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*External Relations Law: How the Outside Shapes the Inside**

CHRISTINA ECKES

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

* I would like to thank Luis Barroso for his comments on an earlier draft and Robbert-Jan Winters for his research assistance.

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.⁵ 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.⁶ 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,⁷ 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'.⁸

⁵ eg D Acosta Arcarazo and A Geddes, 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy' (2013) 51 *Journal of Common Market Studies* 179; S Peers, 'Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon' (2011) 48 *CML Rev* 661.

⁶ eg M Cremona, J Monar and S Poli (eds), *The External Dimension of the European Union's Area of Freedom, Security and Justice*, College of Europe Studies 13 (Brussels, PIE Peter Lang, 2011); T Balzacq (ed), *The External Dimension of Justice and Home Affairs – Governance, Neighbours, Security*, Palgrave Studies in European Union Politics (Basingtoke, Palgrave, 2009).

⁷ The case that springs to mind is of course C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351.

⁸ B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, Verso, 2006).

II. UNION BORDERS: WHERE DOES THE AFSJ END?

About 50 years ago, Michel Foucault identified space as Europe's greatest anxiety.⁹ 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.¹⁰ This concept of heterotopias can inform the discussion about the AFSJ.¹¹ 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-

⁹ M Foucault, *Of Other Spaces (1967), Heterotopias*. Available at: foucault.info/documents/hetero-Topia/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,¹² the Union's pillars remained before Lisbon very different as regards decision-making,¹³ the extent of jurisdiction of the ECJ,¹⁴ and the legal effects of third pillar instruments.¹⁵ 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,¹⁶ special procedures requiring unanimity apply to a significant number of exceptions.¹⁷ Furthermore, the AFSJ is the subject of numerous protocols attached to the European treaties.¹⁸ 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.¹⁹ The position of the UK, Ireland and Denmark could be summarised as a default opt-out from the AFSJ with an opt-in possibility.²⁰ 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

¹² Case C-105/03 *Pupino* [2005] ECR I-5285; Case C-355/04 P *Segi v Council* [2007] ECR I-1657.

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.²¹ This means that the ECJ does not have jurisdiction over Denmark. This geographical differentiation leads to great complexity.²² 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 inter-dependent²³ and the Chapter on the AFSJ does not contain explicit external Union competences, except for very specific actions.²⁴ 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.²⁵ 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.²⁶ 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.²⁷ 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,

²¹ Art 3 of the Schengen Protocol and Art 5 of the Danish Protocol.

²² Which also leads to litigation before the ECJ: Case C-77/05 *UK v Council* (Frontex decision) [2007] ECR I-11459; Case C-137/05 *UK v Council* [2007] ECR I-11593; and Case C-482/08 *UK v Council* [2010] ECR I-10413.

²³ M Cremona, 'EU External Action in the JHA Domain – A Legal Perspective' in Cremona et al, *External Dimension 78*.

²⁴ Art 79(3) TFEU for the conclusion of readmission agreements and Art 78(2)(g) TFEU for cooperation with third countries in the context of the EU asylum law.

²⁵ Ex-Art 24 and 38 EU.

²⁶ Art 218(6)(a) TFEU (explaining that Art 218(6)(a)(v) includes agreements that fall within the policy fields in which the ordinary legislative procedure applies).

²⁷ Art 218(11) TFEU.

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.²⁸ 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).²⁹ The SWIFT Agreement allows US authorities to access, subject to the approval of Europol,³⁰ 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.³¹ 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.³² 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.³³ The European Parliament remained excluded from the negotiations, even after Lisbon. However, in the case

²⁸ See Annex 3 of Decision 2010/2118 of the European Parliament of 20 October 2010 on the revision of the Framework Agreement on relations between the European Parliament and the Commission, OJ 2010 C70E/55, para 3 ('The Commission shall take due account of Parliament's comments throughout the negotiations').

²⁹ J Monar, 'The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and its Implications' (2010) 15 *European Foreign Affairs Review* 143.

³⁰ Vetting by Europol was introduced only after the EP had once voted the agreement down.

³¹ G Fuster, P De Hert, and S Gutwirth, 'SWIFT and the Vulnerability of Transatlantic Data Transfers' (2008) 22 *International Review of Law, Computers and Technology* 191.

³² C Kaunert, S Leonard and A MacKenzie, 'The Social Construction of an EU Interest in Counter-Terrorism: US Influence and Internal Struggles in the Cases of PNR and SWIFT' (2012) 21 *European Security* 474, 488.

³³ C Eckes, E Fahey and M Kanetake, 'International, European and US Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)' (2013) *Currents, International Trade Law Journal*.

of the new Passenger Name Records (PNR) Agreements the information flow to the European Parliament seems to have worked better.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.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.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.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.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.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.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

³⁴ See S in 't Veld, 'Draft recommendation on the draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security' 2011/0382NLE. But see also the preceding media coverage: V Pop, 'Unhappy MEPs to Approve Passenger Data Deal' (2011) *EU Observer*. Available at: euobserver.com/justice/114252 (last visited 6 February 2013).

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.

³⁶ *Sophie in 't Veld I*, para 2.

³⁷ In particular Art 4(1)(a) of Reg 1049/2001, see *ibid*.

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.

³⁹ *Sophie in 't Veld I*, paras 24–25.

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’.⁴¹ 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.⁴² 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 States⁴³ concluded an international legal framework outside of the European Treaties, the Schengen Agreement and

⁴¹ *ibid*, para 89.

⁴² T Tiilikainen, ‘The Empowered European Parliament: Accommodation to the New Functions Provided by the Lisbon Treaty’ (2011) 91 *Finnish Institute of International Affairs*, Briefing Paper.

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.⁴⁴ 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.⁴⁵ It 'expressly presented as an interim arrangement pending a final regime' in the Union context.⁴⁶ Furthermore, even though Schengen was a 'parallel track',⁴⁷ it referred explicitly to the EEC legal framework⁴⁸ and stated that it 'shall apply only in so far as they are compatible with Community law'.⁴⁹ As is well-known Schengen has later been integrated into the EU legal and institutional framework⁵⁰ 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.⁵¹ The integration required some institutional adaptations: the Schengen Secretariat was integrated into the General Secretariat of the Council⁵² 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*'.⁵³ 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 System⁵⁴ or Frontex,⁵⁵ because these legal instruments

⁴⁴ J Schutte, 'Schengen: Its Meaning for the Free Movement of Persons in Europe' (1991) 28 *CML Rev* 564.

⁴⁵ G Papagianni, *Institutional and Policy Dynamics of EU Migration Law*, Immigration and Asylum Law and Policy in Europe 10 (Leiden, Martinus Nijhoff Publishers, 2006) 13. See also: Commission, 'The abolition of border controls of persons at intra-Community borders' (Communication) COM(88) 640 final, 7 December 1988.

⁴⁶ C Timmermans, 'Free Movement of Persons and the Division of Powers between the Community and its Member States: Why do it the Intergovernmental Way?' in H Schermers et al (eds), *Free Movement of Persons in Europe: Legal Problems and Experiences* (Leiden, Martinus Nijhoff Publishers, 1993) 362.

⁴⁷ Papagianni, *Institutional and Policy Dynamics*, 13.

⁴⁸ Preamble, Arts 1, 3, 6, 11, 17, 20, 21, 22, 24, and 26.

⁴⁹ Art 134 Schengen Convention.

⁵⁰ In 1997, the Protocol on the Schengen *acquis* integrated the Schengen *acquis* (which consists of the 1985 Agreement, the 1990 Convention, Accession Protocols, Decisions of the Executive Committee, and Declarations of the Central Group) into the Union *acquis* (eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF).

⁵¹ Iceland, Liechtenstein, Norway, and Switzerland. Iceland and Norway had already concluded the 1957 Nordic Passport Control Agreement with Denmark, Finland, and Sweden.

⁵² Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council, OJ 1999 L119/49.

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. Acceding Member States do not automatically join Schengen.

Schengen has become EU law and has further developed as part of EU law⁵⁶ 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 overlapped⁵⁷ 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 Convention⁵⁸ 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 States⁵⁹ 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

⁵⁶ See, eg the Schengen Borders Code (Reg 562/2006).

⁵⁷ S Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press, 2011) 37.

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.

⁶¹ Ex-Art 67 EC; see also: S Peers, 'EU Justice and Home Affairs Law (Non-Civil)' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (Oxford, Oxford University Press, 2011) 274–75.

against the European Union's AFSJ'.⁶² 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'⁶³ overstates it. The geographical differentiation in the AFSJ more broadly seems to be at least as problematic in terms of credibility and community building.⁶⁴ 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.⁶⁵ The European Parliament was virtually excluded. On substance, the participating Member States made a great effort to ensure compatibility with EU law.⁶⁶ Similar to Schengen's references to the EEC, Prüm explicitly refers to secondary EU legislation, third pillar measures and Schengen.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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,⁷⁰ while the Council took the driving seat under the then third pillar.⁷¹

⁶² T Balzacq, D Bigo, S Carrera, and E Guild, 'The Treaty of Prüm and EC Treaty: Two Competing Models for EU Internal Security' in T Balzacq and S Carrera (eds), *Security versus Freedom? A Challenge for Europe's Future* (Aldershot, Ashgate, 2006) 115–16.

⁶³ *ibid.*, 116.

⁶⁴ See below.

⁶⁵ Ex-Art 11 EC and ex-Arts 43–45 EU. T Balzacq, 'The Treaty of Prüm and the Principle of Loyalty (Art 10 TEC)' (2006) Briefing Paper, European Parliament, Directorate-General Internal Policies, Brussels.

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).

⁷¹ 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, OJ 2008 L210/1. See also: 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, OJ 2008 L210/12; 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, OJ 2008 L210/73.

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

⁷² Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact), signed on 2 March 2012. Available at: european-council.europa.eu/media/639235/st00tscg26_en12.pdf (last visited 31 January 2013); Treaty Establishing the European Stability Mechanism, signed on 2 February 2012. Available at: www.esm.europa.eu/pdf/esm_treaty_en.pdf (last visited 31 January 2013).

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

⁷⁴ S Poli, ‘The Institutional Setting and the Legal Toolkit’ in Cremona et al, *External Dimension*, 49.

⁷⁵ (1) The first one was signed in 2004: Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, OJ 2004 L183/84; Council Decision 2004/496/EC of 17 May 2004, OJ 2004 L183/83 and Commission Decision 2004/535/EC of 14 May 2004, OJ 2004 L235/11; (2) after its annulment an interim agreement was signed in 2006: Agreement between the European Union and

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.⁷⁶ 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.⁷⁷ 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'.⁷⁸ A rejection of the Agreement by Parliament 'would cause problems for air carriers and would negate whatever purposes the system might be used for'.⁷⁹

External pressures work in several ways. In the EU, cooperation with the US as such is seen as a strategy to contain terrorism.⁸⁰ This cooperation has then in turn an influence on *how* the EU interest is constructed.⁸¹ 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'.⁸² They use the PNR Agreement as an example where the

the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, OJ 2006 L298/29; Council Decision 2006/729/CFSP/JHA of 16 October 2006, OJ 2006 L298/27; Letter to the Council Presidency and the Commission from the Department of Homeland Security (DHS) of the United States of America, OJ 2006 C259/1 and Reply by the Council Presidency and the Commission to the letter from the USA's Department of Homeland Security, OJ 2006 C259/4; (3) in 2007 a new permanent agreement was signed: Agreement between the United States of America and the European Union on the processing and transfer of Passenger Name Records to the United States Department of Homeland Security, OJ 2007 L204/18; Council Decision 2007/551/CFSP/JHA of 23 July 2007, OJ 2007 L204/16; European Parliament resolution of 12 July 2007 on the PNR Agreement with the United States of America, OJ 2008 C175E/564; (4) and finally in 2011: Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, OJ 2012 L215/5.

⁷⁶ S in 't Veld, Report, cited above (n 34).

⁷⁷ Joined Cases C-317/04 and C-318/04 *EP v Council and Commission* [2006] ECR I-4721.

⁷⁸ EDRI-gram 8.5, of 10 March 2010, PNR Agreements with US and Australia on the European Parliament's Agenda. Available at: www.edri.org/edriagram/number8.5/pnr-eu-us-australia-post-poned-ep (last visited 6 February 2013).

⁷⁹ *ibid.*

⁸⁰ European Council, Anti-Terrorism Roadmap, SN 4019/01, Brussels, 2001; Council of the European Union, EU Plan of Action on Combating Terrorism, 10586/04, Brussels, 2004, 13; Council of the European Union, The European Union Counter-Terrorism Strategy, 14469/4/05, Brussels, 2005, 7.

⁸¹ This is widely accepted for continuous Member State interaction within the EU framework.

⁸² C Kaunert, S Leonard and A MacKenzie, 'The Social Construction of an EU Interest in Counter-Terrorism: US Influence and Internal Struggles in the Cases of PNR and SWIFT' (2012) 21 *European Security* 474. See also: C Kaunert, 'Conclusion: Assessing the External Dimension of EU Counter-Terrorism – Ten Years on' (2012) 21 *European Security* 578, 582.

US has exercised ‘significant influence on the shaping of the EU interest’.⁸³ The internal legislation on the transfer of passengers’ information is clearly inspired by the EU’s external actions, that is cooperation with third countries.⁸⁴ 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.⁸⁵ The PNR Directive, which could extend passenger-tracking systems to all flights to and from countries outside the EU, is still in the making,⁸⁶ but it is fair to say that it benefits from the already concluded PNR Agreements with the US and Australia,⁸⁷ 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.⁸⁸

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 examples⁸⁹ are the UN Convention against Transnational Organised Crime (Palermo Convention)⁹⁰ 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.

⁸⁵ Discussion on the introduction of the ‘EU PNR scheme’ started after the European Council of 25–26 March 2004 invited the Commission to bring forward a proposal on an EU common approach on the use of PNR data for law enforcement purposes. See, ‘Proposal for a Council framework decision on the use of Passenger Name Record (PNR) for law enforcement purposes’ COM(2007), 654 final, 6 November 2007.

⁸⁶ See the resubmitted proposal: Brussels, 2 February 2011, COM(2011), 32 final 2011/0023 (COD).

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.

⁸⁸ C Kaunert and S Leonard, ‘EU Counter-Terrorism and the European Neighbourhood Policy: An Appraisal of the Southern Dimension’ (2011) 23 *Terrorism and Political Violence* 286; C Kaunert, *European Internal Security: Towards Supranational Governance in the Area of Freedom, Security and Justice?* (Manchester, Manchester University Press, 2010).

⁸⁹ See also: Cremona, ‘EU External Action’, above (n 23) 85.

⁹⁰ United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000. It entered into force on 29 September 2003. Available at: www.unodc.org/unodc/treaties/CTOC/index.html (last visited 30 January 2013).

the PNR Agreements.⁹¹ 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 cooperation⁹² and migration policy.⁹³ 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.⁹⁴ 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.⁹⁵ Hence, in addition to the Community’s conclusion of certain aspects of this third Protocol,⁹⁶ the Council agreed a common strategy on those aspects that fell under what was then the third pillar.⁹⁷ 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.⁹⁸ 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.⁹⁹ It considered the PNR Agreement

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).

⁹⁴ See, eg Council Decision 2006/616/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organised Crime concerning the provisions of the Protocol, *in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a TEC* and Council Decision 2006/617/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organised Crime concerning the provisions of the Protocol, *in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the TEC*; available at: eur-lex.europa.eu/JOHtml.do?textfield2=262&year=2006&Submit=Rechercher&serie=L (last visited 6 February 2013).

⁹⁵ Ex-Art 296 EC (now Art 346 TFEU).

⁹⁶ Council Decision 2001/748/EC of 16 October 2001 concerning the signing on behalf of the European Community of the United Nations Protocol on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition, annexed to the Convention against Transnational Organised Crime.

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 and components and ammunition, supplementing the United Nations Convention against Transnational Organised Crime, based on ex-Art 34(2)(a) EU.

⁹⁸ Joined Cases C-317/04 and C-318/04 *EP v Council and Commission* [2006] ECR I-4721.

⁹⁹ Council Decision 2004/496/EC of 17 May 2004, OJ 2004 L183/83.

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'.¹⁰⁰ The Union had to conclude a new agreement under what was then the third pillar.¹⁰¹

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 legislative procedure.¹⁰² 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, governing 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.¹⁰³ While on the one hand police and judicial cooperation, 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 international 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 organisations and human rights regimes. The ECtHR's case law has the particular potential of becoming influential in the AFSJ.¹⁰⁴ 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.¹⁰⁵ The

¹⁰⁰ Joined Cases C-317/04 and C-318/04 *EP v Council and Commission*, para 56.

¹⁰¹ Based on ex-Arts 24 and 38 TEU. See above (n 75) for the second EU-US PNR Agreement.

¹⁰² Arts 77 et seq TFEU.

¹⁰³ Art 16 is only included in the Recitals. See criticism by: S in 't Veld, Report, above (n 34) para 8.

¹⁰⁴ In 2010, 2011 and 2012, 90 judgments of the ECJ and AG Opinions refer to the ECHR. In the three previous years (2007–09), 68 judgments and Opinions made a reference to the Convention. The largest share of references to the Convention in these years was made in cases concerning the AFSJ: 9 Court decisions and 13 AG Opinions (list with the author). While the references to the ECHR have increased, the specific value given to the Convention and the ECtHR's case law would have to be analysed in more detail. The increase in total numbers contains no further information on in how many cases the Court could have used the ECHR and did not do so.

¹⁰⁵ Until the entry into force of the Lisbon Treaty, the ECJ only had limited jurisdiction on third pillar matters and until 1 December 2014 the transitional provisions continue to limit the Court's jurisdiction over pre-Lisbon instruments.

recent *MSS* ruling of the ECtHR¹⁰⁶ 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.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.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.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.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.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).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.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*).¹¹⁴ It discussed

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

¹⁰⁷ Greece was equally found in violation of the Convention.

¹⁰⁸ Council Regulation 343/2003/EC of 18 February 2003, OJ 2003 L50/1 (Dublin II Regulation), Recital 2.

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

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.

¹¹¹ European Parliament, ‘Judgment by the European Court of Human Rights in the Case of *MSS v Belgium and Greece*’ Parliamentary Questions of 10 February 2011, E-001222/2011.

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.

¹¹³ *ibid.*, 7.

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* case¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ 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'.¹¹⁹ It expresses the self as distinguished from 'others'. Individuals' identities are multi-faceted: they are part of many different distinguishable 'norm-generating communities'¹²⁰ with which they share elements of their identity, such as gender, nationality, age,¹²¹ 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;¹²² yet at the core of identity is *distinction over time*. National

¹¹⁵ *ibid*, para 88 et seq.

¹¹⁶ See in particular Art 3(2) and Recital 2 of the Dublin II Regulation, cited above (n 108).

¹¹⁷ See, for details on the implications of accession, C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 *MLR* 254.

¹¹⁸ *ibid*. See also: Art 52(3) Charter of Fundamental Rights.

¹¹⁹ E Olson, 'Personal Identity' (2002) in E Zalta et al (eds), *The Stanford Encyclopedia of Philosophy*. Available at: plato.stanford.edu/archives/fall2002/entries/identity-personal/ (last visited 6 February 2013).

¹²⁰ P Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155, 1170.

¹²¹ See in more detail: A Smith, *National Identity* (London, Penguin Books, 1991) 15.

¹²² D Miller, *Citizenship and National Identity* (Cambridge Polity Press, 2000); D Miller, *On Nationality* (Oxford, Oxford University Press, 1995); Smith, *National Identity*; W Bloom, *Personal Identity, National Identity and International Relations* (New York, Cambridge University Press, 1993);

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

P Boerner (ed), *Concepts of National Identity: An Interdisciplinary Dialogue – Interdisziplinäre Betrachtungen zur Frage der nationalen Identität* (Baden-Baden, Nomos Verlagsgesellschaft, 1986).

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.

¹²⁵ J Boli, ‘Sovereignty from a World Polity Perspective’ in S Krasner (ed), *Problematic Sovereignty – Contested Rules and Political Possibilities* (New York, Columbia University Press, 2001) 54.

¹²⁶ Eurobarometer 71 – Future of Europe, see map at 35. Available at: ec.europa.eu/public_opinion/archives/eb/eb71/eb713_future_europe.pdf (last visited 3 March 2013).

¹²⁷ U Haltern, ‘On Finality’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford, Hart Publishing, 2006).

¹²⁸ Paul Brass, *Ethnicity and Nationalism: Theory and Comparison* (Aldershot, Gregg Rivals, 1991).

¹²⁹ Habermas speaks of ‘constitutional patriotism’, eg J Habermas, ‘Citizenship and National Identity: Some Reflections of the Future of Europe’ (1992) 12 *Praxis International* 1.

¹³⁰ M Bruter, ‘Winning Hearts and Minds for Europe – The Impact of News and Symbols on Civic and Cultural European Identity’ (2003) *Comparative Political Studies* 1148.

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.¹³³ The Union does so by referring to the area as a pre-existing place.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 *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.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.

VIII. CONCLUSION

Outside-in effects differ from case-to-case and in different policy areas.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

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.

¹³⁴ *ibid.*, 9.

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), *European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press, 2013).

¹³⁶ See, eg for environmental policy: C Eckes, 'Environmental Policy "Outside-In": How the EU's Engagement with International Environmental Law Curtails National Autonomy' (2012) 13 *German Law Journal* 1151.

with Union authority as part of the national rule of law. The extreme of withdrawal or judicial rebellion based on a *Solange* reasoning notwithstanding,¹³⁷ the legal situation of citizens of the Member States under national law is also determined by European law.¹³⁸ 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’.

¹³⁷ BVerfGE 37, 271, of 29 May 1974 (*Solange I*); BVerfGE 73, 339, of Decision of 22 Oct 1986, 2 BvR 197/83 (*Solange II*).

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