External relations law: how the outside shapes the inside

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I. INTRODUCTION

By offering its citizens an area of freedom, security and justice (AFSJ),\(^1\) the Union barely linguistically disguises an aspiration to assume core state functions. The carefully chosen term AFSJ is not only loaded with social contract connotations but also contains a spatial notion of territorial unity that has a state flavour to it. The strengthening of the policy fields brought together under the AFSJ has been explained as a necessary complement to the internal market compensating the removal of frontiers within the EU.\(^2\) However, AFSJ policies, arguably as all EU policies, are shaped by many pull and push forces, originating not only within the Union but also outside.

This chapter explores the extent to which the AFSJ is influenced from the outside.\(^3\) The underlying argument is that the Union’s AFSJ is not merely a product of internal compromise aiming to reconcile the – at times schizophrenic – ambitions of the Union and its Member States, who want to offer EU citizens an AFSJ governed by coherent and indiscriminately applicable policies, while ensuring the greatest possible retention of sovereign rights on the part of the Member States, but also a product of external forces. This chapter aims to demonstrate such ‘outside-in’ effects resulting from the Member States cooperating under international law, and the Union interacting with third parties and recognising external human rights regimes.\(^4\) These outside-in effects will only increase with the intensification

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1 Art 3(2) TEU.
2 ibid.
3 This chapter does not deal with judicial cooperation in civil matters.
4 This chapter forms part of a broader enquiry about the implications of internationalisation for the power division within the TEU legal order: *Outside-In: Tracing the Imprint of the European Union’s External Actions on its Constitutional Landscape*, funded by the Dutch Science Foundation, NWO. For a short description, see: centers.law.nyu.edu/jeanmonnet/fellows/12-13/ ChristinaEckes.html.
of litigation and, in particular, a rise in preliminary rulings in the different policy fields now falling within the AFSJ. These rulings will help to ensure uniform interpretation of EU law creating an AFSJ, but they will also be the ECJ’s tool to determine the rules of the inter-institutional game, the boundaries of EU law competences, and the deeper meaning of what the EU can offer in terms of freedom, security and justice. The Court will be confronted with outside-in effects, which can have constitutional consequences if, possibly only over time, they change the division of power between the institutions or the understanding of core principles. Integration is a process leading towards the establishment of one out of many. The process itself has consequences for the understanding of the involved parts, even before this one is created. The process of European integration has such consequences by shaping the understanding of the sovereignty of the Member States. This is a constitutional change.

Most existing literature on the external dimension of the AFSJ largely focusses on the Union’s external actions, including the Union’s ability to influence the outside. This is an important issue, with real implications for policy-making and substantive influence of the Union beyond its borders. The intention of this chapter is to focus on the reverse question of how the outside shapes the inside. This is relevant not only in extreme cases where the outside aspires to impose rules that undermine fundamental values, but also in every day policy-making, where preferences, institutional influence, and the reading of the law are changed as a result of the outside.

The chapter identifies the above-described outside-in effects on the creation and understanding of the AFSJ. Section II demonstrates that when internal policy areas become external policy the European Parliament is disadvantaged in the decision-making procedure. Even after the changes introduced by the Treaty of Lisbon this has not fully been remedied. Section III analyses how law-making under international rather than EU law has been used in the past to determine the AFSJ policies. Examples are Prüm and Schengen. Section IV turns to the substantive content of internal EU law-making in the AFSJ. It explores examples in which the internal law-making has been inspired or even influenced by (international agreements with) third countries. Section V focuses on the influence of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) on the protection of rights in the AFSJ. The final section offers an account of how the external has influenced the AFSJ as the place of an ‘imagined community’.

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7 The case that springs to mind is of course C-402/05 P and C-415/05 P Kadi [2008] ECR I-6351.
II. UNION BORDERS: WHERE DOES THE AFSJ END?

About 50 years ago, Michel Foucault identified space as Europe’s greatest anxiety. He developed the concept of ‘heterotopias’ as a kind of ‘effectively enacted utopia in which the real sites, all the other real sites that can be found within a culture, are simultaneously represented, contested and inverted’ – real places that are ‘placeless places’ ‘outside of all places’, present in all cultures in the world. This concept of heterotopias can inform the discussion about the AFSJ. Foucault explains that heterotopias are ‘capable of juxtaposing in a single real place several spaces, several sites that are in themselves incompatible’, that they constitute a break with traditional time, by representing either a quasi-eternity or transitoriness, and that the access to heterotopias is restricted. These are all characteristics of the AFSJ. First, it comprises the territories and jurisdictions of the Member States, which support the Union’s claim to governance while at the same time challenging it. Secondly, it, as the Union itself, alludes to eternity by being established for an unlimited period of time. Thirdly, it protects its outer boundaries and determines the criteria of access in a complex interplay with national and international law. Foucault also argues that throughout history heterotopias ‘function in a very different fashion’. Thinking about the AFSJ in these terms allows considering its deeper meaning beyond the actual legal changes it imposes, as well as the potential evolvement of its function in society over time.

When discussing the external influences on the AFSJ the delimitation of space is central. From the perspective of the Member States the very creation of an AFSJ makes what was previously external (territories of other Member States) internal and defines that the territory of third countries remains external. Different forms of ‘external’ influences can be distinguished: direct influence from third parties, be it third countries or international organisations; the use of international law by the EU institutions resulting in an internal power change; and the use of international law by EU Member States influencing EU law. ‘Influencing’ is here understood as having a limiting effect on the autonomy of (some of) the internal actors, be it on their substantive choices or exercise of power within the institutional interaction.

The greatest particularity of the AFSJ is its intergovernmental legacy. This is also what makes it particularly difficult to identify ‘external’ influences on EU law. Is it an external influence if Member States inter se make agreements with the intention to later integrate them into EU law (Schengen)? Are ex-third pillar con-

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9 M Foucault, Of Other Spaces (1967), Heterotopias. Available at: foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html (last visited 6 February 2013): ‘The present epoch will perhaps be above all the epoch of space’.

10 ibid.

11 Even though Foucault’s examples of ‘heterotopias in deviation’ may at first sight seem rather different in that they are specific limited spaces, such as rest homes, psychiatric hospitals, and prisons. See discussion in s VII below.
ventions international agreements? Despite the Court of Justice of the European Union’s (ECJ) attempts to establish jurisdiction and a certain level of uniform interpretation throughout the European legal order, the Union’s pillars remained before Lisbon very different as regards decision-making, the extent of jurisdiction of the ECJ, and the legal effects of third pillar instruments. Some of the historical heritage of the pillars has survived over time, even after the Lisbon Treaty merged all first and third pillar policies of the AFSJ under Title V of the TFEU. Indeed, even though the ordinary legislative procedure has been introduced for most policy areas, special procedures requiring unanimity apply to a significant number of exceptions. Furthermore, the AFSJ is the subject of numerous protocols attached to the European treaties. Most importantly, these protocols contain transitional provisions and geographical limitations. Special interim rules apply to pre-Lisbon instruments; yet, time passes and on 1 December 2014, the interim rules will expire. More permanent remains the continuous shadow of the intergovernmental nature in the geographical limitations of the AFSJ, which does not correspond to the territory of the Union. The UK, Ireland and Denmark do not only continue to enjoy their pre-Lisbon opt-outs for the areas of immigration, visa and asylum (and civil law). The Lisbon Treaty extends it for the UK and Ireland to cooperation in police and criminal matters. The position of the UK, Ireland and Denmark could be summarised as a default opt-out from the AFSJ with an opt-in possibility. In the case of Denmark, this is limited to visa lists and formats. Also, Denmark (which signed the Schengen Agreement) is bound by the Schengen acquis under international law rather than

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13 Even after the partial integration of third pillar policies into the TEC. Unanimity for instance remained the voting requirement in the Council even after the Treaty of Nice for family law and legal migration. The European Parliament was only consulted on these two policies and on visa lists and visa formats.
14 References for a preliminary ruling from final courts only. See ex-Art 35 EU and ex-Art 68(1) EC.
15 See ex-Art 34(2)(b) EU.
16 Arts 75 (financial counter-terrorist sanctions), 77(2) (visa lists and formats), 79 (common European asylum system), 82 (approximation of criminal laws), 83 (minimum rules concerning the definition of criminal offences and sanctions for cross-border offences), 84 (crime prevention), 85 (Eurojust), 87 (police cooperation) and 88 (Europol) TFEU.
17 Arts 77(3) (passports), 86(1) (European Public Prosecutor) 87(3) (operational police cooperation), and 89 (operation on the territory of another Member State) TFEU.
18 Protocol 19 on the Schengen acquis integrated into the framework of the European Union; Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; Protocol 22 on the position of Denmark; Protocol 23 on external relations of the Member States with regard to the crossing of external borders; Protocol 36 on transitional provisions; in a more limited way: Protocol 20 on the application of certain aspects of Art 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland; Protocol 24 on asylum for nationals of Member States of the European Union.
19 The UK may until 31 May 2014 choose whether to accept the application of the Commission’s infringement powers and the Court’s jurisdiction for unamended third pillar instruments or to opt-out of them entirely, in which case they will cease to apply to the UK on 1 December 2014.
20 The UK and Ireland (Protocol 21), as well as Denmark (Protocol 22), are in an opt-out default position with an opt-in possibility, with slightly different rules.
EU law. This means that the ECJ does not have jurisdiction over Denmark. This geographical differentiation leads to great complexity. It might also make it more difficult for EU citizens to feel that the AFSJ is their own, when it does not match the territory of the political entity establishing it or of the internal market, to which their free movement rights apply. Finally, the picture is rendered even more complex by the fact that internal and external objectives are highly interdependent and the Chapter on the AFSJ does not contain explicit external Union competences, except for very specific actions. Instead, competences in other areas, such as trade and Common Foreign and Security Policy (CFSP), which are not geographically limited, are also used to pursue AFSJ objectives.

III. LIMITING LAW-MAKING POWERS OF THE EUROPEAN PARLIAMENT BY TAKING IT OUTSIDE: HAS THE SWIFT SITUATION CHANGED AFTER LISBON?

Until the entry into force of the Lisbon Treaty, the European Parliament’s powers to participate in external policy-making in the AFSJ were very limited. The Parliament did not have any say in the process culminating in the conclusion of international agreements in the third pillar. Since Lisbon, Parliament’s powers for the conclusion of international agreements have been significantly extended in all policy fields governed by the ordinary legislative procedure, including the AFSJ. However, the Council remains the most powerful institution: it authorises the opening of negotiations, adopts negotiating directives, authorises the signing, and concludes international agreements. In principle (subject to exceptions), the Council acts by qualified majority. As to the involvement of the European Parliament, it is important to distinguish between the initiation and negotiation stage on the one hand and the signing and conclusion stage on the other. Parliament is not formally involved in the negotiations, apart from having the right to be informed during all stages of the procedure. At conclusion stage, it can be involved in two ways: consultation or consent. The latter is required for policy fields falling under the ordinary legislative procedure.

The right to be informed, in combination with the European Parliament’s powers at conclusion stage, has introduced certain political safeguards. Indeed,
the rationale of Article 218 TFEU requires involving the European Parliament at negotiation stage. This is also acknowledged in the Framework Agreement on relations between Parliament and the Commission. The greatest strength and influence of a parliament is not consent or rejection, but deliberation in its search for a majority. If the European Parliament is fully and actively involved at an earlier stage, for instance when the negotiation mandate and directives are drawn up, it has a governing role rather than the role of the opposition. Parliament would be forced to find constructive solutions. By contrast, if the European Parliament has very little influence until the very end, it is given the role of an obstructionist: its only option is to veto the agreement if it disagrees with the final draft. The latter, however, breeds mistrust between Parliament and Commission and Council, as well as between the EU and its external negotiation partners.

The two cases in point are SWIFT and ACTA. Shortly after the Lisbon Treaty entered into force, the European Parliament showed its newly established teeth under Article 218(5) TFEU in the adoption of an agreement within the AFSJ. It voted the SWIFT Agreement down the first time (11 February 2010), only to then agree to an amended version (8 July 2010). The SWIFT Agreement allows US authorities to access, subject to the approval of Europol, large volumes of transaction information from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) for the purpose of the Terrorist Finance Tracking Program. SWIFT is an inter-service banking company that is used in roughly 80 per cent of all international transactions. This naturally raises a multitude of data protection concerns. The European Parliament was cut out of the information flow in the negotiations leading up to the conclusion of the SWIFT Agreement. Crucially, the negotiations took place before the entry into force of the Lisbon Treaty and only the conclusion after. Hence, the question remains whether the involvement of the European Parliament at negotiation stage has fundamentally changed with the Lisbon Treaty. The negotiations of the Anti-Counterfeiting Trade Agreement (ACTA), which does not fall within the AFSJ but is also controversial, raises concerns in this regard. The European Parliament remained excluded from the negotiations, even after Lisbon. However, in the case

30 Vetting by Europol was introduced only after the EP had once voted the agreement down.
of the new Passenger Name Records (PNR) Agreements the information flow to the European Parliament seems to have worked better.\textsuperscript{34}

Executive secrecy, particularly in the area of external relations, is the rule rather than the exception. This remains a concern, including after Lisbon, for the European Parliament and for the wider public. Following the controversial adoption of the SWIFT Agreement, the General Court ruled in Sophie in ‘t Veld I on the lack of transparency in negotiating international agreements, along with the difficulties of the European Parliament and the public to access relevant information.\textsuperscript{35} The Sophie in ‘t Veld I case is informative on the interpretation of the right of access to information. It concerned access to the opinion of the Council’s Legal Service concerning a recommendation from the Commission to the Council to authorise the opening of negotiations for the SWIFT Agreement.\textsuperscript{36} Sophie in ‘t Veld, a Member of the European Parliament, relied on the general Transparency Regulation for her access request, and consequently, the discussion was framed as to whether the refusal was justified under the exceptions under that Regulation.\textsuperscript{37} The General Court ruled that

the mere fact that a document concern[ed] an interest protected by an exception cannot justify application of that exception. Such application may, in principle, be justified only if the institution has previously assessed . . . whether access to the document would specifically and actually undermine the protected interest.\textsuperscript{38}

Judicial review of a provision with such ‘a complex and delicate nature’ as the international relations exception

must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.\textsuperscript{39}

The General Court’s analysis led to partial annulment of the Council decision denying access to information because the Council had not established the risk of a threat to the public interest in the field of international relations concerning the undisclosed parts of the document relating to the legal basis.\textsuperscript{40} Under this case law, public access to information cannot be denied simply because it concerns an international agreement, but the assessment of whether secrecy is necessary is the


\textsuperscript{35} See Case T-529/09 Sophie in ‘t Veld v Council (hereinafter Sophie in ‘t Veld I) [2012] ECR II-000, para 2; see also Case T-301/10 Sophie in ‘t Veld v Commission (hereinafter Sophie in ‘t Veld II), OJ 2010 C260/55, 18.

\textsuperscript{36} Sophie in ‘t Veld I, para 2.

\textsuperscript{37} In particular Art 4(1)(a) of Reg 1049/2001, see ibid.

\textsuperscript{38} Sophie in ‘t Veld I, para 20. This is in line with the earlier case: Joined Cases C-514/07 P, C-528/07 P and C-532/07 P Sweden v ASBL [2010] ECR I-8533.

\textsuperscript{39} Sophie in ‘t Veld I, paras 24–25.

\textsuperscript{40} ibid, paras 59–60.
responsibility of the EU institution asked to grant access (usually the Council) and the Court will only check procedural compliance and rule out manifest error of assessment. The extent to which the European Parliament is granted access to information remains to be seen in future negotiations. After all, Parliament continues to hold veto powers in a large number of policy areas.

The involvement of Parliament is particularly important where the Council negotiates an international agreement that foresees a change of the Union acquis – which is perfectly possible under the hierarchy of laws within the EU. Otherwise, the executive would externally predetermine change of legislative decisions without giving the European Parliament the opportunity to influence the course of the discussion or the framing of the subject matter. Indeed, the General Court explained that the principle of transparency is applicable ‘especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union’s legislative activity’. Furthermore, the decision under the Lisbon Treaty to strengthen the role of the European Parliament in the conclusion of international agreements, where a field requires the ordinary legislative procedure internally, can be read as a reaction to the increasingly broad and detailed nature of international agreements, which govern and regulate the legal position of individuals in the same way as internal legislation. The Lisbon Treaty has brought great improvement but the negotiation of international agreements, particularly those with legislative scope, remains a point of concern, including and perhaps particularly in the AFSJ.

**IV. EARLY LAW-MAKING OUTSIDE THE EU FRAMEWORK AND ITS INTEGRATION**

EU law offers a sophisticated legal framework in which the EU institutions and the Member States interact and make policy. It enables these actors but it also constrains them by imposing specific decision-making procedures and, albeit at times limited, judicial review by the Court. As a result groups of Member States have in the past agreed to act outside of the framework of EU law, usually due to a lack of the required support within. These international agreements have affected the development of EU law.

**A. Migration Policies through the Backdoor: Schengen**

In 1985 and 1990, 5 of the then 10 Member States concluded an international legal framework outside of the European Treaties, the Schengen Agreement and

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41 ibid, para 89.
43 Belgium, France, Germany, Luxembourg, and the Netherlands.
the Schengen Convention implementing the earlier agreement respectively. These two instruments established for the first time the concept of free movement of persons, which initiated the abolition of border controls between participating Member States and strengthened the external border of the Union. Today free movement rights form the centrepiece of the internal market, but at the time of the inception of Schengen, the competence to regulate free movement was debateable, particularly since the Schengen Agreement also abolished the internal borders for third-country nationals. A legal basis for such cooperation was introduced only with the Maastricht Treaty. Schengen was interpreted as a reaction to the slow progress within the existing institutional framework on matters of free movement. It ‘expressly presented as an interim arrangement pending a final regime’ in the Union context. Furthermore, even though Schengen was a ‘parallel track’, it referred explicitly to the EEC legal framework and stated that it ‘shall apply only in so far as they are compatible with Community law’. As is well-known Schengen has later been integrated into the EU legal and institutional framework and Schengen cooperation has gradually been extended to include all EU Member States, except the UK and Ireland, as well as four non-EU Member States. The integration required some institutional adaptations: the Schengen Secretariat was integrated into the General Secretariat of the Council and the EU concluded an agreement with Iceland and Norway to allow for their enhanced observer status. The UK and Ireland obtained opt-outs, but ‘may at any time request to take part in some or all of the provisions of the Schengen acquis’. Indeed from 2000/2002 onwards, they have taken part in some aspects of Schengen, such as the Schengen Information System (SIS). At the same time, the UK was not allowed to participate in the new Visa Information System or Frontex, because these legal instruments

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48 Preamble, Arts 1, 3, 6, 11, 17, 20, 21, 22, 24, and 26.
49 Art 134 Schengen Convention.
51 Iceland, Liechtenstein, Norway, and Switzerland. Iceland and Norway had already concluded the 1957 Nordic Passport Control Agreement with Denmark, Finland, and Sweden.
53 Art 4 Schengen Protocol.
54 Case C-482/08 UK v Council, cited above (n 22).
55 Case C-77/05 UK v Council (Frontex decision), cited above (n 22).
were found to build on the existing Schengen *acquis* in which the UK is not participating. Accessing Member States do not automatically join Schengen.

Schengen has become EU law and has further developed as part of EU law\(^{56}\) but it remains an interesting example of how international cooperation can lead to differentiated integration within the EU and impact on the creation and substantive content of EU law. Schengen and justice and home affairs cooperation under the former third pillar largely overlapped\(^{57}\) and the free movement introduced by Schengen is used as one of the fundamental justifications for the necessity of cooperation and coordination between police and judicial authorities to compensate for the open borders. Moreover, the SIS forms a core element of current cooperation.

### B. The Prüm Convention

The Prüm Convention\(^{58}\) is another example of Member States’ use of international law to create institutionalised cooperation with an eye on later integrating it into what is now the AFSJ. In 2005, seven Member States\(^{59}\) agreed to

> further development of European cooperation, to play a pioneering role in establishing the highest possible standard of cooperation especially by means of exchange of information, particularly in combating terrorism, cross-border crime and illegal migration, while leaving participation in such cooperation open to all other Member States of the European Union.\(^{60}\)

This was after the adoption of the Maastricht, Amsterdam and Nice Treaties, which brought the policy areas covered by Prüm squarely within the EU framework. Schengen had been integrated into EU law by then and the former third pillar policies of asylum, migration, and judicial cooperation in civil matters had been moved to the first pillar, with the effect that the Commission had the right of initiative and that the European Parliament was consulted. In certain areas the latter even had the prospect of becoming a co-legislator.\(^{61}\) It is hence a fair assessment that Prüm was ‘not a mere technical attempt to accelerate the flow of information among signatories. It is, fundamentally, a significant countervailing political force

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\(^{56}\) See, eg the Schengen Borders Code (Reg 562/2006).


\(^{58}\) Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation particularly in combating terrorism, cross-border crime and illegal migration, Prüm (Germany), 27 May 2005, Council Secretariat, 10900/05, (Brussels, 7 July 2005).

\(^{59}\) Austria, Belgium, France, Germany, Luxembourg, the Netherlands, and Spain.

\(^{60}\) ibid, Preamble, Recital 3. Article 1(4) also expresses the intention to have the provisions of the Convention brought into the EU legal framework. Article 51(1) confirms that the Convention is open to all other EU Member States.

against the European Union’s AFSJ’. However, the conclusion that Prüm ‘creates a hierarchy within the EU . . . some Member States can decide to create a new structure that will apply to all . . . this produces a multiple level game within the EU that will vitiate its credibility’ overstates it. The geographical differentiation in the AFSJ more broadly seems to be at least as problematic in terms of credibility and community building. In any event, by agreeing Prüm, the states successfully avoided the procedural constraints of EU law, both the decision-making procedures within the institutions and the conditions of enhanced cooperation. The European Parliament was virtually excluded. On substance, the participating Member States made a great effort to ensure compatibility with EU law. Similar to Schengen’s references to the EEC, Prüm explicitly refers to secondary EU legislation, third pillar measures and Schengen. At the same time, Prüm establishes a database, restricted to the Prüm signatories, that competes with the existing EU law principle of availability, pursuant to which the authorities of any Member State should have the same right of access to information held by any other authority in the Union including the authorities within the state where the data are held. Institutionally, Prüm relied to some extent on the EU institutions. For instance, the contracting parties are required to submit joint progress reports to the Council and the Commission. At the same time, the Commission cannot initiate infringement proceedings and the Court is in principle excluded from adjudicating any disputes under Prüm. As is well known, Prüm did not remain a parallel agreement but was partially included into the EU law framework. In the process, the Commission and the European Parliament remained side-lined, while the Council took the driving seat under the then third pillar.

63 ibid, 116.
64 See below.
66 Art 47 Prüm Convention requires compliance with EU law and ensures that future EU law ‘arrangements’ take precedence over the Convention.
67 Secondary EU legislation: Arts 20(1), 23(1), and 40; Third Pillar measures: Art 16, and the 1990 Schengen Convention: Arts 21(2), 27(2), and 30.
68 This principle had at the time of the conclusion of Prüm already been endorsed by the European Council (European Council of 4–5 November 2004) and promoted by the Commission, ‘Proposal for a Council framework decision on the exchange of information under the principle of availability’ COM(2005) 490 final, Brussels, 12 October 2005.
69 Art 1(5) Prüm Convention.
70 The European Data Protection Supervisor argued that the Community institutions should have been involved from the start (‘Opinion of the European Data Protection Supervisor on the proposal for a Council Framework Decision on the exchange of information under the principle of availability’ COM(2005) 490 final, OJ 2006 C116/8, para 48).
Schengen and Prüm may be seen as exceptional, yet they should not be seen as of historical value only. Indeed, by adopting a number of international law instruments to mitigate the Eurocrisis72 the Member States have recently demonstrated that they remain ready to cooperate outside the EU framework on subject matters that at least partially fall under Union competence, possibly affecting areas of exclusive competence. This, at the very least, raises questions of whether such cooperation complies with the spirit of EU law.73

V. EXTERNAL PRESSURES ON EU LAW-MAKING: SUBSTANTIVE AND INSTITUTIONAL ISSUES

Substantive EU law is also subject to direct external influences. Not only do Member States conclude international agreements inter se to enhance cooperation further than would be possible at that point in time under EU law but the Union also concludes international agreements with third countries. In the latter case, the Union is in principle in the same position as other international actors: its interests are shaped in interaction and it has to accommodate the interests of the other parties to reach an agreement. However, besides these substantive influences interaction with the outside also has institutional consequences. In a legal construction as complex as the Union, in which many different players cooperate, each of whom enjoy separate international legal personality, interaction with the outside is particularly prone to cause internal struggles for power and visibility.

A. PNR: Substance Determined from the Outside?

The general assumption in the AFSJ continues to be that external action is closely related and follows internal action, ‘as if the existence of an internal acquis was a pre-condition for the exercise of external powers’.74 This is confirmed by the limited explicit external competences of the Union in the AFSJ and the close interknitting of external and internal objectives. However, examples to the contrary exist, for instance the Passenger Name Record (PNR) Agreements signed with the US.75


73 In the AFSJ, Art 73 TFEU leaves room for future cooperation between Member States outside the Union framework on issues of security.


The Union and the US have concluded four PNR Agreements, which have set consecutive legal frameworks for the transfer of PNR data by carriers operating passenger flights between the territory of the Union and the US to the US Department of Homeland Security (DHS) and the subsequent use of that data to prevent, detect, investigate and prosecute terrorist offences, related crimes, and other serious cross-border crimes. Several MEPs, including Dutch MEP Sophie in ‘t Veld who initially acted as the rapporteur for the European Parliament, the European Data Protection Supervisor (EDPS) and Article 29 Working Party on Data Protection, consisting of representatives from the national data protection authorities, expressed concerns over data protection safeguards. However on 19 April 2012, the European Parliament approved the fourth PNR Agreement, even if it is identical to the previous one, which the Parliament had annulled by the ECJ.

MEP Sophie in ‘t Veld explained in 2010 that ‘the provision of PNR data is part of the conditions the United States have imposed in exchange for a derogation from the visa regime’. A rejection of the Agreement by Parliament ‘would cause problems for air carriers and would negate whatever purposes the system might be used for’. External pressures work in several ways. In the EU, cooperation with the US as such is seen as a strategy to contain terrorism. This cooperation has then in turn an influence on how the EU interest is constructed. Political science scholars have argued that ‘in line with social constructivist literature, it is important to conceptualize interests as being mutually constituted through interactions amongst political actors’. They use the PNR Agreement as an example where the

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76 S in ‘t Veld, Report, cited above (n 34).
79 ibid.
81 This is widely accepted for continuous Member State interaction within the EU framework.
US has exercised ‘significant influence on the shaping of the EU interest’. The internal legislation on the transfer of passengers’ information is clearly inspired by the EU’s external actions, that is cooperation with third countries. The Commission presented a proposal for a framework decision setting up an internal ‘EU PNR scheme’ only after the conclusion of the first PNR Agreement with the US. The PNR Directive, which could extend passenger-tracking systems to all flights to and from countries outside the EU, is still in the making, but it is fair to say that it benefits from the already concluded PNR Agreements with the US and Australia, not only because of the already established structures and practices, but also in terms of acceptance. This is not to argue that the Union is a monolithic block that passively follows the US lead. The different internal players, that is the EU institutions and the Member States, have different stakes. It has, for instance, been shown that the Commission was ready to take advantage of external pressures in order to advance European integration in the particular area of counter-terrorism.

B. Pressure on the Pillar Structure

International cooperation has never taken into account the pre-Lisbon Union pillar structure. In the past, the distinction between the first and the third pillar has indeed constituted a split across the landscape of AFSJ policies. Arguably, the Lisbon Treaty bridged this split to a large extent. However, to appreciate the influence of the external it is worth recalling the uneasy cross-pillar approach of the Union when concluding international agreements. Two illustrative examples are the UN Convention against Transnational Organised Crime (Palermo Convention) and

83 Ibid.  
84 See also: J Argomaniz, ‘When the EU is the “Norm-Taker”: The Passenger Name Records Agreement and the EU’s Internationalization of US Border Security Norms’ (2009) 31 Journal of European Integration 119.  
87 PNR Agreement with Australia: 10093/11, of 13 September 2011, Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service.  
89 See also: Cremona, ‘EU External Action’, above (n 23) 85.  
the PNR Agreements. As to the first, two of the Protocols to the Palermo Convention, on smuggling of migrants and on trafficking of persons respectively, were concluded by the then Community based on its competences under different parts of the first pillar, that is development cooperation and migration policy. Because of procedural differences of the two policy areas the Community concluded each of the Protocols in two separate decisions ‘in so far as the provisions of this Protocol fall within the scope of’ either of the two policy areas. To add to the confusion, a third Protocol, on illicit manufacturing and trafficking of firearms, required a separate conclusion since this issue fell at least partially under the Member States’ competence for security. Hence, in addition to the Community’s conclusion of certain aspects of this third Protocol, the Council agreed a common strategy on those aspects that fell under what was then the third pillar. The need to adopt six EU instruments to conclude three protocols to an international convention in two different Council formations and the uncertain scope of these instruments ‘in so far as the provisions fall’ within a particular policy field demonstrate the mismatch between taking uniform external action and fragmented internal policy-making powers. Necessarily, this is not only an obstacle to uniform external action, it also pressures the Union to unify its internal approach.

In the case of the PNR Agreements, adoption was not only made more complex by the pillar structure, but resulted in a successful legal challenge of the first PNR Agreement. The first PNR Agreement was originally concluded on the basis of Article 95 EC – largely because this was the legal basis of the earlier adopted Data Protection Directive, which determined the legal requirements for data exchange between EU carriers and US authorities. However, the Court struck down the Council decision concluding the Agreement.

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91 EU–US PNR Agreement, see above (n 75).
92 Ex-Arts 177 et seq EC (now Arts 208 et seq TFEU).
93 Part III Title IV EC (ex-Arts 61 et seq EC).
95 Ex-Art 296 EC (now Art 346 TFEU).
97 Common Position 2000/130/JHA of 31 January 2000 on the proposed Protocol against the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition, annexed to the Convention against Transnational Organised Crime, based on ex-Art 34(2)(a) EU.
to fall outside the scope of the Data Protection Directive and consequently also
outside the scope of Article 95 EC, because the agreement concerned ‘processing
operations concerning public security and the activities of the State in areas of
criminal law’. The Union had to conclude a new agreement under what was
then the third pillar.

As is well-known, the particular difficulties of drawing lines between first and
third pillar competences have disappeared with the Lisbon Treaty. Similarly,
much of the decision-making in the AFSJ has become subject to the ordinary legis-
alative procedure. Nonetheless, the dividing line between the AFSJ and CFSP
remains in place and the Union will still have to bridge this split to accommodate
external demands. The joint legal basis of the new PNR Agreement is Article
218(6) TFEU in combination with Articles 82(1)(d) and 87(2)(a) TFEU, govern-
ing police and judicial cooperation. The latter two provisions are also the legal
basis for the proposed PNR Directive. The PNR Agreement is not based on Article
16 TFEU on data protection. While on the one hand police and judicial coop-
eration, that is data exchange rather than protection, is the objective of the PNR
Agreement, one could argue on the other hand that the Agreement’s purpose is to
determine the conditions under which this exchange takes place and hence to
protect the personal data of passengers on European air carriers. If an inter-
national agreement on the basis of Article 16 TFEU was to be concluded, this
would also open the door for an argument in favour of using the complementary
CFSP competence for data protection under Article 39 TEU.

VI. INTERNATIONAL HUMAN RIGHTS CONTROL OF
EU MIGRATION AND SECURITY POLICIES

Another form of direct external pressure is exercised by international organisa-
tions and human rights regimes. The ECtHR’s case law has the particular poten-
tial of becoming influential in the AFSJ. Not only because these are areas of law
in which civil liberties are submitted to far reaching restrictions but also because
the ECJ has not yet built up a large body of case law in this particular field. The
recent MSS ruling of the ECtHR\textsuperscript{106} demonstrated the influence of external control. In MSS, the ECtHR struck a blow to European asylum policy by finding Belgium to be in violation of Article 3 ECHR for sending an asylum seeker back to Greece where their rights under the Convention were blatantly infringed.\textsuperscript{107} External pressure was necessary to fully expose the weakness of a system built on the idea of mutual trust that assumes all Member States are safe third countries.\textsuperscript{108} The main objective of the Dublin II Regulation is to determine which Member State is responsible for examining an asylum application lodged by a third-country national on Union territory. In principle, each application is reviewed by the Member State through which the asylum seeker first entered the EU. It aims to prevent ‘asylum shopping’ and multiplication of administrative procedures. However, this assumes that all Member States, at the very least, offer asylum in compliance with the requirements of the ECHR.\textsuperscript{109} The ECtHR’s ruling in MSS exposed that there are no effective internal EU checks of minimum standards and that Member States – at least under EU law – are largely able to free themselves from unpopular ‘problems’ such as asylum seekers without ensuring the national, European and international standards of human rights protection.\textsuperscript{110}

The ECtHR’s MSS ruling triggered immediate reactions by the EU institutions. The European Parliament asked the Commission whether it would take action against Greece and similar cases.\textsuperscript{111} However against Greece in particular, the Commission had already launched an infringement procedure for the deficient conditions of its national asylum system two years earlier (and hence before the MSS ruling).\textsuperscript{112} In December 2011, the Commission took the ECtHR’s ruling in MSS as the main argument that reform of the Dublin II system was urgently necessary.\textsuperscript{113} Equally in December 2011, the ECJ addressed, in a case joining preliminary questions from Ireland and Wales, whether Member States are obliged not to transfer asylum seekers if such transfer would violate human rights (NS).\textsuperscript{114} It discussed

\textsuperscript{106} MSS v Belgium and Greece (30696/09) (2011) 53 EHRR 2. Numerous cases that raise similar allegations are pending before the court.

\textsuperscript{107} Greece was equally found in violation of the Convention.


\textsuperscript{109} As well as the 1951 Convention relating to the Status of Refugees (Refugee Convention).

\textsuperscript{110} 75% of the nearly 30,000 irregular EU external border crossings between October and December 2011 occurred at the Turkish border with eastern Greece, southern Bulgaria or Cyprus (Eastern Mediterranean route): Commission to the European Parliament and the Council, ‘Biannual report on the functioning of the Schengen area – 1 November 2011 – 30 April 2012’ (Communication) COM(2012) 230 final, Brussels, 16 May 2012, 3.


\textsuperscript{112} Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Enhanced Intra-EU Solidarity in the Field of Asylum, ‘An EU agenda for better responsibility-sharing and more mutual trust’ (Communication) COM(2011) 835 final, Brussels, 2 December 2011, 11.

\textsuperscript{113} ibid, 7.

\textsuperscript{114} Joined Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner [2011] nyr.
the MSS case and adhered to the ECtHR’s ruling by declaring it an obligation of the transferring Member State to examine the asylum application itself in cases such as MSS. In light of the wording of the Dublin II Regulation, this is quite a stretch. Hence, even though the problems undermining EU asylum law were known to the EU institutions before the MSS ruling the latter emphasised the urgency of the need to take reform action, served as an authoritative argument in the discussion, and influenced the ECJ’s reading of EU law in departure from the general spirit of mutual trust.

Furthermore, the envisaged accession to the ECHR will finally submit the Union to an external human rights control mechanism. It will give EU citizens the same protection vis-à-vis acts of the Union as they presently enjoy from their Member States. Rulings of the ECtHR will become directly binding on the ECJ. As a consequence, the ECJ will no longer be able to hold the ECtHR’s decisions at arm’s length – even though this is mainly rhetorical before accession. Further with the prior involvement mechanism, applicable in cases where the EU is a co-respondent, the two courts will enter into a direct institutionalised discourse that will give both courts more influence over the other’s approach.

VII. HOW THE OUTSIDE SHAPES THE INSIDE’S IMAGINATION

Besides the external influences on substantive law and institutional balance in the AFSJ the outside also influences the inside at a deeper level. The Union’s understanding of the ‘self’ – its identity – stands in a reflexive relationship with the outside. Identity can be defined as ‘those attributes that make you unique as an individual and different from others’ or ‘the way you see or define yourself’. It expresses the self as distinguished from ‘others’. Individuals’ identities are multifaceted: they are part of many different distinguishable ‘norm-generating communities’ with which they share elements of their identity, such as gender, nationality, age, but also increasingly being ‘European’. National identity forms one layer of individual identity and concerns the identity shaping characteristics of a population. The details of how national identity is shaped and to what unit it applies are contentious, yet at the core of identity is distinction over time. National

\[\text{[115] ibid, para 88 et seq.} \]
\[\text{[116] See in particular Art 3(2) and Recital 2 of the Dublin II Regulation, cited above (n 108).} \]
\[\text{[117] See, for details on the implications of accession, C Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’ (2013) 76 MLR 254.} \]
\[\text{[118] ibid. See also: Art 52(3) Charter of Fundamental Rights.} \]
identity emerges by contrast to the ‘not national’ or ‘foreign’.123 ‘What we habitually forget [in this context] is that, like any other collectivity, the national polity is an “imagined community”,’124 not an inevitable one.125 In this regard, it is much like the European Union, even if the latter is less deeply rooted in the consciousness of EU citizens and differs depending on nationality.126 Indeed, the Union’s success in establishing itself as an imagined community remains contentious,127 and any construction through law and the media can be accused of remaining an elite identity.128

Two dimensions of European identity should be distinguished: a Habermasian,129 civic identity and a cultural identity.130 The former refers to citizens’ attachment to the political and the institutional system of the European Union, and ultimately with the project of European political integration. The AFSJ is characterised by a greater ambition than other policy fields to contribute to civic identity. With its allusion to territorial unity, it ‘reach[es] deep into issues of frontier control, asylum and immigration, and policing long imagined to be at the very core of sovereign territorial control’,131 decides who forms part of the community and who does not, and ultimately creates an ‘inside area’ that implies that everything else is ‘outside’. The latter refers to a cultural and normative commonality that makes fellow Europeans feel more alike and closer to each other than to non-Europeans.

Indeed as any form of identity, the sense of being European is closely linked to what is not European. This is true not only for the cultural but also for civic identity. At the community and ultimately identity forming level, the external is relevant not only because of who is in and who is out, but also who one is by distinction or even opposition.132 Only outside of Europe, being European is a distinguishing characteristic. On the one hand, introducing a ‘European area’ and linking it intimately with largely unrelated value-loaded policies that constitute the core of state sovereignty requires a focus on the inside. It makes the area the


123 Smith, National Identity, 8.
124 See Anderson, Imagined Communities, cited above (n 8). Anderson argues that the development of the printed press provided the foundation for the development of national consciousness by creating a common, standardised language. This form of communication essentially allowed previously disconnected people to connect on an imaginative level and see themselves as part of a larger community.
131 T Heller and A Sofaer, Sovereignty – The Practitioners’ Perspective’ in S Krasner (ed), Problematic Sovereignty, 36.
132 The reference to European identity in the Preamble of the EU Treaty refers explicitly to the external.
place of EU citizens, their own.\textsuperscript{133} The Union does so by referring to the area as a pre-existing place.\textsuperscript{134} It asserts this spatial dimension in a self-reflective way: linked by common values the community of EU citizens share a common area that is embodying these common values and that combines this normative dimension with a physical one: the actual territory governed by EU law. This is where the above-mentioned concept of heterotopia becomes explanatory: the area is a real place representing other real places, for example the territory of the Member States, as well as imagined places such as a legal space in which the Union guarantees its citizens to be free, safe and fairly treated. On the other hand, any inside necessarily requires delimitation from what is \textit{outside}, from what it is not. Having common values implies that there are also other values that are not constitutive for the community of EU citizens and their area. In the political and legal context, openness towards the outside, that is international law and international relations, is traditionally seen as a particular virtue that distinguishes the EU from third countries, such as the US.\textsuperscript{135} In this way, the outside plays an ambivalent role in influencing EU values and interests but also in defining the commonality of EU citizens by distinction.

\textbf{VIII. CONCLUSION}

Outside-in effects differ from case-to-case and in different policy areas.\textsuperscript{136} This chapter identified and discussed different ways in which the AFSJ is influenced from the outside. In the AFSJ, the situation is particularly complex because it covers issues that lie at the core of sovereignty and immediately affect the rights of individuals, because the former split between the first and the third pillar, the continuous prominence of Member States, and the geographical limits stand in the way of uniformity and coherence, and because it remains a relatively young and fast-developing field of Union action.

The Union’s relationship and interaction with third countries and international organisations under international law is not only a matter of external relations. It does not only concern the Union’s role in the world, but also directly affects what happens within the Union legal order. This includes the policy directions that the Union takes in relation to its citizens and the relationship between the EU institutions and the Member States. At least in practice, Member States submit to Union rule. National courts apply Union law and consider compliance

\textsuperscript{133} H Lindahl, ‘Finding Place for Freedom, Security and Justice: The European Union’s Claim to Territorial Unity’ (2004) 1 Webpapers on Constitutionalism and Governance beyond the State 8.

\textsuperscript{134} ibid, 9.

\textsuperscript{135} The Union’s external ‘self’ is influenced by a sense of opposition to the US, see: C Eckes, ‘EU Climate Change Policy: How Much Governance is Just?’ in F Amtenbrink and D Kochenov (eds), \textit{European Union’s Shaping of the International Legal Order} (Cambridge, Cambridge University Press, 2013).

with Union authority as part of the national rule of law. The extreme of withdrawal or judicial rebellion based on a *Solange* reasoning notwithstanding, the legal situation of citizens of the Member States under national law is also determined by European law. This makes it crucially important to consider who determines EU law, not only in the case of the extreme but also in the day-to-day experience of determining policy priorities.

More often than not, the internal effects are co-determined by internal actors. They are not imposed on the Union but rather enhanced or used by internal actors to push a particular development of EU law. This is the case where groups of Member States have pushed further developments through channels of international law, as we saw in the cases of Schengen and Prüm. This is also the case where the Commission proposes internal legislation mirroring external commitments, as in the case of the PNR Agreements. By contrast, the change in the institutional balance when legislative action is determined by international agreements, as it still occurs after Lisbon – albeit no longer at conclusion but only at negotiation stage – appears to be a general and nearly unavoidable consequence of international law-making that finds parallels at Member State level. Similarly, where individuals initiate proceedings before the ECtHR, this is not as such a strategy of one of the internal players of the EU. Yet, rulings of the ECtHR not only draw attention to human rights violations resulting from Member States implementing EU law, but also shape the understanding of rights and specific policy-making within the Union. Finally, the understanding of the AFSJ as part of European identity creation is affected by the outside. This influence is intensified by the fact that the Union possesses only nascent ‘imagined identity’.

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138 On Union citizenship more generally, see S Coutts, ‘Citizenship of the European Union’ in this volume.