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LEGAL BASIS CONFLICTS REGARDING EU EXTERNAL ACTIONS

“Upholding the key properties of the CFSP and the AFSJ provisions when negotiating and concluding international agreements.”

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<tbody>
<tr>
<td>AFSJ</td>
<td>Area of Freedom Security and Justice</td>
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<td>AG</td>
<td>Advocate General</td>
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<td>CFSP</td>
<td>Common Foreign Security Policy</td>
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<td>COM</td>
<td>Commission of the European Union</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECJ</td>
<td>Court of Justice of the European Union</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EU</td>
<td>European Union</td>
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<td>JAIX</td>
<td>Group on external JHA issues</td>
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<td>JHA</td>
<td>Justice and Home Affairs</td>
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<td>TEU</td>
<td>Treaty of the European Union</td>
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<td>TFEU</td>
<td>Treaty of the functioning of the European Union</td>
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<td>UN</td>
<td>United Nations</td>
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<td>QMV</td>
<td>Qualified majority vote</td>
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<td>WG</td>
<td>Working Group</td>
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1 Introduction

1.1 The subject

The European Union (EU) that exists today is a result of more than half a decade of development amid its Member States. Apart from dealing with the internal dimension of the Union, the EU has also become an important international actor. In the preamble to the Treaty on European Union (TEU) it is stated that two of the goals of the EU are to “reinforce the European identity and its dependence in order to promote peace security and progress...” and “ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice.” The role as an international actor has also grown with the entry into force of the Lisbon Treaty in 2009, when the question whether the EU (EC earlier) is a legal person was answered in the affirmative in the new Article 47 TEU.

As an international actor, the EU has had to lay down formal rules for external actions in trade, humanitarian efforts, combat of crime, security and defence policies, and other areas where it is involved. An area that is especially important for the peacekeeping and security is the battle against crime, concerning which it has been stated:

“The battle of crime is an area in which the European Union can demonstrate its relevance to its citizens in the most visible way”.

However, contemporary case law has illuminated issues arising from the establishment of legal basis when arguing and adjudicating matters in this important area. In the recent case law, which will be analysed in this work, discussions concerning the possibility of a dual legal basis have been conducted in order to find a solution to certain issues. A number of these issues can be traced to the complicated interplay between the two main policy bodies intended to provide such legal basis, namely the Area of Freedom Security and Justice (AFSJ) and the Common Foreign and Security Policy (CFSP). As these two policy areas are intended to provide legal basis for external actions that have proved to be of utmost importance — not just for the protection of the Union, but also for the safeguarding of democracy and humanitarian values across the world — it is in

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1 Final report of Working Group X ”Freedom, Security and Justice”, p 1.
the interest of the legal community to address rigorously these issues through close examination of the ways in which certain agreements and external actions can arguably find legal basis in both the AFSJ and the CFSP. It stands to reason that such efforts will help delineate the finer boundaries within the intersection of these two policy bodies, thereby upholding their integrity when negotiating international agreements and ultimately point to solutions to at least some of the competence issues to which their confluence give rise.

1.2 Purpose

Since the competence provided in the CFSP and the AFSJ areas in certain situation can overlap, issues have arisen in the recent case law and literature concerning the choice of legal basis. The provisions of the two policy areas concern important international areas and the institutional balance, which is based on what legal basis is chosen, leads to a number of institutional consequences such as division of power between the Member states and the Union’s institutions. The idea behind this paper is to display an ample and just picture of a complicated situation in order to highlight the issues at hand that have arisen due to the complexity of the legal framework. A solution to the present problems is difficult to be sought after. A discussion concerning the different remedies available in order to prevent further litigation and discord between the institutions and Member states in the EU could however serve to illuminate the current legal situation and what challenges that lay ahead. In certain scenarios international agreements whose content or intentions can be considered as relating to both CFSP and AFSJ simultaneously can lead to legal basis litigation.

If one of the policy areas are chosen as the correct legal basis, different rules in the treaty applies, which leads to different distribution of power since different institutions in EU play different roles depending on legal basis. The purpose of this work is therefore to analyse the external dimension of the AFSJ and the CFSP rules and examine how the correct legal basis can be determined by the legislator at the same time as the Member States and the EU’s ability to fulfil their objectives and goals is not undermined. In order to fulfil the purpose, the first part of the work will lay down an overview of the specific rules of each area and what consequences these rules have when being used as legal bases for international agreements. In the second part of the
work the consequences will be examined in order to analyse if there could be any solutions to the complications that have occurred during the recent choices of legal that are being analysed in this work.

The purpose mentioned above has been chosen to highlight the issues of the overlapping zones of the different policy areas. Those issues are interesting because the choice of legal basis is closely connected to the conferred competence within the Union. So the choice of the correct legal basis thus leads to conferral of different competences to different EU institutions. The choice of legal basis also decides which procedural rules that applies to for example the negotiation of an agreement. A more thorough discussion concerning the issues will follow but an example could be used to illustrate how the issues described can occur. If the Council wishes to enter an agreement with a third country to limit the risk of a terrorist attack, such a measure could arguably be covered by different legal bases, in this case especially the AFSJ or the CFSP. If the CFSP was to be chosen as the legal basis this would lead to that the EP would be almost entirely excluded from the upcoming negotiations and the conclusion of the agreement. Also the Court of Justice would be deprived most of the jurisdiction it would have had in relation to an AFSJ base since the different areas entails different judicial rules.

1.3 Method and material

A dogmatic legal method is applied in this paper. In this case (and in general), that means a method where the applicable law is firstly interpreted and then analysed. To examine the interpreted law, sources such as case law and doctrine is used throughout the work. To ensure that comprising and trustworthy resources have been used, the authors and/or origins of the sources have been critically reviewed. Normally the dogmatic legal method is focused on preparatory work, or travaux préparatoire, however within EU law this type of sources is more complicated to find than in for example national law, which explains why this work is mainly based on alternative sources such as relevant case law, articles and other trustworthy information provided from official sources such as official documents from the European institutions. However, some preparatory works have been examined – since it has been possible to find such material – to give the work the best background information possible and also to provide a sense of the ideas and objectives behind the legislation. The use of the
preparatory works is also justified by the recent development within the EU law where the preparatory works have been deemed as an increasingly important source to interpret, inter alia, the Lisbon Treaty. To properly compare the different areas, the work analyses the relevant articles together with the objectives and principals of the EU law. Opinions of the Court’s Advocate Generals (AG) are also being considered in order to broaden the discussion. The work does not intend to find arguments for any of the opposing sides of the two policies but rather to find the best practice and how the adoption of international agreement can be made as conform as possible to the current EU legal framework. In order to analyse current issues, recent cases will be analysed and discussed. Concerning the selection of case law presented in this work, the aim has been to give an overview that is as comprehensive and unbiased as possible.

1.4 Structure

To get an overview as well as a good perspective of the current framework the work will start by describing the CFSP and the AFSJ areas, both in a historical perspective but first and foremost what the current situation looks like. To be able to conduct a proper analysis of the different policy areas a thorough description of the current legal framework and situation is deemed as necessary and will be the point of departure of this work. This part will comprise of a discussion that is based on case law, preparatory work and doctrine. This will then be followed by a comparison between the policy areas and a search, both for similarities and differences and why the issues presented have occurred and if there are any existing remedies for those issues. This will be followed by an investigation of current situations where issues have arisen because of problems with the application of the different areas and their competences. The ultimate aim of this paper is to then analyse how the CFSP and the AFSJ policy areas work adjacent to each other and if there is, or needs to be, a solution or at least an improvement to the current legal situation.

2 Bergström, C F, Defending Restricted Standing for Individuals to Bring Direct Actions against ‘Legislative’ Measures, pp. 493 and 499. See also the opinion of GA Kokott in C-583/11 P, paragraph 32.
1.5 Scope of the work

The scope of this paper has deliberately been chosen to focus solely on the CFSP and the external dimension of AFSJ. In relation to these areas the scope has been narrowed down to when the policies concern external (or international) actions, particularly bilateral or international agreements or decisions. The reason to this concretion is that the competence problems this work seeks to analyse concern the external actions of these two areas. To further concretize the work, the AFSJ area will be limited to police cooperation and judicial cooperation in criminal matters. The reason behind this delamination is that the objectives of those two areas of the AFSJ have many similarities with the CFSP and therefore are interesting areas to compare and investigate in the light of each other, since the enhanced risk of overlapping measures could lead to legal basis litigation. The underlying thought is that, by knowing how the policy areas have developed through time, it might be easier to understand their position in the current legal framework. Since the work concerns a strictly EU law regulated area, no national law will be examined since this would extend the intended scope.
2 Background

2.1 EU external policy areas and actions

As mentioned above, the role of the EU as an important actor in an increasingly globalised world is a vital part of Unions’ work. Areas that are especially important in the current climate of the world are also areas where the EU is involved. The combatting of international crimes such as terrorism, different areas of defence and security policy making and migration are examples of such areas. These areas are thereby important parts of the EU external actions and are therefore integrated parts of the Unions’ legal framework. Since there are different types of provisions and areas concerning the external dimension, the Lisbon Treaty set out to ensure consistency and unity between those areas in Articles 21(3) and 3(5) TEU. In Article 3(5) TEU it is also provided that the Union shall “…contribute to peace, security, the sustainable development of the Earth...” Article 21(1) TEU provides the general provisions of the Unions’ external actions and in Article 21(2) TEU a list of objectives that the Union has to follow concerning its international relations can be found. Before the Lisbon treaty, external actions were not incorporated into the legal framework and that could lead to difficulties concerning for example competence questions between the Union and the Member States. The Lisbon Treaty, through article 47 TEU has however unified the Union into one legal person in regard to external actions but that does not mean that the previous problems regarding competence distribution have ceased to exist. Different areas of external policies still have different characteristics and where the rules for example are intergovernmental instead of supranational; there are deviations from the ordinary external competence provisions in the treaties.

2.2 Pre the Lisbon Treaty

Through the Maastricht treaty that was signed in February of 1992 the European communities was brought together based on a unified framework. This framework

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4 See for example Eeckhout, P, EU external Relations Law, p. 475.
5 Eeckhout, P, EU external Relations Law, p. 166.
became the first pillar of the European Union. The new European Union did not only bring together the three communities existing at that time but also two important areas of political cooperation between the founding Member States, namely the CFSP and the area of Justice and Home Affairs (JHA), which later was referred to as an AFSJ in the Amsterdam Treaty in 1999. These two areas of cooperation policies would form the second and third pillar of the Union that would supplement the European Communities. The pillar system has since been abolished but is still important for the understanding of the current structure.

The first pillar of the Union, the so-called EC pillar, was based on a legal framework of Community law, referred to as a “new legal order”. These supranational rules led to a strong role of the supranational institutions in the Union, such as the Commission, the European Parliament (EP) and the Court of Justice of the European Union (ECJ). The second and third pillars however, were of intergovernmental character and were therefore governed by the Members states with unanimity rather than the supranational institutions of the Union, especially concerning the CFSP as it was said to supplement the Community’s external policies. In order to safeguard the “acquis communautaire” and the regulate the relationship between the first, the second and the third pillar the ECJ was given jurisdiction, through article 47 in the earlier TEU, to ensure that the Community competence was not harmed by the new provisions in the Maastricht Treaty and that the institutional balance provided in the treaties was protected.

The original EEC Treaty had few mentions of any of the Community’s external activities and the rules that did exist had led to discussions concerning where the lines were to be drawn regarding the competence; between the Member States and the

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6 The Treaty on European Union, signed in Maastricht on 7 February 1992 (The Maastricht Treaty), article 1. 
7 The European Economic Community (EEC), The European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom). 
8 The Maastricht Treaty, Title V, paragraphs J1-J11. 
9 The Maastricht Treaty, Title VI, paragraphs K1-K9. 
10 The Maastricht Treaty, Title V, Article A. 
11 C-26/62 Van Gend en Loos, summary, paragraph 3. 
12 Eeckhout, P, EU external Relations Law, pp. 165-166. 
13 Eeckhout, P, EU external Relations Law, p. 166. 
14 Acquis communautaire means the collected legislation, legal acts and court decision that together constitute the framework that is the EU law.
Community, and between the Community and the non-Community pillars.\textsuperscript{15} This changed to a certain extent with the entry into force of the Maastricht treaty with the development of the objectives of external actions and the three pillars. However, the splitting of the different policy areas between the pillars was not working properly.\textsuperscript{16} To make sure that the Unions’ external activities followed the new single institutional framework Article 3 TEU stated that the Council and the Commission had a duty to cooperate to ensure consistency of external activities.\textsuperscript{17}

2.3 Post the Lisbon Treaty

The entry into force of the Lisbon Treaty on 1 December 2009 entailed great changes in the Community legal framework and structure. The pillar system was obliterated and the European Community was abolished in favour of a single European Union. This meant that the second and third pillars, because of the Lisbon Treaty, were incorporated into the supranational EU legal framework. Despite that incorporation however, some of the intergovernmental provisions did endure.\textsuperscript{18} Both the CFSP and some of the AFSJ provisions remained intergovernmental after the Lisbon Treaty even though the CFSP provisions did so more significantly. Since some of the measures can be governed by entirely dissimilar provisions than the EU supranational law, litigations concerning which is the correct legal basis could have a “cross-pillar” dimension between the TFEU rules and the CFSP rules.\textsuperscript{19} The Lisbon Treaty also provides that the TEU and TFEU are legally equal and that implementation of TFEU and CFSP policies are not to affect each other.\textsuperscript{20} This can be compared to the previous provision in Article 47 TEU, where it was provided that the EC Treaty was not to be affected by the application of provisions in the TEU.\textsuperscript{21}

\textsuperscript{15} Eeckhout, P, EU external Relations Law, p.165.
\textsuperscript{16} Hillion, C, Wessel, R. A, Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness, p. 552.
\textsuperscript{17} Article 3 and 5 TEU.
\textsuperscript{18} Engel, A, Delimiting Competences in the EU: CFSP versus AFSJ Legal Bases, p. 47. See also P, Craig & G, De Búrca, EU Law, text, cases and materials, pp. 329-330.
\textsuperscript{19} Engel, A, Delimiting Competences in the EU: CFSP versus AFSJ Legal Bases, p. 47. See also Final Report of Working Group III on Legal Personality, paragraph 23.
\textsuperscript{20} See Articles 1 TEU and 1 TFEU together with Article 40 TEU.
\textsuperscript{21} See for example C-91/05, paragraph 32 and C-176/03, paragraph 38.
3 Current legal situation

3.1 Background

As mentioned above, this work mainly focuses on the issues that occur because of the differences between the AFSJ and the CFSP. As the figure below intends to show, most of what the different policy areas cover do not relate to the same objectives and do therefore not lead to such problems as this work analyses. The policy areas as such thus seem to function as the legislator has intended and an area where the CFSP and the AFSJ meet would probably be extremely difficult to eliminate completely. To better understand the problematic section covered by both CFSP and AFSJ, it might favour the analysis to shortly describe the basic traits of the different policy areas. Therefore a short presentation of the differences of the policies will be presented before a more thorough examination of the areas will follow.

3.1.1 An Area of Freedom, Security and Justice

The AFSJ is the result of one of the most extensive constitutional developments of the EU. The AFSJ is mainly a political policy enabling the Union to address internal projects to provide its citizens with an area without borders, with free movement and with security. To fulfil such objectives and protect the huge exposed internal space, the Union has to deal with problems such as organised crime, illegal immigration and terrorism. The policy field also covers visas, asylum and judicial cooperation in civil matters. Those areas are, however, not considered further since this work focuses on the judicial cooperation in criminal matters and the police cooperation. The AFSJ rules

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24 Craig, P & De Búrca, G, EU Law, text, cases and materials, p. 923. See also Title V TFEU.
could previously be found in the third pillar but can now be found under Title V TFEU. Competence regarding AFSJ measures falls within the shared competence, which means that the Union share its power in the area with the Member states.\(^{25}\) Even if the actions based on AFSJ provisions can relate to an external dimension as will be discussed in the next chapter, the AFSJ could be regarded as an internal policy.

To better understand what sort of measures that can be legally based on AFSJ provisions examples will now be presented. Since this work mainly concerns the judicial cooperation in criminal matters and the police cooperation, the examples displayed hereafter will be examples of external measures that clearly fall under those specific areas. This means that the following measures are based on the provisions under title V in the TFEU. One such decision is the Council decision of 2009 establishing the European Police Office (Europol).\(^{26}\) In Article 3 of the decision it is provided that the objective of establishing Europol is to strengthen the cooperation between the Member states in order to combat crime, terrorism and other forms of crimes that affect the Union. The objective of the measure is thus clearly to promote the internal security. In the preamble of the decision it is also provided that this kind of law-enforcement cooperation between the member states could not have been sufficiently working without an EU agreement.\(^{27}\) Another decision adopted under title V of TFEU is the so called Prüm-decision.\(^{28}\) In Article 1 of the decision it is provided that the Member states through the decision agrees to step up their cross-border cooperation relating to matters that fall under title V of TFEU, especially measures to prevent criminal offences. To easier combat cross-border crime and the help the cooperation within the Union, the decisions establishes that national DNA files are to be established in the Member states.\(^{29}\) Both the Europol and the Prüm decision are thus measures that obviously have been adopted in order to protect the internal area of the Union by establishing frameworks that help the Member states to easier cooperate when, for example combating terrorism within the Union.

\(^{25}\) See Article 4(2)(j) TFEU.  
\(^{26}\) Council Decision 2009/371/JHA  
\(^{27}\) See paragraph 23 in the preamble of Council Decision 2009/371/JHA  
\(^{28}\) Council Decision 2008/615/JHA  
\(^{29}\) See Article 1 and 2 in the Council Decision 2008/615/JHA.
3.1.2 The Common Foreign and Security Policy

As mentioned in the previous section the AFSJ rules were previously compiled in the third pillar. The CFSP provisions were formerly the second pillar. With the entry into force of the Lisbon Treaty, the second pillar provisions were also incorporated in the treaty but the CFSP remains to have special characteristics in relation to other fields of EU actions such as AFSJ.\(^\text{30}\) This means that the CFSP is governed by different institutional and procedural rules than other fields and thus entails special traits. Examples of how the CFSP differs from inter alia AFSJ are that the ECJ has no jurisdiction over the provisions and the roles of the institutions, other than the European Council and the Council, is very limited.\(^\text{31}\) While the AFSJ has its scope limited by the different provisions in Title V TFEU the CFSP scope is wide and covers all areas of foreign policy and all questions relating to the Union’s security. The special character could be explained by the fact that the CFSP originally emerged from intergovernmental cooperation between the Member states on matters such as foreign and security policies.\(^\text{32}\)

In order to better understand what characterises a measure falling under CFSP an actual decision will be displayed in the same way as in the previous chapter concerning AFSJ. In a recent decision the Council decided to adopt an agreement establishing crisis management cooperation between the EU and the Republic of Chile.\(^\text{33}\) In the preamble of the agreement it is provided that both Chile and the EU recognise “the importance of world peace for the development of all States, and the obligation of all nations to cooperate in achieving and preserving it”. The agreement is intended to lay down a framework for how the Republic of Chile will assist the Union in a possible crisis, thus helping the EU to cope with, inter alia, security questions in the event of a crisis.\(^\text{34}\) Another example of a CFSP measure is a decision by the Council on an EU military operation in the Central African Republic.\(^\text{35}\) The objectives of the measures relating to that decision are provided in Article 1 of the decision. There it is provided that the EU,

\(^{30}\) Craig, P & De Búrca, G, EU Law, text, cases and materials, pp. 326-327.
\(^{31}\) See Article 24(1) paragraph 2 TEU.
\(^{32}\) Craig, P & De Búrca, G, EU Law, text, cases and materials, pp. 329-330.
\(^{33}\) Council Decision 2014/71/CFSP.
\(^{34}\) See the Agreement between the EU and Chile establishing a framework for the participation of the Republic of Chile in European Union crisis management operation, Article 1.
\(^{35}\) Council Decision 2014/73/CFSP.
through a military operation shall contribute to the provision of a safe and secure environment. It is further provided that the situation in the Central African Republic demands a military operation because of the “multiple and increasing violations of international humanitarian law and human rights”. Contrary to the internal nature of the AFSJ, the CFSP is a strictly external policy and as the following section will discuss, a policy area that by nature is apart from other fields of EU measures. This could also be highlighted by another decision concerning crisis management, namely Council Decision 2008/617/JHA. The said decision lays down general provisions for the Member states to follow when helping another Member state with crisis management. Just as the agreement with Chile, the Member states are bound to help another nation in crisis, however this agreement regards the help to other Member states only. This clearly displays the external nature of the CFSP in comparison to the internal nature of AFSJ. They can thus have similar contents, but the aim and context often differ between AFSJ and CFSP measures as shown in this case.

3.2 CFSP policies

3.2.1 Competence

In Article 2(4) TFEU the Union is provided with competence to define and implement a common foreign and security policy in accordance with the provisions in the TEU. In contrast to the previous paragraphs in Article 2 TFEU and Articles 3, 4 and 6 TFEU, the nature of the CFSP competence in paragraph 4 is not clarified. Even though the CFSP provisions could be regarded as to have their own legal nature, the principle of sincere cooperation also applies to CFSP in accordance with Article 4(3) TEU.36 In the other articles concerning for example AFSJ, a shared, exclusive or supporting competence is provided. The placement of the CFSP is thus unique since it is neither exclusive nor a shared competence distributed to the Union.37 This can be contrasted to other external policy areas such as customs unions and humanitarian aid, which are under the Union’s exclusive, respective shared competence. CFSP is thereby also excepted from the areas

36 Craig, P, & De Búrca, G, EU Law, text, cases and materials, p. 330, See also C-105/03 Maria Pupino, paragraphs 41-43.
37 Wessel and Bopp, The institutional architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?, p. 10. See for a comparison the competences provided in the different paragraphs of Article 2 TFEU.
of general EU law-making. In this regard Wessel and Bopp mean that the unique role of the CFSP could be interpreted as a “pillarisation” within the new legal framework. The competence mentioned in article 2(4) TFEU can be found in Article 24(1) TEU, where it is provided that the CFSP “shall cover all areas of foreign policy and all questions relating to the Union’s security”. It is also stated that such policies are “subject to specific rules and procedures”.

3.2.2 General CFSP legal instruments

The competence provided in Article 24(1) TEU gives the Union competence within the field of CFSP. However, it is in Article 25 TEU that the legal instruments for common foreign and security policies are provided. In Article 25 TEU it is stated that the Union shall define general guidelines, adopt decisions and strengthen the cooperation between the Member States in the conduct of the policies.

To conduct the CFSP the Union has been provided with provisions such as Articles 22(1), 26(1) 28(1) AND 29 TEU, where the Council, the European Council and the Member States are provided with various dimensions of powers to adopt decisions. In Article 28(1) TFEU for example it is declared that the union, when the international circumstances demand so, can take operational action.

3.2.3 International agreements

The Union may according to Article 37 TEU conclude agreements with one or more states or international organisations in areas covered by the CFSP chapter of TEU. When such an international agreement subsequently is to be negotiated and concluded, Article 218 TFEU provides the framework and the procedures to be followed by the EU institutions. Article 218(3) TFEU states that in so far an agreement “relates exclusively or principally” to the CFSP, it shall be the High Representative of the Union for Foreign affairs and Security policy that submits recommendations to the Council about the opening of a negotiation. The Council then authorises the opening of the negotiation and nominates the negotiator or the head of the Unions’ negotiation team. To make sure that the distribution of competences that is intended in the treaties is observed, an assessment has to be made regarding whether a certain negotiation of an agreement actually relates exclusively or principally to the CFSP field. To perform such an

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38 Eeckhout, P, EU external relations law, p. 171.
39 See Chapter 2 TEU.
assessment has appeared to be somewhat problematic in some cases. This assessment will also be a central part of the following chapter of this work.

The Council thereafter has the responsibility to adopt a decision authorising the signing of the agreements and if necessary to adopt them provisionally. Only by following the decision-making procedure provided in Article 218 TFEU can the Union, under EU law, express its consent to be bound by an agreement. In Article 218, provisions concerning the different roles of the EU institutions during the negotiation and the adoption of agreements are provided. According to the provision in Article 218(6) TFEU the Council has to either obtain the consent of the European Parliament (EP) or consult the EP before adopting a decision to conclude an agreement. However, an exception from those requirements is provided when an agreement concerns the CFSP area, in which case the Council may act without the consent of the EP. However, even if an agreement falls under the CFSP the EP has to be informed immediately and fully at all stages of the procedure. The EP thus has to be involved regardless of what kind of agreement that is concerned. The involvement however, varies depending on what legal basis the agreement is based upon.

3.3 The field of AFSJ

3.3.1 Objectives and general provisions

The AFSJ is laid down in Article 3(2) TEU, which provides that the Union shall offer its citizens an Area of Freedom, Security and Justice without internal borders and with free movement. To ensure such an area the Union shall adopt appropriate measures in respect to, inter alia, external border control and the combating of crime. This role is further elaborated and confirmed in Article 67 TFEU, which contains the general provisions of the AFSJ. Through the general provisions however, the rather broad objectives laid down in article 3(2) TEU is limited to non-enforcement aspects of public order in relation to problems with a cross-border character. It can also be noted that

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40 Koutrakos, P, International agreements in the area of the EU’s common security and defence policy, p. 162.
41 Article 218(5) to (8) TFEU.
42 Eeckhout, P, EU external relations law, p. 201.
43 Article 218(10) TFEU.
the scope of the AFSJ in Article 72 TFEU provides constraining elements by declaring that the AFSJ shall not affect the Member States’ work in regard to the maintenance of law and order and the safeguarding of the internal security. The specific objectives of the police cooperation and the judicial cooperation in criminal matters are further developed in Article 82 and 87 TFEU. Mutual recognition of national judgements and cooperation between national police departments are examples of objectives provided in those articles. Article 4(2) TEU also provides that the Union shall respect the national identities of the Member States. The objectives and general provisions of the AFSJ area can thus be regarded as regarding internal actions only. However, the objective of an internal area of safety and justice can never be achieved exclusively based on internal measures mainly because of the transnational nature of the issues that the policy area exists to counteract.45

3.3.2 External dimension of the AFSJ

The AFSJ was, when it first was created, based on an internal model, which could explain why the external dimension of the area maybe is not very palpable.46 The AFSJ is an area that is focused mainly on the internal security and therefor has an internal character. However the objectives to ensure an area of freedom, security and justice also involve combating international crime, control and administer asylums and migration. The nature of these challenges does not give the Union any other option than to work in cooperation with third countries on an external level to ensure the internal security and freedom in the EU.47 The “new” threats in a more globalised world have led to changes in how the Member states apprehend their view on both internal and external security. For example terrorism has become a global threat and the globalisation of the world has led to illegal activities that are being carried out across borders.48 Also mass migration flows and refugees seeking asylum in the EU are examples of challenges that have to be dealt with within the AFSJ in order to properly fulfil the objectives of the policy area.49 This means that the provision of “a high level of security” laid down in article 67(3) TFEU must be interpreted as to include the external issues that could threat the internal

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45 Monar, J, The external dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon, p. 11.
49 Vooren, B. V, Wessel R. A, EU external relations law, p. 481.
security. Often when the AFSJ concerns an external action such as the combating of international crimes and terrorism, there is a close link to the CFSP.\textsuperscript{50} This close link was also highlighted by the EP during a presidency meeting in 1999.\textsuperscript{51}

### 3.3.3 AFSJ external competence

In Article 4(2)(j) TFEU it is laid down that the Unions shall have a shared competence to carry out the AFSJ. As mentioned above, the AFSJ is austerely an internal part of the Union’s policy. This view also gets support in the treaty where most of the competence provisions are internal to their nature.\textsuperscript{52} However, in one article, namely under title V, in Article 79(3) TFEU provides that the Union may conclude international agreements in relation to issues regarding readmission of third-country nationals. Hence, it is only when an international agreement concerns immigration relating questions in general and third-country nationals who no longer fulfil conditions for entry or residence in of the Member states in particular, that an explicit external competence has been conferred upon the Union within AFSJ.

Even though the only expressed external competence concerns immigration, the Union has the opportunity to conclude agreements also in relation to other policy fields of the AFSJ. This opportunity is re-affirmed in the Lisbon Treaty declarations.\textsuperscript{53} The opening was first made possible in the AETR case where the ECJ allowed the application of the implied powers doctrine.\textsuperscript{54} Essentially it means that the Union has the competence and possibility to apply its policies externally to areas where it has been provided with a corresponding internal competence. However, even if there are areas where the ECJ has approved that an AFSJ policy can be applied externally, the wide spread of different AFSJ areas (everything from police and criminal cooperation to asylum and immigration) can have a negative effect on the opportunity.\textsuperscript{55} Since other policies, such

\textsuperscript{50} Wessel, R. A, Marina, L, Matera, C, The external dimension of the EU’s area of freedom, security and justice, p. 277.
\textsuperscript{52} Vooren, B. V, Wessel R. A, EU external relations law, p. 481.
\textsuperscript{53} See 36 Declaration on Article 218 of the Treaty of 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, (OJ C 83 of 30.3.2010).
\textsuperscript{54} C-22/70 Commission v. The Council.
\textsuperscript{55} Monar, J, The external dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon, p. 8.
as CFSP, suffer from less fragmentation in their respective policy field it can be argued that those policies could be given a more political weight.

3.3.4 International agreements

As with international agreements within the CFSP area it is the Council that is responsible for signing and concluding international agreements concerning the AFSJ. When handling such issues, the Council is configured as a JHA Council.\(^{56}\) National experts on international issues, which together form a Group on External AFSJ Issues (JAIEX), can in certain cases assist the JHA Council further. JAIEX not only gathers AFSJ experts but also experts from certain CFSP groups. Decisions under the AFSJ are governed by Article 294 TFEU, which constitutes the ordinary legislative procedure. That provides for a qualified majority vote (QMV) in the Council and co-decision with the EP. In this regard, there are however, exceptions concerning certain external relations.\(^{57}\) The general rules in regard to conclusions and negotiations of international agreements are laid down in Article 218 TFEU and as long as the agreement does not relate exclusively or principally to CFSP, Article 218(3) provides the specific rules. In comparison to the CFSP legislative procedure, the EP is thus given far more power and influence when the competence is based on an AFSJ provision since at least its consent is required in such cases.\(^{58}\)

3.3.5 Examples of international agreements based on AFSJ

As previously discussed, the AFSJ policy area has objectives concerning the internal dimension of the EU for the most part. There are, however, international agreements that have AFSJ as legal basis.\(^{59}\) Examples of agreements based on AFSJ are two decisions to adopt an agreement concerning preventing and pursuing the departure of foreign terrorist fighters.\(^{60}\) Another example of a decision adopted on the basis of AFSJ is the decision to adopt an agreement concerning mutual legal assistance in criminal matters between the EU and Japan.\(^{61}\) The EU also has an agreement with the United States concerning the transfer of passenger name records, the so called PNR

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56 Vooren, B. V, Wessel R. A, EU external relations law, p. 484 (The JHA Council is composed of the national Ministers of Justice and Ministers of Home affairs).

57 See for example Articles 82(2)(d) and 83(1) TFEU, where unanimity and consent only from the EP is required.

58 See Article 218(6)(a) TFEU.

59 For an inventory of agreements see Council doc.11901/15.

60 Ibid paragraphs 2 and 7.

61 Council decision 2010/88/CFSP/JHA.
agreement.62 The purpose of the PNR agreement, is according to its first article to ensure security and protect the life and safety of the public.63

3.4 Differences between CFSP and AFSJ legal bases

As discussed previously in this chapter both CFSP and AFSJ legal bases can be used by the Union in certain external actions, such as adopting international agreements. However, what also has been highlighted is how the different legal bases differs both in procedural and general rules. An analysis of the most important differences will therefore be presented in the following sections. This is intended to deepen the understanding of the different consequences following the choice of legal basis.

3.4.1 The procedural rules

The Union may conclude international agreements in areas where the Treaty provides so.64 This rule is generally applicable on all international agreement but the procedural rules provided in Article 218(3) and (6) TFEU differ based on what the agreement relates to and thereby also differ between the different legal bases. It is the Council that authorises openings of negotiations as well as adopting negotiation directives, authorises signings of the agreements and concludes them.65 Article 218(3) TFEU then provides that it is the Commission that normally submits recommendations to the Council regarding the opening of negotiations and the nomination of the Unions’ negotiating team. However the Article also provides that when the agreement exclusively or principally relates to the CFSP it is the High Representative of the Union for Foreign Affairs and Security Policy that submits such recommendations.66

When an agreement has been negotiated and is ready to be concluded, the Council adopts a decision to conclude the agreement.67 Regarding such decisions the EP can be given an important role since the Council either has to obtain the EP’s consent or at

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62 Council decision 2012/472/EU.
63 Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security.
64 See Article 216(1) TFEU.
65 See Article 218(2) TFEU.
66 See Article 20(2) TEU that provides that the Commission and the High representative of the Union for Foreign Affairs and Security Policy may submit joint proposals to the Council
67 See Article 218(6) TFEU.
least consult with the EP before adopting a decision. If the agreement that is to be concluded relates exclusively to the CFSP however, the Council does not have to obtain consent nor consult with the EP. Agreements with an AFSJ legal base thus give the EP far more influence than agreements that are about to be concluded with a CFSP legal basis. The substantive legal base thus decides what decision-making procedure that will be applied, and this was confirmed in the Mauritius case where the Court stated that symmetry between legal basis and the procedure of the decision was justified in the light of legal certainty and consistency.\(^{68}\) It is not only the Commission that is given a significantly less important role when an agreement concerns the CFSP. The ECJ is also deprived parts of its normal institutional powers concerning the CFSP. In Article 24(1) TEU it is provided that the ECJ shall have no jurisdiction with respect to the CFSP except its jurisdiction to monitor the compliance with article 40 TEU and certain decisions relating to the provision in Article 275(2) TFEU. This lack of judicial scrutiny is one of the most noticeable differences between the AFSJ and CFSP procedures.\(^{69}\)

In comparison to the CFSP provisions certain AFSJ provisions provide the Member states with tools that can be used towards decisions. For example are the Member states enabled to suspend decisions that relate to the judicial cooperation in criminal matters.\(^{70}\) Within the police cooperation, the Member states are provided with the opportunity to an enhanced cooperation if unanimity is not possible to reach in the Council.\(^{71}\) Another important difference between the two policy areas is the voting procedures that precede, \textit{inter alia}, decisions. Article 24(1) TEU provides that the CFSP area is subject to specific rules and procedures. This means that the normal voting procedure in EU supranational law with QMV in the CFSP area is replaced with a unanimity vote in accordance with Article 31(1) TEU. This can also be seen as an indicator that the CFSP area still is governed by the former intergovernmental second pillar rules.\(^{72}\)

\(^{68}\) See C-658/11 Mauritius, paragraphs 59-60.
\(^{69}\) Engel, A, Delimiting Competences in the EU: CFSP versus AFSJ Legal Bases, p. 5. See also for a discussion concerning the ECJ jurisdiction the Final report of Working Group X on Freedom, Security and Justice, part V, paragraphs 24-25.
\(^{70}\) See article 82(3) TEFU.
\(^{71}\) For an enhanced cooperation at least 9 Member states have to cooperate, see article 87(3) TEFU.
\(^{72}\) Engel, A, Delimiting Competences in the EU: CFSP versus AFSJ Legal Bases, p. 50.
3.4.2 Article 40 TEU

Article 40 TEU was introduced with the Lisbon Treaty and replaced the former Article 47 TEU. The Article is important since it protects both the AFSJ and the CFSP area by laying down that the different implementation in the different areas not shall affect the application of the procedures and the extent of powers conferred by the other area and vice versa. This means that both the “acquis communautaire” and the CFSP provisions are protected by the provision. This also means that the previously supplementing nature of the CFSP area now is more of an equal with other policy areas such as AFSJ. This can be contrasted to how former Article 47 TEU made the legal basis litigation easier since the AFSJ basis was given an advantage since no CFSP decisions could be adopted if the same decision could be based on e.g. an AFSJ basis. However, the legal basis litigation that still causes problems was not remedied with the new framework and Article 40 TEU. On the contrary, since the previous pillar areas have been moved closer to each other, it has made the differentiation of the areas more challenging.

3.5 Could CFSP and AFSJ be mixed/split?

The (new) provision in Article 40 TEU protects, as discussed in the previous section, both the CFSP and the AFSJ area and has been described both as a “two way street” and a “Chinese wall”. While both of the expressions describe the same provision the difference between the characteristics of the descriptions leads, according to Engel, to two different ways to solve legal basis litigation between the CFSP and AFSJ, namely either an application of a general criteria or a splitting of the measures. The solution to split the measures and by doing so, base an agreement on dual legal bases was also suggested by the EP in its application for the annulment of decisions concerning the

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73 Hillion, C & Wessel, R. A, Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?, p. 583.
75 See chapter 4.1 in this work where the Ecowas case is discussed.
76 Engel, A, Delimiting Competences in the EU: CFSP versus AFSJ Legal Bases, p. 52.
78 Engel, A, Delimiting Competences in the EU: CFSP versus AFSJ Legal Bases, p. 5. This solution is further discussed in chapter 4 below, especially in relation to C-130/10.
Atalanta Operation. In the application, the EP argues that the attacked decision not exclusively relates to CFSP but also relates to judicial cooperation in criminal matters and police cooperation, and therefore should have been concluded with the substantive legal bases of both Article 37 TEU (CFSP) and Articles 82 and 87 TFEU (AFSJ). A similar argumentation was presented by the EP in the earlier case of C-658/11 but the argumentation was not considered by the ECJ and the solution is therefore not yet an approved measure. This question has also arisen in the case law that will be presented in the next chapter. Even if a dual legal basis as a solution to legal basis litigation has been discussed theoretically by the ECJ, it should be notified that such a solution not yet has been used in reality concerning the post Lisbon Treaty provisions.

3.6 Summary

In this chapter the background of the two areas, CFSP and AFSJ, has been analysed in order to better highlight what the legislator might have intended when distributing the different competences that are provided through the areas provisions. What the chapter specifically displays is the fact that the areas are different in their nature since they pursue diverse goals. Within the CFSP the pursuit is external matters while the AFSJ objectives to their nature are internal. Even though such differences make it easier to distinguish between the areas, certain elements which the areas share might cause troubles when choosing the correct legal basis. Since certain objectives, for example the crisis management objectives discussed in this chapter can relate to both the CFSP and the AFSJ a grey area might occur for which the choice of the correct legal basis might be troublesome. These issues might be, as discussed, specially problematic when the Union is about to conclude international agreements since the institutional balance provided in the Lisbon Treaty is linked to the choice of legal basis since the different provisions have different procedural rules. As a solution to these problems, the possibility to base certain measures on both CFSP and AFSJ legal basis was presented briefly. A more thorough discussion concerning solutions to legal basis conflicts will follow in the next chapter.

79 C-263/14, application by the EP.
80 In C-130/10 the Court stated that a dual legal basis could be approved by the Court in exceptional cases. However, such an exceptional case is yet to be presented to the Court.
81 No cases of a dual legal basis in practice have been found during the research of this work.
4 Recent case law

4.1 Background

In recent cases, the ECJ has faced questions that derive from the issues discussed in this work concerning the choice between CFSP and AFSJ provisions as legal basis. The selection of the cases discussed in this chapter is aimed to be as comprising as possible and to lay an impartial ground for the subsequent discussion and analysis. Some of the cases are chosen because they help to understand the difficulties to choose the proper legal basis and some, especially the Atalanta cases, are chosen to highlight the difficulties of separating CFSP from AFSJ related measures. As both the AFSJ and the CFSP could concern external issues, Wessel and Matera are of the belief that conflicts based on the legal base will arise more often.\(^2\) The following presentation of case law aims to highlight cases where legal basis problems have arisen between AFSJ and CFSP because the underlying agreement could be considered as relating to both CFSP in title V TEU and AFSJ in title V TFEU. The discussions in the following cases are intended to highlight problems concerning the choice of legal basis and are deemed as interesting for this work even though some of the cases do not concern legal basis litigation between CFSP and AFSJ.

4.2 Ecowas (pre Lisbon)

In the Ecowas case the Commission (COM) sought to annul a decision that the Council had adopted under the CFSP in Title V of the TEU.\(^3\) The decision was implementing a joint action on the EU’s support to combat the spread of small arms and weapons (SALW). The COM evidently considered that the Council had gone outside its competence in the area of development cooperation and security.\(^4\) The COM, together with the EP, argued that former Article 47 EU (now Article 40 TEU) established a boundary between the Union and the Community competences and that it meant an infringement of the Community law whenever an act that could have been based on the

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\(^2\) Matera, C, Wessel, R. A, Content or Context? A CFSP or AFSJ legal basis for EU international agreements, p. 1048.
\(^3\) C-91/05 Commission v Council.
\(^4\) Hillion, C & Wessel, R. A, Competence Distribution in EU External Relations after Ecowas: Clarification or Continued Fuzziness? p. 553.
EC treaty was adopted on a CFSP legal basis. Even if the provision now has been changed (see chapter 3.3.3) the principal question of the Ecowas case was if the choice of legal basis was correct or not. In this regard the advocate general (AG) Mengozzi went to earlier case law and found that objective factors like aim and content of a certain measure must be observed when choosing the legal basis rather than the institution’s convictions as to the pursued objectives. AG Mengozzi subsequently found that the decision at least principally pursued CFSP objectives and therefor had been based on the proper legal basis.

The ECJ confronted the argumentation put forward by the participants in the case in a different manner. As the GA previously had found, the Court also stated that the contested decision indeed had a CFSP dimension. However, the ECJ did not conclude its argumentation there but instead continued and stated that the decisions not only related to CFSP but also to development cooperation without, one of those objectives being incidental to the other. Therefore, since the (former) Article 47 TEU, as mentioned above, prohibited the Union to adopt a decision on a CFSP ground that could be properly adopted on the basis of the EC treaty, the ECJ annulled the contested decision.

4.3 The Atalanta operation cases (post Lisbon)

In two cases were the AFSJ and CFSP policies congregate, after the entry of the Lisbon treaty, are C-658/11 (Mauritius) and C-263/14 (Tanzania). The cases concern the European Union-led naval force and its operation to capture suspected pirates in the Gulf of Aden: EU Navfor Somalia, operation Atalanta. The Atalanta operation was made possible, inter alia, because of a United Nations (UN) resolution from 2008, in which the EU states were urged to help the Transitional Federal Government of Somalia to fight piracy at sea and to help the UN to protect their shipping with humanitarian

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85 See C-300/89 Commission v Council, paragraph 10, see also C-411/06 Commission v. Parliament, paragraph 45.
86 C-91/05, GA Opinion, paragraph 213.
87 C-91/05, paragraph 95.
88 Ibid, paragraph 99.
90 See Council Decision 2008/918/CFSP.
aid. In relation to this operation the EU adopted decisions (the attacked decisions) to negotiate and conclude agreements with non-member countries on the conditions of transfers of the suspected pirates and confiscated goods. The agreements also contain elements relating to other policy fields than CFSP such as cooperation in the field of criminal law.

The Council decisions, in both cases, on the signing and conclusion of the agreements were legally based on the CFSP and Articles 37 TEU and 218(5) and (6) TFEU. Therefor the Council also considered that it was not required to neither obtain the consent nor consult the EP under Article 218(6) TFEU. In both cases the EP considered that the choices of legal bases were incorrect, and therefor submitted actions for annulment of the attacked decisions to the ECJ, according to Article 263 TFEU. The EP considered that the attacked decisions were invalid since they did not relate exclusively to the CFSP, as provided for in Article 218(6), second paragraph, TFEU. The EP was arguing that the agreements also related to judicial cooperation in criminal matters and police cooperation and therefor related to areas covered by the AFSJ legal framework.

4.3.1 The Mauritius case – Choice of legal base

As opposed to the Tanzania case, which is currently in progress, the Mauritius case has already been settled by the ECJ. As discussed in the previous section, the EP did not agree with the Council concerning the choice of legal basis in the Mauritius case. The EP submitted two pleas in law to the court in an effort to annul the attacked decision. In the first plea the EP submitted that the decision did not relate exclusively to the CFSP and could therefor not be concluded without the participation of the EP according to Article 218 (6) TFEU. The EP argued that the attacked decision instead should have been concluded on a legal basis combining Article 37 TEU (CFSP) and Articles 82 and 209 TFEU (AFSJ) and subsequently with the participation of the EP. In the second plea, the EP argued that the Council, in any case, had failed to fulfil its obligation provided in Article 218(10) TFEU. Article 218(10) TFEU provides that the EP shall be immediately

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94 See, inter alia, C-658/11, paragraphs 25 and 26.
and fully informed at all stages of the procedure regarding international agreement in any policy area (CFSP included).

In regard of the choice of legal basis the ECJ commenced its argumentation by citing previous case law. In C-130/10 the Court provided that:

“If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component”.  

The ECJ thus found that a predominant aim or component of a measure should be the deciding factor when choosing legal basis. However, the ECJ continued by problematize the reasoning and answered how to decide the legal basis when a measure simultaneously relates to two different areas or has different components relating to different provisions in the treaties. The Court held that in such exceptional cases, an agreement has to be based on the “various corresponding legal bases”. The court continued by stating that the different aims or components of the measure have to be “inseparably linked without one’s being incidental to the other.

The EP did not agree with the ECJ and argued that even if the AFSJ aspects of the attacked decisions were subordinate to the CFSP aspects, it was sufficient to render Article 218(6) TFEU inapplicable. Based on these arguments the ECJ commenced a so-called “centre of gravity test”. It stated that Article 218(6) TFEU is a very complex provision and rejected the EPs’ argument that incidental aims of a measure could affect the choice of legal base. Since the EP had not argued that the principal aim or the main components of the attacked decision fell outside the CFSP area, the ECJ thus only had to examine the result of its “centre of gravity test” and thereby determine that the

95 C-130/10, paragraph 43.
96 C-658/11, paragraph 44.
97 Ibid, paragraph 46-47. See also Matera, C Wessel, R. A., Content or Context? A CFSP or AFSJ legal basis for EU international, p. 1053.
98 See C-658/11, paragraphs 49-50. See also Matera, C, Wessel, R. A., Content or Context? A CFSP or AFSJ legal basis for EU international, p. 1054.
attacked decision was based on the correct legal basis. GA Bot looked to the objectives and the content of the joint action\textsuperscript{99}, which is the base of the attacked decisions and draw the conclusion that the decisions fell under CFSP. This shows that at least the GA considers that it is the context of the objectives of an agreement rather than the content that determines the choice of the correct legal basis.\textsuperscript{100} The ECJ also stated that when adopting decisions to enter an international agreement under Article 218 TFEU it is the substantive legal basis that determines which procedure under 218(6) TEFU that is applicable and not the aims or components of the agreement.\textsuperscript{101}

The ECJ also extended some of the arguments that was put forward by the GA Bot, namely the symmetry between internal and external actions that Article 218(6) TFEU establishes.\textsuperscript{102} GA Bot stated that it would be contrary to the article to confer more powers upon the EP regarding an external action than what it would be provided with regarding the adoption of an internal action.

4.3.2 The Tanzania case – Dual legal bases
The most previous dispute concerning the Atalanta operation that has been brought forward to the court concerns an agreement between the EU and Tanzania.\textsuperscript{103} The case is very similar to the Mauritius case, since them both concern identical agreements that are based on the same joint action. Since the ECJ did not have to discuss the option of a dual legal base in the Mauritius case, the EP has made sure to highlight its opinion concerning the dual legal base issue in its application that is currently being revised by the Court, before the judgement will be delivered. The question is however, if the ECJ will alter or at least develop its views brought forward in the Mauritius case concerning the legal base issues. Since the ECJ in the Mauritius case found that the agreement could be based solely on CFSP the argument concerning a dual legal base, based both on CFSP and AFSJ, was not addressed by the Court in that case. Thus has the ECJ yet to present its view on the correct substantive legal basis concerning the Atalanta agreement. In the Tanzania case however, the EP has presented a new argumentation that provides that the agreement at hand should have been concluded on both CFSP and

\textsuperscript{99} Joint action 2008/851/CFSP.
\textsuperscript{100} Matera, C, Wessel, R. A, Content or Context? A CFSP or AFSJ legal basis for EU international agreements, p. 1055.
\textsuperscript{101} C-658/11, paragraphs 58-59.
\textsuperscript{102} Opinion in C-658/11, paragraph 30.
\textsuperscript{103} C-263/14, application by the EP on 3 June 2014.
AFSJ through articles 82 and 87 TFEU. A precedential discussion concerning these issues will linger since the ruling in this case is still awaited. However the advocate-general Kokott just recently delivered her opinion regarding the case where it was found that the EPs arguments concerning legal basis was unfounded.\textsuperscript{104} In her opinion, Kokott mentioned that the dual legal basis solution presented by the EP certainly has not yet been rejected in the case law.\textsuperscript{105} The discussion was thus moved on to an analysis of the contested decision and an assessment of what or witch legal bases that in her opinion is correct. In doing so, the GA evoked that the argument that legal bases chosen for the adoption of other EU measures with similar traits is irrelevant.\textsuperscript{106} The only correct way in which to establish the correct legal basis is thus through an autonomous analysis of the contested decision. The following discussion presented by the GA concerned the content, context and aim of the contested decision. Regarding the content, it was provided that the disputed agreement has “\textit{certain affinity}” with the subject matters related to AFSJ. However, concerning the aim and the context, no such connection was to be found. GA Kokott argued that the AFSJ is a strictly internal area and that the contested decision despite its AFSJ related content does not affect or alter AFSJ cooperation within the Union.\textsuperscript{107} This can also be compared to chapter 3.1.2 and the crisis management decisions. The conclusion reached there was that the contents of one AFSJ and one CFSP agreement might be similar even though the aim and context are not. Further, Kokott argued that the agreement concerned international security and that a connection to the internal security of the Union or the security of the Member states was not evident.\textsuperscript{108} Even if such a connection existed, the GA continued, it would be merely indirect since the contested decision relate to AFSJ subject matters in Africa and not the European Union.

\textbf{4.3.3 Cross-border exchange regarding road safety – Aim and content}

In a recent judgement the Court decided on an action for annulment of a directive, brought forward by the COM.\textsuperscript{109} The directive that the COM requested to be annulled concerned cross-border exchange of information concerning road safety related traffic

\textsuperscript{104} Opinion in C-263/14  
\textsuperscript{105} Opinion in C-263/14, paragraphs 52-54.  
\textsuperscript{106} Ibid, paragraph 55.  
\textsuperscript{107} Opinion in C-263/14, paragraphs 63-64.  
\textsuperscript{108} Ibid, paragraphs 65-67.  
\textsuperscript{109} C-43/12 Commission v. Parliament.
offences. This case does not concern the relation between CSFP and AFSJ but still highlights certain important principals regarding the choice of legal basis of international agreements. Firstly the ECJ stated that the choice of legal basis must rest upon subjective factors including the aim and content of a certain measure. The ECJ moved on to a similar discussion as in the above-mentioned Mauritius case, concerning if the measures at hand pursue a twofold purpose or have a twofold component and stated that the choice of legal basis must be based on the main or predominant purpose or component if such a purpose or component is identifiable. In order to assess if such a prime objective could be determined the ECJ started by examine the content of the measures, especially the recital of the underlying directive. It then moved on to examine the context of the measure and found that the objectives of the measure, in the light of the context, clearly related to, and had a prime objective, concerning road safety. The Court then discussed if the measure could have other components or purposes relating to another policy field and found that it was clearly true that the measures also pursued objectives concerning traffic offences. However, the ECJ continued its argumentation by stating that the precise aim of the measure, based on the aim and the content, was to enable the EU to pursue the goal of improving road safety. The argument put forward by the Council, that the measure could have been adopted under title V TFEU did not alter the view of the ECJ, which instead countered by stating that the chosen legal basis must be understood in the light of the general objectives of that legal base. In this case, the ECJ did not find that the aim and context of the measure to be directly linked with the AFSJ objectives. In a case delivered a couple months earlier, the ECJ conveyed a similar argumentation. This time the request of annulment also concerned the choice of legal basis. One factor that differ this case from the road safety case is however that the measure at hand was adopted in order to authorise the signing of a convention on behalf of the EU. In this regard, the ECJ

110 The COM argued that the directive ought to be based on the field of transport and not judicial criminal cooperation.
111 C-43/12, paragraphs 29-30. See also C-300/89, paragraph 10, C-130/10, paragraph 42 and C-81/13, paragraph 35.
112 See also C-137/12 Commission v. Parliament and the Council.
113 C-43/12, paragraphs 31-36, see also C-137/12, paragraphs 58-60.
114 C-43/12, paragraphs 48-49.
stated that the examination of the measure must be made in conjunction with the convention in order to assess the aim of the measure.\textsuperscript{116}

\section*{4.4 Summary}

In this chapter recent cases of the ECJ is discussed and analysed in order to provide a comprehensive view of the current legal situation concerning legal basis conflicts relating to AFSJ and CFSP. Firstly the situation before the entry into force of the Lisbon Treaty is discussed. As the Ecowas case highlights, the new Article 40 of the TEU provides a more equal balance between the CFSP and AFSJ since the former wording of the Article provided the AFSJ with advantages over CFSP. The following subsequent cases discussed in the chapter all concern legal basis litigation after the entry into force of the Lisbon Treaty. The idea behind the selection of cases is to provide the reader with an overview of the current legal situation and what possible solutions to the current issues that have been discussed by the ECJ. As the Atalanta cases show, legal basis conflicts have occurred in the recent years and solutions have been analysed by the court. One aspect that seems to stand out is how to assess the measures at hand in order to find the correct legal basis. The way to conduct such an assessment is according to the ECJ to look at the content, context and aim of the measure that is being evaluated. Even though the content might be similar even concerning measures that clearly relates to either CFSP or AFSJ, the aim and context usually help to guide the ECJ to a decision concerning the correct legal basis. Another solution when measures relate to both AFSJ and CFSP is to utilise a dual legal basis. As the discussion in this chapter thus provide; this solution has yet to be tested other than in theory. The ECJ has stated that a dual legal basis exceptionally could be used. However, the negative effects of a dual legal basis such as for example a distorted institutional balance suggest that such a solution might be difficult to apply in practice. An important factor relating the choice of legal basis concerns how to make the distinction between the areas, which is why the next chapter will deal with how to make such a distinction.

\textsuperscript{116} C-137/12, paragraphs 53-54.
5 AFSJ or CFSP, where to draw the line?

5.1 Similarities and degrees of convergence between AFSJ and CFSP

The two areas that this work concerns: AFSJ and CFSP were, as mentioned in the introduction, chosen because they have similar objectives but largely differ in other respects. The increasingly globalised cross border crimes can be mentioned as an example of where the policy areas overlap. The external dimension of the AFSJ and the general external security dimension of the CFSP both can be applied to cross border criminality in general and counter terrorism in particular. The field of counter-terrorism has traditionally been a priority in the CFSP area, but falls at the same time within the internal security mandate of the AFSJ in accordance with Article 67(3) TFEU. The overlap can (and has, as demonstrated in the previous chapter) cause tension between the institutions of the EU, especially the EP and the Council. The Council obviously prefers to avoid the co-decision that is given to the EP under normal legislative procedures. As an example of this preference the Council recently based its measures concerning the freezing of terrorist assets on Article 215(2) TFEU instead of Article 75 TFEU, which explicitly provides such a competence. This highlights according to Monar the difficulties of drawing a line between the two areas. In relation to counter-terrorism, the issues to draw such a line thus provide the question if an area should be guided by a foreign or an internal policy.

5.2 Mixed agreements after Lisbon

Before the entry into force of the Lisbon Treaty and before the Union and the Community became one single legal person, certain international agreement was cross-pillar based. This was thus a way to solve the problems concerning agreements that was relating to both the CFSP and other Union issues simultaneously. However, the merger of the Community and the Union together with the “depillarisation” of the EU

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118 Ibid, p. 29.
have put an end to the cross-pillar mixed agreement since all agreements now is concluded by the EU. Wessel discusses the newly arisen problem of the horizontal mixity of agreements and states that the new legal order has removed the necessity of a combined legal basis.\textsuperscript{120} Certain agreements might nevertheless cause problems even after the Lisbon treaty as the previous chapters of this work have highlighted. Especially situations where an agreement relates principally but not exclusively to CFSP could very well call for “cross-sector” agreements, which could be eased by the fact that the Lisbon treaty actually makes cross-sector agreements easier to reference for the ECJ.\textsuperscript{121}

\section*{5.3 Possible remedies}

\subsection*{5.3.1 Centre of gravity test}

As mentioned above, the tool most often used to remedy legal basis litigation is the centre of gravity test.\textsuperscript{122} In C-377/12 the court found that the choice of legal basis in accordance with settled case law (i.e. C-130/10) must rest on objective factors such as the aim and the content.\textsuperscript{123} The need for a centre of gravity test first appears when a measure pursues more than one policy field objective. As discussed in chapter 4, this principle can certainly help the institutions to choose the correct legal basis. One ambiguity thus arose in C-377/12, where the ECJ stated that the predominant aim determines the legal basis.\textsuperscript{124} However, the ECJ also stated that the main objective only can determine the legal basis as long as the measure do not go beyond the framework of the policy chosen as legal basis. The centre of gravity test thus has a limited capacity when applied as the determining factor when choosing the correct legal basis. This since the main objective has to fall within the framework of the chosen legal basis.

\textsuperscript{120} Wessel, R. A, Cross-pillar Mixity in C, Hillion, P, Koutrakos (ed), Mixed agreements revisited, pp. 51-52.
\textsuperscript{121} Ibid, p. 53.
\textsuperscript{122} The so-called centre of gravity test have been developed and discussed in a numerous cases, such as C-130/10, C-658/11 and 377/12.
\textsuperscript{123} C-377/12, paragraph 34. See also, inter alia, C-130/10.
\textsuperscript{124} C-377/12, paragraphs 34-35.
5.3.2 Splitting of measures

The EP has recently argued for a post Lisbon remedy to measures that arguably falls within different policy areas.\textsuperscript{125} In C-263/14, the EP sought to annul a decision based on the choice of legal base, as mentioned in chapter 4.2.2. In its application the EP argued that the aim and the content of the contested agreement not only were related to CFSP but also, and directly, to AFSJ and the judicial cooperation in criminal matters and the police cooperation.\textsuperscript{126} The Council had, as mentioned above, based its decision on article 37 TEU and thereby on a CSFP basis. The solution brought forward by the EP was to combine the legal bases and add article 82 and 87 TFEU and by doing so substantively base the contested decision on both a CSFP and AFSJ provisions. The EP argued that this was the only correct solution since the contested agreement pursued a twofold purpose and that the agreement in some parts of its content directly related to the AFSJ policy area. This argumentation was also brought forward in the earlier Mauritius case. Since the ECJ found that the contested agreement in the Mauritius case could be based solely on CFSP it did not address that argumentation.\textsuperscript{127} However in C-130/10 the ECJ ruled in yet another similar case and concerning the aim and content the Court stated that:

\begin{quote}
"With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one’s being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases"\textsuperscript{128}
\end{quote}

By this statement the ECJ thus confirmed that a dual legal basis, in exceptional circumstances could be a possible solution when a measure is very problematic or impossible to categorise. This view of the matter was also confirmed very recently by general-advocate Kokott as mentioned in chapter 4.3.2. As the GA pointed out, the opportunity to base a measure on dual substantive legal bases if the measure simultaneously pursues several objectives or has several components has not been

\begin{flushleft}
\textsuperscript{125} See C-658/11 and the application of the EP in C-263/14.
\textsuperscript{126} C-263/14, application, paragraph 33.
\textsuperscript{127} See C-658/11, paragraph 61.
\textsuperscript{128} C-130/10, paragraph 44, see also for example C-377/12 paragraph 34.
\end{flushleft}
ruled out by the Court\textsuperscript{129} However, as in the other case law presented in this work, it seems to exist an aversion against the opportunity to use a dual legal basis as a solution to a conflict. At least does it seem that the very exceptional circumstances that need to occur to justify a dual legal basis certainly are exceptional since they so far have not occurred.

5.4 EU external consistency

According to Article 21(3) TEU the Union shall ensure consistency between both the CFSP and the AFSJ but also in relation to external actions of other policy areas. This has been addressed as in important part of a stable representation for the Union concerning the negotiation of international agreements.\textsuperscript{130} In this regard it was underlined that the Council has to consider the content of agreements, so it can decide how to decide the choice of legal base, in order to optimise the capacity of the Unions negotiations.\textsuperscript{131} The consistency on its own cannot relief the Union of any problems with the choice of legal base, but it can lay down a principle according to which the Union has to be able to adopt international agreements without predicaments in order to be an important international actor. It also highlights the importance of correct choices of legal basis.

5.5 Summary

This chapter pursues to give a better overview of the issues analysed and discussed in the previous parts of the work. The previous parts have hopefully also made the external area where the AFSJ and CFSP meet more visible and clear. The area of CFSP is, as mentioned, external to its nature but the previous chapters also highlights an area of external nature concerning the AFSJ. It is measures that arguably could relate to such an overlapping area that cause the legal basis conflicts. As the chapter shows, certain solutions have been presented in order to solve such legal basis conflicts. The question is however to what extent the existing remedies are enough to solve legal basis conflicts

\textsuperscript{129} Opinion in C-263/14, paragraphs 52-53.
\textsuperscript{130} Final report of Working Group X "Freedom, Security and Justice", p. 23.
\textsuperscript{131} Ibid, p. 23.
and thereby protect the institutional balance. The aim of the following and concluding chapters will therefore consist of a discussion concerning that question.

6 Analysis

The legal framework discussed in this paper is not only complex but also an essential part of the EU’s *acquis communautaire*. Since the entry into force of the Lisbon treaty, the EU is now one legal person and the previous issues caused by different actors and three areas of different pillars do not exist anymore. Thanks to the Lisbon treaty the EU now has one provision governing the international agreements, namely Article 218 TFEU. As long as this provision is complied with, the “new” European Union can become the international actor that it aims to be in order to safeguard not only the security within the union but also in the rest of the world. Since the EU was transformed into one legal person and the legal framework changed its shape, some issues however seem to have arisen or persist. As this paper has discussed, the recent case law shows that issues concerning the choice of legal basis can prove to be difficult especially in situations where the situation at hand relates to more than one of the provided policy areas available to the legislator.

The reason why the specific policy areas of CFSP and AFSJ were chosen to concretize the discussion in this paper is, as mentioned in the introduction, because both areas aspire to create a secure union without neither external nor internal threats, an area where people can move freely without being afraid and an area where justice is imperative. In my opinion, it is obviously better to have a wider range of option when an international agreement is going to be adopted. However, as the previous chapters of this work have shown, the two areas that have been assessed cover areas to which both the CFSP and the AFSJ policies can relate. The result is, unfortunately, that areas that could relate to both CFSP and AFSJ can cause complications during the process of the choice of legal basis for measures that fall under these areas. If the choice of legal basis were merely a formalistic activity, this would not be much of an issue – however, the choice of substantial legal basis between CFSP and AFSJ results not only in different procedures but also in different involvement by the institutions of the EU. The choice of legal basis thus, not only plays an important role for the institutional balance and the
procedural rules but also for the jurisdiction of the ECJ since its jurisdiction alters depending on which legal base is used.

Neither this work nor my personal belief concur with the idea that any of the different policy areas in particular is to be preferred over the other and I think that both CFSP and AFSJ policies are vital in their separate ways to protect both the internal but also the external dimensions of the EU. With the CFSP the EU has been given the opportunity to conclude international agreement relating to peace keeping and the protection of democracy and human rights in the world. According to the AFSJ provisions the EU has been given the competence to take action against everything that could threaten the internal security of, and the freedom in, the Union. So far the legislator has been able to give legal opportunities to the safeguarding of the most vital parts of the EU’s continuing existence. However, the issues occur when a measure that arguably could relate to both CFSP and AFSJ is adopted with one of the different legal bases. Since measures concerning AFSJ and the CFSP by nature in certain cases can relate to both the areas, issues can arise when consensus concerning what legal base to chose cannot be achieved. My own persuasion is that overlapping areas is far better than areas with a grey zone between them, which then would fall outside or at least complicate the distribution of competence in the EU. In most cases the proper choice of legal basis has obviously proven not to cause any major problems.

However, when a decision is about to be adopted concerning the conclusion of an international agreement and the nature of that agreement or measure arguably can relate both to CFSP and AFSJ problems can occur, as has been discussed in this work. Especially if different institutions within the EU cannot agree on what the correct legal base is for a certain agreement. In these cases Article 40 TFEU refer competence or jurisdiction upon the ECJ to try whether the right legal basis has been chosen. The line between the CFSP and the AFSJ seems to be drawn with difficulty and the recent case law suggests that there are different opinions within the Union concerning where such a line ought to be drawn to be fully compliant with the treaties.

The Atalanta operation cases can be used as an example. These cases concern not only CFSP related components since there are certain elements in the contested agreements that could be argued to relate to the police cooperation or judicial cooperation in
criminal matters and thereby to AFSJ. As examples of such elements the EP has been arguing for especially the rules concerning the handover of suspected pirates to third countries once they have been captured by EU military ships. In situations like this, where the agreement or measure arguably can be deemed as to pursue a twofold purpose the case law presented has provided for solutions. If one of the pursued purposes or aims sought by the agreement at hand can be seen as the principle or main objective, then that main objective decide the choice of legal basis. The problems occur when the aims of an agreement are difficult or even impossible to separate. One solution discussed in chapter 4.2.1 concerns the judgement in C-130/10 where the ECJ provided that in exceptional cases, a dual legal basis could be chosen as the proper legal base for a certain measure. In C-130/10, however, the ECJ did not regard the situation as exceptional and the question is how extreme the situation or a certain measure has to be in order to fall under this rather uncertain exceptional area. In the case law discussed and researched in this paper, no such exceptions have yet been made. It is my opinion that the aim and content, together with other factors that the ECJ has examined such as context, in most cases at least should be able to guide the examiner to the proper legal basis. The problems occur however, if there is not one right answer as the EP has argued for recently. I, though, believe that the ECJ has been adverse to a dual legal basis since it can foresee the problems that could occur if a dual legal basis were to be the solution to agreements with aims that are difficult to define. The institutional balance set out in the treaties in general, and in Article 218 TFEU specifically, are factors that have to be taken into account if a dual legal basis should be approved. Another very important factor in my opinion is the characteristics of the different policy areas. The choices of different policy areas not only change the institutional balance, the different areas were created to accommodate different fundamental needs. The AFSJ area is intended to safeguard the internal dimension of the Union and the CFSP the external dimension. Since those dimensions are very hard to define especially because of the cross border crimes such as terrorism and international threats towards the unions safety. I do, however think that it is important to determine the main objective of agreements as far as possible, so that the characteristics of the different policy areas stay protected. To base an agreement on both CFSP and AFSJ would entail an attenuation of the characteristics, and the different advantages of each policy area would be deteriorated since they could counteract each other. Another problem with a dual legal basis would be the practical difficulties such a choice would connote. Since both the
conferred competence and the procedural rules would collide since they in some extent contradict each other.

The ECJ has instead developed the reasoning around the choice of one legal basis, based on the only or main aim of the measures at hand. If an agreement pursues a twofold purpose, the method that has been used so far by the court is first of all to examine the *aim and content* of the agreement. In most cases a main content and aim of an agreement can be established and in such cases the characteristics of the different policy areas should not risk to be harmed by the choice of a certain legal basis. As has been mentioned the most important factor when choosing a legal basis is to base the measure on the area to which the measure have the closest connection.

The CFSP and AFSJ areas are based on objectives and principals that are similar, such as the protection of the Union and the contribution to the overall security both for the Union and its citizens. The safeguarding of peace and security both in the external and internal dimensions are areas that the Unions’ legislator obviously has deemed as vital for the existence of a safe EU for its citizens. This is also common ground and has not been contested in the case law. The issues do not occur just because a certain agreement has a positive effect on another policy area than the one that is used as legal base. For example in the road security case or the Atalanta cases, main objectives were settled by the ECJ but this did not mean that the agreements could not have a positive effect on another policy area. The same argument could be made in the Atalanta cases, where the court in C-658/11 (Mauritius) concluded that the contested decision properly could be based on CFSP provisions, even though the agreement related to, and had a positive effects also on the AFSJ area. However, such positive effects should, in my opinion, not be decisive in the process of choosing legal basis. Instead, positive effects should be seen as contributing to for example the safety of the Union Citizens, which fulfils the objectives of both policy areas.

One should however, even though the problems discussed in this chapter, examine the possibility of dual legal basis solution. Apart from the disadvantages regarding the characteristics of the policy areas mentioned in the previous section, a dual legal basis could perhaps be a possible solution in exceptional cases. As the ECJ argued in C-130/10, in exceptional cases, an agreement based on two different policy areas could be
the only solution. If one would turn the argument of lost characteristics around, an advantage of two legal bases for one agreement could perhaps lead to a more comprehensive agreement that is based on proper provisions in the treaty. When the centre of gravity or the main objective is formulated, the main objective determines the legal basis. This means that other, secondary, elements of an agreement would be based on another legal basis than if they would have been deemed as the main objective or was pursued in a separate agreement. Thus could a dual legal basis arguably ensure that the proper legal basis is applied to all elements and objectives. This is in my opinion advantages that maybe could be considered in very exceptional cases. If this sort of argumentation would have to be dealt with concerning every decision that could be argued to pursue more than one policy area objective, it could lead to unnecessary difficulties in general and could especially risk harming the characteristics of the different policies. It could also work contrary to the principles of legal certainty and consistency that the ECJ has been safeguarding, inter alia, in the case law discussed in this work. Since the CFSP area specifically is held as an intergovernmental area in the Lisbon Treaty an increased power to the EP could perhaps alter the institutional balance as well as the intergovernmental nature intended by the legislator.

7 Conclusion

The CFSP and AFSJ are both vital areas of the Union. Not only for the internal dimension of the EU but also for actions with an external dimension. Because of the instruments and objectives laid down in regard of each policy, the Union can conclude agreements and act as an international actor not only to protect the Union itself but also to safeguard humanitarian values in the world. Since the entry into force of the Lisbon Treaty in 2009, the Union is one legal person, and the earlier pillar system has been abolished. This means that the previous rather different policy areas now have become more similar and are governed partially by the same rules. Both the CFSP and the police cooperation and judicial cooperation in criminal matters have aims and objectives concerning safety, peace and justice. The AFSJ is by its objectives more of an internal policy unlike the CFSP, which by its objectives is a strictly external policy. The issues that this paper has been discussing are the issues that arise when an international agreement relates to both CFSP and AFSJ provisions. Even though the policy areas, to a
certain extent cover similar objectives, the choice of legal basis results in different roles of the institutions and different rules regarding jurisdiction for the ECJ. A correct choice of legal basis is thus important not only for the institutional balance provided in the treaty but also to protect the integrity of the different policies. Regarding the CFSP process, the EP is given a smaller role since the Council only has to keep the EP informed at all stages. This has to be examined in contrast to the AFSJ area where the EP is provided with the power to approve measures or at least give advice concerning for example the negotiation of an agreement. The institutional balance provided in the Lisbon Treaty thus demands that the proper legal basis is chosen at all times.

As a solution to the issues concerning the choice of legal basis, this work has discussed the possibility to use dual legal bases in exceptional cases. First of all, it has to be emphasized that this solution has not yet been utilized to solve legal basis litigation after the entry into force of the Lisbon treaty and the new legal framework. However, in certain cases, a dual legal basis could arguably be the only possible solution when other solutions provided so far in case law do not suffice. If such a measure will ever be presented to the ECJ is impossible to foresee but it cannot be ruled out completely. If a main objective or a centre of gravity cannot be distinguished, a dual legal basis might be the only solution. If a certain measure would pursue goals that are impossible to separate, and none of the objectives or elements of a measure can be characterized as the main objective, one way to solve such a situation could be to use both a CFSP and an AFSJ legal base. Especially if an aspect of an agreement is secondary at the same time as it is a very important element. Another possible solution could be two separate agreements but this approach would probably cause more problems than it entails advantages. In any case does the situation in which a dual legal basis could be used have to be something extremely unusual, such as for example an international crisis or threats of war. Otherwise, it is my opinion that a dual legal base, because of the weaknesses of the solution, could risk to harm not only the institutional balance but also the effectiveness and the legal certainty of EU legislation.

The current system with a case to case based examination of the content, context, aim and other circumstances is in my opinion a viable approach to a complex system. If a main objective or the centre of gravity of an agreement can be determined, the process can be conducted without further complications and the characteristics of the different
policy areas will be protected. The possibility to base exceptionally complicated measures on more than one legal basis could work as a valve if a situation otherwise would be impossible to solve. If such an exceptional case ever will occur is unclear and the best way to solve legal basis litigation regarding EU external action is in my opinion to, as far as possible, seek to establish a main objective which can decide the proper legal basis. If the main objective of an agreement can be determined it will mean that the symmetry between the internal and external measures for adopting international agreements will be taken into account. That would in my opinion be the best way to guarantee that the EP, the Council and other EU institution can enjoy the institutional power that is intended, compliant with case law and the treaties.

In conclusion is it not completely clarified how the institutions should reason when choosing the correct legal basis for an agreement that pursues the objectives of different policy areas. Since it is vital that the security of the Union is protected, the institutions of the EU have to be able to take actions through the different policy areas, without facing legal basis litigation while doing so. There are solutions, such as the centre of gravity test or, in extremely exceptional circumstances, the possibility to base a measure on dual legal bases. Hopefully, however, the possibilities regarding how to solve legal basis conflicts concerning the external dimension of the EU’s actions will be clarified in the future case law or through changes in the legal framework since the need for clarification obviously exists.
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