

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

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### 1. INTRODUCTION

#### 1.1 The specific nature of the area of freedom, security and justice

As an international actor the European Union is engaged in a number of legal relations with non-Member States and other international organisations, but the specific domains of the area of freedom security and justice (hereinafter AFSJ) cause the EU to act beyond the classic areas of international cooperation ('external action') such as trade and development cooperation and foreign security and defence policy. The new projection of the Union as an actor in the fields of the AFSJ, therefore, have raised a series of questions which have been long left unanswered<sup>1</sup> and which – because of the entry into force of the Lisbon Treaty in December 2009 – finally require a sound assessment. Thus, rather than dealing with more classical questions, such as the division of competences between the Union and its Member States, this emerging field of EU action raises questions that are more directly related to the constitutional dimension of the Union, such as 'the balance between protection of human rights

<sup>1</sup> Only a limited number of recent publications explicitly address the external legal relations in the AFSJ domain. See, inter alia, B. Martenczuk and S. van Thiel (eds.), *Justice, Liberty, Security: New Challenges for EU External Relations* (VUBPress/Brussels University Press, 2008); M. Cremona, 'EU External Action in the JHA Domain: A Legal Perspective', EUI Working Papers, LAW No. 2008/24; J. Monar, 'The EU as an International Actor in the Domain of Justice and Home Affairs' 9(3) *European Foreign Affairs Review* (2004) 395–415; G. de Kerchove and A. Weyembergh (eds.), *Sécurité et justice: enjeux de la politique extérieure de l'Union européenne* (Editions de l'Université de Bruxelles, 2003).

and civil liberties on the one hand and the States' interest in public order, security and migration control on the other'.<sup>2</sup>

The AFSJ was introduced as a policy field by the Treaty of Amsterdam in 1999. It replaced the earlier reference to 'justice and home affairs' (JHA) introduced by the Maastricht Treaty. Following the entry into force of the Lisbon Treaty, the AFSJ concept appears as the second Treaty objective in Article 3 TEU. According to this provision 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'.<sup>3</sup> In the light of the existing *acquis*<sup>4</sup> in this field and of the wording of Article 67 TFEU,<sup>5</sup> the AFSJ encompasses the following EU policies: immigration, judicial cooperation in civil and criminal matters, approximation of criminal law, police cooperation and fundamental rights protection.<sup>6</sup> The AFSJ domain thus covers fields 'at the heart of State sovereignty'<sup>7</sup> and, as has been observed, 'unlike many major domains in European law, whether core domains such as the internal market, competition, agriculture or fisheries, or flanking domains such as employment or social policy, the subject matters assembled under AFSJ do not form a "natural" unity in terms of

<sup>2</sup> S. Peers, *EU Justice and Home Affairs Law* (2nd edn, Oxford University Press, 2006) 1.

<sup>3</sup> OJ EU C115, 9/05/2008, 17.

<sup>4</sup> For reference, see the JAI *acquis* Document of the Commission published on the website of the relevant DGs: [http://ec.europa.eu/justice\\_home/doc\\_centre/intro/docs/jha\\_acquis\\_1008\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/intro/docs/jha_acquis_1008_en.pdf)

<sup>5</sup> 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 extra-judicial decisions in civil matters.'

<sup>6</sup> Despite the fact that a policy linked with citizenship falls within the competences of Directorate-General Justice, Freedom and Security (DG JFS), EU citizenship as such does not form part of the AFSJ. Rather, citizenship is a transversal matter that must be taken into account by all policies and that is only administered by DG JLS.

<sup>7</sup> F. Jacobs, *Foreword*, in Peers, *EU Justice and Home Affairs Law*, p. vii

a clearly defined overall project.<sup>8</sup> Indeed, the AFSJ appears to be a new legal concept, or legal construction, tailored to the specific nature of the subject area. The policies are highly sensitive and may have national constitutional implications. Yet, the AFSJ is not an intergovernmental area of cooperation, but one in which the Member States clearly allow the Union as such to play a normative role.

The Lisbon Treaty suggests that the Union will have to develop a comprehensive policy in order to offer more justice, freedom and security to its citizens. In that sense the AFSJ is much broader than the JHA cooperation which was introduced by the Maastricht Treaty. The AFSJ concept has been introduced to reflect the idea that the maintenance of public order, of internal peace and security, is shared between the Member States and the EU.<sup>9</sup> At the same time, the ambiguity of the AFSJ is reflected in the fact that, irrespective of the new competences of the EU in this area, they 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security' (Article 72 TFEU).

It is, however, questionable whether Member States' responsibilities will not be affected at all. As noted by Walker, the AFSJ does not form 'a "natural" unity in terms of a clearly defined overall project'. At first sight, the AFSJ as such rather appears as a mere constitutional *fictio iuris* that serves two organisational purposes: first, it provides a framework for a plurality of specific policies and, second, it indicates that the different policies do not form a common policy in the sense of other EU policies such as the CCP or the CAP.<sup>10</sup>

However, reality appears to be even more nuanced than this, and the introduction of a particular concept to incorporate different policies falling within one major treaty objective was not new in the European integration process. Contrary to what could be argued, the internal market concept itself with its four freedoms represents a policy goal with little legal significance outside the EU context. Just like the AFSJ, the concept of the internal market is a notion composed of a plurality of policies

<sup>8</sup> N. Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey', in N. Walker (ed.), *Europe's Area of Freedom Security and Justice* (Academy of European Law/European University Institute, 2004) 5.

<sup>9</sup> The recent separation into two portfolios of DG JFS reflects, albeit imperfectly, the separation usually present at national level – with the exception of the Netherlands – between home affairs (immigration and police) and justice (civil and criminal procedure law).

<sup>10</sup> J. Monar, 'The Area of Freedom, Security and Justice', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart/C. H. Beck/Nomos, 2010), 551–85, at 556.

touching on many legal sectors such as civil law, administrative law, commercial law and company law. In this respect it must be recalled that the European integration process is not characterised by a harmonisation of sectors of law (such as civil law or administrative law) at the EU level. In the framework of the AFSJ Member States have been willing to transfer part of domestic policies in areas such as immigration, administration of justice and policing to the EU institutions. And as in the internal market these competences have been transferred inasmuch as they relate to trans-border issues.

In this regard, it should be noted that the broad and ambiguous objective enshrined in Article 3 (2) TEU mentioned above must first be read in the light of Article 67 TFEU and subsequently also in the light of the different specific provisions. Irrespective of the widely defined objectives in Article 3(2) TEU (inter alia related to the maintenance of public order and public security), the Union's competences are limited by the specific provisions. In fact, the mandate of the EU to offer its citizens an area of freedom, security and justice, in which public order is guaranteed has three characteristics. Firstly, it is limited to certain specific aspects of public order building, i.e. the ones identified by Article 67 TFEU.<sup>11</sup> Secondly, it relates to trans-border issues only. There may be no doubt that this includes immigration policy issues related to the free movement of persons, but it becomes a defining element in relation to criminal justice matters, judicial cooperation in civil law and police cooperation; and the reference to the free movement of persons codified in Article 3(2) TEU clearly represents the casual nexus, the spill-over effect between the four freedoms of the internal market and the development of the AFSJ. Finally, the mandate does not cover enforcement.<sup>12</sup> Ever since the adoption of the Maastricht Treaty, this limitation to the mandate of the EU

<sup>11</sup> Thus, only immigration judicial cooperation in civil and criminal matters and police cooperation fall within the Union's competence. This means that the Union is asked to coordinate immigration policy and border control, coordinate cooperation among judicial offices within the Union and coordinate cooperation among the police forces of the Member States. It does not fall within the EU competences to frame a policy on the law of criminal procedure or criminal law in general; neither does it fall within the Union competences to address issues such as distribution of competences between civil law courts or administrative law courts in the adjudication of migration law issues.

<sup>12</sup> Article 72 TFEU: 'This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.' This provision could, however, be affected by the introduction of the European Public prosecutor in relation to crimes affecting the financial interests of the Union: see Article 86 TFEU.

has been a constant feature in the domains at stake here.<sup>13</sup> This clause obviously intends to avoid any ambiguity in respect of the possibility of establishing a European police force or something similar. The Member States maintain the monopoly in the area of law enforcement, but allow the EU to approximate and link the different systems in order to enhance cooperation and avoid loopholes that could jeopardise the security of the European territory, a territory without internal borders.

## 1.2 The relation between the internal and external dimension of the AFSJ

This understanding of the AFSJ permits as to take a final, more general step that will guide our analysis of its external dimension. Notwithstanding the formal difficulties to canalise and unify a field of EU action that maintains a high degree of fragmentation,<sup>14</sup> an analysis of the AFSJ cannot ignore the reactive nature of public order as a policy. Contrary to areas such as the common agricultural policy, the internal market and the common currency, the AFSJ introduced an objective that did not need to be established from scratch. Indeed, the AFSJ was a first in one sense. It led to the introduction of an objective that calls for the preservation of something familiar, namely public order, internal peace and security. The predominant reactive nature of the policies of the AFSJ is probably best reflected in the very wording of the treaty when it calls on the Union's institutions to build measures to combat crime and build a common policy on asylum and immigration. In both cases the EU is called upon to react to societal phenomena which relate to public order and security. However, 'the reactive, security-centred approach may have an in-built tendency to marginalize familiar constitutional constraints, such as the proper balancing of fundamental values, the primacy of democratic decision, due process in individual cases, and a robust system of separation and diversification of powers and of institutional checks and balances.'<sup>15</sup> And indeed one of the

<sup>13</sup> Article 33 TEU pre-Lisbon and Article 64 TEC.

<sup>14</sup> Fragmentation in the AFSJ means, above all, three things. Firstly, fragmentation in the AFSJ reflected and still reflects the fact that this EU concept contains a number of distinct policies. Secondly, fragmentation on the basis of the pillar structure between the Amsterdam and Lisbon treaties. Thirdly, fragmentation as variable geometry, for not all Member States participate in all the fields falling within the AFSJ. See B. Martenczuk, 'Variable Geometry and the External Relations of the EU: The Experience of Justice and Home Affairs', in Martenczuk and van Thiel, *Justice, Liberty, Security*, 493–523.

<sup>15</sup> Walker, 'In Search of the Area of Freedom, Security and Justice', 13.

main criticisms of the developments concerning the AFSJ over the past years has been that it has disregarded fundamental rights concerns.

The tension arising from the demand to strengthen the internal security of the EU territory has notably been influenced by the emergence of external threats. Thus, the objective of the EU to offer to its citizens an AFSJ has been challenged by phenomena such as illegal immigration, international terrorism and organised crime. In reaction to these externalities, the EU and the Member States agreed that the development and the establishment of the EU as an AFSJ could not be achieved without allowing the EU to become a global actor that could respond to an uncontrolled flow of migrants and to the threats posed by terrorism and crime. In this perspective, the EU has engaged in concluding agreements falling squarely within the scope of one or more of the policies of the AFSJ, or by concluding agreements with AFSJ clauses, but falling within other external policies such as the common commercial policy, the development policy and the neighbouring policy.<sup>16</sup> Often, the external dimension of the AFSJ is also linked to the Union's common foreign and security policy (CFSP), as is the case of the fight against international terrorism.<sup>17</sup> Moreover, the existing agencies of the EU in the domains of the AFSJ – Europol, Eurojust and Frontex (see below) – also conclude agreements with third countries.

It appears from the foregoing that the Union's reaction to security threats is multidimensional in four different ways: (1) in respect of the policies concerned; (2) because of the concurrent competence of the EU and its Member States; (3) in respect of the institutions involved within the EU; and (4) because of the concurrent activism of other international institutions, such as the UN, or because of the prior existence of other international obligations stemming from international conventions.

As a result, the external dimension of the AFSJ lacks legal certainty and its constitutional legitimation and boundaries are unclear. Thus, if the external dimension of the AFSJ reveals that the EU Member States are increasingly willing to hand over competences to the EU in this sensitive area, this external dimension immediately changes the AFSJ cooperation from a cooperation between Member States to a cooperation which includes other states and international organisations. This, presumably, challenges the capacity of the EU to maintain in its external relations

<sup>16</sup> Cremona, 'EU External Action in the JHA Domain', 7.

<sup>17</sup> See also C. Eckes, 'The Legal Framework of the European Union's Counter-Terrorist Policies: Full of Good Intentions?', ch. 5 in this volume.

the constitutional and rule of law standards that have been agreed upon within the EU. Moreover, these constitutional concerns do not relate solely to the relation between EU competences and Member States competences, but also to the impact that these agreements may have on the life of individuals and on the relations between the international community and the EU.

The purpose of this chapter is not to give an extensive overview of the substantive dimension of the AFSJ external relations law. Rather, it seeks to highlight the institutional framework as well as the competences of the Union and its Member States as they have been developed and currently exist. After an excursus that looks at the historical development of external action as a policy (Section 2), our analysis will focus on the existing external competences and the institutional innovations introduced in the legal governance of the external dimension of the AFSJ by the Lisbon Treaty (Section 3).

## 2. THE EMERGENCE OF THE EXTERNAL DIMENSION OF THE AFSJ

This section will provide an overview of some milestones in the emergence and further development of the external dimension of the AFSJ. It will follow a temporal approach, highlighting only the significant moments in the development or the (re-)orientation of the external dimension of the AFSJ. Thus, it will avoid focusing on developments which are mainly significant for a single policy within the broad realm of AFSJ, such as the policies related to migration, which have developed through EU's external relations according to a specific pattern.<sup>18</sup> Another subject that will not be addressed here concerns the external relations of the former European Community (on crime and policing) when the policies in question were not part of the AFSJ, i.e. before the Treaty of Amsterdam.

In the period from the entry into force of the Amsterdam Treaty to the adoption of the Lisbon Treaty, the agenda of the AFSJ was characterised by programmatic documents. These programmes always had a specific feature, allowing for AFSJ objectives to be attained by making full use of the different external competences of the Union. Thus, parallel to the international agreements concluded in the field of the AFSJ under

<sup>18</sup> T. Balzacq, 'The External Dimension of EU Justice and Home Affairs: Tools, Processes, Outcomes', CEPS Working Document No. 303 (2008), accessible at [www.ceps.eu](http://www.ceps.eu).

a specific AFSJ legal basis, the EU developed a different strategy with a view to negotiating AFSJ objectives under a non-AFSJ legal umbrella. The external dimension of the AFSJ was never meant to be an independent external policy with specific objectives; rather, as has been pointed out,<sup>19</sup> it emerged either as a tool for the attainment of the overall AFSJ objectives, or as a dimension of other external competences of the EU.

The awareness among Member States of the existence of certain externalities that could jeopardise their integration into an AFSJ, albeit to some extent present in the Tampere conclusions,<sup>20</sup> only truly emerged in the aftermath of the terrorist attack of 9/11, notably in the Hague Programme on the AFSJ and the subsequent strategy on the external dimension of the AFSJ published in 2005.<sup>21</sup> The latter states that the EU 'should make JHA a central priority in its external relations and ensure a co-ordinated and coherent approach. The development of the area of freedom, security and justice can only be successful if it is underpinned by a partnership with third countries'.<sup>22</sup> This is a position recently reiterated in the programme on the AFSJ adopted under the Swedish presidency in 2009 in which it is stated that '[t]he external dimension is crucial to the successful implementation of the objectives of this programme.'<sup>23</sup>

## 2.1 The development of the external dimension of the AFSJ: the Tampere mandate

The external dimension of the AFSJ 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

<sup>19</sup> Cremona, 'EU External Action in the JHA Domain'.

<sup>20</sup> 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 of the AFSJ can be found in other sections of the conclusions, for instance the section on migration. The conclusions can be found at [www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm) (last accessed 15 March 2010).

<sup>21</sup> COM(2005) 491 final [http://ec.europa.eu/justice\\_home/news/intro/doc/com\\_2005\\_491\\_en.pdf](http://ec.europa.eu/justice_home/news/intro/doc/com_2005_491_en.pdf).

<sup>22</sup> <http://register.consilium.europa.eu/pdf/en/05/st14/st14366-re03.en05.pdf>.

<sup>23</sup> Stockholm Programme on the AFSJ, p. 73.

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 fresh strategic and programmatic plan for the external AFSJ, which was presented to and endorsed by the Council in December 2005.

The European Council of Tampere<sup>24</sup> devoted comprehensive attention to the policies of the AFSJ, and for the first time the external dimension of the AFSJ received the attention of the highest political forum of the EU. The European Council made a first significant, 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 the AFSJ.<sup>25</sup> Although the European Council refers to ‘policy objectives’, in the first preparatory documents the external dimension of the AFSJ is not labelled as an independent *policy*, but as an *action* complementing the establishment of the AFSJ.<sup>26</sup>

Just before the Santa Maria da Feira European Council of June 2000,<sup>27</sup> the European Council approved a strategic document<sup>28</sup> adopted by the Council in close cooperation with the Commission upon a proposal by Coreper, and in line with the Tampere mandate, 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 for the definition of external action in the domain of JHA.<sup>29</sup> The JHA external action was considered to complement internal policy, and therefore needed to be consistent with the Union’s broader external policy. To that end, criteria to define priorities were identified and formulated. Regarding the fields of action,

<sup>24</sup> See the Presidency conclusions of the Tampere European Council (15–16 October 1999).

<sup>25</sup> This is the mandate of the Tampere European Council: see paragraph 61 of the Conclusions of the Presidency, and more generally paras. 59–62.

<sup>26</sup> ‘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. Quite the contrary.’ Quotation from ‘European Union priorities and policy objectives for external relations in the field of justice and home affairs’, Doc. No. 7653/00 of 6.6.2000.

<sup>27</sup> See the Presidency conclusions of the Santa Maria da Feira European Council (19–20 June 2000), [www.europarl.europa.eu/summits/fei1\\_en.htm](http://www.europarl.europa.eu/summits/fei1_en.htm), para. 51.

<sup>28</sup> ‘European Union priorities and policy objectives for external relations in the field of justice and home affairs’, Doc. No. 7653/00 of 6.6.2000.

<sup>29</sup> 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.

the European Council of Santa Maria da Feira upheld external priorities identified by the Council,<sup>30</sup> and decided to give priority to a number of ('horizontal') policy areas: the external migration 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.<sup>31</sup> We should stress the fundamental role played by Coreper, the Council and the European Council: everything began within these political arenas, leaving the Commission to perform a 'supporting' role.<sup>32</sup>

## 2.2 The political impact of 9/11

The impact of 9/11 on policies and external relations is well known. The gravity of the terrorist attacks caused for a strategic shift in the EU's priorities in the area of external relations, including JHA.<sup>33</sup> However, even before that date, the US had been a long-term partner for Europe also on justice and police issues. Indeed, EU-US cooperation dates back to the 1970s, with the informal Trevi Group, and, later on, with the Transatlantic Agenda of 1995. Nevertheless, it was only after the tragic events of 2001 that the EU assessed cooperation with the US as highly strategic. The reaction of the extraordinary European Council meeting 10 days after the attacks, as well as the package of measures decided on at that occasion,<sup>34</sup>

<sup>30</sup> *Ibid.*    <sup>31</sup> *Ibid.*, 7–8.

<sup>32</sup> A close reading of the first pages of Doc. No. 7653/00 of 6.6.2000 reveals the significant role played by the European Council, the Council (the JHA Counsellors), Coreper and the Presidency. The Commission is also involved, but its role seems to be one more of cooperation and less crucial, as revealed by the terms 'in close cooperation with', and 'with the contribution of'.

<sup>33</sup> Within the framework of the fight against terrorism, the European Union was exceptionally quick in adopting a number of measures that were previously under discussion within the whole programme of action for the AFSJ, sometimes with a lower priority. The best known example is the European Arrest Warrant (EAW), listed in the Vienna Action Plan of 1998 (Council and Commission action plan of 3 December 1998, endorsed by the Vienna European Council some days later, OJ (19/1 23.1.1999). The substitution of extradition in the relations among Member States with a smoother system has been under discussion for some time, but only 9/11 provided Member States the political impetus to adopt such a measure. See also on the EAW E. Guild and L. Marin (eds.), *Still Not Resolved? Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers, 2009). See on some domestic implications of the EAW, L. Marin, 'The European Arrest Warrant in the Italian Republic' 4 *EU Constitutional Law Review* (2009) 251–73.

<sup>34</sup> See Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, accessible at [www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/140.en.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/140.en.pdf)

were largely supported by the other EU institutions (the Commission and Parliament) and also, at that time, by candidate States' ambassadors. The political message aimed at showing unity and solidarity with the US in a context perceived as an emergency.

It is in this framework that we must place and understand the action started by the EU, both internally and in its external dimension, to enforce its Action Plan aiming at a coordinated response to the Twin Towers attacks. A strong emphasis was placed, on the one hand, on the fight against international terrorism, in particular on its funding and on the increase of air security; and, on the other hand, on the enhancement of police and judicial cooperation, on the development of new international legal instruments, as well as on the coordination of the EU's global intervention. Special attention was given to cooperation with the US.<sup>35</sup>

For the development of the external dimension of the JHA area it is important to stress that the enhanced attention to cooperation with the US also went beyond the fight against terrorism and included a broader range of initiatives in the areas of mutual assistance and crime prosecution, through the exchange of police data.<sup>36</sup> As observed earlier, the European intervention was led by a mixture of contingent reactions as well as Member States' political opportunism: the 9/11 reaction package has been exploited by some Member States to tighten up their own security policy, in the interplay between European/international and domestic politics.<sup>37</sup>

Internally, the EU response mainly concerned the areas of sharing intelligence information among European countries and data with Europol on terrorism. Externally, the cooperation with the US was strengthened, for instance via agreements between Europol and the US<sup>38</sup> and through the EU–US Agreements on extradition and mutual legal assistance.<sup>39</sup> Apart from this stream of international legal instruments to strengthen cooperation with the US, the implications of 9/11 on the external dimension of

<sup>35</sup> M. Fletcher, R. Löff and B. Gilmore, *EU Criminal Law and Justice* (Edward Elgar, 2008) 159; B. Gilmore, 'The Twin Towers and the Third Pillar: Some Security Agenda Developments', EUI Working Paper LAW No. 2003/7.

<sup>36</sup> See EU–US Agreements on Mutual Legal Assistance and the one on Extradition, adopted in July 2003. Respectively OJ L181, 19 July 2003, 27; and OJ L181, 19 July 2003, 34.

<sup>37</sup> Gilmore, 'The Twin Towers and the Third Pillar', at 18.

<sup>38</sup> It can be found on the website of Europol: [www.europol.europa.eu/index.asp?page=-agreements](http://www.europol.europa.eu/index.asp?page=-agreements) and also [www.eurojust.europa.eu/official\\_documents/eju\\_agreements.htm](http://www.eurojust.europa.eu/official_documents/eju_agreements.htm). For Eurojust, follow the link to read the cooperation agreement between Eurojust and the USA. This document has not been published in the Official Journal.

<sup>39</sup> Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009) 293.

the AFSJ took the form of an 'internalisation' of international developments on the basis of the UN Security Council resolutions related to the fight against terrorism.<sup>40</sup> Thus, the external dimension of the AFSJ was not only developing inside-out, but also outside-in, in a constant flux of reciprocal influences in which the distinction between internal and external actions and instruments was often blurred.

Summing up, the new strategic focus implied a closer partnership with the US, as well as a stronger role and relevance for JHA agencies in the international sphere,<sup>41</sup> first for Europol, later also for Eurojust, through the conclusion of agreements with external partners by these agencies. In the perspective of the governance of the external dimension of the AFSJ, 9/11 has been a critical moment, for the numerous (re-)actions it triggered at EU level on terrorism and more generally on security, leading to a reorientation of the external dimension on operational aspects (e.g. exchange of data) and led by executive agencies.

### 2.3 The Hague Programme and its implications

A further step was taken by the Hague Programme,<sup>42</sup> which called for the development of a coherent external dimension in JHA cooperation. The programme itself, dealing with external issues in many fields, including security, asylum and migration, and counter-terrorism,<sup>43</sup> invited the Commission and the Secretary-General/High Representative to present an overall strategy on the external dimension of the AFSJ, prioritising 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. Interestingly enough, the European Council guidelines for the development of this new plan had already been proposed by Coreper to the Council in order to fulfil the Tampere mandate.<sup>44</sup>

<sup>40</sup> See also Eckes, ch. 5 in this volume.

<sup>41</sup> See also A. Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield between European and International Law' 13 *European Foreign Affairs Review* (2008) 515–40; Monar, 'EU as an International Actor'.

<sup>42</sup> OJ C 53, 3.3. 2005. <sup>43</sup> The Hague Programme, points 1, 1.6 and 2.2.

<sup>44</sup> The reference is to Council Document 7653/00 quoted and discussed above. For comparison see the Hague Programme at para. 4, where the European Council proposes as a guideline that the existence of internal policies is required to justify external action, that there should be an added value in comparison to projects carried out by the Member States, and that the action contributes to the political objectives of the EU's foreign policies.

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,<sup>45</sup> 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 plan for the AFSJ. Secondly, the Commission elaborated its strategy on the external dimension of the AFSJ, fulfilling the mandate received in the Hague Programme, in a specific policy document,<sup>46</sup> as did the Council.<sup>47</sup> 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. However, the external dimension continues to be conceived as a 'projection' of the internal AFSJ, since it is 'linked' to the ultimate goal of the EU's internal security.<sup>48</sup> Thus, the rationale of the external dimension was underlined, to complement the realisation of the internal AFSJ and to support the EU's external relations in general.<sup>49</sup> It could be argued that, irrespective of the external developments, which certainly played a role in the agenda-setting, the development of the external dimension of the AFSJ is above all triggered by the prior internal

<sup>45</sup> Communication from the Commission to the Council and the European Parliament, The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final, 10.5.2005.

<sup>46</sup> Communication from the Commission, A Strategy on the External Dimension of the Area of Freedom, Security and Justice, COM(2005) 491 final, 12.10.2005.

<sup>47</sup> Council Document No. 14366/3/05 on strategy for the external dimension of JHA affairs: global FSJ.

<sup>48</sup> '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 final, 3.

<sup>49</sup> '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.' *Ibid.*, 4.

development of this area. As in many other EU policy areas, the realisation of values and projects characterising the AFSJ inside Europe both legitimises and forces the EU to look outside as well.

#### 2.4 The external dimension in the Stockholm Programme

More recently a new programme (2010–2014) for the AFSJ has been adopted: the Stockholm Programme.<sup>50</sup> The programme is shaped in an ambitious text, which aims to exploit the new arrangements and possibilities offered by the Lisbon Treaty, titled 'An open and secure Europe serving and protecting the citizens'. Openness and security<sup>51</sup> seem to be the two conflicting paradigms which have inspired the programme. The reference to openness and security postulates also freedoms and controls, and the exercise of sovereign powers on individuals. In the programme there is also an indication of a specific group of individuals, the citizens, who are the beneficiaries of it. At the same time there are clear indications that non-citizens are excluded.

The programme foresees several actions with an external dimension, but the external 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

<sup>50</sup> Council Document 17024/09: The Stockholm Programme – An open and secure Europe serving and protecting the citizens.

<sup>51</sup> The current programme is the result, inter alia, of the works of an informal body, the so-called 'Future Group', which was set up in order to make proposals to the Commission. This original setting was composed by some interior ministries, namely those whose governments were involved in the presidencies from 2007. It is not difficult to imagine the influence of the proposals of the Future Group on the Commission's proposal. It is also interesting to note that this special body had been composed of Interior Ministries, without the involvement of Justice Ministries. This helps explaining the stronger security focus in the strategic evolution of the AFSJ. A reading of the Report of the Future Group gives insights into the likely trajectory of the AFSJ, both in its internal and its external dimension. First, there appears to be an emphasis on a stronger external dimension, which should be consistent with European values. Secondly, the areas in which the AFSJ should develop in its external dimension are mainly the fields of migration and border controls; thirdly the EU is also thinking of expanding civil law cooperation with non-EU countries, in order to strengthen the area of commercial cooperation. A similar logic is also proposed for criminal law cooperation, extending mutual legal assistance and extradition agreements to non-EU countries. In addition, it seems that the security focus of the next programme will stress the external dimension of AFSJ, especially in the domain of borders and migration control. This development is primarily a projection of the general internal development of the AFSJ.

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.<sup>52</sup>

In spite of a clear continuity with regard to the ultimate goal of achieving the internal targets of the AFSJ, the Stockholm Programme displays a stronger attention (or rhetoric?) for the protection of rights, and for the dissemination of the Union's values. The plan reveals the ambition of a comprehensive plan for a system of structured actions, not reactive but planned and coordinated, implemented and assessed, in order to meet 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 Programme is that the external dimension of the AFSJ becomes an *organised* 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. The obvious question here is to what extent the EU is competent to become more active in combining internal and external AFSJ actions. The next section aims to provide an answer to this question.

### 3. EXTERNAL COMPETENCES IN THE AFSJ

#### 3.1 Pre-Lisbon external competences: fragmentation across pillars

##### 3.1.1 *Differences between Title IV TEC and Title VI TEU (Pre-Lisbon)*

The early European Union, which was established on the basis of the 1992 Maastricht Treaty, dealt with JHA in its third pillar only. The newly established JHA competences were meant to lead to 'common positions' in areas that were listed as 'matters of common interest': asylum policy, control of external borders, migration by nationals of non-member States, judicial cooperation in civil and criminal matters, customs and police cooperation (see the old Article K.1 TEU Pre-Lisbon). Although

<sup>52</sup> Communication from the Commission to the European Parliament and the Council, An Area of Freedom, Security and Justice Serving the Citizen, COM(2009) 262 final, 10.6.2009.

many of these 'matters' had a clear external dimension, the focus was on internal cooperation between the Member States and a formal external relations reference was limited to the obligation to defend the 'common positions' within international organisations and at international conferences (Article K.5).

The transfer by the 1997 Amsterdam Treaty of immigration, asylum, and civil law matters to the European Community treaty also implied a 'communitarisation' of the external competences in those areas. From that moment on the regular Community external relations competences applied to these areas as well. In the absence of expressly established competences, external relations in new Title IV TEC (on 'visas, asylum, immigration, and other policies related to free movement of persons') were established on the basis of implied powers in the line with the *ERTA* doctrine as explicit external competences were absent.<sup>53</sup>

However, the legal regime covering the external action of the Community under Title IV has always been somewhat different from the one that emerged from the case law of the ECJ on the general law of external relations. The reason was that the Amsterdam Treaty contained a number of declarations and protocols that had the clear objective of preserving the pre-existing national competences in respect of certain external aspects of immigration policy. Thus, Declaration 18 attached to the Treaty of Amsterdam guaranteed Member States' competences to conclude agreements concerning 'conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion' and a similar provision was contained in Protocol 31 on external relations in respect of external borders.<sup>54</sup> Moreover, the exclusivity of the Union's competences on these matters was also put in perspective by the Danish, Irish and UK opt-outs in this field, a situation that was maintained by the Lisbon Treaty.<sup>55</sup>

Taking into consideration these peculiarities of the external dimension of Title IV TEC, it seems that policies such as the European visa policy did not constitute an exclusive external competence. In fact, it

<sup>53</sup> Case 22/70 *Commission v. Council (ERTA)* [1971] ECR 263.

<sup>54</sup> Protocol 31: 'The provisions on the measures on the crossing of external borders included in Article 62(2)(a) of Title IV of the Treaty shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Community law and other relevant international agreements'. This clause has been preserved and is now Protocol 23 of the treaties.

<sup>55</sup> See current Protocols 19, 20, and 21.

has recently been observed<sup>56</sup> that the visa policy as a whole did not meet any of the requirements and conditions set up by the ECJ in other fields of EC competence to become exclusive. Thus, the EU visa policy could not be considered an exclusive competence *in re ipsa* as is the case of the common commercial policy<sup>57</sup> as established in Opinion 1/75<sup>58</sup> and in *Donckerwolke*.<sup>59</sup> Similarly, the developments concerning visa policy do not seem to point to an exclusive competence of the Union *by necessity*, a scenario first described in Opinion 1/76<sup>60</sup> and now codified in Article 3 (2) TFEU.<sup>61</sup> Possibly, the only room for an exclusive competence of the Union in the visa policy is left in respect of short term visa if one considers the development of internal harmonisation in this respect,<sup>62</sup> but this could be impeded by Declaration 18 and Protocol 31 mentioned above.

A similar conclusion may be drawn in respect of another salient competence of the EU in the field of its immigration policy: the case of readmission agreements.<sup>63</sup> Even here, although this subject matter could potentially fall within the exclusive competence of the EU, the practice until the entry into force of the Lisbon Treaty has been that both the Member States and the EU have concluded readmission agreements. Although the acquiescence of the Commission in this respect does not allow to draw legal conclusions as to a concurrent competence of the EU and its Member States, it is politically meaningful that the Commission avoided any conflict on the matter. At the same time, Member States have themselves been rather keen to exercise their powers in this domain, as is demonstrated by the readmission agreements – *rectius* cooperation agreements containing readmission clauses – that Member States such as France,<sup>64</sup>

<sup>56</sup> B. Martenczuk, 'Visa Policy and EU External Relations', in Martenczuk and van Thiel, *Justice, Liberty, Security*, 36–42.

<sup>57</sup> Here the comparison can be made because the Union has one external commercial border and another external border for individuals.

<sup>58</sup> Opinion 1/75 [1975] ECR 1921.

<sup>59</sup> Case C-41/76, *Donckerwolke* [1976] ECR 1921.

<sup>60</sup> Opinion 1/76 [1977] ECR 741.

<sup>61</sup> '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.'

<sup>62</sup> Martenczuk, 'Visa Policy and EU External Relations', 42.

<sup>63</sup> M. Schieffer, 'Readmission and Repatriation of Illegal Residents', in Martenczuk and van Thiel, *Justice, Liberty and Security*, 89–110.

<sup>64</sup> France has been particularly proactive in this field. The text of this and other agreements can be found at [www.ofii.fr/recruter\\_un\\_etranger\\_192/les\\_accords\\_de\\_gestion\\_concertee\\_des\\_flux\\_migratoires\\_ratifies\\_863.html](http://www.ofii.fr/recruter_un_etranger_192/les_accords_de_gestion_concertee_des_flux_migratoires_ratifies_863.html).

Italy<sup>65</sup> and Spain<sup>66</sup> have recently concluded. In this respect it is interesting to note that, just like at the EU level, Member States attain internal AFSJ objectives by concluding agreements which do not solely cover matters in that area and reveal a link between trade policy, CFSP and AFSJ matters.

Possibly, the only exception is represented by agreements concerning judicial cooperation in civil matters. In this field the ECJ had the occasion to hold, in Opinion 1/2003 on the Lugano Convention, that the EU had exclusive competence to conclude that agreement.<sup>67</sup> In this case, however, the solution given by the ECJ does not come as a surprise if one takes into consideration that the resolution of conflicts of jurisdiction in commercial and civil matters had begun in 1968 with the Brussels Convention.

Fragmentation was above all caused by the fact that the legal framework regulating the external competences of the EU in respect of the third pillar was very different from the Community's competences in Title IV TEC. It is well known that, because of the lack of an express provision conferring legal personality on the EU, it was debated whether the EU could conclude international agreements. However, because both the second and the third pillar provided the tools for the EU to conclude international agreements it was suggested that the EU possessed the legal capacity to conclude international agreements. As mentioned before, 9/11 influenced a large amount of legislation within the EU<sup>68</sup> and simultaneously pushed for a new series of cooperation agreements with the US.

### 3.1.2 *The conclusion of international agreements*

The conclusion of agreements related to police and judicial cooperation in criminal matters (PJCC, as the JHA pillar was called after the Amsterdam Treaty) was possible because of the introduction of an explicit legal basis for the European Union to conclude agreements with third states and other international organisations. The new formal legal basis in Article 24 TEU was first used in the second pillar (CFSP) for the conclusion of the Agreement between the European Union and the Federal Republic of

<sup>65</sup> Legge 6 febbraio 2009 n.7, *Gazzetta Ufficiale della Repubblica Italiana*, Serie Generale n.40 del 18/02/2009.

<sup>66</sup> Boletín Oficial de las Cortes generales IX LEGISLATURA Serie A: 4 de diciembre de 2009 Núm. 231, [http://www.senado.es/legis9/publicaciones/html/textos/CG\\_A231.html](http://www.senado.es/legis9/publicaciones/html/textos/CG_A231.html).

<sup>67</sup> Cremona, 'EU External Action in the JHA Domain'.

<sup>68</sup> See Mitsilegas, *EU Criminal Law*, 293

Yugoslavia on the activities of the European Union Monitoring Mission (EUMM) in 2001.<sup>69</sup> Since then, the Union has made full use of this competence,<sup>70</sup> also in conjunction with (old) Article 38 TEU in the case of agreements in the area of police and judicial cooperation in criminal matters. Article 38, introduced by the Treaty of Amsterdam, was part of Title VI TEU (PJCC). It served as a bridge to allow the Union to use its treaty-making competence in the area of the third pillar: 'Agreements referred to in Article 24 may cover matters falling under this title.'<sup>71</sup> This turned the combination of Articles 24 and 38 into the general legal basis for the Union's treaty-making activities in the third pillar whenever agreements could not be based on the Community Treaty.<sup>72</sup>

Nevertheless, the correct legal basis of the international agreements concluded pre-Lisbon was a source of controversy. Taking into account their subject matter, many of these agreements in fact concerned third pillar measures only. It has been argued that in these cases a reference to Article

<sup>69</sup> Agreement between the European Union and the Federal Republic of Yugoslavia on the activities of the European Union Monitoring Mission (EUMM) in the Federal Republic of Yugoslavia ([2001] OJ L/125/2). The reference to Article 24 can be found in Council Decision (2001/352/CFSP) of 9 April 2001 concerning the conclusion of the Agreement between the European Union and the Federal Republic of Yugoslavia (FRY) on the activities of the European Union Monitoring Mission (EUMM) in the FRY [2001] OJ L/125/1.

<sup>70</sup> Indeed, these 'agreements' can be considered treaties in the sense of Article 2(1)(a) of the 1969 and 1986 Vienna Conventions on the Law of Treaties as they fulfil all generally accepted criteria. See, in general, A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2007) and J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, 1996). All agreements can be found in the international agreements database of the Commission, <http://ec.europa.eu/world/agreements/>.

<sup>71</sup> The debate on whether these agreements are concluded by the Council on behalf of the Union or on behalf of the Member States was not only superseded by practice but the existence of an EU competence was also accepted by most experts in EU external relations law. See, for recent contributions, R. Gosalbo Bono 'Some Reflections on the CFSP Legal Order' 43 *Common Market Law Review* (2006) 354–6; D. Thym, 'Die völkerrechtlichen Verträge der Europäischen Union' 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2006) 863; C. Tomuschat, 'The International Responsibility of the European Union', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer Law International, 2000), 181; R. A. Wessel, 'The EU as a Party to International Agreements: Shared Competences? Mixed Responsibilities?', in A. Dashwood and M. Maresceau (eds.), *The Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge University Press, 2008) 145–80; R. A. Wessel and G. Fernandez Arribas, 'EU Agreements with Third Countries: Constitutional Reservations by Member States', in S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (TMC Asser Press, 2008) 291–308.

<sup>72</sup> See more extensively on the agreements concluded on the basis of the Art. 24/38 combination, R. A. Wessel, 'Cross-Pillar Mixity: Combining Competences in the Conclusion of EU International Agreements', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements in EU Law Revisited*, (Hart Publishing, 2010, forthcoming).

38 TEU would have sufficed,<sup>73</sup> since a reference to Article 24 was already included in that provision. In these cases the mere reference to a dual legal basis would be too formal an argument to decide on their character as cross-pillar agreements. On the other hand, some agreements did indeed touch upon both CFSP and PJCC issues alike. This would at least hold true for the agreements on security procedures for the exchange of classified information. The classified information addressed in these agreements is not specified as being related to either CFSP or PJCC material, and may relate both to information in the framework of the European security and defence policy (ESDP) and the participation of these states in ESDP operations, as well as to information in the area of police cooperation. This shows that some of the agreements could be seen as true 'cross-pillar' agreements.

Because of the link between PJCC policies and other EU/EC policies, cross-pillar measures to create a coherent external policy were already explicitly promoted by the European Council at Feira in 2000 when, in relation to third pillar policy, it said that it 'should be incorporated into the Union's external policy on the basis of a "cross-pillar" approach and "cross-pillar" measures. Once the objectives have been defined, they should be implemented by making joint use of the Community provisions, those available under the CFSP and those on cooperation laid down in Title VI of the TEU.'<sup>74</sup> However, this was easier said than done. Where second/third pillar combinations – when limited to true cross-pillar agreements – were already scarce, this was even more the case in relation to EU/EC combinations. The classic example is formed by the Agreement between the European Union, the European Community and the Swiss Confederation, concerning the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*.<sup>75</sup> Because this agreement concerned both Community and other Union issues, and a combination of an EC and an EU legal basis was not considered to be possible, the Council adopted two Decisions, one 'on behalf of the European Union' (with a reference to Articles 24 and 38 TEU) and one 'on behalf of the European Community' (with a reference to Articles 62, points 3, 63, 66 and 95 in conjunction with Article 200(2) TEC).<sup>76</sup>

Indeed, the delimitation of competences over the pillars was already a major issue in the pre-Lisbon period. In the light of the 2008 ECOWAS

<sup>73</sup> *Ibid.*

<sup>74</sup> See 'A Strategy for the External Dimension of JHA', Doc. 14366/3/05, REV 3, at para. 6. See also Cremona, 'EU External Action in the JHA Domain', at 14.

<sup>75</sup> [2004] OJ L/370/78.

<sup>76</sup> Council Decision 2004/849/EC of 25 October 2004, [2004] OJ L/368/26 and Council Decision 2004/860/EC of 25 October 2004, [2004] OJ L/370/78.

judgment of the European Court of Justice,<sup>77</sup> the division of competences between the EC and the EU (CFSP and PJCC) deserved renewed attention. On the basis of this judgment it could be concluded that EU/EC cross-pillar agreements were to become even more scarce.<sup>78</sup> The Court seemed to limit the possibilities for combined Community/CFSP decisions. The Community was to adopt a measure not only when that measure is, in terms of aim and content, mainly related to an area of Community competence, but also if the measure was both about EC and CFSP matters, without one being incidental to the other. Only when a measure was intended to implement mainly Union objectives, and failing a Community competence, could the Union act (compare paragraphs 71 and 72 of the judgment) – irrespective of a possible relationship with Community objectives. This comes close to a similar situation in the third pillar, where – irrespective of the main purpose of (old) Article 47 TEU – the Court decided that situations could be envisaged in which the Community encroaches upon competences of the *Union* in other pillars. In the *PNR* case, the Court held that the EU–US Agreement on Passenger Name Records should not have been based on the Community Treaty (Article 96 TEC, internal market) but on the Union Treaty.<sup>79</sup> Hence, in determining the ‘centre of gravity’ of a Community instrument, the Court was no longer restricted to the legal bases offered by the Community Treaty itself, but – even before Lisbon – it was compelled to use the overall Union legal order as the interpretative framework.<sup>80</sup>

In fact, it was the development of this ‘interpretative framework’ that paved the way to a consolidation of the different AFSJ policies in the Lisbon Treaty. As has been submitted by one of the present authors earlier, the convergence of the ‘bits and pieces’ that were originally said to make up the Union’s structure<sup>81</sup> created a new institutional and normative

<sup>77</sup> Case C-91/05, *Commission v. Council* (‘ECOWAS’ or ‘Small Arms and Light Weapons’), judgment of 20 May 2008. See also C. Hillion and R. A. Wessel, ‘Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?’ 46 *Common Market Law Review* (2009) 551.

<sup>78</sup> *Ibid.*

<sup>79</sup> Joined Cases C-317/0 and C-318/04 *European Parliament v. Council* [2006] ECR I-4721. See also R. H. van Ooik, ‘Cross-pillar Litigation before the ECJ: Demarcation of Community and Union Competences’ 4 *European Constitutional Law Review* (2008) 399–419; P. Pawlak, ‘The External Dimension of the Area of Freedom, Security and Justice: Hijacker or Hostage of Cross-pillarization?’ 31 *Journal of European Integration* (2009) 25–44.

<sup>80</sup> In this respect, see also Case C-301/06 *Ireland v. Council and European Parliament* (judgment of 10 February 2009, not yet reported), in which Ireland unsuccessfully argued that the Data Retention Directive (2006/24/EC) should not have been based on Article 95 TEC but on Article 34 TEU. See also van Ooik, ‘Cross-pillar Litigation before the ECJ’ 399.

<sup>81</sup> Cf. D. Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’ *Common Market Law Review* (1993) 17–69.

situation.<sup>82</sup> In that view the very fact that both the CFSP and the PJCC were not based on regular cooperation treaties, but together with the European Community formed part of a European Union, had an impact on their development.<sup>83</sup> Thus, the years before the entry into force of the Lisbon Treaty not only already revealed a clear interplay between the different Union policies, but also showed that the nature of the pillars could best be understood when their mutual relation is taken into account.<sup>84</sup>

### 3.1.3 AFSJ agencies

Before discussing the innovations brought by the Lisbon Treaty, it is noteworthy to mention the external action of three AFSJ agencies. In order to support and enhance the Union's activities to pursue the establishment and development of the AFSJ, three specialised European agencies were created:<sup>85</sup> Europol<sup>86</sup>, Eurojust<sup>87</sup> and Frontex.<sup>88</sup> The three bodies cover respectively three main domains of the AFSJ: police cooperation, judicial

<sup>82</sup> R. A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' 5 *European Constitutional Law Review*, (2009) 117–42. For a political science perspective, see T. Christiansen, 'Intra-institutional Politics and Inter-institutional Relations in the EU: Towards Coherent Governance?' 8 *Journal of European Public Policy* (2001) 747–69.

<sup>83</sup> Compare also for a political science perspective S. Stetter, *EU Foreign and Interior Policies: Cross-Pillar Politics and the Social Construction of Sovereignty* (Taylor & Francis, 2007).

<sup>84</sup> See (Director of the Legal Service of the Council) Gosalbo Bono, 'Some Reflections on the CFSP Legal Order', 337–94; and more extensively Wessel, 'The Dynamics of the European Union Legal Order'.

<sup>85</sup> It is however disputed that these three bodies are EU agencies. According to Chiti, only Frontex is to be considered an EU agency. According to this author Europol and Eurojust cannot be seen as agencies. First, the two bodies 'operate as instruments of association of national bodies, whose cooperation, though encouraged and structured, retains an essentially voluntary basis' and, secondly, 'the administrative cooperation involves national administration only, while the Commission is assigned an absolutely marginal position': E. Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' 46 *Common Market Law Review* (2009) 1395–442, at 1398. The Commission however distinguishes between regulatory and executive agencies whereas the literature generally distinguishes between information, management and regulatory agencies: See Ott, 'EU Regulatory Agencies in EU External Relations'.

<sup>86</sup> Council Decision 2009/371/JHA Establishing the European Police Office (Europol), OJ L 121 15.05.2009, 37.

<sup>87</sup> Council Decision 2009/426/JHA on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138 14.06.2009, 14.

<sup>88</sup> Council Regulation 2007/2004/EC Establishing a European Agency for the management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349 25.11.2004, 1.

cooperation in criminal matters and the management of the external border of the Union.

In each case these agencies have been given legal personality and have been conferred with treaty-making power. In this respect, a first distinction between Europol and Eurojust on the one side and Frontex on the other can be made. Europol and Eurojust have been conferred with external powers ‘in so far as is required for the performance of their tasks’;<sup>89</sup> whereas Article 14 of the Frontex Decision envisages two different sorts of external powers: the first concerns facilitation agreements through which Frontex seeks to establish operational cooperation between third countries and the Member States in the framework of EU external relations policy; the second allows Frontex to cooperate directly with authorities of third countries having the same competences by concluding working arrangements.<sup>90</sup>

The conclusion of international agreements by the agencies follows a similar scheme in the cases of Europol and Eurojust, whereas it does not appear in the founding Regulation of Frontex. The two ‘third pillar’ agencies have the power to conclude agreements with third countries and other international organisations that concern the exchange of information and personal data, and in both cases the content of the agreement is assessed in respect of the level of protection of the exchange of data by the respective Joint Supervisory Board. In both cases, the approval of the Council<sup>91</sup> is necessary to conclude the agreement, but a positive opinion of the Joint Supervisory Board in respect of the level of data protection does not appear to be necessary for the Council’s conclusion. As noted elsewhere,<sup>92</sup> it is an improvement in respect of other old third pillar agreements of the EU that did not provide for such scrutiny. In both cases, the European Parliament is not conferred with decisive powers on these matters. The EP is consulted under Article 26 of the Europol Decision

<sup>89</sup> Article 23 paragraph 1 of the Europol Decision and Article 26a paragraph 1 of the Eurojust Decision.

<sup>90</sup> In addition, Article 13 of the Frontex Regulation provides that the agency can cooperate with Europol and international organisations possessing the same competences as Frontex.

<sup>91</sup> In the case of Eurojust agreements the Council decides by qualified majority (Article 26a of the Eurojust Decision), whereas for Europol agreements a simple approval is required (Article 23). However, in the case of Europol the Council has to approve by qualified majority beforehand the list of third countries and international organisations with which Europol wishes to conclude agreements (Article 26 of the Europol Decision).

<sup>92</sup> Mitsilegas, *EU Criminal Law*, 308.

in respect of the list of third countries with which Europol can conclude agreements, but is not involved in the case of Eurojust.

Europol and Eurojust have concluded a series of international agreements over the past years. In the case of Europol, agreements can be distinguished on the basis of the ability of the EU body to share personal data and information with the other party. Thus, operational agreements will include data exchange, whereas strategic and technical agreements do not allow such exchange. Eurojust agreements are characterised by the possibility of allowing liaison magistrates in the Eurojust premises in The Hague. Moreover, Eurojust agreements may also allow for the posting of a liaison magistrate to a third country.<sup>93</sup> Although the transparency of the negotiating process could be improved,<sup>94</sup> both the agencies publish the concluded agreements on their websites.<sup>95</sup> In contrast, the external relations of Frontex appear to be less transparent. Articles 13 and 14 of the founding Regulation do not envisage a particular procedure for the conclusion of international agreements. Thus, it seems that the international ambitions of this agency may only be found in the agency's programme of work which has to be adopted each year following the opinion of the Commission.<sup>96</sup> Moreover, because Article 20 (2) (c) of the Regulation prescribes that the work programme of the agency has to be 'adopted according to the Community legislative programme in relevant areas of the management of external borders', it is likely that the external relations of the agency cannot go beyond the scope of the work programme established by the other relevant institutions.

In the future the external activities of the agencies will have to abide by the priorities set out in the Stockholm Programme,<sup>97</sup> but the transparency and accountability of Europol, Eurojust and Frontex leaves much to be desired, especially in relation to the European Parliament that has now become co-legislator in the fields of action of all three agencies. Moreover, the fact that the agreements are not published in the Official Journal raises questions of accountability and of access to justice. As the law stands today, these agreements could be challenged by individuals through the European Ombudsman but not before the ECJ.

<sup>93</sup> Article 27a of the Eurojust Decision.

<sup>94</sup> Notably in the case of the Europol–US agreement; see Mitsilegas, *EU Criminal Law* 309 and Mitsilegas, 'The External Dimension of EU Action in Criminal Matters' 12 *European Foreign Affairs Review* (2007) 457–97.

<sup>95</sup> Eurojust: [www.eurojust.europa.eu/official\\_documents/eju\\_agreements.htm](http://www.eurojust.europa.eu/official_documents/eju_agreements.htm), and Europol: [www.europol.europa.eu/index.asp?page=agreements](http://www.europol.europa.eu/index.asp?page=agreements)

<sup>96</sup> Article 20(2) (c) of the founding Regulation.

<sup>97</sup> Stockholm Programme on the AFSJ, 73.

### 3.2 Current external competences in the AFSJ

The Lisbon Treaty combines the former provisions in former Title IV TEC on ‘visas, asylum, immigration, and other policies related to free movement of persons’ with the provisions in former Title VI TEU on ‘police and judicial cooperation in criminal matters’. The result is Title V TFEU, which is now actually labelled ‘Area of freedom, security and justice’. Apart from the Union’s promise to 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’ (Article 3 (2) TEU), the status of its competence in the area is now defined as well: according to Article 4 (2) it is a *shared* competence between the Union and its Member States.

Still, however, specific external competences are virtually absent and may only be found in relation to immigration policy. Article 79 (3) provides:

The Union may conclude agreements with third countries for the readmission to their countries 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 does not seem to form a reason to argue that, *a contrario*, external competences do not exist in relation to the other AFSJ policies: judicial cooperation and police cooperation. After all, the general legal basis for the conclusion of international agreements (the most obvious external competence) does not exclude the AFSJ. Article 216 (1) provides:

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.

Indeed, the *ERTA* doctrine has become an explicit part of this new provision, which implies that AFSJ international agreements can be based on either the objectives (compare Article 3(2) mentioned above), or on a decision adopted in the area of AFSJ. This provision extends the *ERTA* doctrine to areas of cooperation previously falling under the non-Community pillars.

The treaty-making competence is confirmed in a special declaration on Article 218 TFEU (on the procedure to conclude international agreements) concerning 'the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice'. In this declaration 'The Conference confirms 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.' Chapter 3 concerns 'judicial cooperation in civil matters', Chapter 4 'judicial cooperation in criminal matters' and Chapter 5 deals with 'police cooperation'. Apart from the already mentioned competence to conclude readmission agreements in the area of immigration policy, the other parts of Chapter 2 (border checks and asylum) seem to be excluded. The obvious question is whether, irrespective of the declaration, international agreements may be concluded in this area once they are 'necessary in order to achieve one of the objectives' or when it 'is provided for in a legally binding Union act' (cf. Article 216 (1)). With a view to the Court's general approach to external relations, it would be hard to believe that an interpretative declaration could limit the Union's competences in these areas.

One of the major improvements of the Lisbon Treaty concerns the consolidation of the AFSJ policies (including the former third pillar). The end of separate EU (Title VI) and EC (Title IV) agreements may certainly improve the consistency of the external dimension of the AFSJ. At the same time, 'vertical' consistency may be enhanced by the fact that paragraph 2 of Article 216 states that the agreements shall be binding on both the Institutions and the Member States, underlining their status as an integral part of Union law. The end of the division between EC and EU agreements also facilitates the negotiation of agreements. Whereas in the area of the common commercial policy the Commission takes the lead (Article 207 TFEU), Article 218 provides that (in other cases) the Council 'shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union's negotiator or the head of the Union's negotiating team.'

In that respect, Lisbon seems to have ended situations as we have seen in the *ECOWAS* or *PNR* cases. In its judgments the Court quite strongly underlined the need to preserve the *acquis communautaire* as mentioned in (old) Article 47 TEU. This does not mean that questions concerning the legal basis will no longer emerge; even within the TFEU the point of

gravity of a decision may define whether or not, for instance, harmonisation is allowed. Indeed, it has been observed that the new provisions ‘may create more problems than offer solutions with regard to the politics of cross-pillarization.’<sup>98</sup> The continued separation between CFSP and other external EU policies in particular may continue to result in a fragmented external policy. Still it is far from clear who will be in charge of the external dimension of the AFSJ. The mandate of the new High Representative is not limited to CFSP, but extends to the coordination of ‘other aspects of the Union’s external action’ (Article 18 (4) TEU). At the same time the new European External Action Service (EEAS) will cover most, but probably not all external relations.<sup>99</sup> In that respect the strong link between internal and external AFSJ aspects may lead to a choice between consistency in external relation policies or consistency in AFSJ policies.

Finally, the Lisbon Treaty allows for the parliamentary involvement in the AFSJ. Apart from an explicit role for national parliaments to ‘ensure that the proposals and legislative initiatives ... comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality’ (Article 69 TFEU), the European Parliament (EP) has been given a role that is more in line with the potential effects of the AFSJ decisions on EU citizens.<sup>100</sup> In the field of external relations a first example was provided when the EP voted on 11 February 2010 not to give its consent to the interim agreement between the EU and the USA on bank data transfers via the SWIFT network.<sup>101</sup> This vote prevented the agreement coming into force and was based on the EP’s right of consent laid down in Article 218 (6)(a) TFEU.

<sup>98</sup> Pawlak, ‘The External Dimension of the Area of Freedom, Security and Justice’.

<sup>99</sup> See on the EEAS, S. Vanhoonacker and N. Reslow, ‘The European External Action Service: Living Forwards by Understanding Backwards’, 15 *European Foreign Affairs Review* (2010) 1–18; and S. Duke, ‘Providing for European-level Diplomacy after Lisbon: The Case of the European External Action Service’ 4 *The Hague Journal of Diplomacy* (2009) 211–33.

<sup>100</sup> See also Maria Fletcher, ‘EU Criminal Justice: Beyond Lisbon’, ch. 1 in this volume.

<sup>101</sup> See European Parliament legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (05305/1/2010 REV 1 – C7–0004/2010 – 2009/0190(NLE)).

## 4. CONCLUDING OBSERVATIONS

The external dimension of EU policy fields usually only become visible once the internal competences have been used. The AFSJ is no exception and has revealed the need for the EU to become active externally after a long period of more or less intergovernmental cooperation in this area. At the same time, the analysis of the emergence of the external dimension of the AFSJ has revealed the impact of external developments on the speed of the internal process. In that sense it can be concluded that the internal and external developments mutually have reinforced one another.

This may have made it more difficult for the EU and its Member States to think about how to achieve a fair balance between *freedom*, *security* and *justice*. The external dimension has simply added more complexity to an already highly sensitive area. While 'respect for fundamental rights' is referred to in the first AFSJ provision (Article 67 (1)), this principle is even more difficult to respect once norms are not merely decided on within the EU legal order, but are found in international agreements or decisions by other international organisations, such as the United Nations. Balancing security and fundamental rights may very well become one of the biggest constitutional challenges the EU faces with the further development of the AFSJ and its external dimension. Indeed, as observed in the introduction to this book, a European Public Order should be able to uphold fundamental EU provisions even in times of a rapidly changing external environment.

In that sense it will be interesting to see how the external dimension of the AFSJ will further develop. As the external competences are shared between the EU and its Member States, much depends on the actual use by the EU of its competences. After all, we know that – even in areas with a more intergovernmental origin – actual use of external competences may ultimately restrain Member States' competences in that area.<sup>102</sup>

The Stockholm Programme states that '[t]he external dimension is crucial to the successful implementation of the objectives of this programme'.<sup>103</sup> Indeed, our analysis has shown a direct link between the internal and the external dimension of the AFSJ. This link is certainly strengthened now that the Lisbon Treaty allows for an active role of the

<sup>102</sup> Cf. C. Hillion and R. A. Wessel, 'Restraining External Competences of EU Member States under CFSP', in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008) 79–121.

<sup>103</sup> Stockholm Programme on the AFSJ, 73.

European Parliament and the Court. The coming years will have to clarify to what extent these institutions in particular are capable of not only striking the right balance between the different elements of the AFSJ (free movement, security and justice), but also of upholding this balance in a globalising world in which both territorial borders and borders between legal orders are becoming increasingly more fuzzy.