The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty

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A. Introduction

Today, the internal and external aspects of the Area of Freedom, Security and Justice (AFSJ) are directly related. Even though the internal dimension constitutes the foremost manifestation of the AFSJ, it is sometimes overlooked that this area has also a significant external component. Indeed, most of the measures adopted within this sphere have implications for the nationals of other States. The ten priorities contained in the Hague Programme, adopted by the European Council on 4 & 5 December 2004, refer to the need to complement the internal dimension with external action.[1]

Furthermore, in recent years the EU has concluded a series of international treaties with third countries that have a direct bearing on the AFSJ, and has taken an active part in international conferences and organisations which have a significant impact on this matter. Given the ever greater importance of what we might refer as the external dimension of the AFSJ, it should come as no surprise that the EU institutions have recently set themselves the goal of defining a coherent strategy in this field. In October 2005, the Commission proposed an initiative to organize the different instruments of the external dimension of justice and home affairs around clearly defined principles.[2] In December 2005, the Council of Ministers adopted this proposal, confirming the underlying principles

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1 In the Hague Programme, the European Council reaffirms the priority attached to the development of an AFSJ, identifying ten areas for priority action within the next five years (European Council, Hague Programme on *Strengthening Freedom, Security and Justice in the European Union*, 4-5 December 2004).

2 Communication from the Commission: a strategy on the external dimension of the area of

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of the Commission's strategy, which involves partnership with third countries, albeit with a differentiated approach to individual third countries and regions.[3] This strategy affects such wide-ranging fields as human rights, strengthening institutions and good governance, migration, asylum and border management, and the fight against terrorism and organized crime.

Given the growing importance that the external dimension of the AFSJ is acquiring, it should perhaps have received greater attention in the Lisbon Treaty. Only two express references to the external dimension of the AFSJ can be found in the Treaty on the Functioning of the Union (TFEU). Within the context of the common European asylum system, Article 78(2)(g) TFEU declares that special attention should be paid to cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. Also, Article 70(3) TFEU clearly states that the EU may conclude agreements with third countries for the readmission of illegal immigrants into their country of origin or provenance. It seems that the Member States do not consider it necessary to explicitly regulate the external dimension of the AFSJ.[4] Nonetheless, one should not underestimate the impact the significant changes introduced by the Lisbon Treaty may have on the external dimension of the AFSJ. In the light of these considerations, it would be interesting to conduct an analysis of those amendments introduced by the Lisbon Treaty which may have a bearing on the external dimension of the AFSJ, as this is a sphere in which the EU and its Members States will clearly intensify their activities over the coming years.

In this article it will be shown that the Treaty of Lisbon creates a legal framework in which the European institutions can adopt legal instruments and operative actions that respond efficiently to the challenges that affect the external dimension of the AFSJ, without infringing upon the protection of human rights and the respect for democratic values. However, the sum of exceptions and derogations to the new regime of the AFSJ may hinder the chances of progress provided by the EU's new structure as regards the external projection of the AFSJ.

This article is organized in three parts. The first part provides a brief overview of some of the EU's main actions in the external dimension of the AFSJ and the second part will examine the most relevant amendments introduced in the AFSJ by the Lisbon Treaty. There will be an analysis of the extent to which the new

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freedom, security and justice, COM (2005) 491 final, 12.10.2005. The mandate to develop this strategy was included in the Hague Programme.

3 Council doc. 14366/05, 6.12.2005.

4 In a Document submitted to the Feira European Council, it is stated that:

> 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. The JHA dimension should form part of the Union's overall strategy. It should be incorporated into the Union's external policy on the basis of a "cross-pillar" approach and "cross-pillar" measures

Priorities and objectives of the European Union for external relations in the field of Justice and Home Affairs, Conclusions of European Council, 19 and 20 June 2000.

institutional and legal framework introduced by the Lisbon Treaty might help to improve the EU's external dimension of the AFSJ. Finally, the last part will focus on the impact of the considerable number of exceptions and derogations to the general rules on the future development of the external action of the AFSJ.

B. An Overview of the AFSJ External Projection

A brief overview of the EU's actions in the external dimension of AFSJ reveals that in the ever present dialectic of *freedom vs. security*, the latter has clearly prevailed over the former in recent years. Given the limited extent of this article, it is not possible to examine all the instruments covering the external aspects of the EU's policies on freedom, justice and security that are in place. However, it seems appropriate to highlight the key features of the external dimension of EU immigration policy, cooperation on criminal matters with third countries and the implementation of the Security Council's anti-terrorism resolutions in the EU. The increasing importance of EU activity within these fields justifies this selection. In no way does this article intend to present a detailed examination of each one of these highly complex issues, but this brief introduction will highlight some of the main themes involving the external dimension of the AFSJ**.**

I. The External Dimension of the Immigration Policy

A European immigration policy worthy of that name requires the supplementation of the internal regulatory action with a suitable deployment of legal instruments in the relations with third countries. Although as yet still modest, the Union's involvement in this field will be crucial in the future, given its greater capacity for negotiation and mobilization of resources to seek the cooperation of the countries of origin or transit of those migrants who attempt to gain illegal entry into the territory of Member States.[5] However, the adoption and subsequent application of this policy is proving to be highly complex, as is revealed by the negotiation of agreements with third countries for the readmission agreements of illegal migrants. Since the entry into force of the Treaty of Amsterdam on 1 May 1999, the Council of Ministers authorized the Commission to negotiate Community readmission agreements with sixteen countries. By the middle of 2007, only five of these sixteen mandates have resulted in signed readmission agreements.[6] The third countries in question have sought to delay as long as possible the start of negotiations, as well as the signing and entry into force of these agreements. Although readmission agreements are not considered separately in the management of migratory flows by the EU, but rather form part of a broader approach that

[5] *See* Communication of the Commission on priorities in the matter of the fight against illegal immigration, of 19 July 2006, COM (2006) 402 final.

[6] The readmission agreement with the Hong Kong Special Administrative region and with Macao entered into force on 1 May 2004, with Sri Lanka on 1 May 2005, with Albania on 1 May 2006 and with Russia on 1 July 2007. As will be shown later, other readmission agreements have also been signed in recent months.

includes cooperation for development with third countries and tackling the root causes of migration, third countries do not appear to be particularly interested in concluding agreements of this kind.[7] This is due mainly to the fact that the EU requires not only the readmission of nationals of the third country, but also those non-nationals who transited through the territory of one of the parties en route to the other.

Despite the fact they are concluded on the basis of reciprocity, the readmission agreements are designed to stop the massive influx of illegal immigrants into the EU.[8] Third countries look upon these agreements as a measure imposed by the EU, as the burden of their implementation will fall upon their shoulders. Practice tells us that the success of negotiations on agreements of this kind will depend on the incentives that the EU is able to offer to third countries, with some of the more salient ones being visa facilitation regimes and the perspective of joining the EU in the future.[9] In view of this, in 2007 the EU has managed to sign readmission agreements with Serbia, Bosnia and Herzegovina, Montenegro, the Former Yugoslav Republic of Macedonia, Moldova and the Ukraine.[10]

These agreements join the five mentioned above, but as the EU is not in a position to offer these incentives to the majority of third countries, negotiations often either become bogged down or even fail to start in the first place.[11] Furthermore, one cannot ignore the fact that if the readmission agreements are not accompanied by the necessary guarantees in terms of human rights and the principle of *non-refoulement*, they may turn the EU into an accomplice in forced returns and human rights violations. Unfortunately, this is not the only sphere in which the attempt to make third countries act as a kind of *cordon sanitaire*, protecting the Union from massive migratory flows, poses a serious risk for the safeguarding of human rights. A good example of this can be seen in the Regional Protection Programmes, proposed by the Commission in 2005 with the aim to enhance the protection capacity of the countries of origin and transit of refugees and asylum seekers.[12]

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7 A. Roig & T. Huddleston, *EC Readmission Agreements: A Re-evaluation of the Political Impasse*, 9 European Journal of Migration and Law 363, at 373, 378 (2007).

8 *See* M. Schieffer, *Community Readmission Agreements with Third Countries-Objectives, Substance and Current State of Negotiations*, 5 European Journal of Migration and Law 343 (2003).

9 In the context of formal national readmission negotiations, some Member States are sometimes prepared to offer incentives to third countries when they agree to readmit both own and third country nationals (Communication from the Commission, Study on the links between legal and illegal migration, COM (2004) 412, 4.6.2004, at 14).

10 Whereas only the Former Yugoslav Republic of Macedonia is currently a candidate to join the EU, the others are potential EU candidate countries.

11 *See* Schieffer, *supra* note 8.

12 Commission Communication to the Council and the European Parliament of 1 September 2005 on regional protection programmes, COM (2005) 388 final, 1.9.2005. *See* A. Baldaccini, *The External Dimension of the EU's Asylum and Immigration Policies: Old Concerns and New Approaches*, *in* A. Baldaccini, E. Guild & H. Toner (Eds.), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy 277 (2007).

II. The External Cooperation in Criminal Matters

The need for a comprehensive approach to combat international crime, and especially the terrorist threat, which exploits the discrepancies existing between sovereign states, has been the driving force behind international cooperation in the area of justice and home affairs. Among the international agreements signed by the EU in this field are the Agreements on extradition and mutual legal assistance between the European Union and the United States of America,[13] which seek to fine-tune existing bilateral relations between the EU Member States and the US in terms of judicial cooperation.[14] The negotiations preceding these agreements were shrouded in secrecy, with a lack of transparency and the cold-shouldering of the European Parliament and of national parliaments regarding the content of the agreements.[15] The absence of the European Parliament from the process of drafting these international agreements is due to the fact that Articles 24 and 38 of the Treaty of the European Union (TEU) do not contemplate its involvement in the negotiation of agreements concerning the CFSP and police and judicial cooperation in criminal matters. Nonetheless, the European Parliament exploited the possibilities for political control bestowed upon it by Articles 39.1 and 2 of the TEU to try to influence the content of the agreements.[16]

The debate which arose during the negotiation process regarding the guarantees that needed to be introduced into the wording of the agreements in order to protect human rights and basic freedoms shows us that the drafting of agreements of this nature is not without its difficulties. One of the more controversial areas during the negotiation process of the Agreement on extradition has been the issue of extradition to the USA of individuals who face the death penalty. The final text of the Agreement allows extradition on condition that the death penalty, if imposed, will not be carried out,[17] but it does not include any provision that allows for extradition to be refused due to human rights concerns.[18]

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[13] OJ 2006 L 181, at 27 and OJ 2006 L 181, at 34. *See* also the Council Decision concerning the signature of the agreements on the basis of Arts 24 and 38 TEU, OJ 2006 L 181, at 25.

[14] *See inter alia*, R. Genson, *Les accords d'extradition et d'entraide signés le 25 juin 2003 à Washington entre l'Union européenne et les Etats-Unis d'Amérique*, 470 RMC et UE 427 (2003); G. Stessens, *The EU-US Cooperation on Extradiction and on Mutual Legal Assistance: How to Bridge Different Approaches, in* G. Kerchove & A. Weyembergh (Eds.), Securité et justice: enjeu de la politique extérieure de l'Union européenne 263 (2007); J. Wounters & F. Naert, *Of Arrest Warrants, Terrorist Offences and Extradition after '11 September'*, 41 CML Rev. 909 (2004).

[15] V. Mitsilegas, *The External Dimension of EU Action in Criminal Matters*, 12 EFA Rev. 457, at 472 (2007).

[16] *See*, the European Parliament Recommendation B5-0540/2002, requesting the Council to inform it as well as national parliaments on the progress of the negotiations and Resolution B4-0813/2001, where the Parliament insisted on safeguards such as not allowing extradition if the defendant could be sentenced to death in the USA.

[17] In the negotiation mandate adopted by the Justice and Home Affairs Council of 26 April 2002, it is declared that "the Union will make any agreement on extradition conditional on the provision of guarantees on the non-imposition of capital punishment sentences, and the securing of existing levels of constitutional guarantees with regard to life sentences" (Council document 7991/02, at 13).

[18] Art. 17.2 of the Extradition Agreement provides for consultations between the parties "where

Another significant challenge to the protection of fundamental rights is related to the inadequacy of data protection in the Agreement on mutual legal assistance. The Agreement requires the parties to provide mutual legal assistance involving the exchange of a wide range of data with the purpose of identifying information regarding natural or legal persons convicted "or otherwise involved in a criminal offence," but does not include an adequate level of personal data protection.[19] Accordingly, the necessary cooperation between European bodies, such as Europol and Eurojust, and third countries and, in particular the United States, has not ceased to be problematic as regards personal data protection.[20] The Agreement between Europol and the USA allows for the exchange of data on a wide range of crimes and the delivery of data by Europol to numerous US authorities, including those at local level.[21] Thus, EU external cooperation on criminal matters is being undertaken without paying sufficient attention to the values and principles that underpin the EU, amongst which the protection of basic freedoms occupies a highly prominent position.[22] At the same time, there is a certain contradiction between the active role the EU plays in the promotion of human rights in its external action and the content of these agreements.

III. The Implementation of the Security Council's Anti-terrorism Resolutions in the EU

The EU's external action in the fight against terrorism involves a wide range of instruments, and therefore there is a need to safeguard their coherent use within the framework of a multilateral strategy defined by the United Nations. Strict application is to be made of the counterterrorism clause that has recently been included in the agreements concluded with third countries, and care must be taken

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the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfillment of its obligation to extradite."

[19] *See* Art. 4(1)(b) of the Agreement on mutual legal assistance. It is even stated in Art. 9(2)(b) of this Agreement that "generic restrictions with respect to the legal standards of the requesting State for processing personal data may not be imposed by the requested State as a condition (…) to providing evidence or information." For a detailed examination of this issue *see* V. Mitsilegas, *The New EU-USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data*, 8 EFA Rev. 515 (2003).

[20] The majority of the agreements concluded by Europol involve former or current candidate countries and Schengen associates. Article 18 of the Europol Convention allows Europol to communicate personal data to third countries and bodies if this is necessary for preventing and combating criminal offences falling within Europol's jurisdiction and if the third countries offer an adequate level of data protection. In 1999 the Council passed an Act setting out the rules governing the transmission of personal data to third countries and bodies, and this was amended in 2002 (OJ 2002 C 76, at 1).

[21] The agreement can be consulted at http://www.europol.europa.eu/legal/agreements/Agreements/16268-2.pdf (last consulted 6 September 2008).

[22] The Agreement between the EU and the USA on the transfer of PNR provides another good example of the EU's weakness in promoting and protecting in its external action the core values upon which European integration is based.

not to contradict the spirit of the same.[23] The efficiency of the EU's antiterrorist policy within the context of relations with third countries must necessarily be accompanied by the strengthening of cooperation with universal and regional organizations that have a crucial role to play in maintaining international peace and security.

The implementation of the sanctions adopted by the Security Council (SC) to combat the terrorist scourge has posed numerous problems for the EU's constitutional framework in recent years. The individuals and entities blacklisted by the 1276 Sanctions Committee have not been given the opportunity to dispute the grounds for their inclusion on the list, nor do they have access to an independent tribunal to assess the fairness of the decisions, which restrict their fundamental rights.[24] The present situation of the victims of such sanctions is unacceptable from the perspective of the international protection of human rights,[25] and some of the listed individuals and entities have initiated legal proceedings before the EC Courts.[26] On 21 September 2005, the Court of First Instance (CFI) of the European Communities delivered its judgments on the *Yusuf* and *Kadi* cases,[27] ruling that it did not have the authority to review whether the regulations implementing UN Security Council resolutions were consistent with fundamental rights as protected by the Community legal order.[28] The CFI

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[23] Counterterrorism clauses are inserted in Community agreements, such as the Cotonou Agreement.

[24] In 1999 the Security Council adopted Resolution 1267 to sanction the Taliban for sheltering and training terrorists within the territory of Afghanistan as well as for their refusal to surrender Osama bin Laden. Resolution 1267 imposed a ban on travel, an arms embargo and the freezing of the Taliban's assets and established a Sanctions Committee to draw up a list of individuals and entities against which the sanctions were to be applied. In 2000, Resolution 1333 expanded the reach of the freezing measures to include Osama bin Laden, Al Qaeda and its affiliates. These measures were renewed for the most recently by Resolution 1822 (2008).

[25] *See* B. Fassbender, *Targeted Sanctions and Due Process*, 20 March 2006 (final), http://www.coe.int/t/e/legal_affairs/legal_co-operation/Public_international_law (last consulted 3 July 2008); I. Cameron, The European Convention on Human Rights, Due Process and United Nations Security Counter-Terrorism Sanctions, Committee of Legal Advisers on Public International Law (CAHDI), Doc. CAHDI (2006) 22, http://www.coe.int/cahdi (last consulted 3 July 2008).

[26] Thereby obliging the CFI to conduct for the first time a detailed examination of the relationship between the legal order created by the UN Charter and the internal or Community order.

[27] *Case T-306/01, Yusuf and Al Barakaat International Foundation v. Council and Commission (Yusuf)*, [2005] ECR II-3533 and *Case T-315/01, Kadi v. Council and Commission* [2005] ECR II-3649.

[28] The reasoning followed by the CFI has been widely criticized. *See inter alia* G. Della Cananea, *Return to the Due Process of Law: the European Union and the Fight Against Terrorism*, 32 E. L. Rev. 896 (2007); P. Eeckhout, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit*, 33 EuConst. 183 (2007); N. Lavranos, *Judicial Review of UN Sanctions by the Court of First Instance*, 11 EFA Rev. 471 (2006); J. Santos Vara, *La indefensión de los particulares frente a las sanciones del Consejo de Seguridad: el reconocimiento de la competencia de los tribunales internos para controlar las resoluciones del Consejo de Seguridad en relación con el ius cogens*, 11 Revista General de Derecho Europeo (2006), available at http://www.iustel.com (last consulted 3 September 2008); P. Stangos & G. Gryllos, *Le droit communautaire à l'épreuve des réalités du droit international: leçons tirées de la jurisprudence communautaire récente relevant de la lutte contre le terrorisme international*, 42

made a restrictive interpretation of human rights in which it prioritizes the fight against terrorism over the interest in safeguarding fundamental rights, and shies away from controlling the compliance of the contested EU legislation with the fundamental rights protected by the EU's legal order.[29] By so doing, the CFI is in fact disregarding the constitutional nature of the EC Treaty and, in particular, the protection of fundamental rights in EU legal order, which is the result of a praetorian creation of the European Court of Justice. In the Court's view, the primacy of the resolutions of the SC determines that EU institutions do not have an independent discretionary margin when implementing targeted sanctions of this nature, whereby the annulment of EU rules would imply that SC resolutions are also in breach of fundamental rights.[30]

Yusuf, Kadi and Al-Barakaat lodged an appeal against the judgments of the CFI before the European Court of Justice,[31] and on 3 September 2008, the Court delivered its judgment on the *Kadi* and *Al-Barakaat* cases.[32] The Court of EU stated that the CFI had erred in law when it held that the Community courts had no jurisdiction to review the internal lawfulness of the contested regulation save with regard to its compatibility with the norms of *jus cogens*.[33] The Court affirmed that the Community courts must ensure the review of the lawfulness of all Community acts in the light of fundamental rights protected by the EU legal order as general principles of Community law, "including the review of Community measures which, (…), are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Chapter of the United Nations."[34] The Court concluded that, in the light of the actual circumstances surrounding the inclusion of persons and entities whose funds are to be frozen, the appellants' claims that the contested regulation infringes the right to be heard, the right to judicial review and the right to property are well founded, and consequently the Court annulled the Council regulation in so far as it concerns the appellants. However, in order to prevent the negative effects arising from the annulment of the regulation with immediate effect, the Court maintained the effects of the regulation for a period of

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Cahiers de droit européen 429 (2006); L. Van den Herik & N. Schrijever, *Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law*, *in* T. J. Biersteker & S. E. Eckert (Eds.), *Strengthening Targeted Sanctions Trough Fair and Clear Procedures* 18 (2006), available at http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf (last consulted 3 September 2008).

[29] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, OJ 2002 L 139, at 9.

[30] The CFI affirms that "any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions" (*Yusuf*, para. 266).

[31] The appeal against the CFI decision on *Yusuf* was later removed from the ECJ register.

[32] *Joined Cases C-402/05P and C-415/05P, Kadi and Al Barakaat International Foundation v. Council* (not yet published in the ECR).

[33] The Court followed the Opinions of Advocate General Poiares Maduro delivered on 16 January 2008, *Case C-402/05 P, Kadi v. Council and Commission*, and on 23 January 2008, *C-415/05 P, Al Barakaat International Foundation v. Council and Commission*.

[34] *Joined Cases C-402/05P and C-415/05P, Kadi and Al Barakaat*, para. 326.

no more than three months. Although the annulment of the contested regulation, in so far as it concerns Kadi and Al-Barakaat, poses a serious legal and political problem, it might help to encourage the Security Council to introduce a review mechanism available to listed individuals and entities.

Secondly, the current pillar division does not sit well with the need to fight terrorism through the implementation of efficient measures that at the same time respect fundamental rights. Accordingly, the judicial control of counterterrorist measures by EU courts has clearly highlighted the weaknesses that characterize effective judicial protection within the sphere of CFSC and Police and Judicial Cooperation in Criminal Matters. Thus, in the *Segi* and *Gestoras Pro-Amnistía* cases, the applicants lodged a compensation action before the CFI for the damages allegedly sustained as a result of their inclusion on the terrorist list drawn up by the Common Position 2001/931 and contested the legality of certain provisions included in this act. The CFI declared that it has no jurisdiction over the application, as the EU Treaty does not consider the possibility of filing an action for damages against acts adopted by EU institutions within the framework of the CFSP and the third pillar.[35] The appeals lodged before the European Court of Justice have been used by the Court to mitigate the more negative consequences of the CFI's orders. The Court accepted that a national court may raise the issue of validity or interpretation of a common position adopted on the basis of Article 34 EU when it has serious doubts "whether that common position is really intended to produce legal effects in relation to third parties." [36] As it is well kwon, it is not expressly laid down in the Treaties the possibility to give preliminary rulings as regards common positions. Even though the European Courts have made great efforts of interpretation, they have not proved sufficient to fill the gaps in effective judicial protection against third pillar acts as the judges cannot replace the Member States in the reform of the Treaties.

C. The Implications of the Lisbon Treaty for the External Dimension of the AFSJ

One of the key new features introduced by the Lisbon Treaty is the abolition of the complex pillar structure that at the same time entails the '*communitarisation*' of police and judicial cooperation in criminal matters. The aim of this part of the article is to examine the extent to which the Lisbon Treaty effectively creates a legal framework in which European institutions can adopt legal instruments and operative actions that respond effectively to the challenges that affect the external dimension of the AFSJ, without infringing upon the protection of human rights

[35] Orders of 7 June 2004, *Case T-338/02, Segi and others v. Council*, [2004] ECR II-1647 and *Case T-332/02, Gestoras Pro-Amnistía and others v. Council* (unpublished).

[36] Judgments of 27 February 2007 in *Case C-355/04P, Segi v. Council*, [2007] ECR I-1657 and *Case 354/04P, Gestoras Pro-Amnistía*, [2007] ECR I-1579, para. 54. By the same token, the Court of Justice declared that it has also jurisdiction to review the lawfulness of common positions "when an action has been brought by a Member State or the Commission under the conditions fixed by Article 35(6) EU." (para. 55).

and the respect for democratic values. It goes without saying that many of the improvements introduced by the new Treaty affect both the internal and external dimensions of the AFSJ, but this article will focus mainly on the implications of the Lisbon Treaty for the external dimension.

I. The Abolition of the Complex Pillar Structure

The EU's current structure of pillars is ill-suited to the challenges that the EU and its Member States will in all probability have to face in the future, as regards both the internal and the external dimensions of freedom, security and justice. The application of different legal regimens to the matters included in the Treaty of the European Community (visas, asylum, migration and other policies related to the free movement of persons) and to the third pillar of the EU (police and judicial cooperation in criminal matters) is an endless source of complications.[37] A good example of this is provided by the mixed inter-pillar agreements. Member States appear to have understood this reality by fully 'communitarising' police and judicial cooperation in criminal matters. In contrast to the situation of the CFSP, which continues to maintain its inter-governmental character despite the formal abolition of the pillars, the AFSJ is fully integrated within the Community pillar.[38] The TFEU creates a new Title V that integrates all the provisions of the AFSJ (Arts. 67-89), and the EU's aim of offering its citizens "an area of freedom, security and justice without internal frontiers" occupies a very prominent position among its goals, standing in second place on the list (Art. 2 of the new TEU). The integration of police and judicial cooperation in criminal matters within the Community sphere implies the suppression of the specific legal acts currently available under the third pillar, the application of the "ordinary legislative procedure" that involves the enhancement of the powers of the European Parliament and the use of a qualified majority in the decision-making process, and the extension of the jurisdiction of the Court of Justice to all the spheres of the AFSJ. Among other highly significant innovations introduced by the Lisbon Treaty will be the abolition of the specific peculiarities of enhanced cooperation under existing Title VI of the TEU, whereby the same rules will be applied to enhanced cooperation throughout the entire AFSJ. These changes would undoubtedly help furnishing Europe with a coherent strategy that responds to the challenges that the EU and its Member States will in all probability have to face in the future as regards both the internal and the external dimensions of the AFSJ.

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[37] On the negative effects of the pillar division on the area of freedom, security and justice *see* the contribution of H. Labayle to the works of the European Convention on this issue and T. Balzacq & S. Carrera, Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy, Centre for European Policy Studies (2005).

[38] Bruno de Witte uses the term 'partial depillarization' to describe the merger of the Treaties (*The Constitutional Law of External Relations*, *in* I. Pernice & M. Poiares Maduro (Eds.), A Constitution for the European Union: First Comments on the 2003 Draft of the European Convention (2004).

II. The Creation of a Single Legal Personality

One of the changes with the potential to have a more positive impact on the external projection of the AFSJ is the explicit recognition of the EU's international personality in Article 47 of the new Treaty of the European Union.[39] This provision contains one of the main innovations introduced by the Constitutional Treaty.[40] The Lisbon Treaty creates a new international organization, the European Union, which will replace and succeed the current European Community and European Union in all their international rights and obligations.[41] In the discussions maintained by the Working Group on Legal Personality of the European Convention, it was quite clear from the beginning that maintaining separate legal personalities for the EU and the European Communities would have a negative bearing on the coherence and visibility of the EU's external action.[42]

Nevertheless, conferring the EU with a single legal personality does not imply unifying the competences of the institutions, and a good example of this can be seen in the survival of the specific characteristics of the CFSP. However, all matters regarding police and judicial cooperation in criminal matters become shared competences between the EU and its Member States.[43] The consequence of this transfer of competences will have far-reaching implications in the external dimension of the AFSJ. Following the entry into force of the Lisbon Treaty, the procedure for concluding international treaties will be the same for all those matters included in the new Title V of the TFEU, doing away with the complex inter-pillar mixed agreements in the AFSJ.[44] The EU's international representation before other organizations and third countries will not vary depending on whether it is an issue involving police and judicial-criminal cooperation or visas, asylum and immigration. In short, the express recognition of its legal personality will undoubtedly help to improve the visibility of the European Union on the international stage and to enhance the coherence of its external action as a whole, including the external dimension of the AFSJ. It is important to consider that the external action of the AFSJ is affected not only by the EU's internal and external activities aimed at creating an AFSJ, but also by the Development policies of the EU and the CFSP. Accordingly, the establishment of the new European External Action Service, which will assist the High Representative of the Union for Foreign Affairs and Security Policy, may help to improve the efficiency and coherence of the Union's external action.

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[39] On the debate of the legal personality of the EU, *see inter alia*, N. Fernández Sola, *La subjetividad internacional de la Unión Europea*, 11 Revista de Derecho Comunitario Europeo 85 (2002); J. C. Gautron, *Article I-7*, *in* L. Burgorgue-Larsen (Ed.), Traité établissant une Constitution pour l'Europe. Parties I et IV. Architecture constitutionnelle (2007); N. Wessels, *Revisiting the International Legal Status of the EU*, 5 EFA Rev. 5 (2000).

[40] Art. I-7 of the Constitution.

[41] *See* Art. 1 of the new TEU. The EURATOM will maintain a separate international personality in the future.

[42] CONV 305/02.

[43] Art. 4 of the TFEU.

[44] Article 218 provides a common procedure for negotiating and concluding agreements between the EU and third countries or international organizations.

III. The Clarification of the EU External Competences

The entry into force of the Lisbon Treaty will entail a clarification and simplification of the Union's external competences. There is no doubt that the disappearance of the so-called 'inter-pillar agreements' will help to improve the exterior projection of the AFSJ.[45] Agreements of this nature require constant coordination between the EU and the EC throughout the negotiation process, and the consent to be bound on the part of the EU has to be expressed in two separate legal instruments.[46] All this may give rise to considerable confusion in third countries. Once the Lisbon Treaty comes into force, EU competence and procedure for concluding international agreements regarding police and judicial cooperation in criminal matters will undergo major changes.

According to the Lisbon Treaty, the EU may not only conclude an international agreement where the Treaties expressly confer such powers, but the EU's external competence may also flow implicitly from its provisions. Article 216 is intended to reflect the Court of Justice case law on external competence,[47] and this constitutes a major innovation as regards agreements on police and judicial cooperation in criminal matters. As the entire AFSJ will become a shared competence between the new EU and its Member States, the application of the 'AERT doctrine' to matters currently included within the third pillar is the obvious consequence. However, within the framework of the European Convention that drafted the European Constitution, some members of the Convention supported the right of Member States to conclude international agreements in the area of judicial co-operation, even if the Union had already adopted internal rules on the

[45] For an overview of the third pillar agreements *see* G. De Kerchove & S. Marquardt, *Les accords internationaux conclus par l'Union européenne,* 2004 AFDI, 803; C. Martínez Capdevilla, *Los acuerdos internacionales del tercer pilar de la U.E., in* A. Remiro Brotóns (Ed.), El futuro de la acción exterior de la Unión Europea 201 (2006).

[46] The conclusion of the agreement between the European Union, the European Community and Switzerland on the Schengen acquis required two separate Decisions by the EU and EC respectively. On behalf of the EU, Council Decision 2008/149/JHA, OJ 2008 L 53, at 50, and on behalf of the EC, Council Decision 2008/149/JHA, at 50. *See* G. De Kerchove, *Relations extérieures et élargissement, in* G. De Kerchove & A. Weyembergh (Dirs.), L'espace pénal européenne: enjeux et perspectives 257, at 272 (2002).

[47] Article 216 of the TFEU provides that

> the Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

Even though the doctrine accepts that the Constitutional Treaty clarifies the EU's external competence, it does not hold the same opinion as regards the attempt to codify the Court's case law on competence. Dashwood stated that "any attempt to fabricate constitutional provisions giving effect to a complex and subtle case law is liable to result in distortion and impoverishment of the *acquis*" (*The Relationship Between the Member States and the European Union/European Community*, 41 CML Rev. 355, at 373 (2004)). This view is shared by M. Cremona, *The Union's External Action: Constitutional Perspective*, *in* G. Amato, H. Bribosia & B. de Witte (Eds.), Genesis and Destiny of the European Constitution 1173, at 1183 (2007).

same matter.[48] As a result of this discussion, the Intergovernmental Conference of 2004 adopted a Declaration on Article III-325 of the European Constitution, stating that Member States may negotiate and conclude agreements with third countries or international organisations in the areas of judicial cooperation in civil and criminal matters and police cooperation "in so far as such agreements comply with Union law." This precedent has led to an identical Declaration on Article 218 of the TFEU.[49] Even though the international agreements concluded by the EU in these areas tend not to exclude the participation of Member States,[50] this Declaration indicates that they are not willing to transfer completely their external competences to the EU on these important issues.

On the other hand, the conclusion of international agreements on police and judicial cooperation in criminal matters will follow the common procedural treaty-making provision. Article 218 of the TFEU provides a common procedure to negotiate and conclude agreements between the EU and third countries or international organizations, that is based on the current Article 300 TEC. The Lisbon Treaty will introduce the innovations that were already included in the Constitutional Treaty.[51] Firstly, the changes to the procedure for the conclusion of international agreements will substantially enhance the role of the European Parliament, putting an end to the democratic shortfall that characterizes the procedure of Article 24 TEU. Whereas at present the Parliament is merely informed of the third pillar agreements, the consent of the European Parliament will be required in a wide range of international agreements, including those concerning domains subject to the ordinary legislative procedure in the internal sphere of the Union.[52] Secondly, the qualified majority vote is generally applied in the decision-making process regarding agreements on criminal and police cooperation. Thirdly, the competence of the ECJ is extended to control the legality of those agreements concerning matters already included in the third pillar. Finally, the current provision that allows the Member States' representatives in the Council to state that they have to comply with the requirements of their own constitutional procedure is not included in the new procedure laid down in Article 218 TFEU.[53] Even though there is not a unanimous interpretation of this clause, most of the

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48 *See* Final report of the Working group X *Freedom, Security and Justice*, CONV 426/02, 2.12.2002.

49 Declaration on Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice.

50 The EU-US Agreements on Extradition and Mutual Legal Assistance do not exclude the conclusion of bilateral agreements between Member States and the USA if they are consistent with the Union agreements (Art. 18 of the Extradition agreement and Art. 14 on the Mutual Legal Assistance).

51 *See* A. Cebada Romero, *Análisis de la reciente práctica convencional de la Unión Europea. Cambios introducidos en el procedimiento convencional por el Tratado constitucional de la UE*, 233 Gazeta Jurídica 3 (2004); R. Passos & S. Marquardt, *International agreements-competences, procedures and judicial control*, *in* G. Amato, H. Bribosia & B. de Witte (Eds.), Genesis and Destiny of the European Constitution 875 (2007).

52 Art. 218 TFEU.

53 *See* Arts. 24 and 38 TEU.

doctrine considers that it amounts to delaying the vote on the conclusion of the agreements by the EU.[54] Consequently, this change will undoubtedly contribute to facilitate the conclusion of international agreements.

IV. The Jurisdiction of the European Court of Justice

The application of what is called 'the Community method' to police and judicial cooperation in criminal matters is accompanied by the extension of the jurisdiction of the Court of Justice to the entire AFSJ, repealing those specific mechanisms provided for in Articles 35 TEU and 68 TCE.[55] This change is very important, as the measures adopted in this field may have many implications on fundamental rights. The Court shall be competent to review the validity of and interpret the acts adopted within the sphere of the AFSJ and, furthermore, citizens will be provided with all the means foreseen in the Community legal order for seeking the protection of their rights. However, the Lisbon Treaty does not grant the EJC jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.[56] This therefore amounts to maintaining the exception to the jurisdiction of the European Court of Justice, as laid down in current Articles 68(2) EC and 35(5) TEU, albeit with more precise regulation, whereby the sole exclusion is the competence of the Court over police and public order actions governed by each country's legislation. The Court will, however, be fully competent to rule on the application of EU Law.

Pursuant to the provisions of the Reform Treaty, and as laid down in the Constitutional Treaty, when the Lisbon Treaty comes into force private individuals may lodge a compensation action before the EC Courts within a factual context similar to the *Segi* and *Gestoras pro-Amnistía* cases. This action may be filed against all the measures adopted in the entire AFSJ.[57] This change provides a positive response to the suggestions put forward in recent times by both the Court of Justice and the Court of First Instance, in the sense that it devolves upon the Member States the reform of the system of legal protection.[58]

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[54] *See inter alia*, S. Marquardt, *La capacité de l'Union européenne de conclure des accords internationaux dans le domaine de la coopération policière et judiciaire*, *in* G. De Kerchove & A. Weyembergh (Eds.), Securité et justice: enjeu de la politique extérieure de l'Union européenne 179, at 180, 192 (2003); A. Mignolli, *Sul* treaty-making *power nel secondo e nel terzo pilastro dell'Unione europea*, 4 Riv. Diritto Internazionale 978, at 989 (2001). In the interim the other members of the Council may agree to apply the agreement provisionally, without binding the Member State that has made the declaration.

[55] At present, the European Court of Justice has no full juridiction over AFSJ legal acts. *See* A. Weyembergh, *La coopération européenne en matière de justice et d'affaires intérieures: vers un rééquilibrage du couple liberté sécurité?*, 35 Revue Belge de Droit International 612 (2002).

[56] Art. 276 TFEU. This restriction was also included in Article III-377 of the Constitutional Treaty.

[57] Art. 368 TFEU.

[58] *See* J. Santos Vara, *El control judicial de la ejecución de las sanciones antiterroristas del Consejo de Seguridad en la Unión Europea*, 15 Revista Electrónica de Estudios Internacionales (2008), available at http://www.reei.org (last consulted 23 August 2008).

The new Treaties likewise introduce amendments that help to solve the problems recently posed by the judicial control of Community acts implementing the sanctions adopted by the 1267 Sanctions Committee against individuals and entities associated with or linked to Al-Qaida and the Taliban. Firstly, Article 215 of the TFEU explicitly empowers the EU to adopt sanctions against non-state actors, and this provision will replace the present Article 301 TEC. Likewise, as regards preventing and combating terrorism, Article 75 TFEU will allow the Parliament and the Council to define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds belonging to natural or legal persons.[59] In both Articles 215 and 75 TFEU, an explicit request is made for the adoption of the necessary legal safeguards.[60] This issue is also addressed by the Intergovernmental Conference in the Declaration annexed to the Treaties, in which it noted that proper attention should be paid to the protection and observance of the due process rights of the individuals and entities concerned. In order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, "such decisions must be based on clear and distinct criteria."[61]

Secondly, although the competences of the Court of Justice for controlling CFSP acts will continue to be very restricted, plans are afoot to enable explicitly natural or legal persons, non-state entities and groups to lodge an action for annulment regarding the restrictive measures adopted by the Council of Ministers within the sphere of the CFSP.[62] The TFEU follows the precedent established by Article III-376 of the Constitution. Accordingly, the aim has been to make it clear that the legal acts implementing the sanctions against individuals or entities are subject to the legal control of EU courts. There is no doubt that the difficulties arising in the jurisprudence examined are behind this new constitutional provision.

Nonetheless, the extension of the Court of Justice's jurisdiction to the whole AFSJ is going to be delayed by a maximum of five years after the date upon which the Treaty of Lisbon comes into force. Indeed, the Protocol on Transitional Provisions upholds the current restriction on the jurisdiction of the European Court of Justice with respect to the acts of the Union in the field of police and judicial cooperation in criminal matters, which have been adopted before the entry into force of the Treaty of Lisbon.[63] This exception may well prolong the

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[59] The text of Article 75 TFEU is based on Article III-260 of the Constitutional Treaty. However, the fact that the Reform Treaty moves it from the provisions concerning free movement of capital to the general provisions on the AFSJ gives rises to suspicion. S. Peers says that the British and Danish opt-outs might also affect this clause (*EU Reform Treaty: Analysis 1: JHA provisions*, Statewatch analysis, 22 October 2007, at 6, available at http://www.statewatch.org/news/2007/oct/eu-refrom-treaty-jha-anal-1-ver-3.pdf (last consulted 23 August 2008)).

[60] It is not clear what is meant by "necessary legal safeguards." It is likely that the Court of Justice will be asked to clarify this notion in the future.

[61] Declaration on Articles 75 and 215 of the Treaty on the Functioning of the European Union.

[62] *See* Arts. 215 and 275 TFEU.

[63] Art. 10 of the Protocol on Transitional Provisions. The legal effects of the acts adopted in the field of police cooperation and judicial cooperation in criminal matters before the date of the entry into force of the Treaty of Lisbon "shall be preserved until those acts are repealed, annulled or amended" (Art. 9 of the Protocol on Transitional Provisions).

intergovernmental nature of police and judicial cooperation for some considerable time. It is a transitory measure that may postpone the full 'communitarisation' of the third pillar, in the sense of delaying the transformation of existing acts into EU Law and providing an incentive for the adoption of those draft acts that are pending at the moment before the Lisbon Treaty comes into force, and thereby prolonging its intergovernmental character.[64]

V. An Enhanced Role for the European Parliament and National Parliaments

As is well known, the role that the Treaty of the EU currently attributes to the European Parliament in the third pillar is wholly marginal within both the internal and the external dimensions of the AFSJ. There is no doubt that the Parliament has managed to make intelligent use of the mechanisms of political and judicial control provided for in the TEU in order to try to influence the content of third-pillar acts.[65] However, there is a clear democratic shortfall, as those policies the institutions may adopt within the sphere of police and judicial cooperation in criminal matters have an increasingly greater bearing on individual rights and freedoms.

The entry into force of the Lisbon Treaty will lead to major progress that will contribute to alleviating the deficiencies that characterize European cooperation in this field from a democratic perspective.[66] As noted earlier, extending the co-decision procedure, the so-called "ordinary legislative procedure", will strengthen the EU's democratic accountability, and this democratic enhancement will obviously have repercussions on the external dimension of all policies included in the AFSJ. It is to be expected that the new powers vested in the European Parliament by the Lisbon Treaty will enable it to influence the implementation of new actions undertaken by the EU both in policies on border checks, asylum, and immigration and in police and judicial cooperation in criminal matters.

Besides the European Parliament's general control competences, the involvement of national Parliaments in the control over draft legislation will also have repercussions on the external dimension of the AFSJ.[67] The Protocol on the Application of the Principles of Subsidiarity and Proportionality stipulates that any national Parliament or any chamber of a national Parliament will have eight weeks to check whether a draft legislative act complies with the principle of

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[64] I. Lirola Delgado, *La cooperación judicial en material penal en el Tratado de Lisboa: ¿Un doble proceso de comunitarización y consolidación a costa de posibles frenos y fragmentaciones?*, 16 Revista General de Derecho Europeo, at 6 (2007), available at http://www.iustel.com (last consulted 3 September 2008).

[65] *See* J. Martín y Pérez de Nanclares, *La posición del Parlamento Europeo en el espacio de libertad, seguridad y justicia*, *in* E. Barbé Izuel & A. Herranz Surrallés (Eds.) Política Exterior y Parlamento Europeo: hacia el equilibrio entre eficacia y democracia 67 (2007).

[66] *See* European Parliament, Report on the Treaty of Lisbon (2007/2286(INI)), 29.1.2008 and Resolution of 20 February 2008 on the Treaty of Lisbon, Doc. A6-0013/2008.

[67] On the role of National Parliaments in the AFSJ, *see* Article 12 of the Title II of the new TEU (Provisions on Democratic Principles).

subsidiarity. Article 7 of the Protocol provides that "where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all votes allocated to national Parliaments, (…) the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice." Although this reduction undoubtedly increases the competences of national Parliaments within this sphere, it may also be interpreted as the acknowledgement of greater leeway to block initiatives according to national interest.[68]

VI. The Reference to the Union's Values in the TEU

Article 2 TEU expresses the values upon which the Union is founded. The Treaty of Lisbon includes respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.[69] These values are not new, in fact they are based on the founding ideas of European integration,[70] but the Lisbon Treaty, following the path laid down by the Constitutional Treaty, proceeds to develop them in a clearer and more precise manner throughout the Treaty. Within the context of this article, it is very important to refer to the values inherent in the provisions devoted to the external action.[71] Article 21 TEU states that the Union's external action will be guided "by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world," including among others, the indivisibility of human rights and fundamental freedoms, and respect for the principles of the United Nations Charter and International law. Although this specific reference to values in external action is made in the Title devoted to the "General provisions on the Union's external action," the EU must also respect these principles in the implementation of the external aspects of the AFSJ.[72]

Elsewhere, the Charter of Fundamental Rights also develops and defines the Union's values, and the new Article 6 TEU includes a direct reference to the Charter that will enable its binding nature to be preserved. The rights, freedoms

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[68] *See* Lirola Delgado, *supra* note 64, at 14. The Treaty of Lisbon provides an even stronger role for National Parliaments than that foreseen in the Constitutional Treaty, as regards not only control over the principles of subsidiarity and proportionality, but also the political mechanisms of control. For details *see* S. Carrera & G. Florian, *The Reform Treaty & Justice and Home Affairs. Implications for the Common Area of Freedom, Security & Justice*, 141 CEPS Policy Brief, at 2 (2007).

[69] The Reform Treaty reproduces literally Article I-2 of the Constitutional Treaty.

[70] A. Mangas Martín, *Nuevos y viejos valores de la identidad europea al hilo del Tratado Constitucional*, 12 Revista General de Derecho Europeo, at 5 (2007), available at http://www.iustel.com (last consulted 3 September 2008), and *Reflexiones en torno al "proceso de constitucionalización" de la integración europea*, *in* F. M. Mariño Menédez (Ed.), El Derecho Internacional en los albores del siglo XXI, Homenaje al profesor Juan Manuel Castro-Rial Garrone 423 (2002).

[71] *See* Arts. 3 and 21 TEU.

[72] *See* Art. 21(3) TEU.

and principles set out in the Charter will have the same legal value as the Treaties,[73] and the provisions of the Charter are legally binding for the European institutions, bodies, offices and agencies of the Union, as well as for Member States when they implement Union law.[74] Consequently, the development of the policies included in the AFSJ is to uphold fundamental rights, in both internal and external actions. The incorporation of the Charter into the TEU means that the external action in police and cooperation in criminal matters will from now on shift from merely being developed within a intergovernmental framework to being fully subject to fundamental rights. If we consider that most of the measures adopted in the AFSJ have ramifications for the nationals of other States, the emphasis on the Union's values and the incorporation of the Charter into the Treaty may have a positive bearing on the external dimension of these policies.[75]

D. The Impact of Exceptions and Derogations on the External Action of the AFSJ

Although the modification of the institutional and legal structures brought about by the Lisbon Treaty will, once it comes into force, create a legal framework that will strengthen the efficiency, democracy and protection of human rights in the external action of the AFSJ, note should also be taken of the limitations introduced by the new Treaty. As has already been mentioned throughout this paper, the Lisbon Treaty provides for a series of exceptions and derogations to the AFSJ that run the risk of fragmenting the AFSJ.[76]

Firstly, the United Kingdom, Ireland and Denmark have expressed their intention to opt out of the AFSJ. According to the Protocol on the Position of the United Kingdom and Ireland in respect of the AFSJ, these countries will not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU. Article 3 of the Protocol accepts that these countries may notify the Council, within three months after a proposal or initiative has been presented to the Council that they wish to take part in the adoption and application of the proposed measures (opting-in). This exclusion is not a new phenomenon. The United Kingdom and

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[73] *See* Charter of the Fundamental Rights of the European Union, OJ 2007 C 303/01, and Explanations Relating to the Charter of Fundamental Rights, OJ 2007 C 303/17.

[74] Art. 51 of the Charter. Unfortunately, the exception of Poland and the United Kingdom to the application of the Charter may have a negative impact on the development of the AFSJ. According to Article 1 of this Protocol

> the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

[75] For a similar opinion, *see* Mitsilegas, *supra* note 15, at 497.

[76] *See* S. Carrera & F. Geyer, *El Tratado de Lisboa y un Espacio de Libertad, Seguridad y Justicia: excepcionalismo y fragmentación en la Unión Europea*, 29 Revista de Derecho Comunitario Europeo 133 (2008).

Ireland do not take part in the measures adopted within the framework of Title IV of the TCE on visas, asylum, migration and other policies related to the free movement of persons. However, the Treaty of Lisbon complicates this situation by extending the exclusion of these two countries to police and judicial cooperation in criminal matters.[77] At the same time, according to the Protocol on the Position of Denmark, this country will remain completely removed from the measures regarding the AFSJ, with no possibility of opting in.[78] The situation of the United Kingdom, Ireland and Denmark introduces great complexity and diversity into the development of these policies.[79] This is the price that has had to be paid in order to achieve the 'communitarisation' of the third pillar. The stance adopted by these three countries has a direct bearing on the external dimension of the AFSJ, as the international agreements concluded by the EU on these issues are not binding upon the three countries. When either the United Kingdom or Ireland notifies the Council of their willingness to take part in any proposed internal measure, they are also accepting the external competence to conclude international agreements on the same issue. Otherwise, the effects of the Protocol will extend beyond the framework of the AFSJ, also including opting out of Article 216 TFEU, which reflects Court case law on external competences. While third pillar agreements are currently binding upon all Member States, including the United Kingdom, Ireland and Denmark, the position of these countries may give rise to a wide range of different situations in the future.

Secondly, the Protocol on the application of the Chapter of Fundamental Rights to Poland and the United Kingdom is also likely to have negative consequences for the future development of the AFSJ. According to Article 1 of the Protocol, "the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms." In paragraph 2 of the same provision, it is stated that nothing in the Charter creates justifiable rights applicable to Poland or the United Kingdom "except in so far as Poland or the United Kingdom has provided for such rights in its national law." This exception will inevitably have the effect of relativizing the progress implied in the incorporation of the Charter of Fundamental Rights into the TEU and the extension of the European Court's jurisdiction.

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[77] According to Article 9 of the Protocol, the opting-out of Ireland would not apply to the freezing of financial assets or funds of entities or individuals suspected of having links with terrorism (*see* Art. 75 TFEU).

[78] The Protocol on the Position of Denmark applies the current opting-out of Denmark as regards Title IV of the TCE on "Visas, asylum, migration and other policies related to the free movement of persons" to the whole AFSJ. The application to Denmark of any measure adopted pursuant to the new Title V of the TFEU will depend on the conclusion of an international agreement between this country and the EU.

[79] At any time Ireland may notify the Council that it no longer wishes to be covered by the Protocol on the Position of the United Kingdom and Ireland in respect of the AFSJ (Art. 9 of the Protocol) and Denmark may decide to adopt an opting-out position similar to that of the United Kingdom and Ireland (Art. 8 of the Protocol of Denmark).

Thirdly, the establishment of minimum rules in criminal law will be subject to the so-called mechanisms of 'emergency brake' and 'enhanced cooperation'. If one member of the Council considers that a draft directive may affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council and the ordinary legislative procedure would be suspended.[80] In the event of disagreement, the same provision facilitates the establishment of enhanced cooperation. In addition to these exceptions, the adoption of measures concerning operational cooperation between the police, customs and other specialized law enforcement services "in relation to the prevention, detection, and investigation of criminal offences" will be subject to the special legislative procedure (unanimity in the Council and mere consultation of the European Parliament).[81] Similar exceptions to the ordinary legislative procedure are provided for the adoption of measures concerning family law with cross-border implications, provisions concerning passports, identity cards, residence permits or any other such document and the establishment of the European Public Prosecutor's Office.[82]

E. Conclusions

The EU's external projection, according to diverse rules, depending on whether it is an issue involving visas, asylum and immigration or police and judicial cooperation in criminal matters, has proven inadequate for achieving a true AFSJ. The Lisbon Treaty upholds the main contributions of the Constitutional Treaty regarding the AFSJ, including the formal abolition of the EU pillar structure and the '*communitarisation*' of the third pillar. Even though the Lisbon Treaty does not include a systematic regulation of external action in relation to the AFSJ, the new Title V of the TFEU introduces substantial institutional and procedural changes to the current regulation of these issues. As mentioned above, the explicit recognition of the EU's international personality is one of the changes with the potential to exert a more positive effect on the external projection of the AFSJ. The procedure for concluding international agreements and the international representation of the EU will not depend on whether it is an issue involving police and judicial cooperation on criminal matters or visas, asylum and immigration. This will put an end to the specificities that characterizes the procedure of Article 24 TEU. Another major change introduced by the Lisbon Treaty is the extension of the jurisdiction of the Court of Justice, granting it the jurisdiction to review the validity and interpret the acts adopted within the sphere of the AFSJ. As a result of this, the new Treaties introduce amendments that help solve the problems posed by the judicial control over Community acts in the third pillar. Furthermore, the entry into force of the Reform Treaty will contribute to alleviate the deficiencies which

80 Art. 82(3) TFEU.
81 Art. 87(1) and (2) TFEU.
82 Arts. 81 (3), 77(3) and 86(1) TFEU.

characterize European cooperation in this field from a democratic perspective, and the external action in police cooperation and criminal matters will be fully subject to fundamental rights.

Nevertheless, the sum of exceptions and derogations to the new regime of the AFSJ may hinder the chances of progress provided by the EU's new structure. The existence of a wide range of situations amongst the commitments of Member States may have a negative bearing on the achievement of a true AFSJ. As Carrera and Geyer have stated, "allowing the possibility of too many 'speeds' going in too many different directions might have helped to end the pillarisation but may create an Area of Freedom, Security and Justice prone to 'differentiation' and 'exceptionalism'."[83] Accordingly, the new Title V of the TFEU continues to reflect the tension between Community and intergovernmental approaches which has been a feature of the third pillar since it was introduced and throughout the successive reforms of the Treaties.

This situation may turn out to have a negative bearing on the external projection of the AFSJ. Without diminishing the contributions made by the Lisbon Treaty to the creation of an external projection of the AFSJ that is both efficient and upholds the most basic democratic requirements, the Treaty also presents certain grey areas. The existence of Member States that fully retain their competences in those matters included in the AFSJ, or which are involved solely in terms of the adoption and application of certain acts, considerably undermines the EU's ability to act as a significant international player in these matters and to speak out with a single voice on highly sensitive issues of international security. The limitations on the competence of the Court of Justice, the secondary role played by the Parliament in the adoption of extremely important decisions, and the British, Irish and Danish opting-out clauses, together with the exceptions of the United Kingdom and Poland to the Charter of Fundamental Rights, considerably weaken the possibilities provided by the Lisbon Treaty to develop the external dimension of the AFSJ. It should be added, moreover, that the involvement of a broad array of actors in the external action of the EU (President of the European Council, High Representative of the Union for Foreign Affairs and Security Policy, Presidency of the Council of Ministers and Commission) may also hinder the development of a coherent external dimension of the AFSJ.

[83] Carrera & Florian, *supra* note 68, at 8.