

The External Dimension of the Area of Freedom, Security and Justice

Juan Santos Vara

University of Salamanca

Introduction

Even though the internal dimension constitutes the foremost manifestation of the Area of Freedom, Security and Justice (AFSJ), the internal and external aspects of the AFSJ are directly related. In the last years, the European institutions have adopted several initiatives to develop the external dimension of the AFSJ. In 1999, at the Tampere Summit, the European Council emphasized that “all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities”.¹ However, in a Document adopted by the Feira European Council, it is underlined that developing the JHA external dimension is not an objective in itself. The European Council stated that “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”.² In the Hague Programme, the European Council reaffirmed the priority attached to the development of an AFSJ, identifying the priorities for action within the next five years, and referred to the need to complement the internal dimension with external action.³

Given the ever greater importance of the external dimension of the AFSJ, it should come as no surprise that the EU institutions have recently set themselves the goal

* The present paper has benefited from the support of the research project financed as Grupo de Excelencia GR 247 by the Consejería de Educación y Cultura de la Junta de Castilla y León.

¹ Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, para. 59.

² 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.

³ European Council, Hague Programme on “Strengthening Freedom, Security and Justice in the European Union”, 4-5 December 2004).

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.⁴ In December 2005, the Council of Ministers adopted this proposal, confirming the underlying principles of the Commission's strategy, which involves partnership with third countries, albeit with a differentiated approach to individual third countries and regions⁵. 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.

The aim of this paper is to analyse and comment upon the 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 Member States will clearly intensify their activities over the coming years. There will be an analysis of 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 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.

The external dimension of the AFSJ has not 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. Nonetheless, one should not underestimate the impact the

⁴ Communication from the Commission: a strategy on the external dimension of the area of freedom, security and justice, COM (2005) 491 final, 12.10.2005. The mandate to develop this strategy was included in the Hague Programme.

⁵ Council doc. 14366/05, 6.12.2005.

significant changes introduced by the Lisbon Treaty may have on the external dimension of the AFSJ.

1. The “*communitarisation*” of police and judicial cooperation in criminal matters

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 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.⁶ 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. 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. 3 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. These changes would undoubtedly help furnishing Europe with a coherent strategy that responds to the challenges that the EU and its Member States will

⁶ 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).

in all probability have to face in the future as regards both the internal and the external dimensions of the AFSJ.

2. The recognition of the EU's international 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.⁷ This provision contains one of the main innovations introduced by the Constitutional Treaty.⁸ 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.⁹ 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.¹⁰

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.¹¹ 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.¹² The EU's

⁷ On the debate of the legal personality of the EU, *see inter alia*: J. C. Gautron, *Article I-7*, in L. Burgorgue-Larsen (Dir.), *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).

⁸ Art. I-7 of the Constitution.

⁹ See Art. 1 of the new TEU. The EURATOM will maintain a separate international personality in the future.

¹⁰ CONV 305/02.

¹¹ Art. 4 of the TFEU.

¹² Article 218 provides a common procedure for negotiating and concluding agreements between the EU and third countries or international organizations.

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 Area of Freedom, Security and Justice, 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.

3. The conclusion of international agreements on police and judicial cooperation in criminal matters

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,¹³ 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 same matter.¹⁴ As a result of this discussion, the Intergovernmental Conference of

¹³ Article 216 of the TFEU provides that the "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".

¹⁴ See Final report of the Working group X "Freedom, Security and Justice", CONV 426/02, 2.12.2002.

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.¹⁵ Even though the international agreements concluded by the EU in these areas tend not to exclude the participation of Member States,¹⁶ 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.¹⁷ 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.¹⁸ 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

¹⁵Declaration 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.

¹⁶ 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).

¹⁷ 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 Amato *et al.*, *supra* note 47, at 875.

¹⁸ Art. 218 TFEU.

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.¹⁹ Even though there is not a unanimous interpretation of this clause, most of the doctrine considers that it amounts to delaying the vote on the conclusion of the agreements by the EU.²⁰ Consequently, this change will undoubtedly contribute to facilitate the conclusion of international agreements.

3. The Extension of 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.²¹ 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.²² 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

¹⁹ See Arts. 24 and 38 TEU.

²⁰ 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.), *Sécurité 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.

²¹ At present, the European Court of Justice has no full jurisdiction 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).

²² Art. 276 TFEU. This restriction was also included in Article III-377 of the Constitutional Treaty.

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.

The new Treaties 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.²³ In both Articles 215 and 75 TFEU, an explicit request is made for the adoption of the necessary legal safeguards²⁴. 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".²⁵

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.²⁶ 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.

²³ 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 Area of Freedom, Security and Justice gives rise 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-reform-treaty-jha-anal-1-ver-3.pdf> (last consulted 13 Mars, 2009).

²⁴ 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.

²⁵ Declaration on Articles 75 and 215 of the Treaty on the Functioning of the European Union.

²⁶ See Arts. 215 and 275 TFEU.

There is no doubt that the case law regarding the implementation of the Security Council's Anti-terrorism Resolutions in the EU laid to this new constitutional provision.²⁷

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.²⁸ This exception may well prolong the 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.

4. 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.²⁹ However, there is a clear democratic shortfall, as those policies the institutions may adopt within the sphere

²⁷ On 3 September 2008, the ECJ held in *Kadi/Al Barakaat* 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 Charter of the United Nations (Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council*, not yet published in the report).

²⁸ 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).

²⁹ 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).

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.³⁰ 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.³¹ 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 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.³²

³⁰ 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.

³¹ On the role of National Parliaments in the area of freedom, security and justice, see Article 12 of the Title II of the new TEU (“Provisions on Democratic Principles).

³² 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 &*

5. 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.³³ These values are not new, in fact they are based on the founding ideas of European integration,³⁴ 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.³⁵ 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.³⁶

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 and principles set out in the Charter will have the same legal value as the Treaties,³⁷ 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.³⁸

Justice and Home Affairs. Implications for the Common Area of Freedom, Security & Justice, 141 CEPS Policy brief, at 2 (2007).

³³ The Reform Treaty reproduces literally Article I-2 of the Constitutional Treaty.

³⁴ 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 April, 2009).

³⁵ See Arts. 3 and 21 TEU.

³⁶ See Art. 21(3) TEU.

³⁷ See Charter of the Fundamental Rights of the European Union, OJ C 303/01, 14.12.2007 and Explanations Relating to the Charter of Fundamental Rights, OJ C 303/17, 14.12.2007.

³⁸ 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

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.

6. The risk of fragmenting 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.³⁹

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 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

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”.

³⁹ 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).

complicates this situation by extending the exclusion of these two countries to police and judicial cooperation in criminal matters.⁴⁰ 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.⁴¹ The situation of the United Kingdom, Ireland and Denmark introduces great complexity and diversity into the development of these policies.⁴² 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

⁴⁰ 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).

⁴¹ 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.

⁴² 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 8 on Position of Denmark).

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.

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.⁴³ 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).⁴⁴ 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.⁴⁵

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

⁴³ Art. 82(3) TFEU.

⁴⁴ Art. 87(1) and (2) TFEU.

⁴⁵ Arts. 81 (3), 77(3) and 86(1) TFEU.

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 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".⁴⁶ 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

⁴⁶ Carrera & Florian, *supra* note 32, at 8.

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 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.