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Contents

Acknowledgements.....	v
Executive summary.....	vi
List of abbreviations.....	ix
I. Introduction.....	1
A. Context and purpose of the study	1
B. Structure and methodology	2
C. A brief overview of policies in the AFSJ.....	4
D. Situating fundamental rights in the field of AFSJ	7
E. The internal-external nexus	11
G. The quest for coherence and fundamental rights	14
II. Fundamental rights in the institutional framework of the AFSJ	18
A. Introduction	18
B. The role of the main EU bodies in the AFSJ.....	20
1. European Council	20
2. Council of the European Union ('Council').....	21
3. European Commission ('Commission')	26
4. European Parliament ('Parliament')	31
5. Other actors involved in the AFSJ	34
a) Sub-institutional/consultative actors	34
b) Other EU bodies	35
c) External actors	37
C. The implementation of AFSJ policies	40
1. Agencies and AFSJ governance	40
2. Exemplifying the interplay between agencies and fundamental rights: Frontex and Europol.....	44
3. EU Member States and the implementation of AFSJ policies.....	47
D. Fundamental rights monitoring in the AFSJ.....	49
1. Introduction	49
2. Non-judicial mechanisms	51
a) The FRA.....	51
b) National and European parliamentary oversight	52
3. Judicial and quasi-judicial EU mechanisms	58
a) The Court of Justice of the European Union (CJEU)	58
b) The European Anti-Fraud Office (OLAF)	62
c) The European Ombudsman	63

d) The European Data Protection Supervisor (EDPS) and Joint Supervisory Bodies (JSBs)	64
4. External judicial control by the European Court of Human Rights (ECtHR)	65
III. The AFSJ instruments and fundamental rights	67
A. The types of instruments used in the AFSJ	67
1. Introduction	67
2. Primary law	68
3. Strategic programming instruments	70
4. Secondary law	74
a) Unilateral EU acts	74
b) Agreements with external actors	79
5. Soft law regulation	82
B. The existing regulatory framework (instruments) in the various AFSJ policy fields	84
1. Border checks, asylum and immigration	84
a) Legal framework regarding border controls.....	84
b) Legal framework regarding short-term visas	87
c) The legal framework on immigration	89
d) The legal framework regarding asylum	92
e) The legal framework addressing irregular immigration	96
f) Fundamental or human rights concerns	98
2. Criminal law and police cooperation	106
a) The legal framework in the criminal law and police cooperation	106
b) Criminal law and police cooperation and fundamental rights	113
3. Civil law cooperation.....	118
a) The legal framework in civil law cooperation.....	118
b) Civil law cooperation and fundamental rights	122
IV. Topical issues in law- and policy-making in the AFSJ.....	124
A. Introductory remark.....	124
B. Competence issues.....	124
1. Unclear scope of competence	124
2. Unclear division of competence	128
C. Member State discretion and integration based on mutual recognition	131
D. A need to develop the fundamental rights framework	137
E. Monitoring and accountability issues	139
1. Enhancing political accountability	139
2. Improving judicial and quasi-judicial accountability	143
F. Technocratisation and expertisation	146
G. The securitisation of “freedom” and “justice”	149

H. The continued disregard for external human rights implications of EU action	152
V. Concluding remarks	154
Bibliography	i
A. Legal and policy instruments	i
1. Treaties	i
2. Regulations	ii
3. Directives	vi
4. Decisions	x
5. Framework Decisions	xi
6. European Council documents	xiii
7. Council documents	xiii
8. Commission documents (COM and SEC documents)	xvi
a) Commission communications (including Commission strategies and action plans)	xvi
b) Commission green papers	xviii
c) Commission proposals	xix
d) Commission reports	xxi
e) Commission staff working documents	xxii
f) Commission guidelines	xxii
g) Commission recommendations	xxii
9. European Parliament documents	xxii
10. Other instruments adopted by EU institutions or bodies	xxiii
B. Case-law	xxiv
1. CJEU case law	xxiv
2. ECtHR case law	xxv
C. Literature	xxv
1. Books	xxv
2. Book chapters	xxvi
3. Journal and yearbook articles	xxx
4. Reports and opinions	xxxv
a) Reports and opinions by EU bodies	xxxv
b) Reports and briefing papers to the LIBE Committee	xxxviii
c) Other reports, opinions and papers	xxxix
D. Other sources	xl
1. Internet pages	xl
2. Press Releases, Speeches	xlvi
3. Blog entries	xlvi
4. Other	xlvi

Annexes.....	I
Annex 1: Council Working Party Tasks	I
Annex 2: The main objectives and tasks of AFSJ Agencies	liii

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Executive summary

The purpose of this research report is to give an overview of institutional decision-making in the Area of Freedom, Security and Justice (AFSJ). Particular attention will be paid to how European Union (EU) institutions active in the AFSJ engage with fundamental rights and through which instruments. AFSJ policies raise fundamental rights concerns by their very definition. The aim of the study is to show the nexus of such concerns to institutional and instrumental features. The timing of this report is delicate, due to the fact that the Stockholm Programme, which sets the policy priorities in the AFSJ, is coming to an end in 2014. During the European Council in June 2014, new strategic guidelines for legislative and operational planning of the AFSJ were adopted.

This report seeks to lay the foundation for the establishment of a nexus between institutional features of the AFSJ, the legal and policy tools available and the fundamental/human rights issues that may be of concern when acting in the AFSJ. The study will therefore not only provide the reader with an overview of the AFSJ policy-making landscape, but also an insight into recognised fundamental/human rights concerns that arise across the different policies.

The discussions in this report build upon previous research concerning the EU and the AFSJ in the fields of both law and political science. Particular attention has also been paid to include EU policy and legislative instruments in the discussion.

The report has been divided into three main parts. First, focus is put on the institutional landscape. This landscape consists of EU primary legislative actors, agencies and Member States at the implementing end, and democratic and legal mechanisms for monitoring and oversight. The multitude of actors also includes external actors as well as sub-actors in the form of committees, working groups and networks. Second, the interest is turned to the instruments through which policies are enacted in the different policy areas of the AFSJ. The interaction with fundamental rights is in this context displayed both in respect of general EU acts, as well as in respect of the specific legislative regime of individual policy areas.

The overview of actors and instruments suggest some issues of particular concern for the realisation of fundamental rights in the AFSJ. In a third part, these concerns are summed up. The report singles out multiple possible sources of incoherence for the protection of rights of individuals. These sources entail (as non-exhaustive main categories) competence issues, Member State discretion and differentiation of obligations, lack of mainstreaming of fundamental rights concerns, flaws in accountability mechanisms, technocratisation of AFSJ policies, securitisation of fundamental rights issues, and disregard for external fundamental

rights implications.

It is to be noted that the concerns identified arise differently for different actors. Eventually, the activities of every individual actor and the implications of every single instrument must be assessed in more detail in order to pinpoint more concrete fundamental rights repercussions. This does not mean, however, that general conclusions on the role of fundamental rights in the institutions and instruments in the AFSJ, or on the coherence of the protection in the internal and external dimension of AFSJ policies could not be made. Above all, the discussions in the report reveal a two-fold image: on the one hand, especially since the adoption of the Lisbon Treaty, the AFSJ has changed dramatically. The AFSJ has been brought into the general constitutional scheme of EU decision-making and has become part of a system of constitutional checks (including fundamental rights). On the other hand, the AFSJ continues to be a policy area that is characterised by institutional peculiarities and novel forms of governance. The institutional improvements that the communitarisation of the AFSJ brought with it are counterbalanced by the challenges arising out of these special features.

The incoherence affecting the protection granted to individuals can have a constitutional source. The very balancing of 'freedom', 'security' and 'justice' is inherent in all policy-making in the area. There is also a constitutional differentiation of Member State obligations. Furthermore, the fact that AFSJ decision-making (mostly) follows the ordinary EU decision-making procedure also means that the area displays the general problems of EU decision-making and institutional design.

Fundamental rights issues can have their source at all levels of AFSJ policy- and law-making. One particular feature characterising the AFSJ is the complexity of the institutional design of the area. There is also in the AFSJ an increasing externalisation or outsourcing of functions, which not only challenges the reach of the EU system for the protection of fundamental rights, but also potentially exports flaws of the EU system to concern third country nationals.

The use of agencies is a feature that has occupied much academic literature concerning the AFSJ. Agencies are both in themselves an expression of experimentalist governance as well as a source of novel governance techniques, which bring with them a particular set of challenges.

Yet another feature of the AFSJ is the use of instruments and integration mechanisms that grant Member States considerable freedom of action. These tools may cause concern in cases where individual States do not respect fundamental rights. At the same time, further integration may not be a political option, or alternatively, requires a differentiation of obligations which raises new coherence issues. Given the nature of the cooperation within the AFSJ and the multiple

sources of potential fundamental rights concern, the rights of individuals in the AFSJ will require constant attention. This report provides a background for further research on fundamental rights in the AFSJ.

List of abbreviations

AFCO	Committee on Constitutional Affairs
AFSJ	Area of Freedom, Security and Justice
CCWP	Customs Cooperation Working Party
CAMM	Common Agenda for Migration and Mobility
CATS	Article 36 Committee
CEAS	Common European Asylum System
CEPOL	European Police College
CF	[Frontex] Consultative Forum [on Fundamental Rights]
CFSP	Common Foreign and Security Policy
CIVEX	Commission for Citizenship, Governance, Institutional and External Affairs
CJEU	Court of Justice of the European Union
COHOM	Human Rights Working Group
COPEN	Working Party on Cooperation in Criminal Matters
CoR	Committee of the Regions
COREPER	Committee of Permanent Representatives
COSAC	Conference on European Affairs Committees
COSI	Standing Committee on Operational Cooperation on Internal Security
CSDP	Common Security and Defence Policy
DPO	Data protection officer
DAPIX	Working Party on Information Exchange and Data Protection
DG	Directorate-General
DROI	[Parliament's] Subcommittee on Human Rights
DROIPEN	Working Party on Substantive Criminal Law
EASO	European Asylum Support Office
EAW	European Arrest Warrant
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EDPS	European Data Protection Supervisor
EEAS	European External Action Service
EES	Entry-exit system
EESC	European Economic and Social Committee
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMN	European Migration Network
ENISA	European Network and Information Security Agency

ENP	European Neighbourhood Policy
EPPO	European Public Prosecutor's Office
EU	European Union
EUCPN	European Crime Prevention Network
eu-LISA	European Agency for the Operational Management of Large-Scale IT Systems
EURASIL	European Union Network for asylum practitioners
Eurosur	European Border Surveillance System
FAC	Foreign Affairs Council
FAO	Food and Agriculture Organization of the United Nations
FRA	European Union Agency for Fundamental Rights
FREMP	Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons
FRO	Frontex Fundamental Rights Officer
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GAMM	Global Approach to Migration and Mobility
GENVAL	Working Party on General Matters including Evaluation
HLWG	High-Level Working Group on Asylum and Migration
ILO	International Labour Organization
IOM	International Organization for Migration
ISS	EU Internal Security Strategy in Action: Five Steps towards a More Secure Europe
JAIEX/ JAI-RELEX	JAI-RELEX Working Party [working party which task is to ensure that the EU's external relations in the area of justice and home affairs are appropriately coordinated]
JITs	Joint investigative teams
JSBs	Joint supervisory bodies
JHA	Justice and home affairs
JURI	Committee on Legal Affairs
JUSTCIV	Working Party on Civil Law Matters
LEWP	Law Enforcement Working Party
LIBE	Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee)
MP	Mobility Partnership
OECD	Organisation for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
OSCE	Organization for Security and Co-operation in Europe
PCAs	Partnership and cooperation agreements
PROCIV	Working Party on Civil Protection
RABIT	Rapid border intervention team

SAAs	Stabilisation and association agreements
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SEA	Single European Act
SIS	Schengen Information System
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFPC	European Police Chiefs Operational Task Force
TFTP	Terrorist Financing Tracking Programme
TWP	Working Party on Terrorism
UN CCPCJ	United Nations Commission on Crime Prevention and Criminal Justice
UN CND	United Nations Commission on Narcotic Drugs
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
VIS	Visa Information System
WFP	United Nations World Food Programme
WHO	World Health Organization

I. Introduction

A. Context and purpose of the study

Cooperation in the field of justice and home affairs (JHA) was incorporated into the institutional framework of the European Union (EU) through the 1992 Maastricht Treaty.¹ A good half decade later, in May 1999, an Area of Freedom, Security and Justice (AFSJ) was created with the entry into force of the 1997 Amsterdam Treaty. This constituted the starting point of the fast development of many AFSJ policy fields: immigration, asylum, border controls, judicial cooperation in criminal and civil law matters, and police cooperation. The 2007 Lisbon Treaty amended the Treaty Establishing the European Community and renamed it as the Treaty on the Functioning of the European Union (TFEU). Today, the TFEU defines the institutional and regulative framework for the area.² For the AFSJ, the Lisbon Treaty entailed a significant move from inter-governmentalism and Council dominance to institutional pluralism and democratic accountability.³ The Lisbon Treaty has also enhanced the status of the AFSJ by enumerating it as the second treaty objective after the promotion of peace and the well-being of the Union's peoples.⁴

The AFSJ treaty provisions have been accompanied with five-year political programmes adopted by the European Council which have set the policy agenda in the field. While the Tampere (1999-2004) and especially the Hague (2005-09) programmes largely focused on security as a key aspect of JHA policy-making, the current Stockholm Programme (2010-14) brought with it a focus on fundamental rights.⁵

This research report is part of a broader research project within the EU FP 7 project "Fostering Human Rights Among European (External and Internal) Policies" (FRAME). It is the first in a series of reports focusing on the coherence of the integration of human rights into the internal and external dimensions of EU AFSJ policies, with emphasis on cross-border mobility in the

¹ On the history of JHA cooperation, see e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 9-41.

² Articles 67-89 TFEU. The Lisbon Treaty entered into force on 1 December 2009.

³ Cf. Sergio Carrera and Elspeth Guild, 'Does the Stockholm Programme Matter? The Struggle over Ownership of AFSJ Multiannual Programming' [2012] *CEPS Paper in Liberty and Security in Europe*, No. 51, 14.

⁴ TEU Article 3(2). The establishment of an internal market is enumerated as the third treaty objective in Article 3(3).

⁵ On the various political programmes, see further e.g., Elspeth Guild and Sergio Carrera, 'The European Union's Area of Freedom, Security and Justice Ten Years On' in Elspeth Guild, Sergio Carrera and Alejandro Eggenchwiler (eds), *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges under the Stockholm Programme* (Centre for European Policy Studies 2010), 4-5.

context of policies on border checks, asylum and immigration, counterterrorism and additional matters related to police and judicial cooperation in criminal matters. The purpose of this study is to give an overview of institutional decision-making in the AFSJ. Particular attention will be paid to how EU institutions active in the AFSJ engage with fundamental rights and through which instruments. The aim of the report is to show the nexus of such concerns to institutional and instrumental features. An identification of the institutional framework and the policy/legal instruments is a necessary prerequisite for achieving the purpose of later studies and a preliminary step towards first identifying coherence issues in the AFSJ internal and external dimensions, and second, to analysing the possible causes and plausible remedies to such issues.

The AFSJ is characterised by a number of policy areas and a myriad of actors. These actors have widely different roles in the AFSJ. This adds to the complexity of the task and also means that the report cannot aim at descriptive comprehensiveness of the full range of functions of single AFSJ actors. A conscious choice has, for example, been made to not give an overview of all agencies active in the AFSJ, but to discuss them in context, and as an expression of the agencification phenomenon. For detailed accounts of AFSJ actors the reader is referred to EU law textbooks and EU internet pages, which are well covered in the references of this report. Instead of merely reproducing such information, this study seeks to lay the groundwork for the establishment of a nexus between institutional features of the AFSJ, the legal and policy tools available and the human rights issues that may be of concern when acting in the AFSJ. The report will therefore not only provide the reader with an overview of the AFSJ policy-making landscape, but also an insight into human rights issues that arise across the different policies.

B. Structure and methodology

This report aims at *identifying* relevant phenomena rather than *analysing* them in depth. Before this task can be embarked upon it is, however, necessary to briefly elaborate on some central concepts. To begin with, the central EU policies in the field must be identified and the role played by human/fundamental rights in EU law must be addressed. Secondly, it is necessary to consider the relationship between the internal and external dimensions of the AFSJ. Finally, the concept of coherence needs to be discussed, even if it is not the purpose of this study to analyse coherence issues within particular policies. An outline of the multifaceted conceptions of coherence serves to underline the variety of approaches needed in order to ensure the protection of fundamental rights within the AFSJ.

The discussions in this report build upon previous research concerning the EU and the AFSJ both in the fields of law and political science. It is in this sense a meta-analysis of existing

research. One striking feature of the academic research concerning the AFSJ has been the lack of comprehensive analytical work. Apart from the book “EU Justice and Home Affairs Law” by Steve Peers, a comprehensive overview of the area, its actors, and the policy and legislative tools in use has been hard to come by.⁶ It should be noted, however, that the report is not a literature review and the aim is not to exhaust the academic research that has been done in the area. Instead, the aim is to demonstrate which issues are brought up in the literature as of particular concern in the AFSJ and to provide illustrative references to guide the reader further. Particular attention has also been paid to include EU policy and legislative instruments in the discussion. This has been especially important due to the complexity of the AFSJ. Through the documented policy and legal materials the reader will be able to access core documents on any topic of interest concerning the AFSJ.

It should also be emphasised that the timing of this report is very delicate, due to the fact that the Stockholm Programme expires by the end of 2014. During the European Council in June 2014, new strategic guidelines for legislative and operational planning of the AFSJ were adopted. The point of departure of this study has been the Stockholm Programme. As the new guidelines were adopted at a very late stage of the research process, they are only occasionally brought into the discussion. It also deserves to be noted that the newly adopted strategic guidelines strongly emphasise further implementation of previous legal instruments and policy measures.⁷

The Stockholm Programme underlines that in order to be successfully implemented a wide range of tools are important. These include: mutual trust, implementation, legislation, coherence, evaluation, training, communication, dialogue with civil society, and financing.⁸ Out of these, the report focuses mainly on *legal instruments*. A discussion on the impact of other tools, such as financing or staff training on governance in the AFSJ, is beyond the scope of this study.

⁶ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011).

⁷ European Council: European Council 26/27 June 2014 Conclusions, para. 3 (‘Building on the past programmes, the overall priority now is to consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place.’)

⁸ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 5-7.

C. A brief overview of policies in the AFSJ⁹

Article 3(2) of the Treaty on European Union (TEU) establishes that the Union shall offer its citizens an area of freedom, security and justice.¹⁰ This provision has been developed in the TFEU, which in Article 67 provides that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. Article 67 also stipulates that the Union shall:

- ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control
- endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws, and
- facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

In short, the EU's AFSJ consists of the following policy areas: (1) Border checks, asylum and immigration; (2) judicial cooperation in criminal law matters and police cooperation; and (3) judicial cooperation in civil law matters. If action within these areas has one thing in common it is that it touches on matters that are at the very heart of the sovereignty of the Member States and already for that reason are often politicised. As noted by Monar: "Providing citizens with internal security, controlling access to the national territory and administering justice have always belonged to the basic justification and legitimacy of the existence of the state since the gradual emergence of the modern state in the 17th/18th century [...]." ¹¹

The central issue in relation to border checks has been the abolition of the internal borders and

⁹ The various policies and agencies will be considered with references in Chapters II-III.

¹⁰ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 [2012] OJ C 326/1.

¹¹ Jörg Monar, 'The Institutional Framework of the AFSJ: Specific Challenges and Dynamics of Change' in Jörg Monar (ed), *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice* (Peter Lang 2010) 21, 23.

the harmonisation of the control of the external borders. In practice, this policy area involves questions such as the creation of an integrated management system for the external borders (key actor: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex))¹² and a common policy on visas. To better manage the control of external borders, information systems have been established: the Schengen Information System (SIS II)¹³ and the Visa Information System (VIS).¹⁴ In relation to asylum, the EU has since 1999 been working on creating a Common European Asylum System (CEAS) that will harmonise certain aspects of asylum processes. The European Asylum Support Office (EASO) plays a key role in the concrete development of the system and enhances practical cooperation on asylum matters.¹⁵ The asylum procedure as well as reception and qualification conditions are regulated by secondary EU law. In addition, the EU has created a fingerprint database (Eurodac) for the identification of asylum seekers.¹⁶ The European Agency for the Operational Management of Large-Scale IT Systems (eu-LISA) has been given the task of operationally managing the EU's large databases: Eurodac, SIS II and VIS.¹⁷ In relation to immigration law, central EU questions have been the creation of common immigration rules to ensure access to Europe for, for example, students, scientists, and workers. Much attention has also been given to the fight against illegal immigration, including trafficking in human beings.

¹² See further e.g., Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, as amended by Regulation (EC) No 863/2007, OJ L 199/30.

¹³ See further e.g., Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2007] OJ L 205/63.

¹⁴ See further e.g., Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS) [2004] OJ L213/5.

¹⁵ See further e.g., Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L132/11. Also see e.g., Françoise Comte, 'A New Agency Is Born in the European Union: The European Asylum Support Office' [2010] *European Journal of Migration and Law* 373.

¹⁶ See further e.g., Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/, and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L180/1.

¹⁷ See further e.g., Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2011] OJ L286/1.

Before the Lisbon Treaty judicial cooperation in criminal matters was a so-called third pillar matter, that is, the cooperation was intergovernmental in nature. Now the pillar structure has been dissolved and criminal law cooperation has become part of the general competence of the EU. This cooperation involves, *inter alia*, cooperation aimed at addressing serious crime with a cross-border dimension (for example, regarding terrorism and human trafficking). While the *substantive* EU criminal law cooperation has focused on more serious forms of crime, the *procedural* EU criminal law cooperation has been more general, that is, applicable to all types of crime. Criminal procedural law questions addressed by the Union include recognition of judgments, admissibility of evidence, rights of individuals in criminal proceedings (including victims' rights), arrest warrants, freezing orders, and confiscation.¹⁸ A central integration mechanism in the field has been mutual recognition (that is, the principle that Member States have an obligation to recognise decisions or judgments taken by authorities in other Member States).

In relation to cooperation between authorities, the TFEU stipulates that there shall be police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.¹⁹ The EU has also created an agency, Europol, the task of which is to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.²⁰ Another agency's – Eurojust's – mission, on the other hand, is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases.²¹ The TFEU also foresees the establishment of a European Public Prosecutor's Office (EPPO) to combat crimes affecting the

¹⁸ "Most instruments in relation to criminal procedural law, compared to substantive criminal law instruments, concern new areas of law, which have not previously been regulated by the EU." Annika Suominen, 'EU criminal law cooperation before and after the Lisbon Treaty – aspects and comments especially in relation to the Norwegian position' [2012] *Tidskrift utgiven av Juridiska föreningen i Finland* 573, 596.

¹⁹ Article 87 TFEU.

²⁰ Article 88 TFEU. See also e.g., Council Decision (EU) 2009/371/JHA establishing the European Police Office (Europol) [2009] OJ L 121/37.

²¹ Article 85 TFEU. See further e.g., Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L138/14 and Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63/1.

financial interests of the Union.²²

In civil law cooperation mutual recognition has been the generally applied method of integration, for example, regarding judgments in civil matters. In the Stockholm Programme it is noted that: “Mutual recognition should [...] be extended to fields that are not yet covered but are essential to everyday life, for example succession and wills, matrimonial property rights and the property consequences of the separation of couples, while taking into consideration Member States’ legal systems, including public policy, and national traditions in this area.”²³ Also, for example, the question of the applicable law has been central in the EU’s civil law cooperation. In this report, AFSJ cooperation within the field of civil law will only be considered briefly.²⁴

D. Situating fundamental rights in the field of AFSJ

Human rights initially entered European Community (EC) law through the case law of the European Court of Justice (ECJ), renamed by the Lisbon Treaty as the Court of Justice of the European Union (CJEU).²⁵ In 1992, the Maastricht Treaty established that the EU shall respect fundamental rights as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and as they result from the constitutional traditions common to the Member States as general principles of Community law. Raulus has observed that it was no coincidence that both this provision and the JHA policies were adopted in the same treaty.²⁶

²² Article 86 TFEU. See further European Commission, Justice, ‘European Public Prosecutor’s Office’, <http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm> accessed 14 March 2014.

²³ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 13.

²⁴ The aim of this report is to function as the background for later reports. As these reports will not focus on civil law matters, the civil law cooperation has largely been left outside the report.

²⁵ See further e.g., Hermann-Josef Blanke, ‘The Protection of Fundamental Rights in Europe’ in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012) 159, 161-163. In the *Internationale Handelsgesellschaft* case the Court argued that the respect for fundamental rights forms an integral part of the general principles of law protected by the Court. Judgment of 17 December 1970 in *Internationale Handelsgesellschaft*, Case 11-70, EU:C:1970:114, para. 4. A terminological note. It has been pointed out that in the EU context the concept of human rights has an external dimension, whereas the concept of fundamental rights has an internal dimension. Florian Geyer, ‘A synthesis of the former EP resolutions in the field of fundamental rights’ [2007] briefing paper to European Parliament’s committee on Civil Liberties, Justice and Home Affairs, 2.

²⁶ Helena Raulus, ‘Fundamental Rights in the Area of Freedom, Security and Justice’ in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 213.

According to her, the widening of the EU's competences to JHA areas "made it necessary for the EU to recognise fundamental rights protection within the EU legal order" as many AFSJ policies have "an inherent connection with fundamental rights".²⁷ It should also be noted that AFSJ measures may strongly affect both the fundamental/human rights of EU citizens and third country nationals (for example individuals on the move).²⁸

The AFSJ is hence to a large extent a policy field where there is an increased risk for fundamental/human rights violations. This is often explained with the area's focus on security and public order, that is, *collective* State/Union interests, the maximisation of which can violate *individual* rights to freedom and justice. In this regard, Peers has pointed out that in JHA a central question is the "balance between protection of human rights and civil liberties on the one hand and the State interests in public order, security, or migration control on the other."²⁹ A debated question is, however, exactly what is understood by the concepts of freedom, security and justice in relation to the AFSJ and how exactly the concepts relate to each other.³⁰ There is, of course, not always an automatic tension between freedom and security as such. Freedom can be constrained in the name of security, but it can also be enhanced in a context in which security as a public good fosters a safe environment for individual development.³¹ Furthermore, not all AFSJ policies need to be seen as security-related (for example, judicial cooperation in civil matters).

At present, the obligation to respect fundamental rights in the JHA field has its basis in two different treaty provisions: Article 67 TFEU, which enumerates the main objectives and principles for the AFSJ; and Article 6 TEU, which is the general fundamental rights provision in

²⁷ Helena Raulus, 'Fundamental Rights in the Area of Freedom, Security and Justice' in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 213.

²⁸ Cf. Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 7.

²⁹ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 1.

³⁰ See e.g., Massimo Fichera and Ester Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom, Security and Justice: A Proportionate Answer for a Europe of Rights?' [2013] *European Public Law* 759, 762. Cf. also "Freedom has a particular meaning in the context of the area. It does not comprise any of Europe's philosophical heritages of the enlightenment period but is focused on, if not limited to, free movement rights. This links the area of freedom, security and justice closely with the core policies of the internal market." Christina Eckes, 'A European Area of Freedom, Security and Justice: A Long Way Ahead?' [2011] *Uppsala Faculty of Law Working Paper* 6.

³¹ Massimo Fichera and Ester Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom, Security and Justice: A Proportionate Answer for a Europe of Rights?' [2013] *European Public Law* 759, 762.

EU law. Furthermore, as regards external action, Article 21(1) TEU provides that the Union's action on the international scene shall be guided by the principles which have inspired its own creation, including the universality and indivisibility of human rights and fundamental freedoms. Of these provisions, Article 6 TEU (as amended by the Lisbon Treaty) significantly altered the Union's fundamental rights infrastructure.³² To begin with, the Charter of Fundamental Rights of the EU ('Fundamental Rights Charter' or 'Charter'),³³ initially proclaimed in 2000, was transformed into a legally binding document.³⁴ According to Article 51(1) of the Charter, the institutions, bodies, offices and agencies of the Union and of the Member States must adhere to the Charter *when they are implementing Union law*. This makes the question of what constitutes measures that fall under the scope of EU law central.³⁵ Such measures have been found to include at least three different types of Member State activity: (1) legislative activity and judicial/administrative practices when fulfilling EU law obligations; (2) activity entailing Member State exercise of discretion vested to them by virtue of EU law; and (3) activity consisting of national measures connected to the disbursement of EU funds.³⁶ Iglesias Sánchez has pointed out that the case law that affirms that the Charter also applies to national measures that allow Member State discretion, is especially relevant in the AFSJ, as the area is "fraught with 'may clauses', derogation clauses and references to national law."³⁷ As regards the substantive content of the EU fundamental rights system, the Charter protects both established human rights, such as the right to respect for private life (article 7), and new types of rights, such as the right to protection of personal data (article 8), the right to asylum (article 18), and the right to protection in the event of removal, expulsion or extradition (article 19).

³² See further e.g., Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' [2011] *Human Rights Law Review* 645.

³³ Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

³⁴ Article 6(1) TEU. Carrera and Guild have pointed out, that this change in the legal force of the Charter has transformed the question of the relationship between freedom, security and justice from a political question into a legal one. Sergio Carrera and Elspeth Guild, 'Does the Stockholm Programme Matter? The Struggle over Ownership of AFSJ Multiannual Programming' [2012] *CEPS Paper in Liberty and Security in Europe*, No. 51, 9.

³⁵ In the *Åkerberg Fransson* judgment, the CJEU famously noted that: "Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter." Judgment of 26 February 2013 in *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 21.

³⁶ European Commission, Report: 2013 Report on the Application of the EU Charter of Fundamental Rights [2014] COM(2014) 224 final, 3.

³⁷ Sara Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' [2013] *European Journal of Migration and Law* 137, 143.

Article 6 TEU also contains an obligation for the Union to accede to the ECHR.³⁸ For reasons that will be discussed later on, this is highly significant. As Article 6 TEU also stipulates that fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States shall continue to constitute general principles of the Union's law, there is currently a "tripartite interwoven system for the protection of fundamental rights in the EU".³⁹ As regards the relationship between these various rights systems, the Fundamental Rights Charter provides that: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".⁴⁰

Thirdly, as regards fundamental/human rights within EU law, it should be noted that the EU has also adopted secondary legislation in the AFSJ with human rights content, for example, regarding rights of suspects and victims in criminal trials. These instruments will be considered further in Chapter III.

Finally, the Council⁴¹ and the European Parliament⁴² have asserted that the promotion of fundamental rights is a priority in the AFSJ. The European Commission has a Commissioner and Directorate-General (DG) with the mandate to watch over the effective implementation of the Fundamental Rights Charter ('Justice, Fundamental Rights and Citizenship') since Lisbon. The former DG for Justice, Freedom and Security was hence split into two: DG Justice and DG Home Affairs in July 2010. The College of Commissioners as a whole has taken the oath before the Court of Justice "to respect the Treaty and the Charter of Fundamental Rights of the European Union in the fulfilment of all [...] duties".⁴³

³⁸ Article 6(2) TEU.

³⁹ Hermann-Josef Blanke, 'The Protection of Fundamental Rights in Europe' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012) 159, 163. See also Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645.

⁴⁰ Article 52(3) Fundamental Rights Charter.

⁴¹ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 4.

⁴² European Parliament: European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme [2009], para. 20.

⁴³ European Commission, Commission Communication: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union [2010] COM(2010) 573 final, 2.

E. The internal-external nexus

With the point of departure in economic integration through the European Economic Community, the 1992 Maastricht Treaty introduced new policies and forms of cooperation through the Treaty on European Union. The rationale behind the creation of the EU was to supplement the existing Communities.⁴⁴ In addition to introducing the concept of Union citizenship, Member States already in the Maastricht Treaty recognised that asylum policy, immigration policy, judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation were “matters of common interest”.⁴⁵ Many security challenges have a cross-border nature and no single Member State is able to effectively respond to these threats on its own.⁴⁶ Importantly, it is not only EU-*internal* borders that are crossed by ‘criminal elements’, but also the EU-*external* border. As such, to effectively address cross-border criminality, cooperation with third countries is a necessity. Even for judicial cooperation in civil matters, external cooperation, for example, through international agreements, can be seen as central.⁴⁷ In 1999, the Tampere European Council therefore emphasised the need of strong external action in the field of JHA.⁴⁸ Later on, the external dimension of the AFSJ has been the objective of a special strategy in 2005,⁴⁹ and it has also been considered in other strategies, including the 2010 Stockholm Programme.⁵⁰ In the new AFSJ strategic guidelines it is noted that the “answer to many of the challenges in the area of freedom, security and justice lies in relations with third countries, which calls for improving the link between the EU’s internal and external policies.”⁵¹

Trauner and Carrapiço have pointed out that the external dimension of AFSJ has changed over

⁴⁴ Allan Rosas and Lorna Armati, *EU Constitutional Law* (Hart Publishing 2010) 9.

⁴⁵ Article K.1.

⁴⁶ European Commission: The EU Internal Security Strategy in Action: Five steps towards a more secure Europe [2010] COM(2010) 673 final, 2.

⁴⁷ Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 17.

⁴⁸ European Council: Presidency Conclusions, Tampere European Council, 15-16 October 1999, para. 59 (‘The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities.’)

⁴⁹ European Commission, Commission Communication: A Strategy on the External Dimension of the Area of Freedom, Security and Justice [2005] COM(2005) 491 final.

⁵⁰ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1.

⁵¹ European Council: European Council 26/27 June 2014 Conclusions.

time due to three different types of developments: (1) *sectoral changes*: new policy areas have been included in the AFSJ or new JHA-objectives have been added to established policies; (2) *horizontal changes*: expansion of geographical focus, many new states and regions form part of the external dimension; (3) *vertical changes*: new EU institutions and bodies get involved in the AFSJ.⁵² All of these developments have also fortified the external dimension of the AFSJ.⁵³

As regards the thematic areas of external action, the 2005 strategy identifies terrorism, organised criminality (including trafficking in drugs and persons), illegal immigration, and addressing state failure in third countries as the principal challenges.⁵⁴ The 2005 strategy also identifies central principles for the external action in the AJFS, including the principle of geographic prioritisations, the principle of partnership, and the application of a differentiated and flexible approach (the content of the partnerships with different countries and regions may vary).⁵⁵ It has been noted that whereas the EU with its neighbouring and African countries has been especially keen to discuss migration, readmission and the strengthening of capacity-building of law-enforcement sector, it has with other countries such as the US, Canada and Australia been more interested in furthering police and judicial cooperation, data exchange and data protection.⁵⁶ The priorities set in the 2005 strategy have been specified and developed in the 2010 Stockholm Programme so that, for example, the geographical focus of the external action has been extended to more remote countries and regions, including India and Afghanistan.⁵⁷

On the one hand, the EU has tried to mainstream JHA questions into its existing cooperation frameworks. The European Neighbourhood Policy (ENP) is a prime example of external policy

⁵² Florian Trauner and Helena Carrapiço, 'The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification' [2012] *European Foreign Affairs Review* 1, 4-7.

⁵³ See Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' [2012] *SIEPS Report*.

⁵⁴ European Commission, Commission Communication: A Strategy on the External Dimension of the Area of Freedom, Security and Justice [2005] COM(2005) 491 final, 3-4.

⁵⁵ European Commission, Commission Communication: A Strategy on the External Dimension of the Area of Freedom, Security and Justice [2005] COM(2005) 491 final, 6-7.

⁵⁶ Sarah Wolff and Grégory Mounier, 'The External Dimension of JHA: A New Dimension of EU Diplomacy' in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 241, 241. The external partners are often divided into: (1) enlargement countries; (2) the EU's neighbourhood; (3) strategic partners (including e.g., USA, Canada and Russia); and (4) other partners. See e.g., <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/index_en.htm> accessed 5 February 2014.

⁵⁷ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 35-37.

being influenced by JHA issues.⁵⁸ This makes it justifiable to regard the development of an external dimension of the AFSJ as a change in the Union's external action, rather than merely as a change within the AFSJ (a move from a policy area that is merely internal, to an area that both has an internal and external dimension). The AFSJ has thus caused "the EU to act beyond the classic areas of international cooperation [...] such as trade and development cooperation and foreign security and defence policy."⁵⁹ On the other hand, the EU has also introduced new types of foreign policy instruments which are not part of the Union's traditional foreign policy. The AFSJ agencies, for example, have been granted the power to conclude agreements with non-EU-member states, a power which many of these agencies have used actively. This latter type of AFSJ agreements have brought up the question of what the relationship should be between the Union's external JHA action and its more general foreign affairs policy. In this regard, it can be noted that the Lisbon Treaty has maintained distinct legal competences for the AFSJ and Common Foreign and Security Policy (CFSP) but is at the same time vague about operational cooperation between the two areas.⁶⁰ For this reason Wolff and Mounier argue that the external dimension of JHA "sits uneasily between two more established EU policies, foreign affairs and internal security".⁶¹

In relation to human rights and external action, Article 21(1) TEU establishes that: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." The Union's external human rights policy has been specified in many policy instruments, and most notably in the EU Strategic Framework on Human Rights and Democracy (2012) and the EU Action Plan on Human Rights and Democracy (2012) ('Human Rights Action Plan').⁶² In the Human Rights Action Plan it

⁵⁸ Sarah Wolff and Grégory Mounier, 'The External Dimension of JHA: A New Dimension of EU Diplomacy' in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 241, 244.

⁵⁹ Ramses A. Wessel, Luisa Marin and Claudio Matera, 'The External Dimension of the EU's Area of Freedom, Security and Justice', in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 272, 272.

⁶⁰ Florian Trauner, 'The Internal-External Security Nexus: More Coherence under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 31.

⁶¹ Sarah Wolff and Grégory Mounier, 'The External Dimension of JHA: A New Dimension of EU Diplomacy' in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 241, 250.

⁶² Council of the European Union: EU Strategic Framework and Action Plan on Human Rights and Democracy [2012] 11855/12, 25 June 2012 (hereinafter Human Rights Action Plan [2012] when the Action Plan is referred to).

is emphasised that: “The EU will promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into [...] the external dimensions of [...] the area of freedom, security and justice, including counter-terrorism policy.”⁶³ The EU has also adopted numerous human rights guidelines to guide the Union’s action in relation to specific human rights topics, such as the EU Guidelines on Death Penalty.⁶⁴

The European Commission has emphasised that the objective of the external dimension of the AFSJ is to contribute to the establishment of the *internal* area of freedom, security and justice and at the same time support the political objectives of the EU’s external relations.⁶⁵ In the recent communication “An open and secure Europe: making it happen”, the Commission, for example, notes that “European internal security also means acting beyond EU borders and in cooperation with third country partners.”⁶⁶ As noted by Trauner, one significant challenge for the EU is, however, how to mainstream internal security objectives in the EU’s external relations without undermining the normative aspirations of EU foreign policy.⁶⁷ Or in other words, how to reconcile the fact that “the main principle of the EU’s foreign and security policy is advancing regional integration and good neighbourly relations in the wider European region” whereas in JHA the Member States have primarily been “guided by their interest in keeping problems out and the external border closed.”⁶⁸

G. The quest for coherence and fundamental rights

The matter of coherence has been a key priority of the EC/EU ever since the 1986 Single European Act (SEA), the preamble of which refers to the aim “to act with consistency and solidarity in order more effectively to defend its common interests and independence”. Article 30(5) SEA states that “the external policies of the European Community and the policies adopted by the European Political Cooperation must be consistent”.⁶⁹ Regarding the virtues of

⁶³ Human Rights Action Plan [2012].

⁶⁴ Council of the European Union: EU Guidelines on Death Penalty [2013] 8416/13, 12 April 2013.

⁶⁵ European Commission, Commission Communication: A Strategy on the External Dimension of the Area of Freedom, Security and Justice [2005] COM(2005) 491 final, 4.

⁶⁶ European Commission, Commission Communication: An open and secure Europe: making it happen [2014] COM(2014) 154 final, 13.

⁶⁷ Florian Trauner, ‘The Internal-External Security Nexus: More Coherence under Lisbon?’ [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 19.

⁶⁸ Florian Trauner, ‘The Internal-External Security Nexus: More Coherence under Lisbon?’ [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 21.

⁶⁹ Single European Act [1987] OJ L169/1.

coherence, Vogel has noted that: “Policy coherence is indispensable for the efficiency and effectiveness of a policy: the first describing the sensible use of resources, the latter referring to the achievement of goals. Lacking coherence can compromise the credibility of a policy [...]. Therefore, coherence is a political as well as economic imperative [...].”⁷⁰

The requirement of Article 3 TEU, introducing one of the main objectives of the EU, is that the Union shall be served by a single institutional framework which shall ensure consistency of the Union’s activities in general, and “ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies”. The choice of the notion ‘consistency’ is in French and German substituted for ‘coherence’ (*cohérence*, *Kohärenz*). Whether the two notions are interchangeable is unclear. An argument can be made that whereas *consistency* refers to the absence of contradiction and compatibility, *coherence* relates to synergy and added value. Nevertheless, ‘consistency’ is increasingly referred to as an issue of ‘coherence’. This practice would imply that the consistency referred to in Article 3 means more than tackling legal contradictions between Union actions, but raises the question of synergies.⁷¹

Hillion distinguishes between *negative coherence* (absence of contradictions) and *positive coherence* (the principle of cooperation). According to him, negative coherence demands that the distribution of powers between different actors in a policy field is clearly settled as well as the existence of established mechanisms for resolving possible conflicts of norm.⁷² Positive coherence, on the other hand, requires rules compelling various policy actors to cooperate.⁷³ A distinction has also been made between *vertical coherence* (addressing the coherence between EU and Member State action), *horizontal coherence* (addressing coherence between different EU policy fields) and *institutional coherence* (addressing coherence between the actions of

⁷⁰ Carola Vogel, ‘The Migration-Development Nexus: Is the Migration Policy of the European Union Coherent with Its Development Policy?’ in Christina Gortázar, María-Carolina Parra, Barbara Segaert and Christiane Timmerman (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 273, 274-275 (referring to Ashoff and Carbone).

⁷¹ For an overview, see Christophe Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’ in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008) 10-36. See also Leonhard den Hertog and Simon Stroß, ‘Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term’ [2013] *European Foreign Affairs Review* 373, 375-376.

⁷² Christophe Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’ in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008) 10, 18.

⁷³ Christophe Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’ in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008) 10, 27.

different EU institutions).⁷⁴ There may in other words be multiple sources of incoherence.

The Stockholm Programme speaks about both consistency and coherence. The Programme refers to the need for further efforts “in order to improve coherence between policy areas”,⁷⁵ but also identifies the importance of addressing “overlapping and a certain lack of coherence” as a means for improving AFSJ legislation.⁷⁶ Under the heading of increased coherence as a tool for implementing the programme, the European Council “invites the Council and the Commission to enhance the internal coordination in order to achieve greater coherence between external and internal elements of the work in the area of freedom, security and justice. The same need for coherence and improved coordination applies to the Union agencies”.⁷⁷ This would indicate a focus on the problem of ‘coherence’ as one that transcends legal issues. The notion ‘consistency’ also occurs in the Stockholm Programme, but is more clearly reserved for indicating the absence of legislative contradictions.⁷⁸ Separate coherence goals are then defined for different policy areas.

The Action Plan Implementing the Stockholm Programme (2010) states that: “Continuity and consistency between internal and external policies are essential to produce results, as is coherence and complementarity between the Union and Member States”⁷⁹ and seeks to introduce a “legislative proposal aimed at improving the consistency of existing Union legislation in the field of civil procedural law action”.⁸⁰ Action to be taken under the heading of “increased coherence” entails communications and proposals for improving monitoring.⁸¹ The Action Plan Implementing the Stockholm Programme also states that “Cross-border transactions can be made easier by increasing the coherence of European contract law”, and

⁷⁴ Paul Quinn, ‘The Lisbon Treaty - Answering the Call for Greater Coherence in EU External Relations?’, in Dieter Mahncke and Sieglinde Gstöhl (eds), *European Union Diplomacy: Coherence, Unity and Effectiveness* (Peter Lang AG, 2012) 45, 47 (referring to Nuttall).

⁷⁵ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 4.

⁷⁶ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 5.

⁷⁷ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 6.

⁷⁸ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 6, 8, 13 and 15.

⁷⁹ European Commission, Commission Communication: Action Plan Implementing the Stockholm Programme [2010] COM(2010) 171 final, 8.

⁸⁰ European Commission, Commission Communication: Action Plan Implementing the Stockholm Programme [2010] COM(2010) 171 final, 23.

⁸¹ European Commission, Commission Communication: Action Plan Implementing the Stockholm Programme [2010] COM(2010) 171 final, 65.

that “A criminal justice strategy, fully respecting subsidiarity and coherence, should guide the EU's policy for the approximation of substantive and procedural criminal law”.⁸² This seems to support the conclusions concerning the Stockholm Programme and indicates that consistency is mainly used for referring to legal matters, whereas coherence indicates a broader focus.

In all, it seems that the goal of coherence has a constitutional basis and that coherence problems can arise both within legal and policy initiatives, as well as in between them. Coherence issues can arise both from the activities of legal and political actors as well as from the interactions (or lack of that) between them. Since coherence issues can arise at multiple levels, focus can not only be on EU action over time, but is also a question of the consistency and coherence of the cooperation between the EU and Member States, between member action, between Union policies, between internal and external aspects of policies, and between EU activities within its suborders.⁸³ The Stockholm Programme identifies several coherence issues that need attention. These are:

- coherence between AFSJ policy areas
- coherence (and consistency) between AFSJ legislative acts
- coherence between AFSJ external and internal elements
- coherence between Union agencies

Even if an in-depth analysis of how coherence issues arise in the AFSJ is the subject of later studies, subsequent discussions will seek to demonstrate the potential impact of a lack of coherence on upholding fundamental rights in AFSJ policy-making.

⁸² European Commission, Commission Communication: Action Plan Implementing the Stockholm Programme [2010] COM(2010) 171 final, 5.

⁸³ Christophe Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’ in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008) 10, 17.

II. Fundamental rights in the institutional framework of the AFSJ

A. Introduction

The various actors within the AFSJ may be divided into groups depending on whether their role is *primarily*: (a) to take part in the adoption of EU legislation or policies (Council, European Commission, European Parliament); (b) to take part in the enforcement of EU legislation or policies (the agencies, Member States); or (c) to supervise the adherence to EU legislation or policies (including fundamental rights) (CJEU, European Union Agency for Fundamental Rights (FRA)). As the consequent discussion will demonstrate, this distinction cannot always be categorically upheld. For example, the European Parliament is involved in monitoring fundamental rights and FRA can indirectly play a role in the legislative process. Yet, the main *raison* of these bodies provides them with separate identities in the making of policies and legislative measures in the AFSJ. This also means that they are subject to different expectations in respect of fundamental rights protection.

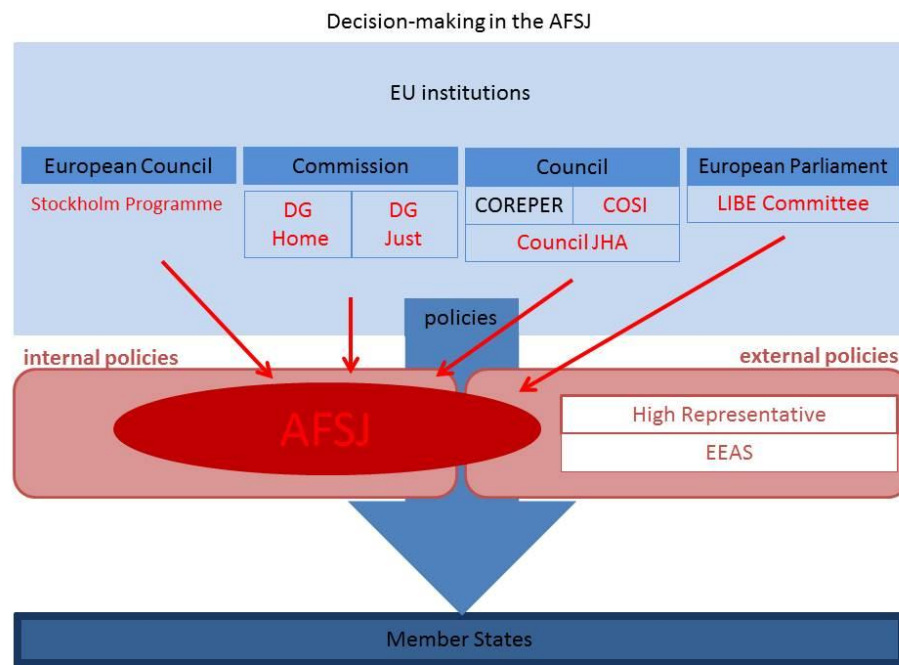
The entry into force of the Lisbon Treaty, marking the latest revision of the AFSJ, entailed a promise of remedying many of the historical complexities that have plagued the AFSJ.⁸⁴ If there is one characteristic that has been pinpointed in the institutional landscape of AFSJ decision-making, it would be the ‘Kafkaesque complexity’ of the area.⁸⁵ The Lisbon Treaty has entailed some improvements to the situation, at least as far as decision-making is concerned. As has been noted above, one of the most notable changes that the Lisbon Treaty brought with it was the eradication of the pillar system. As a consequence of that change, AFSJ matters (with some exceptions) became subject to the ordinary decision-making procedure of the EU known formerly as the co-decision procedure.⁸⁶ Since Lisbon, decisions made by the EU in the AFSJ take the form of regulations, directives, decisions (binding), and recommendations and opinions (non-binding).⁸⁷ The various AFSJ instruments will be considered further in Chapter III.

⁸⁴ For an overview of the historical development of the AFSJ, see e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 4-41.

⁸⁵ The characterization is used by Douglas-Scott. Sionaidh Douglas-Scott, ‘The EU’s Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?’ [2008-2009] *The Cambridge Yearbook of European Legal Studies*, Volume 11, 53, 84. Also see Council of the European Union: JHA External Relations – Trio Programme [2011] 12004/11, 4 July 2011, 2.

⁸⁶ Described in Article 294 TFEU. Notably the provisions in Title V of the TFEU on the Area of Freedom, Security and Justice also contain a number of exceptions to the applicability of the co-decision procedure. On the co-decision procedure, voting patterns and exceptions, see Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 42-43, and Jaap de Zwaan, ‘The New Governance of Justice and Home Affairs: Towards Further Supranationalism’ in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 7, 16-21.

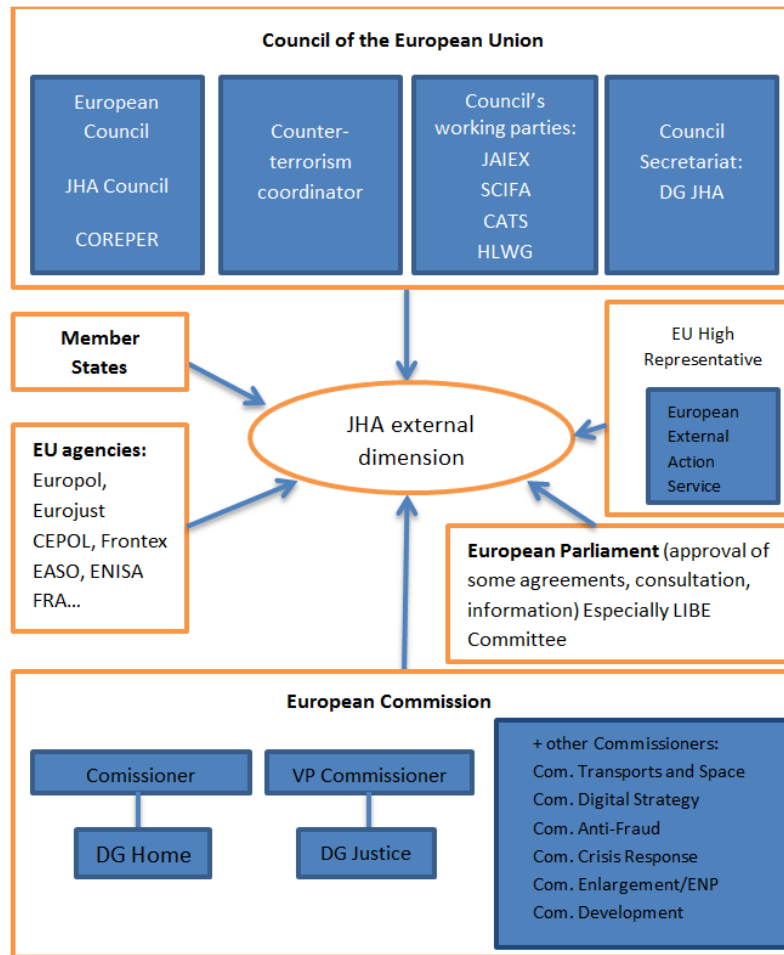
⁸⁷ Article 288 TFEU.



Source: Manuela Weyh, 2013 (unpublished, on file with authors)

As all main EU bodies are involved in the AFSJ, institutional questions of concern in the AFSJ area have first of all to do with the general functions of the main bodies and how fundamental rights are ensured in their performance. Articles 67-76 TFEU contain the general principles governing the AFSJ. However, the precise scope of EU measures is defined in Title V of the TFEU individually for different policy areas.

The 2011 JHA External Relations Trio Presidency Programme contained an unofficial map of AFSJ actors which, although intended to demonstrate the actors feeding into the external dimension of the AFSJ, is illustrative of the broad range of actors involved in AFSJ decision-making at large. Above all, this image adds to the AFSJ one of its most notable characteristics: agencies. One distinguishing feature of the AFSJ is the prominent role of actors that transcend the traditional institutional framework in the development and implementation of the policies. This 'agencification' gives rise to a particular set of fundamental rights issues.



Source: Council of the European Union: JHA External Relations – Trio Programme [2011] 12004/11, 4 July 2011, Annex (with minor adaptations)

B. The role of the main EU bodies in the AFSJ

1. European Council

According to the TEU, the European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.⁸⁸ The European Council consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission.⁸⁹ The High Representative of the Union for Foreign Affairs and Security Policy also takes part in its work.⁹⁰ The European Council

⁸⁸ Article 15(1) TEU.

⁸⁹ Article 15(2) TEU.

⁹⁰ Article 15(2) TEU.

generally meets four times a year.⁹¹ To enhance the effectiveness of its work the European Council has defined policy priorities up to 2014, including the area of Freedom, Security and Justice of the Union.⁹²

Article 68 TFEU confers on the European Council the main responsibility for defining the “strategic guidelines for legislative and operational planning within the area of freedom, security and justice”. Hence, it is important to recognise that the European Council’s function is to set policies, and not to legislate, within the AFSJ.⁹³ The guidelines have so far been the Tampere, Hague and Stockholm policy programmes. The last of these multiannual programmes runs from 2009-2014.⁹⁴ In June 2014, the European Council adopted new strategic guidelines for legislative and operational planning for 2015-2020.⁹⁵ Furthermore, the European Council regularly debates JHA topics, such as the question of migration flows.⁹⁶

2. Council of the European Union (‘Council’)

The Council is the Union’s main decision-making body. The Council consists of Member States’ government representatives and its composition varies depending on the Council meeting in question. When acting as co-legislator in the AFSJ, the Council meets in the Council of Justice and Home Affairs configuration (‘JHA Council’). This means that the meetings are attended by justice and home affairs ministers from the Member States. The JHA Council has competence to adopt legislation over the whole field of AFSJ. The Council’s work in the JHA field is guided by, among other things, the Council’s 18 month programmes.⁹⁷ The decision-making of the Council is facilitated by a number of working parties and committees known as Council preparatory bodies.⁹⁸

The Council bears the main responsibility for inter-level coherence (between actors at national and EU-levels). This responsibility lies with the presidency of the Council. The body given the overall responsibility to ensure intra-institutional coherence within Council structures in

⁹¹ Article 15(3) TEU.

⁹² European Council: European Council priorities up to 2014, Document for the attention of Heads of State or Government, received from Herman Van Rompuy at the European Council on 28 and 29 June 2012.

⁹³ Article 15(1) TEU.

⁹⁴ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1.

⁹⁵ European Council: European Council 26/27 June 2014 Conclusions.

⁹⁶ European Council: European Council 19/20 December 2013 Conclusions.

⁹⁷ See further Section III.A.3.

⁹⁸ See further Council of the European Union, ‘About the Council of the EU’ <<http://www.consilium.europa.eu/council?lang=en>> accessed on 1 April 2014.

internal security and external relations has been the Committee of Permanent Representatives (COREPER).⁹⁹ COREPER performs its coordinating role both at the preparatory stage and through supervising the work of expert groups.

COREPER prepares all of the Council's work and is supported by various working parties and committees. These bodies examine legislative proposals and carry out studies and other preparatory work which prepares the ground for Council decisions. Council committees and working parties can be established by treaty, Council act or by COREPER. In the JHA field, COREPER has established numerous Council committees and working groups.¹⁰⁰

Council Working Parties in the AFSJ

- *Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)*
- *Working Party on Integration, Migration and Expulsion*
- *Visa Working Party*
- *Asylum Working Party*
- *Working Party on Frontiers*
- *Working Party on Civil Law Matters (JUSTCIV)*
- *Working Party on Terrorism (TWP)*
- *Customs Cooperation Working Party (CCWP)*
- *Working Party on Cooperation in Criminal Matters (COPEN)*
- *Working Party on Substantive Criminal Law (DROIPEN)*
- *Working Party on Civil Protection (PROCIV)*
- *Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP)*
- *Working Party on Information Exchange and Data Protection (DAPIX)*
- *JAI-RELEX Working Party*
- *Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS)*
- *Law Enforcement Working Party (LEWP)*
- *Working Party for Schengen Matters*
- *Working Party on General Matters including Evaluation (GENVAL)*

Source: Council of the European Union: List of Council Preparatory Bodies [2014] 5312/14, 14 January 2014 (for a Description of Working Party Tasks, see Annex 1).

⁹⁹ Council of the European Union: A Strategy for the External Action of JHA: Global Freedom, Security and Justice [2005] 15446/05, 6 December 2005, para. 14, and Florian Trauner, 'The Internal-External Security Nexus: More Coherence under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 22-24.

¹⁰⁰ Council of the European Union: List of Council Preparatory Bodies [2014] 5312/14, 14 January 2014. See also Council of the European Union, 'Council committees and working parties' <<http://www.consilium.europa.eu/council/committees-and-working-parties?tab=Committees-and-working-parties&subTab=Established-by-Coreper&lang=en>> accessed 1 April 2014.

Article 71 TFEU laid the ground for the establishment of the Standing Committee on Operational Cooperation on Internal Security (COSI) within the Council. Its function is to facilitate, promote and strengthen the coordination of operational actions of the EU Member States in the field of internal security. COSI has no competence to adopt legislative measures and does not conduct operations. As to its composition, COSI consists of high-level officials from Member States' ministries of the interior and Commission representatives. Agencies, such as Eurojust, Europol and Frontex, may be invited to attend as observers.¹⁰¹

As regards the Council and fundamental rights, a difference can be made between (a) different mechanisms the aim of which is to ensure that the institution's decision-making is in line with fundamental rights; and (b) the more general human rights action and monitoring of the institution. Regarding the former, the Council has first of all adopted conclusions on how to integrate fundamental rights into its work.¹⁰² Furthermore, the Council may ask FRA to issue opinions and to undertake research on fundamental rights issues. In the field of the AFSJ, the Council has, for example, asked for opinions regarding the proposal for a Council Framework decision on the use of Passenger Name Record (PNR),¹⁰³ and the Framework Decision on Racism and Xenophobia (2008/913/JHA),¹⁰⁴ and a survey on gender-based violence against women.¹⁰⁵ The results of FRA's data collection and research may also feed into the discussions of Council preparatory bodies, particularly the Working Party on Fundamental Rights, Citizens'

¹⁰¹ "JHA agencies are not members of COSI, but may be invited where appropriate. In particular Europol and Frontex have been the main interlocutors of the Committee, second to CEPOL and Eurojust. Justice agencies such as the FRA, but also the EDPS do not seem to be included in COSI's work in a systematic manner. This of course carries a danger that the Committee loses sight of the important implications its work may have on fundamental rights and data protection." Jorrit J. Rijpma, 'Institutions and Agencies: Government and Governance after Lisbon' in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 54, 70 (referring to Jeandesboz et al. and Busuioc and Curtin).

¹⁰² JHA Council: Council conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union [2011] 6387/11, 25 February 2011. See also JHA Council: Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union [2014] 5 and 6 June 2014.

¹⁰³ FRA, 'Opinion of the European Union Agency for Fundamental Rights on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes' [2008].

¹⁰⁴ See further FRA, 'Council of the European Union', <<http://fra.europa.eu/en/cooperation/eu-partners/council-of-the-european-union>> accessed 1 April 2014.

¹⁰⁵ In 2014, FRA will present the results of its survey on gender-based violence against women. FRA, 'Council of the European Union', <<http://fra.europa.eu/en/cooperation/eu-partners/council-of-the-european-union>> accessed 1 April 2014. See also FRA, 'FRA presents advance results of the Violence against women survey to the Council', <<http://fra.europa.eu/en/news/2014/fra-presents-advance-results-violence-against-women-survey-council>> accessed 1 April 2014.

Rights and Free Movement of Persons (FREMP),¹⁰⁶ to which FRA presents its annual report on fundamental rights. The FRA also provides data and expertise to the Schengen Evaluation Working Party, the Working Party on Frontiers, the Social Questions Working Party and other preparatory bodies.¹⁰⁷ FRA is furthermore nowadays regularly consulted when important new AFSJ strategies are adopted to ensure their fundamental rights sensitivity.¹⁰⁸ This way FRA participates in processes leading to binding rules, although not having a formal role in the decision-making process.¹⁰⁹ Apart from cooperation and contacts at the expert level, the FRA Director participates in informal ministerial meetings of the JHA Council.¹¹⁰

The Foreign Affairs Council (FAC) – composed of the Member States foreign affairs ministers and sometimes defence/development/trade ministers – is responsible for the Union’s external action. As regards external action and fundamental rights, the Human Rights Working Group (COHOM) – which is composed of human rights experts from the Commission and Member States – is responsible for the preparation and implementation of Council action.¹¹¹ The Human Rights Action Plan sets forth that FREMP and COHOM should cooperate more intensively to achieve coherence and consistency between the EU’s external and internal human rights policy.¹¹² The need to strengthen this cooperation was recently stressed by the JHA Council.¹¹³ Furthermore, the JAI-RELEX working group works to ensure policy coherence between JHA and

¹⁰⁶ On FREMP, see further Wolfgang Benedek, ‘EU Action on Human and Fundamental Rights in 2013’ [2014] *European Yearbook on Human Rights* 85, 93 (‘FREMP shows fewer activities [than COHOM], but also had an important agenda like discussing the internal rules regarding the accession of the EU to the ECHR, debating the future development of the justice and home affairs area regarding fundamental rights or the draft Council conclusions on hate crime.’) and 101.

¹⁰⁷ FRA, ‘Council of the European Union’, <<http://fra.europa.eu/en/cooperation/eu-partners/council-of-the-european-union>> accessed 1 April 2014.

¹⁰⁸ See further FRA, Report, ‘Fundamental Rights in the Future of the European Union’s Justice and Home Affairs’ [2013], 1. See also e.g., FRA, Report, ‘The Stockholm Programme: A Chance to Put Fundamental Rights Protection Right in the Centre of the European Agenda’ [2009].

¹⁰⁹ Edoardo Chiti, ‘European Agencies’ Rulemaking: Powers, Procedures and Assessment’ [2013] *European Law Journal* 93, 99.

¹¹⁰ See e.g., FRA, ‘FRA Director to take part in Justice and Home Affairs Council’ <<http://fra.europa.eu/en/event/2013/fra-director-take-part-justice-and-home-affairs-council>> accessed 1 April 2014.

¹¹¹ See further the 1987 COHOM Mandate, Mandate for the EPC-Working Group on human rights, <http://www.consilium.europa.eu/uedocs/cmsUpload/COHOM_mandates.pdf> accessed 1 April 2014. On the human rights work of COHOM, see further e.g., Wolfgang Benedek, ‘EU Action on Human and Fundamental Rights in 2012’ [2013] *European Yearbook on Human Rights* 55, 69-70, and Wolfgang Benedek, ‘EU Action on Human and Fundamental Rights in 2013’ [2014] *European Yearbook on Human Rights* 85, 93.

¹¹² Human Rights Action Plan [2012].

¹¹³ JHA Council: Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights’ protection and promotion in the European Union [2014] 5 and 6 June 2014, para. 21.

external relations policies.

It can be noted that the Council regularly adopts reports on fundamental rights issues.¹¹⁴ In relation to external action, the Council has adopted eleven guidelines for Member States and institutions on how to promote human rights in relations to external actors.¹¹⁵ In addition, the Council produces an annual report on human rights and democracy in the world, which also covers selected parts of the AFSJ.¹¹⁶

Based on Article 7 TEU, the Council may initiate a preventive mechanism against Member States when there is a “clear risk of a serious breach” of central EU values (including human rights and rule of law) and adopt sanctions when the European Council has found that there is a “serious and persistent breach by a Member State” of these values.¹¹⁷ Benedek has noted that Article 7 creates a very high threshold for action, and as such it may only be applied in the most serious cases.¹¹⁸ In practice, therefore, most fundamental rights problems in Member States escape the article.¹¹⁹ Fundamental rights violations of Member States have, however, been

¹¹⁴ E.g., JHA Council: Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union [2013] 6 and 7 June 2013.

¹¹⁵ E.g., available at European External Action Service (EEAS), ‘Human Rights Guidelines’ <http://eeas.europa.eu/human_rights/guidelines/index_en.htm> accessed 2 April 2014.

¹¹⁶ In the 2012 report, it was shortly (one page) considered how “human rights underpin the external dimension of work in the area of freedom, security and justice.” EU Annual Report on Human Rights and Democracy in the World in 2012, 13 May 2013, 9431/13, 67. In the 2011 report, consideration was given to, e.g., migration, trafficking in human beings and racism. Human Rights and Democracy in the World: Report in EU Action in 2011, 98 ff.

¹¹⁷ Article 7 TEU provides that: “1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. 2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations. 3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.”

¹¹⁸ Wolfgang Benedek, ‘EU Action on Human and Fundamental Rights in 2013’ [2014] *European Yearbook on Human Rights* 85, 88.

¹¹⁹ A new framework to strengthen the rule of law that has been launched by the Commission aims to remedy the flaws with the Article 7 mechanism. European Commission, Commission Communication: A New EU Framework to Strengthen the Rule of Law [2014] COM(2014) 158 final.

highlighted by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) by resorting to Article 7.¹²⁰

3. European Commission ('Commission')¹²¹

In the institutional system of the EU, the main tasks of the Commission are to propose new legislation and to ensure that EU law is correctly applied by the Member States. The Commission consists of independent Commissioners and the institution shall represent the interests of the EU as a whole. The Commission works in departments known as Directorates-General (DGs), but these units do generally not have decision-making power. Rather, the Commission makes its decisions as a collective organ.

The Lisbon Treaty enhanced the role of the Commission as initiator of legislation in the AFSJ.¹²² The Commission has been eager to use its right of initiative and setting policy and legislative priorities. One example of this was the adoption of the Stockholm Action Plan.¹²³ Since the Lisbon Treaty, the Commission may also adopt delegated legislative implementation measures (the comitology procedure). Specific provisions in each legislative act provide for the procedure to be used in the exercise of this power.¹²⁴

The former DG for Justice, Freedom and Security was in 2010 divided into a DG for Home Affairs

¹²⁰ Cf. "Should the Hungarian authorities fail to abide by EU values, MEPs ask the European Parliament's authorities to consider resorting to EU Treaty Article 7 (1), which would enable the EU Council of Ministers to determine whether there is a clear risk of a serious breach." European Parliament, Press Release, 'MEPs call on Hungarian authorities to abide by EU values', 19 June 2013.

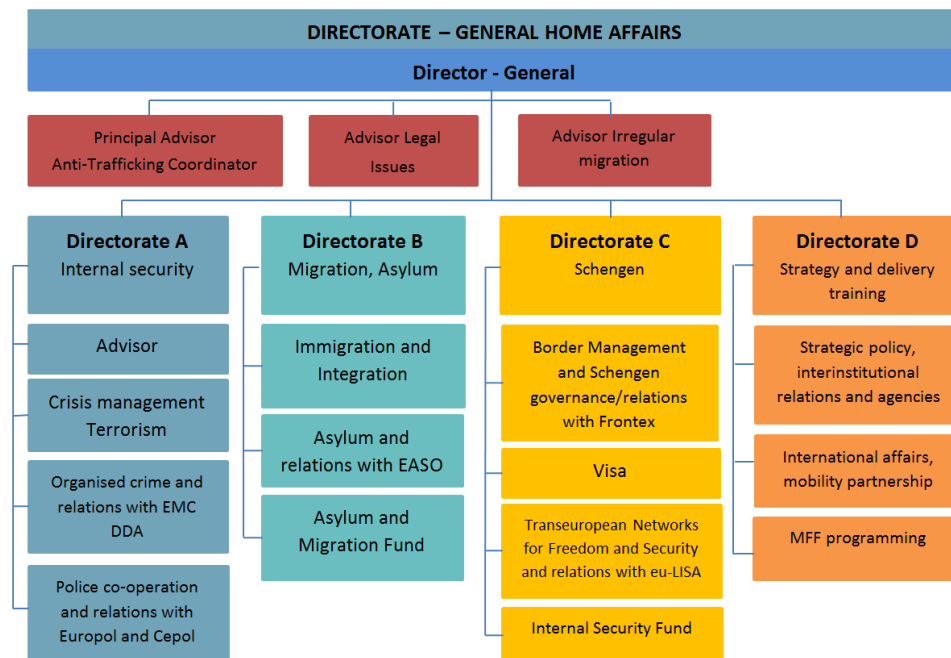
¹²¹ A new Commission will soon take office (the so-called the Juncker Commission) and the internal structures of the Commission will change somewhat when that happens. For example, the Home and Justice Commissioners will become Commissioner on Migration & Home Affairs respectively Commissioner on Justice, Consumers and Gender Equality. There will also e.g., be several vice-presidents. Of these, the First Vice-President is in charge of better regulation, inter-institutional relations, the rule of law and the Charter of Fundamental Rights. It has not been possible to consider the new Commission structure in this report. See further European Commission, 'Towards the Juncker Commission', <http://ec.europa.eu/about/juncker-commission/index_en.htm> accessed 23 September 2014.

¹²² Article 74 TFEU. In respect of police cooperation and criminal justice, Article 76 TFEU also provides a possibility to a quarter of member states to propose initiatives.

¹²³ Sergio Carrera and Elspeth Guild, 'Does the Stockholm Programme Matter? The Struggle over Ownership of AFSJ Multiannual Programming' [2012] *CEPS Paper in Liberty and Security in Europe*, No. 51, 4.

¹²⁴ Article 290 TFEU. See also European Commission, Commission Communication: Implementation of Article 290 of the Treaty on the Functioning of the European Union [2009] COM(2009) 673 final, and 'Common Understanding on Delegated Acts' [2011] <http://ec.europa.eu/commission_2010-2014/sefcovic/documents/common_understating_on_delegated_acts.pdf> accessed 26 May 2014. On the procedure of delegated acts, see e.g. Alan Hardacre and Michael Kaeding, *Delegated & Implementing Acts: The New Comitology* (4th edn, European Institute of Public Administration 2011).

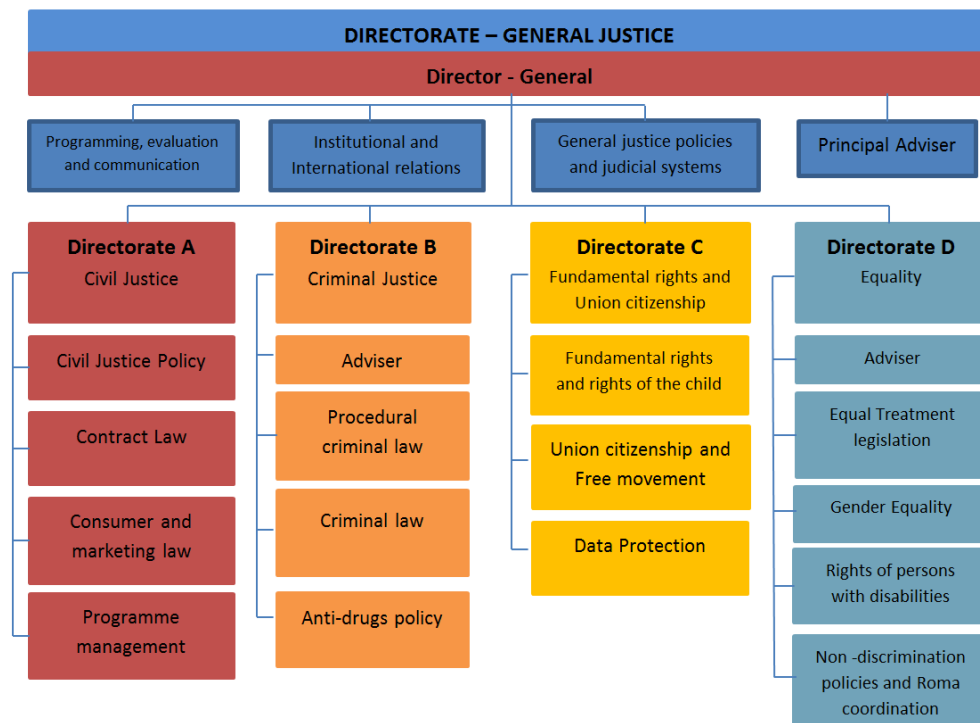
and a DG for Justice. The Home Affairs DG focuses on the policies of immigration, asylum, border control, internal security, organised crime, human trafficking, terrorism and police cooperation, whereas the Justice DG deals with the justice, fundamental rights and citizenship policies.¹²⁵ Both DGs have issued several AFSJ policy documents.¹²⁶



Source: <http://ec.europa.eu/dgs/home-affairs/who-we-are/dg-home-affairs-chart/index_en.htm>, accessed 17 September 2014 (with minor adaptations)

¹²⁵ The organisational charts of the DGs can be found at European Commission, Home Affairs, 'Organigram' <http://ec.europa.eu/dgs/home-affairs/who-we-are/dg-home-affairs-chart/index_en.htm> and European Commission, Justice <http://ec.europa.eu/justice/about/files/organisation_chart_en.pdf> accessed 10 April 2014.

¹²⁶ See examples e.g., in Sergio Carrera and Elspeth Guild, 'Does the Stockholm Programme Matter? The Struggle over Ownership of AFSJ Multiannual Programming' [2012] *CEPS Paper in Liberty and Security in Europe*, No. 51, 6.



Source: <http://ec.europa.eu/justice/about/files/organisation_chart_en.pdf>, accessed 17 September 2014 (with minor adaptations)

As regards the Commission and external action, the Vice-President of the Commission, in the role of High Representative of the Union for Foreign Affairs and Security Policy, has overall responsibility for coherence of EU external action. The high representative also represents the EU externally, establishes the European External Action Service (EEAS) (EU's diplomatic corps supporting the High Representative in Common Foreign and Security Policy (CFSP) matters, with the obligation to “ensure consistency between the different areas of the Union’s external action and between those areas and its other policies”), is chairman of the FAC and coordinates the Commission’s external relations portfolios.¹²⁷ In the Human Rights Action Plan, the responsibility for carrying out the actions listed “resides with the High Representative assisted by the EEAS, and with the Commission, the Council and Member States, within their respective fields of competence”.¹²⁸ Special mention could be made that the Stockholm Programme explicitly lays it on the Commission to “ensure better coherence between traditional external policy instruments and internal policy instruments with significant external dimensions, such as

¹²⁷ Council Decision 2010/427/EU of 26 July 2010 establishing the Organisation and functioning of the European External Action Service [2010] OJ L 201/30, Article 3. The EEAS is functionally autonomous from other EU institutions.

¹²⁸ Human Rights Action Plan [2012].

freedom, security and justice”.¹²⁹ In 2011, a special roadmap was adopted to strengthen the coordination between the Common Security and Defence Policy (CSDP) and the AFSJ.¹³⁰ An area of priority in this roadmap is “improving cooperation in planning the EU external action.”¹³¹

Where the EU has competence to act, the Commission also has the competence to propose legislation that gives full effect to the Fundamental Rights Charter. In this respect, the Commission has, for example, proposed reform of the EU’s rules on the protection of personal data.¹³² The Commission has a procedure for checking the compatibility of its legislative proposals with the Fundamental Rights Charter.¹³³ In the Stockholm Programme, the European Council invites the Commission (and other institutions) to make full use of the expertise of the FRA and to consult, where appropriate, with the agency when developing AFSJ policies and legislation with a possible fundamental rights implication.¹³⁴

The European Commission plays a key role in the FRA’s work and participates in its governing bodies. Commission representatives sit on FRA’s Management Board (together with independent members from Member State and the Council of Europe) and in FRA’s Executive Board, which assists the Management Board in all its work. FRA works particularly closely with the DG Justice and its Directorate for Fundamental Rights and Union Citizenship.¹³⁵

A special independent advisory working party (Article 29 Working Party) has been set up to, *inter alia*, provide the Commission expert opinion on data protection issues and to enhance the

¹²⁹ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 34.

¹³⁰ See European Commission, Joint Staff Working Paper: Strengthening Ties between CSDP and FSJ Actors: Proposals for a Way Ahead [2011] SEC(2011) 560 final, and Council of the European Union: Strengthening Ties between CSDP and FSJ – Draft Road Map [2011] 18173/11, 5 December 2011.

¹³¹ EEAS: Strengthening Ties between CSDP and FSJ: Road Map Implementation Second Annual Progress Report [2013] 02230/13, 14 November 2013.

¹³² European Commission, Commission Communication: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union [2010] COM(2010) 573 final, and European Commission, Commission staff working paper: Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments [2011] SEC(2011) 567 final. See European Commission, Report: 2012 Report on the Application of the EU Charter of Fundamental Rights [2013] COM(2013) 271 final, for references and other examples.

¹³³ See further Section III.A.4.

¹³⁴ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 8.

¹³⁵ For examples of FRA’s cooperation with the Commission, see FRA, ‘European Commission’, <<http://fra.europa.eu/en/cooperation/eu-partners/european-commission>> accessed 13 March 2014.

cooperation between domestic data protection supervisory authorities.¹³⁶ This Article 29 Working Party has adopted various working documents, including ones on the protection of children's personal data and the processing of personal data relating to health in electronic health records.¹³⁷

As regards fundamental rights monitoring, the Commission has since 2010 published an annual report on the application of the Charter. From an AFSJ perspective, it may be noted that the 2012 Report, for example, considers to what extent the right to data protection has been upheld.¹³⁸ The Commission may also propose the evaluation of the implementation of JHA and other policies by Member States.¹³⁹ Furthermore, the Commission may initiate infringement proceedings against Member States for not fulfilling their obligations under EU law.¹⁴⁰ In relation to fundamental rights, one may, for example, mention the proceedings against Malta in relation to EU's Free Movement Directive.¹⁴¹ It should, however, be noted that an infringement proceeding only can be launched when there is a breach of a specific provision of EU law. In relation to rule of law, the Commission has noted that: "There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law."¹⁴² To address such concerns the Commission has initiated a three stage process of structured exchange with a Member State where there is a clear indication of a systemic threat to the rule of law in the

¹³⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

¹³⁷ Working Document 1/2008 on the protection of children's personal data (General guidelines and the special case of schools) and Working Document on the processing of personal data relating to health in electronic health records (EHR).

¹³⁸ European Commission, Report: 2012 Report on the Application of the EU Charter of Fundamental Rights [2013] COM(2013) 271 final.

¹³⁹ Article 70 TFEU ('Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.'). See also Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 52.

¹⁴⁰ Article 258 TFEU.

¹⁴¹ European Commission, Justice, 'Annual report' <http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm> accessed 13 March 2014. For other examples, see e.g., Wolfgang Benedek, 'EU Action on Human and Fundamental Rights in 2012' [2013] *European Yearbook on Human Rights* 55, 57-58.

¹⁴² European Commission, Commission Communication: A New EU Framework to Strengthen the Rule of Law [2014] COM(2014) 158 final, 5.

Member State.¹⁴³ To enhance the rule of law in the Member States, the Commission has also initiated an “EU Justice Scoreboard”. Its aim is to monitor and flag the rule of law performance of the Member States.¹⁴⁴

4. European Parliament (‘Parliament’)

The Parliament is the EU institution that represents the citizens of the Union and is the only directly-elected body of the Union. Today, EU legislation is adopted either through: (a) the ordinary legislative procedure; or (b) through special legislative procedures. In the ordinary legislative procedure, the Parliament and the Council act as co-legislators.

The Lisbon Treaty brought most AFSJ acts within the scope of the ordinary legislative procedure thereby ensuring full involvement of the Parliament. There are, however, still a number of AFSJ areas where special legislative procedures are applied:

- the establishment of EPPO (Article 86(1) TFEU)
- police operations (Article 87(3) TFEU)
- cross-border police operations (Article 89 TFEU)
- family law (Article 81(3) TFEU)
- passports (Article 77(3) TFEU)

As to the first of these, the special legislative procedure requires the consent of Parliament. However, in the rest of the instances the Parliament is only consulted.

With this increase in its powers, the Parliament has also gained a more prominent role in shaping the politics of agency design as well as in the oversight of agencies.¹⁴⁵ The Parliament has set its own policy priorities for the period of the Stockholm Programme.¹⁴⁶ Parliament has also been proactive in putting forward its own policy proposals in AFSJ policy areas through

¹⁴³ “The process is composed, as a rule, of three stages: a Commission assessment, a Commission recommendation and a follow-up to the recommendation.” European Commission, Commission Communication: A New EU Framework to Strengthen the Rule of Law [2014] COM(2014) 158 final, 7.

¹⁴⁴ See further European Commission, Commission Communication: The EU Justice Scoreboard: A tool to promote effective justice and growth [2013] COM(2013) 160 final and European Commission, ‘EU Justice scoreboard’, <http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm> accessed 11 September 2014.

¹⁴⁵ See further below, Section II.4. See also Deirdre Curtin, *Executive Power of the European Union: Law Practices, and the Living Constitution* (Oxford University Press 2009) 150.

¹⁴⁶ European Parliament: European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme [2009].

adopting own-initiative reports and resolutions on AFSJ subjects. The Parliament does not have a formal right of initiative, but Article 225 TFEU and the Framework agreement between Commission and Parliament nonetheless lay it upon the Commission to follow up on the reports and resolutions of the Parliament.¹⁴⁷

Within Parliament it is mainly the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) that is responsible for the legislation and democratic oversight of AFSJ policies.¹⁴⁸ In performing its role as a central AFSJ policy setter, the LIBE Committee also plays an important role as a promoter of fundamental rights in AFSJ cooperation.¹⁴⁹ Rule 36 of the Parliament Rules of Procedure provides that: “Where the committee responsible for the subject matter, a political group or at least 40 Members are of the opinion that a proposal for a legislative act or parts of it do not comply with rights enshrined in the Charter of Fundamental Rights of the European Union, the matter shall, at their request, be referred to the committee responsible for the interpretation of the Charter”. This provides a mechanism for the LIBE Committee to reject Commission legislative proposals on fundamental rights grounds.¹⁵⁰

The own-initiative reports prepared by the Parliament enable the institution to perform a critical analysis of fundamental rights protection both from an institutional and a Member State perspective, and also establish the Parliament as a policy agenda-setter. The Parliament has presented its own policy proposals in areas such as internal security, counter-terrorism, detention of prisoners and asylum, and has made proposals for establishing a “European fundamental rights policy cycle” as well as for the setting up of special committees on organised crime.¹⁵¹ Lately, the LIBE Committee has requested that the Commission establishes a mechanism for monitoring Member States’ compliance with EU values, including fundamental rights, and especially with an eye to violations of the basic rights of migrants, national

¹⁴⁷ According to Article 225 TFEU, the Parliament can request the Commission to submit a proposal on matters it considers important for implementing EU law. Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L304/47 defines this relationship further.

¹⁴⁸ Also other parliamentary committees may be involved in the AFSJ preparatory work. For example, the mid-term review of the Stockholm Programme was prepared by the LIBE Committee together with the Committee on Legal Affairs (JURI) and Committee on Constitutional Affairs (AFCO). European Parliament: European Parliament resolution of 2 April 2014 on the mid-term review of the Stockholm Programme [2014].

¹⁴⁹ Rules of Procedure of the European Parliament, March 2014, Annex VII (‘Powers and responsibilities of standing committees’, XVII ‘Committee on Civil Liberties, Justice and Home Affairs’).

¹⁵⁰ The mechanism has also been successfully invoked. See Sergio Carrera, Nicholas Hernanz and Joanna Parkin, ‘The ‘Lisbonisation’ of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice’ [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 32 on the Anti-Counterfeiting Trade Agreement example.

¹⁵¹ See further e.g., Sergio Carrera and Elspeth Guild, ‘Does the Stockholm Programme Matter? The Struggle over Ownership of AFSJ Multiannual Programming’ [2012] *CEPS Paper in Liberty and Security in Europe*, No. 51, 6-7.

minorities, persons with disabilities and women.¹⁵²

Tasks of the LIBE Committee

1. The protection within the territory of the Union of citizens' rights, human rights and fundamental rights, including the protection of minorities, as laid down in the Treaties and in the Charter of Fundamental Rights of the European Union;
2. The measures needed to combat all forms of discrimination other than those based on sex or those occurring at the workplace and in the labour market;
3. Legislation in the areas of transparency and of the protection of natural persons with regard to the processing of personal data;
4. The establishment and development of an area of freedom, security and justice, in particular:
 - (a) Measures concerning the entry and movement of persons, asylum and migration,
 - (b) Measures concerning an integrated management of the common borders,
 - (c) Measures relating to police and judicial cooperation in criminal matters;
5. The European Monitoring Centre for Drugs and Drug Addiction and the European Union Agency for Fundamental Rights, Europol, Eurojust, Cepol and other bodies and agencies in the same area;
6. The determination of a clear risk of a serious breach by a Member State of the principles common to the Member States.

Source: European Parliament, Rules of Procedure, Annex VII

As to the relationship between FRA and the Parliament, FRA and the LIBE committee cooperate closely. FRA participates in committee meetings, hearings and public seminars where it provides fundamental rights expertise to assist ongoing policy and legislative debates. It responds to queries and presents the findings of its research to relevant intergroups of the Parliament.¹⁵³ Acting on the Parliament's requests, FRA has adopted a number of opinions. One of the most recent concerns the establishment of the EPPO.¹⁵⁴ The Parliament has also engaged FRA in making requests to the Commission, for example, requesting the Commission to consult

¹⁵² LIBE Press Release, 'Civil Liberties MEPs tackle human rights flaws in the European Union',

<<http://www.europarl.europa.eu/news/en/news-room/content/20140113IPR32514/html/Civil-Liberties-MEPs-tackle-human-rights-flaws-in-the-European-Union>> accessed 14 January 2014.

¹⁵³ For examples of FRA's cooperation with the Parliament, see further FRA, 'European Parliament', <<http://fra.europa.eu/en/cooperation/eu-partners/european-parliament>> accessed 13 March 2014. Intergroups can be formed of members of any political group of the Parliament in order enhance informal exchanges of views and to promote contacts with civil society. However, they are not Parliament bodies. See 'Rules Governing the Establishment of Intergroups', Decision of the Conference of Presidents [1999].

¹⁵⁴ FRA, 'Opinion of the European Union Agency for Fundamental Rights on a proposal to establish a European Public Prosecutor's Office' [2014]. See also Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The 'Lisbonisation' of the European Parliament Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 33-34.

FRA in revising its proposal on the use of body scanners in airports.¹⁵⁵

As regards the Parliament and external relations, the TFEU requires the Council to obtain the assent of the Parliament for the conclusion of international agreements.¹⁵⁶ In relation to the Parliament and human rights in the Union's external action, it has been argued that: "The European Parliament's democratic mandate gives it particular authority and expertise in the field of human rights."¹⁵⁷ The Parliament has indeed actively engaged itself in the protection of human rights abroad, for example, by adopting resolutions and reports and by sending missions to third countries to familiarise themselves with the human rights situation in the country.¹⁵⁸ Within the Parliament, it is the Subcommittee on Human Rights (DROI) that primarily adopts/prepares these resolutions and reports and which also drafts the Parliament's Annual Human Rights report.¹⁵⁹

5. Other actors involved in the AFSJ

a) Sub-institutional/consultative actors

Article 300 TFEU stipulates that the Council, Commission and Parliament shall be assisted by the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR), both of which exercise advisory functions. These two bodies shall be consulted where the EU treaties so provide, but they can also issue opinions on their own initiative.¹⁶⁰

The EESC contributes to the decision-making process of the EU by enabling civil society organisations from the Member States to express their views at the European level. Its Employment, Social Affairs and Citizenship Section is one of six specialised sections. For example, in April 2014 the Committee organised a public hearing with the aim of looking into the EU report on the United Nations Convention on the Rights of Persons with Disabilities

¹⁵⁵ European Commission, Commission Communication: On the Use of Security Scanners at EU airports [2010] COM(2010) 311 final. Regional Office for Europe of the UN High Commissioner for Human Rights, 'The European Union and International Human Rights Law' [2011], 18-19

¹⁵⁶ Article 218 TFEU. For an overview, see Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The 'Lisbonisation' of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58.

¹⁵⁷ Human Rights Action Plan [2012]

¹⁵⁸ Human rights resolutions adopted by the Parliament can be found at European Parliament: Publications, <<http://www.europarl.europa.eu/committees/en/droi/publications.html#menuzone>> accessed 18 June 2014.

¹⁵⁹ European Parliament: 'Committees: DROI: Human Rights', <<http://www.europarl.europa.eu/committees/en/droi/home.html>> accessed 18 June 2014.

¹⁶⁰ Articles 300-307 TFEU.

(UNCRPD) as well as on the preparation of an alternative report from civil society perspectives.¹⁶¹

The role of the CoR in the decision making process entails both consultations concerning legislative proposals as well as monitoring the implementation of EU legislation. Notably, the CoR also has the right to bring an action before the CJEU.¹⁶² Within the CoR, it is the Commission for Citizenship, Governance, Institutional and External Affairs (CIVEX) that is responsible for coordinating the work on justice and home affairs as well as fundamental rights issues. The opinions discussed and adopted in CIVEX form the basis of the CoR's position on local and regional responses to AFSJ and fundamental rights issues.¹⁶³ It can be noted that on 7 April 2014 CIVEX adopted a report presenting the vision of EU local and regional authorities on the future political priorities for justice and home affairs, expressing a strong emphasis on enhancing the protection of fundamental rights.¹⁶⁴

b) Other EU bodies

In addition to the main decision-making bodies, there is a variety of bodies and networks that connect to AFSJ policies in various ways. These bodies display varying degrees of formality and serve different purposes. Although it is impossible to provide an exhaustive list of such actors in this context, some examples may serve to illustrate the phenomenon.

Council Working Parties, such as the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the High-Level Working Group on Asylum and Migration (HLWG) are closely connected to the decision-making process of the EU. SCIFA is a forum for exchange of information among Member States in the fields of asylum and immigration. It feeds into the decision-making of COREPER and can create working parties.¹⁶⁵ HLWG is a strategic group which prepares action plans for the countries of origin and transit of asylum seekers and migrants with a focus on external relations with third countries. The group also prepares recommendations for adoption by the Council.¹⁶⁶

¹⁶¹ European Economic and Social Committee, 'Employment, Social Affairs and Citizenship (SOC)', <<http://www.eesc.europa.eu/?i=portal.en.soc-section>> accessed 26 May 2014.

¹⁶² Article 263 TFEU.

¹⁶³ Committee of the Regions, 'Citizenship, Governance, Institutional and External Affairs', <<http://cor.europa.eu/en/activities/commissions/civex/Pages/civex.aspx>> accessed 26 May 2014.

¹⁶⁴ CIVEX-V-047, 23rd Commission meeting, 7 April 2014, draft opinion, Commission for Citizenship, Governance, Institutional and External Affairs, The future EU policies in Justice and Home Affairs.

¹⁶⁵ Council of the European Union: SCIFA mandate [2006] 7123/06, 8 March 2006.

¹⁶⁶ Council of the European Union: Conclusions of the General Affairs Council [1998] 6-7 December 1998.

Other bodies, such as the European Migration Network (EMN), do not directly link to the decision-making process, but instead serve and assist Member States.¹⁶⁷ Likewise, the European Union Network for asylum practitioners (EURASIL) provides a forum for exchange of information and best practices between Member States.¹⁶⁸ Similar purposes underlie the European Crime Prevention Network (EUCPN) and the European Police Chiefs Operational Task Force (TFPC).¹⁶⁹

Actors such as the EU Counter-Terrorism Coordinator¹⁷⁰ and the EU Anti-Trafficking Coordinator¹⁷¹ work across the entire institutional field to monitor and improve coordination and coherence between EU institutions and agencies, Member States, third countries and international actors. Others, such as the Immigration Liaison Officers Network, serve to facilitate EU measures in third countries. Such liaison officers are representatives of “one of the Member States, posted abroad by the immigration service or other competent authorities in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration.”¹⁷² In practice, these officers “cooperate with the local authorities in the host State to collect and exchange information concerning the main routes of irregular migrants, the forgery of identity documents, criminal organisations involved in the smuggling of migrants, as well as possible return options.”¹⁷³

Further actors that could be mentioned are the European Union Intelligence Analysis Centre

¹⁶⁷ Council Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network [2008] OJ L131/7.

¹⁶⁸ European Commission, Commission Staff Working Document: Annexes to the Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation, New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System (COM(2006) 67 final) [2006] SEC(2006) 189.

¹⁶⁹ On the latter, see Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA [2009] OJ L321/44.

¹⁷⁰ Council, ‘EU Counter-terrorism Coordinator’, <<http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-counter-terrorism-co-ordinator?lang=sv>> accessed 3 June 2014. See also Gilles de Kerchove and Serge de Biolley, ‘The EU Counter-Terrorism Coordinator’ in Jörg Monar (ed), *The Institutional Dimension of the European Union’s Area of Freedom, Security and Justice* (Peter Lang 2010) 233.

¹⁷¹ See e.g., Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

¹⁷² Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network [2004] OJ L 64/1, Article 1.

¹⁷³ Katharina Eisele and Natasja Reslow, ‘Encouraging Legal Migration and Preventing Irregular Migration: Coherence or Contradiction?’ in Christina Gortázar, María-Carolina Parra, Barbara Segaert and Christiane Timmerman (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 165, 169.

(INTCEN) (part of the EEAS) which collects data and produces intelligence analyses and threat assessments, and the European Judicial Network (EJN) which is a network of national contact points facilitating judicial co-operation in criminal matters.¹⁷⁴

The input of this wide array of bodies ranges from the production of knowledge that feeds into the decision-making process, to the sharing of information, and the operationalisation of AFSJ policies. Consequently, they also relate very differently to fundamental rights issues. The use of immigration liaison officers, for example, may have an impact on how people in need of international protection have access to the Union.¹⁷⁵ The EU Counter-Terrorism Coordinator has, on his part, been criticised for paying little attention to fundamental rights and democratic control.¹⁷⁶

c) External actors

The EU has increasingly enhanced its participation in both treaty frameworks and international institutions. This development has provided the Union new fora for pursuing its AFSJ objectives. The Organization for Security and Co-operation in Europe (OSCE), the Hague Conference on Private International Law, and the Organisation for Economic Co-operation and Development (OECD) have, for example, been noted as important frameworks for pursuing external AFSJ objectives.¹⁷⁷ As, for example, the *Kadi and Al Barakaat* case demonstrates, decisions made at the international level can have an impact on the capacity to make autonomous policy choices.¹⁷⁸

Article 220 TFEU prescribes that the EU: “shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The Union shall also maintain such relations as are appropriate

¹⁷⁴ See Council Document 5244/05 EU SitCen work programme, 20 December 2005, and Council Decision 2008/976/JHA on the European Judicial Network [2008] OJ L348/130.

¹⁷⁵ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, UN doc. A/HRC/23/46, 24 April 2013.

¹⁷⁶ See e.g., Ben Hayes and Chris Jones, Report on how the EU assesses the impact, legitimacy and effectiveness of its counterterrorism laws [2013] SECILE Research Project, <http://www.statewatch.org/news/2013/dec/secile-how-does-the-EU-assess-its-counter-terrorism-law.pdf> accessed 26 May 2014.

¹⁷⁷ Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 67.

¹⁷⁸ Judgment of 3 September 2008 in *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

with other international organisations". While the influence of many international organisations on the AFSJ occurs at different levels, the impact of the UN and the Council of Europe is probably the strongest.¹⁷⁹

The EU and the Council of Europe interact in various ways. The framework for this cooperation is set by a memorandum of understanding between the two organisations.¹⁸⁰ One form of this cooperation is the promotion of democratic values, respect for human rights, and the rule of law through joint programmes.¹⁸¹ Even if the accession of the EU to the ECHR has attracted much attention in recent years, it is also noteworthy that 37 Council of Europe conventions and protocols are open for EU participation (out of which the EU is a party to 11). There is also an agreement on co-operation between the FRA and the Council of Europe.¹⁸²

As to the UN, cooperation with the United Nations High Commissioner for Refugees (UNHCR) is of particular interest, as Declaration 17 annexed to the Amsterdam Treaty states that the UNHCR shall be consulted on all matters relating to asylum.¹⁸³ Article 78(1) TFEU further establishes that a common policy on asylum must be in accordance with the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'). The UNHCR also advises EU institutions and provides recommendations, legal positions and other input to legislative and policy proposals with the aim of ensuring consistency with international refugee law.¹⁸⁴ In

¹⁷⁹ Claudio Matera, "The Influence of International Organisations on the EU's Area of Freedom, Security and Justice: A First Inquiry", in Ramses A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer 2013) 269.

¹⁸⁰ Memorandum of Understanding between the Council of Europe and the European Union (10 May 2007), CM(2007)74 1, 117th Session of the Committee of Ministers (Strasbourg, 10-11 May 2007), available at <http://ec.europa.eu/justice/international-relations/files/mou_2007_en.pdf> accessed 16 September 2014.

¹⁸¹ For an overview of current programmes, see Council of Europe/European Union, 'Joint Programmes between the Council of Europe and The European Union', <<http://www.jp.coe.int/default.asp>> accessed 16 September 2014.

¹⁸² On the EU-Council of Europe relationship, see Elise Cornu, 'The Impact of Council of Europe Standards on the European Union' in Ramses A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer 2013) 113, and Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe [2008] OJ L186/7.

¹⁸³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1.

¹⁸⁴ See further Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59. See also Memorandum concerning the establishment of a strategic partnership between the Office of the United Nations High Commissioner for Refugees and the Commission of the European Communities in the field of protection and assistance to refugees and other people of concern to the UNHCR in third countries, 1 February 2005. See also UNHCR, 'Working with the European Union', <<http://www.unhcr.org/pages/4dd12ad46.html>> accessed 26 May 2014.

addition, the UNHCR has been granted a place on the management board of EASO (although without a vote). The UNHCR also participates in the agency's working groups and consultative forum.¹⁸⁵ Frontex has also signed a working arrangement with the UNHCR, covering input of the UNHCR on human rights matters through consultations, cooperation, and training.¹⁸⁶

The EU has also concluded several partnership agreements with other UN institutions including the United Nations Development Programme (UNDP), the World Health Organization (WHO), the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations World Food Programme (WFP), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), and the United Nations Educational, Scientific and Cultural Organization (UNESCO). For example, UN Women has become an important partner for DG Justice for matters concerning gender equality and women's empowerment, with a specific emphasis on the fight against gender-based violence and female genital mutilation.¹⁸⁷ Three European Commission Directorates-General (DG Home Affairs, DG EuropeAid Development and Cooperation and DG Humanitarian Aid and Civil Protection) and the EEAS established a framework for strategic partnership with the International Organization for Migration (IOM) in July 2012.¹⁸⁸ Other UN partners include the UN Office on Drugs and Crime (UNODC), the UN Commission on Crime Prevention and Criminal Justice (UN CCPCJ) and the UN Commission on Narcotic Drugs (UN CND). As an example, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and UNODC have cooperated regularly since 1998 above all in the field of gathering, analysing, and sharing of data and information.¹⁸⁹ Furthermore, UNODC is an important partner for DG Home Affairs in the fight against human trafficking.¹⁹⁰

¹⁸⁵ Working Arrangement between the European Asylum Support Office (EASO) and the Office of the United Nations High Commissioner for Refugees (UNHCR) [2013].

¹⁸⁶ The working arrangement between Frontex and UNHCR was signed on 18 June 2008. See also Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 39.

¹⁸⁷ See further e.g., Memorandum of Understanding between the European Union and the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) [2012] and JHA Council: Council conclusions - 'Preventing and combating all forms of violence against women and girls, including female genital mutilation' [2014] 5 and 6 June 2014.

¹⁸⁸ European Commission, Home Affairs, 'FAQ on EU-IOM strategic partnership', <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130502_eu_iom_faq_en.pdf> accessed 26 May 2014.

¹⁸⁹ See further EMCDDA, 'United Nations Office on Drugs and Crime (UNODC)', <<http://www.emcdda.europa.eu/about/partners/unodc>> accessed 13 August 2014.

¹⁹⁰ This topic is of high political importance, given the recent and deliberate appointment of a human trafficking coordinator within DG Home (2010), the launch of an anti-trafficking website (<<http://ec.europa.eu/anti-trafficking/>> accessed 22 September 2014), the adoption of Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing

It should also be noted that the EU has increasingly joined international treaties.¹⁹¹

C. The implementation of AFSJ policies

1. Agencies and AFSJ governance

If there is one distinctive feature of governance in the AFSJ that should be singled out it would be the use of institutional governance structures outside the main EU bodies.¹⁹² In the AFSJ, agencies play a central role and perform tasks of a technical, scientific, operational and/or regulatory nature. They also support cooperation between the EU and national governments by pooling technical and specialist expertise from both the EU institutions and national authorities. The decentralised agencies are independent legal entities under European public law, distinct from the EU institutions.¹⁹³ Although the AFSJ agencies lack formally binding powers, their impact can nevertheless be tangible.¹⁹⁴ Agencies have become major producers of EU soft law, which has a clear policy-making significance and therefore also fundamental rights relevance.¹⁹⁵ In fact, the ways in which the agencies develop, create new modes of governance, and expand the *de facto* competence has been seen to render agencies new sources of authority at the EU level, which, being an additional governance layer in between the Member State and EU levels, transforms the classical understanding of the boundaries of executive and administrative power in the EU AFSJ.¹⁹⁶

Council Framework Decision 2002/629/JHA [2011] OJ L101/1, and European Commission, Commission Communication: The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016 [2012] COM(2012) 286 final.

¹⁹¹ See further Section III.A.4.b.

¹⁹² On the constitutional framework for the creation of agencies and delegation of powers to them, see Herwig C. H. Hofmann and Alessandro Morini, 'Constitutional aspects of the pluralisation of the EU executive through "agencification"' [2012] *European Law Review* 419.

¹⁹³ European Union, 'Agencies and other EU bodies' <http://europa.eu/about-eu/agencies/index_en.htm> accessed 28 May 2014.

¹⁹⁴ See further e.g., Helena Ekelund, 'Making Sense of the 'Agency Programme' in Post-Lisbon Europe: Mapping European Agencies' [2012] *Central European Journal of Public Policy* 26, and Deirdre Curtin, *Executive Power of the European Union: Law Practices, and the Living Constitution* (Oxford University Press 2009).

¹⁹⁵ E.g., Martin Shapiro, 'Independent Agencies' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2011), and Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 101.

¹⁹⁶ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 89-91.

There is no formal definition of a European agency.¹⁹⁷ What can be said in general terms is that they differ from treaty-based institutions due to being set up by secondary legislation. They are also distinct from other institutional arrangements due to the possession of legal personality.¹⁹⁸ Agencies are basically unelected, non-majoritarian bodies.¹⁹⁹ Their involvement in the formal decision-making process and relationship to core political actors differs between agencies, as does the source of the delegation of powers to the agencies. Agencies are supposed to operate independently, free from political influence and considerations.²⁰⁰ They are predominantly framed as ‘coordinators’ or ‘facilitators’ of Member State actions.

The agencies enumerated in the Stockholm Programme are Europol, Eurojust, Frontex, European Police College (CEPOL), EMCDDA, EASO and FRA. The European Council noted that there was in particular in respect of these agencies a need to enhance the internal coordination in the AFSJ in order to achieve greater coherence between the external and internal elements of their work.²⁰¹ Other agencies active in the AFSJ are eu-LISA and the European Network and Information Security Agency (ENISA). Furthermore, there are plans to establish an European Public Prosecutor’s Office.²⁰²

¹⁹⁷ See European Commission, Commission Communication: European agencies – The way forward [2008] COM(2008) 135 final, Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralized agencies [2012], and Roadmap on the follow-up to the Common Approach on EU decentralised agencies [2012].

¹⁹⁸ Sami Andoura and Peter Timmerman, ‘Governance of the EU: The Reform Debate on European Agencies Reignited’ [2008] *EPIN Working Papers*, No. 19, 5.

¹⁹⁹ Deirdre Curtin, *Executive Power of the European Union: Law Practices, and the Living Constitution* (Oxford University Press 2009) 135.

²⁰⁰ Madalina Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’ [2009] *European Law Journal* 599, 600.

²⁰¹ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 6. It should be noted that the Commission presented in 2013 a proposal for Europol to take over the functions of CEPOL. European Commission: Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA [2013] COM(2013) 173 final.

²⁰² European Commission: Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office [2013] COM(2013) 534 final. Full references to founding acts of agencies are to be found in Annex 2.

AFSJ Agencies

- *European Police Office, Europol*
- *The European Union's Judicial Cooperation Unit, Eurojust*
- *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Frontex*
- *European Police College, CEPOL*
- *European Monitoring Centre for Drugs and Drug Addiction, EMCDDA*
- *European Network and Information Security Agency, ENISA*
- *European Union Agency for Fundamental Rights, FRA*
- *European Asylum Support Office, EASO*
- *EU Agency for large-scale IT systems, eu-LISA*
- *European Public Prosecutors Office, EPPO (not yet established)*

For an overview of main tasks of agencies, see Annex 2.

The varied roles of agencies mean that there is no single definition of the functions and tasks of AFSJ agencies. The Commission has classified EU agencies in general according to their functions into:

- Agencies adopting individual decisions which are legally binding on third parties (no AFSJ agencies)
- Agencies providing direct assistance to the Commission and Member States in the form of technical or scientific advice and/or inspection reports (no AFSJ agencies)
- Agencies in charge of operational activities (Frontex, Eurojust, Europol, CEPOL)
- Agencies responsible for gathering, analysing and forwarding information/networking (EMCCDA, ENISA, FRA).²⁰³

Out of the AFSJ agencies, Frontex, EASO, Europol, and eu-LISA act within the field of border checks, asylum and immigration, whereas Europol, CEPOL, Eurojust, EMCDDA and ENISA are concerned with the field of police and judicial cooperation. Operational activity of agencies in the JHA area is formally limited to coordination of activities of national enforcement agencies.²⁰⁴ Some agencies do, however, exercise external powers: Europol, Eurojust, Frontex and EASO have the power to negotiate agreements with third countries and EU bodies.²⁰⁵

²⁰³ European Commission, Commission Communication: European agencies – The way forward [2008] COM(2008) 135 final.

²⁰⁴ Article 74 TFEU.

²⁰⁵ See Claudio Matera, 'The Influence on International Organisations of the EU's Area of Freedom, Security and Justice: A First Inquiry', in Ramses A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence*:

The Fundamental Rights Charter is binding for agencies in all of their activities, including their extraterritorial operations.²⁰⁶ Whereas the use of agencies in AFSJ governance can be discussed on a general level, the differences between the functions of AFSJ agencies means that their operation gives rise to various concerns.²⁰⁷ Whereas for example Europol has been labelled an “unaccountable European FBI”, the creation of Eurojust has been perceived as relatively uncontroversial.²⁰⁸ This means that what is viewed as an institutional concern for one agency does naturally not necessarily hold true for another. Because of this, different human rights concerns arise with different agencies.²⁰⁹ Having said that, and without going into the detailed discussion of the operation of particular agencies, some issues can be noted to have become of more general concern as a result of the prominent role that agencies have gained.²¹⁰

The EU Legal Order Under the Influence of International Organisations (Springer 2013) 269, 287-294. See also Deirdre Curtin, *Executive Power of the European Union: Law Practices, and the Living Constitution* (Oxford University Press 2009) 158-160.

²⁰⁶ Charter of Fundamental Rights of the European Union [2010] OJ C 83/389, Article 51. See also Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 48.

²⁰⁷ For one account, see e.g. Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011).

²⁰⁸ Ben Hayes, ‘The activities and development of Europol: towards an unaccountable FBI in Europe’ [2002] *Statewatch Report*. See also Madalina Busuioc and Martijn Groenleer, ‘Beyond Design: The Evolution of Europol and Eurojust’ [2013] *Perspectives on European Politics and Society* 285, 286.

²⁰⁹ For an overview and classification of EU agencies, see Helena Ekelund, ‘Making Sense of the ‘Agency Programme’ in Post-Lisbon Europe: Mapping European Agencies’ [2012] *Central European Journal of Public Policy* 26.

²¹⁰ This will be considered further in Chapter IV of this report.

AFSJ agencies and policies

Policies on border checks, asylum and immigration			police and judicial cooperation in criminal and customs matters				
Asylum policy	Immigration policy	Schengen, borders and visa policy	Police cooperation		Policy on organised crime and human trafficking	Policy on crisis and terrorism	Judicial cooperation
Policy on <ul style="list-style-type: none">- Identification of applicants (Eurodac)- Examination of applications (Dublin)- Reception conditions- Common procedures- Refugee status- Temporary protection	Policy on <ul style="list-style-type: none">- Work- Family reunification- Study or training- Integration- Long-term residents- Irregular immigration- Return and readmission	Policy on <ul style="list-style-type: none">- Borders- Schengen agreements- Visa- Document security- VIS- SIS	PNR	Customs cooperation	Policy on <ul style="list-style-type: none">- Trafficking in human beings- Cybercrime- Money laundering- Financial investigation- Anti-corruption- Counterfeiting- Illicit drug markets and drug trafficking- Confiscation and asset recovery- crime prevention	Policy on <ul style="list-style-type: none">- Radicalisation- Terrorism financing- Critical infrastructure	Mutual recognition
EASO	Frontex		Europol		EMCDDA		Eurojust
eu-LISA			Cepol			ENISA	EPPO
FRA (except police cooperation and judicial cooperation in criminal matters)							

Source: Manuela Weyh (unpublished, on file with authors)

2. Exemplifying the interplay between agencies and fundamental rights: Frontex and Europol

Frontex and Europol are agencies that act in different policy areas, but which have in common that their activities often have a direct relevance and effect on the fundamental rights of individuals (and particularly the rights of non-EU nationals). This is due, in particular, to three categories of actions that the agencies have in common: (1) operational activities, (2) the exchange and processing of information and personal data (and the subsequent uses of this information), and (3) relations and cooperation (including so-called ‘capacity building’) and exchange of information with third countries.²¹¹

Frontex was established in 2004 with the aim of coordinating and assisting Member States in the surveillance and control of the EU external borders, whereas the main responsibility for the

²¹¹ See further e.g., Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 8 on the categorization and 57.

control of borders lies with Member States.²¹² Frontex's tasks include coordinating operational cooperation in managing borders, human and technical support, intelligence gathering and risk analysis, and assisting Member States in organising joint return operations.²¹³ Furthermore, Frontex has the mandate to establish special rapid border intervention teams (RABIT) to help monitor borders at the request of a Member State facing urgent and exceptional mass influx of illegal immigrants.²¹⁴ Although created in 2007, the pool of some 600 border guard officers had never been activated in real circumstances until late 2010, as a RABIT operation was launched in Greece near the Turkish border.²¹⁵

Europol, on the other hand, is the EU's law enforcement agency.²¹⁶ Europol's objective is to "support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organized crime, terrorism, and other forms of serious crime affecting two or more Member States".²¹⁷ Europol does not have executive law enforcement powers, but its task is to facilitate the exchange of information between Member States, prepare threat assessments and develop criminal intelligence. In addition, Europol can request Member States to initiate and participate in criminal investigations. Europol also has a mandate to participate in joint investigation teams (JITs).²¹⁸ Europol's functioning has been hampered by the fact that not all EU Member States provide Europol's databases with data.

Out of all AFSJ agencies, the one that has faced to most extensive fundamental rights criticism

²¹² Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, as amended by Regulation (EC) No 863/2007, OJ L199/30, Article 1.2 and recital 4.

²¹³ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, as amended by Regulation (EC) No 863/2007, OJ L199/30, Article 2. See also Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?' [2013] *European Journal of Migration and Law* 337, 340.

²¹⁴ Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

²¹⁵ The operation was launched on the request of Greece's Ministry of Citizen Protection, for assistance at its land border with Turkey in the River Evros region of north eastern Greece. See Frontex, RABIT Operation 2010 Evaluation Report [2011], 7.

²¹⁶ Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) [2009] OJ L121/37.

²¹⁷ Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) [2009] OJ L121/37, Article 3.

²¹⁸ Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) [2009] OJ L121/37, Articles 5 and 6.

is Frontex.²¹⁹ It has, for example, been asked to what extent Frontex's operational activities, in which individuals are sent back to their home/transit countries without access to EU territory (push back operations), violate rights such the right to asylum and *non-refoulement*.²²⁰ Due to this criticism, Frontex is also the agency that has taken the most visible steps to alleviate fundamental rights concerns. Frontex has, for example, signed a working agreement with UNHCR (enabling input of the UNCHR through consultations, cooperation and training), signed a cooperation agreement with FRA and adopted its own Fundamental Rights Strategy.²²¹ A regulation now legally obliges Frontex to implement and monitor its fundamental rights strategy, empowers the Executive Director to terminate operations that violate fundamental rights and to develop a code of conduct for operational activities. A Frontex Fundamental Rights Officer (FRO) has been appointed and a Consultative Forum on Fundamental Rights (CF) has been established in order to assist and monitor the impact of the activities of Frontex on fundamental rights.²²² The agency has developed various reporting mechanisms to monitor fundamental rights in joint operations.²²³ Frontex's Code of Conduct is intended to promote respect for fundamental rights which together with the Action Plan for the implementation of the Fundamental Rights Strategy will become main fundamental rights implementation tools.²²⁴

In the case of Frontex, it is the Executive Director and Deputy Director who are responsible for

²¹⁹ For an overview, see e.g. Steve Peers, Elspeth Guild and Jonathan Tomkin, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition* (Martinus Nijhoff Publishers 2012) 119-203.

²²⁰ Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?' [2013] *European Journal of Migration and Law* 337, 344-345.

²²¹ See further e.g., Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 39.

²²² Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1. FRO's and CF's tasks have been explained by Pascouau and Schumacher: "The CF, in place since September 2012, is composed of 15 organisations specialised in different aspects of Human Rights and sharing expertise on migration issues. The CF shall be consulted on the further development and implementation of the Fundamental Rights Strategy, the Code of Conduct and common core curricula. The FRO provides preventive and corrective measures based on field visits conducted on its own initiative and assessments of the input provided in the reporting process regarding joint operations." Yves Pascouau and Pascal Schumacher, 'Frontex and the Respect of Fundamental Rights: From Better Protection to Full Responsibility' [2014] *European Policy Center Policy Brief*, 2.

²²³ See further Yves Pascouau and Pascal Schumacher, 'Frontex and the Respect of Fundamental Rights: From Better Protection to Full Responsibility' [2014] *European Policy Center Policy Brief*, 2.

²²⁴ Luisa Marin, 'Protecting the EU's Borders from ... Fundamental Rights? Squaring the Circle Between Frontex's Border Surveillance and Human Rights', in Ronald L. Holzhaecker and Paul Luif (eds), *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer 2014) 94-96.

the management of the agency. Whereas the Europol Executive Director is responsible for the daily operations of Europol, the agency is also directly accountable to the JHA Council. The Council receives core documents, appoints directors and approves the conclusion of Europol cooperation agreements.²²⁵ In all the impact of the Charter on Europol's working methods has been less explicit than in the case of Frontex due to the fact that the most sensitive activity of Europol from a fundamental rights perspective – the processing of personal data – is covered by a system of data protection consisting of a Data Protection Officer and a Joint Supervisory Body.²²⁶ Europol holds regular but informal meetings with FRA and is set to conclude a working agreement with FRA.²²⁷

When fulfilling its mandate, Frontex liaises with other AFSJ agencies such as Europol, EASO, Eurojust, EU-Lisa, FRA and CEPOL.²²⁸ Out of JHA Agencies, Europol has an operational agreement (allowing for the exchange of personal data) with Eurojust, as well as strategic agreements with European Anti-Fraud Office (OLAF), EMCDDA, CEPOL, and Frontex (the agreement with Frontex not allowing for the exchange of personal data, but only strategic and technical information).²²⁹ As will be discussed further in Chapter IV, such inter-agency cooperation can open up new fundamental rights concerns.

3. EU Member States and the implementation of AFSJ policies

EU law confers rights and obligations on authorities and individuals in Member States. As Member States are responsible for the implementation of EU law within their own legal systems, they must also guarantee citizens' rights. In situations where Member States do not implement AFSJ instruments or adhere to fundamental rights, they may be the object of infringement proceedings (by the Commission). In addition to the general infringement procedure, the Lisbon Treaty introduced another mechanism for ensuring the quality of implementation of AFSJ legislation. Article 70 TFEU establishes a peer evaluation mechanism

²²⁵ For a more detailed account, see e.g., Madalina Busuioc, Deirdre Curtin and Martijn Groenleer, 'Agency growth between autonomy and accountability: the European Police Office as a 'living institution'' [2011] *Journal of European Public Policy* 848, 854-855.

²²⁶ Noteworthy is that the agency has been criticised for leaking information. See further Anna Jonsson Cornell, 'EU Police Cooperation Post-Lisbon', in Maria Bergström and Anna Jonsson Cornell (eds), *European Police and Criminal Law Co-operation* (Hart Publishing 2014) 147, 153-154.

²²⁷ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 43.

²²⁸ The cooperation takes different forms, such as working arrangements and memorandum of understandings.

²²⁹ Europol, 'EU Agencies', <<https://www.europol.europa.eu/content/page/eu-agencies-135>> accessed 18 March 2014.

concerning AFSJ policies.²³⁰ Even if the outcomes of such peer review are not formally binding, the mechanism shares some characteristics with the general infringement procedure.²³¹ Furthermore, measures may be taken against the Member State based on Article 7 TEU if there is serious and persistent breach by a Member State of central EU values.

As regards Member State implementation, the price to be paid for the communitarisation of the formed third pillar is that all EU Member States do not participate in all forms of AFSJ cooperation. In respect of the UK and Ireland, the opt-out regime applies to the entire AFSJ (although they can opt-in to particular measures).²³² More specifically, the Schengen protocol (Protocol 19) allows these countries not to participate in the Schengen building project.²³³ After an initial period of 5 years the UK and Ireland will be subject to the expanded jurisdiction of the CJEU as regards asylum and civil law legislation that they have accepted (Protocol 36).²³⁴ Also, Denmark has a particular position in which none of the provisions of the TFEU concerning the AFSJ shall be binding upon Denmark.²³⁵ According to these opt-out protocols, no provision of any international agreement concluded by the EU relating to the AFSJ is binding or applicable on these three Member States. The territorial application of any such agreement (unless the three states choose to opt-in) is thus limited to the other Member States, constituting an exception from the general principle of EU international agreements applying to the entire Union. This effect also has a bearing on AFSJ agencies, such as when Frontex concludes working

²³⁰ Article 70 TFEU: 'Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.'

²³¹ In general on the peer review mechanism, see Stine Andersen, 'Non-Binding Peer Evaluation within an Area of Freedom, Security and Justice', in Ronald L. Holzhaecker and Paul Luif (eds), *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer 2014). So far, the Article 70 mechanism has only been used to the Schengen evaluation mechanism. Henri Labayle and Emilio De Capitani, 'The Next Justice and Home Affairs Programme: Everything Changed, So Nothing Can Change?' [2014] *EU Law Analysis* [blog], 19 May 2014. The adoption of this evaluation mechanism led to a dispute between the Council and the Parliament. See further Jorrit J. Rijpma, 'Institutions and Agencies: Government and Governance after Lisbon' in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 54, 61.

²³² Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice [2010] OJ C83/295, Article 1.

²³³ Protocol (No 19) on the Schengen Acquis Integrated into the Framework of the European Union [2010] OJ C83/290.

²³⁴ Protocol (No 36) on Transitional Provisions [2010] OJ C83/322, Article 10.

²³⁵ Protocol (No 22) on the Position of Denmark [2010] OJ C83/299, Article 1.

arrangements with third-countries.²³⁶

Additional sources of diversification of cooperation arise from the possibility for enhanced cooperation between at least nine Member States regarding judicial cooperation in criminal matters, operational police cooperation, and the creation of an EPPO.²³⁷ The key question in respect of enhanced cooperation is whether such cooperation in fact constitutes a process of disintegration and fragmentation. At any rate, differentiated integration brings with it risks and side effects, for example, in respect of oversight and judicial control.²³⁸ Yet another source of potential fundamental rights concern is the protocol on the application of the Fundamental Rights Charter to Poland and to the United Kingdom.²³⁹ However, this clause has been held by the CJEU not to constitute an 'opt-out', but rather a clarification concerning the scope of the application of the Charter.²⁴⁰

In all, such differentiation of integration can be seen as examples of an "alternative model of EU integration" that departs from the harmonisation ideal. Above all, innovative uses of EU law are also connected to the discussion on enforcement of EU law, and with that, the question of ensuring fundamental rights.²⁴¹

D. Fundamental rights monitoring in the AFSJ

1. Introduction

Accountability is a multifaceted concept and an actor can be accountable at different levels. A

²³⁶ Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 32-34.

²³⁷ Articles 82(3), 83(3), and 87(3) TFEU.

²³⁸ Paul Luif and Florian Trauner, 'The Prüm Process: The Effects of Enhanced Cooperation within Europe and with the United States in Combating Serious Crime', in Ronald L. Holzhaecker and Paul Luif (eds), *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer 2014).

²³⁹ Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2010] OJ C83/313.

²⁴⁰ See Judgment of 21 December 2011 in *N. S. respectively M. E. and Others*, C-411/10 and C-493/10: In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions", para. 120.

²⁴¹ Ester Herlin-Karnell, 'European Criminal Law as an Exercise in EU 'Experimental' Constitutional Law', [2013] *Maastricht Journal of European and Comparative Law* 442.

function of control can be exercised internally within bodies, such as in the case of managerial accountability of JHA agencies. On the other hand, the controlling function can always be brought to the level of the body bearing main responsibility for JHA policies, that is, the JHA Council. For example, through reporting requirements, appointment powers and strategic planning, the JHA Council can also be said to exercise an element of control over agencies such as the Europol and Eurojust. The competences and degree of involvement of the JHA Council, however, vary in respect of different agencies and would even at best perhaps be more correctly described as “political steering”.²⁴²

As to managerial responsibility, it can be noted that, for example, Europol and Eurojust and their directors are accountable to their respective boards and colleges. However, the strong focus of this mechanism on administrative and technical matters and omission of broader strategic and policy issues has cast some doubt on whether the boards really function as an accountability mechanism.²⁴³ The Commission has, for example, noted in respect of Frontex that despite the management board’s responsibility for strategic control and executive director’s responsibility for day-to-day management, the agency is not in a position to ensure that operations are carried out in line with the objectives of Frontex and the applicable law.²⁴⁴

In setting its political priorities for the post-Stockholm Programme, the Commission has indicated that there is a need to further develop and deepen integration and cooperation in the fields of migration and internal security.²⁴⁵ Any such development makes it ever more important to ensure that effective accountability mechanisms are in place. From a fundamental rights perspective, the most central EU level actors in this respect would be the CJEU, European Data Protection Supervisor (EDPS), European Ombudsman, EU political institutions (Commission, Parliament and Council through their compliance checks) and FRA.²⁴⁶ All of these will be addressed below. However, as the role of EU political institutions has already been

²⁴² Alexandra de Moor and Gert Vermeulen, ‘Europol and Eurojust’ [2011] Annex B to the report Aidan Wills *et al.*, ‘Parliamentary Oversight of Security and Intelligence Agencies in the European Union’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 381.

²⁴³ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 20-24.

²⁴⁴ European Commission, Commission Staff Working Document: Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEx) [2010] SEC(2010) 149.

²⁴⁵ European Commission, Commission Communication: An open and secure Europe: making it happen [2014] COM(2014) 154 final.

²⁴⁶ FRA, Annual Report, ‘Fundamental rights: challenges and achievements in 2011’ [2012], 16-17.

discussed earlier, emphasis here will be on the role of parliamentary oversight more broadly. The role of external accountability mechanisms and of OLAF will also be addressed.

2. Non-judicial mechanisms

a) The FRA

Out of the agencies mentioned in the Stockholm Programme, only one is primarily focusing on fundamental rights, namely FRA. In fact, FRA is the Union's only true human rights body. By its nature, FRA is an expert body. Its task is to formulate and publish conclusions and opinions on topics for EU institutions and Member States to guide them in implementing EU law with the aim of providing independent data with respect to fundamental rights in the EU, formulate advice for EU institutions and Member States, and raise awareness of fundamental rights.²⁴⁷ When acting on a request of EU institutions, FRA can deal with all issues that fall within the scope of EU competencies. When acting on its own initiative, FRA's engagement, while not exclusive of any rights, is restricted by the focus of the multi-annual framework.²⁴⁸ The multi-annual framework adopted in 2013 established that FRA shall carry out its tasks in the following areas: access to justice; victims of crime including compensation to victims; information society and, in particular, respect for private life and protection of personal data; Roma integration; judicial cooperation (except in criminal matters); rights of the child; discrimination; immigration and integration of migrants, visa and border control and asylum; and racism, xenophobia and related intolerance. Notably, this excludes police cooperation and judicial cooperation in criminal matters from the ambit of FRA's work.²⁴⁹

There have been high hopes that the FRA will become the "beacon of fundamental rights" in the EU.²⁵⁰ It should, however, be noted that the FRA does not deal with individual complaints. While the FRA could be said to perform a monitoring function, this is not monitoring in a legal sense. Instead, the monitoring task has been described as "observatory monitoring" or

²⁴⁷ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1, Articles 2 and 4.

²⁴⁸ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1, Article 5(3). Also see Gabriel N. Toggenburg, 'Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?' [2013] *EUI Working Paper*, 7.

²⁴⁹ Council Decision 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights [2013] OJ L79/1. On the exclusion of police/judicial cooperation in criminal matters, see further Wolfgang Benedek, 'EU Action on Human and Fundamental Rights in 2012' [2013] *European Yearbook on Human Rights* 55, 72-73.

²⁵⁰ 'FRA Should Become a European Beacon on Fundamental Rights' [Interview with Morten Kjaerum] [2008] *Equal Voices* 4.

“surveillance”.²⁵¹ FRA’s focus is on observing the Union and Member States in their implementation of EU law. The monitoring function of the FRA does not hereby build on the normative bindingness of its findings, but rather has a disciplinary effect.²⁵²

Tasks of FRA

- *Collect, record, analyse and disseminate information*
- *Carry out, cooperate with or encourage scientific research and surveys*
- *Formulate and publish conclusions and opinions*
- *Publish an annual report and thematic reports on fundamental-rights issues*
- *Publish an annual report on its activities*
- *Develop a communication strategy and promote dialogue with civil society*
- *Raise public awareness of fundamental rights and disseminate information*

Source: COUNCIL REGULATION (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, Article 4

b) National and European parliamentary oversight

National parliaments

The role of national parliaments is institutionalised in Article 12 TEU. National parliaments can be involved directly and indirectly (through ministerial responsibility). Article 12 TEU provides that national parliaments contribute (directly) to the functioning of the Union:

- (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
- (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
- (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political

²⁵¹ For the former characterisation, see European Commission: Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union [2005] COM(2005) 280 final, 38. For the latter, see Bal Sokhi-Bulley, ‘The Fundamental Rights Agency of the European Union: A New Panopticism’ [2011] *Human Rights Law Review* 683.

²⁵² Bal Sokhi-Bulley, ‘The Fundamental Rights Agency of the European Union: A New Panopticism’ [2011] *Human Rights Law Review* 683.

monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

National parliaments are also to hold their government representatives accountable for their actions in the Council.²⁵³ The Protocol on the role of national Parliaments in the European Union also specifies the details of the obligation of EU legislative institutions to send draft legislative acts to national parliaments.²⁵⁴

In respect of the general 'passarelle' clause that enables modification of the voting rules in the Council (concerning the TFEU or Title V TEU) national parliaments are also taken into account.²⁵⁵ For example, regarding family law with cross-border implications where the Council can adopt acts by unanimity, the European Council can adopt a decision authorising the Council to act on the basis of the ordinary legislative procedure (qualified majority). However, the Lisbon Treaty also introduced a mechanism of control in relation to the passarelle clause by providing that the proposal must be notified to the national parliaments, which then have the right to object. If the national parliament makes its opposition within six months, the decision shall not be adopted.²⁵⁶

As to the AFSJ more specifically, the TFEU provides that national parliaments are part of the evaluation mechanism of the implementation of the Union policies in the AFSJ in accordance with Article 70.²⁵⁷ The role of national parliaments to ensure the compliance of legislative proposals with the principle of subsidiarity is explicitly mentioned in initiatives concerning crime

²⁵³ Article 10 TEU.

²⁵⁴ Protocol (No 1) on the Role of National Parliaments in the European Union [2010] OJ C83/203. For a more detailed discussion, see Mendeltje van Keulen, 'New Parliamentary Practices in Justice and Home Affairs: Some Observations', in Ronald L. Holzhaecker and Paul Luif (eds), *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer 2014).

²⁵⁵ Article 48(7) TEU.

²⁵⁶ Article 81(3) TFEU.

²⁵⁷ Article 70 TFEU ('Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.')

and police cooperation.²⁵⁸ Special mention should also be made of the emergency brake procedure. For example, Article 82 TFEU concerning judicial cooperation in criminal matters provides for directives to establish minimum rules in order to facilitate mutual recognition of judgments. As a point of departure the directives are adopted using the ordinary legislative procedure. However, if a Member State considers that a draft directive affects fundamental aspects of its criminal justice system it can request its referral to the European Council, suspending the legislative procedure.²⁵⁹

National parliaments are also involved in the political monitoring of Europol and the evaluation of Eurojust's activities.²⁶⁰ National parliaments are sovereign in determining whether and how to oversee the EU in general and/or AFSJ agencies. In fact, all Member States have put in place national parliamentary committees on EU affairs in order to strengthen democratic control over EU matters.²⁶¹

Probably the most important venue of EU scrutiny by national parliaments has been the Conference on European Affairs Committees (COSAC). All national parliamentary committees on EU affairs are represented in COSAC, which can submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. COSAC also promotes the exchange of information and best practice between national

²⁵⁸ Article 69 TFEU. Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 51. On the 'yellow card' and 'red card' procedures, see e.g., Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press 2010), Mendeltje van Keulen, 'New Parliamentary Practices in Justice and Home Affairs: Some Observations', in Ronald L. Holzhaecker and Paul Luif (eds), *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer 2014) and Juan Mayoral, 'Democratic improvements in the European Union under the Lisbon Treaty: Institutional changes regarding democratic government in the EU' [2011] *EUDO Report* 7-8.

²⁵⁹ If consensus is reached within four months, the European Council refers the draft back to the Council, which terminates the suspension. See further Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press 2010) 443, and Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) 184-185. So far, the emergency brake system has not been used. See further e.g., Ester Herlin-Karnell, 'Recent Developments in the Field of Substantive and Procedural EU Criminal Law – Challenges and Opportunities' in Maria Bergström and Anna Jonsson Cornell (eds), *European Police and Criminal Law Co-operation* (Hart Publishing 2014) 21, 23-24.

²⁶⁰ Articles 85 and 88 TFEU. In general, see Sonia Piedrafita, 'EU Democratic Legitimacy and National Parliaments' [2013] *CEPS Essay*, No. 7.

²⁶¹ The specific arrangements adopted for detailed scrutiny by committees in the national Parliaments can be consulted at COSAC, 'Scrutiny of EU Matters in National Parliaments', <<http://www.cosac.eu/scrutiny-of-eu-matters-in-nati/>> accessed 27 May 2014. See also Juan Mayoral, 'Democratic improvements in the European Union under the Lisbon Treaty: Institutional changes regarding democratic government in the EU' [2011] *EUDO Report*. On models of national parliaments' scrutiny, see also Aron Buzogány, 'Learning from the Best? Interparliamentary Networks and the Parliamentary Scrutiny of EU Decision-Making' in Ben Crum and John Erik Fossum (eds), *Practices of Interparliamentary Coordination in International Politics: The European Union and Beyond* (ECPR Press 2013) 17.

Parliaments and the European Parliament, including their special committees. And although contributions from COSAC do not bind national parliaments, its potential as a scrutinising forum has steadily been growing, especially concerning AFSJ matters.²⁶²

As to agencies, national parliaments have for example scrutinised Europol through their control of their governmental control function (especially targeting the minister responsible for policing).²⁶³ The role of national parliaments has recently been institutionalised in being explicitly provided for in the proposed Europol and Eurojust regulations, both emphasising the joint role of the European Parliament and national parliaments.²⁶⁴ Several national parliaments also have mechanisms for examining the Europol budget.²⁶⁵

In sum, three levels of national parliamentary oversight of the AFSJ bodies can be distinguished: (1) holding national governments accountable for their actions concerning AFSJ bodies; (2) direct engagement with AFSJ bodies; and (3) participating in inter-parliamentary cooperation concerning AFSJ bodies.²⁶⁶

The European Parliament

As discussed above, the European Parliament's role in the legislative process has become more central since the entry into force of the Lisbon Treaty. A similar development has taken place in respect of parliamentary accountability. The European Parliament, and especially its LIBE Committee, is nowadays not only an AFSJ decision-maker, but also a significant fundamental

²⁶² Claudia Hillebrand, 'Guarding EU-wide Counter-terrorism Policing: The Struggle for Sound Parliamentary Scrutiny of Europol' in Christian Kaunert and Sarah Leonard (eds), *European Security, Terrorism and Intelligence: Tackling New Security Challenges in Europe* (Palgrave Macmillan 2013) 96, 109-114. See also Daniel Ruiz de Garibay, 'Coordination Practices in the Parliamentary Control of Justice and Home Affairs Agencies: The Case of Europol' in Ben Crum and John Erik Fossum (eds), *Practices of Interparliamentary Coordination in International Politics: The European Union and Beyond* (ECPR Press 2013) 87, 97-98.

²⁶³ Claudia Hillebrand, 'Guarding EU-wide Counter-terrorism Policing: The Struggle for Sound Parliamentary Scrutiny of Europol' in Christian Kaunert and Sarah Leonard (eds), *European Security, Terrorism and Intelligence: Tackling New Security Challenges in Europe* (Palgrave Macmillan 2013) 96, 112.

²⁶⁴ See European Commission: Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA [2013] COM(2013) 173 final, Chapter IX (Parliamentary Scrutiny), Article 53, and European Commission: Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) [2013] COM(2013) 535 final, Article 55.

²⁶⁵ Claudia Hillebrand, 'Guarding EU-wide Counter-terrorism Policing: The Struggle for Sound Parliamentary Scrutiny of Europol' in Christian Kaunert and Sarah Leonard (eds), *European Security, Terrorism and Intelligence: Tackling New Security Challenges in Europe* (Palgrave Macmillan 2013) 96, 110 (referring to the COSAC 2005 report).

²⁶⁶ Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 65.

rights supervisor.²⁶⁷ This role for the LIBE Committee follows from its responsibilities for the protection within the territory of the Union of citizens' rights, human rights and fundamental rights, legislation in the areas of transparency and the protection of natural persons with regard to the processing of personal data, and the development of an AFSJ (and in particular police and judicial cooperation in criminal matters).²⁶⁸

The general responsibility of committees of the European Parliament is to examine questions referred to them by Parliament. Committees can also present 'own initiative reports' on issues that fall within the scope of their respective competence. The LIBE Committee has frequently prepared own initiative reports on JHA related issues, including reports on the role of the various JHA agencies.²⁶⁹ The European Parliament also issues an annual fundamental rights report.²⁷⁰ The rules of procedure of the EP further provide that:

Where the committee responsible for the subject matter, a political group or at least 40 Members are of the opinion that a proposal for a legislative act or parts of it do not comply with rights enshrined in the Charter of Fundamental Rights of the European Union, the matter shall, at their request, be referred to the committee responsible for the interpretation of the Charter. The opinion of that committee shall be annexed to the report of the committee responsible for the subject-matter.²⁷¹

Yet another mechanism by which the European Parliament can actively advocate fundamental rights concerns is in proceedings before the CJEU, as the European Parliament has been granted standing in actions for annulment. Cases such as C-317/04 and C-318/04 *European Parliament v. Council and Commission* and C-540/03 *European Parliament v Council*, where legislative acts have been invoked on fundamental rights grounds before the CJEU, demonstrate the impact of the Parliament as a fundamental rights watchdog.²⁷² The European Parliament has also used

²⁶⁷ See textbox in Section II.B.4.

²⁶⁸ Rules of Procedure of the European Parliament, March 2014, Annex VII, XVII. Also see Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 67.

²⁶⁹ See further Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 68.

²⁷⁰ European Parliament, Report on the situation of fundamental rights in the European Union (2012) 2013/2078(INI) [2014].

²⁷¹ Rules of Procedure of the European Parliament, March 2014, Article 36(2).

²⁷² Judgement of 30 May 2006 in *Parliament v. Council and Commission*, C-317/04 and C-318/04, EU:C:2006:346, and Judgment of 27 June 2006 in *Parliament v Council*, C-540/03, EU:C:2006:429. It should be noted that the cases as such were not decided by the Court on fundamental rights grounds. See further Federico Camporesi, 'The European Parliament and the EU Charter of Fundamental Rights' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 77, 87-88. On the LIBE committee's use of litigation before the Court between 2005 and 2013, see Sergio Carrera, Nicholas Hernanz and Joanna Parkin,

the threat of litigation as well as more unorthodox measures such as freezing of cooperation on JHA dossiers as a means of forcing the Council to include the European Parliament in decision-making (the so-called Schengen Freeze affair).²⁷³

It should also be noted that individuals have a right to petition the European Parliament, enabling private parties to single out inconsistencies and non-compliances with fundamental rights.²⁷⁴ The right of petition, coupled with the right to address complaints to the European Ombudsman, has also been seen to at least partially compensate for the difficulties of individuals to bring a case before the CJEU.²⁷⁵

A question that deserves special attention is the European Parliament's monitoring of AFSJ agencies. In performing this role, the Parliament has different mechanisms at its disposal. These mechanisms differ as to their nature as well as between agencies. In respect of EASO, the Parliament has been noted to increasingly exercise an *ex ante* control (for example, through having a say in the appointment of the director and involving the UNHCR in its work), whereas in respect of Frontex and Europol the Parliament has focused more on *ex post* control.²⁷⁶

Democratic oversight is first of all facilitated through a number of reporting and evaluation obligations laid down in the founding instruments of, for example, Europol, Eurojust and Frontex.²⁷⁷ Other means by which the Parliament can exercise an influence on agencies is through summoning directors, informal meetings and budgetary powers. As to the first of these, the Parliament does not have uniform powers to summon AFSJ agency directors.

'The 'Lisbonisation' of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, Annex 2.

²⁷³ See further Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The 'Lisbonisation' of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 13-15. Yet another recent case where the Parliament exercised its authority explicitly to safeguard its own prerogatives (although not on fundamental rights grounds) is *European Parliament v. Council*. Judgment of 5 September 2012 in *Parliament v Council*, C-355/10.

²⁷⁴ Article 227 TFEU.

²⁷⁵ Federico Camporesi, 'The European Parliament and the EU Charter of Fundamental Rights' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 77, 88-89.

²⁷⁶ Florian Trauner, 'The European Parliament and Agency Control in the Area of Freedom, Security and Justice' [2012] *West European Politics* 784-802.

²⁷⁷ See Annex 2 for full references to the founding documents. As to Frontex, the agency has also been explicitly urged to place more emphasis on fundamental rights concerns. See e.g., European Parliament, Press Release, 'FRONTEX: new human rights watchdog, new powers', 13 September 2011, and European Parliament, Press Release, 'Frontex border guard teams and fundamental rights', 23 June 2011.

Instead, this right is formulated in slightly different terms in the founding acts of Europol, Eurojust and Frontex, creating an obligation for the Europol director to appear before the Parliament, but not for the other two agencies.²⁷⁸ The Parliament also has the power to establish temporary committees and committees of inquiry.²⁷⁹ As to exercising the ‘power of the purse’, since all agencies are funded by the EU budget, this makes the Parliament the budgetary authority.²⁸⁰ In this capacity, the Parliament can decide on the amount of money that the agencies can spend from the EU budget. However, it has no say over contributions of the Member States to the AFSJ agencies. The Parliament can also refuse to discharge a budget.²⁸¹

3. Judicial and quasi-judicial EU mechanisms

a) The Court of Justice of the European Union (CJEU)

Article 263 TFEU provides that the Court shall review:

the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.²⁸²

As a point of departure, this provision grants the CJEU jurisdiction over all AFSJ measures. As Article 6 TEU asserts fundamental rights protection as a general principle of EU law this means that fundamental rights considerations apply when assessing the interpretation and validity of

²⁷⁸ For an overview, see Aidan Wills *et al.*, ‘Parliamentary Oversight of Security and Intelligence Agencies in the European Union’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 74-75.

²⁷⁹ The Temporary Committee on Organised Crime, Corruption and Money Laundering (completed its work 23 October 2013) was explicitly charged with the task of analysing and evaluating the current implementation of Union legislation on organised crime, corruption and money laundering, and related policies, in order to monitor the compatibility of the legislation and policies with fundamental rights, and furthermore to “examine and scrutinise the implementation of the role and activities of the Union home affairs agencies (such as Europol, the COSI and Eurojust) working on matters relating to organised crime, corruption and money laundering, and related security policies”. European Parliament, Committees, ‘Organised Crime, Corruption and Money Laundering’, <<http://www.europarl.europa.eu/committees/en/crim/home.html>> accessed 28 May 2014. No Committees of Inquiry in the AFSJ has been established to date.

²⁸⁰ Articles 310–324 TFEU.

²⁸¹ Aidan Wills *et al.*, ‘Parliamentary Oversight of Security and Intelligence Agencies in the European Union’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 76. Such a refusal has also taken place in 2010 in respect of the CEPOL, see at 78.

²⁸² Article 263 TFEU

AFSJ measures as well as Member States implementation of those measures.²⁸³

There are nevertheless some limitations upon and exceptions to the review of AFSJ acts. The jurisdiction of the CJEU is first of all limited for a transitional period of five years with regard to acts of the Union in the field of police and judicial co-operation in criminal matters, which have been adopted before the entry into force of the Lisbon Treaty.²⁸⁴ This period ends on 1 December 2014. The CJEU also has no jurisdiction “to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.²⁸⁵

In respect of agencies, it should be noted that at first glance it would seem that the fact that agencies do not issue binding acts, but merely remain limited to coordinating tasks, makes agency action escape review before the CJEU.²⁸⁶ However, Article 263 TFEU foresees the possibility that when acts of EU agencies produce legal effects, these can fall under the judicial scrutiny of the Court.²⁸⁷

The most common types of cases before the CJEU are requests for a preliminary ruling (requested by national courts), actions for failure to fulfil an obligation (brought against EU governments), actions for annulment (against EU legislation violating the EU treaties or fundamental rights), actions for failure to act (against EU institutions for failing to make decisions), and direct actions (brought by individuals, companies or organisations against EU decisions or actions). Actions for annulment can be brought by the Council, Commission, or (under certain conditions) the Parliament. Actions for failure to act can be brought by Member States, EU institutions, and (under certain conditions) individuals or companies.²⁸⁸ Despite

²⁸³ See e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 103.

²⁸⁴ Protocol (No 36) on Transitional Provisions [2010] OJ C 83/322, Article 10.

²⁸⁵ Article 276 TFEU.

²⁸⁶ Bruno De Witte and Jorrit J. Rijpma, ‘Parliamentary Scrutiny of Justice and Home Affairs Agencies’ [2011] Annex B to the report Aidan Wills *et al.*, ‘Parliamentary Oversight of Security and Intelligence Agencies in the European Union’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 362, and Vassilis Hatzopoulos, ‘Casual but Smart: The Court’s New Clothes in the Area of Freedom, Security and Justice (AFSJ) after the Lisbon Treaty’ in Jörg Monar (ed), *The Institutional Dimension of the European Union’s Area of Freedom, Security and Justice* (Peter Lang 2010) 145, 150.

²⁸⁷ Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (OUP, 2013), especially 209 et seq, and Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 13.

²⁸⁸ See Section V, TFEU.

many possibilities to get AFSJ cases to the CJEU, those who can take cases do not always act, which, of course, affects the Court's function as a fundamental rights watchdog. The Commission in particular has been criticised for being reluctant to initiate infringement proceedings against Member States.²⁸⁹ It has, however, also been noted that domestic courts are sometimes reluctant to ask for preliminary rulings if the matter concerns sensitive topics such as migration.²⁹⁰

An especially pertinent fundamental rights question has been to what extent rights violations caused by agency action can be adjudicated before the CJEU. A serious obstacle from an individual's perspective is the requirement to demonstrate that the applicant is directly addressed or that the act is of direct concern to him or her. The more obvious route for an individual seeking redress against agencies would therefore be to raise his/her claim before a national court, which, in case the national court chooses to use the preliminary reference procedure, may provide the CJEU with the opportunity to review the agency action. Article 267 TFEU now provides for single preliminary rulings procedure for all issues of the AFSJ. However, an accelerated procedure is to be used if the question concerns a person in custody.²⁹¹ There is also an urgent preliminary ruling procedure that can be applied in respect of the AFSJ.²⁹² The CJEU has been flexible in using the preliminary reference procedure to hear cases involving non-binding instruments, potentially also bringing agency action within the reach of the procedure. Another avenue for individuals is the compensation for damages procedure allowing an individual to sue an EU institution or body for compensatory damages,²⁹³ and allowing the Court to order the suspension of an act or prescribe interim measures.²⁹⁴ Yet another way for bypassing the strict admissibility criteria could be to let an EU institution bring the case against the agency.²⁹⁵

²⁸⁹ Steve Peers, 'The Next Multi-Year EU Justice and Home Affairs Programme: Views of the Commission and the Member States' [2014] *Statewatch Analysis*, 12 March 2014.

²⁹⁰ Anja Wiesbrock, 'Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty' [2013] *Maastricht Journal of European and Comparative Law* 423, 437.

²⁹¹ Article 267 TFEU.

²⁹² Rules of Procedure of the Court of Justice [2012] OJ L265/1, Article 104(b). See e.g., Koen Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' [2010] *International and Comparative Law Quarterly*, 255-301.

²⁹³ Article 340 TFEU.

²⁹⁴ Articles 278 and 279 TFEU.

²⁹⁵ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 82-86.

The Fundamental Rights Charter has been a binding instrument of EU law since 2009 and the CJEU has made reference to the Charter on several occasions.²⁹⁶ Some authors, in fact, find that the CJEU has started to act as a human rights adjudicator.²⁹⁷ The FRA 2012 Annual report testifies to the role of CJEU as an increasingly important source for the clarification of the meaning of AFSJ provisions for example in EU asylum law (issuing six judgments in 2012 on asylum cases).²⁹⁸

	Review of acts of Member States in light of fundamental rights	Review of acts of EU institutions in light of fundamental rights
Direct Review	Infringement Action: Article 258-260 TFEU	Annulment Action: Article 263 TFEU
		Interim Measures: Article 278 TFEU
	Interim Measures: Article 279 TFEU	Action for failure to act where required by the EU Treaties: Article 265 TFEU
		Opinion on compatibility with the EU treaties of agreements between the Union and third States or international organisations: Article 218(11) TFEU
Indirect Review	Preliminary ruling/reference: Article 267 TFEU	Preliminary ruling/reference: Article 267 TFEU

Source: Liora Lazarus et al., 'The Evolution of Fundamental Rights Charters and Case Law: A Comparison of the

²⁹⁶ Important CJEU references to the Charter can be found in the annual reports on the application of the Charter. See e.g., European Commission, Report: 2013 Report on the Application of the EU Charter of Fundamental Rights [2014] COM(2014) 224 final, 8-9.

²⁹⁷ Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' [2013] *Maastricht Journal of European and Comparative Law* 168.

²⁹⁸ FRA, Annual report, 'Fundamental rights: challenges and achievements in 2012' [2013], 41-44 with tables of cases. See also Sergio Carrera, Marie De Somer and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' [2012] *CEPS Papers in Liberty and Security in Europe*, No. 49.

United Nations, Council of Europe and European Union systems of human rights protection' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 78 (with minor adaptations)

b) The European Anti-Fraud Office (OLAF)

OLAF is an independent EU body responsible for combating illegal (financial) activities, such as fraud.²⁹⁹ OLAF's tasks are to combat fraud, corruption and other illegal activities which harm the EU's financial interests and to investigate the management and financing of all EU institutions and bodies. OLAF also engages in the preparation of legislative and regulatory provisions which fall under Title V TFEU and has the competence to perform administrative investigations.³⁰⁰ As such, the link of OLAF to ensuring respect for fundamental rights in the AFSJ is not direct.

There are, however, some linkages between OLAF and other AFSJ agencies. One such linkage is the partial overlap of the tasks of OLAF and Europol in combating fraud. The cooperation between the agencies has been formalised in an administrative arrangement.³⁰¹ Another linkage can be found in the possible establishment of the EPPO.³⁰² If and when EPPO is established, OLAF's role will be affected as the function of carrying out administrative investigations into EU fraud or other crimes affecting the financial interests of the EU will be reserved for EPPO.³⁰³

It could also be noted that the investigative activities of OLAF have in themselves raised fundamental rights concerns. The European Court of Auditors has repeatedly pointed out that there is no adequate control of legality of OLAF investigative action, while at the same time the performance of the functions of OLAF (such as performance and control of investigative acts)

²⁹⁹ Commission Decision of 27 September 2013 amending Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office (2013/478/EU) [2013] OJ L257/19.

³⁰⁰ Commission Decision of 27 September 2013 amending Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office (2013/478/EU) [2013] OJ L257/19.

³⁰¹ Administrative Arrangement between the European Police Office (Europol) and the European Anti-Fraud Office (OLAF) [2004].

³⁰² Article 86 TFEU and European Commission: Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office [2013] COM(2013) 534 final.

³⁰³ European Parliament has on the 12 March 2014 confirmed its support to the Commission's proposal for a European Public Prosecutor's Office. Whereas the necessity with EPPO has been defended with effectiveness arguments, a number of national Parliaments express the view that investigation and prosecution action at Member State level is sufficient and that the coordination and investigation mechanisms existing at the Union level (Eurojust, Europol and OLAF) would be sufficient. European Commission, Commission Communication: on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 [2013] COM(2013) 851 final.

can give rise to fundamental rights concerns.³⁰⁴ The amendment of the OLAF founding decision can be seen as a response to such criticism.³⁰⁵

c) *The European Ombudsman*

In addition to petition the European Parliament, every citizen of the Union has the right to apply to the Ombudsman.³⁰⁶ According to Article 228 TFEU, the European Ombudsman is empowered to receive complaints from citizens of the Union concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies. The Ombudsman can also launch inquiries *proprio motu*. Maladministration occurs if an institution fails to act in accordance with the law, fails to respect the principles of good administration or violates fundamental rights.³⁰⁷

It is notable that the Ombudsman has investigated several EU agencies, including AFSJ agencies such as Europol, Eurojust and Frontex. While many of these cases have concerned public access to documents, for example, in the special report on its own-initiative inquiry concerning Frontex from 2013, the Ombudsman targeted Frontex for lacking a mechanism by which to deal with individual incidents of breaches of fundamental rights alleged to have occurred in the course of the work of Frontex.³⁰⁸ Such initiatives make the Ombudsman a significant fundamental rights monitoring body.

Compared with the difficulties of individuals to bring a case before the CJEU, the Ombudsman offers individuals easy access. It should, however, be emphasised that, although the Ombudsman's investigation is essentially concerned with the compliance with EU law (and

³⁰⁴ See e.g., European Court of Auditors, *Follow-up of Special Report No 1/2005 Concerning the Management of the European Anti-Fraud Office*, Special Report 2/2011 [2011].

³⁰⁵ See Activity Report of the OLAF Supervisory Committee, February 2013–January 2014 [2014]. See also European Commission, Commission Communication: Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office [2013] COM(2013) 533 final, Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013] OJ L 248/1. On OLAF in general, see George Kratsas, 'A Case of OLAF: The Place and Role of the Anti-Fraud Office in the European Union Context' [2012] *European Public Law* 65, 69, and J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF): An Analysis with a Look Forward to a European Public Prosecutor's Office* (European Law Publishing 2011).

³⁰⁶ Article 24 TFEU.

³⁰⁷ Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties [1994] OJ L113/15 as amended in 2002 OJ L92/13 and [2008] OJ L189/25.

³⁰⁸ Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, Decision [2013].

hereby with fundamental rights), the Ombudsman's decisions are not legally binding and do not produce enforceable rights for the complainant.³⁰⁹ Furthermore, in comparison with the right to petition the European Parliament, the Ombudsman's scope of action is more restricted since complaints to the Ombudsman need to refer to particular instances of maladministration in the activities of EU institutions.³¹⁰

d) The European Data Protection Supervisor (EDPS) and Joint Supervisory Bodies (JSBs)

The EDPS is an independent supervisory authority devoted to protecting personal data and privacy and promoting good practice in EU institutions.³¹¹ Regulation 45/2001 provides an obligation for each Community institution and body to appoint a Data Protection Officer.³¹² The EDPS's general objective is to ensure that the EU institutions and bodies respect the right to privacy when they process personal data and develop new policies. The EDPS monitors the application of the regulation in institutions and bodies and offers advice for institutions on all matters concerning the processing of personal data.³¹³ In addition to Data Protection Officers, Europol and Eurojust have created JSBs that monitor the processing of personal data. These

³⁰⁹ See further Alexandra de Moor and Gert Vermeulen, 'Europol and Eurojust' [2011] Annex B to the report Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 386-387, and Johan van Haersolte and Jan-Kees Wiebenga, 'The Role of the European Parliament in the Fundamental Rights Architecture of the European Union' in Marjolein van Roosmalen, Ben Vermeulen, Fried van Hoof, Marten Oosting (eds), *Fundamental Rights and Principles: Liber Amicorum Pieter van Dijk* (Intersentia 2013) 153, 168. For a more detailed account, see e.g., Alexandros Tsadiras, 'The European Ombudsman's Remedial Powers: An Empirical Analysis in Context' [2013] *European Law Review* 52-64.

³¹⁰ Saverio Baviera, 'Parallel Functions and Co-operation: the European Parliament's Committee on Petitions and the European Ombudsman' in *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005) 126, 134.

³¹¹ A regulation provides for the establishment of data protection officers (DPO) and the European Data Protection Supervisor (EDPS). Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1.

³¹² Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1, Article 24(1).

³¹³ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1, Article 41. EDSP, Position paper on the role of Data Protection Officers in ensuring effective compliance with Regulation (EC) 45/2001 [2005]. See further Alexandra de Moor and Gert Vermeulen, 'Europol and Eurojust' [2011] Annex B to the report Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 387.

bodies can hear appeals from individuals who have been denied access to personal data.³¹⁴ The EDPS cooperates with the JSBs particularly with a view to improving consistency in the protection of personal data.³¹⁵

One of the main duties of the EDPS is to hear and investigate complaints and to conduct inquiries (either on its own initiative or on the basis of a complaint). While individuals can only file complaints about an alleged violation of the processing of personal information, EU staff can file complaints about any alleged violation of data protection rules.³¹⁶

4. External judicial control by the European Court of Human Rights (ECtHR)

The overview of mechanisms by which to ensure the AFSJ measures are fundamental rights compliant would not be complete without also taking the European Court of Human Rights (ECtHR) into account. As all EU Member States are parties to the ECHR, the ECtHR affords individuals negatively affected by EU measures a possibility to initiate proceedings against a Member State if they fulfil the ECtHR admissibility criteria, including that they are personally and directly affected by the breach of a ECHR right. Some well-documented cases particularly in the area of migration, asylum, and border control of the ECtHR³¹⁷ – such as *Hirsi and others v. Italy* and *M.S.S. v. Belgium and Greece* – have been of seminal importance for the evolution of the AFSJ. In the *Hirsi* case, the ECtHR held that convention rights are applicable extraterritorially, serving as a yardstick for assessing the legality of AFSJ agreements with third countries and border control practices.³¹⁸ In the *M.S.S.* case, on the other hand, the ECtHR

³¹⁴ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust ('Eurojust Decision'), Article 23, and Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) [2009] OJ L121/37, Article 34.

³¹⁵ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1, Article 46 sub (f)(ii). See further Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 60-63.

³¹⁶ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1, Article 46. For a description of the procedure, see EDPS, Annual report 2013 [2014].

³¹⁷ ECtHR has also e.g., judged a raid executed under the information of the OLAF as contrary to article 10 ECHR. Judgment of 27 November 2007 in *Tillack v Belgium*, no. 20477/05, ECHR.

³¹⁸ Judgment of 23 February 2012 in *Hirsi Jamaa and Others v Italy* [GC], no. 27765/09, ECHR 2012. See also Sergio Carrera, Marie De Somer and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' [2012] *CEPS Papers in Liberty and Security in Europe*, No. 49, 10.

questioned the principle of mutual trust in holding that the Dublin principle of state of first entry does not free a state that is sending back an asylum seeker from assessing whether that state of first entry complies with its fundamental rights obligations.³¹⁹

Regarding the ECtHR, it is also significant that the TEU establishes an obligation for the Union to accede to the ECHR. On 5 April 2013, the final draft Agreement on the Accession of the EU to the ECHR was accepted and submitted for comments.³²⁰ From a fundamental rights perspective this is significant. Even though the Fundamental Rights Charter provides extensive protection, the ECtHR has by far a more well-established case law on AFSJ topics than the CJEU. The jurisdiction of the ECtHR also allows the court to focus in a direct and general fashion on the infringement of the rights of the individual. After accession the EU will be bound by the ECHR and individuals will be entitled to file applications for infringements against the EU and its institutions instead of filing applications solely against Member States for the implementation of EU law.³²¹

³¹⁹ Judgment of 21 January 2011 in *M.S.S. v Belgium and Greece* [GC], no. 30969/09, ECHR 2011. See also Lillian M. Langford, 'The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity' [2013] *Harvard Human Rights Journal* 217, 236.

³²⁰ Article 6(2) TEU. Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final report to the CDDH [2013].

³²¹ In general, see Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013) and Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) 163-166.

III. The AFSJ instruments and fundamental rights

A. The types of instruments used in the AFSJ

1. Introduction

In relation to the instruments used in the AFSJ, Monar has observed that:

Prior to the 2009 Lisbon Treaty reforms, the legal division of the AFSJ were separated between four policy areas based on Title IV TEC (asylum, migration, border controls and judicial cooperation in civil matters) and two policy areas which were based on Title VI TEU (judicial cooperation in criminal matters and police cooperation). This had the consequence not only of the need for different legal instruments and procedures to be used for internal measures, but also for external relations to be governed by substantially different rules depending on whether ‘first pillar’ (Title IV TEC) or ‘third pillar’ (Title VI TEU) matters were concerned.³²²

As a consequence of the entry into force of the Lisbon Treaty, there is no longer a third pillar with special instruments and procedures. The primary instruments within the internal AFSJ are nowadays regulations, directives and decisions,³²³ and in relation to external action international agreements. There are, however, still some old third pillar instruments which continue to have legal effect in accordance with the transitional rules.³²⁴

The goal of this Chapter is to map the regulatory and policy instruments used within the AFSJ, especially from a fundamental rights perspective. This is done primarily from a substantive viewpoint. It is considered to what extent fundamental rights concerns have been identified in the various policy fields and how/if these concerns have been reflected in the adoption of new secondary law. In this regard, special attention is given to the fundamental rights concerns identified in the Stockholm Programme and the Human Rights Action Plan. Consideration is also given to the question as to where one can find provisions with a fundamental/human rights law dimension in EU law. Finally, the adopted instruments are also on some occasions discussed from a more procedural or instrument-oriented perspective, with the aim of demonstrating how the type of instrument used, may have consequences on the realisation of fundamental

³²² Jörg Monar, ‘The EU’s growing external role in the AFSJ domain: factors, framework and forms of action’ [2014] *Cambridge Review of International Affairs* 147, 150. See also Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 20-21.

³²³ Article 288 TFEU.

³²⁴ See further Steve Peers, ‘Justice and Home Affairs Law since the Treaty of Lisbon: A Fairy-Tale Ending?’ in Diego Acosta Arca and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 17, 29-30.

rights.³²⁵ Attention is also paid to how the Union ensures that fundamental/human rights are respected when new instruments are adopted.

It should be noted that the instruments adopted within the AFSJ are numerous and that it is only possible to mention some of the most important ones within the scope of this research report. In May 2012, it was calculated that the JHA Council had adopted over 1400 texts in the field of the AFSJ.³²⁶ A number of these texts are agreements with third countries, that is, they concern the external dimension of the AFSJ.³²⁷

2. Primary law

Primary EU law mainly consists of the founding treaties, that is, the TEU and the TFEU. Also, for example, protocols annexed to the founding treaties constitute primary law. Hierarchically, primary law is the highest source of law within the EU, making it equivalent to constitutional law in many domestic legal systems. Content-wise, the treaties “set out the distribution of competences between the Union and the Member States” and establish “the powers of the European institutions.”³²⁸ They also “lay down substantive rules that define the scope of the policies and provide a structure for the action taken by the institutions regarding each of them.”³²⁹ Through this institutional design, the treaties hence *enable* certain EU action. At the same time, they may, however, deliberately or unintentionally *impede* certain EU action.³³⁰

Both the TEU and TFEU contain provisions regulating the AFSJ. TEU Article 3(2) establishes that the Union shall “offer its citizens an area of freedom, security and justice” whereas TFEU Article

³²⁵ Special attention is given in Section IV.C to the question of mutual recognition.

³²⁶ Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 11 (since the entry into force of the Amsterdam Treaty).

³²⁷ Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 12 (in 2011, about 19 % of the texts concerned the external dimension).

³²⁸ Europa, Summaries of Legislation, ‘Sources of European Union law’ <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm> accessed 24 March 2014.

³²⁹ Europa, Summaries of Legislation, ‘Primary law’ <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14530_en.htm> accessed 24 March 2014.

³³⁰ See further Jörg Monar, ‘EU Treaty Reforms as ‘Canalisers’ of EU Policies – Enabling and Impeding Effects in Justice and Home Affairs Domain’, in Inge Govaere and Dominik Hanf (eds), *Scrutinizing Internal and External Dimensions of European Law – Liber Amicorum Paul Demaret*, Volume I (Peter Lang 2013), 253 (especially at 266). He also notes that if there is a strong political pressure towards a certain action which is not supported by the treaty framework, this may entail that action is taken outside the treaty context, for example, by certain Member States adopting a treaty that is not part of EU law. *Ibid.*, at 266.

67(1) provides that the “Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”. Furthermore, the TFEU contains more specific treaty provisions on policies on border checks, asylum and immigration (Articles 77-80 TFEU), judicial cooperation in civil matters (Article 81 TFEU), judicial cooperation in criminal matters (Articles 82-86 TFEU) and police cooperation (Articles 87-89 TFEU). The TFEU also contains numerous general and specific demands for secondary legislation in the AFSJ (“shall”) as well as some additional norms giving the EU a right to adopt secondary legislation (“may”).

In relation to fundamental rights, the Stockholm Programme states that: “The Lisbon Treaty offers the Union new instruments as regards the protection of fundamental rights and freedoms both internally and externally.”³³¹ Most notably, Article 6 TEU stipulates that the Fundamental Rights Charter shall be a legally binding instrument *with the same legal value as the Treaties*,³³² and that the Union shall accede to the ECHR. According to Article 6(3) fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States shall constitute general principles of EU law. Article 67 TFEU, on its part, establishes that the EU shall constitute an AFSJ *with respect for fundamental rights*. From a fundamental rights perspective, the following treaty provisions should also be noted:

- Article 16 TFEU provides that everyone has the right to the protection of personal data concerning them and that the Union shall “shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data”;
- Articles 18-25 TFEU reaffirm the principle of non-discrimination; and
- Article 78(1) TFEU provides that the Union’s common policy on asylum, subsidiary protection and temporary protection shall be in accordance with the Geneva

³³¹ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 34. See also Valentina Bazzocchi, ‘The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice’, in Giacomo di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 177.

³³² For the background of this wording, see Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) 148-151 (see also 158-160).

Convention of 28 July 1951 and the Protocol of 31 January 1967 Relating to the Status of Refugees and “other relevant treaties”.

In relation to external action, Article 21(1) TEU stipulates that the Union’s action on the international scene shall be guided by the principles which have inspired its own creation, including the universality and indivisibility of human rights and fundamental freedoms. Article 21 also establishes that the Union shall define and pursue common policies and actions in order to consolidate and support human rights. Furthermore, Article 8 TEU stipulates that the EU shall develop a special relationship with neighbouring countries founded on the values of the Union. Finally, Article 49 TEU provides that EU applicant States must respect the values of the Union.

3. Strategic programming instruments

When EU law is considered, it is usual to start with primary law and then to go over to secondary law. In the field of the AFSJ, it, however, seems more meaningful to consider some political/strategic instruments before addressing secondary legislation, as these instruments have had a strong influence on the secondary law adopted. A difference can be made between the following types of programming instruments:

- (1) programming instruments for the development of the AFSJ as a whole;
- (2) programming instruments that focus on a certain part of the AFSJ, for example, its external dimension or an individual AFSJ field;
- (3) programming instruments with a very particular scope, for example, strategic instruments that focus on the AFSJ cooperation with a particular country.³³³

The most influential programming instruments within the AFSJ are the strategic guidelines for legislative and operational planning within the AFSJ that the European Council shall define.³³⁴ In practice, this refers to the multiannual programmes that have been adopted in Tampere (1999-2004), Hague (2005-2009), and Stockholm (2009-2014), and which have already been mentioned numerous times in this report. In June 2014, the European Council adopted a new programme for 2015-2020.³³⁵

³³³ Cf. Monar’s discussion regarding strategy/programming instruments within the external dimension of the AFSJ. Jörg Monar, ‘The EU’s growing external role in the AFSJ domain: factors, framework and forms of action’ [2014] *Cambridge Review of International Affairs* 147, 159-160.

³³⁴ Article 68 TFEU.

³³⁵ European Council: European Council 26/27 June 2014 Conclusions.

In the Stockholm Programme, the European Council identifies six political priority areas in the AFSJ: (1) Promoting citizenship and fundamental rights; (2) A Europe of law and justice; (3) A Europe that protects; (4) Access to Europe in a globalised world; (5) A Europe of responsibility, solidarity and partnership in migration and asylum matters; and (6) The role of Europe in a globalised world — the external dimension.³³⁶ The general goals or “slogans” have to some extent been operationalised in the Stockholm Programme itself. Most notably, the goals have, however, been specified in the Action Plan Implementing the Stockholm Programme (‘Stockholm Action Plan’).³³⁷ The Stockholm Action Plan has been characterised as “a roadmap for the implementation of political priorities set out in the Stockholm Programme”.³³⁸ It is significant to note that the adoption of new legislation and the implementation of existing norms are only two of many mentioned tools to achieve the goals of the Stockholm Programme. Other tools comprise mutual trust, coherence, evaluation, training, communication, and dialogue with civil society.³³⁹ In this report, the focus is, however, on legal (written) instruments.

Besides the Stockholm Programme, the adoption of secondary legislation in the AFSJ has been affected by other programming instruments, such as the “EU Internal Security Strategy in Action: Five Steps towards a More Secure Europe” (ISS).³⁴⁰ Every year the Commission reports on the implementation of the ISS to the Council. In relation to the external dimension of the AFSJ, the “Strategy on the External Dimension of the Area of Freedom, Security and Justice” adopted in 2005 has also played a central role.³⁴¹ Furthermore, the legislative activity has been affected by the 18-month programmes of the Council (adopted by Council presidency trios). The current 18 month programme runs from 1 July 2014 to 31 December 2015.³⁴² The 18

³³⁶ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 4-5.

³³⁷ European Commission, Commission Communication: Delivering an area of freedom, security and justice for Europe’s citizens: Action Plan Implementing the Stockholm Programme [2010] COM(2010) 171 final.

³³⁸ Europa, Summaries of EU Legislation, ‘Action plan on the Stockholm Programme’, <http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/jl0036_en.htm> accessed 9 April 2014.

³³⁹ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 5-7.

³⁴⁰ European Commission, The EU Internal Security Strategy in Action: Five steps towards a more secure Europe [2010] COM(2010) 673 final. Endorsed by Council at its meeting of 25-26 March 2010.

³⁴¹ European Commission, Commission Communication: A Strategy on the External Dimension of the Area of Freedom, Security and Justice [2005] COM(2005) 491 final.

³⁴² Council of the European Union: 18 month programme of the Council (1 July 2014 - 31 December 2015) [2014] 10948/1/14, 17 June 2014. See also e.g., Council of the European Union: 18 month programme of the Council (1 July 2011-31 December 2012) [2011] 11447/11, 17 June 2011 and Council of the European Union: 18 month programme of the Council (1 January 2013 - 31 June 2014) [2012] 17426/12, 7 December 2012.

month programmes function as the basis for the more detailed six month programmes of the various Council presidencies. As regards more specific strategies, the Commission has, for instance, adopted strategies on trafficking³⁴³ and border management.³⁴⁴ The Council, on its part, has, for example, adopted a revised “External Relations Strategy in the Field of Cooperation in Civil Matters” in 2008,³⁴⁵ and “Council Conclusions on Setting the EU’s Priorities for the Fight against Organised Crime between 2011 and 2013” in 2011.³⁴⁶ The Parliament has also adopted its own strategic instruments within the AFSJ.³⁴⁷

In addition to the strategies, there are also other documents in which the various EU institutions present their viewpoints on how the AFSJ should be developed. In this regard, it may be noted that the Commission in March 2014 published two documents presenting its view on how the AFSJ should be developed after the Stockholm Programme. These are the reports “EU Justice Agenda for 2020”³⁴⁸ and “An Open and Secure Europe: Making It Happen”,³⁴⁹ prepared by DG Justice and Home respectively. The Parliament, on its part, expressed its AFSJ priorities in a resolution adopted in April 2014 on the mid-term review of the Stockholm Programme.³⁵⁰ Carrera and Guild criticise the fact that these documents appear to

³⁴³ European Commission, Commission Communication: The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016 [2012] COM(2012) 286 final.

³⁴⁴ European Commission, Commission Communication: Preparing the next steps in border management in the European Union [2008] COM(2008) 69 final. Furthermore e.g., the European Parliament has called upon the EU to make a roadmap to make fundamental rights a reality of LGBT people. See further e.g., Vanessa Leigh, Levent Altan, Jordan Long and Evelyne Paradis, ‘Towards an EU roadmap for equality on grounds of sexual orientation and gender identity’ [2012] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), <<http://www.lgbt-ep.eu/wp-content/uploads/2012/10/European-Parliament-Study-PE462.482-Towards-an-EU-roadmap-for-equality-on-grounds-of-sexual-orientation-and-gender-identity.pdf>> accessed 27 May 2014 and The European Parliament’s The Intergroup on LGBT Rights, <<http://www.lgbt-ep.eu/tag/roadmap/>> accessed 29 May 2014.

³⁴⁵ “The Council agreed on an update of the external relations strategy in the field of judicial cooperation in civil matters. [...] In April 2006 the Council approved a strategy document outlining aspects of judicial cooperation in civil matters (8140/06).” Council of the European Union: EU Council Factsheet, Decisions in Civil Law Matters, Justice and Home Affairs Council, Luxembourg, 6 June 2008.

³⁴⁶ JHA Council: Council conclusions on setting the EU’s priorities for the fight against organised crime between 2011 and 2013 [2011] 9 and 10 June 2011.

³⁴⁷ See e.g., European Parliament: European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme [2009].

³⁴⁸ European Commission, ‘MEMO/14/174, The Future EU Justice and Home Affairs Agendas: Questions and Answers’, <http://europa.eu/rapid/press-release_MEMO-14-174_en.htm> accessed 26 March 2014.

³⁴⁹ European Commission, Commission Communication: An open and secure Europe: making it happen [2014] COM(2014) 154 final.

³⁵⁰ European Parliament: European Parliament resolution of 2 April 2014 on the mid-term review of the Stockholm Programme [2014].

have been largely ignored by the European Council when it adopted its strategy for 2015-2020 despite the fact that the Lisbon Treaty foresees a central role for all three institutions in the development of the AFSJ.³⁵¹

In relation to policy instruments which goal is to develop the Union's fundamental rights infrastructure, there is, to begin with, the "Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union" adopted in 2010, which emphasises the need to take the Fundamental Rights Charter into account in the legislative process.³⁵² Furthermore, the Stockholm Programme can be characterised as a programme which aims to ensure the respect for fundamental rights. A central goal in the programme is to create a Europe built on fundamental rights.³⁵³ According to Trauner, the very idea behind including a fundamental/human rights element in the Stockholm programme was to clarify how the EU should act in controversial situations, such as *non-refoulement* or cooperation with third countries using the death penalty.³⁵⁴ The main bodies of the Union have also adopted more specific fundamental/human rights strategies or road maps in particular policy fields. For example, the Council has adopted a resolution containing a "Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings" (2009).³⁵⁵

As regards the external dimension of the AFSJ, there is most notably the "EU Strategic Framework on Human Rights and Democracy" (2012), in which it is promised that: "The EU will promote human rights in all areas of its external action without exception. In particular, it will

³⁵¹ Sergio Carrera and Elspeth Guild, 'The European Council's Guidelines for the Area of Freedom, Security and Justice 2020 Subverting the 'Lisbonisation' of Justice and Home Affairs?' [2014] *CEPS Essay*, No. 13/14, 6 ('Moreover, an absence of democratic oversight characterised the way in which the Strategic Guidelines were drafted under the auspices of the Greek Presidency of the EU during the first half of 2014. The decision-making processes leading to the adoption of the Guidelines mainly took place behind 'closed doors', excluding central actors such as the European Parliament. It is true that some limited discussions were organised in Brussels, yet the actual setting of priorities and their value added regrettably was not subject to an open, democratic and pluralistic debate, with the participation of civil society and international organisations. The negotiations of the Guidelines took also place during a period of major democratic transition at EU level with the European Parliament elections held at the end of May 2014.')

³⁵² European Commission, Commission Communication: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union [2010] COM(2010) 573 final, 4. Amnesty International has suggested that the EU should adopt a more general "human rights framework strategy" to advance the protection of human rights within the Union. Amnesty International, *The Future of EU Policies in the Area of Freedom, Security and Justice: A Human Rights Perspective* [2014], 3.

³⁵³ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 8.

³⁵⁴ Florian Trauner, 'The Internal-External Security Nexus: More Coherence under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 14.

³⁵⁵ Council of the European Union: Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C295/1.

integrate the promotion of human rights into [...] the external dimensions of [...] the area of freedom, security and justice, including counter-terrorism policy.”³⁵⁶ This strategic framework is accompanied by a Human Rights Action Plan which foresees: (a) that EU policy documents should contain appropriate references to relevant UN and Council of Europe human rights instruments and the EU Fundamental Rights Charter; and (b) that the Union should continue to develop local human rights country strategies in third countries and ensure that these strategies are taken into account in human rights and political dialogues at all levels.³⁵⁷ The adoption of the Human Rights Action Plan was already called for in the Stockholm Programme.³⁵⁸ Also, the Stockholm Programme contains a section with the title “Europe in a Globalised World – The External Dimension of Freedom, Security and Justice”.

4. Secondary law

a) Unilateral EU acts

Based on the founding treaties and guided by the various strategic policy instruments, the EU institutions may adopt secondary EU law. This secondary law includes both so-called unilateral acts and different types of international agreements. The most important unilateral acts are the instruments listed in Article 288 of the TFEU: regulations, directives, decisions, opinions and recommendations. According to Article 288 TFEU:

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

Based on Article 289, regulations, directives and decisions constitute so-called legislative acts. According to Article 290 TFEU a “legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential

³⁵⁶ Human Rights Action Plan [2012].

³⁵⁷ Human Rights Action Plan [2012].

³⁵⁸ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 34.

elements of the legislative act.”³⁵⁹ Within the AFSJ area, the Schengen Borders Code (a regulation), for example, lays upon the Commission to adopt various implementing measures regarding external border controls,³⁶⁰ and the SIS II Regulation gives the Commission the right to implement the regulation by means of a comitology committee which can adopt implementing measures.³⁶¹ There are also other types of unilateral acts, such as communications, resolutions, conclusions and Commission white and green papers.³⁶² These types of acts are not legally binding, but may be politically significant. The AFSJ is also governed by framework decisions and conventions from the pre-Lisbon time which still have legal effect.³⁶³ As instruments, framework decisions are reminiscent of directives as they both require domestic implementing legislation. Peers has, in this regard, noted that in certain AFSJ policy fields where the treaties foresee integration through directives (criminal law), the change of instrument type has not been as dramatic as in some other policy fields where regulations have become the used instrument.³⁶⁴ The international agreements concluded within the AFSJ can be agreements between the EU and countries/organisations outside the EU, agreements between Member States or agreements between different EU institutions.³⁶⁵

In order to guarantee that fundamental rights are protected in the adoption of secondary law, the Commission has adopted strategies to ensure that its legislative proposals are in accordance with the Fundamental Rights Charter.³⁶⁶ Three different mechanisms have been identified:

³⁵⁹ On legislative and non-legislative acts, see further Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) 92-94.

³⁶⁰ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 184.

³⁶¹ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 204.

³⁶² Europa, Summaries of Legislation, ‘Sources of European Union law’ <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114534_en.htm> accessed 24 March 2014.

³⁶³ See further e.g., Annika Suominen, ‘EU criminal law cooperation before and after the Lisbon Treaty – aspects and comments especially in relation to the Norwegian position’ [2012] *Tidskrift utgiven av Juridiska föreningen i Finland* 573, 579-580.

³⁶⁴ Steve Peers, ‘Justice and Home Affairs Law since the Treaty of Lisbon: A Fairy-Tale Ending?’ in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 17, 18 and 20.

³⁶⁵ Europa, Summaries of Legislation, ‘Sources of European Union law’ <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114534_en.htm> accessed 24 March 2014.

³⁶⁶ European Commission, Commission Communication: Compliance with the Charter of Fundamental Rights in Commission legislative proposals [2005] COM(2005) 172 final, and European Commission, Report: On the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights [2009] COM(2009) 205 final. SEC(2011) 567 and COM(2010) 573. The Commission impact assessments are also considered by the Parliament, see further e.g., Strengthening aspects of the presumption of

- The preparing DGs are urged to engage in fundamental rights consultations with stakeholders at early legislative stages;
- Impact assessments should include fundamental rights impact assessments; and
- An explanatory memorandum accompanying legislative proposals should set out a summary of the proposal's fundamental rights compatibility.³⁶⁷

Further, at later legislative stages the co-legislators of the Commission must ensure that the legislative proposals remain in accordance with the Charter.³⁶⁸ The Council has, in this regard, special guidelines on checking fundamental rights compatibility.³⁶⁹ In relation to the Parliament, Rule 36(2) of the rules of procedure provides that: "Where the committee responsible for the subject matter, a political group or at least 40 Members are of the opinion that a proposal for a legislative act or parts of it do not comply with rights enshrined in the Charter of Fundamental Rights of the European Union, the matter shall, at their request, be referred to the committee responsible for the interpretation of the Charter. The opinion of that committee shall be annexed to the report of the committee responsible for the subject-matter." All legislating institutions furthermore have the possibility to ask FRA for a fundamental rights evaluation. More specifically, Article 4 of the FRA Regulation provides that:

1. To meet the objective set in Article 2 and within its competences laid down in Article 3, the Agency shall: [...] (d) formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions [...] when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission; [...]

innocence and the right to be present at trial in criminal proceedings (2014), Initial appraisal of a European Commission Impact Assessment European Commission proposal on procedural safeguards for children in criminal proceedings (2014), Initial appraisal of a European Commission Impact Assessment Smart Borders Package: European Commission proposal on the entry/exit data of third-country nationals crossing the external borders of the EU (2013), Initial appraisal of a European Commission Impact Assessment Smart Borders Package: European Commission proposal on a Registered Traveller Programme (2013), and Initial appraisal of a European Commission Impact Assessment European Commission proposal on the conditions of admission of third-country national students, researchers, school pupils, volunteers, remunerated and unremunerated trainees and au pairs (2013). These initial appraisals are available at European Parliament, Studies, <<http://www.europarl.europa.eu/committees/en/studies.html>> accessed 8 May 2014.

³⁶⁷ See further Israel De Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' [2012] *European Law Review* 397, 399.

³⁶⁸ European Commission, Commission Communication: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union [2010] COM(2010) 573 final, 8. See also Council of the European Union: Better Regulation: Inter-Institutional Common Approach to Impact Assessment (IA) [2005] 14901/05, 24 November 2005.

³⁶⁹ Council of the European Union: Guidelines on Methodological Steps to Be Taken to Check Fundamental Rights Compatibility at the Council's Preparatory Bodies [2011] 10140/11, 18 May 2011.

2. The conclusions, opinions and reports referred to in paragraph 1 may concern proposals from the Commission under Article 250 of the Treaty or positions taken by the institutions in the course of legislative procedures only where a request by the respective institution has been made in accordance with paragraph 1(d). They shall not deal with the legality of acts within the meaning of Article 230 of the Treaty or with the question of whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty.³⁷⁰

If instruments are adopted by alternative procedures, such as the comitology procedure, it is, however, possible that the legislative proposals to some extent escape established checks.³⁷¹

In relation to the Union's external action, the Human Rights Action Plan stipulates that human rights should be incorporated into impact assessments "as and when [...] they are] carried out for legislative and non-legislative proposals, implementing measures and trade agreements that have significant economic, social and environmental impacts, or define future policies."³⁷² It has been put forward that the Union to a greater extent should make human rights impact assessments when entering into cooperation with third countries in relation to, for example, migration control.³⁷³

Further, in connection to secondary law it must be asked how the realisation of fundamental/human rights is ensured *at the implementation stage*. As the FRA pointed out even though the legislation in itself is in accordance with fundamental rights, "it does not necessary translate into rights being [...] upheld".³⁷⁴ One reason for this is that secondary EU law is often the result of political compromise, which sometimes results in open or vague formulations that may open up to undesired implementation.³⁷⁵ Furthermore, on a more

³⁷⁰ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1.

³⁷¹ Cf. Aviation security: "There was no accompanying impact assessment for the original proposal, which was to be adopted through the comitology procedure. The European Parliament reacted with a resolution highlighting the serious impact of body scanners on the right to privacy, data protection and personal dignity." Israel De Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' [2012] *European Law Review* 397, 400-401.

³⁷² Council of the European Union: EU Strategic Framework and Action Plan on Human Rights and Democracy [2012] 11855/12, 25 June 2012.

³⁷³ Amnesty International, *The Future of EU Policies in the Area of Freedom, Security and Justice: A Human Rights Perspective* [2014], 26.

³⁷⁴ FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 3.

³⁷⁵ FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 4. See also e.g., Dirk Vanheule, 'The Multifaceted Role of Law in the Development of European Asylum and Migration Policy', in Christina Gortázar, María-Carolina Parra, Barbara Segaert and Christiane Timmerman (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 89, 92-93 (regarding the Qualification Directive, noting that the 'use of words like *'inter alia'*, *'may'* or *'in particular'* leaves room for discretion to the Member States'.)

general level, it should be remembered that the permissible scope for Member State action depends on which regulatory technique the EU uses, ranging from binding regulations, harmonisation of national law, adopting minimum standards, to imposing requirements of mutual recognition.³⁷⁶ Within many AFSJ policy fields, directives requiring domestic implementing legislation are used as an instrument of harmonisation. Furthermore, in many AFSJ fields, the principle of mutual recognition has assumed an important role in the integration.³⁷⁷ This means that authorities in one Member State are required to fulfil requests or recognise judgments of other Member States.³⁷⁸ As will be considered further in Section IV.C, practice has shown that mutual recognition is not unproblematic from a fundamental rights perspective.

Finally, it should be noted that secondary law may also have human rights content that can create additional human rights obligations for Member States even though the EU does not have a general competence to adopt legislation in the field of fundamental rights. Within the AFSJ, the EU has, for example, adopted directives on rights of victims of crime, on the right to interpretation and translation in criminal proceedings, and on the right to information in criminal proceedings.³⁷⁹ Furthermore, the EU has also adopted secondary legislation concerning data protection,³⁸⁰ non-discrimination³⁸¹ and the rights of children.³⁸² Many other instruments also contain individual clauses on fundamental/human rights.³⁸³

³⁷⁶ On pre-emption and shared competence in the AFSJ, see e.g. Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press 2010) 338.

³⁷⁷ See Human Rights Action Plan [2012], para. 28, and Article 82(2) TFEU.

³⁷⁸ See e.g., Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1 (as amended by Council Framework Decision 2009/299/JHA, OJ L 81/24), Article 1(1). In general, see Sandra Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' in Susanne K. Schmidt (ed), *Mutual Recognition as a New Mode of Governance* (Routledge 2008), 96, and Markus Möstl, 'Preconditions and Limits of Mutual Recognition' [2010] *Common Market Law Review* 405.

³⁷⁹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1, and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

³⁸⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, as amended by Regulation (EC) No 1882/2003, OJ L284/1.

³⁸¹ For an overview of the instruments adopted, see e.g., European Commission, Justice, 'A broad set of rules to tackle racism and xenophobia', <http://ec.europa.eu/justice/fundamental-rights/racism-xenophobia/index_en.htm> accessed 14 March 2014.

b) Agreements with external actors

In relation to international agreements, a distinction is often made in the EU context between agreements in areas where the EU has exclusive competence and agreements in areas where the competences are shared with the Member States and in which the conclusion of an agreement demands Member States' consent. Regarding the hierarchical status of international agreements in EU law, international agreements are binding on the institutions of the EU and the Member States and therefore provide a criterion for the validity of EU acts (regulations, directives, decisions, etc.).³⁸⁴ In the AFSJ, the competences of the Union are shared with Member States.³⁸⁵ The fact that Member States in certain areas can still conclude international agreements has been noted by some to give rise to coherence and fundamental rights concerns.³⁸⁶ Furthermore, within the AFSJ, not only the EU itself, but also some of its agencies conclude international agreements. For example Frontex has collaborated with many third countries on border control through so-called working arrangements.³⁸⁷

³⁸² For an overview of the instruments adopted, see European Commission, Justice, 'EU *acquis* and policy documents on the rights of the child' (last update 24 February 2014), <http://ec.europa.eu/justice/fundamental-rights/files/eu_acquis_2013_en.pdf> accessed 14 March 2014. See also Helen Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing 2012).

³⁸³ Cf. Frontex Fundamental Rights Strategy [2011], para. 8 ('The relevant EU sectoral legislation, starting with the Frontex Regulation, also underlines respect of fundamental rights. Moreover, the Schengen Borders Code in its Articles 3 and 6 as well as in recital 20 calls for the due respect of fundamental rights and the appropriate training of all staff applying this code. This EU legal framework on border control and the respect of fundamental rights has been further reinforced by the Council Decision for the surveillance of the sea external borders. Guarantees and respect for fundamental rights are also laid down in the Return Directive.')

³⁸⁴ Article 216(2) TFEU. Kieran St C Bradley, 'Legislating in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 97, 101. Also see Europa, Summaries of EU Legislation, 'International agreements', <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/ai0034_en.htm> accessed 24 March 2014.

³⁸⁵ Article 4(2)(j) TFEU. On the competences to conclude agreements, see further Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 21-27.

³⁸⁶ "Unless the EU has completely pre-empted a field by common internal and/or external action, the current system of "shared competences" and the protection of essential state functions in the internal security field means that Member States remain free individually to conclude agreements with third countries – a freedom which is amply used in line with national interests. A recent example is the agreement which Germany signed with the US on 1 October 2008 on access to biometric data and the spontaneous sharing of data about known and suspected terrorists, which also provides for mutual assistance in preventing serious threats to public security, including terrorist entry into either country." Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 59.

³⁸⁷ See further e.g., Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships"' [2012] *Merkourios - International and European Migration Law* 20, 25-26, Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum

The international agreements that the EU has concluded with external actors can also be categorised based on their content. Within the AFSJ there are, for example, migration, readmission, visa facilitation/liberalisation and data exchange agreements with third countries.³⁸⁸ Regarding these agreements, Monar has noted that:

The multilateral agreements consist mainly of the participation of the EU/Member States in AFSJ related international legal instruments – such as the 2007 (“Lugano II”) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹²⁰ (which has replaced the 1988 Lugano Convention) – and the agreements concluded with Iceland, Norway, the Swiss Confederation and Liechtenstein concerning aspects of their association with the Schengen system. The majority of the bilateral agreements concern cooperation on readmission and visa facilitation, but there are also agreements on criminal justice and cooperation on law enforcement as well as the association of third-countries with the EU’s Monitoring Centre for Drugs and Drug Addiction. A special sub-category consists of the agreements which Europol, Eurojust, Frontex and the EASO [...] can conclude with third-country authorities. While the number of these agreements is steadily increasing [...] their scope is limited to the exchange of certain categories of information, support for operational cooperation between national authorities and training.³⁸⁹

AFSJ questions may, however, also be part of broader cooperation agreements. Monar has pointed out that the Union has specifically included so-called readmission clauses in framework agreements.³⁹⁰ The goal of such clauses is to regulate the readmission of persons residing without authorisation in the Union to their country of origin.³⁹¹ Also, counter-terrorism cooperation clauses have been common in broader cooperation agreements.³⁹² Nowadays, provisions on JHA cooperation have also become usual in stabilisation and association

Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 64-65 and 101, and Ramses A. Wessel, Luisa Marin and Claudio Matera, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice’, in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 272, 293-297.

³⁸⁸ Sarah Wolff and Grégory Mounier, ‘The External Dimension of JHA: A New Dimension of EU Diplomacy’ in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 241, 241.

³⁸⁹ Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 57-58.

³⁹⁰ Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 55.

³⁹¹ On the history of EU readmission clauses/agreements, see Steve Peers, ‘Irregular Immigration and EU External Relations’, in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers, 2004) 193.

³⁹² Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 56.

agreements (SAAs) and partnership and cooperation agreements (PCAs).³⁹³ Also, many trade agreements include JHA clauses.³⁹⁴

In connection to international agreements in the field of the AFSJ, it is significant to note that the EU is not just concluding bilateral agreements, but also joining multilateral conventions negotiated in other forums. The EU has, for example, signed and approved the UN Convention against Transnational Organised Crime (2000) and its three protocols, and the UN Convention against Corruption (2003), and signed the Hague Convention on Choice of Court Agreements (2009) and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007).³⁹⁵

As regards fundamental/human rights, a distinction may be drawn between agreements that create human right obligations for the EU/its Member States (or reaffirm such obligations), and agreements through which the EU aims to ensure that external actors adhere to human rights. As regards the former type of agreements, it may be noted that the EU has recently joined the UN Convention on the Rights of Persons with Disabilities³⁹⁶ and is currently negotiating the accession to the ECHR.³⁹⁷ As regards human rights in the EU's external action, it has been noted that ever since the emergence of the CFSP the EU has set the development of democracy, rule of law, and human rights and fundamental freedoms as one of its main goals.³⁹⁸ As was noted above, these values are now reflected in the TEU. In most cases, the EU does not, however, make special human rights agreements with external actors, but includes human rights clauses into many different types of bilateral and multilateral agreements.

³⁹³ Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 57.

³⁹⁴ Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 57.

³⁹⁵ Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 67-68.

³⁹⁶ FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 17 ('This marks the first time that the EU has acceded to a legally binding international human rights instrument, taking on the ensuing responsibilities for implementation within its sphere of competence.')

³⁹⁷ See further e.g., JHA Council, Press Release, '3279th Council meeting, Justice and Home Affairs, Brussels, 5 and 6 December 2013'. <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp, <http://echrblog.blogspot.fi/2013/04/accession-of-eu-to-echr-draft-agreement.html>.

³⁹⁸ See, in this regard, Treaty on European Union, signed at Maastricht on 7 February 1992 ('Maastricht Treaty') [1992] OJ C 191/1, Article J.1. See also e.g., Laurent Pech, 'Rule of law as a guiding principle of the European Union's external action' [2012], *CLEER Working Paper*, No. 2012/3, 10 ff.

5. Soft law regulation

The adoption of binding ‘hard law’ does not always *per se* ensure that policies or fundamental rights are effectively realised.³⁹⁹ To ensure more effective implementation the EU has within the AFSJ adopted numerous roadmaps, strategies, action plans, handbooks, guides on best practices, etc. (that is, soft law instruments) containing not only guidance on how EU law should be implemented/interpreted but also more general guidelines to improve AFSJ practices. In this regard, the Stockholm Programme explicitly recognises that: “The development of action at Union level should involve Member States’ expertise and consider a range of measures, including non-legislative solutions such as agreed handbooks, sharing of best practice [...] and regional projects that address those needs, in particular where they can produce a fast response.”⁴⁰⁰ It is important to note, however, that sometimes the adoption of soft law instruments is not really a matter of choice, but rather reflects the fact that the question at hand is too contested for the adoption of legislative measures.⁴⁰¹

To exemplify fundamental rights soft law instruments within the AFSJ, one may mention the Fundamental Rights Strategy adopted by Frontex in 2011.⁴⁰² It is often central in these instruments to stress the applicable fundamental/human rights and to create mechanisms for monitoring (for example, reporting obligations) and staff training. As noted by Rijpma, the main value of the Frontex Fundamental Rights Strategy is “awareness-raising and mainstreaming of fundamental rights in the work of the agency and national authorities, rather than giving wronged individuals an effective tool for redress against the agency.”⁴⁰³ Also, instruments mentioned above as “programming instruments” often contain sections on this kind of question (for example, the ISS⁴⁰⁴ and the Human Rights Action Plan). Within the AFSJ, guidelines

³⁹⁹ FRA, Report, ‘Fundamental Rights in the Future of the European Union’s Justice and Home Affairs’ [2013], 3.

⁴⁰⁰ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 5.

⁴⁰¹ “Above and beyond these quantitative findings, the fact that the EU has preferred an operational approach to a regulatory approach is a typical characteristic of the AFSJ. The creation of ‘soft law’ consisting of various ‘strategies’, ‘programmes’ and ‘roadmaps’ in order to regulate migratory phenomena or fight crime is a good example of this phenomenon, which fits in with the proliferation of agencies which are often tasked with creating and managing these instruments. The attractiveness of the AFSJ as a hotbed for their development is only equalled by the EU’s interest in instruments based on new technologies.” Henri Labayle and Philippe De Bruycker, ‘Towards the Negotiation and Adoption of the Stockholm Programme’s Successor for the Period 2015-2019’ [2013] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 15.

⁴⁰² Frontex Fundamental Rights Strategy [2011].

⁴⁰³ Jorrit J. Rijpma, ‘Institutions and Agencies: Government and Governance after Lisbon’ in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 54, 67.

⁴⁰⁴ European Commission, The EU Internal Security Strategy in Action: Five steps towards a more secure Europe [2010] COM(2010) 673 final.

with a more specific scope have also been adopted, for example, the “Guidelines for the Identification of Victims of Trafficking in Human Beings – Especially for Consular Services and Border Guards”.⁴⁰⁵ The FRA handbooks for practitioners should also be explicitly mentioned in this regard: Handbook on European data protection law (2014), Handbook on European law relating to asylum, borders and immigration (2013), and Handbook on European non-discrimination law (2011).⁴⁰⁶

It is also significant to note that various soft law instruments may also be problematic from a fundamental rights perspective. Within the AFSJ, much criticism has been directed towards the policy significance given to various risk assessments made by agencies. This question of technocratisation and expertisation will be considered further in Section IV.F. Also the unclear legal status of working arrangements concluded by agencies and third countries has been criticised. Fink has in this regard noted that:

working arrangements concluded between Frontex and the respective authorities of third countries, in their current form, show considerable deficiencies from the perspectives of the rule of law, democracy and human rights protection. They are not open to judicial review, the Parliament is not involved in their conclusion and they are not disclosed to the public. Furthermore, the human rights record of cooperating authorities is not considered. Concerns in this respect are frequently attempted to be dispelled by recourse to the ‘technical’ as opposed to ‘political’ nature of working arrangements. Likewise, it is assumed that merely ‘technical relationships’ cannot affect individuals. These arguments are not convincing.⁴⁰⁷

After having considered what kind of instruments EU law provides for the implementation of AFSJ policies for taking fundamental rights into account, the existing instruments within various AFSJ policy fields will now be addressed.

⁴⁰⁵ European Commission, Home Affairs, ‘Guidelines for the identification of victims of trafficking in human beings: Especially for Consular Services and Border Guards’ [2013] <http://ec.europa.eu/anti-trafficking/EU+Policy/Guidelines_identification_victims> accessed 30 May 2014.

⁴⁰⁶ All available at <<http://fra.europa.eu/>> accessed 24 September 2014.

⁴⁰⁷ Melanie Fink, ‘Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding ‘Technical Relationships’ [2012] *Merkourios - International and European Migration Law* 20, 20.

B. The existing regulatory framework (instruments) in the various AFSJ policy fields

1. Border checks, asylum and immigration

a) Legal framework regarding border controls

The goal of the EU's policy on border controls is to abolish the EU's internal border controls and to create a common external border at which various controls take place. In this regard, Article 67(2) TFEU establishes that the Union *shall* ensure the absence of internal border controls for persons. The Union shall both develop a policy⁴⁰⁸ and adopt measures⁴⁰⁹ to ensure this. In a similar manner, the TFEU provides that the Union *shall* frame a common policy on external border control⁴¹⁰ and adopt a policy and measures regarding border checks at the external borders as well as develop a policy with a view to efficient monitoring of the crossing of external borders.⁴¹¹ The Lisbon Treaty granted new powers to the EU to gradually introduce an integrated management system for external borders and to adopt provisions concerning passports, identity cards, residence permits or any other such document.⁴¹² The latter type of secondary legislation must be adopted in accordance with a special legislative procedure.⁴¹³

Control over external borders has often been regarded as a key aspect of State sovereignty and as such it is not surprising that the integration in this field has not always been without controversy. Initially, the border control cooperation took place outside the EU within the so-called Schengen cooperation (1985). After the entry into force of the Amsterdam Treaty, the Schengen *cooperation* has become part of the EU legal framework, however, not all EU States are part of the Schengen *area* (the United Kingdom and Ireland have an option to take part in some or all of the Schengen arrangements (opt-in), while Denmark can decide whether or not to apply certain measures (opt-out)). Furthermore, there are non-EU Member States that take

⁴⁰⁸ Article 77(1)(a) TFEU.

⁴⁰⁹ Article 77(2)(e) TFEU.

⁴¹⁰ Article 67(2) TFEU.

⁴¹¹ Articles 77(1)-(2) TFEU.

⁴¹² Article 77 TFEU. See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 147-148. On the development of the concept of "integrated border management", see further Violeta Moreno-Lax, 'The External Dimension of the Common European Asylum System after Stockholm in Need of a Comprehensive Approach to Access International Protection in the EU', in Christina Gortázar, María-Carolina Parra, Barbara Segaert and Christiane Timmerman (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 99, 100-101.

⁴¹³ Article 77(3) TFEU.

part in the cooperation (Iceland, Norway, Switzerland and Lichtenstein). Nowadays, changes to the Schengen cooperation is made through the adoption of new EU legislation.⁴¹⁴

The following questions have been central in the EU border cooperation in which secondary legislation has been adopted or is planned:

- The abolition of internal border controls and the exceptional reintroduction of border controls by a Member State. Here, the central legislative instrument is the Regulation establishing a Community Code on the rules governing the movement of persons across borders, that is, the so-called Schengen Borders Code.⁴¹⁵
- The common rules for external border checks, including, for example, conditions for short-term stays in the Union and rules on stamping travel documents.⁴¹⁶ Also here the Schengen Borders Code is the central regulating instrument. The Code allows for the adoption of special rules for local border traffic in order to make it possible for inhabitants in border areas to move more freely over the borders. The border area traffic is also regulated by a special regulation.⁴¹⁷ The EU is currently considering whether similar special rules should be adopted for frequent travellers, that is, whether the so-called Registered Traveller Programme should be established.⁴¹⁸
- The EU has created several large-scale databases to effectively manage its borders. In this regard, most notable is the SIS that in April 2013 was replaced by SIS II.⁴¹⁹ Information about persons who should not be admitted to the Schengen Area is stored in SIS II. The SIS II regulation only applies only to States participating in the Schengen cooperation. All EU Member States are, however, bound by the so-called Returns

⁴¹⁴ On the Schengen cooperation, see further e.g., Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) 192-203.

⁴¹⁵ For a more detailed account, see e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 178-182.

⁴¹⁶ See further, e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 182-201.

⁴¹⁷ Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention [2006] OJ L 405/1, as amended by Regulation (EU) No 1342/2011, OJ L 347/41.

⁴¹⁸ European Commission: Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme [2013] COM(2013) 97 final. See also e.g., Julien Jeandesboz, Didier Bigo, Ben Hayes and Stephanie Simon, 'The Commission's legislative proposals on Smart Borders: their feasibility and costs' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

⁴¹⁹ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2006] OJ L381/4.

Directive, which establishes common rules for the return and removal of irregular migrants, but which also contains provisions on entry bans.⁴²⁰ As will be considered further below, there is also a VIS, the function of which is to store data (for example, applicant fingerprint information) and decisions regarding applications for short-stay visas to visit/transit the Schengen Area. The EU is currently contemplating whether to create an entry-exit system (EES) to supervise the length of third-country nationals' stays in the Schengen area.⁴²¹ This database would contain biometric data (fingerprint information) regarding nationals who come from visa-exempted countries.⁴²²

- As was noted in connection to the AFSJ institutions, the EU has created a border control agency Frontex through regulations.⁴²³ Furthermore, the EU has adopted a surveillance system for its southern borders (Eurosur).⁴²⁴ Based on the Schengen Borders Code, the Council has adopted a decision containing rules for maritime surveillance operations coordinated by Frontex.⁴²⁵ On 13 May 2014, the JHA Council adopted a regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex.⁴²⁶

In relation to the external dimension of border controls, Peers has noted: "As for the EU's exercise of its external competence in this area, as well as the various Schengen association

⁴²⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

⁴²¹ See further e.g., European Commission: Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union [2013] COM(2013) 95 final. See also e.g., Julien Jeandesboz, Didier Bigo, Ben Hayes and Stephanie Simon, 'The Commission's legislative proposals on Smart Borders: their feasibility and costs' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), and Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 197-199.

⁴²² FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 18.

⁴²³ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1, as amended by Regulation (EC) No 863/2007, OJ L 199/30.

⁴²⁴ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) [2013] OJ L295/11.

⁴²⁵ Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010] OJ L111/20.

⁴²⁶ Council, Press Release, 'Council adopts new rules for the surveillance of the EU external sea borders', 13 May 2014, 9492/14, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/142569.pdf> accessed 14 May 2014.

agreements (which obviously concern other issues as well as border controls), the EU has negotiated or concluded several treaties solely or largely on the issues of border controls, dealing with the Schengen associates' participation in Frontex, the EU's border funds programme, and the Commission's committees."⁴²⁷

b) Legal framework regarding short-term visas

Closely connected to the question of border checks is the question of visas allowing third-country nationals to enter the Union. In this regard, the TFEU now provides that the Parliament and the Council *shall* adopt measures concerning the common policy on visas and other short-stay residence permits and the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period.⁴²⁸ Regarding visas, topical questions have been:

- Which nationals must have a visa to enter the Union: A regulation settles the countries the citizens of which must have a visa to enter the external borders of the Union and which countries' nationals are exempted from this.⁴²⁹ The individuals who need a visa may, however, also be affected by EU's free movement legislation. Most notably, the EU's Citizens' Directive establishes that third-country national family members of EU citizens under certain circumstances are exempt from visa requirements.⁴³⁰ The EU also has free movement clauses in Schengen association agreements which usually also affects the family members of nationals from these countries.⁴³¹ Based on CJEU case law, EU companies should have the right to send their employees freely to other EU Member States.⁴³²
- The Visa Code adopted through a regulation governs the procedures and conditions for issuing short-term visas in the Schengen area.⁴³³ The format the visa should have has

⁴²⁷ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 224.

⁴²⁸ Article 77(2) TFEU.

⁴²⁹ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1, as amended by later regulations.

⁴³⁰ See further e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 242-243.

⁴³¹ See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 245.

⁴³² See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 245 and the cases referred to there.

⁴³³ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1.

been set out in another regulation.⁴³⁴ In the Stockholm Programme, the European Council suggests a study on the “possibility of establishing a common European issuing mechanism for short term visas.”⁴³⁵

- A central question in the Visa Code is the substantive grounds for deciding whether a visa should be granted. In this regard, Article 21(1) of the Visa Code provides that: “In the examination of an application for a uniform visa, it shall be ascertained whether the applicant fulfils the entry conditions set out in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code, and particular consideration shall be given to assessing whether the applicant presents a risk of irregular immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.” Furthermore, Article 32 of the Code provides that a visa shall be refused if the applicant: presents a false travel document; gives no justification for the purpose and conditions of the intended stay; provides no proof of sufficient means of subsistence for the duration of the stay nor for the return to his/her country of origin/residence; has already exhausted the three months of the current six-month period; is considered to be a threat to the public policy, internal security or public health of one of the Member States; provides no proof of travel medical insurance, if applicable; presents supporting documents or statements whose authenticity or reliability is doubtful; or has been issued an alert in the SIS for the purpose of refusing entry.
- The VIS has been created through a regulation applicable to the Schengen States and Denmark.⁴³⁶ The database contains information on visa applications and biometric data (most notably fingerprints) on visa applicants and its goal is most notably to prevent visa-shopping in many Schengen States, to prevent people from travelling with another person’s travelling documents, and to make it easier to determine which EU State according to the Dublin system is responsible for examining a possible asylum

⁴³⁴ Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas [1995] OJ L 164/1, as amended in 2002 (OJ L53/7) and 2008 (OJ L 235/1). See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 256-258. The question whether the EU should create an Electronic System for Travel Authorisation (EU ESTA) has been considered. See further e.g., PwC Australia, *Policy study on an EU Electronic System for travel Authorization (EU ESTA)* [2011], http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/esta_annexes_en.pdf accessed 8 May 2014.

⁴³⁵ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 27.

⁴³⁶ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) [2008] OJ L218/60, as amended by Regulation (EC) No 810/2009, OJ L243/1.

application.⁴³⁷

The external dimension of the EU policy on short-time visas primarily consists of various visa abolition or visa facilitation agreements. The common visa policy regarding short-term visas has entailed that it is the Union that nowadays concludes these agreements.⁴³⁸ It has been noted that visa liberalisation follows a pattern of conditionality, and that, for example, the Western Balkan roadmaps and Ukraine and Moldova action plans require the States with which the EU cooperates to support the Union's fight against irregular migration by adopting readmission agreements and to participate in the fight against serious criminality before visa liberalisation can be considered.⁴³⁹ Likewise, for example, the adoption of a roadmap for the liberalisation of visas for Turkish nationals was connected to the signing of a readmission agreement between EU and Turkey.⁴⁴⁰

c) The legal framework on immigration

While the goal of short-time visas is to permit temporarily limited visits within the Union, the goal of long-term visas or residence permits is to allow people to live there. In connection to immigration, central questions have therefore been the issuance of work permits, the right to study/train/research within the Union, and family reunification and integration. In relation to these questions, the TFEU provides that the Union *shall* frame a common policy on immigration based on solidarity between Member States which is fair towards third-country nationals.⁴⁴¹ The TFEU also establishes that the Union *shall* develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, and the fair treatment of third-country nationals residing legally in Member States.⁴⁴² More specifically, the TFEU

⁴³⁷ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1, and Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.

⁴³⁸ Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 17-18. See also Bernd Martenczuk, 'Visa Policy and EU External Relations' in Bernd Martenczuk and Servaas van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (Brussels University Press 2008), 42-48.

⁴³⁹ Raül Hernández i Sàgrera, 'The Impact of Visa Liberalisation in Eastern Partnership Countries, Russia and Turkey on Trans-Border Mobility' [2014] *CEPS Paper in Liberty and Security in Europe*, No. 63, 1 and 9.

⁴⁴⁰ See further Kemal Kirişçi, 'Will the readmission agreement bring the EU and Turkey together or pull them apart?' [2014] *CEPS Commentary*, 4 February 2014, 1.

⁴⁴¹ Article 67(2) TFEU.

⁴⁴² Article 79(1) TFEU.

stipulates that the European Parliament and the Council *shall* adopt measures regarding: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; and (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States.⁴⁴³ Regarding integration, the TFEU also grants the institutions powers ('may') to "provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States".⁴⁴⁴

In 2008, the European Council adopted a 'European Pact on Immigration and Asylum', which is a policy document which aims to influence the development of the Union's immigration and asylum policies. There are, however, also many other policy programmes within the field of immigration, such as the Communication from the Commission on Migration (2011),⁴⁴⁵ and a Communication from the Commission entitled "A Common Immigration Policy for Europe: Principles, actions and tools" (2008).⁴⁴⁶ The Stockholm Programme also contains many proposals on how the Union's immigration policy should be developed.

Within the field of immigration, the following central secondary legislation can be identified:⁴⁴⁷

- The central regulatory instrument in relation to labour migration is the so-called Single Permit Directive granting third country migrants rights that are similar to those of EU nationals in respect of working conditions, pensions, social security and access to public services.⁴⁴⁸ Furthermore, the Union has adopted a so-called EU Blue Card Directive to promote the recruitment of highly qualified workers by granting them a special

⁴⁴³ Article 79(2) TFEU.

⁴⁴⁴ Article 79(4) TFEU.

⁴⁴⁵ European Commission, Commission Communication: Communication on migration [2011] COM(2011) 248 final.

⁴⁴⁶ European Commission, Commission Communication: A Common Immigration Policy for Europe: Principles, actions and tools [2008] COM(2008) 359 final. See also European Commission, Commission Communication: Policy Plan on Legal Migration [2005] COM(2005) 669 final.

⁴⁴⁷ On EU migration legislation in general, see further e.g., Dora Kostakopoulou, Diego Acosta Arcarazo and Tine Munk, 'EU Migration Law: The Opportunities and Challenges Ahead', in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 129.

⁴⁴⁸ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1.

residence and work permit.⁴⁴⁹ The EU has also adopted a directive on seasonal workers⁴⁵⁰ and a directive on admission of intra-corporative transferees.⁴⁵¹ The so-called Researchers Directive provides for special residence permits for researchers.⁴⁵²

- There is a special directive on residence permits for studies, pupil exchange, unremunerated training or voluntary service.⁴⁵³
- A directive has been adopted on family reunification in order to determine when third-country nationals lawfully residing in the Union may exercise the right to reunification.⁴⁵⁴ Application of the directive is guided by a Commission communication.⁴⁵⁵
- The EU has furthermore adopted a directive containing special rules for long-term residents (for at least five years) in the Union.⁴⁵⁶ More specifically, the directive granted to long-term residents some rights similar or identical to those of EU citizens.⁴⁵⁷
- EU law contains obligations for Member States to issue residence permits in certain situations and norms on the procedures to be followed in these situations (for example, that the SIS shall be checked for possible alerts).⁴⁵⁸ There are also a regulation

⁴⁴⁹ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

⁴⁵⁰ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375.

⁴⁵¹ Directive adopted by the JHA Council on 13 May 2014. See also European Commission: Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2010] COM(2010) 378 final.

⁴⁵² Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L289/15.

⁴⁵³ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L375/12. In 2013, the Commission suggested modifications to this directive (as of August 2014 the proposal had not been adopted). European Commission: Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing [2013] COM(2013) 151 final.

⁴⁵⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

⁴⁵⁵ European Commission, Commission Communication: on guidance for application of Directive 2003/86/EC on the right to family reunification [2014] COM(2014) 210 final.

⁴⁵⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44.

⁴⁵⁷ See further e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 478-483.

⁴⁵⁸ See further e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 488-489.

establishing a uniform format for residence permits,⁴⁵⁹ and norms for the issuance of long-term visas.⁴⁶⁰

- In relation to integration of immigrants, the EU has adopted soft law instruments such as Common Basic Principles for Immigrant Integration Policy in the European Union (2004)⁴⁶¹ and the European Agenda for the Integration of Third-Country Nationals (2011).⁴⁶²

The external dimension of the EU's migration policy is based on the Global Approach to Migration and Mobility (GAMM), which has been functional since 2005 and which was renewed in 2011. It is based on dialogues and partnerships with non-EU countries of origin, transit and destination.⁴⁶³ More concretely, the GAMM is based on mutual interests and may result in Mobility Partnerships (MP) or Common Agendas for Migration and Mobility (CAMP), of which the latter (and looser) form of cooperation is often used in relations with non-neighbouring States.⁴⁶⁴

d) The legal framework regarding asylum

While the EU policies on border checks, visas, etc. have as their goal to determine who has the right to enter the Union, the EU policy on asylum addresses the question of whether certain third-country nationals finding themselves within the Union have a right to international protection. In relation to asylum, the founding treaties of the Union establish that the Union *shall* frame a common policy on asylum, based on solidarity between Member States, which is

⁴⁵⁹ Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L157/1, as amended by Council Regulation (EC) No 380/2008, OJ L115/1.

⁴⁶⁰ See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 492-493.

⁴⁶¹ JHA Council, Press Release, 14615/04, '2618th Council Meeting, Justice and Home Affairs, Brussels, 19 November 2004' [2004].

⁴⁶² European Commission, Commission Communication: European Agenda for the Integration of Third-Country Nationals [2011] COM(2011) 455 final. On integration, see further e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 493-495.

⁴⁶³ See e.g., European Commission, Home Affairs, 'Global Approach to Migration and Mobility', <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration/index_en.htm> accessed 16 May 2014. See also European Commission, Commission Communication: The Global Approach to Migration and Mobility [2011] COM(2011) 743 final.

⁴⁶⁴ European Commission, Home Affairs, 'Global Approach to Migration and Mobility', <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration/index_en.htm> accessed 16 May 2014. Raúl Hernández i Sagrera, 'The Impact of Visa Liberalisation in Eastern Partnership Countries, Russia and Turkey on Trans-Border Mobility' [2014] *CEPS Paper in Liberty and Security in Europe*, No. 63, 11 (regarding mobility partnerships).

fair towards third-country nationals.⁴⁶⁵ Furthermore, the TFEU stipulates that the Union *shall* develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*.⁴⁶⁶ The TFEU continues by requiring that the Parliament and Council adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.⁴⁶⁷

The TFEU also establishes that in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of third-country nationals the Council, on a proposal from the Commission, *may* adopt provisional measures for the benefit of the Member State(s) concerned.⁴⁶⁸ The development of EU asylum law has been affected by programming instruments such as the European Pact on Immigration and Asylum (2008) and the Stockholm Programme.

The EU has since 1999 been working for the creation of a CEAS. The secondary legislation in the area contains:

⁴⁶⁵ Article 67(2) TFEU. See also Article 80 TFEU. On the concept of “solidarity”, see e.g., Kaarlo Tuori, ‘A European Security Constitution?’ in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 39, 58 ff.

⁴⁶⁶ Article 78(1) TFEU.

⁴⁶⁷ Article 78(2) TFEU.

⁴⁶⁸ Article 78(3) TFEU.

- the Temporary Protection Directive⁴⁶⁹
- the Asylum Procedures Directive⁴⁷⁰
- the Reception Conditions Directive⁴⁷¹
- the Qualification Directive⁴⁷² (on the grounds for international protection within the Union)
- the so-called Dublin Regulations⁴⁷³ (clarifying which state is responsible for examining the asylum application)
- the Eurodac regulation⁴⁷⁴ (on the database containing, most notably, the fingerprints of asylum seekers and third-country national who have crossed the border irregularly)

⁴⁶⁹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

⁴⁷⁰ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13. See also Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

⁴⁷¹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18. See also Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

⁴⁷² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12. See also Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

⁴⁷³ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1, and Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31. The 2003 Dublin regulation was preceded by the 1990 Dublin Convention.

⁴⁷⁴ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/1. Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1.

Most of these directives and regulations have recently been updated by new directives or regulations, some of which, however, have not yet entered into force. In relation to this, Labayle and De Bruycker have held that:

There can be no question that the adoption in the first half of 2013 of a package of second-generation regulations on asylum was a step forward on the long road towards implementation of the common European asylum system provided for by the Treaty of Lisbon. Although the initial deadline was put back from 2010 to 2012, the adoption of a legislative package of such significance and with such clear financial implications during the current crisis serves as confirmation of the fact that the European Union continues to pursue ambitious goals in the area of asylum policy, all the more so because the negotiations lasted a whole five years and were not without their difficulties.⁴⁷⁵

The EU's external asylum policy has been controversial.⁴⁷⁶ So far the Union has chosen to initiate so-called Regional Protection Programmes which aim to improve the capacity of non-EU states from which many refugees originate or through which they pass.⁴⁷⁷ A contested question has been whether new legal ways to enter the Union should be created for people in need of international protection. In this regard, the extraterritorial processing of asylum applications and the development of protected-entry procedures have been debated.⁴⁷⁸ It is often pointed out that there is incoherence between EU's internal migration policy (focusing on protection)

⁴⁷⁵ Henri Labayle and Philippe De Bruycker, 'Towards the Negotiation and Adoption of the Stockholm Programme's Successor for the Period 2015-2019' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 18.

⁴⁷⁶ A protected entry system and an EU resettlement scheme were suggested in 2003. European Commission, Commission Communication: Towards more accessible, equitable and managed asylum systems [2003] COM(2003) 315 final. The EU resettlement scheme was also endorsed in a later communication, which also contained a suggestion for regional protection programmes. European Commission, Commission Communication: On the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin "Improving Access to Durable Solutions" [2004] COM(2004) 410 final. See also European Commission, Commission Communication: on regional protection programmes [2005] COM(2005) 388 final. See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 379-380, and Steven Sterkx, 'The External Dimension of EU Asylum and Migration Policy: Expanding Fortress Europe?' in Jan Orbie (ed), *Europe's Global Role: External Policies of the European Union* (Ashgate 2008) 117, 119 ff.

⁴⁷⁷ "Since 2007 a number of projects have been launched. The first focuses on Tanzania – hosting the largest refugee population in Africa. The second covers Moldova, Belarus, and Ukraine, which together constitute a major transit region towards the EU. Since September 2010, a new programme began in the Horn of Africa, and plans to develop one for Egypt, Libya and Tunisia started during the Arab Spring. Not only humanitarian but also migration policy considerations have been contemplated in the selection of these locations, with little regard for human rights or the fact that some of these countries are not party to the Refugee Convention." Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 18-19.

⁴⁷⁸ See further e.g., Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 19, and Steve Peers, 'External Processing of Applications for International Protection in the EU' [2014] *EU Law Analysis* [blog].

and external migration policy (focusing on keeping those in need of protection outside the Union area).⁴⁷⁹

e) The legal framework addressing irregular immigration

In connection to irregular immigration, the TFEU provides that the Union *shall* develop a common immigration policy aimed at ensuring at all stages the prevention of and enhanced measures to combat illegal immigration and trafficking in human beings.⁴⁸⁰ More specifically, the TFEU stipulates that the Parliament and the Council *shall* adopt measures regarding illegal immigration and unauthorised residence (including removal and repatriation of persons residing without authorisation) and combating trafficking in persons.⁴⁸¹ Furthermore, the TFEU establishes that the Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.⁴⁸²

The EU's measures against illegal immigration, in short, consist of the following types of measures:

- Measures to improve border controls at the external borders.⁴⁸³
- Measures against those who organise irregular immigration/human trafficking.⁴⁸⁴ An

⁴⁷⁹ Cf. "A close review of EU policy in the area of asylum and the coherence between its internal and external policies reveals that the main objective of the Common European Asylum System (CEAS) is to guarantee a minimum level of international protection in all Member States. On the other hand, there is a very prominent focus on the prevention of abuse and irregular movements of refugees and no legal route of entry for asylum purposes in the EU. As a result, while the CEAS pursues an overall protection goal, the system is rendered inaccessible to its addressees [...] This is the context in which The Hague Programme launched 'the external dimension of asylum', with a view to alleviate the problem of access to international protection. Against this background the Joint Resettlement Programme, Regional Protection Programmes and offshore processing plans all focus on the actions to move asylum obligations elsewhere. Our conclusion is that, because these mechanisms draw heavily on border and migration control preoccupations, their results have been unsatisfactory so far." Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 2.

⁴⁸⁰ Article 79(1) TFEU. On the historical development of EU norms on irregular migration, see further e.g., Ryszard Cholewinski, 'European Union Policy on Irregular Migration: Human Rights Lost?', in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers, 2004) 159.

⁴⁸¹ Article 79(2) TFEU.

⁴⁸² Article 79(3) TFEU.

⁴⁸³ Regarding these measures, see further Section III.B.1.

⁴⁸⁴ E.g., Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision

important instrument in this regard is the Carriers' Sanctions Directive, which obliges Member States to penalise transport companies who bring people without appropriate documentation to the EU territory.⁴⁸⁵

- Measures to hinder the use of irregular labour forces. In this regard, the so-called Employer Sanctions Directive is especially central (not applicable to Denmark, Ireland and the UK).⁴⁸⁶
- Measures that ensure an effective return and readmission policy: Through the Return Directive, the Union has adopted common rules for managing the return of irregular migrants.⁴⁸⁷ There are also directives and decisions regulating the operational cooperation regarding return of illegal third-country nationals.⁴⁸⁸ The Commission has recently submitted a communication on effective implementation of the norms regarding returns.⁴⁸⁹

In connection to illegal immigration, the external dimension of the policy plays a significant role. Monar has, in this regard, noted: "Without its external dimension, EU asylum and migration policy as part of the AFSJ would face the prospect of both higher pressures on its (porous) borders and fewer possibilities to send third-country nationals in an irregular situation back, which could add significantly to the domestic political problems many Member States are

2002/629/JHA [2011] OJ L101/1. See further Europa, Summaries of Legislation: 'Fight against trafficking in human beings',

<http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_trafficking_in_human_beings/index_en.htm> accessed 19 June 2014.

⁴⁸⁵ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [1985] OJ L 187/45.

⁴⁸⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24. See also Elspeth Guild, 'What are the Member States doing regarding sanctions on employers of irregularly staying third country nationals?' [2014] *EU Law Analysis* [blog] 7 June 2014.

⁴⁸⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

⁴⁸⁸ Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air [2003] OJ L 321/26, Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [2004] OJ L 261/28, and Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals [2001] OJ L149/34.

⁴⁸⁹ European Commission, Commission Communication: on EU Return policy [2014] COM(2014) 199 final. See also European Commission, Memo, 'Frequently Asked Questions: the EU Return Policy', 28 March 2014, <http://europa.eu/rapid/press-release_MEMO-14-243_en.htm> accessed 30 May 2014.

experiencing in this policy field.”⁴⁹⁰ The readmission agreements with third countries are today numerous and they are often linked to other agreements such as visa facilitation agreements.⁴⁹¹

f) Fundamental or human rights concerns

The EU cooperation in relation to border controls, visas, immigration and asylum may affect many different fundamental rights guaranteed by the Fundamental Rights Charter, such as the right to seek asylum (Article 18), the right to protection against torture and inhuman or degrading treatment (Article 4), the right to protection in the event of removal, expulsion or extradition (Article 19),⁴⁹² and the right to respect for family life (Article 7, including the right to family reunion and to visit family members).⁴⁹³ Furthermore, the TFEU explicitly provides that third-country nationals must be treated *fairly* if they reside legally in Member States⁴⁹⁴ and that the common policy on asylum, immigration and external border control shall be *fair* towards third-country nationals.⁴⁹⁵ In the EU’s own policy documents/reports and in academic literature the following fundamental/human rights issues in particular have been identified within the field of border controls, migration and asylum:

Access to the Union: In the Stockholm Programme, it is argued that the Union should work for: “Access to Europe for [...] persons in need of international protection and others having a legitimate interest to access the Union’s territory has to be made more effective and efficient.”⁴⁹⁶ In the programme, it is also held that: “strengthening of border controls should not prevent access to protection systems by those persons entitled to benefit from them, and

⁴⁹⁰ Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 16-17.

⁴⁹¹ European Commission, Home Affairs, ‘Visa Policy’, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm> accessed on 23 April 2014. See further e.g., Jean-Pierre Cassarino, ‘Readmission Policy in the European Union’ [2010] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE).

⁴⁹² Article 19 of the Fundamental Rights Charter provides that collective expulsions are prohibited and that: “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

⁴⁹³ Of these rights, Wiesbrock has argued that the right to family life is of special importance. See further Anja Wiesbrock, ‘Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty’ [2013] *Maastricht Journal of European and Comparative Law* 423, 431-432.

⁴⁹⁴ Article 79 TFEU.

⁴⁹⁵ Article 67(2) TFEU.

⁴⁹⁶ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 5. Also the TFEU Article 67(2) emphasizes fairness towards third-country nationals when it comes to external border control.

especially people and groups that are in vulnerable situations.”⁴⁹⁷ While the Union has recently adopted instruments to make it easier for some people to enter the Union area (workers/students),⁴⁹⁸ the Union has not really become accessible for people in need of international protection.⁴⁹⁹ The result of this is well captured by Moreno-Lax who notes that: “Although, in principle, illegal immigration and asylum constitute separate phenomena, refugees are often compelled, in practice, to resort to irregular means to access international protection.”⁵⁰⁰ There is hence still a market for illegal smuggling of persons into the Union. In this regard, the development of the system of humanitarian visas has been put forward,⁵⁰¹ and it has been debated whether it should be possible to apply for asylum from outside the EU. Peers has also held that: “the rules on entry bans in SIS II and the Returns Directive still lack precision and give Member States too much leeway for disproportionate penalization of persons who commit relatively minor breaches of immigration law.”⁵⁰² When issuing visas, a human-rights friendly procedure entails that persons applying for visas are given information about reasons for refusal and a right to appeal. Article 32(2)-(3) of the Visa Code now provides visa applicants with such rights. The EU visa lists, and the criteria used to determine which states are subject to visa requirements, have also been criticised for breaching the principle of non-discrimination as more or less all countries with a black/Muslim majority population are on the list.⁵⁰³ It has also been pointed out that EU Member States should not have legislation that

⁴⁹⁷ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 26.

⁴⁹⁸ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 398-408 (legal migration: family reunion, family life, non-discrimination).

⁴⁹⁹ Cf., however: “It should be noted that the EU’s visa legislation makes implied provision for human rights in several respects. The visa code provides that a fee for a visa application can be waived or reduced in individual cases for humanitarian reasons. Also, the visa Code sets out procedural rights in the event of refusal of a visa application, and there are a parallel data protection safeguards in the legislation governing the VIS. According to the visa code, Member States may issue a visa even if the usual criteria for obtaining one are not met, inter alia for humanitarian reasons [...]” Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 241-242. Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 314-323 (refugee law).

⁵⁰⁰ Violeta Moreno-Lax, ‘The External Dimension of the Common European Asylum System after Stockholm in Need of a Comprehensive Approach to Access International Protection in the EU’, in Christina Gortázar, María-Carolina Parra, Barbara Segaert and Christiane Timmerman (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 99, 101.

⁵⁰¹ FRA, Report, ‘Fundamental Rights in the Future of the European Union’s Justice and Home Affairs’ [2013], 18-19.

⁵⁰² Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 225.

⁵⁰³ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 256 (referring to Cholewinski & Guild see fn 216 on 255).

prevent people from helping people in life-threatening distress when trying to enter the Union illegally.⁵⁰⁴

Human-rights friendly border checks:⁵⁰⁵ Security scanning at airports and other border checks must be conducted in a manner that respects individual dignity and in a safe manner from a health perspective.⁵⁰⁶ The supervision of sea borders must also be conducted in a way that respects human rights.⁵⁰⁷ Notably, much criticism has been directed against Frontex operations at the Mediterranean.⁵⁰⁸ The mass-surveillance systems the Union is developing have been found to be problematic from a fundamental rights perspective.⁵⁰⁹

Data protection/right to privacy and large-scale databases: The EU's large-scale databases have received a lot of human rights criticism. Also the Stockholm Programme recognises that data protection is essential and that: "Basic principles such as purpose limitation, proportionality, legitimacy of processing, limits on storage time, security and confidentiality as well as respect for the rights of the individual, control by national independent supervisory authorities, and access to effective judicial redress need to be ensured and a comprehensive protection scheme must be established."⁵¹⁰ More specifically, the SIS/SS II and VIS databases have been criticised for the discretion they grant to Member States as regards registrations and the lack of possibilities entry/asylum/visa applicants have to challenge registrations made.⁵¹¹ In this regard, Peers has noted in connection to the SIS/SIS II system that:

⁵⁰⁴ E.g., that captains of ships rescuing people from the sea being accused of smuggling/trafficking. See further Elspeth Guild and Sergio Carrera, 'EU Borders and Their Controls: Preventing unwanted movement of people in Europe?' [2013] *CEPS Essay*, No. 6, 2. See also FRA, Report, 'EU solidarity and Frontex: fundamental rights challenges' [2013].

⁵⁰⁵ See further FRA, Annual report, 'Fundamental rights: challenges and achievements in 2012' [2013], Chapter 2.

⁵⁰⁶ European Commission, Report: 2010 Report on the Application of the EU Charter of Fundamental Rights [2011] COM(2011) 160 final, 8, and European Commission, Report: 2011 Report on the Application of the EU Charter of Fundamental Rights [2012] COM(2012) 169 final, 5.

⁵⁰⁷ European Commission, Report: 2010 Report on the Application of the EU Charter of Fundamental Rights [2011] COM(2011) 160 final, 8.

⁵⁰⁸ See further e.g., Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' [2009] *International Journal of Refugee Law* (2009) 256 and Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' [2011] *International Journal of Refugee Law* 174.

⁵⁰⁹ See further e.g., FRA, Report, 'Fundamental rights at Europe's southern sea borders' [2013].

⁵¹⁰ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 10.

⁵¹¹ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 208 and 279-280.

[I]t is unfortunate that there was not some degree of greater harmonization of the grounds for issuing an alert [in the SIS II system] [...]. There is also a fundamental problem in that there is no obligation to publish the national criteria for issuing alerts in the EU's Official Journal. Without that information it is clearly far more difficult for any person to know if the alert on him or her was correctly or lawfully added to SIS II [...]. A person refused entry at the border need not even be told which Member State issued a SIS [...] alert on him or her. The resulting lack of foreseeability of the circumstances in which data will be collected and processed violate basic principles of data protection law.⁵¹²

A disputed question has also, for example, been the types of data that shall be stored in the databases and especially the use of biometric data. Another controversial question has been the extent to which data can be transferred to, for example, non-EU States and international organizations. The general rule today is that such external transfers cannot be made.⁵¹³ In this connection, it should be noted that the fact that the Member States and the various AFSJ agencies increasingly have gained access to the various databases, in practice, has entailed that

⁵¹² Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 209.

⁵¹³ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2006] OJ L 381/4, para. 4 ('Data processed in SIS II in application of this Regulation should not be transferred or made available to third countries or to international organisations.'). Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences [2008] OJ L218/129, para. 4. 'Personal data obtained pursuant to this Decision from the VIS shall not be transferred or made available to a third country or to an international organisation. However, in an exceptional case of urgency such data may be transferred or made available to a third country or an international organisation, exclusively for the purposes of the prevention and detection of terrorist offences and of other serious criminal offences and under the conditions set out in Article 5(1) of this Decision, subject to the consent of the Member State having entered the data into the VIS and in accordance with the national law of the Member State transferring the data or making them available. In accordance with national law, Member States shall ensure that records are kept of such transfers and make them available to national data protection authorities on request. The transfer of data by the Member State that entered the data in the VIS according to Regulation (EC) No 767/2008 shall be subject to the national law of that Member State.') and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1, para. 41 ('Transfers of personal data obtained by a Member State or Europol pursuant to this Regulation from the Central System to any third country or international organisation or private entity established in or outside the Union should be prohibited, in order to ensure the right to asylum and to safeguard applicants for international protection from having their data disclosed to a third country. [...] That prohibition should be without prejudice to the right of Member States to transfer such data to third countries to which Regulation (EU) No 604/2013 applies, in order to ensure that Member States have the possibility of cooperating with such third countries for the purposes of this Regulation.').

the databases are not only used for their original purpose but as “law enforcement tools”.⁵¹⁴ More specifically, national police authorities and Europol can gain access to both the VIS⁵¹⁵ and Eurodac (as of 20 July 2015)⁵¹⁶ databases when investigating terrorism and other serious criminality. In relation to multiuse of data, it should be noted that Article 8(2) of the Fundamental Rights Charter provides that: “data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.” On a more principled level, it has also been questioned whether there is a legitimate need for establishing these kinds of databases that contain sensitive information and as such affect the right to privacy of people. In this regard, Guild and Carrera have pointed out that:

Considering the financial expenses of setting up the VIS and its operation, the intrusion into the private lives of third country nationals not least with the collection of biometric data in the form of fingerprints, this is a very dubious project. 2.4 million sets of fingerprints were entered into the VIS in 2012 and made available to all EU border and law enforcement agencies yet EU border guards only detected 7,888 cases of document fraud in that year and a third of those were in respect of people who do not need visas and so whose details are not in the VIS. In light of this information, it is difficult to claim that the VIS is a border control technology. Yet for the moment, the EU agencies make no other claim regarding the reason for the VIS’s existence.⁵¹⁷

⁵¹⁴ See further Jorrit J. Rijpma, ‘Institutions and Agencies: Government and Governance after Lisbon’ in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 54, 68-69.

⁵¹⁵ Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences [2008] OJ L218/129.

⁵¹⁶ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1, para. 31: ‘For the purposes of protection of personal data, and to exclude systematic comparisons which should be forbidden, the processing of Eurodac data should only take place in specific cases and when it is necessary for the purposes of preventing, detecting or investigating terrorist offences or other serious criminal offences. A specific case exists in particular when the request for comparison is connected to a specific and concrete situation or to a specific and concrete danger associated with a terrorist offence or other serious criminal offence, or to specific persons in respect of whom there are serious grounds for believing that they will commit or have committed any such offence. A specific case also exists when the request for comparison is connected to a person who is the victim of a terrorist offence or other serious criminal offence. The designated authorities and Europol should thus only request a comparison with Eurodac when they have reasonable grounds to believe that such a comparison will provide information that will substantially assist them in preventing, detecting or investigating a terrorist offence or other serious criminal offence.’

⁵¹⁷ Elspeth Guild and Sergio Carrera, ‘EU Borders and Their Controls: Preventing unwanted movement of people in Europe?’ [2013] *CEPS Essay*, No. 6, 10.

The authors likewise question the reasons given for the planned EES and frequent travellers systems.⁵¹⁸

The human-rights friendly treatment of non-EU-citizens who have entered the Union:⁵¹⁹ The Stockholm Programme does not only emphasise the Union's responsibility towards its citizens, but also talks about "other persons for whom the Union has a responsibility".⁵²⁰ This is significant, especially in connection to migrants and asylum seekers, but also, for example, in relation to irregular immigrants who find themselves on the territory of the Union. In this regard, the FRA has emphasised the right to basic rights such as education or healthcare.⁵²¹ It is also important that everyone has access to justice, and in connection to refugees, the FRA has stressed that: "Member States' authorities should better inform potential asylum seekers about the relevant procedures so that these become truly accessible. This includes the provision of information in the language of an applicant, reasonable time limits and effective legal assistance."⁵²² It should also be ensured that irregular migrants who are afraid of detection and return can report crimes committed against them.⁵²³ Special care should be shown towards vulnerable non-EU citizens, such as unaccompanied minors and torture survivors.⁵²⁴

Human-rights friendly treatment of irregular migrants:⁵²⁵ FRA has pointed out that the conditions in detention facilities used to hold persons in return procedures must meet certain minimum standards, and that not all Member States have been able to ensure this.⁵²⁶ It has also been questioned to what extent the EU's approach to irregular migrants, who have often fled difficult conditions, is too harsh. In this regard, Amnesty International has objected to a

⁵¹⁸ Elspeth Guild and Sergio Carrera, 'EU Borders and Their Controls: Preventing unwanted movement of people in Europe?' [2013] *CEPS Essay*, No. 6, 14.

⁵¹⁹ FRA, Annual report, 'Fundamental rights: challenges and achievements in 2012' [2013] Chapter 1.

⁵²⁰ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 4.

⁵²¹ FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 21. See also FRA, Report, 'Fundamental rights of migrants in an irregular situation in the European Union: Comparative report' [2011].

⁵²² FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 11 (referring to a 2010 FRA Report).

⁵²³ FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 21.

⁵²⁴ See e.g., European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 9, and Amnesty International, *World Report 2014* [2014], <<http://www.hrw.org/world-report/2014/>> accessed 30 May 2014, Chapter 'European Union'.

⁵²⁵ FRA, Report, 'Criminalisation of migrants in an irregular situation and of persons engaging with them' [2014].

⁵²⁶ FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 21.

dehumanisation and criminalisation of migrants who only commit administrative offences by attempting to cross borders irregularly and pose no threat to the security of the state or its people. In addition, the use in the EU of the term ‘illegal’ in connection to migrants, differs from common international practice that prefers the term ‘irregular’; “People can be undocumented or have an irregular immigration status but cannot be illegal.”⁵²⁷

Human-rights friendly treatment of potential irregular migrants and former irregular migrants in States with which the EU cooperates: From an EU perspective, the question of to what extent the EU can and should cooperate in asylum/immigration matters with States that do not have a good human rights record is central.⁵²⁸ For example, Amnesty International has criticised the “outsourcing of migration control to non-EU countries with a deplorable human rights record” and mentions Libya as such a State.⁵²⁹ In this regard, the ECtHR judgment in the *Hirsi and others v. Italy case*, where the Court condemned Italy for returning to Libya Somali and Eritrean nationals, is especially central.⁵³⁰ In the Human Rights Action Plan, it is established that the Union should develop a joint framework for raising issues of statelessness and arbitrary detention of migrants with third countries.

Outsourcing of State functions to private actors: Directives, such as the directives on carriers’ and employers’ sanctions, have been criticised for the privatisation of migration control. In imposing fines on transport companies for bringing foreign nationals without proper documentation to the EU territory, a border control function is performed by the carrier. This can result in unclear or “vanishing” responsibility for human rights violations.⁵³¹

The principle of mutual trust: Within the ASFJ fields of border controls, asylum and immigration a central human rights question has also been to what extent the principle of

⁵²⁷ Amnesty International, *The Future of EU Policies in the Area of Freedom, Security and Justice: A Human Rights Perspective* [2014], 23.

⁵²⁸ Sarah Wolff and Grégory Mounier, ‘The External Dimension of JHA: A New Dimension of EU Diplomacy’ in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 241, 247.

⁵²⁹ Amnesty International, Public Statement, ‘EU Leaders Must Urgently Act to Stop the Increasing Death Toll in the Mediterranean Sea’ [2014], 13 May 2014. Such criticism can also be found in academic literature. See e.g., Violeta Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ [2011] *International Journal of Refugee Law* 174, 174-175 and 200-201.

⁵³⁰ See further Judgment of 23 February 2012 in *Hirsi Jamaa and Others v Italy* [GC], no. 27765/09, ECHR 2012. See also Sarah Wolff, ‘The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at Home What the European Union Preaches Abroad’ [2013] *Hague Journal on the Rule of Law*, 129-130.

⁵³¹ Anja Wiesbrock, ‘Shifting the Burden: The Privatisation of Migration Control in the EU’ in Christina Gortázar, María-Carolina Parra, Barbara Segaert and Christiane Timmerman (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 175.

mutual trust and recognition affects the fundamental rights obligations of individual Member States.⁵³² To what extent can and should a Member State trust that other Member States respect fundamental rights when they implement AFSJ policies? In this regard, a clear principle has been established: the human rights obligations of individual States continue to have effect in spite of supranational cooperation. Both the CJEU⁵³³ and the ECtHR⁵³⁴ have found that a State cannot transfer an asylum seeker to another Member State if there are systemic deficiencies in the asylum procedure and reception conditions of that country amounting to substantial grounds for believing that a person would face a real risk of being subjected to inhuman or degrading treatment of which the transferring State cannot be unaware. (The fundamental rights issues connected to the principle of mutual trust will be considered further in Chapter IV.)

The principle of mutual trust can be problematic for EU Member States, but also for individuals. The EU starts in many situations from the presumption that all EU States apply the same standards, which, however, is not always the case in practice. An example of this is given by FRA in its 2013 JHA Report:

In spite of the massive legislative work done on asylum at the EU level and the support given to national asylum systems, including through EU funding, the chances an applicant for international protection has for obtaining such protection depend greatly on the Member State in which he or she applies. According to Eurostat data extracted on 6 December 2013, for example, in 2012 at first instance some 93 % of

⁵³² Helena Raulus, 'Fundamental Rights in the Area of Freedom, Security and Justice' in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 213, 229.

⁵³³ Judgment of 21 December 2011 in *N. S. respectively M. E. and Others*, C-411/10 and C-493/10, para. 94 ('It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.')

⁵³⁴ Judgment of 21 January 2011 in *M.S.S. v Belgium and Greece* [GC], no. 30969/09, ECHR 2011, paras 353 and 359 ('The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention [...]. The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. [...].')

Afghan applicants were found to be in need of protection in Italy, compared to only 17 % in Poland. Similarly, 23 % of Somalis were given asylum in France, compared to some 70 % in Germany. This illustrates that there is still a long way to go to create the level playing field on which the Dublin system is premised.⁵³⁵

As a solution to this kind of problems, the FRA suggests deeper AFSJ integration, namely processing of asylum applications by an EU entity.⁵³⁶

2. Criminal law and police cooperation

a) The legal framework in the criminal law and police cooperation

Criminal law is traditionally viewed as a national branch of law and its Europeanization was initially met with resistance. The transnational character of certain forms of crime has, however, pushed towards the creation of both regional (European) and international criminal law and cooperation.

Regarding criminal law, the TFEU firstly establishes that the Union *shall* endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.⁵³⁷ The TFEU also stipulates that the Union *shall* adopt measures to lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions.⁵³⁸ Secondly, the TFEU provides that to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council *may* by means of directives establish minimum rules, concerning: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by

⁵³⁵ FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 19-20.

⁵³⁶ FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 20.

⁵³⁷ Article 67(3) TFEU.

⁵³⁸ Article 82(1) TFEU.

a decision.⁵³⁹ Thirdly, the Union may, regarding certain crimes, adopt rules concerning the definition of criminal offences and sanctions by means of directives.⁵⁴⁰

As regards cooperation connected to enforcement, the EU shall adopt measures to prevent and settle conflicts of jurisdiction between Member States, support the training of the judiciary and judicial staff, and facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.⁵⁴¹ The TFEU regulates both the main tasks of Europol and Eurojust and foresees the establishment of an EPPO.⁵⁴² Regarding Police cooperation, the TFEU provides that the Parliament and the Council may establish measures concerning: (a) the collection, storage, processing, analysis and exchange of relevant information; (b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection; (c) common investigative techniques in relation to the detection of serious forms of organised crime.⁵⁴³ The Treaty also establishes that the Council may, in certain circumstances, establish measures concerning operational police cooperation between the authorities.⁵⁴⁴ The TFEU also provides that the Parliament and Council *may* establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.⁵⁴⁵ In relation to preventing and combating terrorism and related activities, the TFEU stipulates that the Union, by means of regulations, shall define a framework for administrative measures with regard to capital movements and payments such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.⁵⁴⁶

At present, EU criminal law and police cooperation is regulated by both framework decisions and more recent directives/regulations:

⁵³⁹ Article 82(2) TFEU.

⁵⁴⁰ Article 83 TFEU.

⁵⁴¹ Article 82(1) TFEU.

⁵⁴² See further Chapter II.

⁵⁴³ Article 87(2) TFEU.

⁵⁴⁴ See further Article 87(3) TFEU. On the difficulty to distinguish operational and non-operational police cooperation, see, however, further Anna Jonsson Cornell, 'EU Police Cooperation Post-Lisbon', in Maria Bergström and Anna Jonsson Cornell (eds), *European Police and Criminal Law Co-operation* (Hart Publishing 2014) 147, 149-151.

⁵⁴⁵ Article 84 TFEU. Regarding crime prevention, framework decisions were not adopted in the pre-Lisbon era. See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 870.

⁵⁴⁶ Article 75 TFEU.

- **Mutual recognition:** In relation to mutual recognition in the criminal law field, the EU has adopted several framework decisions. These include framework decisions regulating arrest warrants,⁵⁴⁷ freezing orders,⁵⁴⁸ confiscation orders,⁵⁴⁹ financial penalties,⁵⁵⁰ European Evidence warrants,⁵⁵¹ mutual recognition of sentences (detention and transfer of prisoners),⁵⁵² prior convictions,⁵⁵³ and probation/parole.⁵⁵⁴ Of these, only the framework decision on freezing orders has been replaced by a directive. Furthermore, the EU has recently adopted new directives regarding mutual recognition of investigation orders⁵⁵⁵ and protection orders.⁵⁵⁶
- **Exchange of information in relation to law enforcement:** Peers has argued that the “main focus of EU measures concerning policing has been the facilitation of the ‘free movement of investigations’ by facilitating the gathering, transfer, and/or analysis of information [...]”.⁵⁵⁷ The exchange of information concerns, on the one hand, the

⁵⁴⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1 (as amended by Council Framework Decision 2009/299/JHA, OJ L 81/24).

⁵⁴⁸ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L127/39.

⁵⁴⁹ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L 328/59 (as amended by Council Framework Decision 2009/299/JHA, OJ L 81/24).

⁵⁵⁰ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L76/16 (as amended by Council Framework Decision 2009/299/JHA, OJ L 81/24).

⁵⁵¹ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L350/72.

⁵⁵² Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L327/27.

⁵⁵³ Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings [2008] OJ L220/32.

⁵⁵⁴ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L337/102.

⁵⁵⁵ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1. On this directive, see further Emilio Di Capitani and Steve Peers, ‘The European Investigation Order: A New Approach to Mutual Recognition in Criminal Matters’ [2014] *EU Law Analysis* [blog], 23 May 2014.

⁵⁵⁶ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order [2011] OJ L338/2. See further e.g., Henri Labayle and Philippe De Bruycker, ‘Towards the Negotiation and Adoption of the Stockholm Programme’s Successor for the Period 2015-2019’ [2013] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 24.

⁵⁵⁷ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 906.

creation of large-scale EU information systems and on the other hand access to other Member States' national databases. Regarding the latter, the Council in 2008 adopted the so-called Prüm decision, which incorporated most of the EU-external Prüm Convention (2005) on "access by one Member States' authorities to another Member States' databases as regards fingerprint data, DNA data, and vehicle registration information."⁵⁵⁸ Likewise, the goal of the framework decision adopted based on the so-called Swedish initiative is to simplify the exchange of information ('Stockholm Framework Decision').⁵⁵⁹ The EU has adopted a Data Retention Directive based on which certain operations are required to retain certain data for a certain time period and to make them available to law enforcement authorities when they investigate or prosecute serious crime and terrorism.⁵⁶⁰ In the so-called *Digital Rights* judgment, the CJEU, however, declared the Data Retention Directive as invalid due to a violation of Articles 7 and 8 of the Fundamental Rights Charter.⁵⁶¹

- **Other types of Police cooperation:** Besides information exchange, police cooperation within the EU can take the form of JITs⁵⁶² and cooperation between special intervention units.⁵⁶³
- **Criminal procedure:** In relation to criminal procedure, many directives have also been adopted concerning fair trial rights. These include a directive on interpretation and

⁵⁵⁸ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 913-914. See also Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1, and Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/12.

⁵⁵⁹ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89. In June 2013, the JHA Council held that it agrees (with the Commission) that "currently no need exists for new legal instruments for law enforcement information exchange but existing instruments should be used to their full extent and in a coherent manner". Council conclusions following the Commission Communication on the European Information Exchange Model (EIXM), JHA Council meeting Luxembourg, 6 and 7 June 2013. See also European Commission, Commission Communication: Strengthening law enforcement cooperation in the EU: the European Information Exchange Model (EIXM) [2012] COM(2012) 735 final, and European Parliament: European Parliament resolution of 10 October 2013 on strengthening cross-border law-enforcement cooperation in the EU: the implementation of the 'Prüm Decision' and the European Information Exchange Model (EIXM)' [2013].

⁵⁶⁰ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

⁵⁶¹ Judgment of 8 April 2014 in *Digital Rights Ireland* respectively *Seitlinger and Others*, C-293/12 and C-594/12.

⁵⁶² Council Framework Decision 2002/465/JHA on joint investigation teams [2002] OJ L162/1.

⁵⁶³ Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations [2008] OJ L210/73.

translation in criminal proceedings,⁵⁶⁴ a directive on the right to information,⁵⁶⁵ and a directive on access to a lawyer and communication rights.⁵⁶⁶ There are also currently many Commission proposals regarding further measures in within this justice area.⁵⁶⁷ The Commission has also adopted recommendations, *inter alia*, regarding procedural safeguards for vulnerable persons suspected or accused in criminal proceedings,⁵⁶⁸ and the right to legal aid.⁵⁶⁹ In relation to crime victims' rights, the EU has adopted a framework decision now replaced by a directive.⁵⁷⁰

- **Substantive criminal law:** In connection to substantive criminal law cooperation, a difference may be drawn between different types of secondary legislation depending on the legal basis of the regulation adopted.⁵⁷¹ Firstly, there is secondary legislation regarding so-called Euro crimes, that is, particularly serious crimes with a cross-border

⁵⁶⁴ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

⁵⁶⁵ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

⁵⁶⁶ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1.

⁵⁶⁷ See further European Commission: Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings [2013] COM(2013) 821 final, European Commission: Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings [2013] COM(2013) 822 final, and European Commission: Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings [2013] COM(2013) 824 final.

⁵⁶⁸ Commission Recommendation C(2013) 8178 of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C 378/8.

⁵⁶⁹ Commission Recommendation C(2013) 8179 of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings [2013] OJ C 378/11.

⁵⁷⁰ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

⁵⁷¹ This distinction is based on the current legal basis of adopting criminal law legislation in the TFEU. It is, however, also possible to make a historical differentiation. In this regard, Mitsilegas has argued that: "An analysis of harmonisation of substantive criminal law today demonstrates that the Union *acquis* is a combination of instruments adopted post-Maastricht (eg the Fraud and Corruption in the Public Sector Conventions), post-Amsterdam (a series of framework decisions addressing security threats such as terrorism, organised crime and drug trafficking) and post-Lisbon ([...] recently adopted directives on human trafficking and sexual exploitation)." In relation to Article 83 TFEU, Mitsilegas makes a distinction between *securitized criminalizations* (subparagraph 1) and *functional criminalizations* (subparagraph 2). Valsamis Mitsilegas, 'EU Criminal Law Competence after Lisbon: From Securitized to Functional Criminalisation', in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 110, 112, 115 and 117.

dimension. The Euro crimes most notably include terrorism,⁵⁷² trafficking in human beings,⁵⁷³ sexual exploitation of women and children,⁵⁷⁴ illicit drug trafficking,⁵⁷⁵ illicit arms trafficking,⁵⁷⁶ money laundering,⁵⁷⁷ corruption, counterfeiting of means of payment,⁵⁷⁸ computer crime,⁵⁷⁹ and organised crime.⁵⁸⁰ Based on TFEU Article 83(1) the

⁵⁷² Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L164/3, and Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L 330/21.

⁵⁷³ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1. See also Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences [2011] OJ L 288/1 (NB ongoing legal challenge, ruling expected May 2014!).

⁵⁷⁴ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335/1. See also European Commission, Commission Communication: Towards the elimination of female genital mutilation [2013] COM(2013) 833 final.

⁵⁷⁵ Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L335/8, and Council of the European Union: Joint Action adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking (96/750/JHA) [1996] 17 December 1996. See also European Commission, Report: on the implementation of Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2009] COM(2009) 669 final. See also European Commission, Justice: 'Drug Control Policy - Legislation' <http://ec.europa.eu/justice/anti-drugs/law/index_en.htm> accessed 30 May 2014. "For example, the fight against drugs has been the subject of proposals for regulations which amend the regulations currently in force, such as Regulation 273/2004 and Regulation 111/2005 aimed at preventing the diversion of drug precursors within the EU and third countries." Henri Labayle and Philippe De Bruycker, 'Towards the Negotiation and Adoption of the Stockholm Programme's Successor for the Period 2015-2019' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 21.

⁵⁷⁶ See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 784. Cf. "In practical terms, the fight against terrorism has also been furthered by the adoption of Regulation 98/2013 on the marketing and use of explosives precursors, which aims to address the problem of the misuse of certain chemicals that are explosives precursors for the illicit manufacture of explosives." Henri Labayle and Philippe De Bruycker, 'Towards the Negotiation and Adoption of the Stockholm Programme's Successor for the Period 2015-2019' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 21.

⁵⁷⁷ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L 309/15.

⁵⁷⁸ The Commission proposed a new Directive on the protection of the euro and other currencies against counterfeiting by criminal law in 2013. European Commission: Proposal for a Directive of the European Parliament and of the Council on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [2013] COM(2013) 42 final.

⁵⁷⁹ Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [2013] OJ L218/8.

⁵⁸⁰ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OJ L 300/42.

EU can adopt directives containing crime definitions and sanction levels for these crimes. Many of the crimes have previously been regulated through third pillar framework decisions and as such the adoption of directives regarding these crimes has not significantly changed the area of substantive criminal law regulated by EU law. Secondly, based on TFEU Article 83(2)), the Union may through directives adopt criminal law minimum rules for the enforcement of its policies if this is essential to ensure the effective implementation of the policy. As the EU policies are many, this article has the potential to enlarge the substantive scope of EU criminal law significantly.⁵⁸¹ So far, the EU has, however, only adopted one directive based on this provision, namely a directive on criminal sanctions against market abuse (for insider dealing and market manipulation).⁵⁸² Before the entry into force of the Lisbon Treaty, the EU had, however, adopted some framework decisions/directives that nowadays would fall under Article 83(2)⁵⁸³ regarding racism and xenophobia;⁵⁸⁴ facilitation of illegal entry;⁵⁸⁵ employment of irregular migrants;⁵⁸⁶ environmental crimes;⁵⁸⁷ and protection of EU financial

⁵⁸¹ See in this regard European Commission, Commission Communication: Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law [2011] COM(2011) 573 final. On this communication, see e.g., Ester Herlin-Karnell, 'Recent Developments in the Field of Substantive and Procedural EU Criminal Law – Challenges and Opportunities' in Maria Bergström and Anna Jonsson Cornell (eds), *European Police and Criminal Law Co-operation* (Hart Publishing 2014) 21, 25 ff., and Christopher Harding and Joanna Beata Banach-Gutierrez, 'The Emergent EU Criminal Policy: Identifying the Species' [2012] *European Law Review* 758. Mitsilegas has furthermore pointed out that it is disputed to what extent the Union furthermore can adopt functional EU criminal law based on other treaty provisions. Valsamis Mitsilegas, 'EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation', in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 110, 118-121.

⁵⁸² European Commission, Memo, 'Statement by Vice-President Reding and Commissioner Barnier on European Parliament's vote to approve criminal sanctions for market abuse directive' [2014], 4 February 2014, <http://europa.eu/rapid/press-release_MEMO-14-77_en.htm> accessed 31 May 2014.

⁵⁸³ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 791.

⁵⁸⁴ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L328/55. See also JHA Council: Council conclusions on combating hate crime in the European Union [2013] 5 and 6 December 2013.

⁵⁸⁵ Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1. See also Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17.

⁵⁸⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24.

⁵⁸⁷ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L328/28. See also Ester Herlin-Karnell, 'European Criminal Law as an Exercise in EU 'Experimental' Constitutional Law' [2013] *Maastricht Journal of European and Comparative Law* 442, 449.

interests.⁵⁸⁸ Thirdly, based on TFEU Articles 310(6), 325(4), 85 and 86, the Union may adopt measures to protect EU public money.⁵⁸⁹

- **Jurisdiction:** Most of the secondary legislation on substantive criminal law also contains provisions on jurisdiction.⁵⁹⁰ Furthermore, the EU has adopted a special framework decision on conflicts of jurisdiction.⁵⁹¹
- **Crime prevention:** The Council has, most notably, through a decision created a European Crime Prevention Network (2001).⁵⁹² The main goal of this EUCPN is to share good practices and to share experiences of different types of crime prevention strategies.

Finally, it should be noted that many security threats, including threats caused by organised crime and terrorism, originate from outside the Union. This has made Monar argue that: “More than just being an added value, the AFSJ external dimension is therefore a necessity in the fight against crime and terrorism.”⁵⁹³

b) Criminal law and police cooperation and fundamental rights

Criminal law and police cooperation is both a way to protect fundamental rights and a possible source for fundamental rights violations. The Stockholm Programme especially emphasises that a “Europe that protects” should be created, *inter alia*, by tackling organised crime, terrorism

⁵⁸⁸ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 791 fn 245 and 794.

⁵⁸⁹ See in this regard European Commission, Commission Communication: On the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers’ money [2011] COM(2011) 293 final. See also e.g., European Commission: Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law [2012] COM(2012) 363 final.

⁵⁹⁰ See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 824-825.

⁵⁹¹ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [2009] OJ L328/42.

⁵⁹² See further Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA [2009] OJ L321/44. See also European Crime Prevention Network, ‘European Crime Prevention Network (EUCPN): Crime prevention activities at the EU, national and local level’ [2013] *EUCPN Thematic Paper*, No. 4.

⁵⁹³ Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 16. Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 750-752 and 807-808, 860-861.

and other threats.⁵⁹⁴ The Stockholm Programme also underlines the need to protect the most vulnerable by measures tackling discrimination, racism, anti-semitism, xenophobia and homophobia.⁵⁹⁵ More specifically, the Stockholm Programme pinpoints to the need to evaluate the existing framework decision regarding racism and xenophobia and to update it if needed.⁵⁹⁶ Special consideration should be given to vulnerable groups such as children who may become victims of sexual exploitation and abuse and/or trafficking.⁵⁹⁷ In relation to the creation of a “Europe of Rights”, the Stockholm Programme argues that the “protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union”.⁵⁹⁸ Also, victims of crime should be protected through the adoption of new secondary legislation.⁵⁹⁹ As has been noted above, the EU has indeed adopted a number of instruments regarding fair trial rights recently, and several are under consideration. As regards the external dimension of the cooperation relating to crime, both the Stockholm Programme and the Human Rights Action Plan foresee that the EU should develop its external criminal law cooperation to address phenomena such as human trafficking and racism/xenophobia. For example, in relation to trafficking the Human Rights Action Plan states that the Union should develop a list of priority countries and regions for future partnerships in the area of the fight against human trafficking and ensure appropriate education and training of diplomatic and consular staff in order to detect and handle cases where trafficking is suspected. The Stockholm Programme and/or the Human Rights Action Plan also foresee a *possible* need for enhanced cooperation in relation to international crimes (genocide, war crimes and crimes against humanity)⁶⁰⁰ and the fight against cybercrime.⁶⁰¹

At the same time as criminal law and police cooperation may further the protection of fundamental rights (security), it may, however, also give rise to violations of

⁵⁹⁴ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 5.

⁵⁹⁵ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 9.

⁵⁹⁶ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 9.

⁵⁹⁷ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 9.

⁵⁹⁸ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 10.

⁵⁹⁹ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 10.

⁶⁰⁰ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 8. See also Human Rights Action Plan [2012] regarding international crimes.

⁶⁰¹ Human Rights Action Plan [2012].

fundamental/human rights. To begin with, measures related to criminal procedure may affect the realisation of the right to a fair trial.⁶⁰² Other human rights may also be affected, such as the right to protection against unlawful detention and the right to privacy (in connection with search and seizure).⁶⁰³ In relation to substantive criminal law cooperation, the principle of legality can be threatened.⁶⁰⁴ Also, the principles of proportionality and *ultima ratio* are generally seen as central human rights principles when criminal law is adopted.⁶⁰⁵ Concern has, for example, been raised against unspecific crime definitions and harsh minimum penalties in certain framework decisions.

In EU documents and academic scholarship the following key problems have been identified:

Problems relating to mutual recognition: The mutual recognition and mutual trust method of integration has caused fundamental rights concerns in the field of criminal procedural law. Most notably, in connection to the European Arrest Warrant (EAW) it has been questioned to what extent a Member State should review the legality of the decisions delivered in another Member State from a fundamental rights perspective.⁶⁰⁶ In some Member States the national implementation of the EAW framework decision has also caused constitutional concerns.⁶⁰⁷ In this regard, Eckes has pointed out that: “The problems related to implementation are not only teething problems. They are related to the fact that the Union adopts measures in the area of freedom, security and justice – particularly in the area of EU criminal law – that impose significant limitations on civil liberties. The Member States’ struggles to accept mutual recognition in the field of EU criminal law can be starkly contrasted with their willingness to

⁶⁰² Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 675.

⁶⁰³ “Police operations and investigations raise questions in particular about the right to life, freedom from torture etc., rights regarding detention, and gathering of evidence. [...] There is an obvious tension between the right to privacy and the interests of law enforcement and state security [...]” Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 879.

⁶⁰⁴ E.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 681.

⁶⁰⁵ See e.g., John A. E. Vervaele, ‘Has the European Union a Criminal Policy for the Enforcement of its Harmonised Policies?’ in Inge Govaere and Dominik Hanf (eds), *Scrutinizing Internal and External Dimensions of European Law: Liber Amicorum Paul Demaret* (Peter Lang 2013) 533, 547.

⁶⁰⁶ E.g., Helena Raulus, ‘Fundamental Rights in the Area of Freedom, Security and Justice’ in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 213, 229 ff, and Massimo Fichera and Ester Herlin-Karnell, ‘The Margin of Appreciation Test and Balancing in the Area of Freedom, Security and Justice: A Proportionate Answer for a Europe of Rights?’ [2013] *European Public Law* 759, 763-764.

⁶⁰⁷ Christina Eckes, ‘A European Area of Freedom, Security and Justice: A Long Way Ahead?’ [2011] *Uppsala Faculty of Law Working Paper* 8-9.

hide behind mutual recognition of fundamental rights protection in the area of asylum.”⁶⁰⁸ The CJEU has in its case law emphasised that the principle of mutual recognition in relation to the EAW is not absolute, that is, that there are situations where Member States have a right or obligation not to execute it.⁶⁰⁹

Data protection/right to privacy and large-scale databases:⁶¹⁰ Also within the field of criminal law cooperation, questions of data protection and control over change of information have been relevant, for example, in connection to the proposed agreement on the Terrorist Financing Tracking Programme (TFTP),⁶¹¹ the Europol Information System, and the Eurojust Information System.⁶¹² The question as to what kind of information should be regarded as confidential is central as well as the question of exactly how such information should be exchanged.⁶¹³ Jonsson Cornell has noted that the fact that data may be stored at several levels (topical Member State, another Member State, EU) may “cause insecurity and confusion”.⁶¹⁴ In relation to the Prüm cooperation and exchange of DNA information, the question of the quality of the testing methods is of special significance as well as the question of how the risk for false matches is taken into account.⁶¹⁵ Also, fingerprint databases may result in false matches.⁶¹⁶ The

⁶⁰⁸ Christina Eckes, ‘A European Area of Freedom, Security and Justice: A Long Way Ahead?’ [2011] *Uppsala Faculty of Law Working Paper* 11. European Commission, Green Paper: Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention [2011] COM(2011) 327 final.

⁶⁰⁹ See Judgment of 21 October 2010 in *I.B.*, C-306/09, para. 50 (‘While the system established by Framework Decision 2002/584 is based on the principle of mutual recognition, that recognition does not, as is clear from Articles 3 to 5 of the framework decision, mean that there is an absolute obligation to execute the arrest warrant that has been issued.’) See also e.g., Judgment of 6 October 2009 in *Dominic Wolzenburg*, C-123/08, and Judgment of 5 September 2012 in *Lopes Da Silva Jorge*, C-42/11.

⁶¹⁰ FRA, ‘Handbook on European data protection law’ [2014] and FRA, Annual report, ‘Fundamental rights: challenges and achievements in 2012’ [2013], Chapter 3.

⁶¹¹ European Commission, Report: 2010 Report on the Application of the EU Charter of Fundamental Rights [2011] COM(2011) 160 final, 9.

⁶¹² Sionaidh Douglas-Scott, ‘The EU’s Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?’ [2008-2009] *The Cambridge Yearbook of European Legal Studies*, Volume 11, 53, 63-64.

⁶¹³ See further e.g., Anna Jonsson Cornell, ‘EU Police Cooperation Post-Lisbon’, in Maria Bergström and Anna Jonsson Cornell (eds), *European Police and Criminal Law Co-operation* (Hart Publishing 2014) 147, 157-158.

⁶¹⁴ Anna Jonsson Cornell, ‘EU Police Cooperation Post-Lisbon’, in Maria Bergström and Anna Jonsson Cornell (eds), *European Police and Criminal Law Co-operation* (Hart Publishing 2014) 147, 160.

⁶¹⁵ See further e.g., Carole McCartney, ‘Opting in and Opting out: Doing the Hokey Cokey with EU Policing and Judicial Cooperation’ [2013] *Journal of Criminal Law* 543, 554-555.

⁶¹⁶ Cf. in this regard: “UNHCR is particularly concerned about the potential consequences for innocent asylum-seekers of being wrongfully implicated in a criminal investigation as a result of a false match of a latent fingerprint in ‘Eurodac’. Asylum-seekers often have limited knowledge of the language and legal culture of the country where they are seeking asylum, and are therefore at a significant disadvantage in seeking to assert their innocence. Furthermore, they are particularly vulnerable due to their provisional legal status as asylum-seekers, and their

use of databases created for purposes other than law enforcement (VIS, Eurodac) has been found problematic in that it portrays non-EU-citizens as likely criminals.⁶¹⁷

Fight against terrorism: In the fight against terrorism, there is an increased risk for human rights violations (for example, the presumption of innocence and the right to privacy may be compromised). This is also true in relation to the external dimension of the fight against terrorism and the Human Rights Action Plan therefore emphasises the need to ensure that human rights issues are raised in all forms of counterterrorism dialogues with third countries.⁶¹⁸

Problems to ensure that victims of crimes have effective remedies: It has been pointed out that the right to effective remedies (Article 47 in the Fundamental Rights Charter) may create a duty for authorities to investigate and prosecute crimes.⁶¹⁹ The problem of impunity has been recognised internationally, especially in connection to international crimes such as genocide and crimes against humanity. It is also important that the right to effective remedies is ensured in relation to other crimes.⁶²⁰

Insufficient protection for vulnerable groups, such as children, minority groups, and victims of trafficking: Even though the Union has worked for providing vulnerable groups greater protection it can be asked whether the Union should work even harder in this regard.⁶²¹ A

ongoing asylum application processes. These factors may make it difficult for asylum-seekers to challenge law enforcement bodies, even if they are innocent of the alleged crimes.” UNHCR, ‘An Efficient and Protective Eurodac’ [2012], 6.

⁶¹⁷ UNHCR has in relation to Eurodac noted that the use of the database for law enforcement purposes may “result in stigmatisation of asylum-seekers as a group by associating them with criminal activity.” UNHCR, ‘An Efficient and Protective Eurodac’ [2012], 4.

⁶¹⁸ Council of the European Union: EU Strategic Framework and Action Plan on Human Rights and Democracy [2012] 11855/12, 25 June 2012.

⁶¹⁹ John A. E. Vervaele, ‘Has the European Union a Criminal Policy for the Enforcement of its Harmonised Policies?’ in Inge Govaere and Dominik Hanf (eds), *Scrutinizing Internal and External Dimensions of European Law: Liber Amicorum Paul Demaret* (Peter Lang 2013) 533, 540.

⁶²⁰ Cf. “The eventual establishment of an European Public Prosecutor’s Office will also have to be seen in light of, for instance, Article 47 of the Charter, which provides for the right to an effective remedy and a fair trial. Should the crimes addressed by a European Public Prosecutor’s Office have clear victims, they would have the right to challenge a prosecution that is discontinued. Such a right is not currently provided for by law in all EU Member States.” FRA, Report, ‘Fundamental Rights in the Future of the European Union’s Justice and Home Affairs’ [2013], 13.

⁶²¹ FRA, Annual report, ‘Fundamental rights: challenges and achievements in 2012’ [2013], Chapter 4 (violence against children) and 6 (racism). FRA, ‘Opinion on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime’ [2013].

recent FRA report, for example, finds that more could be done at the EU level to counteract violence against women and hate crime (including cyber hate).⁶²²

Jurisdiction questions: Transnational crime may for example give rise to questions of legality and double jeopardy.⁶²³

3. Civil law cooperation

a) The legal framework in civil law cooperation

The goal of the EU's civil justice cooperation is, first and foremost, to ensure the free movement of persons or, to put it another way, to "facilitate the everyday life of citizens".⁶²⁴ The cooperation concerns both civil and commercial matters and matters of family law. Another goal with the cooperation is to make it easier for companies to do business in several EU States.

In relation to civil law cooperation, the TFEU establishes that the Union *shall* facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.⁶²⁵ The treaty also provides that the EU *shall* develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases.⁶²⁶ This cooperation may include the approximation of the laws of the Member States.⁶²⁷ Moreover, the TFEU stipulates that the Union *shall* adopt measures aimed at ensuring:

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

⁶²² FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 14-15. See also FRA, Report, 'Violence against Women: An EU-wide survey. Main results report' [2014], and FRA, Report, 'Making hate crime visible in the European Union: acknowledging victims' rights' [2012].

⁶²³ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 819.

⁶²⁴ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 4.

⁶²⁵ Article 67(4) TFEU.

⁶²⁶ Article 81(1) TFEU.

⁶²⁷ Article 81(1) TFEU.

- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.⁶²⁸

Measures in relation to family law are subject to a special legislative procedure.⁶²⁹

In relation to civil law cooperation, Labayle and De Bruycker have noted that: “Having long lagged behind the other areas of the AFSJ, judicial cooperation in civil matters is the area where most progress has been made during the Stockholm Programme.”⁶³⁰ In the Stockholm Programme, it is, *inter alia*, suggested that that: “Mutual recognition should [...] be extended to fields that are not yet covered but are essential to everyday life, for example succession and wills, matrimonial property rights and the property consequences of the separation of couples, while taking into consideration Member States’ legal systems, including public policy, and national traditions in this area.”⁶³¹ In some of these areas progress has been made, but not in all.⁶³² Due to the possibility of opt-outs, not all instruments are applicable to all EU Member States. More specifically, the central secondary legislation in the civil law cooperation includes:

⁶²⁸ Article 81(2) TFEU.

⁶²⁹ Article 81(3) TFEU.

⁶³⁰ Henri Labayle and Philippe De Bruycker, ‘Towards the Negotiation and Adoption of the Stockholm Programme’s Successor for the Period 2015-2019’ [2013] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 25 (see also 26).

⁶³¹ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 13.

⁶³² E.g., the following legislative proposals have not yet been adopted: European Commission: Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2011] COM(2011) 126 final, European Commission: Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships [2011] COM(2011) 127 final, European Commission: Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings [2012] COM(2012) 744 final, European Commission: Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts in the area of Justice providing for the use of the regulatory procedure with scrutiny [2013] COM(2013) 452 final, and European Commission: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament

Mutual recognition, enforcement and jurisdiction: the so-called Brussels I regulation on mutual recognition civil and commercial judgements.⁶³³ In 2012, the Union adopted a regulation on civil and commercial jurisdiction.⁶³⁴

Service of documents: the regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (2007).⁶³⁵

Conflicts of law: the regulation on the law applicable to contractual obligations (Rome I regulation) (2008),⁶³⁶ and the regulation on the law applicable to non-contractual obligations (Rome II regulation) (2007).⁶³⁷

The taking of evidence: the regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.⁶³⁸

Access to justice: a directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.⁶³⁹

and of the Council of 12 December 2006 creating a European order for payment procedure [2013] COM(2013) 794 final. See also European Commission, Green Paper: Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records [2010] COM(2010) 747 final.

⁶³³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

⁶³⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1. Agreed proposal: European Commission: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2013] COM(2013) 554 final.

⁶³⁵ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 [2007] OJ L 324/79.

⁶³⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

⁶³⁷ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

⁶³⁸ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174/1. See also European Commission, Report: on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2007] COM(2007) 769 final.

⁶³⁹ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L26/41.

Civil procedure: Measures in this field are the regulation creating a European Enforcement Order for uncontested claims,⁶⁴⁰ the regulation creating a European order for payment procedure,⁶⁴¹ and the regulation establishing a European Small Claims Procedure.⁶⁴²

Alternative dispute settlement: the directive on mediation in civil and commercial matters.⁶⁴³

Family law:⁶⁴⁴ the so-called Brussels II Regulation on mutual recognition of divorce judgements,⁶⁴⁵ the regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations,⁶⁴⁶ the so-called Rome III regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation,⁶⁴⁷ the regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.⁶⁴⁸

⁶⁴⁰ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15, and Commission Regulation (EC) No 1869/2005 of 16 November 2005 replacing the Annexes to Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims [2005] OJ L300/6.

⁶⁴¹ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L 399/1.

⁶⁴² Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1.

⁶⁴³ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.

⁶⁴⁴ See further e.g., European Commission, Commission Communication: Bringing legal clarity to property rights for international couples [2011] COM(2011) 125 final, and Helen Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing 2012).

⁶⁴⁵ Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160/19. Replaced by: Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1. European Commission, Report: on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2014] COM(2014) 225 final.

⁶⁴⁶ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

⁶⁴⁷ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10 (not applicable in all EU States).

⁶⁴⁸ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

Other: The EU has also, *inter alia*, adopted a Regulation on civil law enforcement of protection orders⁶⁴⁹ and a Regulation establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.⁶⁵⁰

In relation to the external dimension of civil law cooperation, it has been noted that the field of judicial cooperation “does not face external pressures of similarly political sensitivity as those impacting on internal security and migration management, yet there are forceful reasons for common external action as well.”⁶⁵¹ In civil matters involving legal systems outside of the EU, legal certainty and foreseeability are of great significance. In practice, the EU has, for example, become party to various international agreements on jurisdiction and choice of law.⁶⁵²

b) Civil law cooperation and fundamental rights

As the EU cooperation in this field of civil law addresses matters like property and inheritance, divorce, and family maintenance in cross-border situations, it may negatively affect human rights such as the respect for private and family life (Article 7 Fundamental Rights Charter) and the rights of the child (Article 24 Fundamental Rights Charter). Also, the lack of common norms may have negative effects, such as in the case of same-sex partnerships/marriages.⁶⁵³

The principle of mutual recognition has also been identified as a possible source of fundamental rights issues in connection to civil law cooperation.⁶⁵⁴ Mitsilegas, for example, notes that the mutual recognition of decisions regarding child abduction based on the Brussels II *bis* regulation may in certain situations be problematic:

[The] degree of automaticity enshrined in the Brussels II bis Regulation with regard to cooperation on child abduction rests upon two fundamental presumptions: that the authorities of the Member State of the habitual residence of the child prior to the wrongful removal can in all circumstances provide solutions which will respect the best interests of the child; and that these authorities will in all circumstances ensure the full respect of the procedural rights of all parties involved. The construction of

⁶⁴⁹ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters [2013] OJ L181/4.

⁶⁵⁰ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59.

⁶⁵¹ Jörg Monar, ‘The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon’ [2012] *SIEPS Report*, 17.

⁶⁵² See further e.g., Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 648-653.

⁶⁵³ FRA, Report, ‘Fundamental Rights in the Future of the European Union’s Justice and Home Affairs’ [2013], 17.

⁶⁵⁴ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 621.

the EU system at present [...] effectively serves to shield the actions of the authorities in the Member State issuing a return order from meaningful scrutiny.⁶⁵⁵

⁶⁵⁵ Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' [2012] *Yearbook of European Law* 319, 332.

IV. Topical issues in law- and policy-making in the AFSJ

A. Introductory remark

The study has so far provided an overview of the AFSJ institutions and instruments and considered how fundamental/human rights issues are considered within the EU infrastructure. Also, some fundamental/human rights problems within the AFSJ have been pinpointed. The aim of this chapter is to provide a more thematically focused presentation of institutional and instrumental issues that may affect the realisation of fundamental rights. The topics discussed are by no means exhaustive, but rather sum up central issues that have been pointed out by both scholars and EU institutions. It should also be noted that some issues identified may at the same time concern both institutions (Chapter II) and instruments (Chapter III), for example, reliance on soft law governance not only affects the institutional structure of AFSJ decision-making, but also has an impact on the way in which integration within the AFSJ proceeds.

The focus here is on topical issues, that is, fundamental/human rights questions that need attention in the post-Stockholm Programme period. As the FRA commented in 2009, the Stockholm Programme can only be a first step in guaranteeing that fundamental rights are taken fully into consideration in the AFSJ.⁶⁵⁶ Whereas in this assessment the main attention of FRA has been on *actual implementation* of particular rights and the effectiveness of rights in practice, the Director of FRA Morten Kjaerum has also noted a need for strengthening the fundamental rights *framework* itself.⁶⁵⁷

B. Competence issues

1. Unclear scope of competence

Prior to the Lisbon Treaty, concerns about JHA decision-making were focused on questions that had their source in the special nature of this area of integration. Being situated outside the regular legal framework, institutional concerns revolved around questions such as accountability and transparency issues, lack of parliamentary scrutiny over agencies, use of extralegal mechanisms for law-creation, use of executive or operational measures of agencies

⁶⁵⁶ FRA, Report, 'The Stockholm Programme: A Chance to Put Fundamental Rights Protection Right in the Centre of the European Agenda' [2009].

⁶⁵⁷ See e.g., Morten Kjaerum. 'What to expect after Stockholm: fundamental rights in the future of the European Union's Justice and Home Affairs' [2013] [paper presented at the high-level conference "Open and safe Europe – what's next?" 29-30 January 2014].

instead of legislative initiatives, lack of judicial control, and lack of regard for human rights (the absence of a binding Fundamental Rights Charter).⁶⁵⁸ As already touched upon above, the Lisbon Treaty addressed many of these concerns through strengthening the role of the European Parliament, by widening the jurisdiction of the CJEU to the AFSJ, by enhancing human rights protection (both through institutional checks and political programming), by clarifying EU competences, by developing the framework of national parliaments, and by increasing the coordination and openness of policy-making within the area.⁶⁵⁹ There are, however, still some aspects of policy-making in the AFSJ that give rise to concern.⁶⁶⁰

In accordance with Article 5 TEU, the limits of Union competences are governed by the principle of conferral. This means that the EU can act only within the limits of the competences that Member States have conferred upon it.⁶⁶¹ The same principle governs not only EU main bodies, but also agencies. Agencies are basically established through a delegation of power (either by Member States, the Commission or the Council). This delegation defines and delimits the functions and the autonomy of the agency. At the same time, it is a well acknowledged phenomenon of international institutional law that conferrals of competence are not only restricted to the explicit wording of the founding act, but that competences may also be implied. Article 352 TFEU, in fact, institutionalises the possibility for the EU to develop its competence implicitly if “action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties”.⁶⁶² The Declaration on Article 352 TFEU defines that the Article can be applied with respect to the “objectives as set out in Article 3(2) and (3) of the Treaty on European Union and to the objectives of Article 3(5) of the said Treaty with respect to external action under Part Five of the Treaty on the Functioning of the European Union”.⁶⁶³ This includes the AFSJ.⁶⁶⁴

⁶⁵⁸ Sionaidh Douglas-Scott, ‘The EU’s Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?’ [2008-2009] *The Cambridge Yearbook of European Legal Studies*, Volume 11, 53.

⁶⁵⁹ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 118.

⁶⁶⁰ For one account, see John D. Occhipinti, ‘Whither the withering democratic deficit? The impact of the Lisbon Treaty on the Area of Freedom, Security and Justice’ [2014] *Cambridge Review of International Affairs* 83.

⁶⁶¹ Article 5 TEU.

⁶⁶² Article 352 TFEU (‘If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.’)

⁶⁶³ Declaration on Article 352 of the Treaty on the Functioning of the European Union [2012] OJ C326/352.

⁶⁶⁴ Declaration on Article 352 of the Treaty on the Functioning of the European Union [2012] OJ C326/353 annexed to the TEU restricts the use of this clause to competences that remain within the “general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the

Interestingly, Article 77 TFEU in defining EU activities in respect of policies on border checks, asylum and immigration, displays analogous expressions to that of Article 352 TFEU. First of all, paragraph 2(d) empowers the European Parliament and the Council to adopt “*any measure necessary* for the gradual establishment of an integrated management system for external borders.”⁶⁶⁵ In addition, paragraph 3 empowers the Council “If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document.”⁶⁶⁶ Although the procedural requirements for adopting decisions on the basis of the latter paragraph are rather strict, both paragraphs nevertheless introduce an element of ambiguity to the definition of EU competence in respect of border checks, asylum and immigration policies.⁶⁶⁷ Such mechanisms also enable the creation of agencies as ‘measures’.⁶⁶⁸

In addition to this institutional mechanism that allows for a gradual development of the competence of the EU, the definitions of the tasks of agencies also give rise to concern. For example, the competences of Frontex have expanded implicitly into conducting operations in the territory of third States and implementing joint return operations. While developments in the functions and tasks of agencies have commonly been formally adopted through (amending) regulations, an expansion of tasks also takes place implicitly and at different levels of legal formality.⁶⁶⁹

Union”. Furthermore Article 352(4) TFEU holds that “This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union”.

⁶⁶⁵ Emphasis added.

⁶⁶⁶ Article 77(3) TFEU.

⁶⁶⁷ Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press 2010) 351.

⁶⁶⁸ Herwig C. H. Hofmann and Alessandro Morini, ‘Constitutional aspects of the pluralisation of the EU executive through “agencification”’ [2012] *European Law Review* 419, 426.

⁶⁶⁹ See e.g., Luisa Marin, ‘Policing the EU’s External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border’ [2011] *Journal of Contemporary European Research* 468, Johannes Pollak and Peter Slominski ‘Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU’s External Borders’ [2009] *West European Politics* 904, Madalina Busuioc and Martijn Groenleer, ‘Beyond Design: The Evolution of Europol and Eurojust’ [2013] *Perspectives on European Politics and Society* 285, and European Commission, Commission Staff Working Document: Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) [2010] SEC(2010) 149.

An uncertainty surrounding the tasks of the agencies also follows from a lack of detailed definition of their tasks. The Frontex founding regulation includes neither rules on how operations should be prepared and conducted, nor a definition on joint operations. Instead, the agency takes a different role in different operations on an *ad hoc* basis. It is also unclear what is meant by “coordination” or “facilitation” in practice. In respect of Europol, having competence over organised crime, terrorism and other forms of serious crime that affect two or more Member States, there is no definition of “serious crime”, thus leaving room for a flexible interpretation of its area of activities.⁶⁷⁰

As agencies have few formal powers, they have been driven to expand their powers and activities by engaging in soft law and policy actions such as funding research, gathering data and analysing information, developing training and exchanging and pooling best practices. Agencies have justified these activities by emphasising their unique positioning at the supranational level.⁶⁷¹ The institutionalisation of, for example, border control is also uncharted territory in the sense that there is a lack of certainty on how best to achieve integrated border management, and consequently, an element of experimenting with novel solutions is easy to defend.⁶⁷²

Even if a majority of the tasks of the agencies follow from their legal mandates, these tasks can often be subject to flexible interpretations. This, in turn, enables the use of ‘experimental’ practices and policy tools – practices that fundamental rights protection mechanisms have difficulties dealing with. In other words, it has been noted that there is a risk that new forms of governance of agencies, going beyond their original mandates and competences, and the use of soft law and informal practices, escapes fundamental rights scrutiny.⁶⁷³

Yet another source of uncertainty is the nature of the delegation of powers to agencies. Being institutionally difficult to position, it is not always clear whether it is an EU institution or

⁶⁷⁰ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 19, 26, and 95.

⁶⁷¹ Joanna Parkin, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] *CEPS Papers in Liberty and Security in Europe*, No. 49, 39.

⁶⁷² Johannes Pollak and Peter Slominski, ‘Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU’s External Borders’ [2009] *West European Politics* 904-924, and Nicolaides et al. 2003: 17.

⁶⁷³ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 12-13.

Member States that delegates powers to an agency. While there are limits to delegation of powers from EU bodies to agencies,⁶⁷⁴ the question arises as to whether the same limits can be upheld in the case of Member State delegation. At the same time, the source of the delegated authority is important to assert in order to be able to pinpoint who is the ultimate bearer of responsibility for fundamental rights violations.⁶⁷⁵ For example, the Council of Europe has noted that there is a lack of clarity in assuming responsibility in coordinating and implementing joint land, air, sea and return operations. Furthermore, the Council of Europe has held that Frontex activities cannot be reduced to that of its Member States and calls any such claim a “dangerous mindset” that affects the protection of fundamental rights.⁶⁷⁶

2. Unclear division of competence

As regards the relationship between institutional actors in AFSJ policy making, it is worth noting that one of the very key issues of the Stockholm Programme was the emphasis on the need for more coherence and cooperation between AFSJ actors. Yet, coherence issues still remain, relating both to issues of intra-institutional coherence (policy-making within EU institutions) and inter-institutional coherence (relations between EU institutions).⁶⁷⁷ Coherence issues may also arise from lack of coordination with external actors. The external dimension of AFSJ activities will meet with concurrent activities of other organisations, such as the UN and the Council of Europe. The possibility of conflict for example with the Council of Europe has been noted to have grown significantly since the Lisbon Treaty, as the EU has begun legislating in areas that are the subject of many Council of Europe conventions. This may create situations of overlap and even double standards (especially the area of judicial cooperation in criminal

⁶⁷⁴ Judgment of 13 June 1958 in *Meroni*, Case 9/56. Also see European Commission, Commission Communication: European agencies – The way forward [2008] COM(2008) 135 final. An important case is *Parliament v. Council*, where the CJEU ruled that provisions which require political choices cannot be delegated by the EU legislature. Judgment of 5 September 2012 in *Parliament v Council*, C-355/10. This has been called a reinforcement of the constitutional checks and balances within the Union. Maarten den Heijer and Eljalil Tauschinsky, ‘Where Human Rights Meet Administrative Law: Essential Elements and Limits to Delegation: European Court of Justice, Grand Chamber C-355/10: *European Parliament v. Council of the European Union*’ [2013] *European Constitutional Law Review* 513, 533.

⁶⁷⁵ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 92.

⁶⁷⁶ See Council of Europe, Parliamentary Assembly, Resolution 1932 [2013], 25 April 2013, ‘Frontex: human rights responsibilities’. See also Pascouau and Schumacher who argue for an explicit recognition of Frontex’s legal responsibility when coordinating operations. Yves Pascouau and Pascal Schumacher, ‘Frontex and the Respect of Fundamental Rights: From Better Protection to Full Responsibility’ [2014] *European Policy Center Policy Brief*, 1.

⁶⁷⁷ Florian Trauner, ‘The Internal-External Security Nexus: More Coherence under Lisbon?’ [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 22.

matters has been singled out).⁶⁷⁸ An interesting special feature of the relationship between the EU and the Council of Europe is the insertion of so-called disconnection clauses in Council of Europe Agreements, which guarantee the prevalence of EU law.⁶⁷⁹

Concerning intra-institutional coherence, Trauner has argued that one of the problems that the EU has with living up to its defined strategies finds its source in the tendencies of each Council formation (JHA Council, FAC, etc.) to protect its own turf. This makes mainstreaming of EU internal security objectives in external relations difficult.⁶⁸⁰ The same is true also within AFSJ policies. In fact, the AFSJ has experienced the emergence of a multiplicity of strategic planning, sometimes laying their emphasis differently or even in competition with one another. The first level upon which this tendency can be noted is between the two JHA DGs, that is, DG Justice and DG Home Affairs, both of which have issued several policy planning documents.⁶⁸¹

Another level upon which the question of ownership arises is between the main legislative bodies. A diversification of policy planning and programming has led to disagreement between European Council/Council, Commission and Parliament over ownership of planning. In this regard, one may mention the process leading to the adoption of the new AFSJ strategic program for 2015-2020, where both the Commission⁶⁸² and Parliament⁶⁸³ put forward

⁶⁷⁸ See Elise Cornu, 'The Impact of Council of Europe Standards on the European Union', in Ramses A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer 2013) 113, 128, and Claudio Matera, 'The Influence of International Organisations on the EU's Area of Freedom, Security and Justice: A First Inquiry', in Ramses A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer 2013) 269. For a more detailed account of the relationship, see e.g. Marina Kolb, *The European Union and the Council of Europe* (Palgrave Macmillan 2013).

⁶⁷⁹ Bruno de Witte, 'EU Law: Is it International Law?' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 174, 192.

⁶⁸⁰ Florian Trauner, 'The Internal-External Security Nexus: More Coherence under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 5-6.

⁶⁸¹ Sergio Carrera and Elspeth Guild, 'Does the Stockholm Programme Matter? The Struggle over Ownership of AFSJ Multiannual Programming' [2012] *CEPS Paper in Liberty and Security in Europe*, No. 51, 6, mention DG Home Affairs policy planning documents such as the annual reports on migration and asylum, the communication on implementation of the Internal Security Strategy, the new strategic framework set in the Global Approach on Migration and Mobility, and DG Justice instruments such as the Strategy for the Effective Implementation of the EU Charter, the Annual Report on the Application of the EU Charter of Fundamental Rights, and the Communication on an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law.

⁶⁸² "EU Justice Agenda for 2020" in European Commission, 'MEMO/14/174, The Future EU Justice and Home Affairs Agendas: Questions and Answers', <http://europa.eu/rapid/press-release_MEMO-14-174_en.htm> accessed 26 March 2014, and European Commission, Commission Communication: An open and secure Europe: making it happen [2014] COM(2014) 154 final.

⁶⁸³ European Parliament: European Parliament resolution of 2 April 2014 on the mid-term review of the Stockholm Programme [2014].

suggestions, which, however, the European Council largely ignored. Carrera and Guild have in relation to this accused the Council of ‘de-Lisbonisation’ of the JHA cooperation and for alone trying to take over the strategic lead.⁶⁸⁴ Although the more plural institutional landscape of the AFSJ that has emerged due to the Lisbon Treaty can be welcomed from a governance point of view, the diversity of planning and programming, combined with the fact that all main bodies also have their own strategic instruments, presents a challenge for ensuring fundamental rights throughout the EU policy cycle.⁶⁸⁵ Carrera and Guild especially criticise the Council for ignoring many suggestions put forward by the Commission and Parliament regarding fundamental rights and rule of law.⁶⁸⁶

Another expression of the institutional competition in policy-setting is the occasional reluctance of the Commission to act upon the resolutions and initiatives of the European Parliament despite an explicit obligation in Article 225 TFEU.⁶⁸⁷ Hence, the European Parliament in its mid-term review of the Stockholm Programme, for example, still calls on the Commission to act on the creation of a Human Rights Action Plan to promote EU human rights in the external dimension of the AFSJ (as already called for in the Stockholm Programme), for Council to involve Parliament more closely in the drawing up of strategic documents, and in general for better inter-institutional coordination.⁶⁸⁸ The Commission has also refused to follow Council strategies in all respects.⁶⁸⁹

⁶⁸⁴ Sergio Carrera and Elspeth Guild, ‘The European Council’s Guidelines for the Area of Freedom, Security and Justice 2020 Subverting the ‘Lisbonisation’ of Justice and Home Affairs?’ [2014] *CEPS Essay*, No. 13/14.

⁶⁸⁵ Sergio Carrera, Nicholas Hernanz and Joanna Parkin, ‘The ‘Lisbonisation’ of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice’ [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 35. See also Sergio Carrera and Elspeth Guild, ‘Does the Stockholm Programme Matter? The Struggle over Ownership of AFSJ Multiannual Programming’ [2012] *CEPS Paper in Liberty and Security in Europe*, No. 51.

⁶⁸⁶ Sergio Carrera and Elspeth Guild, ‘The European Council’s Guidelines for the Area of Freedom, Security and Justice 2020 Subverting the ‘Lisbonisation’ of Justice and Home Affairs?’ [2014] *CEPS Essay*, No. 13/14, 7 ff.

⁶⁸⁷ Sergio Carrera, Nicholas Hernanz and Joanna Parkin, ‘The ‘Lisbonisation’ of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice’ [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 27-28.

⁶⁸⁸ European Parliament: European Parliament resolution of 2 April 2014 on the mid-term review of the Stockholm Programme [2014].

⁶⁸⁹ Cf. “One of the first shocks by the Council came after its adoption of the [...] Stockholm Programme [...]. While the entry into force of the Treaty of Lisbon was imminent, the European Council’s Stockholm Programme still took a JHA Council-dominant focus, following the previous habit of kindly suggesting what the Commission should do in a number of specific AFSJ policy fields, and ignoring the new position of the European Parliament. The result was that the European Commission did not strictly follow the European Council policy and legislative programming in the Stockholm Programme. Instead, it pursued its own vision and agenda. While the Council officially called to attention and reminded the Commission to follow what had been prescribed in the Stockholm Programme as “the sole framework of reference for operational policy and legislative planning”, the Commission insisted on its right of legislative initiative and did not carry out an exhaustive *ex post* evaluation of the Stockholm Programme

At the agency level, it has been noted that although agencies are supposed to operate free of political influence, the *de jure* or formal independence does not necessarily guarantee political independence in practice.⁶⁹⁰ The Stockholm Programme explicitly called for more coherence and cooperation between JHA agencies. In practice, this cooperation mainly takes the form of operational cooperation and information exchange. In addition to agency specific issues that may arise, for example, concerning data protection, an unclear division of tasks between agencies can have an impact upon and blur the allocation of responsibility between agencies, and between agencies and Member States.⁶⁹¹ Such a blurring of responsibilities also affects the possibilities of third country nationals to obtain access to justice in cases of alleged breaches of fundamental rights. Lack of both information and extraterritorial mechanisms - which would make access to justice from overseas possible - make matters even worse for these individuals.⁶⁹²

C. Member State discretion and integration based on mutual recognition

In many AFSJ policy fields, EU integration has proceeded through directives or framework decisions which demand domestic implementing legislation and which allow Member States a certain freedom to choose how to implement the instruments. Sometimes, EU regulation furthermore contains vague language and clauses allowing compatibility with national law to be taken into account which enhance Member State leeway of action.⁶⁹³ In relation to migration

implementation [...].” Sergio Carrera and Elspeth Guild, ‘The European Council’s Guidelines for the Area of Freedom, Security and Justice 2020 Subverting the ‘Lisbonisation’ of Justice and Home Affairs?’ [2014] *CEPS Essay*, No. 13/14, 4.

⁶⁹⁰ Madalina Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’ [2009] *European Law Journal* 599, 600 and 603.

⁶⁹¹ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 103-104.

⁶⁹² Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 110.

⁶⁹³ Anja Wiesbrock, ‘Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty’ [2013] *Maastricht Journal of European and Comparative Law* 423, 425.

law instruments Wiesbrock has argued that what characterises them is the “significant discretion” they grant Member States.⁶⁹⁴

The openness of much AFSJ regulation underlines the supervisory function of the CJEU. It is hence an important task of the Court to evaluate whether Member State action can be said to be *in accordance with EU law*. With reference to CJEU case law regarding the directives on family reunification, long-term residence and the return of illegal migrants, Wiesbrock finds that the CJEU in relation to migration law “has relied extensively on the principle of effectiveness, highlighting its importance in ensuring that national provisions do not compromise the objective and do not undermine the *effet utile* of EU migration law instruments.”⁶⁹⁵ Another EU law principle of significance is the principle of proportionality.⁶⁹⁶ In relation to that principle, Fichera and Herlin-Karnell argue that it has started to gain importance in the field of criminal law cooperation, and especially in the field of migration law.⁶⁹⁷ As examples of the latter, they mention, for example, the CJEU cases *El Dridi*, *N.S.* and *M. E. and Others*, and *B and D*.⁶⁹⁸ In the last of these cases, it was asked whether a Member State can deny refugee status due to national security considerations based on a test of proportionality, which the Court denied.⁶⁹⁹ In relation to fundamental rights, the CJEU has emphasised that it is settled case-law that “Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of

⁶⁹⁴ Anja Wiesbrock, ‘Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty’ [2013] *Maastricht Journal of European and Comparative Law* 423, 424.

⁶⁹⁵ Anja Wiesbrock, ‘Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty’ [2013] *Maastricht Journal of European and Comparative Law* 423, 427.

⁶⁹⁶ E.g., Massimo Fichera and Ester Herlin-Karnell, ‘The Margin of Appreciation Test and Balancing in the Area of Freedom, Security and Justice: A Proportionate Answer for a Europe of Rights?’ [2013] *European Public Law* 759, and Anja Wiesbrock, ‘Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty’ [2013] *Maastricht Journal of European and Comparative Law* 423, 430-431.

⁶⁹⁷ Massimo Fichera and Ester Herlin-Karnell, ‘The Margin of Appreciation Test and Balancing in the Area of Freedom, Security and Justice: A Proportionate Answer for a Europe of Rights?’ [2013] *European Public Law* 759.

⁶⁹⁸ Massimo Fichera and Ester Herlin-Karnell, ‘The Margin of Appreciation Test and Balancing in the Area of Freedom, Security and Justice: A Proportionate Answer for a Europe of Rights?’ [2013] *European Public Law* 759, 773-775. See further Judgment of 28 April 2011 in *El Dridi*, C-61/11 PPU, Judgment of 21 December 2011 in *N. S.* respectively *M. E. and Others*, C-411/10 and C-493/10, and Judgment of 9 November 2010 in *B* respectively *C*, C-57/09 and C-101/09.

⁶⁹⁹ Judgment of 9 November 2010 in *B* respectively *C*, C-57/09 and C-101/09, paras 109 and 111: “Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person’s individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot [...] be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed. [...] the exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.”

an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order”.⁷⁰⁰ This is also the case in situations when the secondary legislation does not contain explicit fundamental rights provisions.⁷⁰¹

Integration in the AFSJ is furthermore often based on mechanisms such as *mutual recognition* and *minimum rules*. In practice, this model of integration entails that EU Member States continue to be “the” central law-making actor. In relation to EU criminal law, Klip has therefore held that:

the area of freedom, security and justice – unlike the internal market – maintains borders. By and large, Member States determine whether and where their criminal law applies. A common European criminal justice area, which would directly determine the conduct that is criminal and enforce it itself, has not yet been proclaimed.⁷⁰²

In a similar vein, Mitsilegas has argued that:

[The creation of a single area of movement, has not been accompanied with the creation of a] single area of law. The law remains territorial, with Member States retaining to a great extent their sovereignty especially in the field of law enforcement. A key challenge for European integration in the field has thus been how to make *national* legal systems interact in the borderless Area of Freedom, Security and Justice.⁷⁰³

This more ‘managerial integration’ (which aims at steering and directing the functioning of domestic legal systems)⁷⁰⁴ may, to begin with, result in differences in domestic approaches which on its part may entail that the domestic authorities do not trust each other. The distrust may result in the mal- or non-functioning of EU law to the detriment of individuals. This has been seen in the Stockholm Programme, where it is noted that: “Ensuring trust and finding new

⁷⁰⁰ Judgment of 21 December 2011 in *N. S. respectively M. E. and Others*, C-411/10 and C-493/10, para. 77. See also Judgment of 6 November 2003 in *Lindqvist*, C-101/01, para. 87.

⁷⁰¹ Cf. “Even if the legislation establishing the EAW in itself “respected” fundamental rights, because it did not require Member States to breach them, it did not “protect” fundamental rights – it did not contain express conditions (or minimum standards) that would prevent the Member States from applying it in a way that fails to comply with the CFR.” Israel De Jesus Butler, ‘Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission’ [2012] *European Law Review* 397, 413-414.

⁷⁰² André Klip, *European Criminal Law – An Integrative Approach* (2nd edn, Intersentia 2012) 470.

⁷⁰³ Valsamis Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’ [2012] *Yearbook of European Law* 319, 320.

⁷⁰⁴ Cf. Christopher Harding and Joanna Beata Banach-Gutierrez, ‘The Emergent EU Criminal Policy: Identifying the Species’ [2012] *European Law Review* 758, 762-763.

ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States [... is] one of the main challenges for the future.”⁷⁰⁵

Integration based on mutual recognition and mutual trust is, however, especially problematic when Member States do not fully implement EU law.⁷⁰⁶ From a fundamental/human rights perspective, the most critical question is to what extent Member States must trust in each other when it comes to ensuring fundamental/human rights.⁷⁰⁷ In practice, these types of fundamental rights concerns have been raised especially in connection to the EAW and in relation to the treatment of irregular immigrants. For example, the reception conditions of asylum seekers have been unsatisfactory in, *inter alia*, Greece⁷⁰⁸ and Bulgaria.⁷⁰⁹

In case law, two key questions have been raised in relation to mutual recognition and fundamental rights: (1) to what extent do Member States have discretion to deny requests based on mutual recognition, such as EAWs; and (2) to what extent are Member States allowed and/or requested to make fundamental rights impact assessments when implementing measures involving mutual recognition. As regards the first question, the CJEU has in relation to the EAW held that the principle of mutual recognition is not absolute, that is to say that there are situations where Member States have a right or obligation not to execute such warrants.⁷¹⁰ The leeway a Member State has to refuse is, however, dependant on the discretion granted to Member States in the secondary legislation. As regards fundamental rights compatibility, an important principle was established in the *N. S.* respectively *M. E. and Others* case, which concerned the Dublin system. In that judgment, the CJEU found that:

⁷⁰⁵ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 5.

⁷⁰⁶ On the implementation of the EAW, see further e.g., Micaela del Monte, ‘Revising the European Arrest Warrant: European Added Value Assessment accompanying the European Parliament’s Legislative own-Initiative Report (Rapporteur: Baroness Ludford MEP)’ [2014] *European Parliamentary Research Service, European Parliament*.

⁷⁰⁷ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 686.

⁷⁰⁸ As to Greece, see e.g., the reference to the *M.S.S. v Belgium and Greece* case below.

⁷⁰⁹ Amnesty International, News, ‘EU Must Ban Transfer of Asylum Seekers to Bulgaria until Country ‘Sets Affairs in Order’ [2014] 31 March 2014.

⁷¹⁰ See Judgment of 21 October 2010 in *I.B.*, C-306/09, para. 50 (‘While the system established by Framework Decision 2002/584 is based on the principle of mutual recognition, that recognition does not, as is clear from Articles 3 to 5 of the framework decision, mean that there is an absolute obligation to execute the arrest warrant that has been issued.’) See also e.g., Judgment of 6 October 2009 in *Dominic Wolzenburg*, C-123/08, and Judgment of 5 September 2012 in *Lopes Da Silva Jorge*, C-42/11. Also, for example, the Dublin regulation allows for certain refusals based on the so-called sovereignty clause (Article 3 § 2). See in this regard also Judgment of 21 January 2011 in *M.S.S. v Belgium and Greece* [GC], no. 30969/09, ECHR 2011, paras 339-340.

It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.⁷¹¹

This judgment largely echoes the ECtHR judgment in the *M.S.S. v Belgium and Greece* case, where the ECtHR observed that:

the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention [...]. The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. [...]⁷¹²

In situations where there are clear indications that fundamental/human rights violations may occur it is hence not possible for Member States to rely on the assumption that all EU Member States respect fundamental/human rights. While there is "no longer a blind insistence of mutual trust"⁷¹³, it is, however, noteworthy that the "CJEU [has] placed the threshold for rebutting the presumption of compliance with fundamental rights very high".⁷¹⁴ There must be indications of "systemic deficiencies". In this regard, the CJEU ruling in the *N. S.* respectively *M. E. and Others* case differs from the recently adopted EIO directive, where the focus rather is on potential individual violations:⁷¹⁵

The creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with

⁷¹¹ Judgment of 21 December 2011 in *N. S.* respectively *M. E. and Others*, C-411/10 and C-493/10, para. 94.

⁷¹² Judgment of 21 January 2011 in *M.S.S. v Belgium and Greece* [GC], no. 30969/09, ECHR 2011, paras 353 and 359.

⁷¹³ Ester Herlin-Karnell, 'European Criminal Law as an Exercise in EU 'Experimental' Constitutional Law' [2013] *Maastricht Journal of European and Comparative Law* 442, 459.

⁷¹⁴ Eva Nanopoulos, 'Trust issues and the European common asylum system: finding the right balance' [2013] *Cambridge Law Journal* 276, 279.

⁷¹⁵ Emilio Di Capitanì and Steve Peers, 'The European Investigation Order: A New Approach to Mutual Recognition in Criminal Matters' [2014] *EU Law Analysis* [blog], 23 May 2014.

fundamental rights. However, that presumption is rebuttable. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the EIO should be refused.⁷¹⁶

It is to be presumed that clauses of this kind will be included in future EU secondary legislation based on mutual recognition.⁷¹⁷

Another related question is to what extent Member States are allowed to require a *higher* level of fundamental/human rights protection than the one provided for by EU law. This was addressed in the *Melloni* case, where the CJEU held that:

The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584. [...] Such an interpretation of Article 53 of the Charter cannot be accepted. [...] That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.⁷¹⁸

Member States can hence only establish higher standards in situations where a question has not been completely regulated by EU law.⁷¹⁹ EU legislation based on mutual recognition may therefore challenge State sovereignty both from a *vertical* (obligation to respect EU law supremacy) and *horizontal* (obligation to trust other Member States) perspective.⁷²⁰

⁷¹⁶ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1, para. 19.

⁷¹⁷ Cf. Henri Labayle and Emilio De Capitani, 'The Next Justice and Home Affairs Programme: Everything Changed, So Nothing Can Change?' [2014] *EU Law Analysis* [blog], 19 May 2014.

⁷¹⁸ Judgment of 26 February 2013 in *Melloni*, C-399/11, paras 56-58.

⁷¹⁹ Vanessa Franssen, 'Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection' [2014] *European Law Blog* [blog].

⁷²⁰ Cf. "It could be argued that, just as the principle of supremacy represents a challenge to sovereignty from a *vertical* perspective (pertaining to the relationship between the supranational and the national dimension), so the principle of mutual recognition, in civil and, all the more so, in criminal matters is a challenge along a *horizontal* line (pertaining to interState interactions and exchanges)." Massimo Fichera and Ester Herlin-Karnell, 'The Margin

Finally, as regards Member State discretion, it should be noted that the use of soft law mechanisms (such as cooperation between authorities and sharing of information and best practices) in the AFSJ also partly is due to sovereignty concerns. As noted by Wiesbrock in relation to migration:

The use of soft law mechanisms promises to open up possibilities for cooperation between national authorities without the risk of losing control over the entry and residence of non-EU nationals by being subjected to common policy decisions. Hence, even though EU legislative competences in the area of migration law have gradually been extended by successive Treaty amendments, multiple elements of migration policy remain within the competences of Member States, but have been harmonized to a certain extent through the use of soft law mechanisms.⁷²¹

From a fundamental/human rights perspective, soft law regulation can be regarded as problematic in that it can escape legal scrutiny altogether.

D. A need to develop the fundamental rights framework

The participation of numerous EU bodies in the adoption of new secondary legislation means that there are also many actors whose task it becomes to ensure the fundamental/human rights compatibility of new legislation. As was noted in Section III.A.4, there are indeed nowadays many impact assessment mechanisms in place. This being said, it has, however, been found that the Union should continue to develop its legislative process to ensure even better fundamental/human rights checks. In this regard, Amnesty International has suggested that:

The Commission's Strategy on the implementation of the Charter does not foresee any consultation on human rights aspects during the drafting phase of EU proposals. In order to ensure that human rights issues raised in the impact assessment stage are duly addressed in the draft, the Commission should seek the advice from external experts, including the FRA, Council of Europe and civil society experts before adopting its proposal.⁷²²

of Appreciation Test and Balancing in the Area of Freedom, Security and Justice: A Proportionate Answer for a Europe of Rights?' [2013] *European Public Law* 759, 763 (referring to Fichera 2011).

⁷²¹ Anja Wiesbrock, 'Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty' [2013] *Maastricht Journal of European and Comparative Law* 423, 433.

⁷²² Amnesty International, *The Future of EU Policies in the Area of Freedom, Security and Justice: A Human Rights Perspective* [2014], 5.

Even though not legally obliged to make preparatory consultations (the DGs are only *urged* to do so), the Commission, however, regularly consults stakeholders.⁷²³ FRA has, however, suggested that independent external experts and civil society organisations to a greater degree could be used to make fundamental rights evaluations.⁷²⁴ It has also been put forward that FRA's role in relation to pre-adoption checks should be made more central. In a Regional Office for Europe of the UN High Commissioner for Human Rights report, it is noted that:

[D]espite being the EU's only dedicated human rights body, the FRA is not given a role in screening policy or legislative proposals or assisting the Commission in its Impact Assessments. Although it may be requested to do so, the Commission, in its Communication on the methodology for ensuring compliance of its proposals with the CFR, did not express enthusiasm towards this possibility [...].⁷²⁵

In this respect it is also worth noting that judicial and police cooperation in criminal matters is not included in the new FRA multiannual framework for 2013-2017.⁷²⁶ It has also been argued that the EU should conduct more general human rights compatibility checks, that is, not only focus on adherence to the Fundamental Rights Charter.⁷²⁷

Finally, as regards ensuring fundamental rights compatibility in relation to legislative drafting, it has been noted that consultations do not necessary result in the viewpoints being taken into account. The Commission has, for example, in relation to its passenger name record directive proposal been accused of largely ignoring the views expressed by the EDPS and the Article 29 Working Party.⁷²⁸ Israel Butler has therefore argued that what is needed is "a shift in attitude surrounding consultation".⁷²⁹ He also suggests that the Commission to a higher degree should make fundamental rights assessments after a certain period of time after entry into force of

⁷²³ Israel De Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' [2012] *European Law Review* 397 (also on the problems connected to the consultations).

⁷²⁴ FRA, Annual Report, 'Fundamental Rights: challenges and achievements in 2013' [2014] 11.

⁷²⁵ Regional Office for Europe of the UN High Commissioner for Human Rights, 'The European Union and International Human Rights Law' [2011], 18 ('[I]t is to be recalled that the scrutiny of conformity of proposals with fundamental rights is not within the mandate of the Agency').

⁷²⁶ Council Decision 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights [2013] OJ L79/1.

⁷²⁷ See further Regional Office for Europe of the UN High Commissioner for Human Rights, 'The European Union and International Human Rights Law' [2011], 17-18.

⁷²⁸ See further Israel De Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' [2012] *European Law Review* 397, 401-402.

⁷²⁹ Israel De Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' [2012] *European Law Review* 397, 403.

new legislation to identify fundamental rights concerns that have become evident after the initial application of the legislation.⁷³⁰

Apart from improvements that concern individual bodies and processes, FRA has also called for a more comprehensive mainstreaming of fundamental rights. As a complement to the European Commission's framework on the rule of law, a strategic framework on fundamental rights is envisaged, involving the EU level as well as the national, regional and local levels. The goal of this mainstreaming would be to ensure that respect for the Charter would become a permanent policy consideration rather than an *ad hoc* and crisis-driven concern. An obligation to mainstream fundamental rights can in certain respects even be traced to the TFEU.⁷³¹ The discussions in this report demonstrate many ways in which the protection of fundamental rights in AFSJ decision-making and implementation has been improved. However, a claim can be made that the achievement of a fully coherent and overarching framework of protection may require further integration by the EU of the protection and promotion of fundamental rights into its policies and legislation.⁷³²

E. Monitoring and accountability issues

1. Enhancing political accountability

Despite the institutionalisation of the role of national parliaments for the good functioning of the Union in Article 12 TEU, there is still some criticism that can be made concerning the impact of national parliaments. National parliaments are not involved at early stages of policy shaping and once they are engaged, national parliaments have been noted to focus more on national matters than on scrutiny of AFSJ policies or agencies as such. National parliaments can also experience resource problems in coping with the volume of JHA legislation.⁷³³ In particular, intergovernmental arrangements concerning counterterrorism policing, as well as the external

⁷³⁰ Israel De Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' [2012] *European Law Review* 397, 415.

⁷³¹ See e.g., Articles 8, 9, and 10 TFEU. FRA, Annual Report, 'Fundamental Rights: challenges and achievements in 2013' [2014] 12-13 with more detailed suggestions on elements to be included in this framework.

⁷³² See e.g., Israel Butler, 'A Fundamental Rights Strategy for the European Union', *Open Society European Policy Institute Policy Brief* [2014] with many examples.

⁷³³ See e.g., Claudia Hillebrand, 'Guarding EU-wide Counter-terrorism Policing: The Struggle for Sound Parliamentary Scrutiny of Europol' in Christian Kaunert and Sarah Leonard (eds), *European Security, Terrorism and Intelligence: Tackling New Security Challenges in Europe* (Palgrave Macmillan 2013) 96, 112, and Florian Trauner, 'The European Parliament and Agency Control in the Area of Freedom, Security and Justice' [2012] *West European Politics* 784.

dimension of agency activities seem to fall outside the scope of national parliamentary control. Among other things this has led to calls for the European Parliament and national parliaments to pool their powers and resources in the name of better parliamentary scrutiny.⁷³⁴ Lack of access to information may also affect national parliaments' possibilities to effectively scrutinise AFSJ actors and instruments.⁷³⁵

As to the European Parliament, while the introduction of the co-decision procedure into the AFSJ has been seen as an increase in transparency, democratic control and accountability, at the same time the shift also brings with it the challenges of supranational decision-making. Hence, the setting of the policy agenda by the Council can be targeted for not being transparent and for only being accountable to national parliaments. The exercise of implementing powers by the Commission can, on its part, be criticised for being opaque and for lacking democratic scrutiny.⁷³⁶ The Council and Commission have been accused of choosing legislative procedures that escape democratic oversight of AFSJ policy-making by the European Parliament (for example, through the use of delegated acts).⁷³⁷ In a similar way, agencies have been seen to expand their autonomy and scope of functions informally, hereby avoiding democratic, political and judicial accountability.⁷³⁸ Furthermore, the European Parliament has come to face a dilemma concerning its identity both as co-legislator and watchdog of fundamental rights and democratic scrutiny.⁷³⁹

⁷³⁴ Claudia Hillebrand, 'Guarding EU-wide Counter-terrorism Policing: The Struggle for Sound Parliamentary Scrutiny of Europol' in Christian Kaunert and Sarah Leonard (eds), *European Security, Terrorism and Intelligence: Tackling New Security Challenges in Europe* (Palgrave Macmillan 2013) 96, 113.

⁷³⁵ "National parliaments have experienced difficulty in scrutinising Europol's work through the national representatives on the Management Board, in finding information and in coordinating their efforts, internationally amongst national parliaments and with the European Parliament. The same holds true for Eurojust and Frontex." Jorrit J. Rijpma, 'Institutions and Agencies: Government and Governance after Lisbon' in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 54, 66-67 (referring to Ruiz de Garibay).

⁷³⁶ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 122-123.

⁷³⁷ Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The 'Lisbonisation' of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 15.

⁷³⁸ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 98-99. A similar argument has been made in respect of the agreements of agencies with third states. The power to conclude agreements has been characterized as discretionary and not fully under the control of the Council authorization. Deirdre Curtin, *Executive Power of the European Union: Law Practices, and the Living Constitution* (Oxford University Press 2009) 158-159.

⁷³⁹ Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The 'Lisbonisation' of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 1-2.

In addition, the fundamental rights monitoring of the European Parliament (and more specifically that of the LIBE Committee) suffers from under-developed and fragmented available tools.⁷⁴⁰ One of the areas where much room for improvement has been identified is control over agencies by the European Parliament.⁷⁴¹ As a point of departure, it should be noted that Member States' police, prosecutorial, border and (to a much lesser extent) intelligence agencies are both the principal suppliers and the main customers of the AFSJ bodies. As both the inputs to AFSJ bodies and actions taken on the basis of the outputs of these bodies are regulated by national law, a claim can be made that AFSJ operational activities should rather be overseen by appropriate national authorities whereas the oversight role of the European Parliament should be concerned with the policies, administration and finance of agencies.⁷⁴² As of now, the oversight by the European Parliament has been accused of being incident-driven,⁷⁴³ suffering from a lack of information,⁷⁴⁴ being weak as far as scrutiny is based on receiving annual reports and work programmes, and insufficient as far as the summoning of executive directors is concerned.⁷⁴⁵

⁷⁴⁰ Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The 'Lisbonisation' of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 2.

⁷⁴¹ It should be noted that Council and Parliament also have different visions on how to ensure accountability. Florian Trauner, 'The European Parliament and Agency Control in the Area of Freedom, Security and Justice' [2012] *West European Politics* 784, 784-802. At the same time Hofmann and Morini interpret case C-518/07 [2010] *Commission v Germany*, March 2010 (although the case concerned agencies established by Member States), that a delegation of powers to an agency can be made if democratic oversight of the agency is sufficient. This means that if the Parliament controls the appointment of the senior management of the agency and that the agency is required to submit regular public reports to the Parliament, the agency may achieve legitimacy. Herwig C. H. Hofmann and Alessandro Morini, 'Constitutional aspects of the pluralisation of the EU executive through "agencification"' [2012] *European Law Review* 419, 435.

⁷⁴² See Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 147-149 who also present several other arguments against involving the EP in the oversight of all aspects of the AFSJ bodies' operational activities. The diverging views as to the intensity of parliamentary scrutiny of JHA agencies are also noted by De Witte and Rijpma. Bruno De Witte and Jorrit J. Rijpma, 'Parliamentary Scrutiny of Justice and Home Affairs Agencies' [2011] Annex B to the report Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 359.

⁷⁴³ Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (OUP, 2013), 154.

⁷⁴⁴ Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 81.

⁷⁴⁵ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 25 and 29-30. Also see European Commission, Commission Communication: on the procedures for the scrutiny of Europol's activities by the European Parliament, together with national Parliaments [2010] COM(2010) 776 final.

A recent study identifies a number of avenues through which to improve parliamentary oversight of agencies. These suggestions range from greater insight into AFSJ threat assessments, better dialogue with other supervisory bodies such as JSBs, extension of the Parliament's power to summon agency directors, improved access to agreements and Memoranda of Understanding concluded by AFSJ agencies, the streamlining of oversight tasks within Parliament, as well as improvement of inter-parliamentary cooperation.⁷⁴⁶ In this respect, it should be noted that the Council of Europe has not only urged Frontex to improve its internal fundamental rights monitoring mechanisms, but also called upon the European Parliament to make full use of and enhance its possibilities of democratic scrutiny and supervision of Frontex activities that have human rights implications.⁷⁴⁷ Further "Lisbonisation" of the AFSJ is in this respect one of the priorities of the post-Stockholm era.⁷⁴⁸

One central actor in respect of political monitoring of fundamental rights issues is of course FRA. While largely appreciative of its achievements, the external evaluation of FRA of its first five years of existence also gives some hints as to problems and prospects of improving its role. Among the issues identified are for example: the limits that the mandate and the Multi Annual Framework set to what the FRA can undertake and what advice it can bring forward (for example, FRA could have a stronger position in the legislative process by not being dependent on requests from the main EU bodies for having an input), the inconsistency with excluding police and judicial cooperation in criminal matters from the Multi Annual Framework,⁷⁴⁹ a clarification and prioritisation of the role in respect of different stakeholders, and an improvement of its usefulness for Member States.⁷⁵⁰

⁷⁴⁶ See Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 175-176 for a full account of the 22 recommendations.

⁷⁴⁷ See Council of Europe, Parliamentary Assembly, Resolution 1932 (2013), 25 April 2013, "Frontex: human rights responsibilities".

⁷⁴⁸ Henri Labayle and Philippe De Bruycker, 'Towards the Negotiation and Adoption of the Stockholm Programme's Successor for the Period 2015-2019' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 37.

⁷⁴⁹ The Commission proposed that the Agency could work in the areas of police cooperation and judicial cooperation in criminal matters. The Council did not endorse this approach and decided to exclude these two major fields of competence of the Union from the Agency's Multiannual framework, which determines the thematic areas on which it can work during the period 2013-2017. Council Decision 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights [2013] OJ L79/1, Article 3. See also European Commission, Report: 2012 Report on the Application of the EU Charter of Fundamental Rights [2013] COM(2013) 271 final, 8-9.

⁷⁵⁰ Ramboll, *Evaluation of the European Union Agency for Fundamental Rights: Final Report* [2012], 95-98. See also Gabriel N. Toggenburg, 'Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?' [2013] *EUI Working Paper*, and Viviane

2. Improving judicial and quasi-judicial accountability

All judicial or quasi-judicial accountability mechanisms discussed in Chapter III have faced criticism. In general terms, the FRA 2011 annual report emphasises the need for greater rights awareness, meaning that individuals should be better informed about where EU law applies and where it does not, as well as to be able to identify the right authority to resort to. In some cases, as in the area of immigration and border control, the situation of third country nationals in respect of means of redress is also a problem.⁷⁵¹ A second main concern is the absence of EU external human rights scrutiny due to the EU not being a party to the ECHR.⁷⁵²

Among the available complaint mechanisms, the Ombudsman's lack of power to award legally binding remedies has been singled out as one of the most apparent drawbacks of this mechanism. However, although it is acknowledged that the exact transformative impact of the Ombudsman's activities is difficult to measure, the Ombudsman's contribution to the shaping of the European administrative practices cannot be denied.⁷⁵³

As for the EDPS, one of the key challenges for the entire data protection regime has been the lack of accountability, openness and transparency in order to ensure the fundamental rights compliance of personal data processing.⁷⁵⁴ The current reform debate has identified that acts in the area of police and judicial cooperation in criminal matters should be included thoroughly,

Reding, Speech, 'The EU and the Rule of Law – What next?' [2013] 4 September 2013, <http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm> accessed 1 June 2014, calling for a stronger mandate for FRA.

⁷⁵¹ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 13-14.

⁷⁵² See FRA, Annual Report, 'Fundamental rights: challenges and achievements in 2011' [2012], 23-24 and 33.

⁷⁵³ See e.g., Alexandros Tsadiras, 'The European Ombudsman's Remedial Powers: An Empirical Analysis in Context' [2013] *European Law Review* 52, who is critical of ideas of "judicializing" the Ombudsman institution. Also see e.g., Nikos Vogiatzis, 'Exploring the European Council's Legal Accountability: Court of Justice and European Ombudsman' [2013] *German Law Journal* 1661, concluding that the Ombudsman cannot be ultimate answer to accountability problems of the European Council.

⁷⁵⁴ Didier Bigo, Sergio Carrera, Gloria González Fuster, Elspeth Guild, Paul de Hert, Julian Jeandesboz and Vagelis Papakonstantinou, 'Towards a New EU Legal Framework for Data Protection and Privacy: Challenges, Principles and the Role of the European Parliament' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

that the independence of supervisory authorities should be strengthened, and that the comprehensiveness of the EU data protection rules should be improved.⁷⁵⁵

OLAF, on its part, has been criticised for its right to non-disclosure of documents, for its dependence on information provided by Member States, for being potentially subject to competing influences by both the European Parliament and Commission, and for risking that overlap with Europol may produce contradictions.⁷⁵⁶

As regards legal accountability and the CJEU, it has been pointed out that the CJEU is not primarily a human rights court that deals with individual complaints. Rather, its main function is to evaluate whether the EU institutions have complied with EU law and to offer guidance to national courts on how to interpret EU law. Article 51 of the Fundamental Rights Charter also states that the provisions of the Charter are “addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”. This means that the CJEU can only deal with fundamental rights issues as far as EU law has been adopted. It has also been held that the CJEU lacks the human rights expertise of human rights courts, and rarely adopts a comparative approach referring to human rights practice.⁷⁵⁷

Secondly, there are factors that affect the possibilities of individuals to bring cases to the CJEU. In principle, an individual can file a complaint with the CJEU for failure to comply with the Fundamental Rights Charter. The central procedure is action for annulment.⁷⁵⁸ However, such a complaint can only be filed against an EU act directed at him/her and which is of direct or individual concern. A central problem is that it might be difficult for a person to show that he/she is directly affected by the act, especially since legislation by its nature establishes general rules (and when it comes to agencies, they mainly seem to coordinate or assist Member

⁷⁵⁵ See e.g., EDPS, ‘Opinion of the European Data Protection Supervisor on the data protection reform package’ [2012] 7 March 2012. Additional comments are available at EDPS page dedicated to the reform: EDPS, ‘EU Data Protection Reform’ <https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/Reform_package> accessed 1 June 2014. However, in all the EDPS annual report 2013 seems to indicate a rather satisfactory image, except of budgetary constraints. European Data Protection Supervisor, Annual Report 2013 (Publications Office of the European Union 2014).

⁷⁵⁶ George Kratsas, ‘A Case of OLAF: The Place and Role of the Anti-Fraud Office in the European Union Context’ [2012] *European Public Law* 65, 69-91.

⁷⁵⁷ See Gráinne de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ [2013] *Maastricht Journal of European and Comparative Law* 168, 171 finding support for this in a survey of CJEU case law.

⁷⁵⁸ Article 263 TFEU.

States).⁷⁵⁹ As regards requests for preliminary rulings, it is the national courts (and not individuals) that decide whether to bring such requests to the CJEU. The same limitation applies to requesting the Commission to bring proceedings against Member States.⁷⁶⁰

Another difficulty that individuals may face when trying to bring a case to the CJEU is reluctance by the Court to engage in fundamental rights review. Despite many cases on the validity of the European Arrest Warrant in domestic courts, and although (as noted by Raulus in 2011) there were almost 1000 cases pending concerning the Dublin system in the ECtHR, practically none had reached the CJEU.⁷⁶¹ While there in recent years have been an increasing amount of AFSJ fundamental rights cases before the CJEU, Labayle and de Bruycker in 2013 argued that only two cases had concerned matters of substance in respect of immigration policy.⁷⁶² Hence, an imbalance seems to persist in the use of the CJEU as opposed to the ECtHR as a fundamental/human rights accountability mechanism. National courts also demonstrate a reluctance to refer migration cases to the CJEU. In fact, it has been argued that national governments have even acted so as to prevent cases ending up before the Court. A similar reluctance to act in questions that are nationally sensitive is displayed by the Commission.⁷⁶³ Even though a claim has been made that EU accession to the ECHR would create insurmountable problems for the implementation of EU legislation especially in the AFSJ, the future accession of the EU to the ECHR is often brought up as the solution to the lack of proper mechanism of redress for individuals.⁷⁶⁴

⁷⁵⁹ For this reason e.g., Guild *et al.* conclude that compensation for damages (340 TFEU) may actually offer the individual greater opportunities, even if the same complications apply in this case. See also Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 83-86.

⁷⁶⁰ FRA, Annual Report, 'Fundamental rights: challenges and achievements in 2011' [2012], 20-21.

⁷⁶¹ Helena Raulus, 'Fundamental Rights in the Area of Freedom, Security and Justice' in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 213, 235.

⁷⁶² Henri Labayle and Philippe De Bruycker, 'Towards the Negotiation and Adoption of the Stockholm Programme's Successor for the Period 2015-2019' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 36.

⁷⁶³ See further Anja Wiesbrock, 'Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty' [2013] *Maastricht Journal of European and Comparative Law* 423, 437-438.

⁷⁶⁴ See e.g., Jörg Polakiewicz, 'EU law and the ECHR: will the European Union's accession square the circle?' [2013] *European Human Rights Law Review* 592, 605 and Alexandra de Moor and Gert Vermeulen, 'Europol and Eurojust' [2011] Annex B to the report Aidan Wills *et al.*, 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 384. See also Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013).

It is generally recognised that one of the most significant sources of human rights violations within the Union is that Member States do not always follow the principles of EU law, including the Union's fundamental rights *acquis*. Amnesty International has, in this regard, submitted that: "The compliance with human rights of member states' implementation of EU law remains an area of concern".⁷⁶⁵ The NGO has therefore held that: "It is essential that the Commission takes into due consideration all relevant human rights issues when reporting on the implementation of EU measures. [... At present, the] Commission's reports tend to focus on the formal transposition of EU standards into national law, failing to consider existing gaps and overlooking the human rights implications which relate to the measures in question."⁷⁶⁶ The NGO has also held that the Commission should try more actively to prevent and react to human rights violations by Member States, including through infringement proceedings.⁷⁶⁷

F. Technocratisation and expertisation

It has not been possible to consider the tasks of the various EU agencies in detail in this report.⁷⁶⁸ However, certain common features need to be considered as the phenomenon of agencification can be problematic from a fundamental rights perspective. Within the AFSJ, the question of agencification is especially pertinent as there is an increasing reliance on agencies in the implementation of AFSJ policies.

While all AFSJ agencies have their particular tasks, a common feature of them is the distinction between technical and political matters. The Commission has presented the necessity of agencies as a way of making the executive more effective at the European level in "highly specialised technical areas".⁷⁶⁹ According to the Commission, the technical and scientific

⁷⁶⁵ Amnesty International, *The Future of EU Policies in the Area of Freedom, Security and Justice: A Human Rights Perspective* [2014], 8. See also e.g., FRA, Report, 'Fundamental Rights in the Future of the European Union's Justice and Home Affairs' [2013], 2.

⁷⁶⁶ Amnesty International, *The Future of EU Policies in the Area of Freedom, Security and Justice: A Human Rights Perspective* [2014], 8.

⁷⁶⁷ Amnesty International, *The Future of EU Policies in the Area of Freedom, Security and Justice: A Human Rights Perspective* [2014], 9-10.

⁷⁶⁸ For a recent set of articles on agencies, see e.g. the special issue of *Perspectives on European Politics and Society*, volume 14, 2013. For an overview e.g., of issues concerning Frontex, see Aoife Spengeman, 'Upholding the Legitimacy of Frontex: European Parliamentary Oversight' [2013] *European Security Review* 1.

⁷⁶⁹ European Commission, Commission Communication: The operating framework for the European Regulatory Agencies [2002] COM(2002) 718 final, 5.

assessments made by the agencies is their real *raison d'être*.⁷⁷⁰ The Commission has held that: “The main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations”.⁷⁷¹ In this image of agencies, an emphasis of and reliance upon expert knowledge is important for agencies themselves, as it becomes the most important feature providing legitimacy and “epistemic authority” to them.⁷⁷²

By way of an example, the ISS lays it upon home affairs agencies (Europol, Eurojust and Frontex) to produce threat assessments as well as to identify and define the phenomenon that are considered to be the most important in implementation of the strategy (through the so-called policy cycle). These threat assessments then gradually, through the involvement of COSI, become background information for the political decision-making of the JHA Council.⁷⁷³ Rijpma has characterised the limited role given to the Commission and the Parliament in relation to the policy cycle as “striking”.⁷⁷⁴

The production of and reliance on knowledge produced by agencies in the political decision-making process is, however, not unproblematic. First, there is no conceptual clarity on what constitutes ‘knowledge’. All agencies operate with a range of techniques of knowledge production. Yet, for example, variations in data collection methods can have an impact on the reliability of the knowledge produced. The way in which agencies interpret central concepts

⁷⁷⁰ European Commission, Commission Communication: The operating framework for the European Regulatory Agencies [2002] COM(2002) 718 final, 5.

⁷⁷¹ European Commission, Commission Communication: The operating framework for the European Regulatory Agencies [2002] COM(2002) 718 final, 5. See also Herwig C. H. Hofmann and Alessandro Morini, ‘Constitutional aspects of the pluralisation of the EU executive through “agencification”’ [2012] *European Law Review* 419, 421.

⁷⁷² Joanna Parkin, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] *CEPS Papers in Liberty and Security in Europe*, No. 49, 38.

⁷⁷³ European Commission, The EU Internal Security Strategy in Action: Five steps towards a more secure Europe [2010] COM(2010) 673 final, Helena Carrapiço and Florian Trauner, ‘Europol and its Influence on EU Policy-making on Organized Crime: Analyzing Governance Dynamics and Opportunities’ [2013] *Perspectives on European Politics and Society* 357, and Joanna Parkin, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] *CEPS Papers in Liberty and Security in Europe*, No. 49, 5. This can already in itself be a source of concern. The adoption of the ISS and its management within the COSI has been seen to stand in contrast with previous approaches (which placed great emphasis on public debate at parliamentary level), essentially turning the clock back to a more technocratic approach. Henri Labayle and Philippe De Bruycker, ‘Towards the Negotiation and Adoption of the Stockholm Programme’s Successor for the Period 2015-2019’ [2013] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 14.

⁷⁷⁴ Jorrit J. Rijpma, ‘Institutions and Agencies: Government and Governance after Lisbon’ in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 54, 72.

such as ‘intelligence’, ‘research’ and ‘development activities’ has an impact on how the agency understands its role as a producer of knowledge.⁷⁷⁵

Second, the importance of the input of knowledge by agencies in the AFSJ’s decision-making makes the question of participation and inclusiveness in the work of agencies especially central. The independent role granted to agencies is seen as a necessity for agencies to be scientifically credible. By being separate from the Member States, the hope is namely to avoid ‘regulatory capture’ by (particular) states. The downside of this independence is that agencies are at the same time left at risk of ‘capture’ from other interests, such as representatives of national law enforcement bodies and practitioners from security industries. A particular concern that has been voiced concerns the role of academic input. Although there are some indications of, for example, Frontex and Europol increasingly cooperating with academics and universities, their overall input nevertheless remain modest. The particular absence of social science and humanities research represents an imbalance in the knowledge production to the detrimental impact of fundamental rights concerns – a lack of representation which undermines the idea of depoliticised knowledge.⁷⁷⁶

On a more principled level, one may furthermore question the idea of “purely technical questions” that do not have political dimensions. The use of seemingly technocratic knowledge as a basis for policy making can, in fact, disguise struggles between policy actors.⁷⁷⁷ The complexity of the terrorist challenge, for example, becomes only partially visible if it is addressed through repression policies.⁷⁷⁸ In a similar way, relabelling preventive border control measures as ‘rescue and interception measures’ becomes a strategy for avoiding engagement in that political struggle.⁷⁷⁹ Framing agencies as depoliticised ‘coordinators’ or ‘facilitators’ of

⁷⁷⁵ Joanna Parkin, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] *CEPS Papers in Liberty and Security in Europe*, No. 49, 31-32.

⁷⁷⁶ Joanna Parkin, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] *CEPS Papers in Liberty and Security in Europe*, No. 49, 33 and 40. For models of Member State representation, see Herwig C. H. Hofmann and Alessandro Morini, ‘Constitutional aspects of the pluralisation of the EU executive through “agencification”’ [2012] *European Law Review* 419, 437. Examples such as the establishment of the Frontex Fundamental Rights Officer and Consultative Forum on Fundamental Rights demonstrate that some improvement may have been made in this respect.

⁷⁷⁷ Herwig C. H. Hofmann and Alessandro Morini, ‘Constitutional aspects of the pluralisation of the EU executive through “agencification”’ [2012] *European Law Review* 419, 422.

⁷⁷⁸ Raphael Bossong, ‘EU cooperation on terrorism prevention and violent radicalization: frustrated ambitions or new forms of EU security governance?’ [2014] *Cambridge Review of International Affairs* 66.

⁷⁷⁹ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 92-93.

Member State actions has increased their relative autonomy, in some cases preventing the proper democratic scrutiny of the nature and impact of their activities and evading questions of accountability, responsibility and liability in cases of alleged unlawful actions, including potential fundamental rights breaches and risks.⁷⁸⁰ It should also be noted that the impact of this development does not stop at agencies. Also, the European Parliament, in addressing AFSJ issues, has been accused of having become subject to a technocratisation and depoliticisation to the detriment of scrutiny and democratic accountability.⁷⁸¹

G. The securitisation of “freedom” and “justice”

The relationship between the values (and policies) of freedom, security, and justice have by many authors been noted to constitute a tension where the balancing between freedom and justice with security gives rise to some concern. Above all, a tendency has been noted whereby a security mindset permeates other JHA issues. By labelling events and issues as security matters a special politics is invoked, or even seemingly moves that particular issue beyond politics altogether. A securitisation of policies legitimises much of the activities that AFSJ actors undertake. Security concerns emphasise prevention, which in turn require risk-assessments and information flows about risks, data processing, exchange of information, and networks of security professionals.⁷⁸²

This approach is most visibly embodied in the ISS, which emphasises prevention and anticipation and which underlines a proactive, intelligence-led approach to cross-border crime. The approach is also reflected in the growing prevalence of intelligence-led tools and strategies among AFSJ agencies.⁷⁸³ Irregular immigration is phrased as a risk and threat, and likens irregular immigration with serious and organised crime and even terrorism. This in turn legitimises the adoption of coercive policies and increased surveillance. Under this pretext,

⁷⁸⁰ These observations have been made in respect of Frontex and Europol. Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 8

⁷⁸¹ Sergio Carrera, Nicholas Hernanz and Joanna Parkin, ‘The ‘Lisbonisation’ of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice’ [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 36.

⁷⁸² Kaarlo Tuori, ‘A European Security Constitution?’ in Massimo Fichera and Jens Kremer (eds), *Law and security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 39, 62-66.

⁷⁸³ Joanna Parkin, ‘EU Home Affairs Agencies and the Construction of EU Internal Security’ [2012] *CEPS Papers in Liberty and Security in Europe*, No. 49, 34. For an overview of key intelligence products and related tools by EU Home Affairs agencies (Europol, Frontex, Eurojust, OLAF, CEPOL), see *ibid*, at 35.

agencies such as Frontex, Europol, and EASO have all also become actors in the sphere of external relations.⁷⁸⁴ Hence, the increase of immigrant arrivals in the Canary Islands in the summer of 2006 was not only presented as an ‘unprecedented humanitarian crisis’ but also as a ‘European problem’ and Frontex was found to be the solution to it.⁷⁸⁵

The Stockholm Programme has been seen as less security-oriented than its predecessor (the Hague Programme), with its emphasis on fundamental rights and accountability. Yet agencification, insufficient parliamentarisation and confidentiality are factors that work against achieving the values of transparency, democracy, accountability, and with it, protection of fundamental rights.⁷⁸⁶ The Stockholm Programme itself is clear on situating security as the starting-point, in stating that the challenge concerning the setting of political priorities “will be to ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security”.⁷⁸⁷ The post-Stockholm policy programme that will be adopted cannot escape a strong risk-focus either, due to the institutionalisation and internalisation of the logic of risks into the AFSJ. This emphasis of the AFSJ is undeniably an inherent aspect of cooperation in the area, as confirmed by the policy programs, the ISS, and most recently in the Commission proposals for the priorities of the post-Stockholm programme. However, at the same time, security concerns seem to adopt a special position that may even relegate other values to a secondary position.⁷⁸⁸

The securitisation of AFSJ policies has several consequences. Framing JHA issues as intelligence matters calls for secrecy and confidentiality in working methods when gathering, processing

⁷⁸⁴ Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, ‘Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office’ [2011] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 100-109.

⁷⁸⁵ Sergio Carrera, ‘The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands’ [2007] *CEPS Working Documents*, No. 261, 13. Johannes Pollak and Peter Slominski, ‘Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU’s External Borders’ [2009] *West European Politics* 904, 914.

⁷⁸⁶ Kaarlo Tuori, ‘A European Security Constitution?’ in Massimo Fichera and Jens Kremer (eds), *Law and security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 39, 79.

⁷⁸⁷ European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 4.

⁷⁸⁸ Perhaps symptomatically the Commission launched two separate documents in preparing for the post-Stockholm programme – one focusing on security, the other on justice. European Commission, Commission Communication: An open and secure Europe: making it happen [2014] COM(2014) 154 final with European Commission, Commission Communication: The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union [2014] COM(2014) 144 final. For a more nuanced view on security, see Massimo Fichera and Ester Herlin-Karnell, “The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?” [2013] *European Public Law* 759, 762. .

and disseminating information. AFSJ agencies involved underline confidentiality as a pre-requisite for efficiency and for confidence building among Member States' security practitioners. Such a culture of secrecy prevents scrutiny and accountability of decisions and actions taken. In the absence of information on how data has been gathered and how sources have been selected and processed, the quality and validity of the intelligence cannot be critically assessed.⁷⁸⁹ This is problematic in that the various threat assessments often function as central background documents for AFSJ decision-making.⁷⁹⁰

Above all, a framing of AFSJ matters as security matters can be at odds with fundamental rights. In Labayle's and De Bruycker's mid-term evaluation of the Stockholm Programme an imbalance between freedom and security is noted to be visible, for example, in the fight against terrorism and the potential discrimination of third-country nationals, the proliferation of automatic data transfer mechanisms and the protection of personal data, as well as in the treatment of asylum seekers. In addition, they note imbalances between justice and security due to the absence of a genuine European judicial area in spite of the adoption of the ISS.⁷⁹¹ Also, the UN Special Rapporteur on the Human Rights of Migrants has noted that in the EU's migration policy "irregular migration remains largely viewed as a security concern that must be stopped".⁷⁹² Perhaps some encouraging signs, at least in respect of data protection standards, can be found in CJEU case law. In the Joined Cases *Digital Rights Ireland and Seitlinger and Others* from April 2014, the CJEU took a firm stance on the balancing between security and fundamental rights concerns in respect of the protection of personal data.⁷⁹³

⁷⁸⁹ Joanna Parkin, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] *CEPS Papers in Liberty and Security in Europe*, No. 49, 35-38 with more detailed examples, and Elspeth Guild, Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 99-100.

⁷⁹⁰ See Stephen Rozée, Christian Kaunert and Sarah Léonard, 'Is Europol a Comprehensive Policing Actor?' [2013] *Perspectives on European Politics and Society* 372, and Helena Carrapico and Florian Trauner, 'Europol and its Influence on EU Policy-making on Organized Crime: Analyzing Governance Dynamics and Opportunities' [2013] *Perspectives on European Politics and Society* 357.

⁷⁹¹ Henri Labayle and Philippe De Bruycker, 'Towards the Negotiation and Adoption of the Stockholm Programme's Successor for the Period 2015-2019' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 12 ff.

⁷⁹² Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, UN doc. A/HRC/23/46, 24 April 2013, para. 31.

⁷⁹³ Judgment of 8 April 2014 in *Digital Rights Ireland* respectively *Seitlinger and Others*, C-293/12 and C-594/12. The court found that in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life, the EU legislature's discretion is reduced. As the proposed Directive 2006/24 failed to lay down clear and precise rules governing the extent of the interference with the fundamental rights, the court held that the directive entailed a serious interference with fundamental rights and excessive of

It should furthermore be noted that security interests are not the only ones that may threaten fundamental rights. For example, in external relations economic interests may triumph a value-based foreign policy.⁷⁹⁴ A difficult question is what kinds of external relations instruments maximise the realisation of human rights. Labayle and De Bruycker have in this regard noted that:

The EU continues to prefer to include AFSJ clauses in broader cooperation agreements, which trivialises JHA issues. The effectiveness of these clauses is questionable since third countries have many other priorities, and the idea of attaching conditionality requirements to these clauses has been abandoned. On the other hand, the conclusion of bilateral or multilateral agreements devoted solely to JHA issues at least has the benefit of ensuring their visibility, even if it also reveals their political sensitivity, as was the case with the PNR agreements or agreements on the fight against terrorism.⁷⁹⁵

In relation to the external dimension of the AFSJ, it should be noted that the EU sometimes interacts with States that have an even stronger security focus than the Union and that the Union then can become a “norm-taker” rather than being a “norm-exporter”.⁷⁹⁶ In this regard, Trauner has held that the external security cooperation between the EU and the USA has had negative internal human rights implications for the Union.⁷⁹⁷

H. The continued disregard for external human rights implications of EU action

In the EU’s CFSP, the furtherance of human rights (including rule of law) has always played a central role. While the Union and its leaders express sympathy for victims of human brutality and natural disasters, it has, however, been argued that there rarely is a real will to alleviate the suffering of non-EU citizens - at least if this involves allowing people in need to enter the Union. Criticism of this type is expressed, for example, by Ward who argues that:

any claimed necessity. Also see Kaarlo Tuori, ‘A European Security Constitution?’ in Massimo Fichera and Jens Kremer (eds), *Law and security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 39, 73.

⁷⁹⁴ Michael Reiterer, ‘Human Rights as Part of the EU Foreign Policy after Lisbon: In Defence of Western Values and Influence?’ [2010] *European Yearbook on Human Rights* 141, 143 and 151.

⁷⁹⁵ Henri Labayle and Philippe De Bruycker, ‘Towards the Negotiation and Adoption of the Stockholm Programme’s Successor for the Period 2015-2019’ [2013] report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 18.

⁷⁹⁶ Cf. Sarah Wolff and Grégory Mounier, ‘The External Dimension of JHA: A New Dimension of EU Diplomacy’ in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 241, 255.

⁷⁹⁷ Florian Trauner, ‘The Internal-External Security Nexus: More Coherence under Lisbon?’ [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 21.

A superficial adherence to European values concerning respect for rights, access to asylum, and humane treatment, masks a brutal reality driven by base politics—with European voters apparently willing to set aside humanity if it offers the faintest chance of keeping out migrants and asylum seekers. [...] the basic philosophy of EU migration policy can be expressed simply: to keep them out, make life as unpleasant as possible for those who do arrive, get rid of them quickly if you can, and if you can't, then detain them for as long as possible.⁷⁹⁸

Likewise Eisele and Reslow point out that:

EU migration policy does not address labour migration and irregular migration on equal terms despite the assertion of a balanced Global Approach to Migration. The fight against irregular migration continues to be prioritised as evidenced by the comprehensive action list in the Stockholm Programme. Conversely, the EU and its Member States encourage legal migration only where it has beneficial implications for them – otherwise consensus in the Council remains difficult to reach.⁷⁹⁹

It is hence argued that the EU has created a “Fortress Europe” and that no real steps towards overcoming this have been achieved despite EU claims to the contrary. What exactly the Union should do to sincerely care about non-EU citizens in distress is, however, disputed. Pascouau, for example, has suggested that the Union should develop a meaningful protection policy, that is, it should adopt more effective measures to protect asylum seekers and refugees outside the EU.⁸⁰⁰ Guild and Moreno-Lax, for their part, find that the Parliament, when negotiating readmission agreements, should ensure that detailed refugee clauses are introduced into them to ensure access to determination procedures.⁸⁰¹

⁷⁹⁸ Benjamin Ward, ‘Europe’s Spectacle of Compassion for Migrants’, *Open Democracy* [2014], 15 May 2014, <<http://www.opendemocracy.net/can-europe-make-it/benjamin-ward/europe%E2%80%99s-spectacle-of-compassion-for-migrants>> accessed 17 May 2014.

⁷⁹⁹ Katharina Eisele and Natasja Reslow, ‘Encouraging Legal Migration and Preventing Irregular Migration: Coherence or Contradiction?’ in Christina Gortázar, María-Carolina Parra, Barbara Segaert and Christiane Timmerman (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 165, 172.

⁸⁰⁰ Yves Pascouau, ‘The future of the area of freedom, security and justice: Addressing mobility, protection and effectiveness in the long run’ [2014] *EPO Discussion Paper*, 23.

⁸⁰¹ Elspeth Guild and Violeta Moreno-Lax, ‘Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR’ [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 3.

V. Concluding remarks

The purpose of this report has been to give an overview of institutional decision-making in the AFSJ. Particular attention has been paid to how EU institutions that are active in the AFSJ engage with fundamental rights and to the instruments through which AFSJ cooperation is conducted. The report has sought to lay the groundwork for the establishment of a nexus between institutional features of the AFSJ, the legal and policy tools available, and the fundamental rights issues that may be of concern when acting in the AFSJ.

The mapping of the institutional mechanisms and instruments through which fundamental rights are guaranteed reveals a two-fold image: on the one hand, especially since the adoption of the Lisbon Treaty, the AFSJ has changed dramatically. The AFSJ has been brought into the general constitutional scheme of EU decision-making. Becoming part of the general constitutional system has meant that former third pillar matters have become part of a system of constitutional checks (including fundamental rights). This development reached its peak in the adoption of the Stockholm Programme with its outspoken emphasis on the rights of individuals. Also, on a more general level, it may be argued that the EU has become more human rights aware over the years, which is reflected in the adoption of various instruments and the improvement of institutional practices and mechanisms.

On the other hand, however, the AFSJ continues to be a policy area that is characterised by institutional peculiarities and novel or experimental forms of governance. These characteristics give rise to general governance issues, but can also generate fundamental rights concerns. The institutional improvements that the Lisbon communitarisation of the AFSJ brought with it are hence counterbalanced by the challenges arising out of these special features. While the 'Lisbonisation' of the AFSJ has improved fundamental rights scrutiny of AFSJ acts and legislation, the development is counteracted by the agencification phenomenon and the difficulties that it brings with it for realising political accountability. Further, whereas bringing AFSJ acts within the jurisdiction of the CJEU can be seen as a huge leap forward for the realisation of the rule of law in the AFSJ, the obstacles that individuals face in bringing cases to the Court seriously undermine the usefulness of the CJEU as a guardian of individual rights.

Some of the incoherence affecting the protection granted to individuals has a constitutional source. The very balancing of 'freedom', 'security' and 'justice' is inherent in all policy-making in the area and cannot find an abstract solution. Instead, the balancing will constantly need to be re-struck. There is also a constitutional differentiation of Member State obligations resulting, for example, from opt-ins/-outs and the possibility of enhanced cooperation through special legislative procedures and emergency brakes.

The fact that AFSJ decision-making (mostly) follows the ordinary EU decision-making procedure also means that the area displays the general problems of EU decision-making and institutional design. While the 'Lisbonisation' of the AFSJ and especially the central role adopted by the LIBE committee in themselves are positive developments from a fundamental rights perspective (not to mention for transparency, democratic control and political accountability in general), these developments also highlight the underdeveloped nature of the tools that the European Parliament has at its disposal in general. Unclear division of competence between institutions (or between institutions and Member States) as well as struggles over policy ownership are other common problems of EU governance that can also be clearly noticed in the AFSJ. Most recently, the political sensitivity of the AFSJ was reflected in the inter-institutional relations of core AFSJ actors through the competing political priorities between the European Council Strategic Guidelines for Legislative and Operational Planning for the coming years in the AFSJ (of 26-27 June 2014), and the European Commission Communications (of March 2014) identifying key challenges ahead.⁸⁰² With these institutional issues in mind, it seems apparent that the 'Lisbonisation' of AFSJ cooperation is still incomplete and needs to be further developed. However, as these problems are also symptomatic of a broader institutional immaturity at the heart of EU policy making, any swift solutions will be hard to come by.

Fundamental rights issues can have their source at all levels of AFSJ policy- and law-making. However, one particular feature characterising the AFSJ is the complexity of the institutional design of the area. The complex institutional structure is a result of numerous sub-bodies taking part in the preparation of EU decision-making, and above all, the use of agencies. The multitude of actors that are involved in AFSJ governance can obscure the decision-making process and affect the allocation of responsibility. There is also in the AFSJ an increasing externalisation or outsourcing of functions, for example, through granting of tasks to third states and private actors in the external dimension of EU migration policy.⁸⁰³ This external dimension not only challenges the reach of the EU system for the protection of fundamental rights, but also potentially exports flaws of the EU system to concern third country nationals.

The use of agencies is the matter that has perhaps been explored most in academic literature concerning the AFSJ. Agencies are both in themselves an expression of experimentalist governance as well as a source of novel governance techniques. Features such as expertisation

⁸⁰² Sergio Carrera and Elspeth Guild, 'The European Council's Guidelines for the Area of Freedom, Security and Justice 2020: Subverting the "Lisbonisation" of Justice and Home Affairs?' [2014] *CEPS Essay*, No. 13/14, 4.

⁸⁰³ See further e.g., Anja Wiesbrock, 'Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty' [2013] *Maastricht Journal of European and Comparative Law* 423, 435.

and technocratisation are particular concerns that are closely attached to the use of agencies. None of this is to say that AFSJ agencies are somehow intrinsically anti-fundamental rights. FRA has indeed become a true human rights body for the EU. Heavily criticised agencies, such as Frontex, have also made progress in ensuring that fundamental rights are protected in their activities. Yet, the reliance on agencies also brings with it its own set of concerns (of transparency, representativeness, and accountability) all of which can have an impact on the rights of individuals who come in contact with these agencies.

It should also be noted that the reliance on agencies can in itself be considered as a policy choice (instead of an inevitability following from the particularities of AFSJ cooperation). Agencies are in themselves a particular form of instrument for governing the AFSJ. The merits and demerits of agencies should therefore be assessed in comparison with other means of governance. This opens up the question as to whether the improvements made are enough to counterweight the governance problems that still remain. Some authors actually contend that the added value of agencies still remains to be demonstrated.⁸⁰⁴

Yet another feature of the AFSJ is the use of instruments and integration mechanisms that grant Member States some or even considerable freedom of action (such as mutual recognition and mutual trust and best practices manuals). The use of these instruments and mechanisms is often dictated by Member State reluctance to pursue further legislative integration. While the use of policy tools instead of legislative measures may be the only available means for pursuing and enhancing cooperation in a highly politically sensitive area, such tools may also cause concerns in cases where individual States do not respect fundamental rights. However, as was noted in Section IV.C, recent case law from both the CJEU and the ECtHR suggests that Member States cannot escape responsibility in situations where they should have been aware of the fact that the other Member State does not act in accordance with fundamental/human rights. Also, the recent EIO directive is based on a rebuttable presumption of compliance by other Member States regarding fundamental rights. Hence, from a fundamental/human rights perspective it is not always necessary to deepen and broaden integration to ensure better protection. Rather, it is necessary to ensure that there is not blind trust in other actors' fundamental/human rights protection and that in cases where many actors are involved, all acknowledge and respect their obligations.

Competing preferences can also affect the process of identifying and locating the source of fundamental rights problems. As has been shown, fundamental rights incoherences can have

⁸⁰⁴ Sarah Wolff and Adriaan Schout, 'Frontex as Agency: More of the Same?' [2013] *Perspectives on European Politics and Society* 305.

their source at all levels of AFSJ policy- and law-making. Fundamental rights issues can derive from a differentiation of obligations as well as from an overly hasty integration process. The report has singled out multiple issues that may affect the enjoyment of fundamental rights such as: competence issues, Member State discretion and differentiation of obligations, lack of mainstreaming of fundamental rights concerns, flaws in accountability mechanisms, technocratisation of AFSJ policies, securitisation of fundamental rights issues, and disregard for external fundamental rights implications. Other matters could certainly be added as well. These identified broad categories are of concern in a different manner for different actors and in different policy areas. Above all, emphasising any one of these will at the same time present an institutional preference. In this way, the debate over the role of fundamental rights in the AFSJ can also become an extension of other institutional priorities.

While this overview of the way in which fundamental rights concerns are present in the AFSJ institutions and tools has identified several points of concern, the nature of the cooperation in the area is bound to continuously give rise to new fundamental rights questions. The challenges that face the ensuring of fundamental rights in the AFSJ are therefore unlikely to diminish in the foreseeable future. In fact, one may argue that the trend is to the contrary. Irrespective of the nature and form of AFSJ cooperation in the coming years, it is easy to concur with FRA in holding that respect for fundamental rights will require a “shared and regularly renewed commitment by all those concerned, at all levels of governance”.⁸⁰⁵

⁸⁰⁵ FRA, Annual Report, ‘Fundamental Rights: Challenges and achievements in 2013’ [2014] 7.

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Annexes

Annex 1: Council Working Party Tasks⁸⁰⁶

Standing Committee on Operational Cooperation on Internal Security (COSI)

COSI was created to strengthen operational cooperation in relation to the internal security of the EU. The key objective of the Committee, as set out in the Lisbon Treaty, is to promote the coordination of operational actions between the EU Member States, including in the area of law enforcement.

Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)

SCIFA consists of senior level officials with the task of determining strategic guidelines for EU cooperation on immigration, frontiers and asylum.

Working Party on Integration, Migration and Expulsion

The Working Party on Integration, Migration and Expulsion deals with issues related to entry and exit of the EU. This includes the framework for legal entry and stay in the EU, questions on returning persons with illegal stay and the EU Commission's negotiations with third countries on readmission agreements. The group also works on integration issues, promoting and supporting national integration policies.

Visa Working Party

The Visa Working Party deals with broad issues connected to the establishment of a common visa policy in relation to third country citizens and the procedures and conditions for issuing visas.

Asylum Working Party

The Asylum Working Party deals with asylum issues and is currently recasting some of the basic texts on asylum. This includes the Dublin Regulation and the Eurodac Regulation on the criteria for the country in which an applicant must have his case examined, and a number of directives concerning the conditions for asylum seekers in the EU.

Working Party on Frontiers

The Working Party on Frontiers deals with legislation regulating the crossing of external EU borders, external borders of the Schengen area and internal borders between Member States. Questions related to the EU agency for the management of external borders, Frontex, are also addressed in this group.

Working Party on Civil Law Matters (JUSTCIV)

JUSTCIV deals with legislative initiatives in the area of civil law cooperation and plays a coordinating role when a common EU position has to be established prior to meetings with other international bodies.

Working Party on Terrorism (TWP)

The Working Party on Terrorism considers initiatives to prevent and fight terrorism. At TWP meetings, relevant national experiences and initiatives as well as information about current terrorism-related incidents are exchanged between Member States.

⁸⁰⁶ Source: <<http://eu2013.ie/ireland-and-the-presidency/abouttheeu/theeuexplained/councilworkingparties/>> accessed 5 June 2014.

Customs Cooperation Working Party (CCWP)

The Customs Cooperation Working Party is responsible for the coordination of customs cooperation between Member States and continuously improving cooperation between customs authorities and between customs and police. The group adopts action plans, projects and proposals for Joint Customs Operations (JCO).

Working Party on Cooperation in Criminal Matters (COPEN)

COPEN deals with initiatives, typically legislative, regarding cooperation in criminal matters between Member States, including mutual assistance in investigations, the surrender and transfer of sentenced persons and the enforcement of judicial decisions.

Working Party on Substantive Criminal Law (DROIPEN)

DROIPEN considers legislative initiatives regarding substantive criminal law, in particular initiatives to harmonise national provisions of substantive criminal law. In addition, the working party considers new legislation relating to criminal procedure.

Working Party on Civil Protection (PROCIV)

PROCIV deals with the Union's efforts to prevent and manage natural and manmade disasters, such as floods, forest fires and earthquakes. The group addresses issues concerning mutual disaster assistance between EU Member States as well as the EU coordination of joint disaster assistance to third countries. PROCIV also engages in cross-sector cooperation on the protection of European critical infrastructure and security cooperation in the fight against terrorism in the area of chemical, biological, radiological and nuclear materials (CBRN).

Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)

FREMP secures compliance with the Charter of Fundamental Rights of the European Union, and considers the question of the EU's accession to the European Convention on Human Rights. The group is also involved with preparatory work in the legislative procedures of the Council.

Working Party on Information Exchange and Data Protection (DAPIX)

DAPIX addresses issues relating to information exchange and data protection. On the information exchange side, it draws up EU strategies for ensuring the exchange of information between law enforcement authorities of Member States. In the area of data protection, the working party helps to ensure that data are exchanged in compliance with current principles and rules on personal data protection.

JAI-RELEX Working Party

The JAI-RELEX Working Party ensures that the EU's external relations in the area of justice and home affairs (JHA) are appropriately coordinated. JAI-RELEX also plays a coordinating role in assisting other relevant Council working parties in making more strategic assessments within the external dimension of the area of justice and home affairs.

Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS)

CATS prepare the work of the Council in the areas of criminal law and law enforcement cooperation. A variety of cases from the relevant Council working parties are discussed from a more strategic and coordinating perspective in the Committee before they go to COREPER and the Council.

Law Enforcement Working Party (LEWP)

LEWP considers initiatives regarding criminal investigation and law enforcement. A number of expert groups associated with the working party discuss topics such as security at major sports events and issues related to radio communication and stolen vehicles.

Working Party for Schengen Matters

The Working Party for Schengen Matters meets in four different formations, each dealing with particular areas within the Schengen system. These are: evaluation mechanisms (SCHEVAL Group), the Schengen Information System (SIS SIRENE Group), technical questions (IS-TECH Group), and the Schengen rules (Schengen Acquis Group).

Working Party on General Matters including Evaluation (GENVAL)

GENVAL draws up some of the Community's strategies and policies aimed at coordinating measures to prevent and counter organised crime. The working party also plans evaluations of the Member States' compliance with their international obligations in this area.

Ad Hoc Working Party on JHA Financial Instruments

This working party was set up in January 2012 to examine the financial instruments relating to the Multiannual Financial Framework in the areas of Justice and Home Affairs.

High-Level Working Group on Asylum and Migration

The High-Level Working Group on Asylum and Migration establishes a comprehensive and integrated strategy for EU cooperation with third countries in the area of asylum and migration. The objective is to strengthen the external dimension of the EU's asylum and migration policies based on dialogue, cooperation and partnership with countries of origin and transit in the areas of legal migration, illegal migration, asylum applicants and development. The group also prepares conclusions and recommendations on the causes and consequences of asylum and migration, for adoption by the Council.

Working Party on Human Rights (COHOM)

COHOM monitors developments in the area of human rights throughout the world and prepares guidelines and assessments of the EU's approach to certain human rights issues. The mandate of this working party includes responsibility for shaping the EU's human rights policy in its external relations.

Working Party on Terrorism (International Aspects)

The Working Party on Terrorism is the main forum for information exchange and EU coordination on international aspects of the fight against terrorism. Its main tasks are preparing meetings with third countries to engage in dialogue on terrorism, and carrying out threat analyses in relation to third countries in order to enhance EU cooperation with these countries on combating international terrorism.

Working Party on the Application of Specific Measures to Combat Terrorism

The working party processes applications for listing and delisting individuals, groups and entities involved in terrorism under the common position concerning sanctions against such actors. The working party also prepares a regular review of the list.

Annex 2: The main objectives and tasks of AFSJ Agencies

The account below enlists the main objectives and tasks of AFSJ Agencies as defined in their founding acts. Additional tasks may have been conferred upon these agencies through other decisions and agreements. The means by which to fulfil these tasks are further defined in the founding instruments, subsequent decisions, and other documents (such as specific rules adopted by the agency itself).

European Police Office, Europol

To collect, store, process, analyse and exchange information and intelligence; to notify Member States of information on criminal offences concerning them; to aid investigations; to ask competent authorities of the Member States concerned to initiate, conduct or coordinate investigations (or suggest the setting up of joint investigation teams); to provide intelligence and analytical support to Member States in connection with major international events; to prepare threat assessments, strategic analyses and general situations reports; to develop specialist knowledge of the investigative procedures of Member States and to provide advice on investigations; to provide strategic intelligence to assist and promote the efficient and effective use of the resources available at the national and Union levels for operational activities and the support of such activities; to assist (through support, advice and research) in crime prevention methods, technical and forensic methods and analysis and investigative procedures as well as training, organisation and equipment of national police authorities; to act as the Central Office for combating euro counterfeiting.⁸⁰⁷

The European Union's Judicial Cooperation Unit, Eurojust

To stimulate and improve the coordination between national authorities of investigations and prosecutions; to improve cooperation between national authorities e.g., by facilitating the execution of requests for, and decisions on, judicial cooperation (including instruments giving effects to the principle of mutual recognition); to support otherwise the national authorities in order to render their investigations and prosecutions more effective; to assist investigations and prosecutions concerning a Member State and a non-Member State where an agreement establishing cooperation or an essential interest exists; to assist investigations and prosecutions concerning a Member State and the Community; ask competent authorities of member states e.g., to undertake investigations, set up joint investigation teams, and provide Eurojust with information; to ensure that competent authorities of the Member States inform each other of investigations and prosecutions of which it has been informed and which have repercussions at Union level or which might affect Member States other than those directly concerned; to

⁸⁰⁷ Council Decision (EU) 2009/371/JHA establishing the European Police Office (Europol) [2009] OJ L 121/37, Article 5. Other core documents: Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) [1995] OJ C316/1, Council Decision 2009/934/JHA adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information [2009] OJ L325/6, Council Decision 2009/935/JHA determining the list of third States and organisations with which Europol shall conclude agreements [2009] OJ L 325/12, Council Decision 2009/936/JHA adopting the implementing rules for Europol analysis work files [2009] OJ L325/14, Council Decision 2009/968/JHA adopting the rules on the confidentiality of Europol information [2009] OJ L332/17, European Commission: Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA [2013] COM(2013) 173 final.

supply logistical support, including assistance for translation, interpretation and the organisation of coordination meetings; to give assistance in order to improve cooperation between the competent authorities of the Member States, in particular on the basis of Europol's analyses; to cooperate and consult with the European Judicial Network in criminal matters.⁸⁰⁸

European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Frontex

To coordinate operational cooperation between Member States in the field of management of external borders; to assist Member States on training of national border guards, to carry out risk analyses, to participate in the development of relevant research for the control and surveillance of external borders; to assist Member States technically and operationally; to set up European Border Guard Teams; to support Member States and coordinate organise joint return operations; to deploy border guards from the European Border Guard Teams to Member States in joint operations, pilot projects or in rapid interventions; to develop and operate information systems for exchange of information regarding emerging risks; to provide the necessary assistance to the development and operation of a European border surveillance system.⁸⁰⁹

European Police College, CEPOL

To increase knowledge of the national police systems and structures of other Member States and of cross-border police cooperation within the EU; to improve knowledge of international and Union instruments; to provide appropriate training with regard to respect for democratic safeguards, with particular reference to the rights of defence; to provide training sessions and help establish training programmes for senior police officers; to provide specialist training for police officers playing a key role in combating cross-border organised crime; to disseminate best practice and research findings; to develop and provide training to prepare police forces of the European Union for participation in non-military crisis management; to develop and provide training for police authorities from the candidate countries; to facilitate relevant exchanges and secondments of police officers; to develop an electronic network to provide back-up for CEPOL in the performance of its duties; and to enable the senior police officers of the Member States to acquire relevant language skills.⁸¹⁰

⁸⁰⁸ Council Document 5347/3/09 Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009], Articles 3, 6 and 7. Other core documents: Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63/1, Council Decision 2003/659/JHA amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2003] OJ L245/44, Council Decision 2009/426/JHA on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L138/14, European Commission: Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) [2013] COM(2013) 535 final.

⁸⁰⁹ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1.

⁸¹⁰ Council Decision 2005/681/JHA establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA [2005] OJ L246/63.

European Monitoring Centre for Drugs and Drug Addiction, EMCDDA

To provide EU and Member States with factual, objective, reliable and comparable information at European level concerning drugs and drug addiction and their consequences; to collect and analyse existing data, to disseminate data, to cooperate with European, international bodies/organisations and third countries.⁸¹¹

European Network and Information Security Agency, ENISA

To assist the Union institutions, bodies, offices and agencies in developing policies in network and information security; to assist the Union and the Member States in enhancing and strengthening their capability and preparedness to prevent, detect and respond to network and information security problems and incidents; to stimulate cooperation between actors from the public and private sectors; to support the development of Union policy and law; to support capability building; to support voluntary cooperation and awareness among competent public bodies, and between stakeholders, including universities and research centres; to support research and development and standardisation; to cooperate with Union institutions, bodies, offices and agencies with a view to addressing issues of common concern; and to contribute to the Union's efforts to cooperate with third countries and international organisations.⁸¹²

European Union Agency for Fundamental Rights, FRA

To collect data, to provide assistance and expertise relating to fundamental rights to EU institutions, bodies, offices, agencies and Member States when implementing EU law; to develop methods and standards to improve the comparability, objectivity and reliability of data; to carry out, cooperate with or encourage scientific research and surveys; to formulate and publish conclusions and opinions on specific thematic topics; to publish an annual report on fundamental-rights issues covered by the areas of the Agency's activity; to publish thematic reports based on its analysis, research and surveys; to publish an annual report on its activities; to develop a communication strategy and promote dialogue with civil society.⁸¹³

⁸¹¹ Regulation (EC) No 1920/2006 of the European Parliament and of the Council of 12 December 2006 on the European Monitoring Centre for Drugs and Drug Addiction (recast) [2006] OJ L376/1, Articles 1-2.

⁸¹² Regulation (EU) No 526/2013 of the European Parliament and of the Council of 21 May 2013 concerning the European Union Agency for Network and Information Security (ENISA) and repealing Regulation (EC) No 460/2004 [2013] OJ L165/41, Articles 1-4. Other core documents: Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency [2004] OJ L77/1, Regulation (EC) No 1007/2008 of the European Parliament and of the Council of 24 September 2008 amending Regulation (EC) No 460/2004 establishing the European Network and Information Security Agency as regards its duration [2008] OJ L293/1, Regulation (EU) No 580/2011 of the European Parliament and of the Council of 8 June 2011 amending Regulation (EC) No 460/2004 establishing the European Network and Information Security Agency as regards its duration [2011] OJ L165/3.

⁸¹³ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1. Other core documents: Council Decision 2008/203/EC Council Decision of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012 [2008] OJ L63/14, Council Decision

European Asylum Support Office, EASO

To help improve the implementation of the CEAS; to strengthen practical cooperation among Member States on asylum matters and to provide and/or coordinate the provision of operational support to Member States; provide scientific and technical assistance in regard to the policy and legislation of the Union in all areas having a direct or indirect impact on asylum; serve as an independent, scientific and transparent reference point; organise, promote and coordinate activities enabling the exchange of information and the identification and pooling of best practices in asylum matters; organise, promote and coordinate activities relating to information on countries of origin; support relocation of beneficiaries of international protection within the Union; manage and develop a European asylum curriculum; establish, develop and support training of national authorities; support for the external dimensions of the CEAS; coordinate and support common action assisting asylum and reception systems of Member States subject to particular pressure; to gather, identify, collect and analyse information e.g., provided by Member States, UNHCR, and other organisations.⁸¹⁴

EU Agency for large-scale IT systems, eu-LISA

To ensure the operational management of the SIS III, the VIS, and Eurodac; to prepare, develop, and manage other AFSJ large-scale IT systems; to assume responsibility for the infrastructure used by the systems; to adopt and to implement security measures; to ensure a high level of data protection requirements are fully met; and to ensure that no data is exchanged between the systems in the absence of a specific legal basis.⁸¹⁵

252/2013/EU establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights [2013] OJ L79/1.

⁸¹⁴ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L132/11, Articles 1-10.

⁸¹⁵ Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2011] OJ L286/1, Articles 1-2.