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EU External Action in the JHA Domain:
A Legal Perspective

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**EUROPEAN UNIVERSITY INSTITUTE
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Abstract

Since the Conclusions of the European Council on the Area of Freedom, Security and Justice (AFSJ) at Tampere in 1999 the Union has recognised the significance of the external dimension to this policy field, and over the last decade the Union's activity in this field has both intensified and broadened to include not only migration, border management and asylum but all aspects of the AFSJ, ranging from counter-terrorism to civil procedure. Although the scope of external action reflects the fragmentation of the subject matter and the AFSJ lacks an easily identifiable policy objective, there are ways in which we can identify certain common elements in the approach to external AFSJ policy, in particular in managing the relationship between different actors. This paper seeks to explore some of these distinctive elements; its purpose is to set out some of the particular legal features of external AFSJ policy. First, to examine the basis for and the scope of external competence given that there is no explicit provision in the EC Treaty for external action in the field. Second, the legal implications of the inter-pillar nature of the AFSJ: the consequences this has for the types of instrument available to the Union and the legal constraints imposed by the need to 'police' the boundary. And finally the paper explores the relationship between Union / Community action and Member State action: the possibility of exclusive Community competence, the mechanisms developed to manage shared competence and the additional complexity created by the varying 'opt-outs' for some Member States.

Keywords:

European law - Area of Freedom - Security and Justice - differentiated integration - international agreements - opting out - international relations - security/external - Treaty on European Union - treaty reform.

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*EU External Action in the JHA Domain: A Legal Perspective**

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Introduction

Since the Conclusions of the European Council on the Area of Freedom, Security and Justice (AFSJ) at Tampere in 1999 the Union has recognised the significance of the external dimension to this policy field, highlighting the importance of partnership with countries of origin in developing a ‘comprehensive approach to migration’, the need to work with international organisations on asylum issues, the use of readmission agreements, and more generally that ‘all competences and instruments at the disposal of the Union, and in particular in external relations’ should be used in building the AFSJ. Since 1999 and the further discussion on the external aspects of the AFSJ by the European Council at Feira in June 2000, the Union’s activity in this field has both intensified and broadened to include not only migration, border management and asylum but all aspects of the AFSJ, ranging from counter-terrorism to civil procedure. Despite this, it is not possible to speak of a single ‘AFSJ external policy’; the scope of external action reflects the fragmentation of the subject matter and of course the development of external policy is affected by the cross-pillar nature of the AFSJ. As the Tampere conclusions themselves show, the AFSJ lacks an easily identifiable policy objective, although the introduction of the concept of an ‘Area’ suggests the aim of constructing a new ‘common policy domain’.¹ Indeed there are ways in which we can identify certain common elements in the approach to external AFSJ policy, in particular in managing the relationship between different actors (the Union, the Community and the Member States).

* A revised version of this paper will appear in Jörg Monar (ed.) xxx xxx

¹ 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*, Oxford University Press 2004, p.7.

This paper seeks to explore some of these distinctive elements; its purpose is not to discuss the EU's policy priorities or initiatives in the field, which will be done by other contributors,² but rather to set out some of the particular legal features of external AFSJ policy. First, and most fundamental, is to examine the basis for and the scope of external competence given that there is no explicit provision in the EC Treaty for external action in the field, and the implications of the fact that competence is therefore necessarily implied. Second, this paper will turn to the legal implications of the inter-pillar nature of the AFSJ: the consequences this has for the types of instrument available to the Union and the legal constraints imposed by the need to 'police' the boundary. And finally we will explore the relationship between Union / Community action and Member State action: the possibility of exclusive Community competence, the mechanisms developed to manage shared competence and the additional complexity created by the varying 'opt-outs' for some Member States.

At the time of writing the future of the Treaty of Lisbon is uncertain. There is no space in this paper to undertake a detailed examination of the putative effects of the Treaty of Lisbon on the external AFSJ, but since any debate about its future will necessarily involve thinking about the changes that have been negotiated and agreed at governmental level and which are at least still on the table, within each section I have included a brief comment on the Lisbon Treaty and the impact it would have.

I. The external AFSJ: objectives and powers

A. Defining external AFSJ objectives

We will start by considering the nature of the objectives of the external AFSJ in the light of its place both within the AFSJ as such, and within overall EU external policy. In what sense do we talk about an external dimension to the AFSJ? Is this essentially part of the AFSJ itself, thus having a primary function of helping to fulfil its (internal) objectives? Or is it to be seen rather as an AFSJ dimension to other external policies, helping to fulfil their objectives, including policies representing the political dimension to foreign policy such as the European Security Strategy, but also including development cooperation? Or is it, should it be, an EU external policy in its own right with its own distinctive objectives?

In practice the emphasis of the EU to date has been on presenting the external AFSJ as contributing to both the first and second of these three possibilities, with a certain ambiguity between the two, but resisting any idea that the external AFSJ has its own independent existence or set of objectives.

At Feira in June 2000 the European Council considered a report drawn up by the 'Council in close cooperation with Commission' on EU priorities and objectives for external relations in the field of Justice and Home Affairs.³ The report starts from the

² See also J. Monar, 'The EU as an international actor in the domain of justice and home affairs', (2004) 9 *EFA Rev.* 395; G. de Kerchove and A. Weyembergh (eds), *Securité et Justice: Enjeu de la Politique Exterieur de l'Union Européenne*, Brussels, editions ULB, 2003.

³ This report was mandated by the European Council at Tampere in October 1999; 'European Union Priorities and Objectives for External Relations in the Field of Justice and Home Affairs: Fulfilling The

position that 'external JHA action is not fundamentally different from other aspects of the Union's external policy' but goes on to stress its inherent function in internal terms: '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.'⁴ The emphasis here is on the link to internal policies and actions. However the second aspect is also clearly present; a Coreper note attached to the report refers to 'the Justice and Home Affairs dimension of external policies of the Union', and the 'need for the Union to integrate JHA matters fully in the Union's external policy'. The priorities established by the European Council in its Conclusions on this document also situate JHA within other external policies, such as enlargement, the Stabilisation and Association Process for the Western Balkans, the common strategies on Russia, Ukraine and the Mediterranean (now largely replaced by the European Neighbourhood Policy), and non-military aspects of crisis-management through policy cooperation. Given this dual focus of the external AFSJ, the Council recognised the need to develop specific priorities and proposed five criteria for action which are still of relevance⁵:

- The existence of internal policies or measures as the 'key parameter justifying the need for external action';
- Added value in relation to action by Member States;
- Contribution to the general political objectives of the Union's external policy (including 'the rule of law, controlling migratory movements and combating organised crime') which requires taking a global and not only a country-based approach;
- The possibility of achieving the established goals during a reasonable period of time;
- The possibility of longer-term action and commitment.

This contribution, in looking at the legal dimension of the external AFSJ, will focus on the first three of these five criteria as they are directly connected to the scope and nature of EU competence, although in practical terms both deliverability and commitment are important to the success of any policy.

The Hague Programme adopted in November 2004,⁶ included a section on External Relations: the European Council asked the Commission and SG/HR to prepare a specific Strategy on External Relations by the end of 2005, referring to the Feira guidelines. The Commission adopted a Communication on an external strategy for the AFSJ in October 2005,⁷ and the Strategy was adopted by the Council in December 2005.⁸ The Commission follows the approach suggested by the earlier policy

Tampere Remit', report of the Council submitted to the European Council, Feira June 2000, Council doc.7653/00, 6 June 2000; Conclusions of the European Council on European Union priorities and policy objectives for external relations in the field of justice and home affairs.

⁴ Council report, note 3 above, point A.1.

⁵ Ibid., point B.

⁶ European Council, Hague Programme, adopted Brussels Nov 2004.

⁷ Commission Communication on external strategy for AFSJ COM (2005) 491, Oct 2005.

⁸ 'A Strategy for the External Dimension of JHA : Global Freedom, Security and Justice', doc. 14366/3/05, REV 3; Council Conclusions December 2005.

statements. Its emphasis is on (i) achieving ASFJ objectives and (ii) achieving broader external policy objectives. The possibility of an independent foreign policy is rejected: 'The external dimension of the area of justice, freedom and security cannot be seen as an independent policy area but must be part of the EU's external policy activities.'

The Council agreed the Strategy in December 2005, stating that JHA has become 'a central priority' in EU external relations. It again emphasized the importance of the external dimension to achieve the aims of the AFSJ and the need for 'a coordinated and coherent approach'. The Council also stressed the strong links between JHA and other external policies, especially the CFSP, the ESDP and the European Security Strategy, and development cooperation policy, as well as supporting the EU's economic and trade objectives by helping to provide a political and legal environment conducive to economic development.⁹

In part, then, this is an internally-driven external policy, but maybe it would be better characterised as an example of the interdependence of the internal and external dimensions to a policy: 'The area of justice, freedom and security is a striking illustration of the positive cross-fertilisation between internal and external policies.'¹⁰

Although the institutions speak of the importance of the JHA dimension to their other external policies, in practice it seems more the case that other external policy fields (such as CFSP, ESDP, ENP, enlargement, even development) provide the institutional and policy context within which to develop external AFSJ policies which are primarily designed to achieve the overall AFSJ objective.

Having said this, defining overall AFSJ objectives is not so easy. As has been pointed out, unlike the internal market or the EMU 'there is no clearly defined overall project implicit in the very idea of AFSJ'.¹¹

The current Treaties bring together a number of disparate objectives and fields of action, including asylum and immigration, judicial cooperation in civil law, and police and judicial cooperation in criminal matters. A variety of AFSJ objectives (which has implications for external competence, as we shall see) the impetus for their development coming both from internally-defined goals such as establishing internal freedom of movement for persons, and also from external challenges, including terrorism and other perceived threats to the internal security of the Union.¹²

The Treaty of Lisbon would establish more explicit objectives for the AFSJ than those in the current Treaties, including the absence of internal border controls, a common policy on asylum, immigration and external borders, and a 'high level of security', with express references to solidarity between Member States, fairness towards third country

⁹ Two reports on progress following this Strategy have been adopted; see First progress report, Commission document SEC(2006)1498 of 16 November 2006, Council doc. 15001/06 and Doc. 15363/06; Second progress report, Commission document SEC (2008)1971 of 27 May 2008, Council doc. 9391/08 of 21 May 2008.

¹⁰ Commission progress report on implementation of external dimension of AFSJ, 20 November 2006, SEC(2006) 1498.

¹¹ N. Walker, note 1 above, p.5.

¹² See V. Mitsilegas, 'The External Dimension of EU Action in Criminal Matters' (2007) 12 EFA Rev 457.

nationals, access to justice and respect for fundamental rights.¹³ As with the current Treaties, however, there are multiple objectives all directed at aspects of the ‘internal’ area, and with no explicit external dimension. The Lisbon Treaty would also retain and even emphasise the way in which the AFSJ may be used in order to achieve the Union’s overall external objectives. Article 21 of the revised TEU, after setting out the general objectives of the Union’s external action (which include safeguarding the Union’s ‘values, fundamental interests, security independence and integrity’), provides that these objectives are to be pursued in the implementation not only of its external policy but also ‘of the external aspects of its other policies’.

B. Competence

Let us now turn to examine the consequences of this interdependence of internal and external objectives for the external AFSJ, and in particular its impact on the scope of external AFSJ competence.

The AFSJ finds its legal basis in the first and third pillars, while also having links to the second pillar (we will return to the inter-pillar nature of the external AFSJ later). Title VI TEU (pillar three), contains a provision granting treaty-making competence to the Union (Article 38 coupled with Article 24 TEU).¹⁴ However the first pillar dimension to the AFSJ, Title IV EC, has no such provision and external competence specific to the AFSJ, and in particular treaty-making powers, must therefore be implied. Implied competence is deeply connected to Treaty objectives.¹⁵ Let us start with the Court of Justice’s recent summary of the conditions under which competence may be implied, in a case involving the AFSJ:

‘The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions (see *ERTA*, paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/76, paragraph 3, and Opinion 2/91, paragraph 7).’¹⁶

From this perspective, the stress put by the institutions on ‘the existence of internal policies as the major parameter justifying external action’ can be appreciated as an important basis for external competence. The Court explains that there are two ways to establish implied external competence, both connected with what it calls the ‘internal system’ of the Community. The first depends on the existence of measures adopted by the Community institutions, whether or not adopted within the framework of a common

¹³ Article 67 of the Treaty on the Functioning of the European Union (TFEU).

¹⁴ In addition Art 37 TEU provides that Member States are to defend the common positions they adopt on the AFSJ within international organisations and conferences; the Presidency will represent the Union.

¹⁵ See further M Cremona, “Defining Competence In EU External Relations: Lessons from the Treaty Reform Process” in A. Dashwood and M. Maresceau (eds.) *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*, Cambridge University Press, 2008.

¹⁶ Opinion 1/2003 of 7 February 2006 on the Lugano Convention, para 114.

policy:¹⁷ the Community will have competence to conclude an international agreement where there is 'internal' or autonomous legislation adopted covering the matters dealt with in the international agreement, even if neither the Treaty provision on which it is based nor the legislation expressly provides for treaty-making powers. This basis for implied powers is founded on pre-emption, the occupation of the field by existing Community law (hence the equation in the *AETR* case, which first established this basis for implied powers, between the existence of the competence and its exclusive nature¹⁸). Examples of the exercise of this type of external competence in the AFSJ field, founded upon internal legislation, would include visa facilitation agreements and (potentially) aspects of asylum.¹⁹

The second basis for implied external competence is founded on the principle of *effet utile*, the implication of powers necessary to achieve an expressly-defined objective. Where a Community objective can be derived from the Treaty, for the attainment of which internal powers have been granted, these may be complemented by external powers. Thus, the objective of establishing an area of freedom, security and justice (Article 61 EC), together with the consequent power to adopt 'measures on immigration policy ... [including] illegal immigration and illegal residence, including repatriation of illegal residents' (Article 63(3)(b) EC) can be used as the implied basis for the conclusion of readmission agreements. Likewise, the power to adopt measures in the field of judicial cooperation in civil matters having cross-border implications (Article 65 EC) implies the power to enter into an international agreement on the jurisdiction and enforcement of judgments (the Lugano Convention).

As the above extract from *Opinion 1/2003* makes clear, implied powers of this type require, in addition to the existence of internal powers, the need (necessity) for EC external action legally as well as politically. If an international agreement is envisaged, it needs to be shown that neither autonomous EC action nor bilateral Member State action will fulfil the relevant objectives. We will return to this point later in the context of the 'value added' criterion, used to decide when the EU should act as opposed to the Member States.

So far we have discussed implied competence based on Title IV of the EC Treaty. Other sources of competence may also be used. That part of the AFSJ which falls within the Third Pillar possesses its own treaty-making powers (Article 38 coupled with Article 24 TEU) and these provisions have been used, for example, as the legal basis for the agreement between the EU and the USA on extradition and mutual legal assistance in criminal matters.²⁰ Insofar as the external AFSJ has as its objective the furtherance of other (EU and EC) external policy objectives, existing policy legal bases and instruments from both the EU and EC Treaties can be used, thus limiting the need for implied powers derived from Title IV EC. So, an AFSJ dimension can form part of the

¹⁷ Case 22/70 *Commission v Council (AETR)* [1971] ECR 263; *Opinion 2/91* [1993] ECR I-1061.

¹⁸ Case 22/70 *Commission v Council (AETR)* [1971] ECR 263. Indeed, if a treaty-making power is expressly provided for in the legislation, it may be that that power becomes exclusive: on this point see further Section III.A below.

¹⁹ See for example Council Decision 2007/827/EC on the conclusion of the Agreement between the EC and Moldova, OJ L 334, 19.12.2007, p. 168. Similar agreements have been concluded with Ukraine, Russia, Albania, Bosnia and Herzegovina, Montenegro, Serbia, the former Yugoslav Republic of Macedonia.

²⁰ See note 52 below.

Common Foreign and Security Policy (CFSP), development cooperation policy, association relationships, and even trade policy. These all have their own legal bases in the Treaties. Examples would include the use of the Generalised System of Preferences (a trade policy instrument) to encourage the adherence of developing countries to anti-corruption and drug prevention conventions;²¹ the counter-terrorism clause in the Cotonou Convention between the EU and developing countries in Africa, the Caribbean and the Pacific;²² and the provisions on Justice and Home Affairs in the Stabilisation and Association Agreements (SAAs) with the Western Balkan states.²³ This approach helps to ensure a level of coherence within these sectoral and regional external policies (e.g. JHA conditionality towards all GSP beneficiaries, or all Cotonou partners), but might also carry a danger of fragmentation for the external AFSJ as it is refracted through a range of other external policies, hence the strong emphasis on coherence and coordination in policy documents.²⁴

This picture of external competence demonstrates that there is in fact no single general 'external AFSJ competence', express or implied. Instead, a number of express competences (such as trade, development, association, the CFSP) may be used to further AFSJ objectives, and the possibility exists of implying external powers based on specific internal AFSJ powers and secondary legislation. External AFSJ competence thus essentially entails the possibility of using specific powers to achieve specific objectives (such as combating illegal immigration or terrorism) rather than serving some overall 'AFSJ objective', and the case for the external competence will always have to be made.

How would the Treaty of Lisbon affect this position? The Treaty does insert two elements of express external competence into the AFSJ provisions: first, the conclusion of readmission agreements under Art 79(3) TFEU and second, as part of the establishment of a 'common European asylum system', partnership and cooperation with third countries 'for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'. These two express provisions (which reflect existing practice) apart, the external AFSJ would remain a field of largely implied external competence; however the revised Treaty would render more transparent the existence of external powers in such cases by inserting an unequivocal statement of the existence of treaty-making competence even in cases where the Treaty does not expressly confer such powers.²⁵ The aim of this provision is to increase certainty, and –

²¹ Regulation 980/2005/EC OJ 2005 L 169/1.

²² Partnership Agreement between the Members of the ACP Group of the one part, and the European Community and its Member States of the other part, OJ L317/3, 15.12.2000; amended by Agreement in 2005, OJ L 209, 11.8.2005, p. 27.

²³ See for example Title VII of the EU-Croatia SAA, headed Justice and Home Affairs and including provisions on justice and rule of law cooperation, cooperation on visas, border control, asylum and migration, control of illegal immigration, readmission, and cooperation on money laundering, illicit drugs and criminal matters.

²⁴ See for example Commission Communication on external strategy for AFSJ COM (2005) 491, Oct 2005, pp.7 and 11. See also JHA External Relations Multi-Presidency Work Programme, 1 July 2008, Council doc. 10546/08, section I.C.

²⁵ Article 216(1) TFEU which 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

by setting out the conditions under which such powers arise – to achieve a clearer definition of competence. Difficulties emerge however in the attempt to reflect the case law on this issue – case law which is complex and sometimes obscure.²⁶

It is clear then that the Lisbon Treaty does not seek to transform the external AFSJ into an autonomous external policy. As now, the focus would be on using external powers to achieve (internal) AFSJ objectives and on integrating an AFSJ dimension into other external policies. In addition, despite the bringing together of the AFSJ provisions into one Title, a certain fragmentation of the policy into its constituent elements remains, evidenced by the differing levels of integration aimed at: a ‘common policy’ on asylum, visas and immigration; a ‘policy’ on external borders leading to an ‘integrated management system’; judicial and police ‘cooperation’; and the adoption of minimum rules for aspects of criminal procedure and the definition of certain criminal offences. These differences may be important when considering whether or not a specific external measure is necessary to achieve the Treaty-based objectives.

As now, external action may also be taken within the framework of the AFSJ (including the conclusion of an international agreement) which furthers *other* external policy objectives. Furthermore, the general objectives for external action which the Lisbon Treaty introduces are also intended to shape the external dimension of the AFSJ; they are to be pursued not only in the Union’s specifically external policies (such as the CFSP, trade and development) but also in the implementation of ‘the external aspects of its other policies’, including the AFSJ (Art 21(3) TEU). In summary, then, there appears in the Lisbon Treaty greater scope to develop wider objectives for the external AFSJ, or at least to take wider objectives into account. However, it is significant that this is still essentially an implied external power – it derives its rationale from the EU’s own AFSJ. There is every reason to expect that Union external action in this field will retain as its primary objective the building of an AFSJ for the Union itself, rather than – for example – seeking to extend security and justice (or freedom) to third countries.

C. Using the frameworks of existing relationships

In its Strategy on the External AFSJ of December 2005 the Council said that the mechanisms used should be ‘governed by the nature of the relationship of the EU to the country or region in question, and will evolve with time’. Indeed, the external AFSJ plays an increasingly important part in overarching geographically-based external policies such as the European Neighbourhood Policy (ENP) or the Stabilisation and Association Policy (SAP) towards the Western Balkans. The fact that implementation mechanisms are founded on the nature of relationship reflects the fact that the external AFSJ has as one of its two objectives the furtherance of other external policies. Thus rather than develop new autonomous ‘external AFSJ instruments’ the tendency will be to use instruments already available within those relationship structures and apply them to the AFSJ context. This is one reason for the very wide range of instruments used. The relationships referred to in the Strategy document include, in addition to the ENP and SAP, the strategic partnership with the USA, and the Common Space on Freedom

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.’

²⁶ For further discussion, see M. Cremona, *op.cit.* note 15.

Security and Justice with Russia.²⁷ Within this broader picture, specific policy initiatives within the AFSJ are targeted at specific relationships; for example, the targets for the EU's visa facilitation / readmission agreement strategy are identified as Russia, the ENP States, the Western Balkans and the candidate States. Pre-existing relationship structures also provide institutional frameworks, such as cooperation councils and committees, for discussion, the sharing of information and a platform for the promotion of EU priorities.

This feature of the external AFSJ is not only a matter of policy coherence or using existing structures. It also reflects the principles – of differentiation, conditionality and partnership – included among the underlying principles of the External AFSJ Strategy adopted in December 2005. As the EU's AFSJ strategy will take place within an existing framework of relations, the instruments used and level of cooperation or integration pursued will reflect these differences. So for example, the priority partners for judicial cooperation in civil matters are the Union's neighbours, especially current and potential candidates and the so-called 'Lugano states' (Switzerland, Norway and Iceland). According to the Council cooperation in this field

'should follow the general framework for the relations between the EU and a particular third country. Account should be taken of the existing level of cooperation, of the legal framework and of reciprocal interest in deepening cooperation in the field of judicial cooperation in civil matters. It should also be noted that, depending on the status of the country with respect to the European Union ... the objectives and the level of detail of such cooperation could vary significantly.'²⁸

A recent JHA external relations Multi-Presidency programme also emphasises this aspect of cooperation; differentiation (identification of the Union's partners' needs) is linked to conditionality, thereby 'striking a balance between EU's priorities and its partner's specificities'.²⁹ At the same time the Presidency argues that the principle of partnership 'means that the EU should seek greater involvement of its external partners in the drafting of agreements at all stages, with a view to ensuring full ownership.'³⁰

There is a further sense in which the Union uses existing frameworks of international cooperation to further its AFSJ objectives. A key aspect of its strategy across many dimensions of the AFSJ has been to participate in multilateral structures and to encourage the ratification and implementation of existing multilateral conventions, ranging from the International Criminal Court³¹ to the Hague Conference on Private International Law.³² Support for multilateralism is both one of the principles of EU

²⁷ It is notable that these policy frameworks have no specific Treaty legal base; thus for each instrument there is a need to find a legal base expressly elsewhere in the Treaty or via implied powers.

²⁸ Presidency Note, 'Aspects of judicial cooperation in civil matters in the framework of the Strategy for the External Dimension of JHA: Global freedom, Security and Justice', 11 April 2006, Council doc. 8140/06, paras 8-9.

²⁹ JHA External Relations Multi-Presidency Work Programme, drawn up by the French, Czech and Swedish Presidencies, 1 July 2008, Council Doc. 10546/08, p.3.

³⁰ *Ibid.*, p.4.

³¹ See Council Common Position 2003/444/CFSP of 16 June 2003 on the ICC, and Council Decision 2006/313/CFSP of 10 April 2006, concluding the cooperation and assistance Agreement between the European Union and the International Criminal Court, OJ 2006 L 115/49.

³² The EC acceded to the Hague Conference in April 2007: Council Decision 2006/719/EC on the accession of the Community to the Hague Conference on Private International Law OJ 2006 L 297/1.

foreign policy, including its Security Strategy, and an avenue for advancing its AFSJ objectives.

II. The inter-pillar nature of the external AFSJ

The second feature of the external AFSJ that we will examine is its inter-pillar nature, a feature that is inherent in the Treaty scheme rather than a deliberate policy choice, in the sense that the AFSJ covers both Title VI TEU (third pillar) and Title IV EC (first pillar), and may in addition be served by instruments adopted under the second pillar. We will here look at two aspects of this cross-pillar character of the external AFSJ: first, the use of a wide variety of instruments from all three pillars in developing the external AFSJ; and second, the boundary issues that inevitably arise and the legal principles that have been developed for resolving them.

A. A wide variety of instruments

In 2005, in its Strategy on the external dimension of the AFSJ, the Council argued that ‘The broad range of instruments at the EU’s disposal should be coordinated across the pillars (Community, CFSP, ESDP, JHA) to deliver a tailored and coherent response.’³³ Provisions on the AFSJ, and from which external powers may therefore be derived, are found both in Title VI of the TEU and Title IV of the EC Treaty; in addition, CFSP powers may be used to achieve AFSJ aims. The external AFSJ has at its disposal, therefore a wide variety of types of instrument: EC Regulations, Directives and Decisions, third pillar common positions, decisions and framework decisions; CFSP joint actions and common positions; and international agreements concluded by either (or both) the EC and the EU. Although, as we shall see, these instruments may be grouped together to form a broader policy towards a particular region or group of States, specific instruments must be linked to the treaty bases and objectives of the relevant pillar – so it is not possible to use an EC instrument to achieve CFSP objectives unless it can be shown that it also achieves an EC objective relevant to its legal base.³⁴ What follows is by no means a complete list of all external AFSJ activity or policy areas; it is merely intended to illustrate the variety of types of instrument used.

(i) The use of EC powers

As we have seen a variety of different express and implied legal bases may be used by the EC to conclude international agreements. These agreements may be entirely concerned with an aspect of the AFSJ (such as a readmission agreement³⁵) or there may be a chapter or a clause in an Association or other broader agreement such as the ‘JHA

³³ See ‘A Strategy for the External Dimension of JHA : Global Freedom, Security and Justice’, doc. 14366/3/05, REV 3, at para 9.

³⁴ T-315/01 *Kadi v Council and Commission*, judgment 21 September 2005, paras 117-120; Case C-91/05 *Commission v Council (SALW)*, judgment of 20 May 2008, paras 72 and 74.

³⁵ Based on Art 63(3)(b) EC. Agreements have been concluded inter alia with Albania, Russia, Ukraine, Sri Lanka, Macao, Hong Kong.

clauses' in the SAAs.³⁶ The EC may accede to a multilateral convention in the field such as the Palermo Convention,³⁷ and participate in international organisations involved in drafting conventions, such as the Hague Conference on Private International Law.³⁸

Some of the EC's international agreements may be designed to extend the Community *acquis* to selected third countries. For example, in 2007 the JHA Council adopted a decision approving an arrangement between the EC and Iceland and Norway on the modalities of those states' participation in the EU agency for cooperation at external borders (Frontex),³⁹ and negotiations are underway also with Switzerland and Liechtenstein.⁴⁰

In addition to EC agreements whereby third States participate in Frontex, the agency itself may conclude agreements with third countries. Frontex signed its first working arrangement with Russia in January 2006 enabling practical and operational cooperation on the common border, and an arrangement with Ukraine was agreed in June 2007.⁴¹

The institutional structures established under EC association and cooperation agreements provide a framework for further dialogue with partner countries. In some cases these institutions have decision-making powers, but they can also be used to adopt non-binding measures such as Action Plans.⁴² In addition, the EC (and EU) is increasingly involved with the UN and UN bodies, such as the UN Counter-Terrorism Committee, the '1267' Sanctions Committee, the UN Office on Drugs and Crime (UNODC); and cooperates with other organisations such as the OSCE, the Council of Europe and the Financial Action Task Force which produces recommendations on money laundering and terrorist financing.

Not all external action is carried out through international agreements or within international organisations. The EC may also use autonomous instruments, such as regulations and decisions, to create new bodies, to manage sectoral policies such as trade or visa policy, and to manage financial and technical assistance programmes. The Frontex agency was created by Regulation, and Regulations are also used for trade measures which may serve AFSJ objectives.⁴³ Thus, the Generalised System of

³⁶ For example, Articles 75-80 of the EU-Croatia SAA.

³⁷ The UN Convention against organised transnational crime OJ 2004 L 261/69.

³⁸ Council Decision 2006/719/EC on the accession of the Community to the Hague Conference on Private International Law OJ 2006 L 297/1; the Decision is based on Art 61(c) EC.

³⁹ Art 21(3) 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 2004, L349/1; Council Decision 2007/512/EC on the signing and provisional application of the Arrangement between the EC and Iceland and Norway on the participation by those States in Frontex, OJ 2007 L 188/17.

⁴⁰ See conclusions of the JHA Council, 18 April 2008.

⁴¹ The Frontex Regulation provides for such cooperation in Article 14.

⁴² For an example, see JHA Action Plan adopted by the EU-Ukraine Cooperation Council, OJ 2003 C 77/1.

⁴³ In its 'special incentive arrangement for sustainable development and good governance', the GSP Regulation 980/2005/EC grants additional trade preferences to those beneficiary States that can show they have ratified and effectively implemented a number of specific international conventions (Article 9 and Annex 3); those relevant to AFSJ include: The United Nations Single Convention on Narcotic Drugs (1961), United Nations Convention on Psychotropic Substances (1971), United Nations

Preferences is a trade instrument but may also be regarded as an anti-drug-trafficking and anti-corruption measure in its 'special incentive arrangement for sustainable development and good governance': additional trade preferences are granted to those beneficiary States that can show they have ratified and effectively implemented a number of specific international conventions.⁴⁴ Counter-terrorism measures include sanctions such as asset-freezing, frequently implementing UN Security Council resolutions. Sanctions against States are in the form of Regulations based on Articles 301 and 60 EC, sanctions against individuals need the additional legal base of Article 308 EC.⁴⁵ In both cases a Common Position adopted under Article 15 TEU is also required.

The EC's financial and technical assistance programmes are organised primarily in terms of the relationship the beneficiary countries have with the EU: thus there are regulations dealing with pre-accession assistance,⁴⁶ development cooperation,⁴⁷ and the European Neighbourhood and Partnership Instrument.⁴⁸ These all contain an AFSJ dimension: so, for example, the ENPI includes among its areas of cooperation

'supporting reform and strengthening capacity in the field of justice and home affairs, including issues such as asylum, migration and readmission, and the fight against, and prevention of, trafficking in human beings as well as terrorism and organised crime, including its financing, money laundering and tax fraud'.⁴⁹

The Stability Instrument also addresses security and justice issues in the context of assistance to third countries; it has as one of its aims 'to help build capacity both to address specific global and transregional threats having a destabilising effect', including 'strengthening the capacity of law enforcement and judicial and civil authorities involved in the fight against terrorism and organised crime, including illicit trafficking of people, drugs, firearms and explosive materials and in the effective control of illegal trade and transit'.⁵⁰

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), United Nations Convention against Corruption (Mexico).

⁴⁴ Regulation 980/2005/EC, Article 9 and Annex 3; those relevant to AFSJ include: The United Nations Single Convention on Narcotic Drugs (1961), United Nations Convention on Psychotropic Substances (1971), United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), United Nations Convention against Corruption (Mexico).

⁴⁵ T-315/01 *Kadi v Council and Commission*, judgment 21 September 2005, appeal pending.

⁴⁶ Regulation 1085/2006/EC establishing an Instrument for Pre-Accession Assistance (IPA) OJ 2006 L 210/82.

⁴⁷ Regulation 1905/2006/EC establishing a financing instrument for development cooperation OJ 2006 L 378/41. This regulation replaces a number of more specific regulations, including Regulation 491/2004/EC (Aeneas) on assistance relating to migration & asylum.

⁴⁸ Regulation 1638/2006/EC establishing a European Neighbourhood and Partnership Instrument (ENPI) OJ [2006] L310/1.

⁴⁹ *Ibid.*, Article 2(2)(r).

⁵⁰ Regulation 1717/2006/EC establishing an instrument for stability OJ [2006] L327/1, Articles 1(2)(b) and 4(1)(a).

(ii) The use of EU powers

Articles 24 and 38 TEU provide the legal base for international agreements within the third (and second) pillar, such as the agreement between the EU and the ICC on cooperation and assistance of 2006,⁵¹ and the EU-US agreements on extradition and mutual legal assistance.⁵² As with the EC, an international agreement may be used to extend the EU *acquis* to third countries; for example, by the agreement on mutual legal assistance certain provisions of the EU Convention on Mutual Assistance in Criminal Matters of 2000 will apply to Norway and Iceland.⁵³

Certain agencies created by third pillar powers in the AFSJ field have the power to make agreements themselves. Under Article 42 of the Europol Convention,⁵⁴ Europol may establish relations with third states and bodies; the Council authorises Europol to enter into negotiations with specific third countries and a number of agreements have been concluded, with candidate States, the USA and non-EU parties to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.⁵⁵ Eurojust may also enter into cooperation arrangements with third countries; unlike Europol, an initial Council mandate is not required, however the agreement once negotiated requires the approval of the Council.⁵⁶ Eurojust and the U.S. have concluded a cooperation agreement on judicial cooperation on criminal matters, complementing the EU-US agreement on mutual legal assistance,⁵⁷ and an agreement has been negotiated with Switzerland.⁵⁸

The Presidency represents the Union as far as Title VI matters are concerned, and may express the position of the Union in international organisations and international conferences.⁵⁹ Member States are under an obligation to coordinate their actions within international organisations and at international conferences and to defend the common

⁵¹ Council Decision 2006/313/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ 2006 L 115/49.

⁵² Council Decision 2003/516/EC of 6 June 2003 concerning the signature of the Agreements between the EU and the USA on extradition and mutual legal assistance in criminal matters OJ 2003 L/25.

⁵³ Council Decision 2004/79/EC of 17 December 2003, OJ 2004 L 26/1. On the EU Mutual Assistance Convention, see E. Denza, "The 2000 Convention on Mutual Assistance in Criminal Matters" (2003)40 CMLRev. 1047. Certain provisions of the Convention apply to Norway and Iceland under the terms of the Agreement of 18 May 1999 concluded by the Council with Iceland and Norway concerning the latter's association with the application, implementation and development of the Schengen *acquis*, OJ 1999 L 176/36. The 2004 agreement covers the other substantive provisions of the Convention; thus, by an agreement with the EU, two third countries agree to apply as between themselves and in their relations with EU Member States, certain provisions of a Convention concluded by the Member States under Article 34(2)(d) TEU.

⁵⁴ OJ 1995 C 316/1. A proposal is under discussion to replace the Convention as the legal base of Europol with a Council Decision based on Article 34(2)(c): COM/2006/0817 final.

⁵⁵ Council Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU related bodies OJ 2000 C 106/1; see further Council doc. 7153/04 of 8 March 2004.

⁵⁶ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust, OJ 2002 L 63 /1, Article 27(3).

⁵⁷ For the EU-US agreement on mutual legal assistance see note 52.

⁵⁸ See Council doc. 9345/08.

⁵⁹ Articles 18 and 37 TEU.

positions adopted under Title VI TEU.⁶⁰ The European Council at Feira in June 2000 emphasised the need for the EU consciously to develop common positions in international fora: 'Action in international fora should, as far as possible, be formalised in common positions, as provided for in Article 37 TEU, when the aim of negotiations is to adopt legal texts. Failing that, systematic prior coordination between Member States is essential.'

Instruments adopted under the second pillar (CFSP) as well as the third pillar itself may be relevant to the external AFSJ, such as common positions listing of members of terrorist organisations. For example Common Position 2001/931/CFSP on the application of specific measures to combat terrorism is based on both Art 15 TEU (CFSP) and Art 34 TEU (third pillar).⁶¹ Article 4 of this Common Position refers to the third pillar dimension and certain people and organisations listed in the Annex are subject only to Article 4.⁶² The ways in which CFSP and ESDP actions and instruments may achieve external AFSJ objectives is stressed in the Council's Strategy of 2005, including crisis management and police cooperation missions.⁶³

(iii) Cross-pillar approaches

The pressure to integrate policy and policy instruments across the pillar boundaries has encouraged the Union to develop specifically cross-pillar initiatives in order to bring together instruments from different pillars in a coherent policy framework. The European Council at Feira in 2000 was already stressing this aspect: JHA policy, it said, '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.' Although the TEU does contain provision for an instrument, the common strategy, which may be seen as a cross-pillar instrument, and the Feira European Council mentioned the possibility of adding a JHA dimension to common strategies, in practice the common strategy has been little used, and instead broader frameworks have been created within which different pillar-based instruments from the 'toolkit' may be combined and used to further common objectives.

Some of these frameworks are country or regionally-based, some are thematic. They include the Stabilisation and Association and Thessaloniki Process for the Western Balkans, the pre-accession process, the 'common space' on freedom, security and justice with Russia, and the European Neighbourhood Policy (ENP). The ENP for example, is a policy with a strong AFSJ dimension which implicates all three pillars; the Action Plans adopted within the ENP for each of the partner States consciously, as well

⁶⁰ Articles 19 and 37 TEU.

⁶¹ OJ 2001 L 344, p. 93.

⁶² Case C-355/04P *Segi v Council*, judgement of 27 February 2007, para 11.

⁶³ See 'A Strategy for the External Dimension of JHA', doc. 14366/3/05, REV 3, at para 6. Relevant actions include EUPM in Bosnia and Herzegovina; EUPOL COPPS in Palestine; EUJUST LEX, the police and rule of law mission in Iraq; and EUBAM for Ukraine and Moldova.

as the ENPI, cover all three pillars.⁶⁴ The ENPI demonstrates that these policy frameworks, while not based on ‘hard law’, nevertheless have a substantive content and impact: the Regulations locates the ‘overall policy framework’ for the assistance provided not only in the bilateral agreements that give a legal structure to the relationships, but also in ‘the relevant Commission communications and Council conclusions laying down guidelines for European Union policy towards these countries’, with the Action Plans providing ‘a key point of reference for setting Community assistance priorities’.⁶⁵

The increasingly common practice of developing EU strategies on specific themes has also been applied to AFSJ-related topics such as terrorism,⁶⁶ drugs⁶⁷ and organised crime.⁶⁸ In addition, the Council’s Strategy on the external dimension of JHA proposed the development of a number of Action Oriented Papers in order to enhance the coherence of EU external policy in specific areas.⁶⁹ These Papers are produced by the Presidency working with the Council Secretariat and the Commission, and according to the Strategy,

‘These papers should include: i) an analysis of the issue and the EU’s objectives, drawing on relevant information from the EU’s institutions (eg Commission, Europol, Eurojust, Sitcen, Frontex) and from the Member States; ii) a summary of current action being carried out by both the Commission and by Member States; and iii) identification of what needs to be done at the political, technical and operational levels in order to meet EU objectives.’⁷⁰

Several priority themes for these AOPs were identified; so far, Action Oriented Papers have been produced on improving cooperation on organised crime, corruption, illegal immigration and counter-terrorism between the EU and Western Balkans,⁷¹ on increasing EU support for combating drug production in and trafficking from Afghanistan,⁷² and on implementing the Common Space of Freedom, Security and Justice with Russia.⁷³ The idea of these AOPs is that they should not only give an overview of EU policy but also make concrete recommendations; according to the French, Czech and Swedish Multi-Presidency programme of July 2008, they remain

⁶⁴ For the JHA dimension of the ENPI see above at note 49. The ENPI thus contrasts with the Phare assistance programme (Council Regulation 3906/89/EEC on economic aid to certain countries of Central and Eastern Europe, OJ L 375, 23.12.1989, p. 11) which when originally adopted did not cover JHA matters; a political decision to use Phare also for this purpose was taken by the Essen European Council in December 1994.

⁶⁵ Regulation 1638/2006, Article 3(1).

⁶⁶ The EU Counter-Terrorism Strategy, doc. 14469/4/05 REV 4, was agreed by the European Council 15-16th December 2005.

⁶⁷ EU Drugs Strategy 2005-2012, doc. 15074/04.

⁶⁸ Commission Communication, ‘Developing a strategic concept on tackling organised crime’ COM(2005)232 final; Council Conclusions Setting the EU Priorities for the Fight Against Organised Crime, doc. 10181/06.

⁶⁹ A Strategy for the External Dimension of JHA, doc. 14366/3/05, REV 3, para 13.

⁷⁰ A Strategy for the External Dimension of JHA : Global Freedom, Security and Justice, doc. 14366/3/05, REV 3, at para 13.

⁷¹ See doc. 9272/06; for first progress report see doc. 15013/1/06 REV 1.

⁷² See doc. 9370/1/06.

⁷³ See doc. 15534/1/6.

relevant but are under-exploited. The trio presidency proposes to develop new AOPs on the eastern dimension of the ENP and on trafficking in human beings.⁷⁴

This trend towards the adoption of broad strategy documents is likely to continue;⁷⁵ we should note that although these instruments are able to adopt a cross-pillar approach, whenever concrete actions are proposed these require a specific legal base within the Treaties and we will now turn to the problems that may arise when attempting to decide on the appropriate legal base.

B. Boundary issues

The cross-pillar nature of the Area of Freedom, Security and Justice and the availability of instruments from all three pillars are bound to lead to questions of allocation and choice of legal base. As well as the political dimension of such choices, and the practical question of choosing the most appropriate instrument, there is a legal dimension. In the first place, EC (first pillar) competence is limited: the Community may not act beyond the express and implied competences granted by the Treaty (Article 5 EC). Although as an international organisation the EU (here distinguished from the EC and encompassing the second and third pillars) in principle acts only under conferred powers, these powers have been very broadly stated, at least externally.⁷⁶ However, EU powers are circumscribed both by the nature of the instruments that may be used and by Article 47 TEU under which it is provided that ‘nothing in this Treaty [the EU Treaty] shall affect the [EC] Treaties’.

The precise way in which this provision should be read is controversial. On one view, if it is possible to adopt a measure under EC competence, then this should be used; others would support a reading which allowed for some overlap between the EC and other two pillars where EC powers are not exclusive and where similar powers under different competences may be exercised for different objectives.⁷⁷ In the Court’s case law it is the first view which has prevailed. Applying its case law on legal base decisions within the EC Treaty to the inter-pillar context, the Court of Justice has held that the decision as to the appropriate legal base must take into account both its aim and its content. Ostensibly the choice should be based on objective factors, not simply the preference of the legislative institutions;⁷⁸ however the aim of a measure is generally derived primarily from its Preamble and the legislature is thus able to ensure that it reflects the scope of the chosen legal base. The Court holds that where it is possible, given the aim and content of a measure, to adopt it under Community powers then these should be used.⁷⁹ It has also held that where an instrument has multiple, equally important, objectives

⁷⁴ JHA External Relations Multi-Presidency Work Programme, drawn up by the French, Czech and Swedish Presidencies, 1 July 2008, Council doc. 10546/08, p.6.

⁷⁵ Under the Lisbon Treaty the European Council is explicitly given the task of adopting decisions setting strategic objectives: Article 22 TEU-Lisbon for external policy and Article 68 TFEU for AFSJ.

⁷⁶ The EU may act in ‘... all areas of foreign and security policy’ (Article 11(1) TEU).

⁷⁷ See for example A. Dashwood, ‘The Law and Practice of CFSP Joint Actions’ in M. Cremona and B. de Witte, *EU Foreign Relations Law – Constitutional Fundamentals*, Hart Publishing, 2008.

⁷⁸ See for example, Case C-94/03 *Commission v Council*, judgment 10 January 2006, para 34.

⁷⁹ In relation to the first/third pillar boundary, see Case C-176/03 *Commission v Council (environmental penalties)*, judgment of 13 September 2005, paras 38-40; in relation to the first/second pillar boundary, see Case C-91/05 *Commission v Council (SALW)*, judgment of 20 May 2008, paras 31-33 and 58-62.

falling under more than one pillar, Article 47 TEU precludes a joint EC/CFSP or EC/Third pillar legal base and requires preference to be given to the EC Treaty legal base.⁸⁰

The *PNR* case⁸¹ is a good example of the difficulty of allocating an international agreement to the correct legal base (and pillar), and of the consequences of getting it wrong. The Community signed the agreement with the US on the exchange of passenger data in air travel to and from the USA.⁸² The legal base chosen was Article 95 EC, on the ground that this was the legal base of the Community Directive on data protection, the requirements of which had to be fulfilled before Community carriers were entitled to transfer PNR data outside the Community. This reasoning broke down once it was decided by the Court, on a challenge from the European Parliament, that the agreement (and the Commission's decision as to the adequacy of US data protection mechanisms) fell outside the data protection Directive on the grounds that the Directive in Article 3(2) excludes from its scope 'activity outside the scope of Community law' such as Title V and VI TEU, public security, defence, State security and criminal law. Although the Directive provides in Article 25 for the possibility of international agreements, this particular agreement thus fell outside its scope. The Court did not suggest an alternative EC Treaty legal base, and its reasoning (including its assumption that the agreement would have to be terminated) suggested that the agreement fell outside the scope of Community law altogether and not merely of the Data Protection Directive and Article 95 EC.⁸³ Indeed, the EC agreement with the US was terminated as a result of the judgement, and a new agreement negotiated on the basis of Articles 24 and 38 TEU.⁸⁴

One of the key results of the Treaty of Lisbon as far as external policy is concerned would be the replacement of the current complex organisational structure encompassing the EC and the EU with a single structure, a single legal order and a single legal personality (albeit spread over two treaties): the European Union. This will both make it easier to project the Union's identity internationally and will simplify policy-making internally, although some issues relating to the relationship between the CFSP and other external policy fields remain. The two treaties are of equal legal value (Art 1 TEU-Lisbon, Art 1 TFEU) and throughout both they are referred to as 'the Treaties'. Thus it is clear that they are to be treated as an integrated whole. This is important for external policy as (unlike any other substantive policy field) the relevant provisions are split between the two Treaties. Indeed, the Treaties provide that the Union must ensure consistency and coherence between the different areas of its external action and between

⁸⁰ Case C-91/05 *Commission v Council (SALW)*, paras 76-77. In this, an inter-pillar legal base decision differs from a choice between two EC Treaty legal bases. Note that this ruling applies where the measure as a whole could be adopted under either the first or the second/third pillars. Where in contrast aspects of the measure (or international agreement) fall outside first pillar competence then two legal bases may be required, although in those few cases where this has occurred to date, two separate instruments have been adopted: see the conclusion of the Palermo Convention protocols at note 136 below.

⁸¹ Joined Cases C-317/04 and C-318/04 *European Parliament v Council*, judgment of 30 May 2006.

⁸² Council Decision 2004/496/EC, OJ 2004 L 183/83.

⁸³ For a full discussion see G. Gilmore and J.J. Rijpma, (2007) 44 *Common Market Law Review* 1081.

⁸⁴ Agreement between the EU and the USA on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security, OJ L 298, 27.10.2006, p. 29. A PNR agreement has also been negotiated with Australia: see Council doc. 9127/2/08.

these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, are to cooperate to that effect.⁸⁵

The removal of the pillars, alongside the single set of objectives for external action introduced by the Treaty of Lisbon, will certainly help to improve policy coherence. Although the provisions relating to AFSJ external action will still be found in several different places, we will no longer have special decision-making rules for the third pillar as it is integrated into the TFEU. As a result the kind of boundary issues between the third and first pillars that gave rise to the PNR case will disappear. However they will remain as far as the AFSJ/CFSP boundary is concerned, as the Treaty of Lisbon maintains 'specific rules and procedures' for the CFSP as well as a revised version of Article 47 TEU.⁸⁶ 'Security' is a common dimension in both the CFSP and the AFSJ, but in practice the fields of action covered by the AFSJ are fairly clearly defined and we are perhaps unlikely to see major disputes as to whether a particular measure falls under AFSJ or CFSP powers. However in two instances, parallel provisions might cause difficulties in deciding which would be the appropriate basis for action. The first, reflecting the PNR case mentioned above, is data protection. The Treaty of Lisbon would introduce a specific legal base for enacting data protection legislation (Article 16 TFEU); however a new CFSP provision is also introduced (Article 39 TEU-Lisbon) which would derogate from this general data protection provision in allowing the Council to establish rules applicable to the processing of personal data by the Member States when acting within the scope of the CFSP. An agreement on data protection with a third country may therefore fall in part or wholly within the CFSP, with consequences for the decision-making procedure to be followed.⁸⁷ The second potentially difficult area relates to individual sanctions. The Treaty of Lisbon would expressly include, for the first time, restrictive measures against individuals and groups within its provision on economic sanctions.⁸⁸ The current two-stage approach of CFSP decision followed by Community Regulation (Article 301 EC) will be retained although the names of the legal acts will be changed. In addition (and apparently as a replacement for Article 60 EC), an article on restrictive measures has been added to the AFSJ provisions (Article 75 TFEU) which relates to asset freezing in the context of 'preventing and combating terrorism and related activities' and which does not require a CFSP decision. Under this provision framework regulations are to be adopted by the ordinary legislative procedure (co-decision); implementation is then by Council act without European Parliamentary involvement. The relationship between the two provisions is unclear. The scope of Article 75 is more narrowly defined, as it relates to capital movements and payments whereas Article 215 merely refers to restrictive measures and so could be used for visa bans, for example. On the other hand, Article 215 is found among the external relations provisions of the TFEU, whereas Article 75 is placed within the AFSJ; so although neither provision is expressly limited in this way it could be argued that Article 215 is intended to be used against non-EU citizens, whereas measures against EU citizens

⁸⁵ Article 21(3) TEU-Lisbon.

⁸⁶ Article 40 TEU-Lisbon. Under this provision the CFSP 'shall not affect the application of the procedures and the extent of the powers of the institutions' in relation to other Union competences, but neither shall those other competences affect the CFSP.

⁸⁷ See Article 218 TFEU, which covers and establishes specific procedures for CFSP agreements.

⁸⁸ Article 215(2) TFEU.

should be based on Article 75. As we have seen, the issue of choice of legal base matters: a measure adopted under Article 75 TFEU which should have been adopted on the basis of Article 215 TFEU (which involves a CFSP decision) may be said to ‘affect’ the procedural and institutional balance contrary to Article 40 TEU (and vice versa). It will not always be easy to decide on the right legal base or even on the basis for distinguishing between the two.

III. Interaction with Member States

The third dimension of the external AFSJ that I want to explore briefly in this paper is a perennial one in external relations law: the relationship between Union and Community competence in this area on the one hand, and Member State powers on the other. When one looks at the external AFSJ, three aspects of this relationship are noticeable: first, the desire to maintain Member State competence and even substantive activity alongside that of the Community / Union; second, as a consequence, the attitude that the decision to act at Union / Community level should be a practical one based on the criterion of ‘value added’, rather than a purely legal competence issue; and third, the variable geometry caused by the Danish, British and Irish opt-outs to Title IV EC..

A. Attitudes to exclusivity

To what extent might the field of external AFSJ become an area of exclusive competence? Here again, of course, the distinction between pillars is important in legal terms although it is noticeable that under the EC Treaty as much as under the TEU the tendency is to maintain the possibility for Member States to act in the field – exclusivity is, at present, the exception.

Taking the EC Treaty first: exclusivity of external Community competence can be attributed *a priori*,⁸⁹ or arise by pre-emption in a number of ways (essentially, the Community ‘occupies the field’). In the external AFSJ as we have seen, instruments from other external policy fields may be used to fulfil AFSJ objectives and exclusivity will then depend on the nature of that policy field: trade policy, for example, is always exclusive (the GSP Regulation furthers AFSJ objectives in its good governance incentive scheme), whereas development cooperation is always a matter of shared competence.

External competence based on Title IV EC, on the other hand, is implied and may thus become exclusive where the exercise of Community powers has had a pre-emptive effect. This is expressed in terms of the possibility that an external agreement, if concluded by the Member State(s) would ‘affect’ Community rules. For this effect to take place, an actual conflict between rules is not necessary.⁹⁰ Rather, it must be shown that the agreement covers a field which is within the scope of common Community rules, or within an area which is already largely covered by such rules; its effect must

⁸⁹ For example, the common commercial policy, based on Article 133 EC.

⁹⁰ C-476/98, *Commission v. Germany (open skies)* [2002] ECR I-9855, para. 108; *Opinion 1/2003*, para. 129.

then be judged by examining the nature and content of both the terms of the agreement and of the Community measures.⁹¹ A close examination of the agreement and its potential effects will be necessary:

“... any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules.”⁹²

This quotation comes from *Opinion 1/2003*, in which the Court of Justice held that Community competence to conclude the Lugano Convention, based on Article 65 EC, was exclusive. The case is important for the Court’s clear statements of the context in which exclusive competence may arise and its emphasis on the rationale for exclusive competence, based on the need ‘to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law.’⁹³ However, it is also unusual: the Convention extends the regime of the ‘Brussels Regulation’ (Regulation 44/2001) on recognition and enforcement of judgments, which itself replaced the Brussels Convention, to the EFTA States. It is thus an area where Community legislation, in the form of the Brussels Regulation, provides a ‘unified and coherent system of rules on jurisdiction’ which would be affected by an ‘agreement also establishing a unified system of rules on conflict of jurisdiction’. This situation is still unusual in the field of AFSJ, and so we must be careful not to assume that AFSJ competence will be readily accepted as exclusive.

In some other areas when considering whether the field has been occupied we need to be careful how the field is defined. The Community has an implied competence to conclude readmission agreements on the basis of Article 63(3)(b) EC and has done so with a number of countries. This does not however mean that the Member States have lost their competence in this field.⁹⁴ The issue has been controversial, but the Commission now appears to accept the Council’s view that competence in the field of readmission agreements is generally shared. In May 1999 the Council considered this question and its corollary, the constraints imposed on the Member States in the exercise of their competence, based on the principle of loyal cooperation (Article 10 EC); it is worth quoting the Council’s Conclusions as an example of its approach to shared competence:

⁹¹ In some cases, the nature of the Community rules is such that any agreement will have an ‘effect’ on them: such is the case where they expressly provide for the treatment of third country nationals: *Opinion 1/94*, para. 95; *Opinion 2/92*, para. 33, C-476/98, *Commission v. Germany*, para. 109; or where a particular issue is completely harmonized: *Opinion 1/94*, para. 96; *Opinion 2/92*, para. 33, *Commission v Germany*, para. 110. In other cases, no such effect will be found, such as where both agreement and Community rules provide for minimum harmonisation: *Opinion 2/91*, para. 18; or where any distortions caused by a bilateral Member State agreement could be rectified by autonomous Community action: C-476/98, *Commission v. Germany*, paras. 111-112.

⁹² *Opinion 1/2003* at para. 124.

⁹³ *Opinion 1/2003*, para. 128.

⁹⁴ For a full discussion, see N. Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (EUI doctoral thesis, April 2007), citing Schieffer, Community readmission agreements with third countries – objectives, substance and current state of negotiations, in *Eur. J. of Migration and Law*, 2003, 343; Kuijper, *The Evolution of the Third Pillar from Maastricht to the European Constitution : Institutional Aspects* (2004) 41 CMLRev 609.

‘... The Community's responsibility with regard to the conclusion of readmission agreements is ... not exclusive. A Member State can continue to conclude readmission agreements with third States provided that the Community has not concluded an agreement with the third State concerned or has not concluded a mandate for negotiating such an agreement. In individual cases Member States may also conclude bilateral agreements after the conclusion of a Community agreement or after the opening of negotiations, for instance where the Community agreement or the negotiating mandate contains only general statements on readmission but one or more Member States require more detailed arrangements on the matter. The Member States may no longer conclude agreements if these might be detrimental to existing Community agreements.’⁹⁵

The current standard ‘readmission clause’ inserted into EU association and other agreements recognises this shared competence by providing (i) that upon request a readmission agreement will be concluded between the EC and the third country, and (ii) that pending the conclusion of such an agreement, bilateral agreements with individual Member States may be concluded. In practice, as Coleman has demonstrated,⁹⁶ the conditions set out in the Council Conclusions are not strictly applied, Member States in fact concluding bilateral readmission agreements after the decision to negotiate a Community agreement with that third State, or even after its conclusion. The readmission agreement concluded with Russia provides an interesting example of the dynamic of the relationship between Community and Member States in this field.⁹⁷ On the one hand, under Article 18(2) of the Agreement, the Community agreement is to take precedence over Member State agreements with Russia insofar as they cover issues dealt with by the Community Agreement. On the other hand, not only may existing Member State agreements continue in force, subject to this rule of precedence; under Article 20 implementing Protocols are to be concluded between Russia and individual Member States establishing the details of the procedures for readmission. The Community agreement thus takes on the character of a framework within which Member State agreements are to be concluded.

This example illustrates two points: first, that pre-emptive exclusivity may have to be ascertained on a case by case basis; and second, that a Community agreement may operate alongside and lay down parameters for existing and future bilateral Member State agreements. Let us look briefly at some more examples which illustrate different ways in which shared competence may be managed in the AFSJ field.

In the first example a Community Regulation, based on Article 62(2)(a) EC, establishes a regime for local border traffic which incorporates the possibility of bilateral agreements between Member States and third countries.⁹⁸ The EC Regulation states that Member States are authorised to conclude or maintain bilateral Agreements with neighbouring third countries in order to implement a local border traffic regime and establishes the parameters for such agreements. Article 13 spells out in some detail the Member States’ duties of information and consultation. In an area of shared competence

⁹⁵ Conclusions of JHA Council, 27-28 May 1999.

⁹⁶ N. Coleman, note 94 above, pp 237-246.

⁹⁷ Council Decision 2007/341/EC of 19 April 2007, 2007 OJ L 129/38.

⁹⁸ Regulation 1931/2006/EC laying down rules on local border traffic at the external land borders of the Member States, OJ 2006 L 405/1. The local border traffic regime operates as a derogation from the Schengen Borders Code (Regulation 562/2006/EC). Thanks to JJ Rijpma for this example.

the Community acts, not to exclude the Member States but to ensure that their bilateral agreements operate within a commonly agreed framework.

The approach adopted towards the negotiation of visa waiver agreements with the USA is also instructive. In early March 2008, just ahead of an EU-USA summit, the EU and its Member States agreed a common approach to take towards the USA in respect of its Visa Waiver Program (VWP) legislation and mutual visa waiver agreements.⁹⁹ It was agreed that aspects of the matter fell within EC competence, whereas other aspects were within the competence of Member States, and that therefore a twin-track approach would be adopted, the EU negotiating directly with the USA but with Member States also conducting their own bilateral negotiations. Alongside a Commission mandate to negotiate on matters within EU competence,¹⁰⁰ a detailed set of principles was agreed which would guide individual Member State negotiations, reaffirming both the extent of Community competence over visas and the Member States' loyalty obligation under Article 10 EC. These include, for example, the principle that as far as passenger record data is concerned, 'the recently signed EU-US PNR Agreement should suffice and no additional requirements should be added as compared with that Agreement'; any sharing of PNR data obtained from third countries should be consistent with that agreement.¹⁰¹ Thus an attempt is made to ensure that a Member State agreement does not compromise an existing Union agreement.

In the case of the VWP it is a priority for the EU to have all Member States participating as soon as possible so that visa-free travel to the USA is available for all EU citizens. In other circumstances the participation of all Member States may not be necessary; for example, shared competence in the field of migration policy has given birth to a new type of instrument, the Mobility Partnership, in which only some of the Member States may take part alongside the Community and a third State.¹⁰²

It is not only in the border control and migration context that different mechanisms such as these have been found for managing shared competence. In the field of judicial cooperation in civil matters multilateral conventions are important and the Community's accession to the Hague Conference on Private International Law in April 2007 will facilitate participation in the conventions negotiated within the Hague Conference.¹⁰³ However conventions concluded before EC accession provide only for State participation, and where they deal with matters now the subject of Community legislation it may be necessary to make provision for a uniform participation by

⁹⁹ Press release on US Visa Waiver Program legislation, Brussels, 5 March 2008, 7338/08 (Presse 66).

¹⁰⁰ The mandate for the Commission to negotiate with the USA on conditions for access for all Member States to the VWP was agreed by the JHA Council on 18 April 2008.

¹⁰¹ Press release on US Visa Waiver Program legislation, Brussels, 5 March 2008, 7338/08 (Presse 66). For the PNR agreement with the US, see OJ L 204, 4.8.2007, p. 16.

¹⁰² Mobility Partnerships are not intended to be legally binding; they establish goals and principles covering the facilitation of legal migration, in particular temporary and circular migration, management of migration flows and reduction of illegal migration. Two have so far been agreed, with Cape Verde and Moldova: Joint Declaration on a Mobility Partnership between the EU and Cape Verde, Joint Declaration on a Mobility Partnership between the EU and Moldova, 21 May 2008, Council doc. 9460/08.

¹⁰³ Council Decision 2006/719/EC on the accession of the Community to the Hague Conference on Private International Law, OJ 2006 L 297/1. Annexed to the accession document is a detailed declaration of Community competence.

Member States. So for example in 2003 the Community adopted a decision authorising the Member States ‘in the interest of the Community’ to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.¹⁰⁴ Aspects of this Convention fall within the scope of Community legislation,¹⁰⁵ while other aspects fall within Member State competence. A mixed agreement being impossible as the Convention was only open to States, the Community sought to ensure that all Member States should become parties, while requiring them to make a declaration at the time of signature to the effect that as regards those aspects of the Convention that deal with recognition and enforcement of judgments, and as between themselves, they would apply the relevant Community law.¹⁰⁶ More generally, the French-Czech-Swedish Multi-Presidency Programme adopted in July 2008 suggests strengthening cooperation with third countries on civil matters by means of ‘concrete measures, such as model agreements, providing better uniformity in Member States’ cooperation with third countries.’¹⁰⁷ The suggestion is even made that in fields covered by Community exclusive competence bilateral negotiations between Member States and third countries might be allowed where the Community ‘does not intend to exercise its exclusive external competence’.¹⁰⁸

So, in spite of the real possibility of exclusive competence flowing from the exercise of Community powers in the field, we have seen that shared competence remains the norm with Member States accepting that it makes sense to act collectively through the Community in many AFSJ fields but wary of ceding external competence completely. The emphasis is then on managing shared competence, and more particularly the continued practice of Member State bilateral treaty-making, a variety of mechanisms being used including: agreed negotiating positions, Regulations establishing the parameters for Member State agreements, Council Decisions authorising ratification of multilateral Conventions, non-binding arrangements with third countries involving some but not all Member States and (possibly) model agreements. In all these cases steps are taken to ensure compliance with Community law.

Similar questions are also raised within the third pillar. Third pillar EU competence is not exclusive. Although there is no explicit ‘loyalty clause’ in Title VI TEU as an equivalent to Article 10 EC, the Court of Justice has, in an internal context, implied an analogous duty of loyal cooperation¹⁰⁹ and there are strong grounds for applying this

¹⁰⁴ Council Decision 2003/93/EC, OJ 2003 L 48/1; see also Council Decision 2008/431/EC authorising those Member States who have not already done so to ratify or accede to the Convention, OJ 2008 L 151/36.

¹⁰⁵ In particular Regulation 1347/2000/EC on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children, OJ L 160, 30.6.2000, p. 19.

¹⁰⁶ Albeit in the form of a declaration, this is a form of ‘disconnection clause’ whereby Community law is applied between the Member States parties to a multilateral convention instead of the convention rules; see further M. Cremona, ‘Disconnection Clauses’ in C. Hillion and P. Koutrakos (eds) *Mixed Agreements Revisited*, Hart Publishing, forthcoming.

¹⁰⁷ JHA External Relations Multi-Presidency Work Programme, drawn up by the French, Czech and Swedish Presidencies, 1 July 2008, Council Doc. 10546/08, p.14.

¹⁰⁸ *Ibid.*

¹⁰⁹ Case C-105/03 *Maria Pupino*, judgment 16 June 2005, see especially para 42.

principle also in the external context. The practice here is fairly limited but a couple of interesting examples may be mentioned. First, the EU-US agreements on extradition and mutual assistance both specify that the agreement shall not preclude the conclusion of bilateral Agreements between a Member State and the USA consistent with the Agreement.¹¹⁰ In addition, both agreements contain detailed references to existing Member State bilateral agreements, and provide that specific clauses of the EU-US agreement will in some cases replace, in other cases be additional to, and in other cases apply only in the absence of, the equivalent clause in the existing bilateral agreements.¹¹¹ The existing Member State agreements are thus adjusted to the new EU agreement but that agreement does not replace them completely. Under Article 3(2) of both agreements,

‘The European Union, pursuant to the Treaty on European Union, shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application, in the manner set forth in this Article, of its bilateral extradition treaty in force with the United States of America.’

These ‘written instruments’ are between the Member States and the US, but the EU undertakes to ensure that it will take place ‘pursuant to’ the TEU. A discussion in the JHA Council in February 2008 reveals how slow and cumbersome this combination of EU and Member State agreements can be in practice. Despite the EU-US agreements being signed in June 2003, by February 2008 they had still not been formally concluded as they were waiting for the completion of the national procedures for concluding the bilateral agreements referred to in Article 3(2): in February 2008 eight agreements had not yet been ratified by national parliaments; the EU-US agreements would then be concluded by the Council pursuant to Article 24 TEU, but in the case of some Member States this too would require parliamentary approval before the agreement could enter into force.¹¹² The US Senate would need to ratify the two EU-US agreements plus two instruments for each Member State (56 agreements in total).

A second example is the cooperation and assistance agreement between the European Union and the International Criminal Court, concluded by the EU on the basis of Article 24 TEU.¹¹³ Under Article 2 of the Agreement, ‘European Union’ is defined specifically (somewhat unusually for either Community or Union international agreements) to include ‘the Council of the European Union ..., the Secretary General/High Representative and the General Secretariat of the Council, and the Commission of the European Communities.’ Crucially, ‘“EU” shall not mean the Member States in their own right.’ As a consequence requests from the Court for information originating in an

¹¹⁰ Council Decision 2003/516/EC of 6 June 2003 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters OJ L 181, 19.7.2003, p. 25, Art 18 of extradition agreement, Art 14 of mutual assistance agreement.

¹¹¹ Article 3(1) of both agreements. See further V. Mitsilegas ‘The New EU-US Co-operation on Extradition, Mutual Legal Assistance and the Exchange of Police Data’ (2003) 8 *European Foreign Affairs Review*.515.

¹¹² Under Article 24 TEU, ‘No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure’. The agreement may be applied provisionally by the other Member States.

¹¹³ Council Decision 2006/313/CFSP, OJ 2006 L 115/49. See also Council Common Position 2003/444/CFSP of 16 June 2003 on the ICC.

individual Member State are not covered by this agreement but must be made directly to the relevant Member State.¹¹⁴

Again we see an EU initiative which is not designed to replace Member State responsibilities or action in the field. This suggests that the AFSJ is developing an external dimension in its own right, in this sense: it is not merely taking over or replacing certain functions of the Member States but is creating a body of law and practice with an existence and rationale independent of the Member States' own, based on the rationale of the AFSJ itself. The external AFSJ may thus (unlike, say external trade policy) co-exist alongside the Member States' own policies on migration, security and criminal and civil justice. This being the case, principles are required to manage this shared competence, both to decide when it is appropriate for the Union / Community to act alongside the Member States, and to establish constraints on Member State action to ensure that the Union interest is not jeopardised. The latter aspect has been touched on above and discussed more fully elsewhere.¹¹⁵ In the next section we will briefly say something about the former.

This is not the place for a detailed discussion of the impact of the Treaty of Lisbon on the exclusivity of the Union's external powers.¹¹⁶ However we may note that the AFSJ is declared to be a field of shared competence; the Member States may thus continue to exercise their competence 'to the extent that the Union has not exercised its competence.'¹¹⁷ In doing so, they will also be bound by the principle of sincere cooperation established in Article 4(3) TEU-Lisbon. In addition, exclusive competence to conclude international agreements may arise under certain conditions, in particular '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.'¹¹⁸ The Treaty thus attempts to codify the existing position whereby shared external competences may become exclusive in a number of ways, including by pre-emption. However there may be limits to pre-emption in the field of AFSJ.

First, Art 72 TFEU says that '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.' Thus, external commitments via Europol, for example, will not pre-empt continuing Member States responsibility (and competence) in the field of policing generally.

Second, Article 79 TFEU, which provides for the establishment of a common immigration policy with the aim *inter alia* of ensuring the 'efficient management of migration flows', also specifies that this is not to 'affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries

¹¹⁴ Council Decision 2006/313/CFSP, Article 3(1).

¹¹⁵ See further M. Cremona, "Defending the Community Interest: the Duties of Cooperation and Compliance" in Cremona, M., and de Witte, B., *EU Foreign Relations Law – Constitutional Fundamentals*, Hart Publishing, 2008.

¹¹⁶ See further J Wouters, D Coppens and B De Meester, 'The European Union's External Relations after the Lisbon Treaty' in S Griller, J Ziller (eds.), *The Lisbon Treaty and the Future of European Constitutionalism*, ECSA Austria Publications, Vol. 11, Springer, 2008.

¹¹⁷ Article 2(2) TFEU.

¹¹⁸ Article 3(2) TFEU. For a discussion of this provision see M. Cremona, *op.cit.* at note 15.

to their territory in order to seek work, whether employed or self-employed'.¹¹⁹ A limit is thus set to the pre-emptive affect of Union agreements with third countries dealing with legal migration.

Third, Declaration 36 declares:

'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 IV of Part Three insofar as such agreements comply with Union law.'¹²⁰

The Member States may not, of course, derogate from the Treaty by means of a Declaration and it is hard to see how this Declaration is consistent with Article 3(2) TFEU – at least it has to be read subject to that provision and the definition of shared competence in Article 2 TFEU, in which case the Declaration does no more than restate that the AFSJ is a field of shared competence.¹²¹

As we have already seen, the effects of pre-emption may be limited in another way. A Union measure may itself specifically preserve the power of the Member States to maintain or conclude agreements in the field, or a Union framework may establish parameters within which the Member States may continue to exercise their competence. Further, under Art 73 TFEU,

'It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.'

This implies that not all cooperation in the field of AFSJ, including external AFSJ, has to take place within the Union framework, leaving scope for extra-Union cooperation, and perhaps also including third countries as long as this does not interfere with Union policy. It seems that the Lisbon Treaty is not likely to change the current approach with respect to the decision whether to take action at Union level; that is, an emphasis on 'value added' and managing shared competence, including EU initiatives which are not designed to replace Member State responsibilities or action in the field.

B. Value-added and shared competence

The criterion that has become accepted to determine whether the Union or the Member States should act is that of *added value*. At Feira this concept was rightly linked to subsidiarity, and indeed it might be said that added value is a version of subsidiarity which can be applied across the pillars, subsidiarity itself being found as an explicit principle only in the EC Treaty (Article 5 EC).

¹¹⁹ Article 79(5) TFEU.

¹²⁰ Title IV referred to here has become Title V TFEU. Chapters 3, 4 and 5 deal with judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation respectively; thus Chapter 2 (on immigration, borders and asylum policy) is excluded from this Declaration.

¹²¹ Compare Article 4(4) TFEU which provides that although development cooperation and humanitarian aid are matters of shared competence, 'the exercise of that competence shall not result in Member States being prevented from exercising theirs'. This provision, contained in the Treaty itself, modifies the normal operation of pre-emption in shared competence.

‘Subsidiarity requires that the Community or Union should intervene only if their action provides added value to bilateral action by Member States. The objective should ... focus on ... fostering effective cooperation in those areas in which Union intervention represents genuine added value.’¹²²

This approach is still current,¹²³ although added value can work in both directions (just as subsidiarity can). The Commission has, for example, emphasised the ‘commitment, expertise and added value’ of the *Member States* in the context of operational cooperation.¹²⁴

The added value criterion is used in the field of readmission agreements, in deciding which third countries should be included on the list for which the Commission is to be given a negotiating mandate.¹²⁵ The concept of added value in readmission agreements is discussed by Coleman who – in identifying the ostensible reasons why the EU has decided to develop a Community readmission policy – puts emphasis on the greater negotiating weight and leverage of the Community as opposed to individual Member States. There are signs that this perception is changing. Readmission is regarded as part of migration policy more generally, and in bargaining with third countries the Community increasingly links the conclusion of a readmission agreement with the reciprocal conclusion of a visa facilitation agreement.¹²⁶ However in this bargaining the Community at present – unlike the Member States – cannot offer as a *quid pro quo* alongside visa facilitation, the establishment of a legal migration quota system, as this has been kept firmly in the control of the Member States. The added value of a Community agreement (certainly from the perspective of the third country) is less obvious. Significantly, then, the European Council, in its Conclusions of 14 and 15 December 2006, agreed that ‘while respecting the competences of Member States in this area, consideration will be given to how legal migration opportunities can be incorporated into the Union’s external policies in order to develop a balanced partnership with third countries adapted to specific EU Member States’ labour market needs’. The Mobility Partnerships referred to above are an example of this new approach and it is significant that they include interested Member States as parties.¹²⁷ Here we can see the ‘added value’ of action at the Community level being combined with the ‘added value’ of including the Member States alongside the Community in a flexible arrangement; whether the result will prove to offer anything of significant value to the EU’s partners is another matter.

¹²² European Council Conclusions, Feira, June 2000.

¹²³ It is used in the Council’s second progress report on the implementation of the strategy for the External Dimension of JHA, 21 May 2008, Council doc. 9391/08.

¹²⁴ Commission Progress Report on the implementation of the Strategy for the External Dimension of JHA, 20 November 2006, SEC(2006) 1498; see also the Commission’s second Progress Report, 27 May 2008, SEC(2008)1971.

¹²⁵ Council Conclusions on criteria for the identification of third countries with which new readmission agreements need to be negotiated, Council Doc 7990/02, adopted by JHA Council 25-6 April 2002.

¹²⁶ For example in the case of Russia, Ukraine and the Western Balkans.

¹²⁷ See note 102 above.

C. Variable geometry

The British, Irish and Danish opt-outs from Title IV EC add an additional element of complexity to EC – Member State relations in this area. To take the Frontex Regulation¹²⁸ as an example, that Regulation does not bind the UK or Ireland, as they do not participate in measures which are regarded as a development of the Schengen *acquis*.¹²⁹ The Regulation does not bind Denmark as such either; however following Article 5 of the Danish Protocol Denmark should decide within six months whether to implement the Regulation in its own national law; and if so, it would create an obligation *in international law* between Denmark and the other Member States (excepting UK and Ireland), in contrast to its direct applicability in Community law within the legal systems of those other Member States. Where the UK and /or Ireland are able and willing to opt in to a measure, however, that measure will apply to them in the same way as to the other Member States under Title IV. A further complexity is added by the fact that in the case of measures developing the Schengen *acquis*, such as Frontex, arrangements are made to include the EFTA States by way of international agreement.¹³⁰

The Danish opt-out means that Denmark will never be bound by Community readmission agreements. As far as UK and Ireland are concerned, however, a choice can be made and may well be exercised in different ways. In the case of the EC-Albania readmission agreement for example, the UK and Ireland did not participate in the Council's concluding decision and are therefore not bound by it;¹³¹ whereas in contrast, the UK has apparently chosen to participate in the EC-Ukraine Readmission Agreement, while Ireland has not.¹³² Community readmission agreements may thus bind different configurations of the Member States.

The revised Lugano Convention also offers an example of how these variable geometries work in legal terms. When the Brussels I Regulation was adopted, based on Title IV EC, the UK and Ireland opted in and are covered in the normal way by the Regulation. Denmark was not covered and the Brussels I Convention continued to apply between Denmark and the other Member States who were bound by the new

¹²⁸ 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 2004, L349/1.

¹²⁹ This view of the Frontex Regulation was (unsuccessfully) challenged by the UK in Case C-77/05 *UK v Council*, judgment of 18 December 2007; see further JJ Rijpma, (2008) 45 Common Market Law Rev. 835

¹³⁰ For Frontex, see Art 21(3) of the Frontex Regulation, and Council Decision 2007/512/EC on the signing, on behalf of the Community, and on the provisional application of the Arrangement between the European Community and the Republic of Iceland and the Kingdom of Norway 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, OJ 2007 L 188/17. A negotiating mandate has also been agreed for an agreement with Switzerland and Liechtenstein: see conclusions of the JHA Council, 18 April 2008. The Regulation on local border traffic (see note 98 above) provides another illustration of how complex the system of opt-outs, opt-ins and third country associations has become.

¹³¹ Council Decision 2005/809/EC concerning the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons, OJ 2005 L 304/14. Community agreements are normally binding on the Member States by virtue of Article 300(7) EC.

¹³² Council Decision 2007/839/EC concerning the conclusion of the Agreement between the European Community and Ukraine on readmission of persons, OJ 2007 L 332/46..

Regulation. In 2005, Denmark concluded a separate agreement with the Community with the aim of applying the Regulation in Denmark.¹³³ Denmark is thus not bound by the exclusive competence of the Community to conclude the revised Lugano Convention, as determined by the Court of Justice in *Opinion 1/2003*; instead, it concluded the Convention in its own right as a separate party, and rather than being bound *qua* EC Member State via Article 300(7) EC it is therefore bound in international law.¹³⁴ This approach carries risks: what if Denmark had either refused to conclude Lugano II, or were to negotiate an agreement on its own account with another third country? Would this be a breach of Art 10 EC? The Agreement with Denmark does attempt to answer the second question in Article 5 by providing for prior consultation and agreement with the Community before Denmark concludes any agreement with a third country which ‘may affect’ the Brussels Regulation. Instead of exclusive competence pre-empting Member State action, in this case Denmark is circumscribed in its actions by its Community law (Article 10 EC) obligations and its commitments under its agreement with the EC. In spite of the reasoning of the Court in *Opinion 1/2003* based on the unity of the Community legal order, that unity is already breached by this differential legal basis for the application of the agreement, although one should add that the aim of all parties is that the Brussels Regulation and Lugano Convention should apply equally in all Member States.¹³⁵

The UN Convention against Transnational Organised Crime (Palermo Convention) also provides a good example of the legal stratagems needed to deal with these variable geometries, as well as with the multi-pillar structure of the Union. Two of the Convention Protocols, on trafficking of persons and on smuggling of migrants respectively, have been concluded by the Community by means of two separate Council Decisions each. The first decision is based on Articles 179 and 181a EC (development cooperation and cooperation with third countries),¹³⁶ the second is based on Title IV of the EC Treaty.¹³⁷ In the latter case, the Decision states in recital 5 that ‘the UK and

¹³³ Council Decision 2005/790/EC on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 2005 L 299/61.

¹³⁴ Thus on the one hand the Council Decision on the signing *by the EC* of the Lugano II Convention does not bind Denmark, while on the other hand the other signatories to this Convention are Iceland, Norway, Switzerland and Denmark.: see recitals 7 and 9 of the Decision approving the signing of the convention.: Council Decision 2007/712/EC, OJ 2007,L 339/1.

¹³⁵ According to Article 1(2) of the agreement with Denmark (see note 133 above), ‘It is the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Brussels I Regulation and its implementing measures in all Member States’.

¹³⁶ Council Decision 2006/616/EC on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the EC Treaty OJ 2006 L 262/24; Council Decision 2006/618/EC on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the EC Treaty OJ 2006 L 262/44.

¹³⁷ Council Decision 2006/617/EC on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the EC Treaty, OJ 2006 L 262/34; Council Decision 2006/619/EC on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, in so far as

Ireland are not bound by this Decision to the extent that it concerns the exercise of an external power by the Community in fields where its internal legislation does not bind the UK and/or Ireland.’ Denmark is similarly not bound. Declarations of Competence outline the scope of EC competence, but since the same Declaration is annexed to both the Decisions in respect of each Protocol, the precise division between those matters based on Articles 179 and 181a EC and those matters governed by Title IV EC is left unspecified. Denmark and the UK have both ratified both Protocols, Ireland has signed both but not ratified either;¹³⁸ With respect to those elements of the Protocols falling within Title IV, therefore, most Member States are bound by virtue of their EC obligations under Article 300(7) EC insofar as the Protocols fall within Community competence,¹³⁹ Denmark and the UK are bound by virtue of the international obligation they have undertaken in their own right, and Ireland is not (yet) bound. A third Protocol to the UN Convention, on illicit manufacturing and trafficking of firearms, did not raise issues for the UK, Ireland and Denmark, but did require cross-pillar measures, since Member State competence in relation to the security aspects of trade in firearms is protected by Article 296 EC. Thus, while the Protocol was signed by the Community in respect of certain provisions only,¹⁴⁰ the Council also adopted a Common Position under the Third Pillar agreeing a common approach to certain issues within the negotiations, such as the definition of a firearm.¹⁴¹

As these examples show, the opt-outs from Title IV and the inter-pillar nature of the AFSJ affect external activity and instruments as well as its internal configuration. In particular, third States need to be aware that a ‘Community agreement’ may bind different Member States in different ways, or not at all.

Conclusion

Without seeking either to summarise or to assess in normative or efficiency terms the EU’s external policy in the AFSJ field, this paper has attempted to map out aspects of the legal context in which that policy is being developed. We have seen that although an explicit EU treaty-making power exists for the third pillar dimension of the JHA, EC

the provisions of the Protocol fall within the scope of Part III, Title IV of the EC Treaty OJ 2006 L 262/51.

¹³⁸ As of 13 August 2008.

¹³⁹ Among other consequences, this will mean that compliance is a matter not just of international but also of Community law: see *inter alia* case C-239/03 *Commission v France (Étang de Berre)*, judgment 7 October 2004.

¹⁴⁰ According to the Commission’s proposal to sign the Protocol, those concerning the marking of firearms, record-keeping, import, export and transit licensing, border controls, brokers, and deactivation of firearms (COM(2001)397). The legal base is Article 95 and 133 EC. Council Decision 2001/748/EC of 16 October 2001 concerning the signing on behalf of the European Community of the United Nations Protocol on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition, annexed to the Convention against transnational organised crime OJ L 280, 24.10.2001, p. 5.

¹⁴¹ Council Common Position 2000/130/JHA of 31 January 2000 on the proposed protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organised crime OJ L 37, 12.2.2000, p. 1.

competence in the field must be derived from the doctrine of implied powers, together with the use of express external relations powers drawn from other policy fields. It is not surprising, therefore, that the objectives of the external AFSJ have two dimensions: to support the fulfilment of the 'internal' AFSJ, and to contribute to the EU's more general foreign policy goals, such as those of development policy, enlargement, the European Neighbourhood Policy, or those set out in the European Security Strategy. As a result of this interdependence between the internal and external AFSJ, and between the external AFSJ and other external policies, it is difficult to identify either an independent 'external AFSJ' objective or indeed a single external policy. We have also seen that the external AFSJ is inherently, under the current Treaty arrangement, an inter-pillar policy. This carries with it not only the possibility of using a wide range of instruments, formal and informal, but also the need to ensure both compliance with the priority at present accorded by the Treaties to the Community system and coherence across the policy field. Despite the undoubted level of activity, the picture appears fragmented and overall coherence a difficult goal. In fact, the goal of coherence is itself multi-dimensional: between the external and internal dimensions of the AFSJ; between the AFSJ and other external Community and Union policies; and between 'freedom', 'security' and 'justice' as complementary aspects of this complex external policy.¹⁴²

Nevertheless, when we examine what appears to be another reason for fragmentation – the fact that EU and EC competence in the field is shared with the Member States, we see a different picture emerge. The Union institutions and the Member States have found a variety of flexible solutions, combining continuing Member State involvement with a unified policy framework. This approach has its disadvantages of course; it can be cumbersome; the need – in the absence of an off-the-peg solution – to work out the precise modalities of Union / Community / Member State action in each case takes time and effort; the Member States may be more or less willing to follow a Union-set policy direction; and care (and even vigilance) is needed to ensure that the Community *acquis* is protected and constitutional principles observed. But the result is that in this respect the Union is developing an autonomous external policy in the AFSJ field; it is a policy which does not replace that of the Member States, but rather operates alongside theirs, in order to achieve objectives which are defined in Union terms. It is in this respect that the external AFSJ offers an interesting perspective on the possible future development of EU foreign policy.

¹⁴² Among the considerable literature on these issues, see M. Anderson and J. Apap, *Striking a Balance between Freedom, Security and Justice*, CEPS, 2002; N. Walker, *op.cit.* note 1, pp.5-10.