to the existence of the said expression in the EEC Treaty in relation to the founding policies of the internal market project and that, exception being made for the cases dealing with the principle of equal pay between men and women, the CJEU used the phrase rhetorically rather than to establish an original rule of interpretation or to better define the constitutional principles of the EU legal system.

On the other hand, the CJEU has also made reference in its case law to the expression “very foundations of the Community” (hereinafter “very foundations of the Union”) and the Court has used this specific formula exclusively in the context of EU external relations. Moreover, the reference to this second expression has been used by the CJEU whenever it was asked to ascertain the relationship between international obligations and obligations stemming from the EU legal order itself. The first case in which the CJEU made reference to “the very foundations of the Union” was in the context of the special procedure envisaged by Article 218 (11) TFEU in its Opinion 1/91 in which the CJEU had to assess the compatibility of the first EEA agreement with the EU Treaties.

According to Article 218 (11) TFEU “[a] Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised”. The procedure envisaged by this provision of the Treaties is, according to the Court itself, “a special procedure of collaboration” between the Court and other institutions “whereby, at a stage prior to conclusion of an agreement which is capable of giving rise to a dispute concerning the legality of a [Union] act which

13 The research finding is based on the results of the CJEU case law database, for similar conclusion see Lavranos, supranote 184, p.269
14 van Rossem 2011 argues that Opinion 1/91 is not the first case in which the CJEU made reference to the ‘foundations of the Community’ (sic et simpliciter). Indeed, since van Rossem erroneously omits the distinction between ‘foundations’ and ‘very foundations’ he unconvincingly fails to distinguish between the internal use of the first expression from the external use of the second.
concludes, implements or applies it, the Court is called upon to ensure, in accordance with Article [19 TEU], that in the interpretation and application of the Treaty the law is observed”.

By establishing an ex-ante review, this provision confers the CJEU with powers to assess the constitutional validity of an agreement so as to abide by the rule enshrined in Article 46 of the Vienna Convention on the law of Treaties. More specifically, since the rule of public international law essentially affirms that a State may not invoke the violation of an internal rule to invalidate its consent to an agreement or to otherwise refuse to give execution to an agreement, this provision contributes to make sure that the Union can validly conclude an agreement in the first place. Similarly, also Article 46 of the draft Convention on the Law of Treaties between States and International Organizations or between International Organizations confirms the same rule for agreements concluded between both the former and the latter. Overall, as the CJEU has had the occasion to clarify in Opinion 1/75, the purpose of this provision is “to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the [Union]”.

On the basis of the existing case law and Article 196 on the Rules of Procedure of the CJEU, an Opinion of the CJEU may “relate both to whether the envisaged agreement is compatible with the provisions of the Treaties and to whether the European Union or any institution of the European Union has the power to enter into that agreement” and this tenet can be further specified. Indeed, the CJEU may be asked to deliver an Opinion on the compatibility of an envisaged agreement with the Treaties in relation to: i) the existence of the EU’s competence to conclude an agreement, ii) the nature of the said competence, iii) the choice of the correct legal basis and the procedure to follow for the correct conclusion of an agreement, and, iv) the substantive compatibility of the agreement with the Treaties. Overall, it can be affirmed that the procedure under

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16 SECTION 2. INVALIDITY OF TREATIES Article 46 Provisions of internal law regarding competence to conclude treaties: 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.
17 See, ex pluribus Schütze 2012, p.209
18 Opinion 1/75 (Local Cost Standard) [1975] ECR 1355, p.1360
examination here contributes to the respect of the rule of law principle in the context of the external relations of the EU.

Moreover, since Article 218 (11) TFEU affirms that the ex-ante review of the CJEU operates in order to ascertain whether an agreement is compatible with the Treaties, this must be interpreted as affirming that the procedure of Article 218(11) TFEU not only aims at assessing the procedural rules pertaining to the negotiation and conclusion of international agreements by the EU, but also aims at assessing the compatibility of the envisaged agreement with substantive rules of EU law. This was made clear already in Opinion 1/75 by the CJEU when it affirmed that “[t]he compatibility of an agreement with the provisions of the Treaty must be assessed in the light of all the rules of the [Treaties], that is to say, both those rules which determine the extent of the powers of the institutions of the [Union] and the substantive rules”. Today, the broad substantive scope of applicability of the procedure envisaged in Article 218 (11) TFEU must be read so as to include not only the TEU and the TFEU, but also the EU Charter of Fundamental Rights since, according to Article 6 (1) TEU, the latter has the same legal value of the Treaties.

However, although the rule contained in Article 46 of the Vienna Convention on the Law of Treaties refers to internal (municipal) laws regarding the competence to negotiate and conclude treaties, it also emerges from the combined reading of Article 218 (11) TFEU with the Rules of Procedure of the CJEU mentioned above that the scope and purpose of this procedure surpasses procedural law. As it has been emphasized elsewhere, the rule contained in this provision must be read in conjunction with the hierarchy of norms established by the Treaties and the existing acquis. This means that the procedure contained in Article 218 (11) TFEU has a constitutional role since it seeks, inter alia and ex ante, to uphold primary law against incompatible norms stemming from international obligations.

The first time that the “very foundations of the Union” where established as an essential constitutional parameter to ascertain the compatibility between an agreement and the treaties was in Opinion 1/91 concerning the conclusion of the European Economic Area Agreement. More precisely the Court was asked to examine the compatibility of the then EEC Treaty with the system of judicial supervision that was proposed with the first EEA

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20 Opinion 1/75 (Local Cost Standard) [1975] ECR 1355, p.1360
21 Dony 2012, p.242
The EEA Agreement was signed by the members of the European Free Trade Area and the Member States of the then European Economic Community with a view to integrating the markets and the economies of the EFTA countries with the Member States of the EEC. From a substantive perspective the Agreement covered rules pertaining to competition law and the free movement of goods, services, persons and capital. Furthermore, the economic provisions were supplemented with the establishment of a system of courts tasked with ensuring the correct and homogenous rules of the EEA system; and it was precisely on this aspect that the CJEU was asked to deliver its Opinion.

Indeed, Article 6 of the EEA Agreement provided that the provisions were to be applied and interpreted in conformity with the rulings of the CJEU. However, because of the special rules regarding the relationship between the (then) EEC legal order and the envisaged EEA legal system, the CJEU considered that the rules on establishing the EEA judicial system could undermine the autonomy of the (then) EEC legal order. In this context, the CJEU considered that the envisaged jurisdiction of the EEA Court was likely to adversely affect the allocation of responsibilities and the autonomy of the EU legal system as defined by the Treaties and in relation to which the CJEU has an exclusive jurisdiction.

Thus, because the EEA agreement was touching upon fundamental provisions of the (then) Community legal system from a substantive perspective and because it created a ‘machinery of Courts’ that could affect the allocation of responsibilities as established by EU primary law, the autonomy of the EU legal system and the exclusive jurisdiction of the CJEU as established by the Treaties, the CJEU concluded that

“in so far as it conditions the future interpretation of the [Union] rules on free movement and competition[,] the machinery of courts provided for in the agreement conflicts with Article [19 TEU] and, more generally, with the very foundations of the [Union]”.26

22 For an analysis of the judgement and the revised agreement see Brandtner 1992, The Drama of the EEA Comments on Opinions 1/91 and 1/92, EJIL, pp.300-328, for the second EEA agreement OJ L1, 03/01/1994, p. 3
23 Paragraph 23-30
24 Paragraph 35
25 At the time the rules pertaining to the internal market fell under Part II of the EEC Treaty, Supra Chapter 8.1 and 8.2
26 Paragraph 46
As observed by Lavranos, this was the first time the CJEU used the expression “very foundations of the Union” and as this author argued, this passage of Opinion 1/91 indicates that

“there exists something more fundamental than primary EC law. Otherwise, the [CJEU] could have simply referred only to the EC Treaty, whereas it felt the need to add the expression 'more generally'. In other words, the [CJEU] emphasized that there is a ‘core’ of [Union] law that contains such fundamental values that even the [EU] Member States as Masters of the Treaties cannot abrogate or modify this core of [Union] law”

Because of the link that the CJEU made at the time between the autonomy of the EU legal system and its exclusive jurisdiction, it could be argued that the reference to the “very foundations of the Union” was coined by the CJEU to preserve first and foremost its exclusive jurisdiction and, as a consequence, the autonomy of the EU legal order. This first analysis of Opinion 1/91 was reinforced by the Mox Plant judgement in 2006 in which the CJEU held that by instituting dispute-settlement proceedings against the UK according to the rules enshrined in the United Nations Convention on the Law of the Sea (UNCLOS) Ireland had breached the principle of loyal cooperation. Indeed in paragraph 123 of this judgment the CJEU reiterated the 35 of Opinion 1/91 and affirmed “an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the [EU] legal system, compliance with which the Court ensures under Article [19 TEU]”.

Although the CJEU made express reference to Opinion 1/91 in the Mox Plant case, the decision differs in as much as the Court in the latter decision does not make reference to the “very foundations of the Union”. Therefore, it is important at this stage to try and formulate a hypothesis on the reasons for this difference. As it was said in the preceding paragraph, the two cases dealt with the possible affectation of EU rules by the establishment of an external courts system (Opinion 1/91) and the institution of an Arbitral Tribunal to settle a dispute (Mox Plant). However, the difference between the

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27 Lavranos 2010, p.269
28 Idem, p.269
29 See recently the works of van Rossem 2012 and 2013
30 Case C-459/03 Commission v Ireland (Mox Plant), Judgment 30 May 2006, [2006] ECR I-4635
31 Ibid, para. 123
two cases and, the reason behind the choice of the CJEU to refer to the “very foundations of the Union” only in Opinion 1/91 resides in the different scope of powers of the external jurisdictions: a permanent system of courts capable of influencing the future interpretation and application of EU law and thus affecting also the division of tasks and scope of powers of the CJEU in the case of the EEA agreement; and an ad-hoc Arbitral Tribunal in the Mox Plant case.

It appears from the preceding paragraph that the CJEU considered the necessity to refer to the ‘very foundations of the Union’ in Opinion 1/91 and not in Mox Plant because only in the former case was the creation of the EEA court deemed capable of affecting EU rules and thus influencing the integration process also in relation to the works of the different institutions whereas in Mox Plant the adverse affectation of the Arbitral Tribunal was not going to have systemic effects and would only apply in the specific dispute. In support of this line of thought comes the second Opinion of the CJEU on the EEA Agreement in which the Court accepted the revised EEA agreement from which the EEA court system was cancelled to the benefit of an extension of the CJEU’s jurisdiction.32

In light of the case law examined in this section it emerges that the CJEU first made reference to the “very foundations of the Union” in Opinion 1/91 in order to affirm that certain rules and principles of the Treaties cannot be affected by the conclusion of an international agreement. More specifically, in paragraph 36 of Opinion 1/91 the Court made reference to a number of elements, substantive and institutional, that need to be examined respectively. First, the Court referred to a temporal element. As we have seen the difference between the Mox Plant case and Opinion 1/91 is that in the former case the Court was dealing with an ad-hoc Arbitral Tribunal whereas in the latter the establishment of the courts system of the EEA was envisaged to operate for an indefinite period of time. Secondly, the Court in Opinion 1/91 referred to substantive elements characterising the EU legal system, i.e. the internal market with its four freedoms and its competition rules, which, as we have seen in the previous paragraph, constituted the ‘foundations of the (then) Community’ by virtue of the EEC Treaty itself. Thirdly, Opinion 1/91 considered the institutional aspect of the courts system of the first EEA Agreement and held that it was incompatible with what has become Article 19 TEU and the EU’s jurisdictional system. Thus, the CJEU considered that the combination of temporal, substantive and institutional elements contained in the first EEA Agreement

32 Opinion 1/92 Paragraphs 22, 24, 29 and 36 and Lavranos 2010, p.269
were incompatible with primary law provisions related to those aspects and, more generally, with the foundations of the Union.

As emerges from the preceding observations, in *Opinion 1/91* the CJEU considered that because of the *temporal, substantive,* and *institutional* elements present in the first EEA Agreement, the conclusion of that Agreement would have amounted to something equivalent to an amendment of the (then) EEC Treaty, something that could only be done following the revision procedure provided therein and not by the means of an international agreement. From this perspective then, the reference to “the very foundations” made by the Court on that occasion appears as an encompassing expression that contains institutional and substantive *core* elements of the integration process deemed to be impermeable to external influence inasmuch as such changes to the constitutional system of the EU may only occur by the means of the revision procedure envisaged by the Treaties themselves.

Yet, it could also be argued that the three cases analysed in this section can be better explained through the prism of the autonomy of the EU legal system. Indeed, as Van Rossem has argued the three cases deal with preserving the integrity of the EU legal order form external influence. However, it is submitted by the present author that the reason according to which the CJEU used the expression “very foundations of the (then) Community” in *Opinion 1/91* is that, contrary to the *Mox Plant* case or other cases in which the mere influence of external decisions within the EU system were at stake, the magnitude of the EEA Agreement, with its substantive and institutional dimensions, was considered to amount to a revision of a number of essential provisions of EU primary law and *thus* affecting the *very foundations* of the European integration process. From this perspective then, autonomy of the legal system is only one of the constitutional characteristics and that was at stake in *Opinion 1/91.* Moreover, this conclusion also allows us to turn our attention to something else.

Indeed, should we follow the interpretation proposed by Van Rossem, the case law analysed here would only explain the boundaries within which the EU system is permeable to external sources of law. However, the perspective used here to analyse the three cases at hand allows us to look into the constitutional boundaries that the participation to the European integration process imposes on the external powers of the EU and its Member States thus confirming that, as the CJEU had held in *Van Gend en*

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33 This is the conclusion reached by van Rossem 2013
Loos, the EU constitutes a new legal order that is more than an agreement that merely creates mutual obligations and for the benefit of which States have limited their sovereign rights. Indeed, what appears to be particularly relevant from these cases is that neither the EU nor the Member States can conclude international agreements that would run against the principles of the EU legal order and thus it can be concluded that also at the EU level exists an **Ewigkeitklausel**\(^{34}\) or “principi inviolabili”\(^{35}\); and this is more than a vindication of autonomy or a declaration of “self-regulation”. The section that follows will argue that the 2008 decision of the CJEU in the *Kadi* affair strengthen the proposed understanding and will further develop the analysis of the “very foundations of the Union”.

### 8.4 The Innovation of the Kadi Judgement of 2008 on the Concept of Constitutional Foundation

After *Opinion 1/91*, the expression “very foundations of the Union” was not used by the CJEU until the *Kadi* judgement in 2008. Indeed, as it was emphasised in previously in this Chapter, whilst the CJEU made reference to the ‘foundations of the Union’ in relation to the four freedoms and to the principle of equal pay between men and women, no other reference to the “very foundations of the Union” emerges from the database of the CJEU, nor any reference on the use of this expression before *Kadi* is mentioned by academics who have worked and written on this topic.\(^{36}\)

Contrary to the facts of *Opinion 1/91*, the *Kadi* case did not concern the compatibility of an agreement with the Treaties; rather, the *Kadi* case concerned the scope of application of Article 351 TFEU (Article 307 TEC at the time) on the relationship between pre-accession treaties of EU Member States and their Union obligations.\(^{37}\) Article 351 TFEU

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\(^{34}\) Expression elaborated by the German Federal Constitutional Tribunal and based on Article 79 (3) of the German Constitution.

\(^{35}\) Doctrinal principle developed on the basis of the decisions of the Italian Constitutional Court. For an analysis see Cartabia1999,

\(^{36}\) Lavranos 2010, p.269, Dony 2012, pp. 243-244 and Rosas A & Armati L (2010), pp.42-44. Conversely, Van Rossem 2013, considers the expressions equivalent, p.18; the position of Van Rossem is criticized above in paragraphs 8.2) and 8.3) of this Chapter.

\(^{37}\) Article 351 TFEU affirms: The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an
holds that agreements concluded by Member States prior to the entry into force of the EEC Treaty in 1958 or before accession are not affected by the EU Treaties. However, the provision also holds that Member States are compelled to take all appropriate steps to eliminate the incompatibilities that may exist.

Whilst the immediate objective of this provision may appear to be the protection of anterior treaties so as to expressly abide by the principle of pacta sunt servanda on the law of treaties, the real objective of this provision probably resides in its second indent where the norms imposes Member States to “take all appropriate steps to eliminate the incompatibilities”. Therefore, as Klabbers and Koutrakos have pointed out, Article 351 TFEU really is concerned with the protection of the acquis of the Union and, on the basis of the loyal cooperation principle enshrined in the Treaties, it demands Member States to activate their national authorities so as to “accommodate their international law obligations within the [EU] legal order”. The provision in question, rather than constituting an exception to the principle of supremacy of EU law, provides a balancing act between the respect of the principle pacta sunt servanda and the protection of the acquis of the EU.

While Article 218(11) TFEU analysed above seeks to avoid conflicts between the EU Treaties and agreements that the EU may conclude ex-ante by conferring the CJEU with the power to review the agreement and issue a binding Opinion, Article 351 TFEU deals with the relationship between obligations stemming from international agreements concluded by Member States before they joined the EU and the EU legal system. The CJEU clarified in the case of Centro-Com that Article 351 TFEU allows national measures that are contrary to a policy of the EU and its implementing acts “only if they are necessary to ensure that the Member State concerned performs its obligations towards non-member state countries under an agreement concluded prior to accession to the EU or prior to the entry into force of the Treaties in 1958”. The decision of the CJEU in Centro-Com is noteworthy for two reasons that are relevant for this inquiry. First, the CJEU in its decision clearly referred to primary and secondary EU norms so as

integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

38 Klabbers 2009, p.118
39 Koutrakos 2006 p.304
40 Klabbers 2009, p.118 and Lavranos 2009, p.4
42 Centro-Com, paragraph 61
to make clear that Article 351 TFEU also touches upon Treaty provisions and not only secondary measures: while this merely abides by the rules of public international law that are a corollary to the principle of *pacta sunt servanda*, it is nonetheless important to highlight this element from the perspective of the EU legal system. Secondly, the CJEU refers to a ‘necessity’ clause as it makes clear that the derogation from Treaties’ obligations are allowed only if these are *necessary* to ensure the performance of the obligations stemming from the anterior treaty.

Similarly to *Centro-Com*, the *Kadi* case pertained to the implementation of a UN Security Council Resolution and, as a consequence, it also touched upon the relationship between a pre-existing agreement (the UN Charter) with the Treaties.\(^{43}\) And for the purposes of this study, and similarly to *Opinion 1/91*, the CJEU was asked to establish the boundaries of the relationship between international obligations with the Treaties. However, while *Opinion 1/91* the procedure sought to ascertain whether an envisaged agreement was *compatible* with EU primary law, the *Kadi* case stemmed from an action for annulment based, *inter alia*, on the breach of the fundamental rights of persons affected by the implementation of the UN Security Council Resolution at the EU level.

In the first instance proceeding the General Court\(^{44}\) (GC) ruled that obligations stemming from the UN Security Council supersede EU primary law and that EU Courts could not review implementing acts of those measures with the sole exceptions of *jus cogens* violations.\(^{45}\) In the appeal against the decision of the GC, the CJEU rejected the approach used by the first court and held that, *because* the EU legal order is based on the rule of law principle, any act of the Institutions is amenable to judicial review. More precisely, the line of argument used by the CJEU was developed in the following manner.

First, making reference to the case of *Les Verts,*\(^{46}\) the CJEU held that the Union is

> “based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the [EU Treaties], which established a complete

\(^{43}\) However, the *Kadi* case differed from other instances in which the EU and its Member States were implementing UN Security Council Sanctions since the targets of the sanctions were not States or commercial activities but natural and legal persons respectively citizens and established within a Member State. On this aspect of the Kadi case see Tridimas T and Gutierrez-Fons J 2009

\(^{44}\) Court of First Instance at the time.

\(^{45}\) There are numerous academic writings on this aspect. See, inter alia, Garrido-Muñoz A (2013), Eckes C 2009 and 2012 and Tridimas T and Gutierrez-Fons J 2009

\(^{46}\) Supranote
system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.”

Secondly, and on the basis of Opinion 1/91 and Commission v Ireland (Mox Plant), it added that

“an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the [Union] legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article [19 TEU], jurisdiction that the Court has, moreover, already held to form part of the very foundations of the [Union].”

The two passages of the judgment reported here served the CJEU to confirm two rules that were first elaborated in Opinion 1/91 and the Mox Plant case: namely that international agreements cannot have the effect of altering the constitutional design and/or deviating from primary law provisions of the EU legal system. Moreover, it also confirmed the principle first elaborated in Les Verts that neither the institutions nor the Member States can avoid the application of the rule of law principle which includes the rule according to which any act must be amenable to judicial review. However, reference to these three cases and their authority was not enough to depart from the decision of the GC since the latter court held that the combined reading of Article 103 UN Charter with Article 351 TFEU excluded any judicial review on the lawfulness of implementing acts of Resolutions of the UN Security Council.

To address the last point mentioned, i.e. that the combined reading of Article 103 UN Charter and Article 351 TFEU guaranteed an immunity from jurisdiction and review for acts implementing UN Security Council Actions the CJEU had to take into consideration its rulings in previous cases such as Centro-Com in which it was held that Article 351 TFEU did allow for derogations from primary law. In this respect, in Kadi the CJEU did not elaborate on the ‘necessity’ test elaborated in Centro-Com, but focused on the

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47 Supranote
48 Supranote
49 Paragraphs 281 and 282 of the judgement.
50 Paragraph 290. The GC added in this respect that the sole type of review possible could be based on the principle of jus cogens as developed within the context of public international law.
implications deriving from a strict application of the rule contained in Article 351 TFEU: that is, immunity from jurisdiction.

The CJEU rejected the interpretation proposed by the GC because such interpretation would amount to an immunity of jurisdiction that would be incompatible with the principle of the rule of law and with the “principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in [Articles 2 and 6 TEU] as foundation[s] of the Union”.51 Thus, in relation to the interpretation and application of Article 351 TFEU the CJEU concluded that the provision in question “may in no circumstances permit any challenge to the principles that form part of the very foundations of the [EU] legal order, one of which is the protection of fundamental rights, including the review by the [EU] judicature of the lawfulness of [Union] measures as regards their consistency with those fundamental rights.”52

The paragraphs of the Kadi judgment reported here suggest that with this decision the CJEU went beyond the affirmations made in Opinion 1/91 in relation to the existence of the foundations of the Union. Indeed, the CJEU makes reference to the ‘very foundations of the Union’ three times in this case and while the first time the reference seems to simply mirror the reasoning adopted in Opinion 1/91, with the second and third references the CJEU has developed the concept further.

In Paragraph 282, after having re-affirmed that the EU legal system is based on the rule of law, the Court says that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system. This passage is key in the sense that it confirms that primary law of the EU can only be modified by the revision process and that the incompatibility between an international norm and EU primary law will always see the latter prevail. To this end the Court confirms Opinion 1/91 when it calls upon itself as the ultimate protector of this the established legal system since it confirms its exclusive jurisdiction to adjudicate such matters as well as confirming that such exclusive jurisdiction belongs to the very

51 Paragraph 303
52 Paragraph 304
foundations of the Union'. Therefore, these statements can be traced back to and confirm what the CJEU had already had the occasion of affirming in Opinion 1/91.

The innovative element brought by Kadi, however, is to be found in subsequent parts of the judgment. First, because the Kadi case touched upon the standards of protection of fundamental rights, the CJEU affirmed that the EU legal system considers the protection of human rights and the review of legislation on the basis of human rights as a ‘very foundation of the Union’. While the affirmations that ‘according to settled case law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures’ and ‘that respect for human rights is a condition of the lawfulness of Community acts’ build upon the case law of the Court, the Kadi decision adds to the substantive and institutional elements of the ‘very foundations of the Union’ as first established in Opinion 1/91 the protection of fundamental rights.

However, since the final decision of the CJEU had to be based on a balancing act between the force of the EU legal system and its principles against the alleged superiority of a UN Security Council Resolution, the Court needed to consider, following its Centro-Com jurisprudence, the extent to which the above-mentioned ‘foundations’ could be relativized in the given circumstances. However, the Court refused to follow such a path and held that the founding principles of ‘liberty, democracy and respect for human rights and fundamental freedoms’ now enshrined in Article 2 TEU, but at the time codified in Article 6 TEU, trumped Articles 351 and Article 347 TFEU, i.e. the precedence rule applied in Centro-Com and the derogations’ rule considered in Commission v Greece (Thessalonika Harbour). Indeed, after the Court had included the principles of Article 2 TEU as ‘founding principles’ of the EU legal system thus belonging to the ‘very foundations of the Union’, it held that these cannot be challenged under any circumstances because of their foundational role.

53 Paragraph 282: It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraphs 35 and 71, and Case C-459/03 Commission v Ireland [2006] ECR I-4635, paragraph 123 and case-law cited).
54 See supra, Chapter 7, Section 7.3)
55 Paragraphs 283-290
57 Paragraph 304
Clearly, with the *Kadi* decision the Court cannot be considered as merely protecting its jurisdiction when invoking the principles of judicial review and the rule of law in the context of external relations since with this decision it chose to expressly consider the rights of individuals a key parameter to determining the effects that international agreements may have on the EU legal order. Moreover, it also emerges clearly that the significance of this decision goes beyond a mere declaration of ‘autonomy’. Rather, this judgment contributes to that particular strand of case law that is concerned with the development of the EU’s constitutional internal principles: while the object of the decision was the relationship between UN obligations and their effects within the EU legal system, the decision of the CJEU, much like the one in *Les Verts*, is mostly about affirming the Constitutional kernel of the European Integration process at a time in which, the legislative measures adopted by the EU independently or in connection with third countries and international organizations affect more and more the fundamental rights of individuals.

### 8.5 Conclusion: The ‘Very Foundations of the Union’ Between Article 2 TEU and the Case Law of the CJEU

Since the decision in *Kadi* was adopted in 2008, there has been a growing attention to the individuation of the EU’s founding principles; most importantly, however, more authors seem to accept that there is a hierarchy within the EU legal system. 58 Moreover, Lavranos and Eckes have touched upon the parallel lines developing between the case law of the CJEU in cases such as *Kadi* with the case law stemming from national constitutional courts, notably the German one. 59 At the same time, the declarations of principles made by the CJEU need to be substantiated and considered, in a systematic manner, together with Article 2 TEU.

Table 8.1 considers the elements that we have considered as composing the constitutional foundations of the EU as codified in Article 2 TEU and compares these with the elements that, on the basis of *Opinion 1/91* and *Kadi*, have been elevated as ‘very foundations of the Union’.

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58 Lavranos 2010, Dony 2012, Rosas 2010  
59 Eckes 2012 and Lavranos 2010
Table 8.1 The Founding Principles of the EU Legal Order

<table>
<thead>
<tr>
<th>Article 2 TEU on the founding principles of the EU legal order (discussed in Chapter 5)</th>
<th>The very foundations of the Union stemming from Opinion 1/91 and Kadi</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human dignity</td>
<td>The allocation of powers codified in the Treaties, which includes autonomy</td>
</tr>
<tr>
<td>Freedom</td>
<td>Liberty</td>
</tr>
<tr>
<td>Democracy</td>
<td>Democracy</td>
</tr>
<tr>
<td>Equality</td>
<td>The exclusive jurisdiction of the CJEU ex Article 19 TEU</td>
</tr>
<tr>
<td>Rule of law</td>
<td>Rule of law</td>
</tr>
<tr>
<td>Respect for human rights</td>
<td>Respect and protection for human rights and fundamental freedoms</td>
</tr>
<tr>
<td></td>
<td>Judicial Review of EU acts</td>
</tr>
</tbody>
</table>

Following the entry into force of the Lisbon treaty and in the light of the Kadi judgement, it clearly emerges that the founding principles of Article 2 TEU and the list of principles considered under former Article 6 TEUaL by the CJEU in Kadi are the same. Therefore, also taking into consideration the analysis of Article 2 TEU made in Chapter 5, the analysis of the external dimension of the CJEU will take into consideration those principles as expressed in Article 2 TEU. Moreover, taking into consideration the equivalence between the references to Article 6 TEUaL made by the CJEU in Kadi and Article 2 TEU it emerges clearly that the innovative character of this decision did not reside in its substantive element, i.e. in expressly listing the foundations of the EU legal system. Rather, the innovative character of 2008 decision resides in the elevation of these rules to the family of the ‘very foundations of the Union’ so as to affirm their overriding nature and hence their constitutional rigidity vis-à-vis future modifications. On the other hand, the Table also shows that there are a number of elements that reflect the Court’s opinion on the first EEA Agreement. While some of these are either related to the principles mentioned in Article 2 TEU, e.g. the principles of judicial review of EU acts and the protection of human rights, others pertain to the specific architecture of the EU legal order, e.g. the allocation of powers within the EU and the exclusive nature of the CJEU.

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60 Paragraph 303
As Lavranos has argued, the list that emerges from the table is

“a ‘mixed bag’, which aims at protecting the institutional architecture of the EC, some of the most fundamental political values and principles underpinning the European integration process and basic fundamental rights from interferences emanating from international treaties. As such, the elements that make up the ‘very foundations of the Community legal order’ are not surprising but rather reflect what is commonly understood as the essentials of European constitutional law”.

In conclusion, it can be inferred from this Chapter that Article 2 TEU and the case law of the CJEU on the foundations of the EU legal overlap. In this respect, it seems possible to argue that the case law on the foundations of the EU legal order should be interpreted as a specific expression of Article 2 TEU: in other words, Article 2 TEU should be considered as the kernel of the EU constitutionalism and the case law of the CJEU should be considered as a manifestation, conditioned by the facts of each case, of that provision. After all, if one considers the material overlap between Article 2 TEU and the decisions of the CJEU, it would be unreasonable to suggest at this stage of the European integration process, that the EU developed a constitutional kernel autonomously.

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61 Lavranos 2010
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General Conclusion of Part Three

This part of the study aimed at identifying the constitutional foundations of the EU legal order. This Part is of pivotal importance since it provides the benchmark against which the external dimension of the AFSJ will be assessed. Firstly, Chapter 7 analysed Article 2 TEU and in relation to this it aimed at demonstrating that this provision has normative force in the sense that it requires the EU to respect its precepts in every field of EU action. Furthermore, it also argued that Article 2 TEU has an institutional component and a substantive one in the sense that Article 2 TEU must inform the institutional life of the EU as well as its relationship with Member States and individuals. On the other hand, Chapter 8 looked at the emergence of founding principles through the case law of the CJEU. Also in this respect the two components emerged. Moreover, Chapter 8 has also demonstrated that the foundations of the EU legal order in the case law of the Court emerged in relation to the external activities of the EU.

Chapters 7 and 8 have also showed that the foundations of the EU legal order firstly emerged in their institutional component, i.e. in relation to the regulation and the assessment of the activities of institutions and their internal relations as well as their external powers. Conversely, it was only with the Kadi decision of the CJEU in 2008 that the foundations of the EU legal order were expressly linked to the protection of human rights. However, a systematic reading of Article 2 TEU and the case law of the CJEU leave no doubt that today the founding principles of the EU cover institutional and substantive matters alike and that they address the activities of the institutions, the relationship between the EU and the member States and the relationship of the EU with individuals, citizens or third country nationals alike. In this respect, it also emerged that the constitutional challenges of the external AFSJ identified Table 1.1 of Chapter 1 coincide with the content of the constitutional foundations identified in Chapters 7 and 8 and summarised in Table 8.1; indicating that research question pursued in this study is correctly embedded within the EU legal system.

Whilst the case law of the CJEU shows that the foundations of the EU legal order have predominantly affected the institutional sphere, it remains to be seen in the next parts of this study whether the external dimension of the AFSJ changes this. Also the majority of the disputes emerged in relation to the AFSJ and discussed in Part One of this study showed that these were mostly related to the application of the rule of law at the institutional level. Possibly, the evolution of the external dimension of the AFSJ in recent
years has changed this. Indeed, as the external dimension of the AFSJ covers more fields and touches upon more policies, the likelihood of affecting directly fundamental rights becomes bigger. Yet, taking into consideration the constitutional limitations that affect the AFSJ and its external dimension this might also not be the case. Indeed, as it was argued in Chapters 5 and 6, there are numerous constitutional limitations that need to be taken into account. Firstly, as Chapter 5 argued, the EU in the AFSJ is a normative power, but not an enforcer. This means that enforcement mechanisms are mostly left in the hands of the Member States and that Member States still enjoy a certain margin of discretion when implementing EU norms and international agreements connected to the AFSJ. Secondly, this means that the different agreements that the EU may conclude in the different AFSJ domains are hardly directly enforceable and will hardly affect directly the fundamental rights of individuals. Indeed, Kadi remains the only case in which there was a direct breach of fundamental rights and thus of founding principles of the EU legal order caused by the externalisation of Justice and Home Affairs.

However, and as it will emerge in Part Five and Part Six, there are a number of pending agreements and a number of signed agreements that may well be considered to breach Article 2 TEU in connection to human rights protection. Either way, this Part of the study has showed that there are clear and hierarchically superior rules governing the exercise of power within the EU legal order that can be invoked in Courts and that have the power to annul legislative and regulatory acts of the institutions, including international agreements. This Part also confirms the sceptic view and analysis that was made in part One on the vision of the externalisation of the AFSJ within the policy documents of the European Council and Commission: indeed, the documents mostly – if not only – pay attention to elements such as the rule of law when it comes to assisting partner countries in capacity-building type of actions, but leave a big policy and regulatory gap when it comes to the analysis of the internal implications of externalising the AFSJ such as in the case of Kadi.
PART FOUR

The Substantive Dimensions of the External AFSJ: The Connections Between the External Dimension of the AFSJ and the External Action of the EU under the TEU

“He has to be crazy to keep flying combat missions after all the close calls he’s had. Sure, I can ground Orr. But first he has to ask me to”

‘That’s all he has to do to be grounded?’

“That’s all. Let him ask me.”

‘And then you can ground him’ Yossarian asked.

“No. Then I can’t ground him.”

“You mean there’s a catch?”

“Sure there’s a catch, Doc Daneeka replied. “Catch 22. Anyone who wants to get out of combat duty isn’t really crazy”

Chapter 9

The EU as a Global Security Actor: Foundations and Boundaries of the Links Between the AFSJ and the CFSP and the CSDP

9.1 The Policy Convergences and the Constitutional Limitations of Bringing Together AFSJ and CFSP Objectives

This Chapter kicks-off the substantive analysis of the externalisation of the AFSJ. More specifically this Chapter is the first one in which the theoretical backdrop analysed in Part One, Two and Three is contextualized in the actual external activities of the EU. Chapter 9, a stand-alone chapter in Part Four, analyses the specific linkages of the externalisation of the AFSJ in the context of the CFSP and CSDP. As the policy documents make clear, the integration of the AFSJ with the external policies of the EU includes the integration of the AFSJ within the external powers of the EU organised in the TEU: a field of EU external action that maintains a specific governance and follows peculiar objectives. ¹ The key aspect that must be considered in this ambit is the relationship between the rights of individuals and their access to justice within a governance structure that expressly departs from classic canons of modern constitutionalism and to a large extent –if not absolutely– ignore the democratic representativeness and judicial review.

9.1.1 Introduction

The European Union is committed to contributing to international peace and security. To this end, Article 21 TEU confers the Union with an express mandate to “preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter”. Parallel to this, the EU has also been developing, since 1999 and the entry into force of the Amsterdam Treaty, an Area of Freedom, Security and Justice (AFSJ) “without internal frontiers, in which the free movement of persons is ensured in

¹ van Vooren and Wessel 2014, pp. 346ss
conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”\(^2\). The two tasks assigned to the Union appear, *prima facie*, distinct. Firstly, the tasks referred to in Article 21 (c) are related to Title V TEU on the Common Foreign and Security Policy (CFSP), whereas the AFSJ objective is disciplined in Title V Part Three of the TFEU; therefore, the two policies are formally distinct and belong to two different methods of governance and integration: one building upon the cooperation process which began with the European Political Cooperation\(^3\), the other building upon the so called ‘*méthode communautaire*’\(^4\).

Secondly, tasks such as preserving peace, preventing conflicts and strengthening international security clearly fall within the context of collective security and, consequentially, create a nexus between action of the Union and action by the United Nations (UN) and NATO, whereas the tasks assigned to the EU in relation to its AFSJ such as judicial cooperation in criminal matters, police cooperation and external borders control seem to exclusively fall within a municipal (regional) discourse aiming at the maintenance and development of a European Public Order\(^5\). However, in the past ten years, policy developments elaborated at EU and UN level have been arguing that the aforementioned distinction should be abandoned for the benefit of a broader, holistic, approach to regional and global security.

From the perspective of the EU, this was firstly established in the European Security Strategy of 2003\(^6\) where it was held that the collective (regional) security of the EU and its neighbourhood were facing new threats such as organised crime and terrorism. Therefore, in order to face these new threats, the Council called for a better coordination between external action based on the AFSJ pillar and external action based on other external policies, including the CFSP. This new ‘multi-policy’ and ‘multi-pillar’ approach was then reiterated

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\(^2\) Article 3(2) TEU

\(^3\) While the Lisbon Treaty has improved the overall coherence of the Union’s external action, the CFSP remains a distinct policy of the EU because of its constitutional architecture. For recent appraisals of the EU external action after Lisbon see Van Elsuwege (2010) and van Vooren and Wessel (2014).

\(^4\) But with the peculiarities seen in Chapter 7, supra.


also in the 2008 report on the implementation of the Security Strategy where for the first time, internal and external security matters were deemed to be inseparable. Moreover, and simultaneously, the strategy documents on the development of the EU qua Area of Freedom, Security and Justice have also emphasised the importance of the external projection of this field of EU competence. Thus, not only is the external dimension of the AFSJ presented as a projection of internal powers necessary to attain the AFSJ objectives; but the external dimension of the AFSJ is also presented as a piece of a broader strategy that aims to promote security and public order by integrating the different fields of EU external action in a coherent manner.

Indeed, taking a closer look at the policy programmes of the AFSJ there is a great emphasis on combining AFSJ elements with other external policies, including the CFSP and the CSDP (the Common Security and Defence Policy). Already at the time of the Hague Programme the European Council held that “[all] powers available to the Union, including external relations, should be used to in an integrated and consistent way to establish the area of freedom security and justice”. This was subsequently reiterated in the Stockholm Programme where the European Council asked for the AFSJ policies to be integrated into other external policies in order to develop “a single external policy” for the EU. Moreover, the document emphasised for the first time the specific linkages existing between the AFSJ and CSDP missions where the Union helps host countries to fight transnational organised crime and helps them to develop a stronger respect for the rule of law. Indeed, the interactions between the CSDP and the AFSJ have recently been the object of a new policy document where the Commission and the High Representative for Foreign Affairs discussed the establishment of new means of coordinating AFSJ and CSDP objectives building

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8 The expression “external action” is used in this contribution to describe all the different types of EU external relations irrespectively of their TEU or TFEU anchorage.
on the experience acquired on the field with missions like EULEX Kosovo\(^{12}\), EUJUST Themis\(^{13}\) and EUJUST Lex.\(^{14}\)

It follows that from a policy perspective internal and external action on (regional) security issues should be developed on the basis of a systematic approach that should lead to a coherent implementation of the different policy texts in the light of the Treaties’ objectives. However, while from a policy perspective the practice of using various external channels to promote the AFSJ agenda has grown into a characterising feature of EU action, the legal implications of this phenomenon have not yet been fully clarified.\(^{15}\) Thus, for instance, the hasty reaction to international terrorism aiming at securing Europe and the world in cooperation with the UN has led to a strand of case-law on the relationship between the rule of law and effectiveness that seem to have found some balance only recently.\(^{16}\)

At the same time, the externalisation of AFSJ objectives through the different channels of EU external action has also been developed by means of network governance where the legislative dimension of a goal is replaced by institutionalised interactions amongst administrative agencies.\(^{17}\) In the context of the AFSJ this is not only the case of executive agreements concluded by agencies such as Europol, Eurojust and Frontex\(^{18}\) with their foreign counterparts, but is also the case of participation by the said agencies to CFSP and CSDP initiatives.\(^{19}\) Thus, in the Joint Staff Working Paper, *Strengthening Ties between CSDP and AFSJ Actors. Proposals for a Way Ahead* of 2011 the AFSJ agencies are called upon to play a growing role in relation to CSDP missions\(^{20}\),

\(^{15}\) For instance, see Cremona (2011) and Koutrakos (2011).
\(^{16}\) Indeed, while the foundations of counter terrorism legislation, including the external dimension still poses a number of challenges to the respect of the rule of law principle, Murphy (2013); the issue of the relationship between Un and the EU poses unresolved problems of principles rather than problems on the implementation and effectives of the measures in question: Larik 2014.
\(^{17}\) Lavanex (2011)
\(^{18}\) And potentially the more recent European Asylum Support Office.
\(^{20}\) Recital 49
enhance the exchange of information\textsuperscript{21} and exchange of practices in the fight against transnational organised crime and terrorism.\textsuperscript{22}

After a short analysis of the security threats identified at EU and UN level (9.1.2), this chapter will look into the legal challenges that combining AFSJ and CFSP objectives brings (9.1.3). Subsequently, this chapter will look at substantive issues. First, the chapter will look into two fields in which the interrelations between the CFSP and the AFSJ have been raised disputes pertaining to the foundations of the EU: namely the fight against terrorism (9.2) and the fight against maritime piracy in the framework of operation ATALANTA (9.3). Finally, the chapter will look in to other initiatives that bring together AFSJ objectives with CFSP ones (9.4) as well as the impact that variable geometry has on these initiatives (9.5) before drawing some conclusions (9.6).

\textbf{9.1.2 The Nexus Between the European Security Strategy and the External Dimension of the AFSJ}

The 2003 Security Strategy of the EU\textsuperscript{23} was adopted shortly after the adoption of similar documents by the Union’s allies in the aftermath of 9/11\textsuperscript{24} and, like those documents, the EU Security Strategy aimed at identifying and analysing new security threats in order to unveil the plans to fight them. The document clearly served a dual purpose and aimed not only at pinpointing global security threats that could affect the EU beyond military-related concepts, but it also aimed at presenting the EU as a global security actor. More precisely, the Strategy identified terrorism, the proliferation of weapons of mass destruction, regional conflicts, state failure and organized crime as ‘Key Threats’ and held that in order to fight these new threats the EU had to work on three objectives: preparedness, a secure neighbourhood and multilateralism.

\begin{footnotesize}
\begin{itemize}
\item[21] Recital 60\textsuperscript{21}
\item[22] Recital 78\textsuperscript{22}
\item[23] A Secure Europe in a Better World. European Security Strategy, 12 December 2003.\textsuperscript{23}
\item[24] Such as the National Security Strategy adopted by the USA in 2002, the Concept of National Security adopted by Russia in 2000 or the Strategy to Address Threats to Security and Stability in the Twenty-First Century adopted by the OCSE in 2003. For a general overview of these documents, see Bailes and Wetter (2010), Security Strategies in Max Planck Encyclopaedia of Public International Law, in \url{www.mpeil.com}.\textsuperscript{24}
\end{itemize}
\end{footnotesize}
In parallel to the EU initiative of 2003\textsuperscript{25}, the international community developed a new vision that should guide the collective security system embodied by the UN. Hence, whereas the concept of collective security was traditionally linked to threats to or breaches of peace and mainly had a military acceptation, the report “In Larger Freedom” by the United Nations Secretary-General of 2005 embraced a broader concept of what should be considered as a threat to peace for the purposes of collective security\textsuperscript{26}. Thus, as suggested by the \textit{High-level Panel on Threats, Challenges and Changes} a security threat should be considered as “[a]ny event or process that leads to large-scale death or lessening of life chances and undermines states as the basic unit of the international system”\textsuperscript{27}. Therefore, the report argued that the notion of “threat to peace” should be construed as to comprise not only interstate and internal conflicts, but also i) economic and social threats such as poverty, infectious diseases and environmental degradation, ii) nuclear, radiological, chemical, and biological weapons, iii) terrorism and iv) transnational and organized crime.

It appears from this short overview that there are a number of points in common between the two strategies. Firstly, the two visions convey in affirming that the notion of security threats should be construed as to include events other than internal and international conflicts. Yet, this first statement should not be overly emphasized: after all, the Security Council had already had the occasion to affirm that the notion of a threat to peace and collective security went beyond military action in relation to generalized systems of racial discrimination as it happened in South Africa and South Rhodesia.\textsuperscript{28} Therefore, a first common emerging element of these documents is not the departure from a military-centred notion of threats to peace and security; \textit{rather}, the emerging element is posed by the recognition and codification in a written document of phenomena that, such as transnational organised crime, cannot be related to a country but nonetheless constitutes a threat to peace and security. Secondly, there is convergence between the two documents also in relation to the identification of new specific threats: thus, terrorism, transnational organized crime, corruption and human trafficking are identified as threats that require a global and regional

\textsuperscript{28} On the actions undertaken by the UN in these occasions see Conforti (1999).
response. Lastly, a third point in common is represented by the non-legislative nature of the documents.  

However, the convergence existing at the political level regarding the identification of new security threats and the idea according to which the fight against these threats should follow a multi-instrument approach leaves, or actually opens – especially at the EU level – a number of legal questions.  

Indeed, while these strategic documents provide a fairly clear notion of what must be considered as a security threat, they do not provide an insight about the instruments to be adopted in order to tackle such threats in concreto. At UN level, this expansion of the notion of threat to peace, although generally accepted, poses the problem of preparedness and adequacy of the existing UN mechanisms for response. Hence, as it has been recently observed, while the UN Charter broadly defines a threat to collective security as any threat to the peace, “the specific powers of response outlined by the Charter assume that the threats can be traced back to a single national government with which one can mediate, negotiate, arbitrate or engage militarily”.  

Therefore, the new proposed understanding of what constitutes a threat to collective security “explodes the Charter’s state-centric model for maintaining peace and security” because it falls outside the sphere of action of the powers that were conferred to the Security Council back in 1945. Yet, while at the UN level the discretionary powers possessed by the Security Council together with those of the General Assembly have already proven to be capable of providing innovative and effective measures to respond to international crises, the question appears more complex in the context of the EU.

As De Baere observed, unlike most nation states the EU “must always give precedence to considerations of competence over considerations of

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29 In this respect, however, it must be borne in mind that these documents “may declare, and seek to impose on those who are subject to [their] guidance, a certain attitude to the law, or an interpretation of the law, or an operational intent that relates to existing law either supportively or in some problematic way”

30 Danchin and Fischer (2010)

31 Wolf (2010)

32 Ibid.

33 In this respect, suffice it here to mention, as an example of the difficulties encountered at UN level to regulate in a manner consistent with the principle of the rule of law and human rights, the sanctioning regime established by Resolution 1267 (1999) of the Security Council; see Gargiulo and Vitucci (eds.) (2009) and Fassbender (2011)

34 I refer, for instance, to the establishment of the ICTY in 1993. UN Security Council Resolution 827 (1993) formally establishing the International Criminal Tribunal for the former Yugoslavia.
effectiveness"\textsuperscript{35} when considering the response to an international situation. This is a consequence of the founding principle of conferral (Article 5 TEU) as an expression of the allocation of powers established by the Treaties within the EU legal order and it brings, as a corollary, the rules on the choice of the proper legal basis.\textsuperscript{36} Considerations over competence issues in EU constitutional discourses, however, not only pertain to the vertical distribution powers between Member States and the EU, but also to the horizontal balance of powers between the institutions.\textsuperscript{37} Moreover, both vertical and horizontal dimensions play a role in the division of powers between the TEU and the TFEU.

As a consequence of the principle of conferral and the horizontal distribution of powers within the Union, action by the EU must always be construed in connection to a specific legal basis and a Treaty objective. Moreover, the constitutional duty to anchor concrete measures to a legal basis must be based on objective criteria amenable to judicial review in the context of both internal\textsuperscript{38} and external action.\textsuperscript{39} However, the Court of Justice has also acknowledged the possibility of allowing the use of more than one legal basis for the adoption of a measure or the conclusion of an agreement. Indeed, the CJEU has held in this respect that when a measure pursues a number of objectives without one being incidental to another, then a measure can be founded upon more than one legal basis.\textsuperscript{40} Therefore, the possibility to combine CSFP and AFSJ actions as envisaged by the EU Security Strategy and strategic documents of the AFSJ previously analysed could be – in principle – possible.

However, the reality is more nuanced than this and the policy impetus given to the admixture of CSFP and AFSJ policies poses, in reality a number of legal issues. The first, \textit{immediate}, issue pertains to the horizontal distribution of competences between the TEU and TFEU. However, taking into consideration that CFSP and CSDP measures to combat new security threats should, according to the EU’s policy programmes, be linked to AFSJ domains such as criminal

\textsuperscript{36} The principle of conferral is a founding principle as elaborated by the CJEU; Chapter 6 above.
\textsuperscript{40} \textit{Commission v. Council (Rotterdam Convention)}, Case C-94/03, [2006] ECR 1-1, par. 36.
law, administrative sanctions, data exchange and police cooperation, it emerges clearly that the admixture of the CFSP with the AFSJ begs for an analysis of other constitutional aspects that belong to founding principles of the EU such as the principles of democracy, judicial review and protection of human rights. And indeed, taking into account the de minimis role that the EP and the CJEU have, in the CFSP and the CSDP, there are good reasons to question the constitutional legitimacy of the admixture of the AFSJ with the CFSP and the CSDP.

**9.1.3 Mission Impossible? The Constitutional Framework of the EU and the Combination of the External AFSJ with the CFSP: Setting the Scene**

**9.1.3.1 From the Rule of Precedence to “Catch 40”**

The issue of combining security objectives with other policies of the EU for the conclusion of an agreement or otherwise engage in international missions and actions is not the result of the recent policy developments such as the 2011 CSDP/AFSJ document or the 2010 Stockholm Programme. Indeed, while the novelty brought by those documents resides in the express call to combine the AFSJ with the CFSP and CSDP, the latter fields were already combined with other external relation policies. This is the case of the affair that was brought to the attention of the Court of Justice in *Commission v Council (ECOWAS).* The facts of the case are known and have been thoroughly discussed. In 2005 the Commission challenged Joint Action 2002/589/CFSP on “the European Union’s contribution to combating the destabilizing accumulation and spread of small arms and light weapons” and its implementing decision. In essence, the Commission at the time considered the act in question as an implementation or development of the Cotonou Agreement that had been signed in 2000 and that entered into force in 2003. Thus, while the Council had adopted the contested measure on the basis of CFSP powers, the Commission argued that the act in question fell within the scope of powers conferred to the EU qua EC Treaty and its Development Cooperation policy. However, since the act really fell within the scope of both the CFSP and the Development Policy of the EU, one possible solution would have been to apply the ‘Rotterdam Convention doctrine’ and

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41 *Commission v Council (ECOWAS)*, Case C-91/05, [2008] ECR I- 3651.
42 See *inter alia* Wessel and Hillion (2009).
43 Council Decision 2004/833/CFSP.
45 Development Cooperation was regulated by Articles 177-181 TEC, now 208-211 TFEU.
46 Supra note 40
impose the use of a dual legal basis for the acts in question. However, because of the profound divergences in the decision-making procedures that existed (and still exist) between the CFSP and the (then) TEC on the one side, and because of the existence of Article 47 TEUaL on the other, the Court held that such solution was not applicable. 47

Indeed, because Article 47 TEUaL was considered to contain a rule of precedence that favoured the EC Treaty over the EU one, the CJEU held that the simultaneous use of two legal bases belonging to the two Treaties was impossible:

"Since Article 47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community," 48.

Since then, the Lisbon Treaty has amended Article 47 TEUaL and Article 40 TEU now regulates the relationship between the TEU and the TFEU. However, the latter provision has abrogated the rule of precedence that favoured the former Treaty on the European Community against the TEU and has introduced an ‘equal protection clause’:

"The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the

47 Old art. 47 TEU held: “Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them” (emphasis added).
48 Case C-91/05 Commission v Council (ECOWAS), par. 77.
institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.”

In a similar way to the rule called Catch 22 that is at the centre of the novel by Heller and that is mentioned in epigraph to this Chapter, Article 40 TEU appears as a ‘legal imbroglio’. Indeed, while from a policy and political perspectives the equal protection clause may be sound, it does not help to identify the parameters and therefore distinguish external action as an expression of the TEU and external action as an expression of the TFEU. Thus, while Article 40 TEU clearly demands operators as well as interpreters to abandon the approach used by the Court in the ECOWAS case, it is less clear what criteria should now be applied in order to identify the proper legal basis for measures that pursue a CFSP goal as well as a goal belonging to the specialised powers anchored in the TFEU.

In their analysis of the ECOWAS case, Wessel and Hillion argued that there are a number of other criteria that have been used by the CJEU in cases pertaining to the identification of the correct legal basis that could be used also in the context of having to establish the legal basis for agreements that simultaneously pursue CFSP and other external relations objectives that belong to one of the policies regulated within the TFEU. For instance, they mentioned the criterion connected to the role of the European Parliament in the decision making process and they argue that the Court of Justice could still make use of such criterion and give precedence to the legal basis that better reflects the democratic principle. However, while this argument is convincing in point of principle, the use of the criterion on ‘democratic representativeness’ and the role of the EP in order to

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49 Van Elsuwege (2010)
50 I refer to paragraphs 75 to 77 of the ECOWAS judgement of the Court of Justice where it was held that: “75. With regard to a measure which simultaneously pursues a number of objectives or which has several components, without one being incidental to the other, the Court has held, where various legal bases of the EC Treaty are therefore applicable, that such a measure will have to be founded, exceptionally, on the various corresponding legal bases [...]. 76. However, under Article 47 EU, such a solution is impossible with regard to a measure which pursues a number of objectives or which has several components falling, respectively, within development cooperation policy, as conferred by the EC Treaty on the Community, and within the CFSP, and where neither one of those components is incidental to the other. 77. Since Article 47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community.”
51 Wessel and Hillion (2009), p. 584
52 Idem
identify, rectius: in order to prefer a certain legal basis to another, between the TEU and the TFEU would probably breach the division of powers between institutions as established by the Treaties since, as it was discussed in Chapter 7, also the founding principle of ‘democracy’ must necessarily be interpreted systemically and cannot – in the light of Article 40 TEU – be interpreted to the detriment of the provisions and procedures established within the TEU Treaty. In other words, while the principle of democracy as codified by Article 2 TEU would support the criterion indicated by Wessel and Hillion, this does not seem applicable as a general rule to the present context since such criterion would de facto reduce disproportionately the sphere of action of the CFSP; and this is confirmed by the decision of the CJEU in case C-130/10 European Parliament v Council decided in 2012 and pertaining to the choice of the proper legal basis to adopt anti-terrorism ‘smart sanctions’. At the same time, as we shall see at a later stage, there are specific cases in which the argument based on the role of the EP in the decision making process, as suggested by Wessel and Hillion, should be adopted.

Van Elsuwege on the other hand argued that taking into account what the CJEU held in Opinion 1/08, it should be possible to conclude an agreement by means of a plurality of legal bases requiring different decision-making procedures. However, also in this respect, it must be borne in mind that the different models of decision-making discussed in Opinion 1/08 fell within the single context of the Common Commercial Policy and that the different voting systems at stake in the case concerned primarily the voting procedures applicable within the Council. Therefore, taking into consideration that the majority of decisions by the CJEU on this topic exclude the use of a dual legal basis when the decision-making procedures are incompatible, in the context of the existing dichotomy

53 The issue would probably be different if the choice of the legal basis had to be made, for instance within the TFEU and between two legal bases; one of which where the EP has to consent (e.g. Article 352 TFEU), the other where the EP operates under the ordinary legislative procedure.
54 Part II, Chapter 5, Section 5.3.2.1) Democracy, of this study
55 Case C-130/10 European Parliament v Council, judgement 19 July 2012, NYR, paragraph 79. See Blockmans and Spernbauer 2013 in support of this argument.
56 Infra, this Chapter.
57 Opinion 1/08 Concerning the conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union, 30 November 2009
58 For an argument a contrario, Van Elsuwege (2010), p.1008
59 See Case C-130/10 European Parliament v Council, judgement 19 July 2012, paragraphs 47-48, Case C-300/89 Commission v Council (Titanium Dioxide) [1991]
between a TEU and a TFEU legal basis, the latter solution proposed is not fully convincing since the decision-making procedures for the conclusion of agreements under the CFSP and under other TFEU-based policies are undoubtedly incompatible.\(^{60}\) Therefore, and bearing in mind the ‘catch’ of Article 40 TEU, the solution to the legal question addressed here cannot be found by interpreting restrictively or extensively this provision. This means that the solution to the question concerning the identification of a criteria to establish when a certain agreement must be based on the CFSP and when an agreement must be based on a AFSJ provision\(^{61}\) cannot be found by antagonising the two Treaties and their objectives\(^{62}\) since the EU and the two Treaties form a single, integrated polity\(^ {63}\) in which the different instruments of external relations have common objectives as established in Article 21 (2) TEU. Rather, the solution is to be found on the basis of a case-by-case approach that prioritises substantive elements rather than ‘policy objectives’ and that is anchored to the Article 218 TFEU, the provision that disciplines the conclusion of international agreements.

9.1.3.2 From a rule of precedence based on objectives, to a rule of exclusivity based on substance

Indeed, the solution to this problem comes, albeit indirectly, from moving attention to Article 218 TFEU rather than focusing on Article 40 TEU. Article 218 (6) TFEU affirms that the Council will conclude international agreements alone if, and only if, “agreements relate exclusively to the common foreign and security policy”.\(^ {64}\) Therefore, the combined reading of Article 40 TEU with Article 218 (6) TFEU establishes a rule of exclusivity whereby only if an agreement relates exclusively to the CFSP, a CFSP legal basis must be used; whereas in all other cases in which such exclusivity does not apply, and taking into consideration the incompatibility between the decision-making procedures in the CFSP with the ones applicable for the AFSJ under the TFEU for the conclusion of international agreements, only a TFEU legal basis must be used.


\(^{60}\) See also Blockmans and Spernbauer 2013, p.18

\(^{61}\) But the same is true for other fields in which the EU is externally active.

\(^{62}\) For an example of this erroneous technique see the arguments of the EP as reported in the Opinion of AG Bot and in the judgment of the Court of Justice in Case C-130/10 EP v Council (terrorist sanctions), paragraphs 12-16 and 28-34. See infra this chapter for an analysis also in relation to Case C-658/11 EP v Council (extradition agreement)

\(^{63}\) Article 1 TEU

\(^{64}\) Article 218 (6) TFEU
this perspective, as other authors have emphasised, it seems that with the abrogation of Article 47 TEUaL, the choice of the proper legal basis will have to follow the ‘centre of gravity test’ in a context of equal standing between the two Treaties. While this latter proposition appears in line with the argument just put forward in the preceding paragraph, it is submitted by the present author that the rule of exclusivity mentioned above is something other, something deeper, than a call to revisit the ‘centre of gravity test’ that the CJEU has already used.

It appears from the preceding paragraphs that the rule of precedence (and preference) existing prior to the entry into force of the Lisbon Treaty has been replaced by a rule of exclusivity; and the latter is more restrictive than the former. While under the authority of the ECOWAS case it was sufficient to demonstrate that a certain agreement was either predominantly linked to the former TEC Treaty or equally belonging to the (then) TEC Treaty and the TEUaL Treaty to give precedence to the TEC legal basis by virtue of Article 47 TEUaL, today the rules to follow differ considerably. Moreover, the reference in Article 218 (6) TFEU to the rule of exclusivity seems to suggest that this new test to establish the correct legal basis is somewhat stricter than a mere ‘centre of gravity’ one: while gravity, as a force of attraction, is capable of operating within a radius that may well be very extended and touch a very remote (policy) object(ive), the rule of exclusivity suggests that the test to determine whether an agreement must be concluded on a CFSP legal basis is stricter and that the CFSP legal basis will have to be applied only if an envisaged agreement, because of its content, can exclusively be concluded under a CFSP/CSDP basis; thus allowing lawyers to focus back on the exegesis of substantive norms, rather than with policy objectives.

65 Blockmans and Spernbauer 2012
66 It is important to emphasise that while Article 218 (3) pertaining to the submission of recommendations concerning “the decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team” distinguishes agreements that fall ‘exclusively or principally’ to the CFSP as a parameter to establish whether it is the Commission or the HR that has to submit the said recommendations, Article 218 (6) on the decision on the conclusion of an agreement uses only the ‘exclusivity’ parameter to establish the decision-making procedure to conclude an agreement. This means that while at the phase opening negotiations the precedence is given to the HR to submit recommendations, the final choice pertaining to the conclusion of the agreement will necessarily have to follow the stricter test of exclusivity to base an agreement on the CFSP/CSDP and not on another provision of the TFEU.
67 Wessel and Hillion 2009
68 See infra, Section 9.2) and 9.3)
Indeed, taking into account the abrogation of the said *rule of precedence* and the existence of the ‘*exclusively*’ parameter codified in Article 218 (6) TFEU, the choice on the correct legal basis needs to abandon *not only* considerations related to the relationship between the Treaties -since the Treaties have equal standing within the legal order now, *but also* considerations pertaining to ‘policy objectives’ pursued by the envisaged agreement under the ‘centre of gravity test’.  

Accordingly, the new test should follow purely *substantive parameters* in relation to:

i) first, the interpretation of the scope of powers attributed to the TEU and the TFEU respectively for the conduct of EU external relations

and,

ii) second, the relation between the specific powers of the TEU and the TFEU with the actual measures envisaged by the agreement the EU wants to conclude.

In other words, it is submitted here that the approach to be followed in order to choose the proper legal basis in relation to ambits in which the security objectives bring together the CFSP and the AFSJ, is not the ‘objectives-based’ approach used in the ‘centre of gravity test’ since this would only add a *substantive impasse* to *the legal catch* introduced by Article 40 TEU; this is because, as we have seen, the policy objectives of the AFSJ and the CFSP, by virtue of the documents elaborated by the Council and the Commission, coincide. Rather, what is needed is to develop a substantive, content-based analysis on a case-by-case basis so as to determine whether the ‘rule of exclusivity’ enshrined in Article 218(6) TFEU is applicable. And in this respect, the use of the founding principles of the EU legal order can operate as coadjutants to make the correct choice.

All in all, it appears from the foregoing that while the EU policy documents demand more coherence and integration between the different (external) policies of the EU in order to fight against new security threats, the existing division between the CFSP and other internal and external policies seem to jeopardise such a result in the sense that the complex rules pertaining to external relations may prove to be an obstacle for the EU to deliver a single, coherent and credible

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69 See also Blockmans and Spernbauer 2013 that hint at this possibility.
response. Moreover, as we have seen in Part One of this study, the call for integration of policies and instruments and the explosion of the external AFSJ has often lead to the adoption of measures that later were trumped by human rights or other constitutional violations.

In order to analyse the constitutional difficulties that the EU has been facing with a view to propose a solution to the legal, constitutional challenges of combining AFSJ with the CFSP while respecting the constitutional foundations of the EU, the analysis that follows will principally take into consideration two recent scenarios in which the necessity to identify the correct legal basis has resulted in horizontal conflicts of attribution within the EU legal system. Moreover, the two cases discussed below will highlight that behind the formal challenge on the identification of the proper legal basis, the borderline initiatives adopted on the on the CFSP policy also have serious implications in relation to the respect for human rights, leaving the interpreter to wonder the extent to which the foundations of the EU legal system are taken into account when developing these policies. Also in this respect, and taking on board the duty of the EU to abide by its founding principles, the sections that follow will propose a way to combine the CFSP and the AFSJ without having to violate constitutional principles.

9.2 The Fight Against Terrorism and the CFSP/AFSJ Dichotomy

9.2.1 The Specific Case of Sanctions Against the Financing of Terrorism, Terrorist Organisations and (Suspected) Terrorist

9.2.1.1 Introduction

As Eckes has argued, “counter-terrorist sanctions against individuals have acquired a somewhat dubious fame”. 70 Indeed within the EU context counter-terrorist sanctions have been criticised for a number of reasons and on the basis of a number of constitutional aspects. 71 A first line of criticism pertained to the fundamental rights violations that the system triggers, especially in relation to the right for judicial review. 72 A second line of criticism has been put forward in

70 Eckes 2012, p.113
71 For a recent excursion of the literature see Larik 2014
72 See Part I of this study. There is an abundance of literature on this topic, see in particular the more recent work of Eckes 2012 and O’Neill 2014
relation to the consequences that their annulment at EU level may have for the relationship between EU law and international law. Thirdly, the issue of counter-terrorist ‘smart sanction’ has been criticised in relation to the choice of the legal basis and the division of competences between the CFSP pillar and the AFSJ. While the human rights aspect and the issue on the relationship between international and EU law have been touched upon in earlier Chapters of this study, this section wishes to deepen the analysis pertaining to the third aspect; however, this will eventually lead back to the fundamental rights arguments criticising counter-terrorism sanctions.

In the Kadi II trial, decided in 2008 by the CJEU, one of the pleas for annulment pertained to the choice of the legal basis. More precisely, it was argued at the time that while the Treaties allowed the EU to adopt, on the basis of Articles 301 and 60 TEC economic sanctions against third countries and targeted sanctions against state officials; the same provisions, even when topped by Article 308 TEC, could not be interpreted as legitimising the adoption of restrictive measures directed against individuals and non-State entities. At the time the CJEU considered, on the contrary, that the combination of the three provisions constituted the correct legal basis. Indeed, while the CJEU had to agree with the fact that, at least prima facie, Articles 60 and 301 TEC did not “provide for any express or implied powers of action to impose such measures on addressees in no way linked to the governing regime of a third country such as those to whom the contested regulation applies”, that gap could be filled by having recourse to Article 308 TEC as a legal basis in addition to the other two. Moreover, and interestingly, the CJEU at the time held that the admixture of Article 308 TEC “enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at

73 See in particular de Burca 2009 and for a different perspective Larik 2014
74 For an analysis of this aspect see Eckes 2012
75 Joined cases C-402/05 P and C-415/05 P Kadi and Al Barakaat ECR I-6351
76 Article 301 TEC authorised the Council to ‘interrupt or to reduce … economic relations with one or more third countries’ through unspecified ‘urgent measures’ that are necessary to carry out the Union’s CFSP
77 Article 60(1) TEC authorised the Council to take measures envisaged by Article 301 TEC with respect to the ‘movement of capital and on payments as regards the third countries concerned’.
78 For a reconstruction of the arguments presented in front of the CJEU see paragraphs 121-157 of the Kadi judgment
79 Joined cases C-402/05 P and C-415/05 P Kadi and Al Barakaat ECR I-6351, paragraph 216
individuals whereas, under Articles 60 EC and 301 EC, no role is provided for that institution”. In this respect there are two main aspects that appear noteworthy. The first is that the CJEU refused to interpret Articles 60 and 301 TEC restrictively as two instruments that allowed the EU only to adopt sanctions against States and State actors; secondly, to validate the use of Article 308 TEC the CJEU used the argument of the participation of the EP in the decision-making process. However, the institutional aspects of the Kadi ruling were soon to be overruled by the entry into force of the Lisbon Treaty with its reformed provisions concerning the adoption of smart sanctions.

Indeed, the entry into force of the Lisbon Treaty has brought two significant changes in relation to the adoption of smart sanctions by the EU. First, Articles 60 and 301 TEC have been replaced by a new provision, Article 215 TFEU. This provision reads as follows:

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

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

Firstly, while paragraph 1 of Article 215 TFEU builds on the wording and purposes of Articles 60 and 301 TEC, the second paragraph expressly provides for the adoption of sanctions against natural and legal persons. In this way the latter introduction at primary law level settles one of the issues that was raised in the Kadi trial concerning the use of Article 308 TEC (now 352 TFEU). However, while at the time of the Kadi trial the CJEU, had placed emphasised

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80 Idem, paragraph 235
that the use of Article 308 TEC would include the participation of the European Parliament for the adoption of targeted sanctions,\textsuperscript{81} the Lisbon Treaty, \textit{rectius:} the Member States, have manifestly rejected that connection and have expressly excluded the EP from the process. Lastly, while the last paragraph of Article 215 TFEU on ‘legal safeguards’ may appear as a welcome innovation against the criticisms and litigation that stemmed out of the previous sanctioning regime, this provision does not add much to what the CJEU had already had the occasion to affirm at the time of the \textit{Kadi} trial; conversely, by imposing the establishment of ‘\textit{ad hoc}’ rules, this provisions could be interpreted as a legal base to establish a separate regime of ‘legal safeguards’ against what is provided in Articles 2, 6 TFEU and 51(1) EUCFR.\textsuperscript{82}

Parallel to the introduction of Article 215 TFEU, the Lisbon Treaty has also introduced Article 75 TFEU. Article 75 TFEU, as we have seen in Chapter 5, is a new provision that confers the EU with the necessary powers to “\textit{define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities}” with a view to combat terrorism. While this provision fills a gap at primary law and thus finally legitimizes the adoption of AFSJ-based counter-terrorism measures,\textsuperscript{83} it also opened the question concerning the definition of the field of application of this provision \textit{vis-à-vis} Article 215 TFEU.

As others have observed,\textsuperscript{84} while it goes without doubts that Article 215 TFEU allows the EU to implement the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries and to implement other types of smart sanctions against natural and legal persons based on a CFSP decision, Article 75 TFEU, in combination with Article 25 TEU,\textsuperscript{85} could be read in the same way in relation to the EU’s counter-terrorism policy. Indeed, while Article 215 TFEU serves as the operating arm of a CFSP decision

\textsuperscript{81} Paragraph 235 of the judgment, supranote 77 and 78
\textsuperscript{82} The same applies, \textit{mutatis mutandis}, to Article 75 TFEU
\textsuperscript{83} For an analysis see Eckes 2009.
\textsuperscript{84} Eckes 2012, Hillion 2014
\textsuperscript{85} Article 25 TEU: The Union shall conduct the common foreign and security policy by: (a) defining the general guidelines; (b) adopting decisions defining: (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii); and by (c) strengthening systematic cooperation between Member States in the conduct of policy.
and can be used for a variety of purposes, Article 75 TFEU is specifically framed to confer to the EU the necessary powers to adopt sanctions to fight against terrorism and from this perspective, results as a *lex specialis* in comparison to Article 215 TFEU which may serve any CFSP objective. Moreover, the combined reading of Article 75 TFEU with Article 216 (1) TFEU should be understood as empowering the Union to conclude agreements with third countries or international organizations; thus conferring the AFSJ-based provision a wide scope of application for countering terrorism.

### 9.2.1.2 Case C-130/10 European Parliament v Council

After the entry into force of the Lisbon Treaty, the Council adopted, on the basis of Article 215 TFEU, Regulation 1286/2009 to implement Common Position 2002/402/CFSP. Against this decision, the European Parliament challenged the adoption of Regulation 1286/2009 on the basis of two main grounds. First, it argued that because the Regulation in question aimed at fighting terrorism, the correct legal basis should be Article 75 TFEU since this is the specific, counter-terrorism legal basis provided for 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 the European Parliament in the decision-making process, the protection of fundamental rights.

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86 The wording of Article 215 is very broad so as to cover the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries as well as smart sanctions against natural and legal persons with a view to implement, lato sensu, the a CFSP decision.
87 For an analysis of Article 216 TFEU see Chapter 6
88 Art. 215 TFEU: 1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. 3. The acts referred to in this Article shall include necessary provisions on legal safeguards.
As Eckes has argued, there were four different ways of delimiting the scope of two legal bases in question.\footnote{Eckes (2012), pp.121-122} A first possibility was to affirm that the choice of the legal basis at EU level depended on the origin of the listing: Article 75 TFEU for autonomous sanctions, Article 215 TFEU for sanctions based the specific regime based on UN Security Council Resolution 1267/1999. A second option would have been to say that Article 75 TFEU was applicable as a \textit{lex specialis} in the field of counter terrorism whilst Article 215 TFEU was applicable to government officials. Thirdly, Articles 75 TFEU and Article 215 TFEU could have been understood as a joint legal basis and, fourthly, Article 215 TFEU could have been indicated as the sole procedure to implement UN Security Council Resolutions whilst Article 75 TFEU would be applied only for counter-terrorist measures not based on a UN Security Council Resolution.

With its decision, the Court of Justice rejected the action of the EP but did not pick up on any of the propositions above; rather, as pointed out by Hillion,\footnote{Hillion (2014), p.8} the CJEU considered satisfactory enough that Article 215 TFEU replaced the old combination of Articles 60, 301 and 308 TEC so as to confer the EU with the necessary powers to adopt measures to interrupt or reduce economic relations with one or more third countries and against natural and legal persons\footnote{Paragraphs 50-54} and added that the specific ambit of Article 215 TFEU is to provide a bridge between a CFSP Decision and its legislative implementation.\footnote{Paragraphs 55-66} In doing so, the CJEU affirmed that because terrorism constitutes a threat to peace and international security, the fight against \textit{international} terrorism is an objective in which CFSP considerations prime over the scope of application of Article 75 TFEU.\footnote{Paragraph 61 and 63} Much like AG Bot in his Opinion,\footnote{Opinion of the Advocate General delivered on the 31 January 2012, in particular paragraphs 62-69} the CJEU took the view that given the broad scope of powers conferred to the Union \textit{qua} CFSP in the field of external relations,\footnote{Article 24(1) TEU reads: The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security.} and taking into consideration that terrorism constitutes a threat to peace and international security, the decision on the choice of the legal basis had to follow
the CFSP Decision and use Article 215 TFEU to implement the UN Security Council Resolution.\textsuperscript{98}

As Ott has highlighted, with this ruling the CJEU held that, above considerations of policies and objectives, “the background and procedure of the restrictive measure determines the application of either Article 215 TFEU or Article 75 TFEU”.\textsuperscript{99} This is because the CJEU considered that once the Council has ‘occupied’ a specific policy objective requiring economic sanctions or restrictive measures with the adoption of a Decision based on Article 25 TEU, the only legal basis to implement and regulate such Decision is Article 215 TFEU.

Moreover, while the CJEU does not follow AG Bot in affirming that the objectives enshrined in Article 21(2) (c) exclusively belong to the CFSP,\textsuperscript{100} the Court nonetheless seem to affirm that because the fight against international terrorism is a matter pertaining to preserving peace, preventing conflicts and strengthening international security, this specific field of EU competence is defined (exclusively?) by the decisions adopted within the CFSP context.\textsuperscript{101} It follows from this last point that, not only with this judgment has the CJEU endorsed the \textit{PESCalisation}\textsuperscript{102} of counterterrorism, but also, as pointed out by Ott and Hillion, that this vision might diminish the role that Article 75 TFEU in combination with 216 TFEU might play for the conclusion of Agreements related to the fight against international terrorism.\textsuperscript{103} Furthermore, the judgment may also be interpreted so as to affirm that, on the basis of a ‘first pass, the post’ kind of rule, whenever a CFSP Decision ‘occupies’ a domain related to any field falling within the scope of Article 21 (2) a)-c) TEU, the EU will be able to conclude an international agreement based on such Decision and Article 37 TEU to the detriment of a TFEU provision with the result of ‘watering down’ Article 216 TFEU.\textsuperscript{104}

All in all, it appears from the foregoing that the CJEU maintained the position according to which Article 215 TFEU is the provision necessary to adopt

\begin{footnotes}
\item[98] Paragraph 65
\item[99] Ott (2012), p.593
\item[100] Paragraph 64
\item[101] See in Particular the combined reading of paragraphs 61 a and 62. For an interpretation \textit{a contrario} on paragraph 62 see Hillion 2014
\item[102] Hillion 2014
\item[103] Ott 2012, p.594, Hillion 2014, p.9
\item[104] See infra section 9.4) and Hillion 2014, p.10
\end{footnotes}
measures pursuant to a CFSP decision; and that by doing so it emphasized the interrelation between the fight against international terrorism and the powers and objectives attributed to the CFSP. From this perspective, and taking into account the neutral position of Article 40 TEU, the CJEU’s decision clears off the table a valid constitutional question on the division of tasks between Articles 75 and 215 TFEU. As such, the decision does not re-define the allocation of powers defined by the Treaties, but it does reveal that the distinction between CFSP action and TFEU ones is far from being clear: whilst the policy documents call for synergies and admixture, the legal reality that emerges from this case reveal that the different amits of external action by the EU in the field of security provokes numerous inter-institutional tensions that the Court settles without paying too much attention to constitutional nuances.

From the perspective of founding principles such as democracy and human rights protection, the CJEU held in Parliament v Council (Restrictive measures) that the role of institutions and procedures do not determine the choice of the proper legal basis. This statement was made to reject the position of the EP according to which, and on the basis of a number of precedents of the Court, the choice between Article 75 TFEU and Article 215 TFEU had to favour the former since only under Article 75 TFEU the EP acted under the ordinary legislative procedure whereas in the latter case the EP is merely informed. However, it is true that following the EP with its argument would have emptied Article 215 TFEU of much of its scope. In this respect it emerges clearly how the insertion of two very similar provisions such as Articles 215 and 75 TFEU in a context governed by Article 40 TEU has brought the EU system to a double imbroglio, in which only formalistic decisions and interpretations could be adopted, leaving the CJEU with little room for manoeuvr.

On the other hand, the judgment is to be welcomed in relation to a specific issue concerning the standards of protection of fundamental rights. As we have seen in the previous Section, Articles 75 and 215 TFEU speak vaguely of provisions on legal safeguards that are to be included in the acts adopting sanctions; and as we have argued this could have been interpreted to mean that economic and financial sanctions ex Article 215 TEFU only had to abide by the ‘ad hoc’ rules on legal safeguards as established by the Council each time it adopted an act.

105 Paragraph 79
under the said provision. With the judgment on this case, the CJEU excluded such interpretation and held that while all bodies and acts of the EU have to respect Article 51 (1) of the EUCFR, the last section of Article 215 TFEU is to be interpreted as a provision imposing the adoption of special rules on legal safeguards for those who fall within the scope of restrictive measures; hence the CJEU interpret the said provision as a way to impose on the EU extra care for the protection of the fundamental rights of the targeted persons.

Case C-130/10 European Parliament v Council (restrictive measures) decided by the CJEU in the summer of 2012 essentially asked the CJEU to unfold the principles governing the horizontal division of competences between the TEU and the TFEU. However, the European Parliament probably chose the wrong case to do so. With the introduction of two, extremely similar, provisions on the adoption of restrictive measures, and taking into consideration the equal standing of the two Treaties ex Article 40 TEU, the CJEU could only rely on the exegesis of the two provisions to settle the case. And because the issue at stake concerned a unilateral internal act and not the conclusion of an agreement, the ‘rule of exclusivity’ ex Article 218 (6) proposed in the previous Section could not be applied and the case had to be decided only by defining the scope of application of the two provisions at stake.

Since Article 215 TFEU clearly has the scope of adopting sanctions on the basis of a CFSP act, the CJEU chose to maximize this against the arguments favouring Article 75 TFEU. Moreover, because Articles 215 and 75 TFEU now provide for an identical clause on legal safeguards and judicial review against restrictive measures, also the argument based on human rights protection that could have favoured Article 75 TFEU against a CFSP-related act was not sustainable in the present case.

Possibly, the only argument that could have validly been used to choose Article 75 TFEU over Article 215 TFEU was the democratic one, i.e. the fact that only with Article 75 TFEU the European Parliament is involved in the adoption of restrictive measures. In this last respect while it is true that the nature of restrictive measures is still debated and that the GC has refused to apply the safeguards normally applicable in the field of criminal law to restrictive
measures, there can be no doubt that when targeted against individuals not affiliated with government officials, restrictive measures have the same purpose and effect as criminal law measures such as confiscation orders, i.e. a type of criminal law instrument for which modern constitutionalism requires the respect of the principle of legality and, ergo, the participation in the decision-making process of the democratically elected assembly.

Yet, this case confirms that within the EU constitutional order the democratic principle is a relative principle in the sense that it is not a decisive in cases concerned with the choice of the proper legal basis. Moreover, this also means that the democratic principle is not hierarchically superior to other founding principles of the EU legal system and that it must always be balanced with other constitutional rules. Indeed, while in Kadi the breach of fundamental rights was too manifest to do otherwise, in this case legal formalism helped to preserve the position sought by the Council when the CJEU affirmed that “the difference between Article 75 TFEU and Article 215 TFEU, so far as the Parliament’s involvement is concerned, is the result of the choice made by the framers of the Treaty of Lisbon” and choosing Article 75 TFEU “would render Article 215 (2) TFEU largely redundant”.

Clearly, while the democratic principle is enlisted as a founding principle of the EU legal order, this very passage of the judgment confirms that the CJEU interprets this principle very formally (if not restrictively): this means that the CJEU decided not to give the democratic principle a role in the decision of this case even though the substantive elements at the centre of the dispute called for an assessment of the sanction system also from the democratic perspective. Indeed, according to the formalistic approach of the CJEU, since 215 TFEU does not include a role for the EP, then the democratic principle cannot play a role in the analysis of this provision. However, this seems unacceptable since, by implying that the democratic principle and the role of the EP therein can only be considered if there is an express reference or involvement of the EP in a given domain, the CJEU essentially restricts the scope of a fundamental constitutional

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106 Ex-pluribus, T-86/11 Bamba v Council, judgment 8 June 2011, paragraph 43
107 Pantaleo 2012
108 See chapter 5 and on the risks linked to disconnecting Parliaments and democratic representativeness Lupo and Piccirilli 2015
109 Paragraph 82
110 Paragraph 84
111 Chapter 5 above
principle. This is very interesting since it suggests that whilst founding principles of the EU legal order prime over secondary measures such as Regulations, Directives and international agreements, founding principles do not have such force within primary law and cannot play a decisive role in the choice of the proper legal basis in cases where the disputes is related to the horizontal distribution of tasks between the TEU and the TFEU. However, this seems contradictory with the very concept of ‘founding principle’ which, nomen omen, should always be applied and have an impact on the interpretation and application of EU rules, at primary and secondary level.

It remains to be seen, however, the extent to which the CJEU will allow the Council to go in relation to the division of tasks between the CFSP and the AFSJ (or any other external projection of a TFEU-based policy). While in the case at hand the CJEU was caught between a double legal imbroglio, the subsequent Section will analyse another case in which the division of competences between TEU and TFEU in the context of the fight against new security threats was at stake; this time with greater repercussions and significance for the application of founding principles such as the allocation of powers as established by the Treaties, human rights protection and the democratic principle.

9.3 The Fight Against Piracy and the CSDP/AFSJ Dichotomy

The second scenario in which the AFSJ agenda meets with the CFSP one concerns the conclusion of bilateral agreements whose content could be considered as pertaining simultaneously to Title V TEU (CFSP) and to the AFSJ. The combination of foreign policy objectives with AFSJ ones is not problematic from an abstract point of view. However, this becomes problematic in concreto when one considers the governance of the CFSP and CSDP on the one side and the policies of the AFSJ on the other. Indeed, it can be argued from the outset that implementing policies that directly affect the rights and liberties of individuals in a governance setting in which democratic representatives are not decision makers and in which judicial authorities do not have a comprehensive jurisdiction to control the exercise of public authority are at odds. The case study analysed in this section provides an example of when and why the combination
of AFSJ and CFSP objectives may appear, once more, in contrast with the constitutional foundations of the EU legal order.

This is the case of the dispute recently closed by the CJEU in relation to the conclusion of the EU – Mauritius Agreement for the transfer and prosecution of suspected pirates arrested in the framework of Operation Atalanta.\textsuperscript{112} 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.\textsuperscript{113} Parallel 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”.\textsuperscript{114} Following the conclusion of two separate agreements with Kenya and the Seychelles in 2009\textsuperscript{115}, the EU sought to conclude similar agreements with other partners\textsuperscript{116}. In this respect, the latest development occurred was 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. The said agreement, similarly to the ones concluded by the EU with Kenya and the Seychelles, contains detailed provisions on the transfer, detention, trial and the serving of a conviction.\textsuperscript{117}

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

\begin{itemize}
\item \textsuperscript{112} Case C-658/11, European Parliament v Council (Mauritius Agreement), judgment 24 June 2014, NYR.
\item \textsuperscript{114} Article 12, par. 1, second indent of Joint Action 2008/851/CFSP
\item \textsuperscript{115} Exchange of Letter of the 6\textsuperscript{th} 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 10\textsuperscript{th} of November 2009, in OJ L 32/14, 10.12.2009.
\item \textsuperscript{116} Wolff and Mounier 2011
\item \textsuperscript{117} See Article 4 of the EU-Mauritius Agreement, p.4
\end{itemize}
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 require the contracting State to guarantee legal assistance, translation facilities, the right to dispute evidence against him/her and the right to provide evidence on his/her favour. Lastly, the agreements also guarantee the right to silence for suspects and prohibit, where potentially applicable, the application of the death penalty.\textsuperscript{119}

Taking into consideration the detailed regulation of detention conditions and on the rules of trials, there can be no doubt that the agreements concluded by the EU pertain to criminal law and criminal procedure law. 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.\textsuperscript{120} Lastly, since the agreements place a considerable burden on the justice systems of the third country, the agreements also provide for technical cooperation and assistance: from financial resources to technical equipment and know-how to the use of digital means to facilitate the attendance of witnesses.\textsuperscript{121} These last clauses in particular emerge as ‘capacity building clauses’; rather than having a criminal law and criminal procedure nature, these appear more like a technical agreement concluded by the EU under its Economic, Financial and Technical Assistance policy with third countries ex Article 212 TFEU. All in all, a systematic reading of this agreement unequivocally reveals that the EU-Mauritius Agreement in question is an extradition agreement, i.e. an international agreement about criminal procedure law as evidenced by Article 1 of the agreement.\textsuperscript{122}

\textsuperscript{118} Free legal assistance in case the suspected pirate does not have means to pay his/her counsel.
\textsuperscript{119} See Articles 4 and 5 of the EU-Mauritius Agreement for example.
\textsuperscript{120} Idem.
\textsuperscript{121} Articles 6 and 7 of the EU-Mauritius agreement for example.
\textsuperscript{122} 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.
While the content of the agreement in question pertains exclusively to criminal law and mutual legal assistance, the agreement was concluded in the context of operation Atalanta. The EP attacked the Council Decision to authorise the Conclusion of the EU-Mauritius Agreement arguing that the agreement should have been concluded by combining Article 37 TEU with Articles 82 TFEU and 209 TFEU and, consequentially, under the rules of Article 218 (6) (a) (v) TFEU, i.e. rules that impose the Council to obtain the consent of the EP for the conclusion of an agreement. Additionally, the EP contended that the Council had failed to fulfil its obligations ex Article 218 (10) TEU which establishes that the Parliament must be immediately and fully informed at all stages of the procedure leading to the conclusion of an agreement.

9.3.1 The Opinion of the AG and the Judgement of the CJEU: Choosing the ‘Context’ over the ‘Content’ of an Agreement

As we have seen above, the entry into force of the Lisbon Treaty has meant that the division of external competences between the TEU and the TFEU is characterised by a test of exclusivity that must be understood as a consequence of the different decision-making processes applicable within the TEU and within the TFEU. In this case, however, the EP chose to attack the conclusion of the EU-Mauritius agreement precisely on this aspect. However, while the rule of exclusivity seems to imply an either/or type of reasoning, the EP chose to put

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123 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
125 On Judicial Cooperation in Criminal Matters
126 On Development Cooperation
127 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”. 
128 Either the agreement exclusively belongs 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).
forward a more complex argument. Indeed, in spite of the case law sanctioning
the impossibility of combining legal bases that prescribe incompatible decision-
making procedures, the EP sought from the CJEU precisely a ruling which
would impose the reconciliation of incompatible procedures because the
envisaged agreement could not be considered as exclusively belonging to the
CFSP: the EP did not play its cards effectively.

Indeed, since the EP did not contend the use of Article 37 TEU as a legal basis
but merely suggested that such legal basis had to be integrated by Articles 82, 87
and 209 TFEU, the AG and the CJEU only had 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
imposing the impossible, i.e. the combination of different decision-making
procedures for the conclusion of the said agreement.

As a result of the choice made by the EP, the CJEU was facilitated in framing
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”. 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 implicitly asked the CJEU to eventually overrule some
decades of rulings which related to the choice of the legal basis and the ‘centre of
gravity test’; but the Court was not prepared to do so.

Thus, after having reiterated the criteria to establish the proper legal basis, the
CJEU rejected the argument according to which the pursuit of ‘incidental aims’

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129 Paragraph 46
130 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
could affect the choice of the proper legal basis to the point of having to reconsider which part of Article 218 (6) TFEU should be applied. Indeed since the EP did not argue that the principal aim of the agreement was falling outside the CFSP, then 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 only the procedure established by the second subparagraph of Article 218 (6) TFEU was applicable.

While the CJEU, aided by the weak argumentation brought forward by the EP, decided the case with a formalistic approach, the AG took the time of analysing the substantive issues on amount thoroughly. Thus, whilst reaching the same conclusion as the Court in relation to the choice of the proper legal basis, the Opinion of the AG allows interpreters to evaluating 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, 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 focuses and 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. Conversely, he spends three short paragraphs (sic!) discussing the core content of the agreement in question, i.e. the rules on transferring (extraditing) suspected pirates to the Republic of Mauritius for trial without analysing any of the rules contained therein. 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 the same view, it possible to affirm that this view relativizes the ‘exclusivity rule’ and maximises the approach according to which once the CFSP ‘occupies’ a certain domain, only a CFSP legal basis can be used to adopt acts or conclude agreements. From this perspective, it seems that ‘PESCalisation’ is not only affecting the EU’s counter terrorism policy.

9.3.2 An Alternative View: Prioritizing Content over Context

While there can be no doubt that the objectives and the policy 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 it is disproportionate because it advantages the broad scope of the CFSP against policies based on the TFEU; with results that could violate Article 40 TEU and, consequently, 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 also renders the ‘exclusivity test’ and the wording of Article 218 TFEU redundant,

135 Paragraphs 50-55 of the Opinion
136 Paragraphs 62-64
137 Hillion 2014 and preceding Section.
especially if one adheres to the broad mandate that AG Bot confers to Article 21 (2) (a) - (c).\textsuperscript{138}

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. In the preceding Section it was evidenced that 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, 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 assessing the extent to which EU law allows the Council \textit{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,\textsuperscript{139} 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.

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 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;\textsuperscript{140} 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 \textit{formalistic} view. Conversely, it is submitted here that the correct interpretation of the

\textsuperscript{138} This is similar to what the AG concluded in his Opinion in \textit{Case C-130/10 Parliament v Council (restrictive measures)}
\textsuperscript{139} See Paragraph 43 of the CJEU decision
\textsuperscript{140} Schütze 2012, p.169
exclusion contained in Article 24 TEU should be read also for its material or functional conception: legislative acts are legal rules with general and abstract scope addressed to an undetermined group.  

From this perspective it emerges clearly 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 without the participation of the European Parliament. This is because the exclusion of Article 24 TEU should not be solely read in conjunction with Article 289 TFEU (formalistic perspective), but should also be read in conjunction with Article 40 TEU as a means to protect the substantive competences attributed to the EU under the TFEU. Moreover, in the case analysed here this interpretation needs to be read also in relation to the special role that the democratic principle qua Article 2 TEU plays in relation to criminal law matters: while it is true that the principle of legality principally applies to substantive criminal law, it is equally true that norms on criminal procedure may be covered by the principle inasmuch as only legislative instruments and not acts of the executive can adopt or modify criminal procedure rules; and while the scope of application of this rule is not uniform within the EU and under the ECHR, this is a constitutional rule according to Article 111 of the Italian Constitution.  

This means that, notwithstanding the way in which the CJEU and other institutions currently understand the scope of the principle of legality in criminal matters in general, the current approach may well become, from the perspective of Member States, a boomerang against the EU’s policy.

In conclusion, it appears that precisely because of its content the EU-Mauritius Agreement should have not been considered as pertaining exclusively to the CFSP. Rather, in this scenario 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.

141 Schütze 2006
142 For an analysis of the EU and ECHR implications of the applicability of the legality principle under EU and ECHR law see Peers 2011, p.681
In the introductory Section of this Chapter it was argued that the policy emphasis on combining the AFSJ and the CFSP seemed at odds with the constitutional provisions pertaining to the horizontal distribution of competences and powers between the TEU and the TFEU. The case *Parliament v Council* on the transfer of pirates analysed here, however, may lead to the wrong conclusion that the tensions only concerned the balance of powers between the European Parliament and the Council. In a similar way to the decision of the CJEU on restrictive measures, this case was also decided by the CJEU with a very formalistic approach. Yet, this Section tried to argue that the substantive background of the case had constitutional significance not only in relation to the distribution of competences and powers amongst institutions and between Treaties, but also in relation to the respect of the democratic principle in the context of EU external relations.

Thus, while also in this case we can speak of the ‘PESCalisation' of the external dimension of the AFSJ, the overall conclusion is negative: 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, then 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 impose upon the Council to constructively engage with the European Parliament, for example by requiring the two-steps approach presented above.

Instead in the case analysed here 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.\(^{143}\)

Pending the decision of the similar case C-263/14 *European Parliament v Council* on the agreement to extradite suspected pirates to Tanzania, it is

\(^{143}\) Case C-658/11 Parliament v Council (transfer of pirates) judgement 24 June 2014, Paragraph 77
possible at this stage to take a step back and reflect on the significance of the analysis conducted thus far in this Chapter in relation to the research question of this dissertation. In part One it was argued that the ‘Sturm und Drang’ approach in reaction to the different security threats that affect the EU, the European Council and the institutions have prioritized the security concerns over the legitimacy; the Kadi affair was used as an example of this problem, but the judgement of the CJEU was also used as the benchmark against which the externalisation of the AFSJ could be analysed. On top of these considerations, it was also argued that because of its peculiar constitutional settings, the integration of the AFSJ with the CFSP/CSDP was particularly problematic since the CFSP/CSDP do not provide the democratic and judicial guarantees that are provided under the TFEU Treaty –in spite of the positive changes brought by the Lisbon Treaty.144

This section on the fight against maritime piracy shows how the constitutional architecture may well be one of the factors that create tensions between the constitutional foundations and the externalisation of the AFSJ. It also shows that, in the EU the overabundance of provisions on the attribution of powers and divisions of tasks, it is at times difficult to draw borderlines between policies. However, it is difficult to argue that the choice made by the CJEU in the piracy case analysed here is, from a systematic perspective, coherent with the narrative used and the decision reached in Kadi; perhaps the CJEU prefers not to intervene drastically until the something goes wrong.

9.4 Other Ambits in the CFSP and CSDP are Linked with the AFSJ

9.4.1 The Fight Against Terrorism as CFSP and CSDP Competence

EU counter-terrorism initiatives anchored to the EU’s CFSP pre-date 9/11. In this respect the most known type of activity pertaining to counter-terrorism has been the implementation of ‘smart sanctions’ Resolutions adopted at UN level within the EU legal system; yet, the EU has engaged itself in a number of other initiatives linked to the fight against terrorism anchored to the powers conferred to it by virtue of Title V TEU.

144 Eckes 2015 and Hillion 2014
As it has been observed elsewhere, the EU’s counter terrorism policy is embedded within the EU’s Security Strategy (ESS). However, it has also emerged that counter terrorism initiatives pursued by the EU internationally may have an ambivalent characterisation and bring together the AFSJ field of competences with the CFSP/CSDP policies. Indeed, since the adoption of the ESS and its holistic understanding of security, counter-terrorism initiatives have been developed and so as to bring together the AFSJ aspects thereof with the CFSP and the CSDP. In this respect, the policy impetus to integrate these policies has been considerable: suffice it here to mention the ‘Conceptual Framework on the European Security and Defence Policy Dimension of the Fight Against Terrorism’ of 2004, the Stockholm Programme and the Joint Staff Working Paper on the ties between the CSDP and the AFSJ of 2011.

As a consequence of these policy orientations, counter-terrorism objectives may be sought and attained not only by the adoption of instruments belonging to either the CFSP/CSDP or the AFSJ, but also with the adoption of CFSP/CSDP initiatives that possess a strong link, prima facie, with the AFSJ: this is the case, for example, of EULEX Kosovo.

With the entry into force of the Lisbon Treaty the policy ambitions to combine counter-terrorism with AFSJ and with CSDP missions has been finally codified in Article 43 TEU. Indeed, Article 43 TEU holds that operations and missions falling within the scope of Article 42 TEU such as joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization, may have as objective the fight against terrorism, including the support of third countries in combating terrorism in their territories.

Table 9.1 provides an overview of recent CSDP and CFSP actions that contain counter terrorism elements as well as AFSJ-related clauses. More precisely, the

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145 Matera 2012 and Part One above
146 In relation to the inter-linkages between different policies in relation to the security of the EU see Longo 2013 and Koutrakos 2011
147 Longo 2013
148 OJ [2010] L 115/1
150 OJ 16.02.2008, L 42, p.92
151 For an analysis Hillion 2014
The table aims to show how different CSDP and CFSP initiatives implement parcels of the EU’s counter-terrorism policy. The Table takes into consideration three CSDP missions. While EULEX-Kosovo was adopted prior to the entry into force of the Lisbon treaty, EUCAP Sahel Niger and EUTM Mali are the first examples of CSDP initiatives that make use of Article 43 TEU and that contain also AFSJ elements so as to implement the security strategy of the EU. While it is too early to assess the impact of these initiatives, suffice it to say that the introduction of Article 43 TEU appears to have successfully legitimised and implemented the *PESCalisation* and *hybridisation* of the EU’s external dimension of its counter-terrorism policy so as to strengthen the legitimacy and the role of the EU as a global counter-terrorism actor capable of assisting third countries in relation to numerous aspects of countering terrorism.

**Table 9.1**

<table>
<thead>
<tr>
<th>COUNCIL DECISION 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali)</th>
<th>Article 1 Mission</th>
<th>Article 11 Release of information</th>
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<tr>
<td>17.01.2013 OJ L14/19 18.1.2013</td>
<td>“Enabling [Malian Armed Forces] to conduct military operations aiming at restoring Malian territorial integrity and reducing the threat posed by terrorist groups”</td>
<td>The EU’s High Representative of the Union for Foreign Affairs and Security Policy shall be authorised to release to the third States associated with this Decision, as appropriate and in accordance with the needs of EUTM Mali, EU classified information generated for the purposes of EUTM Mali.</td>
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<td>16.07.2012 OJ L187/48 17.7.2012</td>
<td>“EUCAP SAHEL Niger shall aim at contributing to the development of an integrated, multidisciplinary, coherent, sustainable, and human rights-based approach among the various Nigerien security actors in the fight against terrorism and organised crime”</td>
<td>The HR shall be authorised to release to the third States associated with this Decision, as appropriate and in accordance with the needs of EUCAP Sahel Niger.</td>
</tr>
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<tr>
<th>Council Joint Action 2008/124/CFSP establishing EULEX Kosovo</th>
<th>Article 3 Tasks</th>
<th>Article 18 refers to the release of information</th>
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</thead>
<tbody>
<tr>
<td>OJ 16.02.2008, L 42, p.92</td>
<td>(d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, (…)</td>
<td>Article 3 (a)-(c), (h) refers to judicial cooperation</td>
</tr>
</tbody>
</table>

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152 The expressions are of Hillion 2014, supranote 32, at p.7
Table 9.1 provides us with some insight in relation to the CFSP/CSDP interconnections with the AFSJ. A first aspect that emerges is that a prominent tool used by the EU to establish cooperation mechanisms to fight against terrorism is the ‘release of’ or ‘sharing of’, information. The different provisions of the initiatives present in the Table show that it is for the High Representative of the EU to decide whether the EU can share its classified information with the authorities of the host third country in which the operation takes place. This practice must be read in conjunction with the growing practice of concluding agreements with a view to share ‘classified information’. However, in the cases mentioned in the Table above, the release of information is restricted to classified information gathered by the Council and its organs in relation to the specificities of a given CSDP mission, whereas the latter type of agreement foresees a more structured system of information sharing. While some institutional and substantive issues concerning the sharing of classified information will be dealt with in Section 9.4 of this Chapter, suffice it here to highlight that the Council has only recently revised rules on the protection of EU classified information and on the basis of Article 240 (3) TFEU, a provision that aims, essentially at regulating its functioning and the works of the COREPER.

From a substantive perspective, the Table above shows how, in practice, the combination of AFSJ elements are combined within CFSP and CSDP initiatives. Indeed, it can be seen from provisions such as Articles 2 and 3 of EUCAP SAHEL Niger or from Article 3 of EU EX Kosovo, that AFSJ-related tasks form an essential part of the different CFSP/CSDP missions. At the same time it

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153 See infra, this Chapter, Section 9.4
155 For an analysis Curtin 2013
clearly emerges that objectives and tasks such as “strengthening the rule of law through the development of the criminal investigation capacities”\textsuperscript{156} in Niger or “contributing to the fight against corruption, fraud and financial crime” in Kosovo\textsuperscript{157}, that little have to do with the AFSJ internal objectives as established in Article 67 TFEU.

In this respect then, it can be argued that the inclusion of AFSJ policies within the context of CFSP and CSDP missions does not relate to the establishment and development of the EU \textit{qua} AFSJ, but merely means integrating Justice and Home Affairs policies within the framework of CSDP and capacity-building operations such as the ones considered here in the context of the fight against terrorism. Furthermore, nothing in the above-mentioned initiatives refers to developing direct means of police or judicial cooperation in these ambiits. This means that the initiatives of the EU in this context do not seek to establish operative bridges between the targeted country and the EU; with the result that EU and national rules pertaining to extradition, criminal investigation and police cooperation are not triggered or affected by these initiatives. For these reasons, and as it will be argued later in Section 9.4 of this Chapter, it seems erroneous to consider these initiatives as an example of the external dimension of the AFSJ since there is no direct link with the EU \textit{qua} AFSJ in the first place.

Therefore, it becomes clear that this type of admixture between AFSJ \textit{topics} such as fighting crime and upholding the rule of law in the context of CFSP and CSDP missions established with a view of stabilizing a country or assisting a country to build its own capacity to fight against security threats such as transnational organized crime and terrorism do not pose problems of horizontal division of tasks between the TEU and the TFEU. Consequently, when having to assess the legal basis with which a particular external initiative that has security objectives linked with Justice and Home Affairs should be concluded, it must be ascertained, as a first step, whether such initiative envisages or requires mechanisms of direct cooperation between EU or Member States authorities responsible for the enforcement and application of AFSJ law with the authorities of the targeted third country; and whenever such direct link with EU and Member States authorities is not envisaged, then the purely CFSP/CSDP aspect of the mission does not pose problems of compatibility with AFSJ provisions.

\begin{footnotesize}
\begin{enumerate}
\item Article 3 (c) of EUCAP Niger
\item Article 3 (e) of EULEX Kosovo
\end{enumerate}
\end{footnotesize}
However, should the EU need to conclude an agreement to address a specific aspect of cooperation with one of the host countries such as the transfer of suspected criminals and the imposition of criminal procedural rules, then in this respect the solution should be similar to the one proposed in relation to the Atalanta case and the transfer of suspected pirates.\(^{158}\) Since the adoption of the Decisions analysed in Table 9.1 the integration of AFSJ objectives with CFSP and CSDP instruments has acquired a central position in policy proposals, and has been translated into practice on a number of occasions, often involving also the agencies of the AFSJ. A first example of such integration was the EU Integrated Border Management Assistance Mission in Libya (EUBAM Libya) launched with Council Decision 2013/233/CFSP.\(^{159}\) That mission, which was terminated in 2015 due to the instability of the country, had the task of supporting the Libyan authorities on their border management but without any executive function,\(^{160}\) also saw the active participation of the EU’s agency Frontex.\(^{161}\)

More recently, and under the pressure of the Italian government, the EU has adopted Council Decision 2015/972 launching the EU’s military operation in the southern Central Mediterranean EUNAVFOR MED with a mandate that to act as watchdog against human trafficking and monitoring migratory networks via the Mediterranean Sea.\(^{162}\) Whilst the the initial discussions were linked to the creation of a mission with clear search and rescue tasks and building upon the national Mare Nostrum Operation, the EU has split its operations between Operation Triton and EUNAVFOR MED.\(^{163}\)

Building on these recent experiences, in a Communication titled “Addressing the Refugee Crisis in Europe: The Role of EU external Action”,\(^{164}\) the Commission emphasised how the different CSDP missions taken in consideration in this section should be used and empowered in order to make more effective the control of irregular migration. Possibly this means that existing missions such as

\(^{158}\) Above, Section 9.3  
\(^{159}\) OJ L138/15 2. 5.2013  
\(^{160}\) Idem, Article 3  
\(^{162}\) OJ L122/31 19.05.2015 and OJ L157/51 23.06.2015  
\(^{163}\) Cuttitta 2014  
\(^{164}\) JOIN (2015) 40final of 9.9.2015
those in Mali, Niger and Nigeria will see their mandates expanded and in any case reinforced so as to cover also the prevention of irregular migration. Overall, the AFSJ Agencies are called upon to contributing into the execution of missions, which often pertain to capacity building tasks such as trainings for civil servants, officials and police and military forces. Yet, as recently observed by Trauner, involving the AFSJ agencies in the CFSP/CSDP fields does pose problems of transparency and human rights protection standards whenever the EU agencies are allowed to share their data and information with their third country counterparts.165

9.4.2 The Conclusion of Classified Information Agreements and Other CFSP/CSDP Actions

Another aspect that has been emerging in the recent years and that brings together the AFSJ with the CSDP is the conclusion of bilateral agreements that the EU concludes with third countries for the purpose of sharing classified information.

The definition and use of classified information in the EU has recently been addressed by Council Decision 2011/292/EU;166 in this document the EU has adopted a very broad definition of what constitutes ‘classified information’ so as to cover “any information or material designated by an EU security classification, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the European Union or of one or more of the Member States”.167 In spite of the tautological definition provided by the Council, it is possible to argue that the Decision wishes to cover any type of information stemming from any agency or office within the EU and its Member States: thus including military, police and judicial information.168

Prior to the entry into force of Council Decision 2011/292/EU, the EU had concluded a number of agreements with a view to exchange classified information with third countries. For instance the EU concluded in 2005 an

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165 Trauner 2016 and Infra, Part Six,
166 OJ 27.05.2011 L141, p.17
167 Idem, article 2(1)
168 This reading is confirmed, a contrario, by looking at the list of authorities taken into consideration by the Decision.
agreement with the Former Yugoslav Republic of Macedonia\textsuperscript{169} and it did so by the means of Articles 24 and 38 TEU (before Lisbon); i.e. on the basis of the express competence conferred to the Union for the conclusion of agreements pertaining to Police and Criminal law; and because the agreement was concluded before the entry into force of Lisbon, Denmark, Ireland and the U.K. took part in the conclusion.\textsuperscript{170}

Since the adoption of the Lisbon Treaty, however, the praxis of the Council has shifted and agreements on classified information have been concluded on the sole basis of Articles 24 and 37 TEU, i.e. on the basis of the CFSP pillar.\textsuperscript{171} Because the content of the agreements has not substantially changed, it is difficult to individuate a legal reason for this shift. While, the ambivalent nature of these agreements could argue in favour of the shift, it is equally true that the ambivalent nature of these agreements provided a material subterfuge to circumvent not only the constitutional hurdles connected with the new Article 40 TEU, but also to circumvent the applicability of the different opt-out regimes and confirm, once more, the PESCalisation of the external dimension of the AFSJ.

\textbf{9.5 Conclusion}

Chapter 7 argued that the democratic principle hardly plays a rhetoric function within EU constitutional law. The CJEU has made use of this principle to safeguard the role of the European parliament a number of times. Yet, it was also argued that within EU constitutional law this principle plays a double role. Indeed, because the democratic principle in EU constitutional discourses must be understood as protecting the two constitutional components of the EU legal system – citizens and Member States – also the assessment of the external dimension of the AFSJ in relation to its CFSP component must consider this dichotomy.

This Chapter looked into the ways in which the AFSJ and the CFSP/CSDP meet in order to implement the European Security Strategy and the programmatic

\textsuperscript{169} OJ 13.04.2005 L94, p.39
\textsuperscript{170} Other agreements pertaining to the exchange of classified information were also concluded on the basis of articles 24 and 38 TEU (before Lisbon).
\textsuperscript{171} See agreement on Classified information with Australia (OJ 30.01.2010 L 26, p.31) and
documents of the AFSJ. The Chapter had the objective provide insight on the main research question of this study on the extent to which the externalisation of the AFSJ is compatible with the foundations of the EU legal order. The analysis carried out in this moved from a series of disputes related to topics such as the fight against international terrorism and the fight against maritime piracy that are clearly linked to both the AFSJ and the CFSP. The analysis moved from the observation that the Lisbon treaty has worsened the relationship between external activities under the CFSP and under the TFEU. Mover, the Chapter showed that the institutions and the CJEU have not yet managed to find a way to integrate in a positive manner CFSP activities with other polices.

The Chapter argued if the AFSJ and CFSP integration does not directly affect individuals then the use of the powers of the CFSP does not pose particular constitutional problems: the foundations of the EU legal order must be interpreted in a systematic manner and thus taking into account of the choice operated by the masters of the Treaties. However, this Chapter showed that whenever the rights of individuals are concerned or affected, then the the integration of the AFSJ in the CFSP does pose a problem. In the Chapter it was argued that the weak framework on democratic participation and access to justice provided to individuals in the context of the CFSP makes this field ill-fitted to regulate matters that affect directly individuals. The fact that the Lisbon treaty has introduced renewed, ad hoc, provisions on sanctions against individuals and has created exceptional rules on human rights protection mechanisms and on the jurisdiction of the CJEU proves that the powers attributed to the EU in the fields of the CFSP should be used to define policies, common positions and set agendas, but should not be used to affect individuals in a context where decisions are not made in cooperation with bodies that represent citizens and in which access to justice is not fully guaranteed. Until these last two elements are solved, action by the Union that integrates the AFSJ with the CFSP and affects private citizens of the EU or of other countries should be considered in conflict with the founding principles of the EU and outside constitutional legitimacy.

Lastly, the entry into force of the Lisbon Treaty changed the way the EU concludes classified information agreements, and the opt-out countries may benefit from the PESCalisation of the AFSJ; however, the integration of the
AFSJ into the CFSP should not be used as a subterfuge to circumvent the complexities linked to the management of the opt-outs.\textsuperscript{172}

\textsuperscript{172} Matera C 2014
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General Conclusion Part Four

The introductory analysis on the policy documents defining the AFSJ and its external dimensions highlighted that the European Council and the Commission have repeatedly called for the integration of the AFSJ with the CFSP/CSDP. In that context it was also argued that this ambition also posed a number of constitutional questions on the compatibility between the foundations of the EU legal system and the externalisation of the AFSJ. More specifically, it was argued that such combination may be problematic in the light of the peculiar constitutional framework of the CFSP/CSDP pillar on the one side and the delicate relationship between public authority and individual rights and liberties on the other. The risk with an acritical, security-driven, approach to such integration is that the balance between public interests and individual ones are being re-written without much constitutional debate or reflections by the European Council and the Commission.

This also means that the nature of the AFSJ is being changed. From a policy born as a complement to the internal market, the AFSJ is construed by institutional actors and Member States as a complement to the CFSP and the tenets of Article 21 TEU linked to foreign policy. This however, runs against the wording and the scope of the AFSJ powers as established by the Treaties: the provisions on the FAFSJ have a narrower, more instrumental and sector specific purpose that is ill fitted to in the broader context of the CFSP. Especially if the measures adopted restrict or in any case interfere with the rights and liberties of individuals.

In this Part of the dissertation, the integration of AFSJ action and CFSP /CSDP was analysed by looking at some of the salient activities and measures undertaken by the EU. The analysis showed that such integration is problematic in as much as the measures adopted directly affect individuals.

The analysis conducted is insightful and shows that the PESCisation of the AFSJ is at the borderline of EU constitutional law because the exclusion of the democratic process and the limited jurisdiction of the CJEU allow the executives of the Member States to adopt measures directly affecting individuals and
restricting their individual rights bypassing democratic control and marginalising judicial control. This is clearly not a conceptual or theoretical problem. Because the types of actions and measures –including agreements– that the EU *qua* CFSP can conclude are only vaguely defined by the Treaties in order to allow of effective action in foreign relations, the position of individuals is threatened because the decision making process remain largely obscure, especially if we consider that the Council has repeatedly and purposively kept the European Parliament uninformed about some if its initiatives.

The case law of the CJEU, however, does not appear to share this fundamental concern. In its view, this representative and democratic gap is merely and simply a result of the Treaties’ structure and it considered that policy context and objectives prevail over constitutional concerns. Possibly, this position of the CJEU will remain until, like the *Kadi* saga suggests, an actual violation of human rights occurs and an individual brings judicial action against the EU authorities. However, scholars and the academic community do not need to witness a breach of rights to question the constitutional compatibility of a given measure. The question at hand goes beyond substantive cases and pertains to the foundations of democratic rule: whatever affectation or limitation to individual rights must be foreseen by an act adopted by their democratically elected representatives and executive authorities must act within the limit established by law. Framed in this manner, the question of the compatibility between ASJ and the CFSP/CSDP is not interested with the legal imbroglio codified in Article 40 TEU or the possible interpretations of Article 218(6) TFEU on the conclusions of international agreements in the CFSP/CSDP domains.

In any case, the fact remains that the principle of the rule of law requires access to an independent judiciary and judicial review. And even though the role of the judiciary is often limited in the fields of foreign policy so as to enable institutions to react firmly and quickly to international events, these latter arguments cannot completely overrule any consideration for the positions of individuals who are the object of foreign policy decisions outside the scope of Article 215 TFEU.

All in all, this Part does provide a first partial answer to the main research question of this study: the integration of the AFSJ with the CFSP and the CSDP is not compatible with the foundations of the EU legal order inasmuch as the
measures adopted to combine AFSJ and CFSP objectives directly affect individuals and do not include the EP in the decision making process.

The parts that follow will clarify whether issues of compatibility will emerge also in relation to the other dimensions of the external AFSJ.
PART FIVE

The Substantive Dimensions of the External AFSJ: The Combination of AFSJ objectives with other External Relations Policies anchored to the TFEU
Chapter 10

The integration of AFSJ Clauses in Mainstream External policies of the EU

10.1 Introduction

This Part of the study aims at mapping and analysing the ways in which AFSJ objectives are integrated in the different external policies and instruments based on the TFEU Treaty. In the pages that follow, the integration of AFSJ objectives within other external policies of the EU will be assessed so as to ascertain the extent to which this side of the external AFSJ is compatible with the foundations of the EU legal order. In a similar way to the CFSP/CSDP context, the externalisation of the AFSJ by the means of integrating its objectives into other external instruments and initiatives poses problems of legal basis and legitimacy as well as problems concerning the protection of fundamental rights. In addition to these issues, however, the integration of AFSJ elements within other instruments of external relations of the EU poses other legal challenges such as understanding the extent to which the legal framework in which external policies with clear objectives such as the Development and Cooperation policy can absorb AFSJ clauses and thus reduce the relevance and impact of the externalisation of the various AFJS provisions.

As argued in Part I of this study, the European Council has placed a lot of emphasis on combining AFSJ objectives and their external projections with other policies and instruments of external relations. Since the adoption of the Tampere conclusions of 1999, the European Council has promoted the integration of Justice and Home Affairs in the definition and implementation of other external policies of the EU. While the external dimension of the JHA was never considered to be an independent policy within the context of building and maintaining the EU as an Area of Freedom, Security and Justice, there have been several attempts to defining the objectives of this sub-policy.

1 The Tampere Conclusions of 15-16 October 1999 can be found at http://www.europarl.europa.eu/summits/tam_en.htm, in particular Point D, Paragraphs 59-62
2 Cremona 2011
Yet, the findings of the Feira meeting of the European Council appear to be still valid today and do provide the key parameter against which the analysis of the external dimension of the AFSJ can be conducted:

“Developing the JHA external dimension is not an objective in itself. Its primary purpose is to contribute to the establishment of an area of freedom, security and justice. The aim is certainly not to develop a ‘foreign policy’ specific to JHA”. ³

Whilst this conclusion served the immediate purpose of identifying the scope of the external AFSJ, it also served, as observed by Cremona, to situate JHA within the different external policies existing at EU level; from the Stabilisation and Association Process for the Western Balkans, to the common strategy on Russia, from the Eastern Partnership to Euro-Med relations and, consequently, the whole of the ENP.⁴ As we have seen in the previous Chapter, Justice and Home Affairs matters have been included in the list of policies that contribute to fighting new security threats.⁵ Consequentially, and with the exception of the enlargement policy, the externalisation of the AFSJ emerges as a means to implement the EU Security Strategy so as to strengthen the safety not only of the EU as an internal area of freedom, security and justice, but also to secure the regions immediately adjacent to its borders.

Since the early days of the AFSJ, the idea has always been to establish cooperation mechanisms with key partners so as to contribute to the establishment of the internal AFSJ objective; therefore, the external projection is an instrument necessary to attain the internal goal. In this respect, it becomes clear that the vision behind the externalisation of AFSJ policies considered the internal goal as the priority and that the strengthening of other external relations instruments and foreign policy goals of the EU only were considered as a secondary objective. However, this vision has evolved with the years and the distinction between external action to attain internal objectives and external action to contribute to other foreign policy goals has turned more and more blurry, thus posing a number of legal questions. However, this Chapter will show

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³ Report on EU priorities and objectives for external relations in the field of Justice and Home Affairs: Fulfilling the Tampere Remit, Council Document 7653/00
⁴ Cremona 2011, p.79
⁵ See the European Security Strategy and the analysis provided in Chapter 9 above.
that the two elements can coexist and that the EU combines its internal agenda whilst promoting international standards on AFSJ matters with its partners.

In relation to the subject of this Chapter, the external dimension of the AFSJ emerges, therefore, as having a triple objective. The first consists in the conclusion of agreements that contain clauses and provisions addressing goals that are directly linked with the establishment of the EU qua AFSJ such as agreements on visas. The second objective consists in addressing macro security concerns as enshrined in the European Security Strategy so has to fight new security threats and promote regional (as well as global) security. Thirdly, the EU promotes the application of international standards and norms by promoting the ratification and the implementation of international rules. While in the previous Chapter the second aspect emerged as the predominant one, in this Chapter and the one that follow in this Part of the study, the first and third elements will prevail.

10.2 The Choice of the Correct Instrument to Implement the Objectives of the EU

Since the adoption of the report published at the time of the Feira meeting of the European Council, the development of the external dimension of the AFSJ has been marked by the adoption of a number of policy documents in order to better define its different ramifications. The need to identifying a strategy built upon the Feira document was expressed at a later stage at the time of adopting the “The Hague programme: Strengthening Freedom, Security and Justice in the EU” in 2005,6 and in the fall of 2005 the Commission adopted a specific strategy on the matter.7 For the purpose of this Chapter, the Strategy of 2005 is of key importance for a principal reason: it identifies, in Section VI on policy instruments, the mechanisms through which the EU intends to exercise its competencies in order to actualise the external AFSJ.8 However, this document does not discuss the challenges linked to the implementation of the strategy and does not indicate how internal and external objectives linked to the AFSJ and to

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6 Point 4, second paragraph; OJ C53/1 3.3.2005
8 Idem, p.7
other external policies are to be combined in a manner consistent with the constitutional principles on the conferral and distribution of competences.

Table 10.1 transposes Section VI of the 2005 Strategy. The Table is divided in three columns. The first column on the right (Type of action) and the central column (Type of policy and/or Type of Instrument) are a direct transposition of the lists contained in the Commission document of 2005. It can be inferred that these two columns represent a synthesis of the different ambitions and dimensions of the external AFSJ as described in The Hague Programme and the Strategy itself. Finally, the third column on the left attempts to indicate which Treaty provisions can be used to implement the different actions listed in first two columns.

Table 10.1

<table>
<thead>
<tr>
<th>Type of action</th>
<th>Type of policy and/or type of instrument</th>
<th>Legal basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Bilateral agreements</td>
<td>Association or Partnership and Cooperation Agreements, including provisions on freedom, security and justice subjects; readmission agreements; visa facilitation agreements; mutual legal assistance and extradition agreements.</td>
<td>Article 217 TFEU; 211 TFEU; Article 79 (3); Article 77 (2) (a) &amp; (c); Articles 81 and 82 TFEU</td>
</tr>
<tr>
<td>(2) Enlargement and pre-accession processes</td>
<td>The enlargement process with Croatia and Turkey, and the Stabilisation and Association Process with the Western Balkans include justice, freedom and security priorities.</td>
<td>Article 49 TEU; Article 217 TFEU</td>
</tr>
<tr>
<td>(3) European Neighbourhood Policy (ENP) Action Plans</td>
<td>Action Plans with substantial justice, freedom and security components have been concluded with Ukraine, Moldova, Morocco, Tunisia,</td>
<td>Article 217 TFEU; Article 8 TEU</td>
</tr>
<tr>
<td>(4) Regional cooperation</td>
<td>Regional organisations such as the Baltic Sea Task-Force, ASEM and the Euro-Med process bring together actors on justice, freedom and security issues of common concern. This is in relation to regional cooperation other than the ENP. No specific legal basis, but general ones such as association agreements (Article 217 TFEU), development and cooperation (Article 208 TFEU) and cooperation agreements (211 TFEU)</td>
<td></td>
</tr>
<tr>
<td>(5) Individual arrangements</td>
<td>With the US, justice, freedom and security issues are covered under the New Transatlantic Agenda but also in a special format at ministerial level in the Policy Dialogue on Border and Transport Security. These issues are discussed with Canada, Australia, Japan and China in the context of a horizontal dialogue. There are AFSJ ministerial meetings with Russia (Permanent Partnership Council), Ukraine and the Western Balkans Forum. No specific legal basis. However, this strategic document should be read in the light of existing external relations competencies available within the context of the TFEU: either under Articles 208, 211, 212 and 217 TFEU or under any other AFSJ-related legal basis.</td>
<td></td>
</tr>
<tr>
<td>(6) Operational cooperation</td>
<td>Europol, Eurojust, the European Police College and the Borders Agency are or will develop agreements and working arrangements with counterparts in third countries. Networks of liaison officers drawn from the Member States are being Each Agency is conferred with legal personality and the power to conclude agreements with the authorities of third countries and with international organisations in so far as is required for the performance of the tasks attributed to each of them.</td>
<td></td>
</tr>
<tr>
<td>(7) <strong>Institution building and twinning</strong></td>
<td>Developing institutions and implementation capacity in third countries are central to activities with many third countries. Twinning between Member State institutions and counterpart institutions in third countries are a highly useful mechanism in capacity building, while expert missions can provide expertise on particular issues.</td>
<td>Economic, Financial and Technical Cooperation with Third Countries: Article 212 TFEU and Development Cooperation ex Article 208 TFEU</td>
</tr>
<tr>
<td>(8) <strong>Development Policy</strong></td>
<td>Development is an effective long-term response to concerns in the justice, freedom and security area. The Commission proposal for a new EU Development Policy identifies governance and human rights as complementary aims to the overriding objective of poverty reduction.</td>
<td>Article 208-211TFEU</td>
</tr>
<tr>
<td>(9) <strong>External aid programmes</strong></td>
<td>Projects on justice, freedom and security issues are financed under the external relations assistance programmes (e.g. CARDS, TACIS and MEDA). Under the new financial perspectives, the proposed external relations instruments include appropriate provisions for these actions. The Commission has proposed a thematic programme for migration and asylum as successor to the current</td>
<td>Economic, Financial and Technical Cooperation with Third Countries: Article 212 TFEU and Development Cooperation ex Article 208 TFEU</td>
</tr>
<tr>
<td>(10) International organisations</td>
<td>The EC and Member States are key players in international organisations (e.g. UNHCR, UNODC, Council of Europe, FATF, UNIDROIT, UNCITRAL, Hague Conference on Private International Law), which provide a useful basis for promoting common values and priorities. The EU encourages third countries to ratify and implement international conventions, which become a cornerstone for developing international cooperation.</td>
<td>211 TFEU, 216 TFEU and AFS-specific legal bases.</td>
</tr>
<tr>
<td>(11) Monitoring</td>
<td>Evaluation mechanisms should be adapted to respond to evolving situations. Current examples include the European Partnerships for the Western Balkans, the Action Plan on Organised Crime with Russia, the EU-Ukraine Justice and Home Affairs (JHA) Action Plan, the monitoring and evaluation mechanism for third countries in the fight against illegal immigration, sub-committees and expert missions.</td>
<td>This parcel appears to refer to soft law instruments or other type of implementing procedure. This seems to be the case of implementing agendas within the ENP.</td>
</tr>
</tbody>
</table>

Table 10.1 is significant on a number of grounds. Firstly, it reveals the width of the AFSJ ambitions since it does connect the AFSJ agenda to most external policies and instruments available to the Union. However, since the document of 2005 fails to clarify when one type of instrument or action is to be preferred to
another one, Table 10.1 reveals that the strategy of 2005 has little legal value since no indication on the choice of the proper instrument is made and no legal criterion to distinguish the different options is offered. Thus, whilst the Table shows that the priority of the Commission at the time was to demonstrate that the EU disposed a panoply of instruments to develop externally the AFSJ, it also shows that the legal implications of this external projection were completely neglected, with the result that the strategy did not clarify what was going to be the relationship between promoting and concluding AFSJ-based agreements as opposed to integrating AFSJ elements in other, broader, external relations instruments. However, a deeper analysis reveals that also its policy significance should be relativized.

From these observations two types of criticisms toward the strategy can be put forward. The first is that in its eleven points about “Policy Instruments” the Commission disorderly combined policies such as the ENP in point (3) with instruments such bilateral agreements in point (1) or with international partners in point (10). The result of this is a confounded and confused list deprived of any analytical significance since policies, instruments and partners are mixed-up with the obvious result that some entries of the table such as the broad category of “Bilateral Agreements” absorb, from a legal perspective, all the other categories except the reference to International Organisations in point (10) since in this context the EU often (but not exclusively) works in multilateral contexts. Similarly, the reference to ‘monitoring’ in point (11) where the Commission clearly intended to refer to soft-law implementation and supervision mechanisms is applicable to all the other categories of Table 10.1, but surely has no autonomous significance. The second criticism is that the list of Section VI on Policy Instruments of the Strategy does not have an accompanying narrative with the result that it is not clear how the Commission envisaged the external dimension of the AFSJ to function. What is the relationship between policy instruments such as the ENP and Stabilisation and Association Agreements (SAAs) with the Western Balkans with legal instruments such as readmission agreements, visa agreements and other AFSJ-based initiatives? And how did the Commission envisaged to manage the integration of policies such as the

9 From Latin, *cum-fundere*, to mingle together
10 For example, when the EU concluded the UNTOC Convention. See Council Decision of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime; OJ L261 of 06/08/2004, p.69
Development Policy ex Articles 208-211 TFEU which is aimed at “the reduction and, in the long term, the eradication of poverty” with policies and objectives such as the ones of the AFSJ that aim to strengthen public order and security within the context of the EU’s territorial and economic integration? Lastly, the Strategy of 2005 does not consider the vertical relation between the competencies of the EU and competencies of the Member States, leaving unanswered a number of questions concerning the scope of the respective powers and the issue of coordination of external action. Moreover, no specific attention is given to the impact that the different instruments and choices may have on individuals, EU citizens and third country nationals alike.

Almost ten years since that document was adopted, the European Council and the Commission still have not clarified these above-mentioned points. Suffice it to mention that neither the Stockholm Programme of 2010\(^{11}\) nor the Strategic Guidelines of 2014 for legislative and operational planning of AFSJ policies in the period 2015-2020 address the above-mentioned challenges.\(^{12}\) Indeed, the predominant concern of the institutions has been to integrate thematic and geographic priorities of different EU policies so as to comprise them into one external policy or one external instrument. This was made clear, once more, in a passage of the European Council Conclusions of June 2014 where it is held that to maximize the role of the Union as a Global Actor - it’s clout - it must ensure: “consistency between member states' and EU foreign policy goals and by improving coordination and coherence between the main fields of EU external action, such as trade, energy, justice and home affairs, development and economic policies”.\(^{13}\)

However, also in this occasion the European Council failed to address, the question of the relationship between different policies and legal instruments in order to achieve its external and internal goals. In the previous Chapter it was argued that recent initiatives as endorsed by the CJEU seem to prioritize foreign policy discourses against other considerations linked to the implementation of the AFSJ or otherwise linked to the democratic guarantees provided in the TFEU and not provided within the context of the TEU. This has resulted in a strand of

\(^{11}\) The Stockholm Programme. An Open and Secure Europe: Serving and protecting Citizens, Section 7.1, OJ C115/1 4.5.2010
\(^{12}\) European Council, Conclusions, 26/27 June 2014, EUCO 79/14, Brussels, 27 June 2014
\(^{13}\) Idem, p. 20
case law in which the CFSP pillar, thanks to its extremely broad objectives, takes over TFEU objectives and democratic prerogatives of the TFEU with the result of negatively affecting the scope of the external dimension of the AFSJ and the guarantees that come with it. 14 The legal implications of the relationship between to the integration of AFSJ objectives within other external policies based on the TFEU differ from those analysed, but a recent decision of the CJEU also seem to protect and give precedence to broad external policies over AFSJ considerations. 15 And even though intra-TFEU disputes on the choice of the proper legal basis are not as charged with constitutional significance as those decisions pertaining to inter-pillar disputes, the fact that neither the Commission nor the European Council address this this topic is to be criticised because, given the excess of regulation in EU external relations, their silence hinders legal certainty and policy consistency. Moreover, the lack of clarity on the legal criteria to follow in the development of the external dimension of the AFSJ and its integration into other external policies of the EU as well as the silence of the 2005 strategy on the matter are also at odds with the principle of conferral since the rules on the choice of the proper legal basis are a manifestation of the latter principle.

These last observations bring us to question whether there should be substantive limits to the possibility of including AFSJ provisions in broader contexts such as Association Agreements concluded in the framework of the ENP or in the context of the EU’s Development and Cooperation policies. While this question may appear as a matter of mere academic and scholarly relevance, it is argued that this question has substantive consequences and its answer depends on a number of considerations. Firstly, it relates to the distribution of tasks among the different branches of the Commission and the role that the European External Action Service (EEAS) plays therein; secondly, it also relates to the relationship between general external competencies and the external dimension of AFSJ ones. In both cases the Treaties do not provide much guidance; however, in relation to the first point the emerging role of the European External Action Service should promote synergies and prevent internal conflicts of competencies at the time when initiatives are taken. 16 In relation to the second point, the existing case law on the choice of the proper legal basis should also contribute in

14 Supra Charter 9
15 Case C-377/12, Commission v Council, judgement of the 11 of June, NYR
16 Gatti 2013, p. 176
preventing and solving disputes. As it will be argued at the end of this Chapter, the existing confusion of roles, procedures and use of legal bases is probably linked to the speed at which the external relations of the EU have integrated AFSJ matters without any proper guidance from the Commission. Unfortunately, the EEAS has, thus far, avoided playing a greater role for the development and consistency the external dimension of the AFSJ.\footnote{Monar 2012, p. 41}

This Chapter will analyse the manner in which the AFSJ is being integrated into the Development and Cooperation Policy of the EU, Political Dialogue and Cooperation Policy agreements and Partnership and Cooperation Agreements. This Chapter will demonstrate that general external policies are being used to the detriment of sector-specific provisions with the result of widening the boundaries of general external policies and restricting the application of AFSJ provisions for external action to the point that in the context of EU external relations one could affirm that, contrary to the traditional doctrine, ‘\textit{lex generalis derogat legi speciali}’. At the same time, it will show that the integration of AFSJ clauses in these other external policies does not pose immediate concerns in relation to human rights protection since these clauses are usually limited to the establishment of cooperation objectives and mechanisms between the EU, its Member States and third countries. And whilst this Chapter will argue that the content of the different clauses does not immediately pose constitutional concerns in relation to the protection of fundamental rights, the praxis of the institutions reveals that that the integration of the AFSJ in to these policies has poses a number of other constitutional problems.

\textbf{10.3 The Boundaries of Including AFSJ Clauses in General Instruments of EU External Relations: ‘Lex Generalis Derogat Legi Speciali’?}

\textbf{10.3.1 The Inclusion of Sector-Specific Clauses in Development Cooperation Agreements: Commitments to Cooperate Do Not Need a Specific Legitimisation}
In May 2012, the Council adopted Decision 2012/272/EU\(^{18}\) on the signing, on behalf of the Union, of a Framework Agreement on Partnership and Cooperation between the EU and its Member States on one part and the Republic of the Philippines on the other. Similarly to other Partnership and Cooperation Agreements concluded by the EU,\(^{19}\) the EU – Philippines PCA\(^{20}\) covers a wide range of dossiers: from economic and development cooperation, to trade and investment; from general political dialogue to justice and security matters, including migration. Because of the wide scope of the EU – Philippines agreement, the Council decided that the development and trade legal bases needed to be supported by sector-specific additions. As a result of this the EU – Philippines Agreement was concluded on the basis of the following provisions: Articles 79(3) [Readmission agreements], Articles 91 [Transport policy] and 100 [Transport policy], Article 191(4) [Environmental policy] and Articles 207 [Common Commercial Policy] and 209 [Development Cooperation] in conjunction with Article 218(5) [Negotiation and conclusion of international agreements] TFEU. On the other side, the Commission considered this choice wrong since, according to this institution, there was no need to supplement the Development Cooperation and CCP legal bases. The Commission eventually attacked the Decision of the Council ex Article 263 TFEU and on the basis of a single plea in law alleging that the Council infringed Treaty rules and established case law pertaining to the choice of the proper legal basis.

As it has been previously argued, the choice of the proper legal basis has constitutional significance: it not only relates to the vertical distribution of competences between the Union and Member States, but also to the horizontal allocation of powers between institutions and between Treaties.\(^{21}\) Therefore, the choice of the proper legal basis relates to the definition and application of the principle of conferred powers in practice. Consequentially, the implementation of the rules on the choice of the proper legal basis are but one of the many manifestation of the rule of law principle within the EU legal order. While in the past the choice of the proper legal basis was often at the centre of disputes that were a revealing index of the power struggle between institutions and/or between Member States and the EU, this case only related to the definition of the scope of

\(^{18}\) OJ 25.5.2012 L134/3

\(^{19}\) See for instance the PCAs with Tajikistan OJ 29.12.2009 L350/1 or the one with Iraq 31.7.2012 L204/18

\(^{20}\) For the text of the Agreement see Brussels, 18.12.2013 COM (2013) 925 final

\(^{21}\) See Part II and Chapter 9 in Part III
application of EU external relations provisions such as Article 209 TFEU. In other words, whilst legal bases disputes have often been an occasion to define the powers of institutions, in this case the dispute pertained to the definition of the Union’s Development and Cooperation Policy and whether the integration of specific policies of the EU into general external instruments was conditioned to the addition of the specific legal basis in question.

Case C-377/12 Commission v Council on the Agreement with the Philippines presented a number of similarities with case C-268/94 Portugal v Council on the conclusion of the EU–India Partnership Agreement. The EU – India Partnership Agreement was concluded by the EU on the following legal bases: Common Commercial policy (now 133 TFEU) and the provision on cooperation agreements qua instruments of the EU’s Development Policy now codified in Article 211 TFEU. On that occasion Portugal demanded the annulment of Decision 94/578/EC because it considered that certain provisions of the Agreement went beyond the scope of the EU’s Development policy and demanded supplementary legal bases to legitimise the conclusion of the said agreement. More specifically, the Portuguese government considered at that time that the inclusion of a provision on human rights and sector-specific provisions on energy, tourism and intellectual property went beyond the scope of the powers attributed to the EU to implement its Development policy and asked for supplementary legal bases so as to reflect the different specific fields that were included in the Agreement.

However, the CJEU rejected the plea of the Portuguese government in its entirety. First the CJEU considered whether the scope of powers attributed to the EU in the field of Development Cooperation also covered the contested specific provisions and held that because of the broad objectives enshrined in Articles 208 – 2111 TFEU (130u TEC -130y TEC at the time). In this respect the CJEU held that it must be possible for an agreement based on the EU’s Development Policy to pursue a number of specific matters and added that

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“to require a development cooperation agreement concluded between the [Union] and a non-member country to be based on another provision as well as on Article [211 TFEU] and, possibly, also to be concluded by the Member States whenever it touches on a specific matter would in practice amount to rendering devoid of substance the competence and procedure prescribed in Article [211 TFEU].”

The line of argument used by the CJEU reflected the principle of effet utile and the specific doctrine of ‘keeping competencies intact’: taking into consideration the scope of the competence conferred by Member States to the EU in the field of Development Cooperation, the CJEU considered that the restrictive reading proposed by the Portuguese government would have rendered the actual implementation of the Development policy of the EU devoid of any substance if a sector-specific integration was necessary whenever an agreement identified concrete fields of cooperation. From this perspective, a parallelism with the early CCP case law can be drawn: similarly to what the CJEU had the occasion to affirm in Opinion 1/78, also the powers conferred to the EU in the context of its Development policy must be interpreted in a dynamic and purposive manner so as to maximize the potential scope of action attributed to the EU.

In case C-377/12 Commission v Council, and Similarly to what the CJEU had declared in Portugal v Council, the CJEU adhered to a broad notion of the EU’s development policy. Indeed also in this case the Court affirmed that Development Cooperation pursues a wide spectrum of objectives including those “referred to in Article 21(2) TEU, such as the objective, set out in Article 21(2) (d)TEU, of fostering the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty”. This is an interesting point because by bridging Article 21 TEU with Article 211 TFEU, the CJEU uses a comprehensive approach to interpret EU external relations provisions so as to reflect the post-Lisbon unity of the legal order; however, and similarly to what has emerged in relation to the use of Article 21 TEU to define the scope of powers attributed to the EU qua

27 Opinion 1/78, International Agreement on Natural Rubber [1979] ECR 2871, paragraphs 43-45
28 Paragraph 37 of Case C-377/12, Commission v Council, judgement 11 June 2014, NYR
CFSP/CSDP, the broad scope of the provisions used by the CJEU are ill-fitted to satisfy the test concerning the identification of objective factors to support the choice of a determined legal basis for the purpose of concluding an agreement. Thus, similarly to the criteria used to assess the scope of application of the CFSP/CSDP powers to conclude agreements, also in this context the Court gives preference to broad notions of general policies over sector specific considerations; with this technique the Court manages to solve disputes without entering in the details of a case and facilitates the absorption of sector specific legal bases against generalist ones.

Indeed, notwithstanding the choice to adhere to the broad notion of Development Cooperation, the case on the Partnership Agreement with the Philippines needed to be solved by looking at the different sector-specific provisions in order to establish whether such clauses could be considered as falling within the scope of the EU’s Development Cooperation policy or whether such clauses, because of their scope, required further legitimisation and the addition of sector-specific ones. Again, the CJEU referred to the decision in Portugal v Council to affirm that such integration is not required if the insertion of specific clauses do not alter the essential objective of a given agreement; a test with a threshold which is very high because of the broad notion of Development Policy retained by the Court. At the time of the EU – India Agreement the CJEU affirmed that the insertion of sector-specific clauses could be considered as altering the objective of a given agreement only if such clauses impose “such extensive obligations concerning the specific matters…that those obligations in fact constitute objectives distinct from those of development cooperation”. Therefore the CJEU recognised the fact that, notwithstanding the broad scope of the Development Cooperation competence attributed by the Treaties to the EU, the conclusion of a specific agreement may require, if certain provisions go beyond the framework of development, the integration of additional legal bases to legitimize its conclusion.

Moreover, in Portugal v Council case the CJEU took the occasion of developing a number of indicators so as to determine the extent to which the provisions of an agreement can be considered to fall wholly or partially within the

29 Supra, Chapter 9.
30 Paragraph 40 C-377/12
31 Paragraph 39 Portugal v Council
Development Cooperation Policy. In the light of that judgment we assume that additional legal bases are not required as long as sector-specific clauses aim to address specific needs of the developing country with whom the EU is concluding the agreement (i), and as long as sector-specific clauses are “limited to determining the areas for cooperation and to specifying certain aspects and various actions to which special importance is attached” (ii). Conversely, the Court added that provisions containing concrete prescriptions on the manner in which cooperation in each specific area envisaged is to be implemented could require an integration of legitimacy and hence and additional legal bases.

In order to assess the extent to which the decision in Portugal v Council could be applied in Commission v Council and other similar cases where the Union’s Development Cooperation agreements contain clauses that are connected to other EU polices, it is necessary to analyse the clauses that at the time of Portugal v Council constituted the object of the dispute and compare those to the ones of the EU – Philippines agreement. At the time of the EU–India agreement, Portugal considered that a number of clauses required and additional legal basis; one of such clauses was on ‘Energy’ and provided as follows:

The Contracting Parties recognize the importance of the energy sector to economic and social development and undertake to step up cooperation relating particularly to the generation, saving and efficient use of energy. Such improved cooperation will include planning concerning energy, non-conventional energy including solar energy and the consideration of its environmental implications.

Another disputed clause, the one on ‘Tourism’, held that:

The Contracting Parties agree to contribute to cooperation on tourism, to be achieved through specific measures, including:
(a) interchange of information and the carrying out of studies;
(b) training programmes;
(c) promotion of investment and joint ventures.

32 Paragraph 44 Portugal v Council
33 Paragraph 45 Portugal v Council
34 Paragraph 45
35 Article 7 of the Partnership Agreement with India, emphasis added.
36 Article 13 of the Partnership Agreement with India, emphasis added.
In both cases the CJEU considered that these clauses pursued the objectives of the EU’s Development Policy since they addressed the needs of the third country and only provided for a framework of cooperation. Therefore, according to the CJEU Article 130y (now Article 211 TFEU) was a sufficient legal basis to conclude the agreement with India. In this respect it is important to emphasise that the Court considered the sector-specific clauses such as the two quoted above as mere ‘obligations to take action’ that were not capable of imposing rights and obligations on the parties beyond a vague commitment to cooperate.

Since the decision of the CJEU in Portugal v Council, the EU has acquired new competencies whilst the scope of existing ones has widened; as a result of this, also sector-specific clauses in Development Cooperation agreements have changed. In the dispute between the Commission and the Council in relation to the conclusion of the EU – Philippines agreement the CJEU was once again asked to ascertain the extent to which sector-specific clauses could be inserted in broader agreements such a Partnership Agreement on Development and trade without requiring the use of additional legal bases. This is of specific importance for the purpose of this study since it relates to ascertain the extent to which AFSJ objectives and competences can be integrated in other external policy fields.

10.3.2 The Relationship Between Readmission Clauses and Development

The official title of the EU – Philippines agreement is Framework Agreement on Partnership and Cooperation and its conclusion was based on Articles 207 TFEU on the Common Commercial Policy and on Article 209 TFEU on Development Cooperation. Moreover, contrary to its position at the time of the conclusion of the EU – India Agreement, the Council considered it necessary to integrate the two aforementioned bases with Articles 79 (3) TFEU to legitimize the readmission clause inserted in the agreement, Articles 91 and 100 TFEU on transport and Article 191 (4) TFEU on Environment. According to the Council, this integration was necessary in the light of the evolution of partnership and cooperation agreements. It argued that because nowadays these agreements seek to establish a comprehensive relationship covering many different areas of cooperation, it is impossible to consider a particular policy as predominant compared to the others; moreover, it also considered that because sector-specific

clauses of the agreement clearly prescribe the means of cooperation between the parties, these specific commitments required the additional legal bases. On the other hand, the Commission argued that in the light of the decision of the CJEU in Portugal v Council, the agreement only needed to be based on the Development Cooperation and Trade provisions of the Treaties since the sector specific clauses of the agreement did not “impose extensive obligations distinct from those of development cooperation”.

With its judgement rendered on the 11th June 2014, the CJEU upheld the position of the Commission and annulled Council Decision 2012/272/EU in so far as the Council added the legal bases relating to the readmission of third country nationals, transport and the environment. In its reasoning the CJEU followed its traditional two-steps approach: first it considered the extent to which the Agreement with its sector–specific clauses could be considered, as a whole, to fall within the EU’s Development Policy; secondly, it looked at the contested provisions of the agreement with a view to assess whether these constituted independent objectives of the agreement and thus requiring additional legal bases.

Similarly to Portugal v Council, in relation to the first point the Court confirmed the applicability of a broad notion of Development policy and held that Article 209 TFEU and the reference contained therein to Article 21 TEU indicate that the EU’s Development Cooperation “is not limited to measures directly aimed at the eradication of poverty, but also pursues the objectives referred to in Article 21(2) TEU, such as the objective, set out in Article 21(2)(d), of fostering the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty”. Moreover, the Court added that “the fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterisation of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses, provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those

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38 Paragraph 24 C-377/12
39 Paragraph 20
40 See paragraphs 35 and 48 of the judgment
41 Paragraph 37 of the judgment
Up to this point the reasoning of the Court complies with its precedent and is firmly anchored to a teleological interpretation of the mandate conferred upon the Union in relation to Development. However, the Council contested the applicability *sic et simpliciter* of Portugal v Council in the present case on account of the extension and the deepening of the sector specific clauses that were introduced to this agreement as opposed to the clauses present at the time of the EU – India Agreement. Indeed, taking alone the example of the clause on readmission, there is a qualitative and significant change in scope this clause as opposed to the provisions on Tourism and Energy that were present in the 1994 agreement. As it was previously showed in this Section, the EU – India Agreement merely expressed the commitment to open a dialogue and cooperate on certain thematic priorities. While some similar clauses are still present also in the recent EU – Philippines Agreement, other clauses are significantly different. This is the case of the readmission clause inserted in Article 26 of the agreement.

Article 26 (3) of the EU – Philippines Agreement goes beyond the establishment of a mere framework of cooperation and actually codifies three main commitments: the obligation to readmit nationals irregularly present in the

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42 Paragraph 39
43 See section 10.3
44 Article 26 (3) of the EU–Philippines Agreement reads as follows: Within the framework of cooperation in this area and without prejudice to the need to protect victims of human trafficking, the Parties further agree that: a) The Philippines shall admit back any of its nationals as defined under paragraph 2, point e) of this Article present in the territory of a Member State upon request by the latter, without undue delay once nationality has been established and due process in the Member State carried out. b) Each Member State shall readmit any of its nationals as defined under paragraph 2, point e) of this Article present in the territory of the Philippines upon request by the latter, without undue delay once nationality has been established and due process in the Philippines carried out. c) The Member States and the Philippines will provide their nationals with required documents for such purposes. Any request for admission or readmission shall be transmitted by the requesting state to the competent authority of the requested state. Where the person concerned does not possess any appropriate identity documents or other proof of his/her nationality, the competent diplomatic or consular representation concerned shall be immediately requested by the Philippines or Member State to ascertain his/her nationality, if needed by means of an interview; and once ascertained to be a national of the Philippines or Member State, appropriate documents shall be issued by the competent Philippine or Member State authorities.

4. The Parties agree to conclude as soon as possible an agreement for the admission/readmission of their nationals, including a provision on the readmission of nationals of other countries and stateless persons.
territories of the contracting parties; the obligation to cooperate in order to ascertain the nationality of an individual irregularly residing in the territory of the Philippines or of the Member States and, thirdly, the obligation to conclude as soon as possible a readmission agreement that shall cover the also the readmission of third country nationals and stateless persons. This type of readmission clause emerges as a ‘habilitation clause’, i.e. as a provision setting specific actions and allowing the EU and its Member States to cooperate in the future in a given domain. From a content perspective, this clause reflects other recent readmission clauses inserted in other agreements such as Article 105 (3) of the Partnership and Cooperation Agreement with Iraq.45

As a preliminary and partial conclusion, it is clear that the aforementioned readmission clause binds the parties of the agreement to concrete commitments and does not merely indicate the willingness to cooperate on a certain topic as the sector-specific clauses of the EU–India Agreement did. This is best exemplified by the provision on the conclusion of future agreements where it imposes that future agreements will have to include a clause on the readmission of third country nationals: a thorny issue that imposes on third countries the duty to readmit irregular migrants that although nationals of another country, arrived to the EU from the Philippines. At the same time, there can be no doubt that the readmission clause of the EU – Philippines Agreement is not detailed enough to be enforced or applied by either party. Indeed, the readmission clause of the said agreement does not identify the conditions upon which a person can be considered an irregular migrant and thus readmitted, nor does it set procedural rules applicable in the readmission process. And it does not identify the institutions responsible for enforcing the readmission clause.46 This is confirmed by the fact that the clause itself requires the contracting parties to conclude, at a later stage, a proper readmission agreement. Moreover, Article 26 (3) and (4) of the EU – Philippines Agreement does not touch upon the question concerning the relationship between a EU – Philippines readmission agreement and bilateral agreement concluded by Member States with the Philippines. Because of the importance of this point from a constitutional and substantive matter, the fact that such point is not dealt with in Article 26 of the Agreement is another revealing index of the fact that the readmission clause under analysis does not

45 OJ 31.7.2012 L204/20
46 By way of comparison, suffice to consider the recent readmission agreement that the EU has concluded with Turkey in May 2014. OJ 7.05.2014 L 134/1
have the strength to constitute an independent clause or an objective distinct from the main one, i.e. Development Cooperation. Taking into consideration the different aspects emerging from the readmission clause of the EU – Philippines agreement, it can be argued that the plea of the Commission and the decision of the CJEU are fully convincing.

Yet, the reality is more nuanced than this and the readmission clause of the EU – Philippines agreement should be tested against the two parameters identified by the CJEU in Portugal v Council. As we have seen in the previous section, the CJEU held, at that time, that additional legal bases would not be required as long as sector-specific clauses aim to address specific needs of the developing country with whom the EU is concluding the agreement (i), and as long as sector-specific clauses are “(i) limited to determining the areas for cooperation and to (ii) specifying certain aspects and various actions to which special importance is attached”. Indeed, whilst we have just argued that the readmission clause of the agreement is not detailed enough to be considered as a self-standing arrangement on readmission, it seems less obvious that such clause, including the thorny issue on the readmission of third country nationals, could be considered as a provision aiming to ‘address specific needs of the developing country with whom the EU is concluding the agreement’. In this respect, it is doubtful that the obligation of readmitting its own nationals as well as third country nationals enshrined in Article 26 of the EU – Philippines Agreement can be considered as a contribution of the EU to the eradication of poverty and sustainable development of the Philippines. The agenda in this case is all about the internal objectives of the EU and this emerges also by reading the judgement of the Court. Indeed, in relation to this aspect, i.e. the need for the sector-specific clause to fall within the main objective of the treaty, the CJEU avoids discussing this and merely refers to ‘migration and the fight against illegal migration’ without saying how a readmission clause can actually contribute to these goals. However, while fighting illegal migration means establishing cooperative mechanisms on border controls and set-up mechanisms against human trafficking whilst enhancing legal channels of migration, readmission has got nothing to do with fighting such phenomena: readmission is merely a remedy, an instrument to enforce a decision

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47 Paragraph 44 Portugal v Council
48 Paragraph 45 Portugal v Council
49 Paragraphs 49-55
on the unlawfulness of the presence of a third country national in the territory of a EU Member State.

This emerges also from the Opinion of AG Mengozzi. The Advocate General first affirmed that “Article 26(3) and (4) of the PCA which contain provisions which depart from the PCA’s first concern – steady progress in development in the Philippines – to fulfil one of the European Union’s own objectives and to serve its interests: the commitment by the contracting third country to take back its own nationals who are illegally resident in European Union territory”.

Secondly, AG Mengozzi affirmed that “The vision promoted in Article 26(3) and (4) of the PCA is thus rather a defensive one which places European Union interests first. The idea is to protect the Union and its Member States from the deficiencies of the contracting third State with regard to management of migratory flows. (...) Admittedly, seen in that way, the link with the objectives pursued by development cooperation appears much more tenuous”.

10.3.3 Lex Generalis Derogat Legi Speciali?

What can be inferred from the decision of the CJEU on case C-377/12 Commission v Council decided in June 2014? As Peers has observed, the main result of this case is that the EU’s Development Policy is stronger and broader in its scope. This judgement does indeed legitimise the use of deeper, sector-specific clauses in the context of Development cooperation. This means, for the purpose of this inquiry, that the integration of AFSJ clauses in broader external policies are absorbed by the general external legal basis. Indeed, this judgment confirms the Court’s concern of ‘keeping the competencies intact’ and confirms the method it developed to ascertain that the institutions choose the right legal basis to conclude an agreement. Considering the specific case of readmission, the decision of the Court promotes the insertion of readmission clauses in the context of general external policies of the EU as long as such clauses do not impose concrete rights and obligations; possibly this makes the threshold close to affirming that sector-specific clause requires its own legal basis only if such clause is self-executing or directly applicable. Consequently this undoubtedly

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50 Paragraph 70 of the Opinion AG Mengozzi delivered on the 23 January 2014
51 Paragraphs 71 and 72, emphasis added.
52 Peers 2014
53 The two-step approach discussed in the previous Section.
fosters the integration of AFSJ clauses in other external policies; however, it also seems to raise the threshold established by the Court in Portugal v Council.

The criteria used by the Court to ascertain the extent to which a sector-specific provision of an agreement may still be linked to a general external policy such as Development, the Court seems to have introduced a distinction between provisions of an agreement that codify ‘legal commitments’ and provisions of an agreement that codify ‘legal obligations’, however, the Court fails to clarify the distinction and the consequences thereof. Taking this into consideration, the Court thus implies that a provision such as Article 26 (3) and (4) on the conclusion of a readmission agreement that makes use of the imperative form and imposes duties on the contracting parties such as the readmission of third country nationals only amounts to a commitment. However, this can hardly be considered as the result aimed by the institutions when the agreement was being negotiated. While the reasoning of the Court is convincing in as much as it makes clear that the readmission clause is not enforceable as such against individuals, the reasoning is not convincing when it affirms that the framework of cooperation established within the agreement does not contain clear obligations for the parties. This is because either we argue that such clauses are inserted to define the conduct of the contracting parties, or we argue that such clauses do not have any added value for the EU and its Member States in the fight against irregular migration.

54 Paragraphs 58-59
55 Article 26 (3) and (4) of the EU – Philippines agreement: 3. Within the framework of cooperation in this area and without prejudice to the need to protect victims of human trafficking, the Parties further agree that: a) The Philippines shall admit back any of its nationals as defined under paragraph 2, point e) of this Article present in the territory of a Member State upon request by the latter, without undue delay once nationality has been established and due process in the Member State carried out. b) Each Member State shall readmit any of its nationals as defined under paragraph 2, point e) of this Article present in the territory of the Philippines upon request by the latter, without undue delay once nationality has been established and due process in the Philippines carried out. c) The Member States and the Philippines will provide their nationals with required documents for such purposes. Any request for admission or readmission shall be transmitted by the requesting state to the competent authority of the requested state. Where the person concerned does not possess any appropriate identity documents or other proof of his/her nationality, the competent diplomatic or consular representation concerned shall be immediately requested by the Philippines or Member State to ascertain his/her nationality, if needed by means of an interview; and once ascertained to be a national of the Philippines or Member State, appropriate documents shall be issued by the competent Philippine or Member State authorities. 4. The Parties agree to conclude as soon as possible an agreement for the admission/readmission of their nationals, including a provision on the readmission of nationals of other countries and stateless persons.
Indeed, this finding may jeopardise the objective that the institutions actually pursued: create an obligation for both contracting parties to conclude, in the future, a readmission agreement with a clause on third country nationals. Clearly, the interpretation according to which these clauses are mere commitments may jeopardise the attainment of the underpinning objective of the UE which is not only to codify a first engagement to conclude a readmission agreement, but also to pre-determine some essential features so as to protect such elements from political and policy changes. However, since the CJEU has introduced this distinction, two questions follow. First, what are the concrete differences between a commitment and an obligation in the context of international agreements? Secondly, taking in to consideration the high threshold that follows form the decision of the Court in Commission v Council, is the CJEU going to give precedence to general policies and policy contexts to the point of affirming that *lex generalis derogat legi speciali*?

Another issue that emerges form this judgement is the relationship between the Development Policy on the one side and the vertical distribution of competencies on the other. With the adoption of sector-specific clauses as phrased as Article 26 of the EU – Philippines Agreement, the EU implicitly aims at creating a common readmission policy whereby the conclusion of habilitating clauses first and the conclusion of specific agreements on readmission second, create an EU-based legal framework in which the role of Member States is restricted to administrative and enforcement rules. This is particularly interesting since, as was previously argued, the development of the readmission policy of the EU has been characterised by the competition of the EU and its Member States where the second do not renounce to address individually this domain when concluding agreements with third countries. Lastly the decision also poses a number of questions in relation to the scope of application of the opt-outs regimes of the UK, Ireland and Denmark.

From the analysis of the case Commission v Council in relation to the EU – Philippines it can be inferred that the CJEU will consider sector-specific clauses in Development Cooperation agreements instrumental to the main objective of the agreement as long as such clauses do not impose clear and unconditional obligations to the contracting parties. From a EU external relations perspective

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56 Matera 2011, p.222
57 Garcia Andrade and Di Pascale 2011 and, in this book infra, Chapter 11
this solution enhances the role of the Union and strengthen its bargaining powers. However, it remains to be seen where the threshold concretely stands and for the time being the CJEU has retained the power to decide when *lex generalis* derogat *legi speciali*.

### 10.4 The Inclusion of AFSJ Clauses in Partnership and Cooperation Agreements and Political Cooperation and Dialogue Agreements: A Substantive Comparative Overview

In the previous section we have seen that the Partnership and Cooperation Agreements concluded by the EU under the general and broad umbrellas of the European Development Policy and Common Commercial Policy may contain AFSJ clauses and that according to the CJEU these clauses, provided that no legal obligation is created, do not need to be legitimised by the corresponding AFSJ bases. Therefore, it appears that the integration of AFSJ objectives and policies in other broad and express instruments of EU external action such as the Development Policy can be done without adding the sector-specific legal basis of the AFSJ. In this way we can observe that the external AFSJ is absorbed by the widening and the deepening of other external action instruments.

However, this seems problematic if the AFSJ clauses in question become very detailed because this entails the risk of deviating the scope of policies such as the Development Cooperation Policy from their original scope and turn these into a one-catch-all sort of instrument. This is the case of readmission clauses as analysed before. At the same time, reasons of transparency and legitimacy of EU action run against the absorption of sector-specific clauses inserted in general agreements concluded by the EU: if the different legal bases are not supposed to appear, it will be more difficult for the public to be aware of the type of activities in which the EU enters. Also in the light of this last observation, this section will map and analyse this phenomenon further to assess the relationship between the content of AFSJ-related clauses with the general legal framework in which these are inserted.
10.4.1 The Insertion of AFSJ Clauses in the First Agreements in the Period 1999 - 2003

The integration of AFSJ clauses in the framework of broader external policies of the EU is a relatively recent phenomenon. If we take into consideration partnership and Cooperation Agreements concluded on the basis of either the EU’s Development Policy and/or the EU’s Common Commercial Policy we can see that AFSJ policies were excluded from these agreements or, if present, only marginally included. The first reason for this was, of course, related to the internal evolution of the EU legal system since the AFSJ was only established in 1999 and that until the Lisbon Treaty external agreements on police and criminal law cooperation had to be based on Article 24 and 38 TEU. As a consequence of these two factors, and bearing in mind that, also the Schengen acquis was integrated within the EU only in 1999, it does not come as a surprise if the Cooperation Agreements concluded between 1992 and 2001 do not contain significant AFSJ clauses. Yet, some agreements contained some clauses that we can consider as being the precursors of what later became the external dimension of the AFSJ.

Firstly, this is the case of the agreements concluded by the EU with Macao and Yemen. Article 13 of the Agreement with Macao contained a cooperation clause on the fight against drugs according to which the contracting parties agreed to cooperate and intensify their efforts to prevent and reduce the production, trafficking and consumption of drugs by exchanging relevant information and Article 11 of the agreement with Yemen contained a similar clause on cooperation against illicit cultivation, production and trade of drugs with the addition of a clause on cooperation against money laundering. However, as we have seen in relation to the EU – India Partnership Agreement

58 For instance, the agreement with Paraguay of 1992 OJ 30.10.1992 L313/72
59 Wessel et al 2011
62 OJ 11.3.1998 L 72/18
63 Article 13 of the EU — Macao Agreement: Within the bounds of their respective powers, the Contracting parties undertake to coordinate and intensify their efforts to prevent and reduce the production, trafficking and consumption of drugs. They shall exchange relevant information in this regard.
of 1994, the two clauses did little more than opening a table for further cooperation without specifying the ways in which such cooperation had to be implemented. Similar clauses were also adopted in the Agreements with Cambodia, Brazil and, lastly, Korea.

The second types of ‘precursor agreements’ were the ones with Vietnam, Lao, Cambodia and Pakistan, concluded between 1996 and 2001. While also these agreements contained, at the most, clauses on anti-money laundering and illicit drugs formulated like the ones present in the agreements with Yemen, Macao and Brazil, the agreements with Vietnam, Lao, Cambodia and Pakistan had an additional AFSJ element: a ‘declaration’ on readmission. The first of these examples is the agreement with Vietnam and its declaration on readmission reads as follows:

**Declaration of the Socialist Republic of Vietnam**

The Government of the Socialist Republic of Vietnam declares that the repatriation of its citizens will be carried out on the bases of mutual agreements between Vietnam and the country concerned in order to ensure the principles if orderly repatriation in conditions of safety and dignity, in accordance with international acceptable practices and the Comprehensive Plan of Action (CPA) 1989, with financial assistance from the international community.

**Declaration by the European Community**

1. 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 Agreement. 2. The European Community points out that the provisions of that Agreement in no way affect the obligations in the matter deriving from bilateral agreements concluded between the Socialist Republic of Vietnam and its Member States.

Similarly, the 1997 agreement with Lao and the 1999 one with Cambodia contain a Joint Declaration in which the (then) Community “recall[ed] the importance that its member states attach to the establishment of effective

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64 See Section 10.2) above
65 Cambodia OJ 19.10.1999, Brazil OJ 1.11.1995, Korea OJ 30.3.2001 L 90/46
cooperation with third countries in order to facilitate the readmission by the latter of its own nationals and in which the two third countries undertook to conclude agreements with EU Member States. Lastly, but on a similar vein, the EU managed to insert a similar clause in the agreement of 2001 with Pakistan, although in this case the third country in question was allowed for a more elaborated statement. 67

As it has been argued elsewhere, 9/11 has been a propeller for the development of the external dimension of the AFSJ in all its aspects. 68 In the context of the conclusion of Development Cooperation agreements, this emerged with the conclusion of two agreements: with the Andean Community and with Central American States in 2003. The two agreements in question were concluded by the Union on the basis of former Article 181 TEC, now Article 211 TFEU, hence falling within the scope of the Development Policy of the EU and without the integration of any other sector-specific legal bases. Whilst the two agreements have not yet entered into force, they are two good examples of how, almost ten years before the conclusion of the EU – Philippines Agreement the Union was integrating AFSJ objects in Development Cooperation agreements. The two agreements are structured identically and the different provisions of the two instruments in relation to the AFSJ are almost identical. 69

The AFSJ - related provisions of the two agreements are inserted in Title III of each agreement under the unspecified title on ‘Cooperation’. In both cases AFSJ cooperation is divided in four provisions: on combating illicit drugs, on combating money laundering, on migration and on terrorism. Possibly, because

67 STATEMENT BY THE ISLAMIC REPUBLIC OF PAKISTAN ON THE DECLARATION ON READMISSION AGREEMENTS In agreeing to the undertaking "to conclude readmission agreements with the Member States of the European Union which so request", the Islamic Republic of Pakistan desires to make it clear that the undertaking exclusively represents Pakistan’s readiness to enter into negotiations with the objective of concluding mutually acceptable readmission agreements with the Member States of the European Union which so request. At present Pakistan does not have such readmission agreements with any Member State of the European Union. However, on the request of EU Member States, Pakistan is willing to start negotiations or intensify where such negotiations are already underway. Pakistan considers these negotiations as independent of any other bilateral or multi-lateral agreements that it has concluded or is in the process of negotiating with EU Member States or the European Commission. Also, Pakistan does not accept any non-negotiable text for such bilateral readmission agreements.
68 Wessel et al 2011, p. 279
69 The Agreement with the Andean Community in relation to the fight against drugs contain a slightly different list of priorities and actions that take into consideration the production of illicit drugs in the region.
Police and Judicial Cooperation on Criminal Matters were anchored to the pre-Lisbon third pillar no provision of the agreements contains any reference to these domains. Using the prism of analysis developed by the CJEU in *Portugal v Council*, it emerges that the different provisions do not go beyond establishing a framework of cooperation between the contracting parties and are limited to determining areas for cooperation and to specifying certain of its aspects and various actions to which special importance is attached.\footnote{Paragraph 45 *Portugal v Council*.}

In relation to combating illicit drugs, the two agreements engage the parties to cooperate against the production, trafficking and consumption of illicit drugs, but most of the actions foreseen relate to the development of programmes to prevent drug abuse, projects to treat and rehabilitate drug addicts and develop joint research programmes on the matter. Conversely, the only direct example of concrete cooperation envisaging legislative measures and enforcement mechanisms relates to projects favouring harmonization of legislation and (unspecified) actions.\footnote{Article 47 of the Political Dialogue and Cooperation Agreement with the Andean Community and Article 47 of the Political Dialogue and Cooperation Agreement with Central American States.} However, the provision in question does not provide any details concerning its field of application or its implementation. The subsequent provision on money laundering is even more vague since it only codifies the willingness of the parties to cooperate in preventing money laundering by the means of administrative and technical assistance and exchange of information on the basis of EU standards a as well as those developed by the Financial Action Task Force.\footnote{The FATF is an intergovernmental body established in 1989. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a “policy-making body” which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. [http://www.fatf-gafi.org/pages/aboutus/membersandobservers/](http://www.fatf-gafi.org/pages/aboutus/membersandobservers/).} In a similar vein, also Article 50 of each agreement on counter-terrorism refers to the full implementation of UN Security Council resolutions on the topic and engages the parties to exchange information and support their counter-terrorism networks and practices.

On the other hand, the provisions on migration, Article 49 in each case, are more elaborated. Indeed, each provision is divided in two main sections. The first, structured similarly to other provisions on cooperation identify a number of
themes on which the parties wish to cooperate. From a substantive perspective, the two provisions of the two agreements comprehensively address a number of issues, ranging from the exchange of best practices on the management of borders to cooperation on visas and the implementation of national legislation with regard to instruments of international protection and, more specifically, the Geneva Convention of 1951 on refugees. Whilst this first part retains a very vague tone in relation to the level and intensity of cooperation between the parties, the second part of Article 49 of each agreement changes tone in relation to the fight against illegal migration and, more specifically, in relation to the readmission of illegal migrants. Indeed, in both cases the clauses on readmission clearly codify a precise and clear commitment—the parties agree to readmit their illegal migrants—which is topped by a number of specifications.\footnote{The readmission clause of each agreement reads as follows:

- each Andean Country/Central American Country shall, upon request and without further formalities, readmit any of its nationals illegally present in the territory of a member State of the European Union, provide their nationals with appropriate identity documents and extend to them the administrative facilities necessary for such purpose.
- each Member State of the European Union shall, upon request and without formalities, readmit any of its nationals illegally present in the territory of an Andean or Central American country, provide their nationals with appropriate identity documents and extend to them the administrative facilities necessary for such purpose.

The Parties agree to conclude, upon request and as soon as possible, an agreement on regulating the specific obligations for member States of the European Union and the Andean and Central American countries on readmission, this agreement will also address the readmission of nationals of other countries and stateless persons.}

Taking into consideration the wording of these readmission clauses, and trying to assess them through the prism of the CJEU decision in case C-377/12 \textit{Commission v Council}, a number of conclusions can be drawn. Firstly, the provisions on readmission clearly fall in the category of ‘habilitating clauses’: this is because the provisions in question indisputably codify the mandate to conclude readmission agreements between the EU, its Member States and the third countries composing the Andean Community and Central America. Yet, the clauses in question do more than merely confer the mandate to conclude readmission agreements, they do more than habilitate the parties involved. This can be deduced by a number of indicators suggesting that the provisions in question actually define the basic framework in which the negotiations shall take place. Firstly, this can be inferred by the fact that each provision on readmission\footnote{Article 49 in both cases} conditions the content of future readmission agreements by affirming that readmissions requests shall be accepted ‘without further
formalities’. This clause, a clause that comes short of exporting the principle of mutual recognition in the relations with third countries, prohibits the parties to subject readmission procedures to procedural hurdles. As a result of this, readmission agreements between Andean and Central American States and the EU and its Member States will have to address administrative rules to facilitate the readmission of illegal migrants, but will not be allowed to introduce rules concerning the scrutiny of the decision leading to the expulsion decision of one of their nationals, however, such limitation must be interpreted as not precluding the application of EU human rights standards and the principle of non-refoulement. Secondly, in both cases the framework agreements impose on the parties the duty to address, in future readmission agreements, the readmission of third countries nationals and stateless persons. Lastly, both readmission clauses contain the express intention to conclude readmission agreements.

The comparison of these clauses with Article 26 (3) of the EU – Philippines Agreement discussed in the previous section reveals that there are no major differences. It appears from the foregoing that the EU has successfully developed a praxis consisting in the inclusion of readmission clauses in the context of Development Cooperation agreements with third countries so as to codify the obligation to conclude readmission agreements between the contracting parties in the future. Yet, the specific case of readmission is the only example of an AFSJ sub-policy has been successfully inserted within the context of Development Cooperation by the codification of concrete obligations, or commitments using the expression of the CJEU, between the parties. Indeed, if we consider other AFSJ sub-policies, the provisions of the different agreements concluded by the EU do not go beyond the more traditional praxis of identifying themes for cooperation. Looking AFSJ clauses in general, the EU has inserted such provisions in the context of Development Cooperation consistently and always containing the following elements:

- Identification of themes in which the parties agree to cooperate;
- Identification of a number of priorities and opening of dialogue on specific challenges;

75 The only difference is that while the agreements with the Andean Community and Central American States affirm that readmission shall occur ‘without further formalities’, the agreement with the Philippines uses the weaker expression of ‘without undue delay’. While the former refers to procedural and administrative procedures, the use of the noun ‘delay’ merely implies a temporal factor, which can absorb a number of procedural issues.
- Reference to soft law mechanisms of cooperation such as exchange of best practices;
- Support of the EU to the implementation of international conventions and standards in the targeted country;
- Establishment of a link with international initiatives, e.g. FATF or UN Resolution 1373(2001), the Geneva Convention Relating to the Status of Refugees of 1951

By privileging soft law and having the mere intention of opening a dialogue in most cases, these habilitating clauses open the road to future cooperation. With this in mind it clearly emerges that these clauses do not have the capacity of directly affecting the rights of individuals and, as a consequence of this, one might wonder whether these agreements can pose problems of constitutional nature aside from those linked to the choice of the proper legal basis. This conclusion will also be valid for the following strand of agreements, those concluded between 2004 and 2014. In relation to readmission, however, the praxis of inserting readmission clauses that include clear obligations, not mere commitments, in relation to the content of future agreements, poses two main problems: on human rights protection mechanisms first and on the distribution of competencies between the EU and the Member States second.

Firstly, none of the readmission provision appears to include a human rights protection clause. In fact, also in the cases in which the parties commit to conclude readmission agreements in which the parties agree not impose further formalities, the EU has not inserted a clause on human rights protection expressly saying that the prohibition to impose further formalities does not cover human rights protection standards. This, of course, means such clause could be (erroneously) interpreted as precluding the competent authorities of a EU Member States from considering human rights protection standards before the repatriation of a third country national. Surely such a result can be avoided in two ways. First, such an interpretation and application of readmission clauses can be avoided by inserting clear human rights protection mechanisms at the moment of concluding actual readmission agreements; secondly, also a systematic interpretation of the agreements within the EU legal order guarantees the protection of human rights in the sense that the execution of a readmission agreements anchored to EU law must abide by EU human rights protection standards ex Article 51 EUCFR. However, notwithstanding these two observations that apply to the agreements with central American and Andean
states, considerations on human rights protection standards seem to be better, but not satisfactorily, included in the recent agreement with the Philippines. In this case Article 26 (2) (f) expressly provides that i) the return of persons must occur under humane and dignified conditions, and ii) that the readmission of persons shall be with due regard to the parties' right to grant residence permits or authorizations to stay for compassionate and humanitarian reasons and the principle of non-refoulement. From this provision it can be concluded that whilst the return of persons must occur under humane and dignified conditions – suggesting that this provisions may refer to the actual return trip of third country nationals, the readmission process must give due regard to the right of the parties to grant residence for humanitarian reasons or for the application of the non-refoulement principle. Whilst the central aspects on human rights processioning the context of readmission are present since Article 26 of the EU – Philippines agreement mentions humane return conditions and non-refoulement, the provision leaves ample discretionary powers to EU Member States since it does not prescribe the conduct of Member States authorities in cases in which human rights do not appear sufficiently protected by the Philippines; especially in the thorny case of third country nationals, i.e. individuals that are not citizens of the Philippines, but that may be returned to this country buy virtue do the EU – Philippines agreement.

The specific case of the insertion of readmission clauses in Development Cooperation agreements shows how controversial the insertion of AFSJ clauses into other instruments of EU external relations might be if such clauses identify obligations and commitments for the contracting parties without including comprehensive human rights protection mechanisms. While there can be no doubt that the lack of a comprehensive human rights protection mechanism may be remedied by the means of a systematic interpretation of EU law which includes, ex Article 51 EUCFR, the charter of fundamental rights, it is regrettable that the EU dos not consider the urgency to insert such clauses when concluding agreement that include AFSJ provisions. This is particular true also if we consider that AFSJ clauses are likely to be implemented by Member States rather than EU authorities; this is very much the case of readmission where the lack of human rights protection clauses may lead to a fragmented application of protection standards by the Member States.
The role of Member States is the second problem that emerges from the insertion of the clauses such as the readmission clause of the EU – Philippines agreement. Indeed, as it emerged in Part II of this study, EU Member States remain the sovereign authorities in charge of public order and retaining enforcement powers in the fields of the AFSJ. Moreover, as it emerged in Chapter 6, whilst readmission is an express external competence of the EU, the Union does not have the powers to enforce such agreements and, de facto, has allowed member States to conclude readmission agreements independently from EU initiatives. Yet in readmission clauses such as the one inserted in the EU – Philippines agreement analysed in this Section, no reference to the distribution of powers amongst EU and its Member States is made, with the result that it is not clear whether a EU Member States is allowed to conclude a bilateral agreement with the Philippines on readmission independently from the EU. In other words, the question is to ascertain whether the inclusion of readmission clauses by the EU does preclude Member States to act autonomously in the field.

To answer this question it must be borne in mind that since 1999, the EU adopted a standard format for the inclusion of readmission clauses in broader external agreements. Whilst the Council had already adopted such document in 1995, the 1999 version is, in principle the format which is still applicable to this date. In the 1999 document it is expressly stated that pending the conclusion of the readmission agreement with the EU, Member States and third countries with whom the EU has concluded an multidisciplinary agreement such a as Development Cooperation one, can conclude bilateral readmission agreements. Therefore, according to this document member States retained the power to conclude bilateral agreements on readmission under two different situations: firstly, if a third country had no agreement with the UE that touched upon readmission and if, secondly, a third country had signed a readmission clause in a multidisciplinary agreement with the EU, but no concrete readmission agreement had been signed since the conclusion of the agreement with the readmission clause. In practice, however, Member States have contributed to pursue their own readmission policy; consequentially it must be assumed that the power to conclude readmission agreements is, in principle a shared one since the Commission has never took any measure against the praxis of Member States.

76 Wessel et al. 2011 and Schieffer 2008
78 Ibid., p.31
In this respect Peers has observed that “the EU has not acquired exclusive competence pursuant to full harmonisations of the relevant internal law; nor it can be argued that it is absolutely essential for the Community to exercise external competence in order for it to adopt internal legislation”.  

Yet the reality is more nuanced than this. Firstly, the 1999 model readmission clause has not been thoroughly used as a model readmission clause. As this Chapter reveals, clauses are very similar, but not identical, especially in relation to the conditionality referred to in the document of 1999. This means that while the 1999 document clearly says that Member States can conclude agreements if the EU has not concluded a bilateral agreement on readmission, this clause is not always present in the different multidisciplinary agreements concluded. For instance, the readmission clause in the Partnership and Cooperation Agreement with Iraq does not touch upon this issue at all and is very vague on this matter:

“the Parties agree to conclude, upon request by either Party as defined in the Article 122 and as soon as possible, an agreement on preventing and controlling illegal migration and regulating the specific procedures and obligations for readmission, covering also, if deemed appropriate by both Parties, the readmission of nationals of other countries and stateless persons”.  

As the excerpt of the agreement with Iraq shows, the provision on readmission does not clearly say whether EU Member States can autonomously conclude at bilateral level readmission agreements. As the said PCA agreement is a mixed agreement the reference to “Parties” can be interpreted as covering Iraq, the EU and each Member State; from a literal perspective this could be interpreted as allowing Member States to act in case the EU fails to do so. Yet, taking into consideration the importance attached to the conclusion of readmission agreements by the EU and the role that the readmission policy has within the broader context of the Union’s migration policy, taking into consideration that the EU is significantly expanding its role in relation to the conclusion of readmission agreements and taking into consideration the existence of partial

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79 Peers 2012, p.589
80 Article 105 (5) of the EU – Iraq PCA Agreement, OJ [ 2012] 31.7.2012 L204, p.48 See infra, next Section and Table 10.2
internal harmonisation of procedural rules with the adoption of the Return Directive of 2008,\(^{82}\) it seems difficult to argue that member States’ discretionary powers are not affected by readmission clauses inserted in broader agreements. Hence, whilst Member States may retain their powers to conclude readmission agreements after the EU has concluded an agreement with a readmission clause, but not concluded a readmission agreement, Member States’ external action would nonetheless be conditioned, according to the principle of loyal cooperation, by the existing acquis on the one side and by the external objective of the Union on the other.

**10.4.2 The Insertion of AFSJ Clauses in the Period 2004 - 2014**

In the aftermath of The Hague Programme on the AFSJ and the adoption of the strategy on the external dimension of this policy, the integration of AFSJ clauses in broader contexts has not only increased, but it has also become more detailed. A first result of this is evidenced by the new agreements with the African, Caribbean and Pacific Countries and the Republic of Korea of 2010. In both cases the EU had prior agreements concluded in 2000 and 2001 that did not contain AFSJ-related clauses. Moreover, the EU has recently concluded also other Partnership and Cooperation Agreements with other third countries such as Indonesia, Iraq and the Philippines. In all these cases the EU has managed to obtain the insertion of AFSJ clauses.

**10.4.2.1 The Choice of Legal Bases and Readmission Clauses**

In the period of time between the Partnership and Cooperation Agreement with Pakistan and the decision of the CJEU on the EU – Philippines Agreement, the Council has modified the approach adopted at the time of the conclusion of the EU – India Agreement and has integrated the general legal bases on Trade and Development with sector-specific ones.

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<table>
<thead>
<tr>
<th>Country</th>
<th>Legal Basis(es)</th>
<th>AFSJ clauses</th>
<th>OJ Reference of Council Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partnership and Cooperation Agreement with ACP States 2010 amendments</td>
<td>217 TFEU</td>
<td>Article 13 on Readmission</td>
<td>4.11.2010 L 287/1</td>
</tr>
<tr>
<td>Framework Agreement on Partnership and Cooperation with Mongolia</td>
<td>79 (3) TFEU, 207 TFEU and 218 (5) TFEU</td>
<td>Title V, Articles 29-34</td>
<td>24.5.2012 L 134/4</td>
</tr>
<tr>
<td>Framework Agreement with Korea</td>
<td>207 TFEU, 212 TFEU</td>
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<td>23.1.2013 L 20/1</td>
</tr>
<tr>
<td>Framework Agreement on Comprehensive Partnership and Cooperation with Indonesia</td>
<td>91 TFEU, 100 TFEU, 191(4) TFEU, 207 TFEU and 209 TFEU</td>
<td>[Article 34 3) on readmission], Articles 35, 36 and 37</td>
<td>OJ 26.4.2014 L125/44</td>
</tr>
<tr>
<td>Framework Agreement on Comprehensive Partnership and Cooperation with Indonesia</td>
<td>79(3) TFEU, 218 (6) (a) TFEU</td>
<td>Article 34 (3) on readmission</td>
<td>OJ 26.4.2014 L125/46</td>
</tr>
<tr>
<td>Partnership and Cooperation</td>
<td>Article 79(3), Articles 91 and</td>
<td>Title IV On Justice, Freedom and</td>
<td>OJ 31.7.2014 L 204/18</td>
</tr>
</tbody>
</table>
Table 10.2 shows that the Council has not adopted a consistent pattern concerning the choice of the proper legal bases to conclude Trade and Development agreements that have AFSJ-related clauses. A first type of solution adopted by the Council is the one represented by the jigsaw of Decisions on the agreement with Indonesia, which was concluded following the adoption of three different Council Decisions. In this case, but possibly because the first Decision on the conclusion of the agreement was adopted in October 2009, before the entry into force of the Lisbon Treaty, we have three Council Decisions. The first was adopted before the entry into force of the Lisbon Treaty and is based on Trade and Development; the second was adopted after the entry into force of the Lisbon Treaty, is based on Articles 91 and 100 TFEU on transport, Article 191(4) TFEU on the environment and, finally, Articles 207 and 209 TFEU on Trade and Development. The third, decision, on the other hand, is based on Article 79(3) TFEU and covers Article 34 (3) of the Agreement, i.e. the provision that commits the parties to conclude readmission agreements. Contrary to what may appear prima facie, the solution adopted in the EU – Indonesia jigsaw was not caused by the necessity to legitimize the clause on readmission for reasons linked to its depth or level of commitment. Rather, the choice of adopting a separate decision for the readmission clause of this agreement is to be found in the peculiar opt-out regimes of the UK, Ireland and Denmark.83

It appears from the foregoing that whilst one Decision was adopted to accommodate the transition towards the entry into force of the Lisbon Treaty,84 a second Decision was adopted to accommodate the positions of the opt-out Member States. The third Decision on the Conclusion of the EU – Indonesia

83 This is made clear in the preamble of the ad-hoc Decision 2014/231/EU: “(2) In accordance with Articles 1 and 2 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States are not taking part in the adoption of this Decision and are not bound by it or subject to its application; (3) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application”, Council Decision 2014/231/EU, OJ 26.4.2014 L125/46

84 Council Decision 2014/229/EU expressly mentions the conclusion of the agreement at a later date. OJ 26.4.2014 L125/16
Agreement, instead, is the main document concerning the identification of the legal basis and contrary to the position of the Council as emerged in the EU – India agreement analysed above, it contains plurality of legal bases so as to reflect the different ambits of cooperation: Articles 91 and 100 TFEU on Transport, 191(4) TFEU on environment, 207 TFEU on the CCP and 209 TFEU on Development Cooperation. However, in relation to the AFSJ it emerges that while the agreement in question contains a number of cooperation clauses on organised crime and corruption (Article 35), combating illicit drugs (Article 36), combating money laundering (Article 37) and on combating terrorism (Article 5), none of these policies is mirrored in the Decision pertaining to the choice of the proper legal basis; and in relation to the readmission clause, the Council justified its special choice because of the opt-out regimes of three Member States and not because of the content of that clause alone, and not in relation to the other AFSJ clauses. This is significant since it could be inferred that the opt-out regimes require an express provision only if an international agreement contains clauses that go beyond the simple establishment of a cooperation framework. However, this conclusion does not explain the difference between the decision concerning Articles 91, 100, 191(4) against the decision not to expressly mention the other AFSJ provisions in any of the decisions concerning the conclusion of the envisaged agreement. It appears from the foregoing that in relation to this agreement the Council did not consider the various AFSJ-related specific enough and in need of a separate legal basis. Looking at the different AFSJ clauses of the agreement and comparing them to other sector-specific ones, there is nothing that justifies the discrepancy since also the other sector-specific clauses of the agreement with Indonesia are formulated in the exact same way of those anchored to the AFSJ.

As Table 10.2 shows, the Indonesia case is a special one. However, also in the other agreements considered in this section the only express reference to AFSJ policies contained in the different agreements is Article 79 (3) TFEU on readmission, whereas the other policies are absorbed by the general Development Cooperation legal basis. Looking at the different provisions on readmission as included in the agreements with the Philippines Mongolia and Iraq, the rationale behind the choice of adding the specific legal basis appears to be consistent because each readmission clause contains the commitment to conclude readmission agreements under the conditions set out in the different
texts, these clauses could justify the integration of Article 79(3) TFEU to the Development Cooperation legal basis.\footnote{However, the clause on readmission in the EU – Mongolia Agreement is less developed than the ones in the agreements with the Philippines and Iraq.}

In the cases of the ACP and the Korean agreements, however, the Council proceeded to conclude the agreement without the integration of Article 79 (3) TFEU on readmission as a sector-specific legal basis. This solution appears justified if one looks at the specific clause contained in the EU – Korea agreement if we consider that the latter text merely affirms that “\textit{[t]he Parties endeavour to conclude, if necessary, an agreement regulating the specific obligations for readmission of their nationals. This will also address conditions relating to nationals of other countries and stateless persons}”.\footnote{Article 33 of the agreement OJ 23.1.2013 L 20/13} Indeed, if we compare this clause with the other readmission clauses we can see that the Council considered this clause not specific enough to require its own legal basis and, therefore this seems consistent with the position that the council expressed at the time of the EU – India Agreement. On the other hand, in the case of the ACP agreement we can see that the insertion of a readmission clause in the agreement has not lead the council to integrate the legal basis of the Agreement, even though the specific clause is similar to the different clauses adopted with Indonesia, Iraq and Mongolia and, therefore, more detailed than the one with Korea.

In conclusion, it appears from the analysis above that the Council has not been following a consistent pattern for the conclusion of Development Cooperation and Partnership Agreements that include readmission and AFSJ clauses. A first level of incoherence relates to the position of the opt-out countries. As it will be discussed later in this Chapter, the EU has not adopted a common position concerning the accommodation of the opt-out regimes in the context of the conclusion of international agreements with the result that recent agreements have been concluded on the basis of different conditions and clauses. The second level of inconsistency relates to the relationship between the special position of readmission clauses \textit{vis-à-vis} other types of clauses related to the AFSJ, as it will emerge more in detail in the next Section.
10.4.2.2 The Insertion of Other AFSJ Clauses

In the previous Section the impact of AFSJ clauses in Development Cooperation and trade agreements was analysed from a formal perspective: i.e. by looking at the different decisions of the Council on the conclusion of the different agreements. From a formal perspective, it could be assumed that the different agreements concluded with Korea, the ACP Countries, Indonesia, Mongolia and Iraq only envisaged readmission clauses and that only in relation to this sub-policy the Council strived to follow a consistent and coherent approach when concluding the different agreements since only this sub-policy is incoherently used as a separate legal basis. However, this is not the case and the different agreements do contain other provisions linked to the AFSJ. Consequentially, it must be further ascertained the reason why only readmission clauses and not other AFSJ-related ones influence the Council in the choice of the legal basis for the conclusion of the different agreements.

The reason for which the integration of AFSJ clauses not related to readmission is not reflected in the conclusion of the different agreements and the addition of sector-specific legal bases is substantive. As we have seen, readmission clauses are usually rather detailed in the sense that they codify an obligation or, in the words of the CJEU, a commitment to conclude readmission agreements between the contracting parties and they include specific conditions that such agreements must meet, for example in relation to the readmission of third country nationals. Conversely, other AFSJ-related clauses present in the different agreements merely set an agenda for future collaboration, without identifying concrete bilateral obligations.

This is the case of Article 37 on cybercrime of the EU – Korea Agreement in which the parties agree to

“strengthen cooperation to prevent and combat high technology, cyber and electronic crimes and the distribution of terrorist content via the Internet through exchanging information and practical experiences in compliance with their national legislation within the limits of their responsibility” and to
“exchange information in the fields of the education and training of cybercrime investigators, the investigation of cybercrime, and digital forensic science”.

Similarly, Article 107 on combating money laundering and terrorist financing codifies the commitment of the parties to work together on preventing the use of financial systems to launder the proceeds of all criminal activities, including drug trafficking, corruption and the financing of terrorism, but does not go beyond the identification of general means of cooperation:

“(2) The Parties agree to cooperate on technical and administrative assistance aimed at the development and implementation of regulations and the effective functioning of mechanisms to combat money laundering and financing of terrorism. This cooperation extends to the recovery of assets or funds derived from the proceeds of crimes.

(3) The cooperation shall allow exchanges of relevant information within the framework of respective legislations and the adoption of appropriate standards to combat money laundering and financing of terrorism equivalent to those adopted by the Financial Action Task Force on Money Laundering (hereinafter referred to as ‘FATF’) and by the Union and relevant international bodies active in this area”.

It appears from the foregoing that the express reference to Article 79 (3) TFEU in the different Decisions of the Council for the conclusion of Development Cooperation and Partnership Agreements is the consequence of the following substantive elements. First, whenever Article 79 (3) TFEU is mentioned in the Decision of the Council on the conclusion of a given agreement, it can be inferred that the readmission clause of the agreement codifies the mutual obligation to conclude in the future a readmission agreement and for this reason such clauses cease to fall within the scope of Development and Cooperation and require a separate legal basis. Secondly, the specific integration of Article 79 (3) TFEU in the different Decisions of the Council reflects the substantive content of the different readmission clauses. As a consequence, Article 79(3) TFEU will be used if the readmission clause of the agreement conditions the content of readmission treaties between the EU and the partner third country. However,

87 Article 37, OJ 23.1.2013 L 20/1
88 Article 107 OJ 31.7.2012 L 204/48
these findings and these considerations have to been reassessed against the decision of the CJEU in case C-377/12 Commission v Council.

10.5 Conclusion

The purpose of this Chapter was to map out and analyse the manner in which the EU has integrated the AFSJ in a number of key instruments of EU external relations such as Development Cooperation agreements and Partnership and Cooperation Agreements. By doing so, the Chapter contributed to the analysis of the externalisation of the AFSJ and the answer of the main research question of this study. On the basis of the existing acquis on both the AFSJ and EU external relations law, it was argued that the ‘Sturm und Drang’ approach of the EU institutions in promoting the external dimension of the AFSJ opened a number of constitutional questions that could be traced back to the notion of ‘constitutional foundations’ as used by the CJEU.

Since the adoption of the Development and Cooperation agreements in the late nineties, the EU has successfully managed to integrate AFSJ clauses. From the perspective of the rules pertaining to the choice of the proper legal basis, the praxis reveals that the Council chose to integrate the Development and Cooperation legal basis with other sector-specific provisions whenever a clause of a given agreement codified a specific obligation and whenever a specific clause would condition the content of future bilateral relations. Conversely, whenever a sector-specific clauses did not fulfil the above-mentioned criteria, the Council adhered to the strict application the criteria established by the CJEU at the time of Portugal v Council (EU – India Agreement). This straightforward rule was applicable for any policy field covered by the Treaties, including the AFSJ.

The recent judgement of the CJEU in C-377/12 Commission v Council radically changes these considerations. As a result of that judgement the EU will be able to conclude Development and Cooperation agreements with AFSJ clauses without additional legal bases as long as those clauses do not impose clear and unconditional obligations. Whilst the broad definition of Development Cooperation given by the Court strengthens the role of the EU in this field, it remains to be seen the distinction between obligations and commitments.
proposed by the CJEU will be applied in practice. This Chapter criticised the approach used by the CJEU. The CJEU introduced a distinction without providing a clear explanation for it and, most importantly, without providing a clear definition for what constitutes a ‘commitment’ as opposed to an obligation.

If a clause such as the readmission clause considered in the judgement only amounts to a commitment, does this mean that the EU, its Member States and the third country involved can elude the conclusion of a readmission agreement under the conditions enshrined in the clause? And if the clause only amounts to a commitment, will the Member States be allowed to conclude independent readmission agreements and eventually derogate from the conditions present in the clause? Moreover, if the readmission clause is only a commitment, can we consider that the EU has pre-empted the field of readmission between the EU and the Philippines? These questions remain open for further analysis and debate and will likely be addressed only in the future by the CJEU, if the court decides to continue the use of the above mentioned distinction. As partial answers to these questions it should be borne in mind that with the introduction of this distinction the CJEU probably only wished to emphasise that the readmission clause is not self-executive and that, as a consequence, it cannot be immediately enforced; as a result of such considerations, the CJEU indirectly confirmed the broad mandate of EU Development Cooperation Policy.

At the same time, the broad notion of Development Cooperation means that, strictly speaking, the externalisation of the AFSJ in the context of Development Cooperation is an academic and analytical concept, but not a legal one because with the exclusion of AFSJ legal bases for the conclusion of Development Cooperation agreements containing AFSJ clauses the CJEU has absorbed the latter in favour of the former. Whilst this does not affect the constitutional rules on decision making since the role of the European Parliament does not change, this ruling could be interpreted to support the idea according to which the AFSJ legal bases are necessary only if the EU concludes an international agreement strictly anchored to an AFSJ provision.

Furthermore, this Chapter has revealed that the choices of the CJEU also affect the relationship between the opt-out regimes that characterise the AFSJ and the insertion of AFSJ clauses in other external relations contexts. In this respect the CJEU held that the existence of the opt-outs does not require the addition of
specific legal bases. In this respect the decision seems praise-worthy: the existence of the different opt-outs does not be interpreted as affecting the scope of the EU’s competences; rather, the existence of the different opt-outs means that agreements which include AFSJ clauses will have to expressly mention the limited territorial scope of those clauses in relation to the UK, Ireland and Denmark, but this should not interfere with the scope of external powers attributed to the Union. 89

Lastly, it must be noted that in the agreements and CJEU decisions analysed in this Chapter the issue of human rights protection standards related to the AFSJ does not emerge as a central issue. This can be explained in two main ways: firstly, this might be because each agreement contains a general human rights protection clause. From a systematic perspective, one could argue that this instrument is sufficient to protect a human rights in the context of each agreement. Secondly, it was also observed that because the different AFSJ clauses are not self-executing, there is not direct affectation of individual rights. However, the two considerations do not convince. Firstly, general clauses appear to be ill-fitted to cover all the sector specific principles related to human rights protection that are connected to the different fields of the AFSJ. This means that the EU could, for each sector of the AFSJ covered in a given agreement, add specific human rights clauses and/or standards to make sure that certain benchmarks are respected. Moreover, the existing framework does not convince also because the different agreements analysed in this Chapter establish different levels of cooperation and, especially where some sort of detailed actions are envisaged or when the cooperation between enforcement agencies is foreseen, a stronger and more detailed human rights protection framework should be introduced in order to avoid the emergence of grey areas and/or future violations.

The different observations mentioned in these concluding remarks allow to consider how this Chapter contributes to the answer of the main research question of this study. The integration of AFSJ policies and objectives in external action instruments such as Development Cooperation and Partnership and Cooperation Agreements has two parallel aims: the first is to include ‘justice and home affairs matters’ in the broader context of democratisation and institution-building. This is very close to the general foreign policy goals

89 See Matera 2013 and infra Part Six
enshrined in Article 21 TEU and capacity building. Secondly, the EU uses these instruments to open platforms upon which deeper mechanisms of AFSJ cooperation may be established. This is the ambit in which ‘habilitating clauses’ come into play and where the issue of human rights protection and coherence between internal and external values come into play. This Chapter argued that the EU has not always managed to approach these two aims in a coherent and consistent manner and that, in general, also these *prima facie* inoffensive clauses may turn out to be boomerangs of foreign EU policy.
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Chapter 11

The Inclusion of AFSJ Clauses in ENP and SAP Agreements

11.1 Introduction: Article 8 TEU and the Conclusion of ENP Agreements

This Chapter investigates the integration of AFSJ clauses in the context of the European Neighbourhood Policy (ENP) and the Stability and Association Process (SAP). In the pages that follow, the analysis will turn to the integration of AFSJ objectives in two key external policies of the EU the ENP and the SAP. By doing so this Chapter will contribute to the main theme of this Part of the study which is to analyse how the AFSJ has been integrated into other instruments of EU external action. This Chapter, like the one before, will shed some light in relation to the main research question of this study on the compatibility between the EU’s constitutional foundations and the externalisation of the AFSJ.

The European Neighbourhood Policy has a special position within the European Union and it’s the only external policy of the EU that is expressly mentioned in Title I of the TEU. Article 8 TEU affirms:

“1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation”.

Article 8 TEU establishes a specific objective for the EU which is linked to a territorial element (neighbouring countries of the EU) and a qualitative element
(establishment of an area of prosperity and good neighbourliness) on the basis of the values of the EU ex Articles 2 TEU and 3 (5) TEU. As Van Vooren and Wessel have argued, Article 8 TEU does not appear to be a legal basis on its own right, rather, this provision states an objective, but does not confer new or distinct powers to the EU.¹ As a result of this, in order to attain the objective of establishing an area of prosperity and good neighbourliness, the Union must make use of its various external powers. This means that whilst the EU must make use of its ordinary external powers, the agreements with neighbouring countries should have a qualitative distinct element that codifies the special relation that neighbouring countries have with the EU. As a result of this, it can be inferred that, at least in principle, the EU should make an effort in concluding agreements that mirror the special relationship with these countries. This can be achieved, for example, by integrating them to the various activities of the EU and by establishing common objectives and specific mechanisms of cooperation.

The ENP is divided into a southern and an eastern dimension. The southern part comprises Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Occupied Palestinian Territory, Syria and Tunisia. The eastern part comprises Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. Although a neighbour of the Union, the Russian federation is not part of the ENP and its relations with the EU fall within the specific “Strategic Partnership” between Russia and the EU. However, for the purpose of this study the integration of AFSJ element in the Strategic Partnership with Russia will be dealt in this Chapter.²

In relation to the objectives of this policy, the Council of Ministers of the EU described the main objective of the ENP as “sharing the stability, security and prosperity of the European Union and its neighbours”.³ As the ENP was launched after the 2004 enlargement, this new policy was launched to promote stability and prosperity with the new neighbours of the Union. This means, that the ENP was considered “a security policy because following the 2004 enlargement, the EU would have very different countries and challenges right outside its borders”.⁴ The security dimension of the ENP emerged already in the European Security Strategy of December 2003 where it is affirmed:

¹ Van Vooren and Wessel 2014, p. 537
² Originally the EU intended to include the Russian Federation in the ENP but Russia refused and an ad hoc partnership was coined specifically for this country.
³ Conclusion of the GAER Council, 14 June 2004, pp.11-14
⁴ Van Vooren and Wessel 2014, p.543
“It is in the European interest that countries on our borders are well-governed. Neighbours who are engaged in violent conflict, weak states where organised crime flourishes, dysfunctional societies or exploding population growth on its borders all pose problems for Europe. The integration of acceding states increases our security but also brings the EU closer to troubled areas. Our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations”.

Taking into consideration the objective of establishing an ‘area of prosperity’ on the one side, and the nexus between neighbourliness and security emerging from the ESS, it can be concluded that the ENP is an comprehensive policy or ‘umbrella policy’ in which economic, trade, and energy objectives coexist with migration and security ones. Because the Treaties do not provide for a distinct legal basis conferring to the EU the powers to conclude comprehensive agreements for the ENP, either Association Agreements or Partnership and Cooperation Agreements govern the relationship between the EU and its neighbours; and while Association Agreements are often concluded on the sole basis of Article 217 TFEU, PCAs are usually concluded on a number of legal bases. For instance, whilst the Euro-Med Association Agreement with Lebanon was concluded on 310 TEC alone, the PCA with Armenia of 1999 was concluded on a plurality of legal bases. Furthermore, PCAs in the context of the ENP must not be confused with Partnership and Cooperation Agreements concluded under the European Development Cooperation policy: whilst the latter type of agreements have in Articles 209-211 TFEU their legal bases, PCAs concluded in the context of the ENP do not have a specific legal basis and are usually concluded upon the different sector-specific provisions of the TFEU, but not on Articles 209-211 TFEU. However, since most PCAs with ENP countries were concluded in

5 European Security Strategy, 12 December 2003
6 Van Vooren and Wessel 2014, p.544
7 OJ 30.5.2006 L143/1
8 OJ 9.9.1999 L 239/1
the late 90s the EU is currently replacing those with Association Agreements ex Article 217 TFEU.

In this respect, Council Decision 2014/492/EU of 16 June 2014 on the signing of the Association Agreement with Moldova and Council Decision 2014/494/EU on the signing of the Association Agreement with Georgia are particularly interesting for two main reasons. First, the two Decisions authorise the signature of the agreement on the following provisions: Articles 37 and 31(1) TEU in conjunction with Articles 218 (5) and 218 (8) TFEU. This means that the agreements in question are also anchored to the TEU and the Common Foreign and Security Policy following a Decision of the Council *qua* CFSP (Article 31(1) TEU) and the power conferred to the EU under this Treaty to conclude international agreements (Article 37 TEU). This means that the two Council Decisions are anchored to the TEU from a procedural perspective, but the Council fails to mention, in both cases, the substantive acts adopted within the CFSP/CSDP context that link the two agreements and the TEU. At the same time, the Council anchored its two Decisions to Article 217 TFEU on the conclusion of Association Agreements. These two examples follow the EU’s accession to the Treaty of Amity and Cooperation in South-East Asia that was concluded in 2012: at that time the Council adopted a single Decision authorising the signature of the agreement on the basis of 37 TEU and Articles 209 and 212 TFEU, after the EP gave its consent. In this case, and similarly to the cases mentioned above for Georgia and Moldova, the procedural compatibility was guaranteed by the fact that for each instances the Council could act through unanimity without violating any other decision-making rule; meaning that if there is political consensus, the differences between the pillars can be overtaken.

While the CFSP/CSDP dimensions of the two covenants emerge from the substantive provisions of Title I of the agreement with Moldova and Title II of the agreement with Georgia, where there are clauses on weapons of

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9 OJ 30.8.2014 L 260/1 and OJ 30.8.2014 L261/1 respectively
10 Council Decision 2012/308/CFSP, OJ 2012 L154/1
mass destruction (WMD) and small arms and light weapons (SALW), neither the Decisions nor the agreements expressly mention Article 8 TEU. Moreover, none of the agreements clarifies the ways in which the two components (TEU and TFEU) will be implemented in case a specific issue falls within the scope of both CFSP and TFEU provisions: this is the case of countering terrorism in which the intelligence and defence dimension coexists with criminal justice and police investigations.\textsuperscript{11} This problem is likely to emerge more prominently in the future since the renewed ENP will have a strong focus on security cooperation, possibly with a strong focus on capacity building and operational cooperation between the agencies of the EU and those of the third countries concerned.\textsuperscript{12}

To test the special bond between the EU and its neighbouring countries in the fields of the AFSJ, this chapter will compare the different AFSJ clauses inserted in the ENP association agreements with those AFSJ clauses and the AFSJ scheme used by the EU in the context of Development Cooperation and Political Dialogue Policies. Since the EU’s ENP is a deeper kind of external relations policy, it should emerge in the following sections that the AFSJ cooperation with ENP countries is deeper and more significant.\textsuperscript{13}

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\textsuperscript{11} Herlin-Karnell and Matera 2014
\textsuperscript{12} Section V.2 of Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, JOIN (2015) 50 final, 18.11.2015 For a comment Blockmans 2015
\textsuperscript{13} See Chapter 10.4.1, supra. The different indicators are the following: i) identification of themes in which the parties agree to cooperate; ii) identification of a number of priorities and opening of dialogue on specific challenges; iii) reference to soft law mechanisms of cooperation such as exchange of best practices; iv) support of the EU to the implementation of international conventions and standards in the targeted country; v) establishment of a link with international initiatives, e.g. FATF or UN Resolution 1373(2001), the Geneva Convention Relating to the Status of Refugees of 1951
11.2 The Inclusion of AFSJ Clauses in the Context of the Association Agreements with Eastern Europe, the Southern Caucasus and the Strategic Partnership with Russia

11.2.1 Introduction

The integration of AFSJ elements with neighbouring countries is a priority for the EU. This firstly emerged in the European Security Strategy of 2003 and has, since then characterised the evolution of the relations between Eastern European Countries and Southern Caucasus Countries with the Union. Naturally, the evolution of the relations has also been the result of the internal evolution of the EU and the expansion of its AFSJ competences. At the same time, since bilateral agreements reflect the interests and the common goals of two parties, the level of cooperation on AFSJ matters reflected in each agreement will depend also on the political willingness of each partner. This can be seen in relation to the Partnership and Cooperation Agreement with Russia concluded in the late nineties and containing only one provision on AFSJ matters which does not go beyond the identification of ambits of cooperation in very general terms.\(^\text{14}\)

11.2.2 Substantive Analysis

Table 11.1 provides an overview of the agreements falling within the eastern dimension of the ENP. While the early agreements of the late nineties where formulated in broad terms and contained general clauses similar to the ones analysed in relation to the Development Cooperation policy of the EU, the recent agreements signed by the EU with Georgia, Moldova and Ukraine reveal how the AFSJ has grown into an important parcel in the ENP agenda. Firstly, the three agreements concluded in 2014 contain a number of general provisions that condition the association to the respect for democratic principles, human rights, peace, good governance and economic growth.\(^\text{15}\) This is the case, for instance, of

\(^{14}\) Partnership and Cooperation Agreement with the Russian Federation OJ 28.11.97 L 327/3. Article 84 affirms that the Parties shall establish cooperation aimed at preventing illegal activities in a number of sectors (economic, migration, drugs, goods and waste) and that such cooperation is based on mutual consultations and close interactions concerning drafting legislation, training personnel, creation of information centres. Since the conclusion of this agreement, the EU and its agencies and the Russian Federation have concluded a number of ad hoc agreements on the different fields covered by the AFSJ.

\(^{15}\) On the application of conditionality in the ENP see Cremona M 2008
Article 2 of the agreement with Moldova, but identical provisions have been inserted in the other two agreements with Georgia and Ukraine. In relation to the specific fields of the AFSJ, each agreement has a provision on the rule of law and human rights that affirms the following:

1. In their cooperation in the area of freedom, security and justice the Parties shall attach particular importance to further promoting the rule of law, including the independence of the judiciary, access to justice, and the right to a fair trial.

2. The Parties will cooperate fully on the effective functioning of institutions in the areas of law enforcement and the administration of justice.

3. Respect for human rights and fundamental freedoms will guide all cooperation on freedom, security and justice.

While the provision appears to be more declaratory than regulatory, this is nonetheless a positive development since cooperation on AFSJ matters is ultimately designed to affect the rights of individuals. It remains to be seen, however, what will be the impact of this type of provision. Will these provisions be used to condition cooperation at the operational level or will these provisions be considered a distinct parcel, a distinct sub-objective of each agreement? Furthermore, will these provisions condition the applicability of the AFSJ parcel

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16 Article 2 of the Agreement with Moldova reads as follows: 1. Respect for the democratic principles, human rights and fundamental freedoms, as proclaimed in the United Nations Universal Declaration of Human Rights of 1948 and as defined in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990 shall form the basis of the domestic and external policies of the Parties and constitutes an essential element of this Agreement. Countering the proliferation of weapons of mass destruction, related materials and their means of delivery also constitute essential elements of this Agreement. 2. The Parties reiterate their commitment to the principles of a free market economy, sustainable development and effective multilateralism. 3. The Parties reaffirm their respect for the principles of the rule of law and good governance, as well as their international obligations, in particular under the UN, the Council of Europe and the OSCE. In particular, they agree to promoting respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence. 4. The Parties commit themselves to the rule of law, good governance, the fight against corruption, the fight against the various forms of transnational organised crime and terrorism, the promotion of sustainable development, effective multilateralism and the fight against the proliferation of weapons of mass destruction and their delivery systems. This commitment constitutes a key factor in the development of the relations and cooperation between the Parties and contributes to regional peace and stability.

17 Article 12 of the agreement with Moldova, Article 13 of the agreement with Georgia and Article 14 of the agreement with Ukraine.
of each agreement? At this time, all these questions remain open since it is not yet clear how these clauses impact the application of bilateral relations.

Moreover, each agreement contains a general clause on data protection in connection with AFSJ cooperation and the establishment of specific rules to guarantee the right to data protection. However, the different clauses are not identical and where the agreement with Moldova and Georgia speak of ensuring ‘a high level of protection’, the one with Ukraine speaks of ensuring only an ‘adequate level of protection’. This difference is clearly at odds with the mandate enshrined in Article 21 TEU to uphold, promote and protect the EU’s founding principles and, ex Article 3 (5) TEU the interests of its citizens. Yet, one way to reconcile the distinction operated with primary law provisions is to say that only where high level of protection is guaranteed the EU can and its agencies can conclude operational agreements that involve the sharing of personal data. Unfortunately, the EU has already concluded via its agencies a number of operational agreements (involving the sharing of personal data) independently from the general clause of the various ENP agreements with the result of making it harder for the EU to promote reforms and improve data protection standards with partner countries of the ENP since operational agreements are already in place.\(^{18}\) Moreover, the three provisions differ also in their scope. Article 13 of the agreement with Moldova affirms that:

> “Any processing of personal data shall be subject to the legal provisions referred to in Annex I to this Agreement. The transfer of personal data between the Parties shall only take place if such transfer is necessary for the implementation, by the competent authorities of the Parties, of this or other agreements concluded between the Parties”.

This article, together with Annex I of the agreement, provides for a specific set of rules regulating the exchange of personal data between the contracting parties; moreover, it conditions the exchange of personal data to a necessity clause linked to the implementation of the association agreement or other AFSJ-related agreements such as those on readmission and cooperation between Moldova, and

\(^{18}\) For an overview of the agreements on operational cooperation see part Six, infra.
from a systematic perspective, those concluded with AFSJ agencies. However, Article 15 of the Agreement with Ukraine affirms that “cooperation on personal data may include, the exchange of information and of experts” without referring to more specific standards whereas the agreement with Georgia contains an Annex setting the rules on the exchange of personal data, but does not contain the necessity clause present in the one with Moldova. The inconsistencies of the three agreements are very unsatisfactory: while the addition of a specific Annex regulating the exchange of data with Moldova and Georgia is praise-worthy, only the one with Moldova is capable of affecting the concrete application of data exchange. Moreover, it is striking that the EU has not explicitly regulated the relationship between these clauses and the different clauses on data exchange that have been concluded, or that may be concluded, in the specific domains of the external dimension of the different AFSJ policies. The lack of consistency on this sensitive domain is at odds with the obligation to “uphold and promote its values and interests and contribute to the protection of its citizens” as codified in Article 3(5) TEU. This means that the EU has difficulties in promoting its values and protect its citizens if it does not manage to have similar clauses on data protection with its key partners, especially if there are substantiated reasons to believe that its standards of protection are higher than those of the partner country. After all, doesn’t Article 8 TEU bind the EU to engage with its neighbours by asserting its values?

Since the conclusion of the Partnership and Cooperation Agreements of the late nineties, the cooperation in the various fields of the AFSJ has been significantly expanded: it covers more fields and it sets more ambitious goals. However, the structure of these agreements remains the same. Provisions on the AFSJ integrated in Association Agreements continue to identify topics and ambits of cooperation and do not aim at regulating, in a concrete manner, cooperation. In other words, the expansion of AFSJ clauses has not changed their nature and these clauses remain ‘habilitating clauses’, i.e. provisions that identify sectors in which the contracting parties agree to cooperate in the future. These clauses therefore habilitate the EU, its Member States and the agencies of the Union to engage with the third countries of the Eastern Partnership to address the challenges identified in the respective Association Agreements. This clearly

19 Infra Part Six
20 Hillion 2013, p.14
emerges from Article 16 of the EU – Moldova Agreement on Preventing and combating organised crime, corruption and other illegal activities:

1. The Parties shall cooperate on preventing and combating all forms of criminal and illegal activities, organised or otherwise, including those of a transnational character, such as:
   (a) smuggling and trafficking in human beings;
   (b) smuggling and trafficking in goods, including in small arms and illicit drugs;
   (c) illegal economic and financial activities such as counterfeiting, fiscal fraud and public procurement fraud;
   (d) fraud, as referred to in Title VI (Financial Assistance, and Anti-Fraud and Control Provisions) of this Agreement, in projects funded by international donors;
   (e) active and passive corruption, both in the private and public sector, including the abuse of functions and trading in influence;
   (f) forging documents and submitting false statements; and
   (g) cyber crime.

2. The Parties shall enhance bilateral, regional and international cooperation among law enforcement bodies, including strengthening cooperation between the European Police Office (Europol) and the relevant authorities of the Republic of Moldova. The Parties are committed to implementing effectively the relevant international standards, and in particular those enshrined in the United Nations Convention against Transnational Organised Crime (UNTOC) of 2000 and its three Protocols, the United Nations Convention against Corruption of 2003, and relevant Council of Europe instruments on preventing and combating corruption.

The first subparagraph of the Article 16 of the EU – Moldova Agreement is the part of the provision that identifies the ambits of cooperation and the second subparagraph identifies specific means of cooperation or framework of cooperation that the parties are required to follow. Also other provisions such as the ones on migration, asylum and border management or the ones on fighting terrorism follow a similar pattern whereby one paragraph contains the specific
fields in which the parties have agreed to cooperate and another paragraph creates a bridge between cooperation amongst the contracting parties and the promotion of international cooperation, norms and standards in a given field.\textsuperscript{21}

The recent agreements with Georgia, Moldova and Ukraine reveal other interesting aspects. Firstly, there is greater attention to migration policies as a whole. This can be inferred by the fact that the different provisions comprise a broad range of activities for the purpose of developing the joint management of migration flows. To this end, and by way of example, the EU - Ukraine Agreement touches upon the following matters: tackling root causes of migration, establishing an effective and preventive policy against illegal migration, establishing a comprehensive dialogue on asylum, cooperation on admission rules and the status of legal migrants, developing operational measures in the field of border management, enhancing document security and developing an effective return policy.\textsuperscript{22} Furthermore, what is interesting in relation to the three recent agreements concluded in 2014 is the inclusion, in the Title of the agreement dedicated to the Area of Freedom, Security and Justice, of provisions regulating the movement and treatment of workers. This particular choice shows how migration policy with third countries is not seen as a parcel of economic cooperation, but as a parcel of the security policies of the EU, thus testifying a paradigm shift in the handling of the EU’s migration policy that significantly demonstrates how the Union perceives migration as a potential security threat rather than as societal and economic phenomenon.\textsuperscript{23}

The least developed parcels of the AFSJ clauses with ENP countries with Eastern Europe, the Southern Caucasus and the Strategic partnership with Russia are the ones on legal cooperation, or more precisely, judicial cooperation on civil and criminal matters. For instance, Article 24 of the EU – Ukraine Agreement reads as follows:

1. The Parties agree to further develop judicial cooperation in civil and criminal matters, making full use of the relevant international and bilateral instruments and based on the principles of legal certainty and the right to a fair trial.

\textsuperscript{21} Article 23 on fighting terrorism of the EU - Ukraine Association Agreement
\textsuperscript{22} Article 16 of the Agreement
\textsuperscript{23} Mehdi 2011
2. The Parties agree to facilitate further EU-Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of The Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children.

3. As regards judicial cooperation in criminal matters, the Parties shall seek to enhance arrangements on mutual legal assistance and extradition. This would include, where appropriate, accession to, and implementation of, the relevant international instruments of the United Nations and the Council of Europe, as well as the Rome Statute of the International Criminal Court of 1998 as referred to in Article 8 of this Agreement, and closer cooperation with Eurojust.

It emerges from this provision that in the field of judicial cooperation the EU relies largely on two organisations that have a consolidated experience in developing mechanisms to enhance judicial cooperation: the Council of Europe and The Hague Convention on Private International Law. This, however, should not come as a surprise since these two organisations have contributed to foster judicial cooperation in civil and criminal matters way before the EU acquired its powers in JHA; and although the bilateral relations of the EU with the two organisations is characterised by a certain degree of competition that affects the harmonious development of their cooperation, the EU presents itself as a strong promoter of the two organisations and, taking a broader perspective, other international initiatives such as the International Criminal Court and other relevant measures adopted at UN level.

The analysis on the integration of AFSJ clauses in the framework of the Eastern Partnership of the ENP reveals a number of interesting points for the purpose of this study. The research shows that, quite logically, the integration of AFSJ clauses has been evolving and that only recent agreements seem to fully reflect the policy ambitions of the AFSJ policy programmes. Possibly, this result is facilitated by the fact that the conclusion of association agreements does not raise legal bases disputes.

A striking feature that has emerged is the lack of consistency amongst recent agreements in relation to specific, key, clauses such as the one on data protection
standards. Firstly, this poses questions of legitimacy in relation to the strong mandate the EU has to uphold and promote EU standards, especially in relation to human rights, transparency and democracy. Secondly, the lack of consistency within the ENP also suggests that the EU is not capable of being coherent between internal and external action. These issues will put the EU to test in relation to the operationalization of the agreements and, in particular, in relation to the conclusion and implementation of operational cooperation, a type of cooperation that involves enforcement agencies and that requires exchange of all relevant (personal) information in order to be effective.

At the same time the new agreements provide a more balanced and deeper AFSJ framework for cooperation than past agreements. Of course this is only natural if we consider the special position that the ENP and the AFSJ respectively have within the treaties, but the new Eastern Partnership agreements better reflect the AFSJ external agenda of the EU than the ones concluded in the framework of the Euro-Mediterranean Partnership and balance AFSJ cooperation objectives (readmission, cooperation to fight against transnational crime) with internal reforms (e.g. adoption of international standards on human rights and refugee protection. In this respect it can be easily said the the latest agreements of the ENP are structured around some of the cardinal points that emerged in Chapter 10 above:

- Support of the EU to the implementation of international conventions and standards related to the AFSJ in the targeted country;
- Establishment of a link with international initiatives, e.g. FATF or UN Resolution 1373(2001), the Geneva Convention Relating to the Status of Refugees of 195;
- Identification of key priorities and and main objectives for cooperation;

In this respect then, the overall ambition to integrate in a consistent manner AFSJ elements in all the external instruments and policies of the AFSJ seems partially attained: whilst formally speaking the widening of AFSJ clauses suggests that the objective has been successfully the attained, the lack of coherence in the wording of the different clauses and on the standards of human rights and data protection required is to be criticised since it can negatively effect internal standards of protection and expose EU citizens and third country nationals to undue intrusions of public authorities.
11.3 The Inclusion of AFSJ Clauses in the Context of the Euro-Mediterranean Partnership

11.3.1 Introduction

Also the cooperation between the EU and its southern neighbours is anchored to Article 8 TEU, but, similarly to what has emerged in relation to the Eastern Partnership, the agreements with the southern neighbours of the EU still lack an express reference to this provision. Contrary to the wave of new agreements that have been concluded in the context of the eastern partnership with Moldova, Georgia and Ukraine, the agreements concluded with the southern neighbours of the EU appear outdated. Indeed, as it will emerge in the sections that follow, the clauses on AFSJ cooperation with the southern neighbours not only fail to cover all the aspects of the AFSJ and, most notably, border management and migration, but also fail to individuate clear AFSJ objectives making these agreements the least innovative agreements analysed in this Part of the study.

11.3.2 Substantive analysis

Table 11.2 below provides an overview of the different Euro–Mediterranean agreements. These agreements were concluded between 1998 and 2006. From this perspective it should not come as a surprise that only the latest agreements cover a wider range of AFSJ polices. However, taking in to consideration the strategic importance of the south Mediterranean for the European Union it does come as a surprise that these countries have not been approached so as to renovate the agreements, in a manner similar to what has happened within the Eastern partnership. This is particularly true for countries that have maintained their respective forms of government, such as Morocco, or countries that have engaged also internationally to overcome troubled periods such as Lebanon or, more recently, Tunisia. Yet, as it will emerge in the next Part of this study, the EU has recently intensified its JHA relations with some countries of the Mediterranean region for the conclusion of Mobility Partnerships and Readmission Agreements. This possibly shows how difficult it is to negotiate and conclude comprehensive agreements such as ENP-related ones with the

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24 Infra Part Six, Chapter 13
result that the EU finds it easier to negotiate sector-specific agreements that require less negotiators at the table and that probably satisfy the immediate policy goals of the EU more quickly.25

Contrary to Partnership and Cooperation Agreements, but similarly to the Eastern Partnership, also the association agreements within the framework of the Euro-Mediterranean Partnership were concluded ex Article 217 TFEU. The use of this legal basis simplifies, from a procedural point of view, choices for the institutions since Article 217 TFEU works as an adjustable container that can be used to cover any policy included within the TFEU. These agreements are multi-purpose agreements because, on the one side, the aim is the gradual liberalisation of trade and market integration and, on the other one, the aim is to build a solid framework for political dialogue with a view to broaden the cooperation between the EU, its Member states and each Euro-Mediterranean Country.26 Depending on when negotiations of each agreement were started, the AFSJ will be present to a higher degree in recent agreements but none of the AFSJ-related policies is ever mentioned in the general provisions setting the aims of each agreement, at least not expressly, possibly because of the time in which the agreements were negotiated.

It can be inferred from the Table 11.2 (below) that the main priority in relation to which the EU has managed to assert itself as an AFSJ actor with its Mediterranean partners is the fight against money laundering and drug trafficking. Indeed, with the sole exception of the EU – Israel agreement, the EU has included these two fields in its agreements. However, the level of cooperation differs notably. For instance, while Article 61 of the EU – Morocco Agreement refers to the “need to work towards and cooperate on preventing the use of their financial systems to launder the proceeds of criminal activities” and

25 Infra, Part Six. This conclusion of course is valid only until the EU begins to implement its new ENP strategy. See Section 11.1 above.
26 See for instance Article 1 of the Euro-Med Agreement with Morocco: 1. An association is hereby established between the Community and its member States, of the one part, and Morocco, of the other par. 2. The aims of this Agreement are to: – provide an appropriate framework for political dialogue between the Parties, allowing the development of close relations in all areas they consider relevant to such dialogue, – establish the conditions for the gradual liberalization of trade in goods, services and capital, – promote trade and the expansion of harmonious economic and social relations between the Parties, notably through dialogue and cooperation so as to foster the development and prosperity of Morocco and its people, – encourage integration of the Maghreb countries by promoting trade and cooperation between Morocco and other countries of the region, – promote economic, social, cultural and financial cooperation.
affirms that the parties “shall cooperate on administrative and technical assistance with the purpose of establishing standards equivalent to those adopted by the EU and international for such as the Financial Action Task Force (FATF)”, 27 the agreement with Algeria provides, in addition to those activities, for the identification of more concrete objectives such as the training of agents of the services responsible for preventing, detecting and combating money laundering and the support for the creation of specialist institutions. 28 Similarly, also the clauses on drug trafficking differ considerably and their ambition will depend on the existence within the agreement of a general clause on cooperation to fight against organised crime. Thus, while in the context of the EU – Tunisia agreement Article 62 titled “Combating drug use and trafficking” only refers to trafficking in the context of “improving the effectiveness of policies” by setting out appropriate strategies and methods of cooperation, 29 the agreement with Lebanon expressly includes the fight against drug trafficking as an objective of the cooperation against organised crime but ignores the issue in the ad hoc provision on illicit drugs. 30

On the other hand, general provisions on organised crime and judicial cooperation in criminal matters are rare. Indeed, only the agreement with Algeria has an express provision dedicated to judicial cooperation in civil and criminal matters with a view to strengthen mutual assistance with regard to cooperation in the handling of disputes in civil, commercial and family matters and the

27 Article 61 of the EU– Morocco agreement, OJ 18.3.2000, L 70, p.14
28 EU – Algeria agreement OJ 10.10.2005 L 265, p.23
29 Article 62 Combating drug use and trafficking: 1. The aim of cooperation shall be to: (a) improve the effectiveness of policies and measures to prevent and combat the production and supply of and trafficking in narcotics and psychotropic substances; (b) eliminate illicit consumption of such products. 2. The Parties shall together set out appropriate strategies and methods of cooperation, in accordance with their own legislation, to attain those objectives. For any action which is not conducted jointly, there shall be consultations and close coordination. Such action may involve the appropriate public and private sector institutions and international organisations, in collaboration with the government of the Republic of Tunisia and the relevant authorities in the Community and the Member States. 3. Cooperation shall take the following forms in particular: (a) the establishment or expansion of clinics/hostels and information centres for the treatment and rehabilitation of drug addicts; (b) the implementation of prevention, information, training and epidemiological research projects; (c) the establishment of standards for preventing diversion of precursors and other essential ingredients for the illicit manufacture of narcotics and psychotropic substances, which are equivalent to those adopted by the Community and the appropriate international authorities, particularly the Chemicals Action Task Force (CATF).
30 According to which the parties agree to establish technical and administrative cooperation that includes “training and the strengthening of effectiveness of the authorities and structures responsible for the fighting and for preventing criminality and the formulation of preventative measures. Article 61 OJ 30.5.2006 L143, p.14
exchange of experience in relation to the administration of civil justice on the one side and the strengthening of mutual assistance as well as the development of exchange on practices pertaining to the protection of individual freedoms and actions against organised crime on the other.

More surprisingly, also the field of countering terrorism is not covered by all the existing agreements and only the ones with Egypt and Algeria contain ad hoc provisions on this topic with a view of strengthening exchange of information on means and methods to combat terrorism. Yet, also in this case it is only the most recent agreement with Algeria that contains the most developed framework according to which, and in a manner similar to the clauses analysed in Development and Cooperation Agreements, cooperation between Algeria and the EU is anchored to the following three activities: implementation of Security Council Resolutions, exchange of information on terrorist groups and their support networks and pooling of best practices and means for combating terrorism, including technical trainings.\(^{31}\)

Another surprising common trait of the different agreements concluded with the Mediterranean partners of the EU is the lack of clear commitments on borders and readmission, which are two big parcels of the external projection of the AFSJ. This is the case for the agreements with Tunisia and Morocco where the only reference to readmission is inserted in provisions dedicated to ‘Dialogue on Social Matters”. In the other agreements, but with the exception of the one with Israel, border management is also absent but the clauses on readmission are much stronger and reflect the same style used by the EU in relation to Development and Cooperation agreements and the most recent clauses included within the Eastern Partnership. Thus, Articles 68 and 69 of the agreements with Lebanon and Egypt and Article 84 of the agreement with Algeria contain an express clause on the readmission of any of their respective nationals illegally present in the territory of one of the contracting State and the agreements with Egypt and Lebanon also contain an express provision on the conclusion of a separate readmission agreement. Indeed, while the agreements with Egypt and Lebanon affirm that the Parties “shall negotiate and conclude bilateral agreements”,\(^{32}\) the one with Algeria does not contain a similar clause and uses a

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\(^{31}\) Article 90 of the EU Algeria Agreement OJ 10.10.2005, L265, p. 23
\(^{32}\) Articles 69 of the two agreements, OJ 30.9.2004 L304, p. 50 Egypt and OJ 30.5.2006 L 13, p.16 Lebanon.
more indefinite and vague clause on “the conclusion, in the future, of agreements on readmission and illegal immigration”.\textsuperscript{33} Notwithstanding the differences existing, no ENP-South country has concluded an agreement based on the ENP clause with the EU. In fact, to this date the Commission has received the mandate to open negotiations for such an agreement only with Tunisia in December 2014; however, the triggering factor was not the Association Agreement concluded in 1995, but the Mobility Partnership established in December 2014, a soft law instrument that “aims to facilitate the movement of people between the EU and Tunisia and to promote a common and responsible management of existing migratory flows, including by simplifying procedures for granting visas”\textsuperscript{34} and that conditions the conclusion of agreements pertaining legal migration such as a visa facilitation agreement with the conclusion of a readmission one.\textsuperscript{35}

Similarly to the clauses on readmission and illegal migration contained in the agreements with Tunisia and Morocco, legal migration cooperation is present as a matter for dialogue whereby the EU, with a view to achieve progress in the field of movement of workers and reducing migratory pressure –as expressly mentioned in the EU–Egypt Agreement, identifies legal migration as one topic for further cooperation.\textsuperscript{36} Contrary to other agreements concluded within the context for the Eastern Partnership of the ENP and other agreements related to the Development Cooperation policy of the EU, the Euro-med agreements contain weak AFSJ clauses that pay the price of having been negotiated in the late nineties and concluded in the early 2000s without having being updated in recent years. This means that the different clauses appear more like programmatic clauses than establishing clear rights and obligations between the contracting parties. And although the wording of the different clauses analysed in this chapter can be considered as habilitating clauses in the sense that they identify fields in which the parties agree to cooperate in the future, the different clauses appear vague and have not proved to be of any added value for the management of the terrorist and migratory crises in the Mediterranean area. This also means that the added value of the EU’s external action in these fields can be

\textsuperscript{33} See Article 84 of the EU – Algeria agreement, OJ 10.10.2005, L 265, p. 65  
\textsuperscript{34} See press release 3 March 2014 \url{http://europa.eu/rapid/press-release_IP-14-208_en.htm}  
\textsuperscript{35} Paragraph 9, \url{http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/declaration_conjointe_tunisia_eu_mobility_fr.pdf} See infra, Part Six  
\textsuperscript{36} See Article 65 of the EU – Egypt Agreement, OJ 30.9.2004 L 304, p. 50
put into question since these clauses have not yet led to the development of a consistent and coherent policy in which the EU takes the lead and establishes the framework in which the Member States can enforce and implement AFSJ-related actions.

11.4 The inclusion of AFSJ Clauses in Stabilisation and Association Agreements

11.4.1 Introduction

The European Union adopted the Stability Pact for South-Eastern Europe in May 1999 with a view to help “the long-term stabilisation, security democratisation and economic reconstruction and development of the region, and for the establishment of durable good-neighbourly relations among them between them and with the international community”. Thus, the Stability Pact (SP) was initiated in the context of the CFSP and was a “multilateral political declaration and framework agreement” that included alongside the the EU and its Member States also a number of international organisations and other third countries. The aim of the Stabilisation and Association Process (SAP) that triggered from the SP was to offer an express accession perspective to the countries of the Western Balkans: Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia, the Former Yugoslav Republic of Macedonia and Albania. Since then Croatia has become a EU Member State, Montenegro has become an independent country and, pending the challenges linked to the status of Kosovo, Serbia has replaced the Federal Republic of Yugoslavia; amongst these countries Albania, Montenegro Serbia and FYROM have become candidate countries of the EU, whilst Bosnia and Herzegovina and Kosovo remain potential candidates.

Today we know that the Stabilisation Process that characterises the relation between the EU and the Western Balkans turns around an express accession perspective, even though it was not necessarily so at the beginning of the SP. The Stabilisation and Association process builds upon the experience gained by the EU in relation to the Central and Eastern European Countries (CEECs) in the

37 Article 1 (2) Common Position 1999/345/CFSP of 17 May 1999 adopted by the Council on the basis of Article 15 TEU [a.L], concerning a Stability Pact for South Eastern Europe,
38 Blockmans 2007, p.251 and 280ss
nineties: the EU concludes bilateral agreements that function as a means to export the EU \textit{acquis} and prepares the partner country for acceding to the EU.\footnote{See Van Vooren and Wessel 2014 pp.525-532} To do so, the EU developed an \textit{ad hoc} instrument: Stabilisation and Association Agreement(s) [SAA(s)]; a type of instrument that was coined to stabilise the targeted countries and then associate those to the EU.\footnote{Idem, p.254}

The Commission launched the concept of Stabilisation and Association Agreements from the beginning of the SP in May 1999.\footnote{Communication from the Commission to the Council and the European Parliament on the Stabilisation and Association Process for Countries of South Eastern Europe, COM (1999) 235 final, 26.05.1999} According to its Communication on the Stabilisation and Association process, SAAs would be tailor made, differentiated to take into account the specific situations of the counties concerned, but would have the following common objectives:

\begin{itemize}
  \item To draw the region closer to the perspective of full integration into EU structures;
  \item To support the consolidation of democracy, rule of law, economic development and reform, adequate administrative structures and regional cooperation;
  \item To establish a formalised framework for political dialogue both at bilateral and regional level,
  \item To promote economic relations, trade, investment, enterprise policy, transport and development, and cooperation in the customs area, with the perspective of closer integration into the world trading system, including the possibility of establishing a free trade area or areas, when sufficient progress has been made in economic reform,
  \item To provide a basis for cooperation in the field of justice and home affairs,
  \item To provide a basis for economic, social, civil, educational, scientific, technological, energy, environmental and cultural cooperation (including a plan to safeguard the cultural heritage of these regions), underpinned by "association-orientated" assistance programmes which would also be designed to facilitate approximation of legislation in accordance with relevant EU \textit{acquis}.
\end{itemize}
With the said aims, the Commission considered at the time that SAAs would strike a good balance between the deeper agreements concluded with CEECs and the narrower agreements concluded with former Soviet Union Countries such as Partnership and Cooperation Agreements.\(^{42}\) In relation to the topic dealt with this study, it can be inferred that from the very beginning the fields of the AFSJ were an important parcel of the process, albeit not particularly ambitious since the Commission document only aimed at the establishment of a “basis for cooperation” in the said domains. More specifically the Commission Communication held that

“Initiatives in the fields of Justice and Home Affairs [now AFSJ] could be considered – not only as part of Stabilisation and Association Agreements (...) but more generally. Assistance could be provided by both the [EU] and the Member States, for institution building increasing the efficiency of law enforcement, border controls, the fight against organised crime and corruption (...). Co-ordinated support could also be provided in the context of migration through the development of relevant legal instruments, particularly in the area of readmission.”\(^ {43}\)

It appears from this excerpt that back in 1999 and similarly to what was argued in relation to the integration of AFSJ clauses in ENP and PCA agreements that the EU tries to combine general, capacity building objectives with a few, expressly mentioned, specific objectives in relation to which the EU wishes to build operational cooperation. In this respect, the general objectives enshrined in the Communication of 1999 fit with the AFSJ-specific objectives established by the European Council since the Tampere conclusions.

### 11.4.2 Substantive Analysis of AFSJ clauses in the SAAs

Since the introduction of the SP in 1999, the SAAs have significantly evolved and even though only Bosnia and Herzegovina and Kosovo don’t have the status as candidate countries, for the purpose of this Section we consider the Western Balkans as a single group and will discuss the integration of AFSJ objectives in

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\(^{42}\) Idem and Blockmans 2007, supra note 2, pp.253-254 and Chapters 10 and 11 of this book.

the various SAAs concluded by the EU in a timeframe that goes from the agreement with FYROM entered into force in 2004\textsuperscript{44} to the one with Kosovo signed in October 2015.\textsuperscript{45}

With the exception of the agreement concluded with FYROM, the existing SAAs provide a deeper and clearer platform for AFSJ cooperation than other agreements analysed in this chapter. Justice, Freedom and Security Matters thus have a dedicated Title within each agreement that cover all the AFSJ chapters of the TFEU.

In the analysis that follows the latest agreement concluded with Kosovo will be used as an example and an overview of different AFSJ clauses is provided in Table 11.3 below. More precisely, AFSJ sections in SAAs are structured in the following manner. In the SAA with Kosovo AFSJ clauses cover most internal AFSJ fields with the sole exception of Private International Law and, more specifically, judicial cooperation in civil matters. This is not a gap specific to the agreement with Kosovo since no other SAA has a specific provision on judicial cooperation in civil matters. However, this should not raise particular concerns: the relevant parts of judicial cooperation in civil matters are absorbed by the approximation and harmonisation process of substantive EU civil law, which we construe here as covering the spectrum of EU internal market law. Yet, even taking into consideration this broader acceptation of EU civil law it does come as a surprise that the agreement does not pay attention to the relationship between Kosovo and Private Internal Law standards and conventions such as the acquis stemming from the Hague Conference on Private International Law: in this respect the EU appears to come short from its role in promoting international law standards.\textsuperscript{46}

Each SAA, and the one with Kosovo is no exception, has a general, capacity building provision, on the “Reinforcement of institutions and rule of law”.\textsuperscript{47} The

\begin{itemize}
\item \textsuperscript{44} OJ L 84 20.3.2004, p13
\item \textsuperscript{46} Kosovo, however is proactively acceding instruments agreed upon within the works of the Conference.
\item \textsuperscript{47} See Article 83 of the SAA Agreement with Kosovo: \textit{In their cooperation in the field of freedom, security and justice, the Parties shall attach particular importance to the consolidation of the rule of law, and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation shall notably aim at strengthening the independence,}
 provision aims at setting a clear objective and standard: in order to cooperate in the AFSJ fields Kosovo must reinforce the rule of law at all levels, with a particular focus on law enforcement and the administration of justice. As said, this provision is actually common to each SAA, but the one on Kosovo does emphasise the need of reform in the administration of justice sector with a focus on independence and impartiality.

The second general provision present in SAAs deals with personal data protection standards. Also in this case, but with the exception of the agreement with FYROM, each provision aims at securing personal data protection standards but the EU has failed to maintain a consistent position. Indeed, whilst in the other agreements the general personal data protection provision would demand to the third party in question to harmonise its legislation concerning personal data protection with the EU acquis and other international conventions and standards upon the entry into force of each SAA, Article 84 of the agreement with Kosovo merely states that

*The Parties shall cooperate on personal data protection legislation with a view to achieving a level of protection of personal data by Kosovo corresponding to that of the EU acquis. Kosovo shall ensure sufficient financial and human resources for one or more independent supervisory bodies in order to efficiently monitor and guarantee the enforcement of its personal data protection legislation.*

If one reads the provision from the perspective of the long term relationship that Kosovo and the EU have entered into, it could be argued that the objective of achieving a level of protection that corresponds to the one of the EU can be considered sufficient since what matters from the perspective of human rights protection is to achieve a uniform level of protection of personal data. Yet, if one takes into consideration that SAAs are concluded with the long term perspective of accession to the EU, it is surprising that such clause does not immediately impose the same, stronger, threshold used in other SAAs: duty to harmonise internal legislation to the EU acquis upon the entry into force of each agreement.

*impartiality and accountability of the judiciary in Kosovo and improving its efficiency, developing adequate structures for the police, prosecutors and judges and other judicial and law enforcement bodies to adequately prepare them for cooperation in civil, commercial and criminal matters, and to enable them to effectively prevent, investigate, prosecute and adjudicate organised crime, corruption and terrorism.*
The clause with Kosovo is thus much weaker and this specific flaw puts into question the legitimacy of any enforcement–related activity in the fields of police, criminal and migration policies until Kosovo attains such corresponding standard.

The first sector-specific provision of the SAA with Kosovo deals with visa, border management, asylum and migration. Article 85 of the agreement, similarly to corresponding provisions of the other SAAs, aims at establishing a framework in relation to which the parties agree to cooperate. The said framework is supposed to facilitate consultations and coordination between the parties and includes technical and administrative assistance in relation to a number of activities such as the drafting of legislation, the exchange of statistics and the training of staff.\(^48\) In addition, each agreement contains a clause on the reception, by the third country in question, of the international standards on refugees and the principle of non-refoulement.\(^49\) Interestingly, the agreement does not refer to any sector specific policy or instrument adopted by the EU, nor it regulates the terms of any future cooperation mechanisms between EU authorities and agencies with the respective authorities of Kosovo: in other words, it is striking that the agreement does not refer at all to sector specific legislation such as visas, border controls standards or the works of Frontex and EASO. In relation to (legal) migration, the SAA with Kosovo emerges as an innovative instrument since it makes an express reference on the links between the SAP, the agreement and cooperation on AFSJ matters where it affirms in

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\(^48\) Article 85 of the SAA agreement with Kosovo: The Parties shall cooperate in the areas of visa, border/boundary control, asylum and migration and shall set up a framework for cooperation, including at a regional level, in these fields, taking into account and making full use of other existing initiatives in this area as appropriate. Cooperation in the matters referred to in the first paragraph shall be based on mutual consultations and close coordination between the Parties and may include technical and administrative assistance for: (a) the exchange of statistics and information on legislation and practices; (b) the drafting of legislation; (c) enhancing the efficiency of the institutions; (d) the training of staff; (e) the security of travel documents and detection of false documents; (f) border/boundary control management. Cooperation shall focus in particular: a) in the area of asylum, on the adoption and implementation of legislation by Kosovo to meet the standards of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, and the Protocol relating to the Status of Refugees, done at New York on 31 January 1967, thereby to ensure that the principle of “non-refoulement” is respected as well as other rights of asylum seekers and refugees; (b) in the field of legal migration, on admission rules and rights and status of the person admitted. In relation to migration, the Parties agree to the fair treatment of non-EU nationals who are legally resident in the territory of a Member State or in Kosovo and to explore possibilities to establish measures to provide incentives and support for the actions of Kosovo with a view to promoting the integration of non-EU nationals residing legally in Kosovo.

\(^49\) See n 12 above
Article 86 that Kosovo citizens enjoy rights under EU *acquis* and notably in areas of working conditions, remuneration and dismissal, family reunification, long-term residence, students, researchers and highly qualified employees, seasonal workers, intra-corporate transferees, and pensions.\(^5\)

With such a strong reference to rights of legal migrants to the EU, it does not come as a surprise that the agreement also contains an equally strong provision on readmission. Article 87 of the SAA with Kosovo affirms:

> With a view to cooperating in order to prevent and control illegal migration, the Parties shall, upon request and without further formalities:
> 
> (a) readmit any Kosovo citizens or EU nationals illegally present in the respective other Party;
> 
> (b) readmit non-EU nationals and stateless persons having entered the territory of a Member State via Kosovo or Kosovo via the territory of a Member State.

Kosovo shall provide its citizens with appropriate identity documents and shall extend to them the administrative facilities necessary for such purposes.

The parties agree to explore possibilities to start negotiations with a view to concluding an agreement regulating the specific procedures for readmission of the persons referred in points (a) and (b) of the first paragraph.

The provision at hand contains the three controversial characteristics that have emerged also in relation to other readmission clauses inserted in other types of agreements: the use of the verb “shall”, the insertion of the “without further formalities”.

\(^5\) The Parties shall cooperate with the objective of supporting Kosovo in the approximation of its legislation with the EU *acquis* on legal migration. The Parties recognise that Kosovo citizens enjoy rights under the EU *acquis*, notably in areas of working conditions, remuneration and dismissal, family reunification, long-term residence, students, researchers and highly qualified employees, seasonal workers, intra-corporate transferees, and pensions. The Parties also recognise that this is without prejudice to the conditions and modalities applicable in each Member State. Within a period of four years following the entry into force of this Agreement, Kosovo shall grant reciprocal rights to EU nationals in the areas referred to in the second paragraph. The SAC shall examine the necessary measures to be taken to that effect. The SAC may consider any other matter related to the implementation of this Article.
formalities” clause and the clause extending the applicability of the agreement to third country nationals who entered the EU via Kosovo. However, and similarly to other readmission clauses analysed in this Part of the study, Article 87 of the EU Kosovo agreement does not clarify with whom Kosovo should enter negotiations first: the EU or its Member States? While the lack of consistency and clarity on this matter has been absorbed by events to the extent that every other SAP country has concluded a readmission agreement with the EU, this is of particular importance in the Kosovo case since at the bilateral EU – Kosovo level there is still a gap. In this respect it should be clear that on top of the general considerations presented in Chapters 5 and 6, it is preferable for the EU to take the lead and set the standards in this respect. Because such an agreement would be embedded within the SAP and the potential status of candidate country, it is preferable to consider the EU as possessing a preliminary exclusivity in relation to the conclusion of readmission agreement: this means that the EU should be considered as having the exclusive competence to concluded a general readmission agreement in which the main legal framework is set and on the basis of which Member States later conclude an implementing bilateral agreement containing the executive rules on readmission.

Moving to other AFSJ related clauses, and similarly to the conclusions reached in relation to the ENP section of this Chapter, the numerous AFSJ clauses are present, but fail to go radically beyond the scheme that was already identified in relation to recent Development and Cooperation Agreements and Partnership and Cooperation Agreements. Yet, because of the type of partnership that the EU is supposed to establish with the conclusion of SAAs, it is striking that in some aspects the most recent agreements under the ENP umbrella have deeper commitments than those agreed upon with Western Balkans countries. For instance, there is no specific reference to Conventions concluded under international for a such as the Council of European and The Hague Conference.

51 See Chapter 10 and the sections above.
52 See infra, Part Six on the EU readmission policy.
53 See Chapter 10, specifically 10.4 and the first sections of Chapter 11. The scheme of AFSJ clauses was the following: Identification of themes in which the parties agree to cooperate; Identification of a number of priorities and opening of dialogue on specific challenges; Reference to soft law mechanisms of cooperation such as exchange of best practices; Support of the EU to the implementation of international conventions and standards in the targeted country; Establishment of a link with international initiatives, e.g. FATF or UN Resolution 1373(2001), the Geneva Convention Relating to the Status of Refugees of 1951.
on Private International Law in relation to judicial cooperation in criminal and civil matters. Moreover, no sector-specific clause on human rights protection standards is present and this gap, together with some recent inconsistencies in data protection standards, may jeopardise the legitimacy of certain actions unless the EU manages to promote its standards efficiently in the near future.

11.5 Conclusion

The purpose of this Chapter was to map out and analyse the manner in which the EU has integrated the AFSJ in two very important policies of EU external relations: the ENP the SAP. By doing so, the Chapter contributed to the analysis of the externalisation of the AFSJ and the answer of the main research question of this study. On the basis of the existing acquis on both the AFSJ and EU external relations law, it was argued that the ‘Sturm und Drang’ approach of the EU institutions in promoting the external dimension of the AFSJ opened a number of constitutional questions that could be traced back to the notion of ‘constitutional foundations’ as used by the CJEU.

This Chapter, the third that deals with concrete examples of the external dimensions of the AFSJ, has reached, to some extent similar conclusions to those of Chapter 10. The externalisation of the AFSJ in the context of broader instruments and/or policies of EU external relations materialises the ambitions of the EU connected to both its Security Strategy and strategic documents on the AFSJ. The EU integrates the AFSJ in the ENP and the SAP by the means of AFSJ clauses within each bilateral agreement that it concludes with either ENP countries or with the Western Balkans ones.

Also in these cases, the different AFSJ clauses can be considered ‘habilitating clauses’ because such provisions merely establish a platform upon which the EU and its partners may cooperate on. As a result, the different clauses are not self-executive, not even when clauses such as readmission clauses contain non-derogable provisions. At the same time, the Chapter showed that the different agreements bring together two distinct elements. On the one side the agreements contain provisions on capacity building and internal reform in relation to democracy, rule of law and human rights protection. These provisions, albeit inserted in the different AFSJ sections of the agreements should not be read as an external projection of the AFSJ: these have nothing to do with strengthening the
AFSJ. Rather, these clauses represent another issue: a tacit admission that the EU cannot enter into cooperation on AFSJ matters with countries that do not have the same standards on democracy, rule of law and human rights. In a way the inclusion of these clauses represent a pre-requisite for cooperation and should be taken more seriously, should be considered as a condition for further, substantive cooperation.

From the perspective of procedural constitutional law, the fact that agreements under the ENP and the SAP are concluded under the broad umbrella of Article 217 TFEU on Association Agreements avoids quarrels on legal bases: here Article 217 TFEU is sufficient to conclude the agreements in question because of its broad scope and because the EP is involved in the procedure ex Article 217 (6) (i) also the democratic legitimacy criterion is satisfied. Contrary to the thorny issue of agreements falling under the CFSP analysed in Chapter 9, in this context the fact that the EP has to give its consent provides sufficient guarantees in relation to democratic legitimisation for agreements that, because of their AFSJ content, affect individuals and their rights.

Yet, this does not seem to be enough: human rights protection clauses *per se* are not sufficient to legitimise material cooperation and do not necessarily shield individuals from violations. Because concrete cooperation on AFSJ matters touches directly individuals something more should be done by the EU in order to act in coherence with the tenets of Article 2 TEU: for instance, it should consistently raise the bar and impose ‘equal protection standards’ to its partner countries when dealing with personal data transfer and have this type of clause as a pre-requisite for further cooperation. This is particularly important because in the fields of the AFSJ, substantive means of cooperation are left to the AFSJ agencies and at present there is an embarrassing silence in ENP and SAP agreements on the general standards that must be necessarily met in order to establish cooperation mechanisms with EU agencies. More broadly, the general conclusions on Chapter 10 are valid also in this context: the EU could, for each sector of the AFSJ covered in a given agreement, add specific human rights clauses or standards to make sure that certain benchmarks are respected; secondly, a stronger and more detailed human rights protection framework should be introduced in order to avoid the emergence of grey areas and/or future violations in relation to enforcement cooperation.
Two broader and concluding observations can be added: if one contextualises the findings of this Chapter with the current ‘refugee crisis’ the effectiveness of the integration of AFSJ clauses in the ENP and SAP are not helping the humane and effective management of the influx of asylum seekers and this observation may well put into questions the whole added value of AFSJ clauses in bilateral agreements with third countries. Secondly, ENP clauses do not seem to reflect the ambitious tenet of Article 8 TEU: if one compares AFSJ clauses in the ENP agreements with recent Development Cooperation agreements (Chapter 10) it is difficult to find the deeper integration referred to by Article 8 TEU.

The analysis conducted in this Chapter against the backdrop of what is currently happening in relation to the refugee crisis shows that the different clauses failed to impose reforms or the adoption of concrete normative standards that would help concrete cooperation in the different AFSJ fields. In other words, not only the ENP has failed to inspire neighbours and lead those countries through a sustainable and prosperous reform process, but the ENP has also failed to offer, as highlighted by Blockmans, “any real value in terms of conflict prevention or crisis management”.

Against this background it is not surprising that the Commission Communication on the review of the ENP published in November of 2015 places a strong emphasis on enhancing cooperation mechanisms on AFSJ fields such as the fight against organised crime, human trafficking, terrorism migration and border management. Yet, there is absolutely nothing new in this and it remains to be seen how this ‘renewed’ attention for AFSJ matters will be transformed into practice: past experience shows that in addition to weak or vague conventional provisions, the ENP failed at delivering its objectives. For the future therefore it will be necessary no only to increase differentiation and mutual ownership, but also to create effective mechanisms of cooperation that will be able to give effect to the different AFSJ provisions present in the ENP agreements for example, in relation to borders control management and the integration of neighbouring countries to the Common European Asylum System.

54 See, infra, Chapter 16
55 Blockmans S (2015)
56 Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, JOIN (2015) final, 18.11.2015, pp. 12-17
57 Idem
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General Conclusion Part Five

The introductory analysis on the policy documents defining the AFSJ and its external dimensions highlighted that the European Council and the Commission have repeatedly called for the integration of the AFSJ with the CFSP/CSDP. In that context it was also argued that this ambition also posed a number of constitutional questions on the compatibility between the foundations of the EU legal system and the externalisation of the AFSJ. More specifically, it was argued that such combination may be problematic in the light of the peculiar constitutional framework of the CFSP/CSDP pillar on the one side and the delicate relationship between public authority and individual rights and liberties on the other.

In this Part, the integration of AFSJ action and CFSP /CSDP was analysed by looking at some of the salient activities and measures undertaken by the EU. The analysis showed that such integration is problematic in as much as the measures adopted directly affect individuals. This is because the different agreements do not condition the establishment of operational cooperation to the attainment of EU-like standards in relation foundational elements such as human rights (including data protection) and access to justice. Furthermore, also in relation to international standards and conventions such as the Geneva Convention on the rights of Refugees, it is difficult to imagine meaningful substantive cooperation with countries that are not willing to take their duties seriously. The fact that the EU nonetheless pursues cooperation in order to manage the migratory crisis currently taking place, does pose a question of legitimacy if one considers the obligation, stemming directly from the Treaties, to respect and uphold the Geneva Convention. Any agreement with countries that fail to respect such standards would amount to a violation of the constitutional obligation to respect Article 2 TEU in combination with Article 21 TEU and Article 18 of the EUCFR.
PART SIX

The Substantive Dimensions of the External AFSJ: The External Dimensions of the AFSJ under Title V Part III TFEU

“Oh God said to Abraham kill me a son
Abe says man you must be putting me on
God said no Abe said what
God said you can do what you want Abe
but the next time you see me coming
you better run
well Abe said where do you want this killing done
God says out on highway 61”
(Bob Dylan, Highway 61 Revisited)
Chapter 12

The External Dimension of Borders Control, Migration and Asylum

12.1 Introduction

This Chapter is the first of Part Six and the first dealing with international agreements concluded by the EU on the basis of AFSJ provisions in Title V, Part II of the TFEU. Going back to the findings of Part One of this book, it may be said that it is in this Part that the external AFSJ in the proper sense is dealt with. In a similar manner to the structure used in the other substantive chapters of this book (Part Four, Part Five), also this Part and this Chapter look at substantive examples of international agreements concluded in the fields of the AFSJ in order to contribute to answering the main research question. By looking at the ways in which the EU interacts with third countries and international organisations on the various AFSJ policies, this Part too will offer some insights in order to assess the extent to which the external AFSJ is compatible with the foundations of the EU legal system. However, it would go beyond the scope of this dissertation to offer an analysis of the different agreements: on the one hand there is a considerable amount of literature dedicated to the different substantive fields in which the externalisation of the AFSJ has been developed and, on the other hand, this study only wishes to analyse the relationship between the externalisation of the AFSJ with the constitutional foundations of the EU legal system.

Firstly, this Chapter will look at the externalisation of border checks (Article 77 TFEU) and irregular migration (Article 79 TFEU). In relation to the external dimension of border checks, this Chapter looks at two main issues possessing a particular importance: visa policy and local border traffic. In relation to irregular migration, the Chapter will look into readmission agreements. The fourth main element linked with these dimensions of the AFSJ, border checks from an operational perspective, will be dealt when looking at the external dimension of
the activities of Frontex. The three categories analysed here are highly charged with symbolism: borders and the control of who and what access the territory of a State are closely anchored to the notion of sovereignty and are objectively linked to the maintenance of public order and security. This means that in the context of the EU integration process, the EU and the Member States have to find a balance that takes into account not only the objectives of the integration process, but also the prerogatives that Member States have maintained in these policies. However, Chapter 5 of Part Two of this study has already highlighted that in this context Declaration 36 on Article 218 TFEU could be interpreted in the sense that the EU has acquired and exclusive competence to conclude international agreements in these fields.

Secondly, the Chapter will look at the externalisation of the EU’s migration and asylum policies. The path towards an EU migration policy for long stays and long terms residents has been a difficult one for the EU. In spite of the general principles enshrined in association agreements, the development of a common policy on legal migration has been obstructed by Member States in order to preserve their discretionary powers as much as possible. However, the EU has succeeded to adopt a number of measures such as the Directive on the single permit, the Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, the Directive on seasonal workers, and other rules for researchers, intra-corporate transfers and family reunification. The external dimension of legal migration, however, has been mostly dealt with under the umbrella of broader instruments such as Association Agreements, trade agreements and other broader instruments such as partnership and Cooperation Agreements; however, also in these cases the clauses on legal migration focus on political dialogues and the practical rules and operational matters are left to either sector-specific bilateral programmes, or to provisions on free movement of workers, services and freedom of

1 See infra, Chapter 14
2 Part Two, Chapters 5 and 6
3 Peers 2012, pp 382 - 435
establishment. Yet, a new aspect of the EU migration policy has also emerged in recent years: the use of soft law instruments such as Mobility Partnerships (MPs) and Common Agendas on Migration and Mobility (CAMMs). This chapter will look into these two aspects of the external dimension of EU migration policy.

In relation to asylum, in spite of numerous policy references on the development of EU tools to enhance protection for asylum seekers outside the EU; the different policy solutions have often been contested. Indeed, as Moreno-Lax has argued, the external dimension of asylum was not conceived as a way of granting admission to the Common European Asylum System; rather, the focus has been on shifting the burden elsewhere by facilitating access to protection in another country. By doing so, the underlying rationale of this EU policy “seems to be that regions of origin and transit should assume the responsibility of hosting ‘their’ refugees”, and to this end the EU has put forward a number of soft law instruments and policies such as Regional Protection Programmes, voluntary resettlement schemes and off-shore processing. These ideas have not yet been the object of international agreements; rather, these are capacity building missions in which the EU invests and organises in cooperation with local authorities and the United Nations High Commissioner for Refugees (UNHCR).

In the late winter of 2016, on the midst of the refugee crisis affecting the EU’s CEAS, the Union has concluded a comprehensive deal with Turkey on border controls and asylum management.

It can be stated already at this stage that in relation to borders, migration and asylum the external AFSJ appears to be a laboratory for new avenues through which the EU exercises its external powers. Whilst there are examples in which the EU acts internationally on the basis of the classic distinctions between implied and external powers and exclusive and shared competences, the external activities of the EU in the fields of the AFSJ considered here suggest that new forms of external action by the EU are emerging.

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8 See Chapters 10 and 11.
9 Moreno Lax 2014
10 Ibid, p. 158
12.2 The External Dimension of the Visa, Readmission and Local Border Traffic Policies of the EU.

From an institutional perspective the policies analysed in this Section have a special position in relation to the division of competences between Member States and the EU. Whilst the EU has harmonised the rules on the crossing of the internal and external borders of the Union under the Schengen Border Code,\textsuperscript{11} Member States remain the responsible authorities for the enforcement of these rules and retain a certain amount of discretion in the execution of their tasks in case border controls are linked to the maintenance of public order and security. Secondly, and from a substantive perspective, the rules on external borders, which include the rules on irregular migration and the EU’s return policy, are connected with the principle of non-refoulement and asylum law. In the Tampere conclusions of 1999 the European Council held that the European Union must remain accessible for those legitimately seek to enter its territory. This means that, in the light of the establishment of the Schengen area and the relevant Treaty provisions, the EU must coordinate the checks of the common external border and manage migratory flows.

The link between these policies and the main research question resides in the following challenges. First, the division of tasks in relation to the management of border controls reveals the ambiguous nature of the EU project in relation to the AFSJ. While the EU has harmonised the rules on border controls and border management, the EU is, to this date, deprived of any independent and autonomous operational capacity. At the same time, because the Member States have maintained their operational prerogatives, they are competing with each other in order to answer the internal demands for order and security. The outcome of these ambiguities has emerged with all of its complexities in relation to the migratory crisis started with the Arab Spring in 2011: since then a number of times various Member States have introduced temporary border checks at the internal borders of the EU. This turf war on protecting internal security at the expense of EU partner countries is but one example of how legal harmonisation may not be sufficient for the EU project unless the EU also acquires effective instruments to regulate and limit the discretion of its Member States, and this implies not only regulatory powers, but also operational and enforcement ones.

\textsuperscript{11} Regulation 562/2006 OJ L 105, 13.04. 2006, p.1. This Regulation contains the rules on patrolling the external borders of the Member States and thus the EU.
12.2.1 Agreements on Visas

A first example of how the EU tries to do this is concerns the visa policy of the EU. According to Article 77 TFEU, the EU has an express competence to develop a common policy on visas and short stay residence permits. Because the EU is, in principle, an area without internal borders, it plays a key role in establishing the rules concerning the documents necessary to enter the EU as well as conditioning the timeframe in which third country nationals are allowed to enter and move within the EU. The latter issue must be read in connection with the three months time-frame in which EU citizens and third country nationals within the EU can, in principle, move freely without having to obtain papers or register within a certain city. As a result, the short-term visa policy (i.e. visas valid for three months within the Schengen area) is a domain that can be considered as falling within the exclusive competence of the EU. This central bargaining power of the institutions in Brussels provides the necessary leverage to negotiate the rules on the documents necessary to enter the Schengen area for important groups of travellers such as tourists and businessmen; and this power has been used to develop two main types of external action in relation to visas.

As noted by Peers, the decision whether to impose or remove a visa requirement for third States is a significant political issue. This means that the policy on visas must be read in conjunction with other external policies of the EU such as those on borders, migration and economic cooperation. Because of the harmonisation attained internally via Regulation 539/2001 on the third countries whose nationals must be in possession of visas when crossing the external borders of the EU and Regulation 856/2008 laying down a uniform format for visas, the EU can claim an exclusive competence over international agreements dealing with visas; and in this respect the EU has developed two instruments: visa waiver agreements and visa facilitation agreements.

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12 Peers 2012, pp 226 - 293
13 See Chapters 5 and 6 above. See also Peers 2012, p. 287ss
14 Peers 2012, p.287
First, the EU has concluded short-stay visa waiver agreements. With this type of instrument, the EU and the third country in question decide to reciprocally stop requiring short term visas to enter their territory; the EU has concluded this type of agreements with some twenty countries\(^{17}\) and this choice is connected with Regulation 539/2001 on the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. Each of these bilateral arrangements provide that EU citizens and the nationals of the third country in question can travel visa-free to the other party\(^{18}\) for 90 days within a period of 180 days, subject only to holding a valid passport.\(^{19}\)

For the purpose of our study two elements appear interesting. Firstly, whilst the issue of visas is largely administrative, the policy on visa relates to broader foreign policy and economic concerns and does have a connection to public security and public order. Therefore, each agreement also establishes a committee for the management of the agreement with a view to monitoring implementation, suggesting amendments and settling disputes for each agreement,\(^{20}\) and the provisions on the establishment of such committees state that the Union is represented only by the Commissions, a choice that could be interpreted as a result of the administrative nature of such agreements, but that nonetheless begs the question over the democratic scrutiny of the European Parliament over the decisions of such committees. The second interesting element is linked to the relationship between EU and national visa policies: each visa waiver agreement thus far concluded expressly says that the EU agreements “take precedence” over bilateral agreements concluded by the Member States of the EU and a third country in so far as they cover the issues falling within EU visa waiver agreements.\(^{21}\) Such provisions confirm that this external policy of the EU falls within the realm of exclusive external powers.

Should, however, the waiver of visa requirement appear too risky in relation to the potential migratory pressure of a certain country, the EU has developed the


\(^{18}\) See Article 3 of the recent EU – Peru Agreement, OJ 24.3.2016

\(^{19}\) See for example Article 4 of the agreement with Peru, OJ 24.3.2016

\(^{20}\) Ibid., Article 6 of the EU – Peru Agreement

\(^{21}\) Ibid., Article 7 of the EU – Peru Agreement
praxis of concluding visa facilitation agreements whereby the two parties agree on slimming down the procedural and administrative steps for short term visas; agreements of this type have been concluded with all the ENP and SAP countries as well as with Russia. Moreover, a visa facilitation agreement has also been concluded with Cape Verde. All these agreements, however, are usually conditioned to the acceptance, by the third country in question, of concluding also a readmission agreement.

Taking the latest agreement with Cape Verde as an example, it appears that these agreements have the same temporal scope as visa waiver agreements: they cover visas for a stay of no more than 90 days over a period of 180 days. The agreement is reciprocal, and identifies the categories of individuals that benefit from the agreement, as well as the fees and other procedural matters. Similarly to the case of visa waiver agreements, also in this case the pact establishes a joint committee for the management of the agreement and, again, only the Commission takes part on behalf of the EU; moreover, the agreement establishes that the EU one takes precedence over the provisions of any bilateral or multilateral agreement or arrangement concluded between Member States and Cape Verde, in so far as the provisions of those agreements or arrangements relate to matters that are dealt with by the EU one.

The external dimension of the EU’s visa policy is, possibly, the best example of how the EU acts on the international pane on the basis of the existing acquis of EU external relations. In this field the EU has acquired an exclusive competence to negotiate and conclude agreements. While the combined reading of Article 218 and 77 TFEU guarantee that the EP is involved in the conclusion of such agreements, the management of these agreements does not appear satisfactory: the EP should be represented in the management committee tasked to manage these agreements, but aside from this aspect the power of the EU

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22 For a comprehensive list of ongoing negotiations and concluded agreements
24 See infra, 12.2.3
25 EU–Cape Verde agreement, Article 4, supranote, 21.
26 Article 10, EU–Cape Verde agreement
27 Article 11, EU–Cape Verde agreement
28 See Chapter 6, Part Two above.
gained in this field does not appear to pose fundamental constitutional challenges in the sense of Article 2 TEU and the relevant case law.\footnote{See Part Three}

Indeed, on the basis of the analysis that precedes, it can be inferred that the external dimension of the EU’s visa policy does not pose particular constitutional problems. Both the competence issue and the content of the different agreements reflect the high level of internal harmonisation on the one side, and the administrative nature of the topic at hand on the other one. Yet, as it was noticed, the exclusion of the European Parliament from the management team of each agreement appears as an archaeological finding of the pre-Lisbon era.

However, the thorny issue in relation to the EU’s visa policy has never been related the scope of visa-related agreements; these agreements are the ‘carrot-side’ of another controversial instrument of the external AFSJ: readmission agreements or, to follow our simile, ‘the sticks’ of EU border and migration control.

\subsection{12.2.3 Readmission agreements}

Readmission agreements constitute another type of agreements linked to border management. The EU and its member states have placed an increasing importance to the conclusion of this type of bilateral agreements; moreover, this particular field is also at the centre of tensions between Member States and the EU in relation to the question of competence. In this respect it shall be briefly recalled here that the EU has an express external power to conclude such agreements. Article 79(3) clearly confers upon the Union this faculty and it has been argued that this provision read in conjunction with Declaration 36 on Article 218 could be used to argue in favour of an exclusive competence of the EU.\footnote{Wessel et al 2011, p.288} This argument appears plausible if one considers that the EU has approximated the laws of the Member States in relation to the return of irregular migrants via the Return Directive,\footnote{Directive 2001/40 on the mutual recognition of expulsion orders and a number of other instruments adopted to facilitate return, OJ L 38/98 24.12.2008} Directive 2001/40 on the mutual recognition of expulsion orders\footnote{OJ L 149, 2.6.2001} and a number of other instruments adopted to facilitate
cooperation between the Member States when dealing with expulsions of irregular migrants.\textsuperscript{33} Moreover, also the political ambition of the Union seems to suggest such development.\textsuperscript{34} However, the existence of objective impediments and the praxis of the EU indicate the opposite.

Firstly, but less importantly, it cannot be ignored that Member States have continued to conclude readmission agreements independently for EU ones.\textsuperscript{35} What is more important is the operability of readmission agreements and the key role that Member States retain in this respect. Indeed, because the EU is not the authority that would ultimately be in charge of the return process on the one side, and because the return process must guarantee the respect, on a case-by-case basis, of the rights of the individuals concerned, including the non-refoulement principle, Member States authorities must be able to establish cooperative frameworks and procedures with third countries in relation to readmission. This of course does include, but goes beyond, the mere establishment of an administrative procedure amongst national authorities. For this purpose, EU readmission agreements always include the following key provisions: an article in which the relationship with bilateral agreement concluded by Member States is regulated and an article dedicated to implementing protocols.

In relation to the first issue, and using the EU–Cape Verde agreement as an example, Article 20 affirms that:

\begin{quote}
The provisions of this Agreement shall take precedence over the provisions of any legally binding instrument on the readmission of persons residing without authorisation which, under Article 19, have been or may be concluded between individual Member States and Cape Verde, in so far as the provisions of any such legally binding instrument are incompatible with those of this Agreement.
\end{quote}

This provision tells us that EU agreements prime over those concluded by Member States either before or after the conclusion of the EU one. Such rule

\begin{footnotesize}
\begin{footnotes}
\textsuperscript{33} Such as Directive 2003/110 on assistance in cases of transit for the purposes of removal by air, OJ L321/26 06.12.2003 and a Decision on joint expulsion flights as well as expulsions via land or sea. There are a number of problematic issues in relation to the coherence of the instruments together with a number of human rights-related problems. For a critical analysis see Peers 2012, p. 575-583
\textsuperscript{34} Cassarino 2011, p.192
\textsuperscript{35} Cassarino 2011, Garcia-Andrade 2012
\end{footnotes}
\end{footnotesize}
of precedence must be interpreted jointly with the provision on the non-affaetation clause \textit{vis-à-vis} human rights protection standards stemming from international law; and such clause must be read in a systematic manner, i.e. under the precepts of internal human rights law stemming from the EU Charter of Fundamental Rights.

The second key provision relates to the powers left to Member States to conclude bilateral readmission agreements. As it was argued before, arguments of operability in the broad sense require Member States to conclude such agreements. Throughout the years, however, the EU has becoming more strict and is predetermining a number of issues: from the identification of the competent authorities, to conditions of the return process and other elements.\textsuperscript{36} Such implementing agreements, that are proper international agreements,\textsuperscript{37} are nonetheless conditioned by EU law: Member States retain only some of their prerogatives as actors in the field of readmission and must abide the framework agreement concluded by the EU. This is particularly significant because recent readmission agreements such as the one with Cape Verde, go as far as affirming that, in any case, the implementing agreement concluded by the Member States enter into force only once such an agreement is notified to the Joint Readmission Committee: the managerial committee tasked with monitoring and managing the implementation of the agreement.\textsuperscript{38}

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\textsuperscript{36} Article 20 of the EU–Cape Verde Agreement: 1. At the request of a Member State or Cape Verde, Cape Verde and that Member State shall draw up an implementing Protocol which shall, inter alia, lay down rules on:
(a) designation of the competent authorities, border crossing points and exchange of contact points;
(b) conditions for escorted returns, including the transit of third-country nationals and stateless persons under escort;
(c) evidence and documents additional to those listed in Annexes 1 to 4 to this Agreement;
(d) the arrangements for readmission under the accelerated procedure;
(e) the procedure for interviews.
2. The implementing Protocols referred to in paragraph 1 shall enter into force only after the Readmission Committee provided for in Article 18 has been notified.
3. Cape Verde agrees to apply any provision of an implementing Protocol drawn up with one Member State also in its relations with any other Member State upon request of the latter.

\textsuperscript{37} See the notion of international agreement given by Klabbers 1995, p.249

\textsuperscript{38} See Article 18 of the EU–Cape Verde Agreement; this is similar to the managing committees seen in relation to the visa agreement analysed above. This is not the case in relation to the agreement with Macao: OJ L143/99, 30.04.2004
The inclusion of the provisions we have analysed in EU framework agreements on readmission with third countries suggests that the EU at the moment shares the competence to conclude readmission agreements with Member States; however, this competence is pre-empted once the EU concludes such an agreement and Member States have to conclude implementing agreements under the conditions set in the EU one. Whilst the importance of the implementation protocols suggest that Member States should be considered parallel actors to the EU, the relative margin of discretion left to Member States and the rule of precedence included in each agreement actually suggest that the EU is slowly becoming the key actor in readmission agreements and Member States are left executors of EU norms. A clear hierarchical pattern has thus been established.

The current state of affairs in relation to readmission agreements is, after all, something that the EU has been pursuing for some time: since the first readmission clauses inserted at the end of the 1990s and early 2000s in Association, Partnership and Development Cooperation agreements, the EU has grown into an actor that, also on the basis of the internal level of normative approximation, has now concluded seventeen agreements, with several others on their way. And whilst at the beginning the the EU had managed to conclude readmission agreements only with some smaller countries, the EU has now managed to secure readmission agreements with its eastern partners and important partners such as Turkey. On the other side, readmission clauses with Mediterranean countries such as Algeria have not gone beyond the general clause contained in the Association Agreement.

The other main aspect in relation to which the external dimension of the EU’s readmission policy must be analysed concerns human rights protection and access to justice. Firstly, it must be borne in mind that the object of readmission agreements is to codify the obligation to readmit irregular migrants to the respective country of origin or country of transit. From a procedural perspective the issue of returning irregular migrants is the last step of a process concerned with ascertaining the (il)legitimate presence of a third country national in the territory of a State with a view of returning the individual in question to his or her country of either transit or origin. As such, the respect of international norms such as the the principle of non-refoulement or the Geneva Convention on the Status of Refugees precedes the administrative process with which the actual return of the irregular migrant is concerned with. Nonetheless, a number of
issues that relate to human rights protection and thus with the constitutional foundations of the EU are pivotal also in relation to return.

Firstly, as it was mentioned before, EU readmission agreements contain a ‘non affectation clause’ or ‘without prejudice clause’ in which it is stated that the application of readmission agreements shall be without prejudice to the rights, obligations and responsibilities of the Union, its Member States and the third country concerned arising from international law, and recent agreements such as the one with Cape Verde make sure to expressly mention the relevant conventions and norms such as the Geneva Convention on Refugees of 1951, the European Convention on Human Rights and other international instruments.\(^{39}\) This is an important issue, but the EU has not always managed in the past to be consistent in this respect with the result that some of the initial agreements merely codify a general obligation to respect international law without specifically indicating the relevant normative framework.\(^{40}\) Moreover, in relation to the respect of international and EU norms that protect from refoulement and guarantee the application of the Geneva Convention on Refugees or any other human rights-related safeguard, it could be argued that each readmission agreement should expressly provide that the enforcement of a readmission decision should be suspended at whatever stage if, pending the execution of the repatriation, new elements concerning the risks of refoulement emerge. Such a provision would serve as a last guarantee for individuals and would better reflect the constitutional duty to respect human rights protection standards.

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\(^{39}\) 1. This Agreement shall be without prejudice to the rights, obligations and responsibilities of the Union, its Member States and Cape Verde arising from international law, including from international conventions to which they are party, in particular:
   — the Convention of 28 July 1951 on the Status of Refugees as amended by the Protocol of 31 January 1967 on the Status of Refugees,
   — the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms,
   — the international conventions on determining the State responsible for examining applications for asylum,
   — the Convention of 10 December 1984 against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,
   — international conventions on extradition and transit,
   — multilateral international conventions and agreements on the readmission of foreign nationals.

2. Nothing in this Agreement shall prevent the return of a person under other formal or informal arrangements between the requested and requesting States.

\(^{40}\) See Article 17 of the Agreement with Albania, OJ L124/31, 17.5.2005
Secondly, readmission agreements could benefit from the integration of additional guarantees for the protection of the rights of third country nationals. Even though Member States do not seem to take advantage of such clauses, the EU should require an express commitment from partner countries to comply with key international human rights conventions to which they are party and, where necessary, expressly contain an *ad hoc* provision for third country nationals against refoulement.

Thirdly, taking into account the position of readmission agreements within the EU legal system, any readmission agreement should take greater care in addressing the relationship between the return process based on a readmission agreement with the procedures of other EU legislative instruments such as the Return Directive and the Asylum Procedure Directive. In this respect readmission agreements should make clear that pending the procedures to determine the status of a third country national under EU and national law, the readmission procedure cannot be initiated until a final decision with no possibility to appeal has been reached. Furthermore, the time limits for readmission should take also into consideration and regulate the relationship between the rules on the detention of irregular migrant prior to expulsion and the time limit set by the agreements on readmission. At the moment the existing readmission agreements do not expressly refer to the limitations ex Article 15 of the Return Directive and whilst the two points argued in this paragraph can be addressed by the means of systematic interpretation of the existing *acquis* on human rights, asylum and migration law, it would be preferable to mention these elements expressly in future readmission agreements in order to enhance human rights protection.

Fourthly, the readmission process poses questions in relation to data protection. All the agreements consistently codify a number of rules concerning data protection, but as Peers has observed these clauses do not specifically address

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43 Directive 2013/32/EU, OJ L180/60 29.06.2013
44 Again, as an example see Article 16 of the EU – Cape Verde Agreement: The communication of personal data shall take place only if such communication is necessary for the implementation of this Agreement by the competent authorities of Cape Verde or a Member State as the case may be. The processing and treatment of personal data in a
the issue of enforcement of such protection rules. This means that the agreement sets a certain number of data protection standards based on EU provisions such as the principle of proportionality and the purpose limitation one, but does not say how these standards of protection are supposed to be enforced and monitored – apart from the duty to monitor also the respect of data protection that falls upon the Readmission Committee under its general tasks.

Recent readmission agreements concluded by the EU appear to take into due account the divisions of tasks between the Member States and the EU on the one side, and are increasingly satisfactory in relation to human rights and data protection standards on the other one. However, the lack of consistency and some persisting loopholes still make this policy a controversial dimension of the external AFSJ. This is particularly true if one considers that the EU normative framework on irregular migration has been systematically criticised for the

particular case shall be subject to the domestic laws of Cape Verde and, where the controller is a competent authority of a Member State, to the provisions of Directive 95/46/EC of the European Parliament and of the Council (4) and of the national legislation of that Member State adopted pursuant to that Directive. Furthermore, the following principles shall apply:

(a) personal data must be processed fairly and lawfully;
(b) personal data must be collected for the specified, explicit and legitimate purpose of implementing this Agreement and not further processed by the communicating authority nor by the receiving authority in a way incompatible with that purpose;
(c) personal data must be adequate, relevant and not excessive in relation to the purpose for which they are collected and/or subsequently processed; in particular, personal data communicated may concern only the following:
   (i) the particulars of the person to be transferred (e.g. given name, surname, any previous names, other names used by which known or aliases, sex, civil status, date and place of birth, current and any previous nationality);
   (ii) passport, identity card or driving license (number, period of validity, date of issue, issuing authority, place of issue);
   (iii) stop-overs and itineraries;
   (iv) other information needed to identify the person to be transferred or to examine the readmission requirements laid down in this Agreement;
(d) personal data must be accurate and, where necessary, kept up to date;
(e) personal data must be kept in a form which permits identification of the data subjects for no longer than is necessary for the purpose for which the data were collected or for which they are subsequently processed;
(f) both the communicating authority and the receiving authority shall take every reasonable step to ensure, as appropriate, the rectification, erasure or blocking of personal data where their processing does not comply with the provisions of this Article, in particular because those data are not adequate, relevant, accurate, or they are excessive in relation to the purpose for which they are processed. This includes the notification of any rectification, erasure or blocking to the other Party;
(g) upon request, the receiving authority shall inform the communicating authority of the use of the communicated data and of the results obtained therefrom;
(h) personal data may be communicated only to the competent authorities. Further communication of personal data to other bodies shall require the prior consent of the communicating authority;
(i) the communicating and the receiving authorities shall make a written record of the communication and of the receipt of personal data.
excessive criminalisation of irregular migrants, but time will tell whether the increasing role of the EU in these matters, thanks to the renewed powers of the EP, the EU Charter on Fundamental Rights and the case law of the Court of Justice will improve the current situation.

Nonetheless, the way the EU has developed its readmission policy is significant for this inquiry. What we are witnessing is a system whereby the EU concludes framework or umbrella agreements that regulate the essential aspects of the return of irregular migrants and outsources to the Member States the conclusion of agreements in which procedural aspects of the policy are further regulated; and imposing the obligation to notify to the relevant readmission committee the bilateral agreements concluded by each Member State. In relation to its eastern neighbouring countries, the EU has successfully created a comprehensive system in which various external relations instruments have been used to put forward the internal objectives.45

It appears from this analysis that the traditional dichotomy between exclusive and shared competences is being replaced by a more virtuous and dynamic process that resembles, in a broad manner, the use of Directives in internal EU law. Taking into account the findings of Chapter 5 and 6 of this dissertation this new avenue of EU external relations seems to be the best way to combine the EU integration process in the AFSJ fields whilst respecting the existing vertical boundaries between the role of the Member States on the one side and the role of the EU on the other.

12.2.4 Local Border Traffic

The management of EU borders is built upon the Schengen Border Code on the one side, and the establishment of a network of national and EU bodies vested with the operational tasks linked to border controls on the other one.46 Whilst the normative framework is provided to the operative actors by the EU, already in the 2000 Schengen Convention it was provided that the peculiar geographic and economic context of some regions at the external borders of the EU required exceptional rules. Today, Article 35 of the Schengen Border Code (SBC)

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45 See, in particular, Chapter 11 above.
46 Matera 2011, p.224
provides for the adoption of special rules for local border traffic (LBT).\textsuperscript{47} As Dubowski has argued, “[l]ocal border traffic could be described in a nutshell as a mechanism balancing the need for strict protection of Union’s external borders and the necessity of holding the Union open to the cooperation with third countries”.\textsuperscript{48} To implement this provision of the SBC, the EU has adopted Regulation 1931/2006 on the rules on local border traffic in order to allow for a smoother management of the external borders of the EU in certain specific contexts.\textsuperscript{49}

The Regulation thus established a specialised regime and a specific permit for local border traffic and to this end created an authorisation mechanism so as to allow Member States to conclude bilateral agreements with neighbouring third countries for the purpose of facilitating the crossing of borders for individuals living in an area next to the external border of an EU Member State.\textsuperscript{50} The Regulation allows for derogations from the SBC for residents of an area that extends no more than 30 kilometres from the border and for this purpose defines LBT as the regular crossing of an external land border by residents for societal, cultural, family or substantiated economic reasons.\textsuperscript{51}

Leaving the analysis of the rules on border checks aside, the Regulation affirms that

“[f]or the purposes of implementing the local border traffic regime, Member States shall be authorised to conclude bilateral Agreements with neighbouring third countries in accordance with the rules set out in this Regulation.

Member States may also maintain existing bilateral Agreements with neighbouring third countries on local border traffic. To the extent that such Agreements are incompatible with this Regulation, the Member

\textsuperscript{47} Article 35 Schengen Border Code: “This Regulation shall be without prejudice to Community rules on local border traffic and to existing bilateral agreements on local border traffic”, Regulation establishing a Community Code on the rules governing the movement of persons across borders, OJ L105/01 13.4.2006, last amended with Regulation 1051/2013, OJ L295/1 06.11.2013 on the reintroduction of border control at the internal borders of the EU
\textsuperscript{48} Dubowski 2013, p.1
\textsuperscript{49} OJ L 405/1, 30.12.2006
\textsuperscript{50} Idem, Article 1.
\textsuperscript{51} Idem, Article 3.
States concerned shall amend the Agreements in such a way as to eliminate the incompatibilities established.”

This provision created a new mechanism according to which, in an area in which the EU has attained the harmonisation of rules governing the controls and the management of borders, Member States are authorised to conclude bilateral agreements with their neighbouring countries so as to derogate form EU rules.

However, because in this case the EU allows for derogations from its legislative framework, the solution envisaged by the EU is different from the rules on the implementation of readmission agreements analysed in the preceding Section. In this case, the LBT Regulation affirms that before concluding or amending any bilateral agreement on LBT, Member States must consult the Commission as to the compatibility of the agreement with the Regulation, and if the Commission considers that the agreement envisaged is incompatible with the Regulation, the Member State concerned must amend the incompatible rules. Moreover, the Regulation also provides that, should there be no readmission agreement between the parties of an LBT agreement, then the LBT agreement must contain rules and procedures on readmission.

Since the Regulation was adopted, nine agreements have been concluded: three agreements have been concluded between a EU Member State and Belarus (Poland, Latvia and Lithuania), one between Norway and the Russian Federation and one between Poland and the Russian Federation in relation to Kaliningrad. Moreover, Hungary, Slovakia and Poland have concluded LBT agreements with Ukraine and Romania has concluded one with Moldova. Whilst the Commission has considered that most agreements were not fully in compliance with the LBT Regulation, to this date the only dispute that has been brought to

52 Idem, Article 13 (1).
53 Idem, Article 13 (2)
54 With the conclusion of a readmission agreement with Turkey, this provision now only applies to LBT regimes with Belarus.
55 Communication of the Commission on the implementation and functioning of the LBT regime COM (2011) 47 final and Report from the Commission on the bilateral agreement concluded by Poland with the Russian Federation COM (2014) 74 final
56 Idem.
the attention of the CJEU concerned the time limitations linked to the LBT permits.57

In conclusion, and similarly to the remarks made in relation to readmission agreements, also in this case the EU has proved to be able to develop new mechanisms to implement the externalisation of border controls by sharing with its Member States tasks. Whilst in the case of readmission the EU would conclude a bilateral agreement with a third country first only to let its Member States take care of implementing agreements; in this case the EU has used an internal act, a Regulation, to achieve the same result. Constitutionally, this seems a convincing way to combine the existing operational limits of the EU in the field of border management with the prerogatives of Member States stemming from Articles 4(2) TEU and 72 TFEU and their social, cultural and economic interests.

12.3 The Use of Soft Law and the External Dimension of Migration and Asylum

12.3.1 The Emergence of a Soft External Dimension of the EU’s Migration Policy

The EU has struggled and still is struggling to become a global actor on legal migration issues. Possibly, the only significant results achieved have been those on the EU’s visa policy, but also in this respect it does not go unnoticed that most visa facilitation agreements have been concluded with the neighbouring countries of the EU and the few visa waiver agreements have been concluded with relatively small states.58 Article 79 of the TFEU identifies one main field in which the EU can legislate for the purpose of establishing a common policy on legal migration: the definition of the rights of third country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other member States. This is not a strong mandate for the EU and it appears, mostly, as a complement to the fact that the Union is, in principle, a single area without internal borders. The provision in question appears as an inward looking provision in relation to which the external powers

57 Case C-254/11, Szabolcs-Szatmár-Bereg Megyei Rendőrkapitánysság Záhony Határrendészeti Kirendeltsége v Oskar Shmodi, judgment 21 march 2013, ECR 2013-NYR
58 See Chapter 11 and Chapter 12.2, supra.
will have to be, first and foremost, inferred from the combined reading of Article 216 TFEU and adopted internal measures.\(^{59}\)

Bearing in mind the internal *acquis* on legal migration,\(^{60}\) the priorities of the Union have been mostly connected to either regulating the formal status of third country nationals present in the EU or to create preferential mechanisms to accede the EU territory as a worker on specific circumstances such as seasonal workers or as family members of someone lawfully resident in the EU. Possibly, the main legitimisation for an EU external migration policy resides in Article 79(1) TFEU where it is stated that the EU “shall develop a common immigration policy aimed at ensuring at all stages, the efficient management of migration flows (…)”. Yet, also in this case the wording of the Treaties suggests a ‘border controls oriented’ mandate for the EU. And this may well be the case if one considers that, traditionally, the EU has developed its migration policy with the conclusion of Association Agreements and or Development Cooperation Agreements: a praxis that dates well before the creation of the AFSJ. With this consideration in mind, it may well become less of a surprise that the AFSJ provision linked to legal migration have not been used as the primary tool to regulate legal migration: the EU traditionally does that via other instruments. However, the question that emerges from the current context is whether such an approach is sufficient to regulate the migratory pressure on the one side and the migratory needs of the EU’s economy on the other one and, possibly, the answer is negative.\(^{61}\) Moreover, Article 79 (5) TFEU clearly leaves to member States the determination of volumes of admissions for third country nationals.

Taking all of these considerations in mind, it does not come as a surprise that the EU has not evolved into an AFSJ-based international actor in the field of legal migration; yet, in order to overcome the political and legal hurdles associated to developing a proper external policy on migration, the EU has started to use a simplified mechanism: Mobility Partnerships (MPs).\(^{62}\) Since the 2007 Communication, the EU has signed Mobility Partnerships with Moldova and

\(^{59}\) Supra, Chapter 6, Part Two  
\(^{60}\) Supra 12.1  
\(^{61}\) For an analysis of the EU’s external competences in legal migration see García Andrade 2013  
\(^{62}\) Communication on circular migration and mobility partnerships between the European Union and third Countries, COM (2007) 248, 16 may 2007

Mobility partnerships are considered to be an instrument, a tool, at the disposal of the EU in order to implement the four pillars of the EU’s Global Approach to Migration and Mobility (GAMM). According to the 2011 Communication of the Commission, the four pillars are: (1) organising and facilitating legal migration and mobility; (2) preventing and reducing irregular migration and trafficking in human beings; (3) promoting international protection and enhancing the external dimension of asylum policy; (4) maximising the development impact of migration and mobility.64 With these objectives (or pillars) in mind, Mobility Partnerships are positioned as a cushion between Association Agreements or other traditional frameworks of cooperation and implementation such as the Action Plans used in the framework of the ENP. As Van Vooren has argued, the form of Mobility Partnerships “is clearly inspired by the coherence rationale of soft legal instruments in the context of the ENP”.65 Yet, it is difficult to understand why a new instrument was coined … to foster cooperation with countries that are already signatories of either ENP Association Agreements or PCAs and with whom the tool of Action Plans could have been used. Possibly, two elements can clarify this issue: firstly, the creation of Mobility Partnership to manage migration issues against the use of ENP-related instruments must be found in the turf war amongst the different DGs of the EU; secondly, Mobility Partnerships, are a flexible instrument of external relations because the participation of the Member States is on a voluntary basis that allow Member States to be in control of the content.

Anchored to the four pillars of the GAMM, Mobility Partnerships are flexible, mixed deals that the EU and interested Member States sing with third countries to set up a cooperation framework in relation to migration. Whilst the initial communications were vague on the nature of these pacts,66 and were using a

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63 For a list of the partnerships, see the website of DG Home: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/southern-mediterranean/index_en.htm
65 Van Vooren 2012, p.208
66 Commission Communication on Circular Migration, supra note 61: Mobility partnerships will necessarily have a complex legal nature, as they will involve a series of components, some of which will fall in the Community’s remit and others in the Member States’. The EU needs to ensure that a coherent partnership can be put together in the
legal vocabulary, by the time the EU had signed the first partnerships the Council made clear that Mobility Partnerships were to be understood as policy tools and not as agreements with binding effects:

“The Council underscores that the non-binding legal framework for Mobility Partnerships, taking the form of political statements and declarations of intention signed by the Community, the Presidency of the EU, interested Member States and the respective partner third countries, is an appropriate arrangement allowing for the expeditious establishment of Mobility Partnerships and ensuring their open, flexible and voluntary nature.”

Mobility partnerships are facilitating tools dedicated to migration policies and projects promoted by the EU and the participating Member States. Mobility partnerships set commitments on the basis of a number of projects promoted by either the EU or the participating Member States. Moreover, the third country in question can choose which projects to implement and with whom, thus making MPs an instrument of EU external relations à la carte. Yet, the interesting issue for the purpose of this study is to analyse how MPs are related to the constitutional foundations of the EU. To do so, the latest agreement will be taken as an example, the EU signed with Tunisia in 2014.

Firstly, there can be no doubt over the fact that the MP with Tunisia, like the others MPs, is positioned within the existing legal framework of cooperation and thus within the framework established with the Association Agreement between the EU, its Member States and Tunisia. From a content perspective, it is remarkable that the MP touches upon all the four pillars of the GAMM and thus touches upon issues that are linked to existing agreements or declares the willingness of the parties to fill existing gaps. In this respect, but with the

most expeditious manner, while respecting the division of powers between the EC and Member States and ensuring consistency with the existing legal and political framework for relations between the third country in question, the Community and the relevant Member States.

Draft Council Conclusions on Mobility Partnerships as a tool of the Global Approach to Migration, Council doc. 15811/09, 12 November 2009, Paragraph 9

Mobility Partnerships, as soft law instruments are not published in the official journal of the EU and must be retrieved from the website of the Commission: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/international-affairs/general/docs/declaration_conjointe_tunisia_eu_mobility_fr.pdf
exception of Tunisia and Morocco, the adoption of a MP has allowed the EU to conclude readmission agreements: the last example of this process is the case of Cape Verde, a country that first concluded a MP and then a readmission agreement and a visa facilitation agreement in 2013. In relation to other migratory issues such as asylum and legal migration, the MP with Tunisia remains vague. For instance, the parts dedicated to asylum do not go beyond what recent Association Agreements, Development Cooperation and PCA agreements provide for. Also the other part on legal migration does not add to initiatives concluded under the Action Plans established under the ENP, but what is striking is the fact that contrary to other MPs, the one with Tunisia does not contain the list of the specific initiatives that either the EU or Member States (either individually or jointly) propose to the partner third country. As a matter of fact, the existing MPs do show a consistent pattern: whilst some include a detailed list of proposed joint activities, that mostly serve bilateral administrative cooperation schemes, others do not have such list, making it difficult to assess the relationship between these instrument and the existing legal framework under the various Association Agreements.

Other scholars have already observed that this practice seems at odds with the sensitive matters touched upon by the various MPs. Indeed, as García Andrade has observed, “the issue of migrants’ rights demands the kind of legal security

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that can only be obtained through legally binding instruments”. Indeed, the use of soft law instruments means that the CJEU has no jurisdiction to control these acts and evaluate their legitimacy within the EU legal system and individuals cannot relay on these instruments to protect their rights and interests. At the same time, because of the content of the different MPs analysed, the possibility that individuals may be negatively affected by these instruments appear, for the time being, remote. Therefore, as long as MPs truly remain soft law pacts on dialogue and capacity building, human rights protection issues should not emerge.

Possibly, the biggest problem posed by these instruments relates to the democratic principle. By using soft law instruments, the signature of MPs bypasses the procedure to conclude international agreements established in Article 218 TFEU. Thus, whilst the Council and the Commission cooperate and work together during the negotiations together with representatives of Member States, the only institution that is normally involved in the decision making process and that remains left out in the case of MPs is the European Parliament. Naturally, if the activities envisaged by a MP merely relate to political dialogue, the exclusion of the EP would not pose problems of constitutional nature.

Moreover, also from an integration process perspective the EU risks to jeopardise the development of a common migration policy and a common external immigration policy if it allows for such uncontrolled and uncontrollable proliferation of soft law measures. Indeed, as Member States are not under pressure to work together and agree on a common policy, the risk is to render nugatory an entire provision of the TFEU; and similar negative effects may occur in relation to the application and implementation of the various Association Agreements existing with the EU’s partner countries that have also signed a Mobility Partnership. At least this is the risk the EU faces. Whilst it is true that MPs give to third countries a feeling of ownership that the Action Plans under the ENP could not deliver, the creation of MPs, without a consistent and coherent pattern may turn out to be more of a curse than a blessing for the development of a common (external) migration policy. Possibly, the lack of political cohesion on the EU side first, and the lack of interest to cooperate on many migration-related dossiers on the side of third countries second has led to

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72 García Andrade P 2013, p279
the development of such instruments; but the fact that on top of MPs the EU has also promoted the use of Common Agenda on Migration and Mobility (CAMM) as an alternative instrument to MPs to be used with third countries in cases where one of the parties is not ready to conclude a MP\textsuperscript{73} shows that, for the time being, the external dimension of the EU’s migration policy will depend on the political climate existing on the EU and in each targeted country.

12.3.2 The External Dimension of the EU’s Asylum Policy: From Soft Law Programmes to Uncharted Pacts

Another policy context in relation to which the externalisation of an AFSJ policy has proved to be controversial – both politically and legally, is asylum. The EU started to discuss paths and avenues to externalise its asylum policy as early as 2003. In the aftermath of a proposal by the UK government of the time, the Commission issued a Communication in which its held that: \textit{“[a]ny new approach should be built upon a genuine burden-sharing system both within the EU and with host third countries, rather than shifting the burden to them. Any new system should therefore be based upon full partnership with and between countries of origin, transit, first asylum and destination”}.\textsuperscript{74}

Subsequent discussions within the Council led to a revised policy proposal from the Commission on managed entry of persons in need of protection and enhancing protection capacities of regions of origin.\textsuperscript{75} With this Communication the Commission proposed a number of balanced approaches to build upon the EU’s mandate to develop a Common European Asylum System, including an external dimension thereof. Three ideas were put forward: Protected Entry Procedures (PEPs), Resettlement Schemes or Resettlement Programmes (RPs) and Regional Protection Programmes (RPPs). The first tool, PEPs, are administrative arrangements according to which a State allows asylum seekers to approach its diplomatic mission in a third country, ask for protection and obtain an entry permit. Whilst the EU has promoted this type of policy on a number of occasions, the EU has never managed to implement PEPs and, at the moment only some Member States have established such systems. To this date, and in

\textsuperscript{73} GAMM Communication, COM (2011) 743final, supra note 63
\textsuperscript{74} Communication from the Commission ‘Towards more accessible, equitable and managed asylum systems’, COM (2003) 315final, p.12
\textsuperscript{75} Communication from the Commission, Improving Access to Durable Solutions’, COM (2004) 410 final, 4 June 2004
spite of the favourable opinion of the Commission and the EP, the EU has not yet acted. This is particularly surprising since this type of procedure would diminish the pressure at the borders, uphold the right to seek asylum enshrined in Article 18 of the EU Charter for Fundamental Rights (EUCFR). At the same time, it has been suggested that such procedures might fall outside the scope of the attributed powers of the EU in the field of asylum;\textsuperscript{76} yet, taking into account the existing internal \textit{acquis} on EU asylum law, it is submitted by the present author that the EU has three possible avenues to take: firstly, a systematic reading of Article 78 (2) TFEU letters (b), (c) and (d) does create an implied external competence for the EU to conclude agreements with third countries with which the EU already cooperates in the framework of its RPs and RPPs; secondly, the EU could use its internal asylum competence to adopt a Directive in which, after setting the administrative process, the EU identifies the regions and third countries with whom Member States should cooperate in order to implement Protected Entry Schemes; thirdly, the EU could use its internal and external powers to create, a PEPs via the EU delegations and then resettle refugees on the basis of a criterion similar to the one introduced with Council Decision 2015/1601 to relocate migrants from Italy and Greece.\textsuperscript{77} Moreover, it could also be argued that the emergency powers of Article 78 (3) TFEU could be used to promote external instruments such as PEPs.

The second tool, Resettlement Programmes, was launched by the Commission with a Communication in 2009.\textsuperscript{78} This RPs are solidarity and burden sharing tools that regulate the transfer of a refugees, not asylum seekers, from a State in which they have sought and received protection to a EU Member State that has agreed to admit them. Resettlement is a tool developed by the UNHCR and it is this organisation that generally acts as intermediary between governments, NGOs and other actors. At EU level, in spite of the efforts of the Commission and the solemn proclamations by the European Council in policy programmes such as the Stockholm Programme,\textsuperscript{79} not much has happened. Firstly, it should be made clear that RPs were conceived as a voluntary mechanism within the EU,

\textsuperscript{76} Garcia Andrade P (2014), p. 58
\textsuperscript{77} Council Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L248/80, 24.09.2015
\textsuperscript{79} The Stockholm Programme — An open and secure Europe serving and protecting citizens, OJ C 115/1, 4.05.2010, Paragraph 6.2.3
this has always been a starting point also for the Commission.\textsuperscript{80} To this date, the EU promotes resettlement in two ways: first, via the European Refugee Fund (ERF) first –now the Asylum, Migration and Integration Fund (AMIF), the EU financially supports those Member States that participate in RPs;\textsuperscript{81} secondly, via its specialised agency EASO (European Asylum Support Office)\textsuperscript{82} the EU helps third countries and Member States to implement this procedure.

The third tool that relates to the externalisation of the EU’s asylum policy are the Regional Protection Programmes (RPPs). The objective of RPPs is to enhance the protection capacity of third countries and to this end RPPs consist in practical actions that offer help and support to refugees and the third countries concerned. More specifically the 2005 Communication identifies seven core constituent activities that range from administrative support to better manage migration and asylum implications to projects that give direct benefits to refugees.\textsuperscript{83} As Moreno–Lax has observed, RPPs are “a toolbox of actions aiming at capacity building” in the countries and regions of origin and transit.\textsuperscript{84} Since the first pilot projects were launched in the Great lakes Region (Tanzania)\textsuperscript{85} and the Western Newly Independent States (Ukraine, Moldova, Belarus)\textsuperscript{86} other RPPs have been launched in North Africa and in the Horn of Africa in 2011\textsuperscript{87} and in December 2013 one was approved for Lebanon Jordan and Iraq that was launched in the summer of 2014 as Regional Development and Protection Programme (RDPP).\textsuperscript{88}

It appears that until now, the EU has privileged the use of soft law instruments to act internationally in the field of asylum. This may well be because, from a policy perspective, the Union has preferred to promote protection in the regions of origin and transit, and has avoided as much as possible to create binding

\textsuperscript{81} AMIF Regulation 516/2014 of 16 April 2014, OJ L150/168, 20.5. 2014
\textsuperscript{83} Communication from the Commission to the Council and the European Parliament on regional protection programmes, COM (2005) 388 final, 1.9.2005., p.4
\textsuperscript{84} Moreno-Lax V (2012), p104
\textsuperscript{85} Communication from the Commission to the Council and the European Parliament on regional protection programmes, COM (2005) 388 final, 1.9.2005., p.6
\textsuperscript{86} Idem, p. 5
\textsuperscript{87} Communication from the Commission, Annual Report on Immigration and Asylum, COM (2011) 291 final
\textsuperscript{88} Press Release, 16 December 2013
instruments to enhance protection in the EU in cooperation with third countries. This is particularly true for RPPs that are designed precisely to increase reception capacities in affected regions so as to prevent the influx of asylum seekers at the borders of the EU. For the purpose of this research, the choice made poses a number of questions. First, it must be borne in mind that the protection of refugees has a particular constitutional importance within the EU legal order. The present author has already had the opportunity to say that the protection of asylum seekers and refugees has a special position within the EU legal order; yet, the EU has not managed thus far to conclude agreements with third countries to promote the protection of asylum seekers.

From a constitutional perspective, it goes without saying that any external initiative, whether internationally binding or not, must in any case respect the high level of protection that internal legislation guarantees to asylum seekers and refugees. More specifically, it can be argued that even soft law instruments should be compatible with Article 18 EUCFR. At the moment however, the choices made by the EU suggest that the type of capacity building measures promoted with RPPs are actually a valid complement to promote the protection of asylum seekers and refugees even though in the recent 2014 guidelines the European Council pushed for the insertion of ‘return’ as one of the topics that

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89 Matera C 2013: “By adopting a technique similar to the one used at the time of the Maastricht Treaty in relation to the European Convention on Human Rights, Article 78 TFEU is a provision of EU primary law authorising the influence of an external source. More precisely, Article 78 TFEU affirms that for the purpose of developing a common policy on asylum, subsidiary protection and temporary protection to third country nationals the European Union is bound to abide by the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties. This provision makes clear that any legislative instrument or international agreement concluded by the EU must be in accordance with the Geneva Convention and the latter thus emerges as a benchmark of legality, or normative parameter, that can be invoked to challenge the legitimacy of EU secondary norms under Articles 263 and 267 (b) TFEU. Secondly, the Geneva Convention of 1951 is used as the source of a substantive individual right under Article 18 of the EU Charter of Fundamental Rights (EUCFR). Indeed, Article 18 EUCFR introduces the right to asylum within the EU legal order; however, this innovation must be read in conjunction with, and limited by, the scope of Article 78 TFEU and the existing legislative acquis in the field with the result that the right contained in Article 18 cannot be interpreted as an absolute right independent from secondary legislative acts. Yet, it must be also emphasized that Article 18 EUCFR goes beyond the equation between ‘the right to asylum’ and the status of refugee under the Geneva Convention of 1951 since it affirms that the said right ‘shall be guaranteed with due respect for’ the Geneva Convention. This means that the right to asylum ex Article 18 includes a plurality of protection mechanisms (national or international) in which the status of refugee is but one example. In addition to Article 78 TFEU and Article 18 EUCFR, also secondary instruments systematically refer to the Geneva Convention of 1951 either as a normative source or as a source of interpretation”. See also Matera C (2012)
should be addressed in RPPs. Certainly, it could be argued that the political choice underneath the adoption of RPPs is one that tries to prevent individuals to come to seek asylum and live in the EU, but strictly speaking this is quite irrelevant considering that the immediate impact of RPPs is to support efforts in poor regions of origin and transit. In relation to PEPs and RPs, however, the limits of EU action really emerge. In these two cases the EU would be able to adopt effective and binding instruments so as to enhance access to protection (PEPs) and share the burden of third countries (RPs); but also in this case the ways in which the two instruments are implemented do not raise particular concerns, as long as individuals are not negatively affected by the application of those instruments. Conversely, the soft law nature of these instruments would make it hard, in case the rights of a refugee were to be violated, to have access to justice; and this issue does raise constitutional concerns. Yet, and from a systematic perspective, one must remember that the European Parliament participates to the adoption of the financing of these programmes and has, therefore, the political and legal authority to investigate the use of funds and the way these soft law instruments are implemented.

In any case, the use of soft law in relation to the externalisation of the EU’s asylum policy appears as a political subterfuge to bypass formal instruments and overcome the obstacle of qualified majority voting (QMV) within the Council. At the time of sending this manuscript to press, the EU closed a deal with Turkey in order to cooperate with the latter country on the management of the Syrian refugee crisis. At the moment, the Commission is keeping an online European Agenda on Migration where it is possible to accede the different initiatives taken since May 2015. On top of internal measures such as the internal relocation system that bypasses the Dublin transfer system so as to help Italy and Greece to cope with the migratory pressure, and measures to financially support RPPs and the new RDPPs, the biggest policy achievement was the negotiation of a ‘deal’ with Turkey.

92 The precursor of the deal of March 2016 was a summit at the end of 2015, Meeting of the EU heads of state or government with Turkey, 29/11/2015: http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/29/
Indeed, on the 18th of March the EU has concluded a deal with Turkey to manage the influx of asylum seekers coming via Turkey to Greece. The deal, that was not negotiated under the terms of Article 218 TFEU and, therefore, appears to fall outside the scope of any provisions of the Treaties, is built under nine action points of which four are worth mentioning here: 1) all new irregular migrants arriving to Greece from Turkey are to be returned to Turkey, but will be given the opportunity to seek protection under EU rules; 2) For every irregular migrant that is not entitled to receive protection in Greece and is returned to Turkey, another Syrian refugee will be resettled from Turkey to a Member States on the basis of a voluntary resettlement scheme; 3) Turkey will take any necessary measure (sic!) to prevent new sea or land routes for illegal migration; 4) Once the irregular crossing stops, a voluntary humanitarian admission scheme will be adopted. At the same time, the deal also comes with a counterpart, or incentive, for Turkey: visa liberalisation with participating Member States, further financial aid to implement the deal, an unspecified upgrade of the custom union with the EU and a commitment to re-energise the accession process.

The EU–Turkey deal epitomises the fact that the EU has tried to bypass the decision making process regulated by the Treaties to act internationally in the field of asylum. First, it opted for soft law instruments anchored to existing financial instruments such as the ERF and the AMIF; secondly, for the purpose of striking a deal with Turkey the EU bypassed the Treaties and opted for the conclusion of an uncharted pact. At the time of closing this research the deal with Turkey, which undoubtedly is an international agreement from a material perspective because it codifies obligations and rights between the two parties, appears as a striking violation of all decision making procedures and hence the rule of law principle enshrined in the Treaties. Two main questions remain open: why wasn’t the urgent procedure of article 218 TFEU used? Why didn’t the Council used the powers it has under the CFSP to address the crisis and conclude a first political agreement on the basis of Article 37 TEU? Furthermore, and from a substantive perspective, the deal does not provide for convincing mechanisms dedicated to effectively protect the rights of asylum seekers and migrants but merely refers to the the fact that Turkey will apply EU standards

94 Idem.
95 I refer to the broad definition of international agreement proposed by Klabbers. Klabbers (1995), p.249
and that Turkey is a safe third country to which asylum seekers can be returned with no risks for the non-refoulement principle. Clearly, further analysis of this uncharted pact will tell if the above mentioned concerns are justified.

12.4 Conclusions

The purpose of this Chapter was to analyse the manner in which the EU is externalising its borders, migration and asylum policies with a view to answering the main research question. This Chapter has showed that in spite of the entry into force of the Lisbon Treaty, there are still a number of challenges that affect the externalisation of the EU’s policies on borders, migration and asylum.

The concrete examples analysed here show that the EU and the Member States have been asked to develop new forms of coordination such as the combination of framework agreements concluded by the EU with delegated (implementing) agreements left to Member States in the case of readmission agreements. At the same time, the EU is increasingly prone to try alternative ways to develop its external dimension of the AFSJ: this is the case of Mobility Partnerships, and other soft law instruments in the field of asylum.

In both cases, the constitutional challenge resides in the amount of scrutiny that the EP can exercise. However, the use of supposed soft law instruments to achieve ‘hard law’ goals appears as a way to avoid the application of the existing rules and should be monitored thoroughly in order to prevent violations of the existing procedural and substantive norms. Finally, the EU–Turkey deal on the refugee crisis shows that the constitutional foundations of the EU legal system are indeed challenged and possibly violated by the externalisation of some AFSJ policies and that the European Council qua voice of the Member States is ready to bring the EU at the border line of its constitutional rules; just like the Kadi case first and other AFSJ-related instruments have done before. The challenges that have emerged in this chapter do not relate solely to institutional and decision making rules, but also concern individuals. From the EU’s readmission policy to the the externalisation of the EU’s asylum policy this Chapter has showed how difficult it is for the EU to uphold its human rights protection standards when it comes to reacting to humanitarian and political crises.
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Chapter 13

The External Dimension of Judicial and Operational Cooperation

The second Chapter on the external dimension of Title V Part III of the TFEU analyses the external dimension of judicial and operational cooperation within the AFSJ. From a substantive perspective, this means that the present Chapter will refer to Articles 81, 82, 83, 85, 87 and 88 of the TFEU. More specifically, the Chapter analyses agreements connected with judicial cooperation in criminal matters, criminal law, judicial cooperation in civil law and the external activities of the AFSJ agencies. Also in this case the purpose of this Chapter is to contributing in providing an answer for the main research question of this study. However, because the fields covered in this Chapter have been the object of a numerous publications, this Chapter will only discuss the initiatives of the EU in order to consider the extent to which the findings of Chapter 12 can be applied also in relation to judicial and operational cooperation agreements concluded by the EU.

13.1 The External Dimension of Judicial Cooperation in Criminal Matters and Criminal Law

This Section aims to analyse the external dimensions of judicial cooperation in criminal matters and criminal law. Whilst primary law provisions in these two fields appear to address primarily, if not exclusively, internal matters, the EU has in fact developed, to a certain degree, an external dimension in both fields. Indeed, as it emerged in Chapter 6, the provisions of the TFEU on judicial cooperation in criminal matters and criminal law within the EU are ‘internal provisions’, i.e. provisions that are essentially internal in nature and that can be projected internationally only as a result of the exercise of that internal competence.1

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1 See Chapter 6 Part II, supra.
13.1.1 Mutual Legal Assistance and Extradition

From a bilateral perspective, the EU has concluded two main sets of agreements immediately falling within the scope of the JCCM provisions of the TFEU: two Mutual Legal Assistance (MLA) agreements with the USA and Japan, and an extradition agreement with the USA. All these agreements were concluded prior to the entry into force of the Lisbon Treaty and thus were concluded on the combined basis of Articles 24 and 38 TEU. Whilst the two agreements with the USA were signed in 2003, the one with Japan was concluded by the Council on the 30th of November 2009: the last day prior to the entry into force of the Lisbon Treaty and, therefore, on the last day before the procedures of Article 218 TFEU had to be applied. Should other MLA and extradition agreements be concluded today, these would have to be adopted on the basis of Articles 82 (1) (d) and Article 216 (1) TFEU. Moreover, the EU has also concluded an agreement with the International Criminal Court on the basis of Article 24 TEU in 2006.

MLA and extradition agreements are instruments that aim to discipline cooperation in criminal affairs. MLA agreements regulate judicial and administrative cooperation in a number of fields such as transmission and collection of evidence between two different States and the establishment of joint investigation teams. On the other side, extradition agreements discipline the conditions concerning the surrendering of individuals suspected of having committed a crime with a view of bringing an individual to trial or the surrendering of convicted individuals for the purpose of executing a sentence.

The USA-EU MLA and extradition agreements are the first example of criminal law-based international treaties that the EU has ever concluded. The two agreements work as ‘framework agreements’ or ‘umbrella agreements’ that set a common framework on MLA and extradition rules for the conclusion of bilateral

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3 Agreement with the USA OJ 19/07/2003 L181/34 Agreement with Japan OJ 12.2.2010 L 39/20
4 Article 82 (1) (d) affirms: 1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to: (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.
6 OJ 19.07.2003 L181/27
agreements between a Member State and the USA. In other words the EU – USA agreements define common rules that must be respected by the USA and each Member States when negotiating bilateral instruments. Naturally, the role of the EU has facilitated the works of USA diplomacy since with the conclusion of these umbrella agreement the negotiations at bilateral level need only to touch upon specific dossiers and reduces the bargaining power of each party, but with a clear advantage for the US. It should be immediately noticed that the format used for these agreements confirms the findings of the previous Chapter: because of the peculiar division of tasks within the EU legal system in relation to AFSJ matters, the externalisation of these policies goes beyond the classic dichotomy between exclusive and mixed agreements and provides for a more complex pattern that brings the Member States together whilst safeguarding the role that they have in relation to the enforcement of justice and home affairs matters.

It must be emphasised that with the conclusion of these agreements the EU and the USA have directly affected the existing bilateral MLA and extradition agreements between the USA and Member States. However, the affectation must be evaluated negatively, for the reasons that follow.

Firstly, it must be noticed that while Article 14 of the MLA agreement affirms simply that this agreement does not preclude the conclusion, after its entry into force, of bilateral agreements, Articles 3 and 13 provide a number of rules and mechanisms to make sure that the content of the EU – USA text primes over bilateral treaties concluded by EU Member States on a number of points. Moreover, in both cases Article 3, paragraph 1 affirms that, under a number of conditions and terms, the EU and the USA “shall ensure that the provisions of this agreement are applied to the bilateral mutual legal assistance treaties between the Member States and the USA” with the result that any provisions of a bilateral treaty that contradicts this agreement should be set aside. Indeed, the same provision contains a list of conditions and procedures that integrates pre-existing bilateral agreements between the US and a member State.

Moreover, and more problematically, Article 13 adds that, notwithstanding the invocation of grounds for refusal of assistance available pursuant bilateral agreements or, in the absence of an agreement, legal principles of the USA or of

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7 Article 3(1) of the EU – MLA Agreement OJ 19.7.2003 L181/3
an EU Member State, bank secrecy and generic restrictions with respect to the legal standards of the requesting State for processing personal data may not be imposed by the requested State as a condition to providing evidence or information. This last excerpt of the MLA agreement with the USA allows emphasizing two points. First, from an institutional perspective, the structure and purpose of this agreement shows how the EU is developing for itself a role of norm-setter where enforcement-related rules and implementation are carried out by Member States.

Secondly, and from a substantive perspective, Article 13 of the EU – USA MLA agreement discussed above reveals the little attention paid to constitutional principles pertaining to criminal law and human rights. Indeed, as Article 13 makes clear that Member States may not invoke grounds for refusing assistance in relation to unspecified “generic restrictions with respect to the legal standards of the requesting State for processing personal data” this provision bluntly suggests that national authorities called upon to implement the MLA agreement should refrain from scrutinising the request for cooperation on the basis of their national rules and principles of procedural and substantive criminal law. Such a clause openly disrespects the internal hierarchy of norms and the principle according to which acts of public authorities must not only respect, but uphold constitutional principles in a field such as criminal law in which the powers of judicial and police authorities need to be strictly regulated in order not to violate human rights. In fact, it seems like the EU–USA agreement sought to impose a sort of mutual trust and mutual recognition principles on transatlantic judicial cooperation. However, this seems hardly legitimate from a constitutional point of view since this provisions clearly implies a derogation from the rule of law principle.

Conversely, the MLA agreement concluded with Japan in 2009 contains no clause on bilateral agreements and must therefore be understood as an agreement

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8 See the combined reading of Articles 13, 4(5) and 9(2) (b) of the EU – USA MLA agreement.
9 Article 9 (2) (b) of the agreement. Moreover, sub-paragraph (4) of the same article makes clear that if a bilateral agreement has less stringent rules concerning the imposition of limitations on the use of data, those rules can be applied, meaning that the EU – USA MLA Agreement does not even set minimum-standards. The explanatory note to Article 9 of the MLA Agreement
10 OJ 12.2.2010 L39, p.20. It has also concluded. Moreover; it has also concluded MLA agreements with Norway, Iceland Switzerland and Lichtenstein as a result of the special association position these countries have with the EU.
with less impact on bilateral relations with Japan established by the Member States. However, also in this case the EU has not completely renounced to coordinate the action of Member States. Indeed, Article 27 of the EU–Japan agreement affirms that Japan and Member States should cooperate also on the basis of other applicable international conventions and instruments, and affirms that the conclusion of bilateral agreements should confirm, supplement, extend or amplify the provisions of the EU – Japan one.11

At the time of its conclusion, the EU – USA MLA agreement was highly contested: the two abovementioned restrictions in relation to data protection and privacy posed a number of challenges and concerns. Indeed, not only the MLA agreement restricted the possibility of refusing cooperation in relation to certain aspects of data protection and banking secrets, but it also failed to provide a comprehensive set of norms on data protection, posing, once more, a serious concern in relation to the compatibility of such agreement with Article 2 TEU. Possibly, because of the criticism that the EU–USA agreement had sparked, the EU–Japan agreement was concluded with a specific provision on “Grounds for refusal” which included a general provision linked to sovereignty, security, public order and other essential interests.12 Moreover, because Japan still applies the death penalty, Article 11 (1) (b) of the EU–Japan MLA agreement, which is not about the extradition of a suspect or a convicted individual to stand trial or face execution of a criminal penalty, made sure to affirm that for offences related to crimes punishable with the death penalty, EU Member States could refuse to execute a request for assistance. Conversely, the EU–USA MLA agreement did not have a specific clause allowing the authorities of an EU Member State to refuse the execution of a request for cooperation due to the possible application of the death penalty: Article 13 on derogation is phrased in rather general terms.13

The same problem related to the application of the death penalty emerged when the EU concluded its first (and only) extradition agreement with the USA.

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11 Article 27 of the EU–Japan agreement, cit.
12 Article 11 of the EU–Japan MLA Agreement
13 Article 13 of the MLA agreement with the USA: Subject to Article 4(5) and Article 9(2)(b), this Agreement is without prejudice to the invocation by the requested State of grounds for refusal of assistance available pursuant to a bilateral mutual legal assistance treaty, or, in the absence of a treaty, its applicable legal principles, including where execution of the request would prejudice its sovereignty, security, ordre public or other essential interests.
Indeed, also at that time the issue of capital punishment was on the table from the beginning, but also in this case the final provision is rather cumbersome and does not expressly prohibit extradition in cases where the capital punishment could be imposed.\textsuperscript{14} To make things more odd, the EU–USA extradition agreement only provides in Article 17 for a generic provision on grounds for refusal that openly challenges EU and national constitutional rules since it affirms that in the case where a constitutional principle of the requested State poses an impediment to extradition, the parties have to consult one another.\textsuperscript{15}

It cannot be sufficiently emphasised how this type of provision is in conflict with the rule of law: the provision of the agreement essentially calls for negotiations where constitutional rules prohibit cooperation. Today we know that under the authority of the \textit{Kadi} decision of 2008\textsuperscript{16} international agreements cannot authorise, either expressly or implicitly, any deviation from the EU constitutional foundations, but at the time this was not necessarily the case since the case law of the CJEU on the foundations of the EU legal order had not yet been applied to protect human rights.

The external dimension of the competences attributed to the EU in the field of judicial cooperation in criminal matters is the less developed parcel of the external AFSJ. Looking at the three existing agreements, there may be a number of (good) reasons for this. Firstly, the sensitive and controversial role played by the EU in this field is till very controversial also internally. While it is true that by virtue of its power of consent ex Article 218 TFEU the European Parliament today plays an important role to strengthen the democratic legitimacy and

\textsuperscript{14} Article 13 of the EU – USA extradition agreement: Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.

\textsuperscript{15} Article 17 (2) of the EU – USA Extradition Agreement: “Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States.”

\textsuperscript{16} Joined cases C-402/05 P and C-415/05 P Kadi and Al Barakaat, 8 September 2008 ECR I-6351
accountability of EU initiatives, it still remains to be ascertained the extent to which EU action can be considered as an added value in this policy.

13.1.2 The Accession of the EU to International Conventions On Criminal Law

The EU has been developing a stronger relationship with international multilateral conventions related to judicial cooperation in criminal matters. In this respect Mitsilegas has already noted how the EU uses the conventions negotiated within the Council of Europe with candidate countries. On the other hand the EU has concluded a number of multilateral conventions and instruments such as the UN Convention on Transnational Organised Crime (UNTDOC) and two protocols: the Protocol Against the Smuggling of Migrants by Land, Sea and Air and and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The two protocols related to migration but adopted in the framework of the UN Convention on Transnational Organised Crime (UNTDOC) must also be considered as belonging to a more general multilateral commitment of the EU with the UN in the fight against transnational crime, a field in which the EU is engaged since 1999 and that has led not only to the ratification of the Convention in 2004, but also served, as recently emphasised by Mitsilegas, to revise pre-existing EU legislation on organised crime. Yet, the biggest interlocutor and reference in relation to criminal law and criminal law standards remains the Council of Europe and the ECHR that are used by the Union not only as benchmarks for the adoption of EU legislation in criminal matters, but also to grant legitimacy to internal EU measures. Lastly, the combination of EU competences in criminal

17 Mitsilegas 2009, p. 312
21 Mitsilegas V (2011), pp.239-272
22 For an overview of the relations of the EU with the Council of Europe see Mitsilegas V (2011) The European Union and the implementation of international Norms in Criminal Matters and Mitsilegas V (2009), EU Criminal Law, as well as Peers S (2011)
law and the willingness to affirm itself as a global actor in this field has also emerged in the field of money laundering were the Commission has consistently referred to the guidelines of the Financial Action Task Force (FATF) to adopt and amend EU legislation.  

13.1.3 International Agreements and the Thorny Issue of Data Transfers

Another field in which the EU’s external projection has been extremely controversial is pertains to the conclusion of Passenger Name Records (PNR) and the Terrorist Finance Tracking Programme (TFTP). To this date, the EU has concluded three PNR agreements with Canada, Australia and the USA; each agreement concluded on the basis of Articles 82(1) (d) and 87(2) (a) TFEU whereas the TFTP concluded with the USA is based on Articles 87(2) (a) and 88 TFEU. Both types of agreements concern the collection and exchange of data: the objective of the TFTP is to collect information on financial transactions in order to cut the financing of terrorist activities whereas PNR agreements relate to the transfer of the data that airline companies acquire whenever someone buys an airplane ticket.

In 2006 the CJEU, on an action brought by the European Parliament annulled the first wave of agreements with the US and Canada on grounds of legal basis even though the biggest concern raised in relation to those instruments was the lack of data protection standards comparable to EU ones and the risk of discrimination on ethnical and religious grounds. After the annulment of the CJEU and the application of an interim agreement and the entry into force of the Lisbon Treaty, the European
Parliament, because of its role in the conclusion of international agreement, managed to influence the negotiations of PNR and TFTP agreements. In relation to PNR, the involvement of the EP the EU has managed to improve numerous clauses of PNR agreements in relation to the methods of data transfers and data retention provisions. However, the negative advisory opinion of the Data Protection Protection Supervisor on a request from the EP shows that, still today, the EU is ready to conclude international agreements that are at the borderline of EU constitutional principles.\(^\text{29}\) Also the TFTP has undergone a similar saga. A first TFTP agreement was reject by the EP on data protection grounds in 2009 and a revised agreement was subsequently accepted in July 2010.\(^\text{30}\) Since then however, the the EP has called for the EU to suspend the agreement on grounds of data protection once the the US mass surveillance programme was disclosed in 2013.\(^\text{31}\)

The overview of the main channels through which EU criminal law competences are used shows that the *Sturm und Drang* approach identified in Part One still drives the agenda of the Commission and the Council that have been willing to negotiate international agreements with the USA to the detriment of EU data protection rules.\(^\text{32}\) At the same time, this section has also revealed that the EU promotes and participates to multilateral conventions on criminal law and, whenever a judicial agreement has to be concluded, it uses the form of umbrella or framework agreements like in the case of the readmission.

### 13.2 The External Dimension of Judicial Cooperation in Civil Matters and Private International Law

Judicial cooperation in civil matters, together with judicial cooperation in criminal matters and police cooperation, distinguishes itself for the role the EU is called upon to exercise. Contrary to the mainstream cases of the EU integration

\(^{29}\) Executive summary of the Opinion of the European Data Protection Supervisor on the proposals for Council decisions on the conclusion and the signature of the agreement between Canada and the European Union on the transfer and processing of passenger name record data, par. 3 (OJ 2014, C 24/51).

\(^{30}\) For a reconstruction of the TFTP saga, Commission Communication on the Joint Report regarding the value of TFTP, COM (2013) 843 final


\(^{32}\) For a recent analysis see Poli S 2016
process, where the EU is called to substitute, to lead or to support Member States in the implementation of a policy, in these cases the Union is called upon to create the instruments necessary for national judicial authorities of the Member States to enter in a direct discourse without requiring technical and administrative support of (national or EU-based) central administrations.

This section will analyse the vertical distribution of competences and the impact that the existing rules have on the development of the Union’s external relations in this domain. In doing so, the section will look at a specific solution developed for the purpose of bringing together the EU and its Member States in the externalisation of judicial cooperation in civil matters and civil law.

The history of judicial cooperation in civil law does not solely on the development of the EU \textit{qua} AFSJ; rather this field of the AFSJ is built upon the successful history of negative integration that we can trace back to the Brussels Convention of 1968, a sort of external AFSJ ‘\textit{ante litteram}’. Moreover, in Chapter 5 it was argued that this field of the AFSJ has a particularly strong tie with the Internal market. And while the scope of Brussels Convention of 1968\textsuperscript{33} has been absorbed by the emergence of proper competences within the EU and the adoption of internal measures through what has now become the ordinary legislative procedure, the external projection of this policy has developed into an exclusive external competence of the EU as prominently affirmed by the CJEU in its Opinion 1/2003 concerning the Lugano Convention.\textsuperscript{34}

The Opinion of the CJEU in relation to the Lugano Convention and the resulting exclusive external competence of the EU to negotiate and conclude the convention is only but one aspect of the types of external action in the field of Private International Law (lato sensu). Parallel to this development, the EU has developed an intense cooperation relationship with the Hague Conference on Private International Law.\textsuperscript{35} The EU did in fact join the Conference in 2007\textsuperscript{36} and since then has consolidated its role as a proactive member in the field of private international law. In this respect, having participated to the negotiations of

\textsuperscript{33} OJ (1998) C 27/1, for the consolidated version after the accession to the EU of Austria, Finland and Sweden.
\textsuperscript{34} Paragraphs 134 -141 and 152, 161
\textsuperscript{35} Van Loon et al 2009.
covenants within the framework of activities of the Conference since the 60s, and having proactively worked for the adoption of a number of conventions in that context, the EU membership to this international organisation came as a natural development of the EU’s role in the field of private international law. EU participation to this forum should be read as a means for the EU to coordinate with the Member States the rules on conflicts of law and jurisdiction adopted at EU level with the “acquis de la Haye”. By participating to the works of this International Organisation the EU seeks to coordinate with the Member States the rules on conflicts of law and jurisdiction adopted at EU level with the ‘acquis de la Haye’. This has happened, for instance, in relation to the Hague Convention on parental responsibility for children.\(^{37}\) Yet, precisely in this field and because of the internal acquis, the relationship between the EU legal order and rules of private international law adopted in the framework of international organisations has been characterised by the insertion of “disconnection clauses” to international covenants in order to preserve the application of EU measures among Member States to the detriment of the provisions contained in international covenants.\(^{38}\)

In the light of the *Lugano Opinion* and the participation to the Hague Conference on Private International Law the EU has concluded or has acceded a number of agreements and covenants in this field; yet, because the scope of the agreements is often broader than issues such as distribution of jurisdiction and enforcement issues, the majority of the agreements concluded in this domain are mixed agreements,\(^{39}\) but those more strictly linked to jurisdiction and enforcement have been considered to belong to the exclusive competence of the EU: this is the case for the Hague Convention on choice of courts agreements,\(^{40}\) and the Protocol on the Hague convention on maintenance obligations concerning the choice of law.\(^{41}\)

Moreover, and similarly to the the logic behind the Local Border Traffic Agreements, the external dimension of EU judicial cooperation in civil matters and private international law the EU, can be implemented by the means of

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\(^{37}\) On this point Cremona 2008, p.23.

\(^{38}\) On the use of disconnection clauses in EU law, Cremona 2010 and Kuipers 2011. On the emerging trend of emancipating EU criminal law from Council of Europe conventions see Mitsilegas 2011.

\(^{39}\) For an overview see Peers 2012

\(^{40}\) OJ L133, p.1

\(^{41}\) OJ L 331, 2009, p.17
authorisations to Member states to conclude international conventions falling within this AFSJ domain as ‘trustees’ of EU law. The Council has thus far adopted a number of these decisions on matters such as parental responsibility for children. Fourthly, it must be emphasised that in the aftermath of the Opinion on the Lugano Convention the Council has adopted two separate Regulations in which the EU disciplines the conditions under which, in spite of Lugano, Member States are conferred powers to conclude their own treaties in civil and commercial matters linked to article 81 TFEU.

While the EU has become party to a number of covenants on jurisdiction and choice of law, sometimes jointly with Member States and other times alone, the most interesting aspect of the external dimension of the EU’s competences on judicial cooperation in civil matters and private law is the relationship between the EU and the Hague Conference on Private International Law. The EU did in fact join the Conference in 2007 and since then has consolidated its role as a proactive member in the field of private international law. The EU joined the Conference on the basis of Article 61 (c) TEC, which has been repealed but was similar to Article 67 (3) TFEU and contained an express reference to what has now become Article 81 TFEU on judicial cooperation in civil matters.

The external dimension of judicial cooperation in civil matters and private international law reveal, once more, how in the fields of the AFSJ the classic dichotomy between exclusivity and mixity is fluid. From the perspective of the constitutional foundations of the EU, it could be inferred that the division of competences between Member States and the EU for the purpose of concluding international agreements relies on exclusivity only exceptionally; indirectly, this confirms the interpretation of the different AFSJ provisions proposed in Chapter 5: the EU qua AFSJ should be seen as a facilitator of cooperation between national authorities rather than an actor that substitutes Member States and pre-empts common policies.

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44 Regulation 662/2009 OJ L 200, p.25 2009 applicable to treaties falling within the scope of the Rome I regulation
45 The issue is discussed in Peers 2011a, 648-654.
13.3 The External Dimension of the AFSJ: Operational Cooperation and Enforcement via Specialised Agencies

In order to support and enhance the Union’s activities to pursue the establishment and development of the AFSJ, a number of specialised European ‘agencies’ were created: Europol, Eurojust, Frontex, CEPOL, and EASO. The bodies cover respectively main domains of the AFSJ: police cooperation (Europol and CEPOL), judicial cooperation in criminal matters (Eurojust), the management of the external border of the Union (Frontex) and support to national authorities in the application of the common asylum system (EASO). Because EASO is an agency tasked with administrative and capacity building mission, it will not be discussed in this Chapter.

In each case these agencies have been given legal personality and have been conferred with express treaty making power. That these competences have been used, is for instance reflected in the agreements concluded between Europol and a large number of third-countries on the sharing of strategic data (fight against organised crime and terrorism, in particular) and on the sharing of personal data (so-called ‘operational agreements’). Eurojust, for instance, has agreements with the US, Norway and Switzerland on the posting of liaison magistrates, whereas legal cooperation agreements have also been concluded with a number of other countries.

While the actual wording of the different founding instruments of the agencies differ, it is possible to affirm, in principle, that the agencies of the AFSJ have been conferred a teleological external competence: that is to say that AGSJ agencies have the power to conclude agreements with external partners “in so far as is required for the performance of their tasks”. The teleological nature of external powers for AFSJ agencies serves two purposes. First, it identifies the

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49 Article 23 (1) of the Europol Decision and Article 26a paragraph 1 of the Eurojust Decision.
objectives that the agencies must pursue when negotiating agreements with their external partners and, secondly, it serves as a limiting tool to prevent abuses of powers.

In the light of the current legal framework it is possible to classify the agreements that the AFSJ agencies can conclude in two categories: cooperation agreements and operational agreements. Under the first type of agreements AFSJ agencies are given the power to establish stable mechanisms in order to work together with external partners. For instance the Europol – Russia agreement of 2003 creates a platform for cooperation in order to allow the parties to “1) exchange technical and strategic information such as crime situations and development reports, threat assessments; 2) exchange of law enforcement experience including the organisation of scientific and practice-oriented conferences, internships, consultations and seminars; 3) exchange of legislation, manuals, technical literature and other law enforcement materials; and 4) training”.

In order to give effect to the agreement, a cooperation agreement usually identifies contact points for each party so as to facilitate direct contact cooperation and coordination.

Operational agreements are distinguished from cooperation agreements for two, related, reasons. Substantially, operational agreements are those agreements concluded by one of the AFSJ agencies that include mechanism to share personal data between the parties and/or that foresee concrete operational mechanisms such as joint patrolling of borders or the coordination of investigations. Procedurally, in order to conclude an agreement that envisages the exchange of personal data the EU agency will have to go through a number of authorizations, however often the controls are internal within the Agency itself. Thus for instance, Article 23 of the Europol Regulation affirms that the agency can conclude an agreement containing provisions on the exchange of personal data “after the approval by the Council, which shall previously have consulted the Management Board and, as far as it concerns the exchange of personal data, obtained the opinion of the Joint Supervisory Body (an independent body that monitors the use of personal data by the Agency) via the Management Board” for the purpose of assessing the existence of an adequate level of data protection.

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50 Article 5 Europol – Russia Agreement of 6 November 2003, available at www.europol.eu
by that entity. It appears, therefore, that operational agreements, because of their material scope, require a thorough scrutiny of the envisaged agreements and an assessment of the international partner with which the agency wants to conclude it so as to make sure, at least in principle, that EU standards on rights protection and rule of law are respected. Other than the possibility to exchange personal data, operational agreements concluded by the agencies may even go as far as establishing the position of liaisons desks (Eurojust and Frontex) and foresee participation of third countries officials in border control operations (Frontex). Thus, depending on the agency’s mandate, an operational agreement concluded by an AFSJ agency is an agreement that goes beyond the establishment of cooperative tools and that establishes means of cooperation at the enforcement moment.

Because of the sensitivity in relation to the rule of law and human rights in relation to the fields of the AFSJ, also the activities carried out by the agencies should be subject to a thorough scrutiny. While the legal framework in which internal and external activities by the agencies is constantly developing, instruments of administrative accountability and democratic checks and balances have not been developed consistently and coherently. Thus, while the Europol Regulation conditions the exercise of the agency’s external powers to a Decision containing the list of third countries with whom to enter agreements adopted by the Council in consultation with the European Parliament, the Frontex regulation not only lacks a provision on the preliminary identification of international partners, but merely affirms that the EP “shall be fully informed as soon as possible”. Today, after some initial discrepancies, all the Agencies publish on their website the text of the agreements that they conclude with third countries and international organisations. To this date the powers of the EP vis-

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51 The rules are similar for Eurojust. However, it is worth mentioning that Eurojust conditions the exchange of personal data to either an ad hoc assessment of data protection standards or to the subjectivity of the third country in question to the Council of Europe Convention of 28 January 1981 on data protection.
52 Research conducted in this respect, however, shows a very fragmented picture where in the past the EU has been asked to adopt its system to the requirements of third parties while imposing its own standards with other partners. See D. Curtin UVA lecture 2011, V Mitsilegas EU Criminal Law 2009 and C Matera The influence of IOs in the AFSJ.
53 Articles 26 and 26 a Eurojust Regulation and 14 (3) & (4) Frontex Regulation
54 Article 14 (6) Frontex Regulation
55 With the exception of Europol, all the AFSJ agencies were established in the last decade and have all (including Europol) undergone important amendments in the past years (Europol, Frontex and Eurojust)
56 Art. 26 Europol Regulation.
57 Emphasis added; Art. 14 Frontex Regulation.
à-vis the AFSJ agencies appear as manifestly insufficient: because the agencies have operational powers and can conclude agreements with third countries, the EP should be fully involved in the monitoring mechanisms.

The issue concerning the respect for rule of law and human rights standards is also linked to the different partners of the agencies, i.e. the countries with whom AFSJ bodies actually conclude agreements. The founding instruments of the agencies do not *a priori* fix the third countries with which agencies have to conclude agreements. As we have seen, only the Europol Regulation regulates the procedure that leads to the identification of ‘targeted countries’ at the political level (Council decision after proposal of Europol and in consultation with the EP). Thus, the choice of international partners will depend on a set of considerations that can be summarised as follows: i) geostrategic importance, ii) policy context, iii) existence of special relations or specific importance of a third country in relation to a specific policy. In the first category we find leading partners of the EU in AFSJ matters such as the US and Canada. Thus the three leading AFSJ agencies Europol, Eurojust and Frontex have signed agreements with the USA. The second and largest category refers to agreements signed with countries that are connected to the EU as a result of a specific policy context.

The ENP countries constitute the most important group of states falling within this category; while the importance of the ENP has been reinforced by the introduction of Article 8 TEU, the security dimension of this policy has played a central role since its inception in 2004. However, it should be noted that agreements have been successfully concluded mostly with Eastern neighbours of the Union and not with the southern neighbours of the EU. Furthermore, special attention has been naturally given to candidate countries and pre-candidate countries. Lastly, because of their participation to the Schengen area and because of their connection to the internal market Iceland Norway and Switzerland also have concluded agreements with the agencies.

At the same time, the founding instruments of AFSJ agencies expressly regulate and foresee the conclusion of agreements with international organisations.58 In this respect, however, the external action by the agencies appears less problematic since these agreements exclude the transfer of personal data and/or

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58 For example, Art. 52 of Regulation 439/2010 establishing the EASO.
operational cooperation. For instance, Frontex has concluded a number of cooperation covenants with international organisations. A first type of cooperation concluded by this Agency with an international organisation is the exchange of letters of June 2008 with the UNHCR. In this case the cooperation aims to “contributing to an efficient border management system fully compliant with the Member States’ international protection obligations” and to establish regular consultations among the two entities. Similar to the agreement with the UNHCR is the “exchange of letters” with the International Organisation for Migration of July 2008. Again, in the latter case the covenant seeks to establish regular cooperation and the exchange of information and best practises also in the preparation of operational activities, but excluding the exchange of personal data.

Possibly, the only problematic agreement with an international organisation has been the one concluded by Europol with Interpol. Indeed, this is the sole operational agreement that the Agency has concluded with an International organisation. Article 5 of the agreement holds that neither party may process information clearly obtained in obvious violation of human rights and imposes to both of them to indicate the source of the information they share with one another. Moreover, it regulates the kind of personal data that the parties can share and holds that, as a safeguard clause to be read in addition to the conditions of Article 23(2) of the Europol Decision, no personal data is to be transmitted where an adequate level of data protection is not guaranteed by the other party.

However, contrary to agreements concluded with third countries such as the US, the conditionality rule for the conclusion of operational agreements seems to work in respect of international organisations. Thus, in this (restricted) field it’s the standards of the EU on data protection that are likely to influence the international partners of the agency, and not the contrary. However, while the conditions on the exercise of its external competences as well as the conditions for the exchange of personal data are characterised by relatively transparent procedures that the other AFSJ agencies are lacking, the system envisaged for Europol nonetheless lacks mechanisms to scrutinise the operative application of these agreements; and this gap is also present in relation to the agreements signed by the other agencies. The role of the agencies for the development of the

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59 Matera C 2011
60 Curtin D 2011, Mitsilegas 2009, de Hert 2008
EU *qua* AFSJ is growing both internally and externally. At the same time, the concerns raised by the European Parliament, the Ombudsman and academics in relation to the applicability rule of law standards, accountability and transparency in the actions of the agencies have lead to a series of recasts of the founding regulations that, although not decisive, have brought some improvements. Indeed, as an instrument of the AFSJ, the governance of the Agencies fail to address all the concerns expressed by many authors in relation to the lack of transparency and in their activities.\textsuperscript{61}

\begin{footnotesize}
\textsuperscript{61} Santos Vara (2015)
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13.4 Conclusion

The purpose of this Chapter was to analyse the manner in which the EU is externalising its policies in judicial cooperation in civil and criminal matters, criminal law and operational cooperation. This Chapter has showed that in spite of the entry into force of the Lisbon Treaty, there are still a number of challenges that affect the externalisation of these polices. With the sole exception of judicial cooperation in civil matters – which confirms the AFSJ as a laboratory for new avenues in EU external relations law, all other external aspects of the policies analysed here pose numerous concerns on their compatibility with the constitutional foundations of the EU. From an institutional perspective the democratic principle and transparency are the biggest concern: whilst the EP has gained, in principle, a veto in relation to the conclusion of international agreements on the AFSJ, the the PNR and TFTP sagas reveal that the EP does not fully manage to stir the policy of the Commission and the Council, rather, the EP needs to plead in front of the CJEU to win its battles.

However, the struggle to uphold the principles of Article 2 TEU is not limited to institutional matters: on every aspect of the external AFSJ analysed here, reasonable concerns over the legitimacy of the substantive measures have been raised. Looking back at some ten years of external action in the different policy fields analysed in this Chapter, only the one on judicial cooperation in civil matters has not been the object of a dispute over human rights protection standards. Yet, in spite of some improvements obtained thanks to the involvement of the EP in the decision making process, the external dimensions of judicial and operation cooperation of the AFSJ remains at the borderline of the EU’s constitutional spectrum.
References


General Conclusions Part Six

The verses of Bob Dylan’s Highway 61 Revisited in epigraph to this Part of the manuscript leave little space to the expectations of the reader of what is to come. The purpose of this Part was provide for a strand of research in the remaining fields of the AFSJ in order to answer the main question of this project. It was already stated form the beginning of Chapter 12 and 13 that the externalisation of these policies had resulted in numerous controversial measures.

On a more formal note, the concrete examples analysed here confirm that the EU and the Member States have been asked to develop new forms of coordination such as the combination of framework agreements concluded by the EU with delegated (implementing) agreements left to Member States in the case of readmission agreements; Local Border Traffic agreements, MLA and Extradition agreements and the external dimension of judicial cooperation in civil matters are other such examples.

At the same time, the EU is increasingly prone to try alternative ways to develop its external dimension of the AFSJ: this is the case of Mobility Partnerships, and other soft law instruments in the field of asylum. In both cases, the constitutional challenge resides in the amount of scrutiny that the EP can exercise in order to make sure that the provisions of the Treaties are not bypassed. On the other hand, also the existing legislative framework upon which the AFSJ agencies operate is not satisfactory at all: the EP is not sufficiently involved in the monitoring of these bodies and, moreover, the different legislative framework does not take into account the position of individuals affects by the work of these bodies.

More generally, the level of protection, promotion and safeguard of EU human rights protection standards is still very weak. The PNR and TFTP sagas have revealed that the Council and the Commission are not capable of upholding EU standards in negotiating agreements with the USA and the the lack of transparency in relation to the activities of the agencies pose serious doubts also about the manner in which these bodies share personal data with their international counterparts. On top of the cherry, after years of habilitating clauses with ENP countries on asylum law and border management, the EU concluded a deal with Turkey outside the framework of the Treaties that, instead of
prioritizing the wellbeing of asylum seekers – as international law would require, prioritises the police unspecified concerns over excessive migration flows and law and order narratives; almost as if, with their deal with Turkey, the European Council and the Commission wanted to legitimise those governments who are building walls within the EU Schengen area. Indeed, the EU–Turkey deal on the refugee crisis shows that the constitutional foundations of the EU legal system are indeed challenged and violated by the externalisation of some AFSJ policies and that the European Council *qua* voice of the Member States is ready to bring the EU at the border line of its constitutional rules; just like the *Kadi* case first and other AFSJ-related instruments have done before. The challenges that have emerged in this chapter do not relate solely to institutional and decision making rules, but also concern individuals.

From EU external agreements in criminal law to the externalisation of the EU’s asylum policy, this Part has showed that the path to uphold human rights protection in the external activities of the AFSJ of the EU is still a long way from here. The Highway 61 of the verses in epigraph to this Part is closer than one could think.
Chapter 14

The External Dimensions of the AFSJ and the Constitutional Foundations of the EU Legal Order

The purpose of this dissertation was to answer the following research question: *To what extent is the development of the external dimension of the European Union’s Area of Freedom, Security and Justice compatible with the constitutional foundations of the EU?* The research took its cue from two distinct but connected developments: firstly, the proactive attitude of the EU institutions to develop an external dimension of the AFSJ and, secondly, a number of decisions of the CJEU that were questioning the constitutional legitimacy of such policy and its implementation.

In relation to the first element, this dissertation argued and showed that the policy programmes of the institutions calling for an externalisation of the AFSJ did not pay attention to the existing constitutional framework. As a result of this negligence, it was argued that the the policy programmes followed a ‘*Sturm und Drang*’ approach and that such approach led to a number of legal disputes. As a result of this first finding, it was argued that the decision of the CJEU in the *Kadi* case suggested – or, more bluntly, confirmed– that the institutions were not following the right, constitutional, approach in the externalisation of EU justice and home affairs matters.

More specifically, it was argued that the *Kadi* judgement confirmed the existence of core constitutional principles within the EU’s constitutional order and that the CJEU itself has labelled these core constitutional principles ‘constitutional foundations’. Furthermore, it was demonstrated that the notion of ‘constitutional foundations’ of the EU legal order could be traced back to other judgements of the CJEU and to a specific provision of the Treaties, Article 2 TEU. From a systematic perspective, it was argued, this means that whenever the institutions adopt measures, including international obligations, these must ultimately respect the constitutional foundations of the EU legal order. As the *Kadi* decision shows, the CJEU is ready to declare a measure void if such measure violates these core constitutional foundations.
Because the Kadi affaire related to external relations and to the fight against international terrorism, a topic which is linked to the AFSJ; and because the AFSJ, does touch upon ‘constitutional foundations’ such as the vertical distribution of competences, the attribution of powers to institutions and human rights protection, Part One of this dissertation argued that, in the absence of existing publications on this very topic, it was relevant to pursue a study on the compatibility of the external AFSJ with the foundations of the EU constitutional systems.

Against this backdrop, Part One of the dissertation anticipated the method through which the research question would be answered and anticipated two main findings of this research. First, the current use of the expression ‘external dimension of the AFSJ’ should be repealed and substituted with external dimensions of the AFSJ: the AFSJ qua EU policy is too diverse and pursues too many different objectives to be synthetized into one single external policy or label. Moreover, not only the AFSJ is a multidimensional field of EU action, but also the external activities have a pluralistic nature and cannot be –also in the light of the clear imbrolio of Article 40 TEU –reduced to a single dimension.

The second main finding already anticipated in Part One is both an academic argument and a normative one. In Chapter 3 it was argued that the study of EU law is being increasingly instrumentalised and, often, ‘policy concerns’ have taken over more rigorous studies on the systemic relationships between norms within the EU legal order.¹ To prove this point reference was made to a publication in which the author suggested that –for a number of reasons– policy programmes on the AFSJ should have a leading position in the interpretation of the relevant treaty provisions. Against this background, this study analysed the external dimensions of the AFSJ from a systemic perspective, looking at treaty provisions and their connections, rather than using a ‘law in context’ approach. In Part One it was argued that such an approach was preferable for this study for two main reasons: academically, because no comprehensive study of the external AFSJ had yet done so; from a normative perspective, the choice was made because, since the EU is a constitutional legal system with an internal hierarchy, then the analysis of adopted measures should firstly assess their compliance with EU primary law.

¹ See van Gestel and Micklitz 2013 and, on the importance of the systemic relationships of norms within the EU legal order Syrpis 2015
With this conceptual and methodological background in mind, it is possible to answer the main research question in the following manner:

The external projection of the EU’s AFSJ is compatible with the foundations of the EU legal order only to the extent that any particular external commitment respects the division of competences existing between the EU and the Member States, the prescribed decision-making procedures, and only to the extent that any particular external commitment respects democratic and judicial control mechanisms.

In relation to the first point, the analysis conducted here shows that the EU has found a number of solutions that respect the distribution of tasks between Member States and the EU. Against the backdrop of Articles 4(2) TEU and 72 TFEU, the EU has developed virtuous ways of acting internationally. To this end, two mechanisms were highlighted: umbrella or framework agreements on the one side, and delegated external competences from the EU to Member States on the other.

In relation to the second aspect pertaining to the democratic principle and access to justice, it can be said that whenever an international agreement or external measure based on the AFSJ directly affects the rights and liberties of individuals, EU action will necessarily have to be decided with the participation of the European Parliament and access to justice via the EU Courts need to be guaranteed. Failing to do so clearly violates Article 2 TEU.

Furthermore, in relation to the rule of law and decision making procedures, it can be said that the externalisation of the AFSJ is at the borderline of EU’s constitutional foundations. In relation to the activities of the EU agencies and in relation to the externalisation of the EU’s asylum policy, for example, the analysis of the agreements suggest that little attention is paid to institutional and substantive tenets of the rule of law.

In relation to human rights standards, this research has showed that the EU has not been able to systematically uphold in a coherent and consistent manner its human rights protection standards in the externalisation of the AFSJ. From

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2 For example, readmission agreements and mutual legal assistance agreements

3 For example, Local Border Traffic and Private International Law
All in all, this study has showed that the existing patchwork of initiatives reveals an incoherent policy design (vis-à-vis the constitutional foundations) that is often translated into agreements that are inconsistent with one-another. The first context in which the externalisation of the AFSJ was deemed incompatible with the foundations of the EU legal order was the one in which the AFSJ is integrated with the CFSP and the CSDP. In Part Four it was suggested that the current institutional setting of the CFSP and CSDP pillar does not guarantee the respect of the tenets of Article 2 TEU. Even though the CJEU has decided otherwise, the study argued that if EU initiatives directly affect the rights and liberties of individuals, these measures should be deemed incompatible with the foundations of the EU legal order because any direct affectation by the public authority of individual rights and liberties should be adopted with the involvement of bodies directly elected by the people; and because the EP does not participate in the decision making process of international agreements in the framework of the CFSP/CSDP, the mere duty to keep the EP informed of the negotiation process and on the content of an agreement is not sufficient to respect the democratic principle. In fact, it was submitted that the agreements concluded by the EU to fight maritime piracy under the CFSP/CSDP umbrella constitute a violation of the rule of law. And this is also because the CJEU lacks jurisdiction to hear actions brought by individuals outside the scope of Article 275 TFEU, meaning that also ex-post mechanisms of human rights protection are missing in such cases. Yet, this research has argued that the EU could combine in a virtuous manner action under the CFSP and under the AFSJ by adoption two complementary acts.

The analysis on the integration of the AFSJ and the CFSP also revealed two other findings. Firstly, the study showed that what is labelled as integration of the AFSJ into the CFSP/CSDP does not really relate to the AFSJ as such. Rather, we have seen that the institutional background of the AFSJ such as the organisation of the judiciary, the organisation of police forces and the development of a national counter-terrorism strategy can be the object of cooperation between the EU and third countries in the context of the CFSP on the basis of Article 21 TEU alone. In this respect it was argued that these types
of external activities should not be considered as the external AFSJ: these are capacity-building or even state-building type of measures and initiatives in which the EU shares best practices and supports reforms in order to improve the democratic legitimacy of those countries or in order to help them designing AFSJ-related policies, such as in the case of developing a counter-terrorism policy at national level. Moreover, the same reasoning should apply for those provisions inserted in Association, Development and Cooperation and Political Dialogue and Cooperation agreements analysed in Chapters 10 and 11: also in this respect, the object of those clauses is not cooperation at AFSJ level; rather, the cooperation envisaged relates to the tenets of Article 2 TEU in relation to which the AFSJ policies are but one aspect only. All in all, international agreements or clauses that promote the rule of law, access to justice and the administration of justice are ‘Rule of Law Missions’ in the sense of the analysis proposed by Laurent Pech.\(^4\) This primarily means that these activities should be anchored to the broader scope of Article 21 TEU in combination with Article 2 TEU. In any case, in relation to these clauses little can be said from the point of view of this research: these clauses cannot affect the foundations of the EU constitutional system since these clauses are not supposed to have effects in the EU or affect individuals. Yet, this does not mean that these clauses are unimportant. Quite the contrary, one could argue that the establishment of cooperation in the field of the rule of law, democracy and human rights protection with partner countries is a necessary precondition for any type of substantive cooperation in the AFSJ fields. The EU should not engage in operational cooperation with third countries that do not respect the tenets of Article 2 TEU sufficiently; this should include, from a systematic perspective, also international norms and conventions that are related to the fields of the AFSJ, for instance, the Geneva Convention of 1951 on the rights of refugees. After all, the combined reading of Article 2 and 21 TEU leave little discretion to the EU and are quite clear in setting the bar: the EU must promote the founding principles when it acts in the international pane.

However, in Part Five it emerged that some types of habilitating clauses, in recent years, have become deeper. This is the case of readmission clauses in Development Cooperation, Association and PCA agreements: in these cases, the relevant provisions contain specific obligations for the contracting parties and in

\(^4\) Pech 2012
this respect it emerged that the EU is probably failing at negotiating convincing rules aimed at protecting and upholding human rights protection standards. In this respect it was noticed, also in relation to data protection clauses, that the EU does not manage to act consistently with its different partners; moreover, it was also noticed that the different clauses are not always coherent with EU standards. Therefore, the more the EU manages to deepen AFSJ cooperation in its agreements with partner countries, the more it should pay attention to counterweight AFSJ cooperation with sufficient guarantees such as monitoring mechanisms and stronger conditionality clauses.

Part Six has showed similar findings. Also in this respect the externalisation of the AFSJ has been marked by security concerns that have dominated the types of engagements concluded by the EU. Also in this respect, agreements in the fields of readmission, asylum, criminal law and AFSJ agencies have been concluded in a context in which, the foundations the EU constitutional order were at least marginalised, if not neglected and violated. Since the entry into force of the Lisbon Treaty, the EP and the CJEU contribute to respect Article 2 TEU in the external action of the EU and the entry into force of the EU Charter of Fundamental Rights protects, at least formally, individuals from the undue influence and interference of public authorities. However, many agreements fail to include strong and serious monitoring mechanisms and, in the case of the AFSJ agencies, the lack of transparency must be condemned.

Because agreements concluded on the basis of the provisions of Title V of Part III of the TFEU have operational objectives, the EU should make sure to prevent human rights violations and make the implementation of such agreements more transparent. Indeed, because the EU concludes agreements with third countries that have human rights protection standards that differ from ours considerably, it would be good practice to consider the establishment of monitoring mechanisms and the identification of bodies or organs that could intervene in case of human rights violations. In this context, the Commission and the European Council should systematically involve the European Parliament because the participation of this institution would enhance the transparency of the Union’s activities and, as a consequence, strengthen the role of the EU as a credible and principled-oriented actor. One field in which such shift would be beneficial is the one related to the activities of the Unions’ AFSJ agencies. At the moment the
international agenda of this bodies as well as the monitoring of their international, operational activities are not sufficiently transparent.

Taking a step back and turning to a broader perspective, a number of interesting issues pertaining to the exercise of the EU’s external competences in the AFSJ have emerged. Chapters 5 and 6 have argued that, because of the predominantly internal scope of the different AFSJ provisions, and because Member States retain a great executive and operational role in the fields of the AFSJ, the doctrines developed to define the scope of EU external powers were not automatically transposable for the external AFSJ. Part Six of this study has revealed that to overcome the peculiar division of tasks existing between the Member States and the EU, the externalisation of Justice and Home Affairs has developed some new, interesting tools. Indeed, the mechanisms established in the fields of readmission, mutual legal assistance and local border traffic reveal that the AFSJ is a laboratory for a new type of EU external relations in which the EU defines the main traits of a certain external action and delegates to the Member States the conclusion of implementing agreements. At the same time, the external action of the EU has also revealed some shortcomings. This is the case of the different instruments developed in relation to asylum and mobility whereby the choice of soft law may threaten the unity of the EU legal system and the promotion of its constitutional values. The problems related to international cooperation in the field of criminal law with data transfers and the works of the agencies were well known before this research.

As a final way to conclude this research, it is worth to propose four new avenues of research that could build on these findings. Firstly, the findings of this study suggest that greater attention should be given to monitoring mechanisms. More precisely, it would be interesting to study the different ways in which at EU and national level democratic assemblies such as the EP and national parliaments can control the implementation of the different dimensions of the external AFSJ. Secondly, and related to this, because of the way in which the external dimensions of the AFSJ has been developed, further research should be done on the implementing agreements concluded by Member States. Thirdly, further research should investigate the extent to which the EU External Action Service could enhance the coherence of the various dimensions of the external AFSJ. Lastly, the concept of constitutional foundations and its influence in the interpretation and application of norms is something that should be addressed by
more scholars. After all, most national constitutional systems know norms and principles that have a special, hierarchically superior, position. Because the EU Treaties are a framework that contains material rules, administrative rules as well as institutional provisions, the study of EU law in general could benefit from studies on the relationship between primary law provisions.
References


Annexes

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LIST OF AGREEMENTS DIVIDED PER TOPIC CONCLUDED BY THE EU IN THE FIELDS OF THE AFSJ OR RELATED TO THE AFSJ

AGENCIES
(Not published in the Official Journal of the EU)

**Eurojust**
- MoU between Eurojust and CEPOL
- Agreement between Eurojust and the Republic of Croatia
- MoU between Eurojust and the European Commission
- MoU between Eurojust and the European Judicial Training Network
- Agreement between Eurojust and Europol (2009)
- MoU between Eurojust and Frontex
- MoU between Eurojust and the Iberoamerican Network of International Legal Cooperation
- Agreement Eurojust and Iceland
- MoU between Eurojust and Interpol
- Agreement on co-operation between Eurojust and the Principality of Liechtenstein
- MoU between Eurojust and the Former Yugoslav Republic of Macedonia
- Cooperation Agreement Eurojust and Moldova
- Agreement Eurojust and Norway
- Practical Agreement on arrangements of cooperation between Eurojust and OLAF
- Agreement between Eurojust and Switzerland
- MoU between Eurojust and the United Nations Office on Drugs and Crime
- Agreement Eurojust and USA

**Europol**
• Strategic Agreement between the Republic of Albania and Europol
• Agreement on Operational and Strategic Cooperation between Australia and Europol
• Strategic Cooperation Agreement between Bosnia and Hercegovina and Europol
• Cooperation Agreement (operational and strategic) between the Government of Canada and Europol
• Strategic Agreement between CEPOL and Europol
• Agreement on Cooperation between the Government of the Republic of Colombia and Europol
• Agreement on Operational and Strategic Cooperation between the Government of the Republic of Colombia and Europol
• Agreement on Strategic Cooperation between the European Centre for Disease Prevention and Control and Europol
• Administrative (Strategic) Co-operation Agreement between the European Commission and Europol
• Co-operation Agreement between the European Monitoring Centre for Drugs and Drug Addiction and Europol
• Strategic and Operational Agreement between the Former Yugoslavic Republic of Macedonia and Europol
• Operational and Strategic Agreement between the Republic of Iceland and Europol
• Operational and Strategic Agreement between Interpol and Europol
• Agreement on Operational and Strategic Co-operation between the Principality of Liechtenstein and the European Police Office
• Strategic Cooperation Agreement between the Republic of Moldova and Europol
• Agreement on Operational and Strategic Co-operation between the Principality of Monaco and Europol
• Agreement on Strategic Cooperation between Montenegro and Europol
• Operational and Strategic Agreement between the Kingdom of Norway and Europol
• Agreement on Strategic Co-operation between the Office for Harmonisation in the Internal Market and Europol
• Administrative Arrangement between the European Anti-Fraud Office (OLAF) and Europol
• Strategic Agreement on Cooperation between Europol and the Russia Federation
• Agreement on Strategic Cooperation between the Republic of Serbia and Europol
• Operational and Strategic Agreement between the Swiss Confederation and Europol
• Strategic Agreement on Cooperation between Europol and the Republic of Turkey
• Strategic Agreement between Europol and Ukraine
• Strategic Cooperation Agreement between the United Nations Office on Drugs and Crime and Europol
• Operational and Strategic Agreement between the USA and Europol
• Supplemental Agreement between Europol and the USA on the exchange of personal data and related information
• Strategic Cooperation Agreement between World Custom Organization and Europol

**Frontex**

• WA establishing operational cooperation between Frontex and the Ministry of Interior of the Republic of Albania
• WA establishing operational cooperation between Frontex and the National Security Council of the Republic of Armenia
• WA establishing operational cooperation between Frontex and the State Border Service of the Republic of Azerbaijan
• WA establishing operational cooperation between Frontex and the State Border Committee of the Republic of Belarus
• WA establishing operational cooperation between Frontex and the Ministry of Security of Bosnia and Herzegovina
• WA establishing Operational Cooperation between Frontex and the Polícia Nacional de Cabo Verde
• WA establishing Cooperation between Frontex and the Canada Border Services Agency
• WA establishing Cooperation arrangement between Frontex and CEPOL
• WA between Frontex and the Coordination Service of the Commonwealth of Independent States Border Commandants' Council
• Cooperation Arrangement between Frontex and the European Union Agency for Fundamental Rights
• WA (in the form of an exchange of letters) between Frontex and Geneva Centre for Democratic Control of Armed Forces (DCAF)
• WA establishing operational cooperation between Frontex and the Ministry of Internal Affairs of Georgia
• Exchange of Letters between Frontex and the International Centre for Migration Policy Development
• Exchange of Letters between the International Organization for Migration and Frontex
• WA between Frontex and Interpol
• WA establishing operational cooperation between Frontex and the Ministry of Internal Affairs of the former Yugoslav Republic of Macedonia
• Framework Training Agreement between Frontex and the University of Malta
• WA (in the form of an exchange of letters) between Frontex and Migration, Asylum, Refugees, Regional Initiative (MARRI) Regional Centre
• WA establishing operational cooperation between Frontex and the Border Guard Service of the Republic of Moldova
• WA establishing operational cooperation between Frontex and the Police Directorate of Montenegro
• WA establishing operational cooperation between Frontex and Nigeria
• Exchange of Letters between the Office of the United Nations High Commissioner for Refugees and Frontex
• WA between United Nations Office on Drugs and Crime (UNODC) and Frontex
• Text of the Terms of Reference on the Establishment of Operational Cooperation between Frontex and the Border Guard Service of the Federal Security Service of the Russian Federation
• Arrangement between the European Community, of the one part, and the Swiss Confederation and the Principality of Liechtenstein, of the other part, on the modalities of the participation by those States in the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
  Official Journal L 243 of 16.9.2010
• WA establishing operational cooperation between Frontex and the Ministry of Interior of Republic of Serbia
• MoU on establishing cooperation between Frontex and the Ministry of Foreign Affairs of the Republic of Turkey
• WA establishing operational cooperation between Frontex and the Administration of the State Border Guard Service of Ukraine
• WA establishing operational cooperation between Frontex and the United States Department of Homeland Security

**EASO**

• Working Arrangement between EASO and the European Agency for Fundamental Rights
• Working Arrangement between EASO and the Principality of Liechtenstein
• Working Arrangement between EASO and the Kingdom of Norway
• Working Arrangement between EASO and the Office of the United Nations High Commissioner for Refugees

**LOCAL BORDER TRAFFIC AGREEMENTS**

• Agreement between the Government of Ukraine and the Government of the Hungarian Republic on the rules of the local border traffic
• Agreement between the Government of Ukraine and the Government of the Republic of Poland on the rules of the Local Border Traffic
• Agreement between the Government of Ukraine and the Government of the Slovak Republic on the local border traffic
• Agreement between the Government of the Republic of Moldova and the Government of Romania on local border traffic
• Agreement between the Government of Slovenia and the Government of Croatia on local border traffic
• Agreement between the Government of the Republic of Poland and the Government of the Republic of Belarus on local border traffic
• Agreement between the Government of the Republic of Belarus and the Government of Latvian Republic on procedure of reciprocal trips of residents of local border areas of the Republic of Belarus and Latvian Republic
• Agreement between the Government of the Republic of Belarus and the Government of Lithuanian Republic on procedure of reciprocal trips of residents of local border areas of the Republic of Belarus and Lithuanian Republic
• AGREEMENT between the Government of the Kingdom of Norway and the Government of the Russian Federation on Facilitation of Mutual Travel for Border Residents of the Kingdom of Norway and the Russian Federation

**ASYLUM**

• Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway - Declarations OJ L93, 03/04/2001, p. 40
• Protocol to the Agreement between the European Community, the Republic of Iceland and the Kingdom of Norway, concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway OJ L57, 28/02/2006, p. 16
• Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland
OJ L 53, 27/02/2008, p. 5

• Protocol between the European Community, The Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and the mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland
OJ L 161/8 24.6.2009 p. 8

• Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland
OJ L 160, 18.6.2011, p. 39

Agreements on the sharing of classified information and exchange of (personal) data

• Agreement between Australia and the European Union on the security of classified information
OJ L 26, 30/01/2010, p. 31

• Agreement between Bosnia and Herzegovina and the European Union on security procedures for the exchange of classified information
OJ L324, 27/10/2004, p. 16

• Agreement between the European Commission and the European GNSS Supervisory Authority on the security and exchange of classified information

• Agreement between the European Union and the Republic of Iceland on security procedures for the exchange of classified information
OJ L184, 06/07/2006, p. 35

• Agreement on security procedures for exchanging classified information between the European Union and Israel
OJ L192, 24/07/2009, p. 64

• Agreement between the Organisation for Joint Armament Cooperation and the European Union on the protection of classified information
OJ L 229, 24/08/2012, p. 2

• Agreement between the European Union and the Principality of Liechtenstein on security procedures for exchanging classified information
OJ L 187, 21/07/2010, p. 2

• Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information
OJ L 094, 13/04/2005 P. 0039 - 0044

• Agreement between the European Union and Montenegro on security procedures for exchanging and protecting classified information
OJ L 260, 02/10/2010, p. 2

• Agreement between the European Union and the Kingdom of Norway on the safety procedures for the exchange of classified information
OJ L362, 09/12/2004, p. 29
• Agreement between the Government of the Russian Federation and the European Union on the protection of classified information
  OJ L155, 22/06/2010, p. 57

• Agreement between the Swiss Confederation and the European Union on the security procedures for the exchange of classified information
  OJ L 181, 10/07/2008, p. 58

• Agreement between Ukraine and the European Union on the security procedures for the exchange of classified information
  OJ L172, 05/07/2005, p. 84

• Agreement between the European Union and the government of the United States of America on the security of classified information
  OJ L115, 03/05/2007, p. 30

• Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service
  OJ L 186, 14/07/2012, p. 4

• Agreement between the European Union and the Confederation’s Swiss government represented by the federal department of the Foreign Affairs concerning the participation of Switzerland in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (Baha)

• Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data
  OJ L82, 21/03/2006, p. 15

• Agreement between the European Community and the Government of the People’s Republic of China on drug precursors and substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances
  OJ L56, 28/02/2009, p. 8

• Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe

• Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part
  OJ L272, 16/10/2009, p. 2

• Agreement between Ukraine and the European Union on the security procedures for the exchange of classified information
  OJ L172, 05/07/2005, p. 84

• 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

• Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection
  OJ L183, 20/05/2004, p. 84

• Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security
  OJ L 215, 11/08/2012, p. 5
Implementing arrangement between the European Commission and the Government of the United States of America for cooperative activities in the field of homeland/civil security research
OJ L 125, 21/05/2010, p. 54

Agreement between the European Union and the government of the United States of America on the security of classified information
OJ L115, 03/05/2007, p. 30

EUROPEAN NEIGHBOURHOOD POLICY

• 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 L 265, 10.10.2005, p. 1

• EURO-MEDITERRANEAN AGREEMENT establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part
OJ L304, 30/09/2004, p. 39

• EU-Georgia Association Agreement

• Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part and the State of Israel, of the other part
OJ L 147, 21.6.2000, p. 1

• Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part
OJ L 129, 15.5.2002, p. 3

• EURO-MEDITERRANEAN AGREEMENT establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part
OJ L 143, 30.5.2006, p. 1

• EUROPEAN NEIGHBOURHOOD POLICY EU-Lebanon Action Plan

• EU/Moldova Association Agreement

• Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part
OJ L 70, 18.3.2000, p. 2

• Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part
OJ L 97, 30.3.1998, p. 1

• EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement

• EU-Ukraine Association Agreement

EXTRADITION

• Agreement on extradition between the European Union and the United States of America
OJ L 181, 19/07/2003, p. 27
MUTUAL LEGAL ASSISTANCE

  OJ L 26, 29/01/2004, p. 3
- Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway – Declarations
  OJ L 292, 21/10/2006, p. 2
- Agreement between the European Union and Japan on mutual legal assistance in criminal matters
  OJ L 39, 12/02/2010, p. 20
- Agreement on mutual legal assistance between the European Union and the United States of America
  OJ L 181, 19/07/2003, p. 34

MOBILITY PARTNERSHIPS

- Joint Declaration on a Mobility Partnership between the European Union and Armenia
- Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde
- Joint Declaration on a Mobility Partnerships between the European Union and Azerbaijan
- Joint Declaration on a Mobility Partnership between the European Union and Georgia
- Joint Declaration on a Mobility Partnerships between the European Union and the Republic of Moldova
- Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States
- Déclaration conjointe pour le Partenariat de Mobilité entre la Tunisie, l'Union Européenne et ses Etats membres participants

PIRACY

- Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta)
  OJ L 202, 04/08/2009, p. 83
- Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer
  OJ L 79, 25/03/2009, p. 49
- 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 L 254, 30/09/2011, p. 3
- Agreement between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the
deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta)
OJ L 88, 08/04/2010, p. 3

• Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer
OJ L315, 02/12/2009, p. 37

PASSenger Name RECORDS

• Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service
OJ L 186, 14/07/2012, p. 4

• Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data
OJ L82, 21/03/2006, p. 15

• Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security
OJ L 215, 11/08/2012, p. 5

• Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection
OJ L 298, 27/10/2006, p. 29

READMISSION

• Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation
OJ L 124, 17/05/2005, p. 22

• 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 L 107, 28/04/2009, p. 166

• Agreement between the European Union and the Republic of Armenia on the readmission of persons residing without authorisation
OJ L 289, 31 October 2013 p.2

• Agreement between the European Union and the Republic of Azerbaijan on the readmission of persons residing without authorisation
OJ L 128, 30.4.2014, p. 17

• Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation - Joint Declarations
OJ L334, 19/12/2007, p. 97

• AGREEMENT between the European Union and the Republic of Cape Verde on the readmission of persons residing without authorisation
OJ L 37 (08/02/2013) p.1

• Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part - Final act
OJ L352, 30/12/2002, p. 3
• Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China, on visa and related issues concerning tourist groups from the People's Republic of China (ADS)  
OJ L83, 20/03/2004, p. 14

• Agreement between the European Union and Georgia on the readmission of persons residing without authorisation  
OJ L 52, 25.2.2011, p. 47

• Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorization  
OJ L 17, 24/01/2004, p. 25

• Council Decision of 14 April 2014 on the conclusion of the 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, as regards matters related to readmission  
OJ L 125, 26.4.2014, p. 46

• Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation  
OJ L143, 30/04/2004, p. 99

• Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation  

• Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part - Protocol 1 on textile and clothing products - Protocol 2 on steel products - Protocol 3 on trade between the former Yugoslav Republic of Macedonia and the Community in processed agricultural products - Protocol 4 concerning the definition of the concept of "originating products" and methods of administrative cooperation - Protocol 5 on mutual administrative assistance in customs matters - Final Act  
OJ L84, 20/03/2004, p. 13

• Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other part  
OJ L181, 24/06/1998, p. 3

• Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation – Declarations  
OJ L 334, 19/12/2007, p. 149

• Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorisation - Joint Declarations  
OJ L 334, 19/12/2007, p. 26

• Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part  
OJ L 108, 29/04/2010, p. 3

• Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part - Protocol 1 on the arrangements applying to imports into the Community of agricultural products originating in Morocco - Protocol 2 on the arrangements applying to imports into the
Community of fishery products originating in Morocco - Protocol 3 on the arrangements applying to imports into Morocco of agricultural products originating in the Community - Protocol 4 concerning the definition of originating products and methods of administrative cooperation - Protocol 5 on mutual assistance in customs matters between the administrative authorities - Final Act - Joint Declarations - Agreements in the form of an Exchange of Letters - Declaration by the Community - Declarations by Morocco

OJ L70, 18/03/2000, p. 2

• Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation

OJ L287, 04/11/2010, p. 52

• Agreement between the European Community and the Russian Federation on readmission

OJ L129, 17/05/2007, p. 40

• Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part - Protocol 1 on the establishment of a coal and steel contact group - Protocol 2 on mutual administrative assistance for the correct application of customs legislation - Final Act - Exchanges of letters - Minutes of signing

OJ L327, 28/11/1997, p. 3

• Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation

OJ L 334, 19/12/2007, p. 46

• Stabilisation and Association Agreement between the EU and Serbia

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• Partnership agreement between The members of the African, Caribbean and pacific group of States of the one part, and the European community and its Member states of the other part

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• 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

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• 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 - Annexes - Protocols - Final Act – Declarations

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• Political dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community
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• Stabilisation and Association Agreement (SAA) between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part
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• Agreement establishing an association between the European Community and its
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• Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama
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• Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part
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• Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part
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• EU-Georgia Association Agreement
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• Agreement between the United State of America and the European Union on the
  processing and transfer of financial messaging data from the EU to the USA for
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• Agreement between the European Community and the Republic of Albania on
  the facilitation of the issuance of visas – Declarations
  OJ L 334, 19 December 2007 p.85
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  and their Member States, of the one part, and the Republic of Albania, of the
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  OJ L 107, 28/04/2009, p. 166
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  Guatemala, Holy See, Honduras, Israel, Japan, Malaysia, Mexico, Monaco, New
  Zealand, Nicaragua, Panama, Paraguay, Salvador, San Marino, Singapore, South
  Korea, United States of America, Uruguay, Venezuela
  OJ L 81, 21.3.2001, p. 1
• Agreement between the European Union and the Republic of Azerbaijan on the
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  OJ L 128, 30 April 2014 p.17
• Agreement between the European Community and Antigua and Barbuda on the
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  OJ L169, 30/06/2009, p. 3
• Agreement between the European Union and the Republic of Armenia on the
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• Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China, on visa and related issues concerning tourist groups from the People's Republic of China (ADS)
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• REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement: Colombia, Dominica, Grenada,, Kiribati, Marshall Islands, Micronesia, Nauru, Palau, Peru, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Solomon Islands, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu, the United Arab Emirates and Vanuatu. Will only come into force once Bilateral Agreements on visa waivers come into force.
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• Agreement between the European Union and Georgia on the facilitation of the issuance of visas
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• Common Consular Instructions on visas for the diplomatic missions and consular posts, in relation to visa requirements for holders of Indonesian diplomatic and service passports
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OJ L 143, 30.5.2006, p. 2
• Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part - Protocol 1 on textile and clothing products - Protocol 2 on steel products - Protocol 3 on trade between the former Yugoslav Republic of Macedonia and the Community in processed agricultural products - Protocol 4 concerning the definition of the concept of "originating products" and methods of administrative cooperation - Protocol 5 on mutual administrative assistance in customs matters - Final Act
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