The development of the external dimension of the AFSJ – new challenges of the EU legal and policy framework

Maria O'Neill

This is an Accepted Manuscript of an article published by Taylor & Francis in European Politics and Society on 8th January 2016, available online: http://wwww.tandfonline.com/10.1080/23745118.2016.1120997

The development of the external dimension of the AFSJ – new challenges of the EU legal and policy framework

Dr. Maria O'Neill

Senior Lecturer in Law

University of Abertay Dundee

Bell Street

Dundee DD1 1HG

Scotland, UK.

Tel: 01382 308421

E-mail: m.oneill@abertay.ac.uk

Bio-note: Maria O'Neill is a Senior Lecturer in Law at the University of Abertay Dundee. Maria O'Neill is the co-ordinator of the UACES Policing and European Studies collaborative research network. She has published widely in this area, to include a monograph with Routledge entitled 'The Evolving EU Counter-Terrorism Legal Framework', and a number of co-edited books on the topic with Cambridge Scholars.

Acknowledgements: This article was initiated via a European Commission funded workshop entitled 'European Internal security' which took place at the European University Institute, from the 23rd to the 25th of April 2012. She would like to than the organisers of this conference and the anonymous reviewers for their feedback on this paper.

(word count 8459)

The development of the external dimension of the AFSJ – new challenges of the EU legal and policy framework

Abstract

The Stockholm Programme sets new challenges for the AFSJ. The development of external relationships with ENP and the Euro-Mediterranean Economic Area countries will prove problematic. The treaty boundary lines between the Common Foreign and Security Policy (CFSP) and the Area of Freedom Security and Justice (AFSJ) will need to be negotiated. In addition the full range of EU provisions with regard to policing, investigation and prosecution, and fundamental and due process rights, all required to obtain safe convictions, which will need to be part of the EU external relations legal framework for the AFSJ. EU legal agreements for the AFSJ could be either directly with a particular third country, or via Europol. Europol counterparts could be the South East European Law Enforcement Centre (SELEC) or the Central Asian Regional Information and Coordination Centre (CARICC). This paper will critically analyse the problems likely from an EU legal framework and policy perspective.

Key words: AFSJ, CFSP, Europol, SELEC, CARRIC

1. Introduction

The Stockholm Programme sets new challenges for the EU in the AFSJ. While crime patterns clearly show a need for the EU to work closely with its neighbours, recognising that internal and external threats to the EU's security are 'inextricably linked,' (Commission of the European Union, 2010b) the development of effective legal and police practice provisions in this area opens up a mine field of issues which will have to be carefully negotiated. In addition, Article 8 TEU states that the EU will 'develop a special relationship with neighbouring countries.' These developments will pose challenges for the interaction of the Area of Freedom Security and Justice (AFSJ) with the Common Foreign and Security Policy (CFSP), to include the interaction between their different institutions and agencies. The external relations of the EU have attracted a lot of academic commentary from a CFSP perspective. In addition the various aspects of the AFSJ, in particular the security provisions, have been well covered in the academic literature, to include from a legal perspective. Beyond the EU structural issues which arise in the CFSP-AFSJ relationship, little academic attention had been given to a legal analysis of the development of the external aspects of the AFSJ, in particular from the perspective of how such developments will be operationalized, by not only law enforcement but also justice professionals. If the objective of the external aspect of the AFSJ is to obtain safe convictions for criminals engaged in serious transnational crime, then the external relations development in this area needs to engage with the full range of what would normally be state legal frameworks and apparatus from the instigation of a law enforcement criminal intelligence operation, through the law enforcement provisions, the investigation and prosecution of crimes, through to convictions, and ultimately, but outwith the scope of this paper, imprisonment. The EU has well developed provisions for transnational law enforcement at a supranational level, and is currently

involved in developing its justice and due process provisions. External relations activities in the AFSJ which do not engage with these issues might develop satisfactory international relations, and might provide some crime disruption solutions, but will not develop useable justice and law enforcement products. It is the argument of this paper that engagement with these issues need to be built into the external relations activities from the very start of EU negotiations with third countries, once there is an agreement to go down this road, with a multi-level negotiating strategy being developed, involving not just EU diplomats, but also law enforcement and criminal justice professionals. Within the EU, bottom up developments in cross-border law enforcement have been found to be more effective, and adopted quicker by relevant professionals, than exclusively or predominantly top down developments, designed by diplomats or civil servants, which have often been found to be cumbersome to use, or just less favoured in practice. It is for this reason that the legal analysis in this paper, which is on the external relations of the AFSJ, focuses on the legal and police practitioner perspective of the proposed external dimension of the AFSJ.

The development of external AFSJ relationships with non-strategic alliance partners, such as those in the ENP[1] and the Euro-Mediterranean Economic Area,[2] and with Russia through the four common spaces programme, (Van Elsuwege, 2008, p.334) will prove problematic, not only for law enforcement practice, but also for the institutional structure of the EU, and the maintenance of the rule of law. Some of these third countries are members of the Council of Europe[3] and the Organisation for Security and Cooperation in Europe (OSCE),[4] both of whom are key players in the development of crime control policies and protocols. Others, in particular the North

African and Middle Eastern member of the ENP/ Euro-Med,[5] are not. The focus of cross border law enforcement is most likely to be in the context of drug trafficking, (building on the provisions of Council Framework Decision 2004/757/JHA), and human trafficking (Directive 2011/36/EU), and allied crime areas, to include anti-money laundering (*Inter alia*, Council Framework Decision 2001/500/JHA) and the new proceeds of crime provisions (European Parliament and Council of the European Union, 2012, and Council Decision 2007/845/JHA) provisions. This is due to the fact that global definitions of these crimes are available under the UN's Palermo Convention on organised crime (UN, 2000a) and its protocol on human trafficking (UN, 2000b). While counter-terrorism provisions have been developed within the EU, there is no global definition of a terrorist offence, which would prove problematic for the development of more wide ranging counter-terrorism law enforcement operations with third countries.

The EU cross border provisions on policing, investigation and prosecution, and fundamental and due process rights all need to be taken into consideration in developing EU external AFSJ provisions. In this context it should be noted that the work of the security services, where they exist, is not a matter of EU law (Article 73 TFEU). Equally the EU does not become involved in the style or approach to law enforcement used within any EU member state (Article 72 TFEU), and so will not be in a position to dictate law enforcement approaches and styles to third countries.

Structural EU issues will hinder developments in this area as Cremona's (2008, p. 45) 'Chinese wall' between the CFSP and the rest of the post Lisbon EU will have to be

negotiated by EU lawyers and policy makers, given that the external relations of the EU is clearly a CFSP matter, while the law enforcement and justice institutional/ agency mix, together with the need to involve the relevant practitioners in this field, is a matter for the AFSJ. Acknowledging that illegal immigration and border management are part of the reunified AFSJ post Lisbon, this paper will however not deal with these issues, but will rather focus on Police and Judicial Cooperation in Criminal Matters (PJCCM) issues, which have recently been transferred to the mainstream EU, post Lisbon, from the post Amsterdam third pillar.

2. The EU structure AFSJ v. CFSP

Post Lisbon the CFSP remains a separate legal regime from the rest of the EU. In additional to being intergovernmental, rather than being a supranational legal system, the legal tools are, under Article 25 TEU, general guidelines, actions, positions, arrangements and systematic cooperation, rather than the more familiar and effective, regulations, directives and decisions. As stated by the then European Court of Justice (ECJ), in Grand Chamber, in the pre-Lisbon counter-terrorism financing case, *Kadi,* the then Community and the then Union were 'integrated but separate legal orders', (*Kadi*, para 156), with the framers of the treaty 'militating against any extension of the bridge to articles of the EC Treaty other than those with which it explicitly creates a link'. Highlighting an 'institutional system based on the principle of conferred powers', powers originating from the EU member states, and conferred on the then

EC, now EU, the various articles 'cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole and, in particular, by those defining the tasks and the activities of the Community' (*Kadi*, para 30). The choice of legal basis for a measure 'must rest on objective factors which are amenable to judicial review, including, in particular, the aim and the content of the measure' (*Kadi*, para 182).

Any international agreements signed with third states will have an impact on the EU internal legal provisions, if the EU enacts internal legal provisions in order to implement them, or if internal legal documents make express reference to the international law agreements (Case C149/96 *Portugal* v. *Council*, relying on Case 70/87 *Fediol*, and Case C-69/89 *Nakajima*, in the context of the World Trade Organisation). These agreements with third countries will, in those contexts, give rights to individuals (*Inter alia*, Case C-162/00 *Land Nordrhein-Westfalen* and Case C-265/03 *Igor Simutenkov*). However, as pointed out by the then ECJ in Grand Chamber in *Kadi*, "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court" of Justice (CJEU) (*Kadi*, para 282). Given the sensitivity of issues surrounding cross-border law enforcement, the correct legal basis needs to be ensured for the development of the external relations of the AFSJ. It is necessary to ensure that the arrest and detention of a known criminal group is not jeopardised by a judicial review ruling at the CJEU to the effect that the agreement with the third state was incorrectly enacted, with the whole investigation and prosecution thereby collapsing in which ever court is seized with the criminal prosecution. It is in this context that Cremona's Chinese wall is particularly

problematic. This view of an impenetrable legal wall between the CFSP and the rest of the EU post Lisbon arises from her reading of the post-Lisbon Article 40 EU, which provides that the CFSP will 'not affect' the provisions of the TFEU, which now includes the AFSJ measures, and 'similarly, the implementation of the policies listed in those articles [in the TFEU] shall not affect' the CFSP. This provision, while altering the balance of power between the CFSP and the mainstream EC/EU provisions, is going to pose problems for two significant areas of EU cross border law enforcement, that of (internal) counter-terrorism, and the external relations of the EU in the area of general cross border law enforcement, the subject matter of this paper.

These issues will continue to be relevant in the post-Lisbon legal framework, with the choice of legal basis for developing the external aspects of the AFSJ being critical. Legislators will have to choose between the CFSP legal tools or those specific to the AFSJ. In this context, it is worth pointing out that while most of the AFSJ is fully integrated into the post Lisbon EU, the legal basis for the internal deployment of police and other law enforcement personnel across borders differs from that of the rest of the AFSJ. This deployment of law enforcement personnel requires the Council to enact the legal provisions using 'a special legislative procedure', which requires unanimity among those states participating in the measure, 'after consulting the European Parliament' (Article 87 TFEU). This unanimity required by the Council differs from the usual ordinary legislative procedure, which involves co-decision and qualified majority voting, which applies, along with the rest of the EU provisions, to the balance of the AFSJ provisions post Lisbon (e.g. Article 75 TFEU, and Article 82-84 TFEU).

Problems arose under the pre-Lisbon EU legal framework in the ECOWAS case (Case C-91/05 *Commission* v *Council* (SALW)) when measures concerning the control of the Small Arms and Light Weapons (SALW) programme were enacted pursuant to the CFSP, when they should have been enacted pursuant to the EC Development Policy. At that time the EC was to have superiority over the other two EU pillars, under the pre-Lisbon Article 47 EU. Barkan is of the view (Barkan, 2012, p.104) that a post-Lisbon ECOWAS case would be 'decided differently', with the primary test being the 'primary purpose of the measure'. If both EU and CFSP policy areas were equally dominant issues, the measures would 'need to be adopted on two legal bases', but that this approach 'could, however, cause difficulties.' Barkan addresses the differences between the CFSP voting procedures and that of the rest of the EU. This author would add that cross border policing measures also need to be borne in mind. A consensus is emerging in academic writings that as post-Lisbon ECOWAS style case could pose some very serious problems for the legislature. It is to be hoped that the Court of Justice will have an opportunity, earlier rather than later, to rule on this matter, in particular now as the AFSJ has been fully 'Lisbonised,' now that the phase in period of the Lisbon Treaty has expired.[6] It is also to be hoped that this future Court of Justice ruling will not compromise a transnational law enforcement or counter-terrorism operation, and subsequent efforts to convict any identified perpetrators.

3. The institution/ agency mix

Post-Lisbon the EU is represented externally by the High Representative, supported both by the Special Representatives[7] and by the External Action Service, the new diplomatic service of the EU. The Special Representatives are all political in focus, and none have the capacity to bind the EU into a legal agreement. The Political and Security Committee continues to operate in the post-Lisbon CFSP (Council Decision 2001/78/CFSP), as does the Policy Planning and Early Warning Unit (Declaration (No 6)), as evidenced by a response to questions in the European Parliament.[8] The European Parliament and the Court of Justice continue to maintain very limited roles in the CFSP. In contrast, the AFSJ has a number of key organisations relevant to cross border law enforcement and subsequent prosecutions, with both the Parliament and in particular the Court of Justice maintaining much higher profiles. While the posting of law enforcement officers across borders is mainly a Council matter, as discussed above, the Commission is now a key player, post Lisbon, in the development of a coherent and effective legal framework for internal EU provisions. The Committee on Internal Security, the COSI committee, has a key role in ensuring that 'operational cooperation on internal security is promoted and strengthened within the Union' (Article 71 TFEU). The COSI committee's staffing would therefore reflect this need to focus on operational security issues. In addition the COSI committee has a responsibility to keep both the European Parliament and national Parliaments 'informed of [its] proceedings' (Article 71 TFEU).

In addition the role of Europol (Council Decision 2009/371/JHA), Eurojust (Council Decision 2009/426/JHA) and the European Judicial Network – Crime (Council Decision 2008/976/JHA), are not to be underestimated in developments in the AFSJ.

Eurojust, in particular, has traditionally described itself as being the organisation for investigating and prosecuting magistrates. In a number of EU countries, senior police officers are the counterparts for investigating magistrates. This is reflected in Article 2.1 of both the original Council Decision 2002/187/JHA, and as subsequently amended. Under the new legal framework for Eurojust, the task of managing controlled deliveries (Article 12 EU Convention 2000), the standard method of following illegal drugs across borders, has been allocated to Eurojust (Council Decision 2009/426/JHA, Article 9c). This measure could equally be deployed in the context of Trafficking in Human Beings (THB). While the justice aspects of the Stockholm Programme are focused on internal EU measures, the Home Affairs provisions, which would include controlled deliveries, are also very much focused on EU external relations. The Home Affairs roles of Eurojust would have to be included in any substantive external relations developments.

Another concrete example of the wide range of actors in the internal EU law enforcement framework is in the context of Trafficking in Human Beings (THB). The EU has already drafted an external THB action oriented paper, with both the criminals engaged in THB and the 'proceeds from their activities' being seen to 'pose a serious threat to the community' (Implementing the Strategy 2010, page 20). In order to address this issue, a 'Threat Assessment of THB to the EU, including from third countries and regions, should be drawn up.' This is to build on both the Council's Conclusions on intelligence-led policing (Council of the European Union, 2005), and the Council Conclusions on the architecture of Internal Security (Council of the European Union, 2006). It is to be informed by the Europol Organised Crime Threat Assessment (OCTA), the Russian Organised Crime Threat Assessment (ROCTA) and

the South-East European Organised Crime Threat Assessment (SEEOCTA) (Council of the European Union, 2010). It will also build on intelligence supplied by a variety of EU organisations, to include Frontex, Eurojust, Cospol[9] and the PCTF.[10] This THB threat assessment will then inform decisions on both the feasibility and prioritisation of third countries for the development of Anti-THB Partnerships (Council of the European Union, 2010). It is clear that the external relations of the EU in the AFSJ is not an exercise in external diplomacy, but a reaction to not only a perceived, but an actual need on the ground, from existing serious crime patterns, to develop further and deeper relations with third countries.

The web of institutions and agencies feeding both strategic information and actionable intelligence into internal developments of the EU in this area is large. They are largely independent of the institutional and organisational framework which operates in non-AFSJ, CFSP matters. Nevertheless there will be a need for the CFSP organisations and structures to work effectively with the AFSJ organisations and structures, when developing external AFSJ initiatives, at least in the early diplomatic stages, until the negotiations reach a level of detail that will require the AFSJ institutions and agencies to become more hands on in their developments. If cross border law enforcement with third countries it to lead to more than just the disruption of transnational criminal activities, then a variety of technical and legal requirements will have to be met. These requirements are necessary to bring a case effectively to court, and for successful prosecution and incarceration, in either one of the EU jurisdictions, or in one of the neighbouring states. These relevant technical and legal issues, normally not within the skill sets of CFSP officials and diplomats, will need to be addressed in the

early design stages of the development of cross border law enforcement provisions with third countries.

The motivation behind EU developments in this area is to tackle serious and organised crime, in particular drug trafficking and THB, and associated anti-money laundering provisions. While it is possible that an export of the model of cross border law enforcement might be easier using the Schengen Convention style provisions, to include some extension of the Schengen Information System (Schengen, Articles 92-119) to third countries, focusing on one off cases such as murder and rape, these are not the crimes that the EU is seeking to address with the Stockholm Programme proposals. In addition, where physical borders will continue to exist, between the EU and its neighbours, the Schengen hot pursuit provisions (Schengen, Article 41) will not be relevant. However the extension of covert surveillance provisions (Schengen, Article 40), under-cover officers (Schengen, Article 14) (which is highly problematic within the EU itself), controlled deliveries (EU Convention 2000, Article 12), and the use of cross border telecommunications intercepts EU Convention 2000, Article 20), as well as joint investigation teams (EU Convention 2000, Article 13) and the resources which underpin Europol's analysis work files (Council Decision 2009/371/JHA, Article 14), might all be relevant. The take up on these tools will vary from one third country to another. Council of Europe member states may already be members of the 2001 second protocol to the European Convention on Mutual Assistance in Criminal matters 1959, which has some cross border policing provisions. However, at a strategic development level, the EU must engage in negotiations with those institutions and agencies which are relevant for the use of these internal provisions when developing potential AFSJ external relations with third

countries. As the role of the police, reflected in Europol, and the role of the senior police officer or investigating magistrate in leading and investigation, reflected in Eurojust, are both relevant, both of these EU agencies need to be involved from the beginning of the negotiations with third countries. In addition the myriad of issues surrounding the handling of classified material,[11] in addition to data protection measures[12] and general security measures for data processing, will need to be addressed. The Stockholm Programme called for 'a framework model agreement consisting of commonly applicable core elements of data protection' to be created (European Council, 2009, p.35). The lack of adequate data protection measures has already proven a stumbling block in the development of cross border law enforcement relations with Russia (Commission of the European Union, 2008), with adequate data protection provisions being seen as a pre-condition for any such developments.

4. The police

The design, structure and style of law enforcement varies quite considerably from one country to another. Even within the EU the style of policing can be quite different. Within the UK policing ranges from the high visibility community style policing, to the very low visibility intelligence led policing, which is use most commonly in the context of serious and organised crime. Intelligence led policing, as understood in the UK, was build on initial work by Kent County Constabulary (Radcliff, 2008). It is the style of policing which underpins most of the EU's provisions on transnational law enforcement in the context of serious and organised crime. Specialist units operate

within each of the EU member states which are familiar with this style of policing, and, over the years, have developed close working relationships with their neighbours within the EU.

Many of the third countries which the EU would hope to engage with, in the external relations aspects of the AFSJ, do not have the same starting point in the design of their policing structures and styles. While many eastern countries are operating from a starting point of military style policing, they are involved, to varying extents, in police reform programmes either with the Council of Europe,[13] or with the Organisation for Security and Cooperation in Europe (OSCE).[14] The OSCE is promoting the development of community style policing, as it is understood in the EU. It is less clear where third country specialist units which are tasked with dealing with serious and organised crime are in their development of modern policing styles. The EU's potential partners in North Africa and the Middle East are not members of either the Council of Europe or the OSCE. An interesting development however, in the North African region is that, in addition to relations with the EU, Algeria, Egypt, Morocco and Tunisia,[15] have negotiated Partner for Cooperation status at the Organisation for Security and Cooperation in Europe (OSCE). It is less clear, however, where the impetus for change and development in policing structures and practice are coming from in those regions, although individual countries have made commitments under their European Neighbourhood Policy (ENP) Action Plans with the EU. In the absence of similar levels of development of police practice, many of the policing tools developed for the EU, to include the afore mentioned joint investigation teams EU (Convention 2000, Article 13), cross border covert surveillance (Schengen, Article 40) and controlled deliveries (Convention 2000, Article 12), will not export safely or

effectively to the EU's potential partners. It is possible that some hybrid style of community policing in third countries, feeding into intelligence led policing within the EU might work, for example in a THB transnational operation, where the type of crime, and how it is committed, might actually suit this type of hybridisation. However if some form of hybrid style of policing is required then it must be planned for and designed into the initial negotiations on the AFSJ with the particular third country.

Two initiatives in countries east of the EU, the SECI Centre[16] and the CARRIC Centre[17] are of interest. The EU's neighbours have developed their own ideas on how to tackle transnational crime in their own regions. Both the EU law enforcement agency, Europol, and other international actors in this area are involved in both of these initiatives to different degrees. The SECI Centre would be considered by the EU to be the more developed, and is currently seeking, not only training programmes at CEPOL,[18] the EU's police college, but also to develop protocols for more effective transnational law enforcement with the EU (Council of the European Union, 2011). The CARRIC Centre, with Russia as a dominant member, may be seeking different ways of doing business in the area of transnational law enforcement. Nevertheless, both centres are offering interesting possibilities for future transnational law enforcement. The question then arises as to whether the new or newly reformed governments in North African and Middle Eastern countries would be interested in similar developments in their regions.

5. The investigation/ prosecution role

The investigation/ prosecution role in the EU legal framework has been allocated to Eurojust. The prosecution role of Eurojust is very much a 'justice' matter, which is not being developed, to any great extent, externally, under the Stockholm Programme. The investigation role, however, is a 'home affairs' matter, and would be relevant to the external dimension of the Stockholm Programme. This split between justice and home affairs is, in itself, going to create problems for external relations in the AFSJ. In addition, much of the work under internal home affairs measures is in order to apprehend criminals and to bring them to court, with a view to seeing successfully prosecuted criminals spend some time in prison. A whole range of checks and balances have been build into EU member state's criminal law and evidence rules, in order to ensure that justice is not only done, but is seen to be done. Different EU member states take quite different approaches to these issues. In addition, the style of prosecution within EU member states can be radically different. Any measure which would conflict with the rules of criminal law or evidence of a jurisdiction seized with a particular trial could seriously jeopardise that particular trial, leading the accused to be freed, and the rejection of most of the 'home affairs' aspects of the pre-trial preparation. It is difficult to see, in the context of the need to bring a criminal to court, how the 'home affairs' aspects of a case can be successfully divorced from the 'justice' aspects. It is arguable that law enforcement operations with third countries, which end up in the EU will need to meet the internal EU investigation/ prosecution standards.

The full range of developments in the EU 'justice' sector need to be taken into account when developing the external aspect of the AFSJ. From an investigation/ law enforcement perspective, in addition to the well know provisions on the European Arrest Warrant (Council Framework Decision 2002/584/JHA), is the quite limited European Evidence Warrant (Council Framework Decision 2008/978/JHA), which is now being supplement by the European Investigation Order (Directive 2014/41/EU). Also relevant for building up the police case, are the provisions on the exchange of information extracted from the criminal record (Council Framework Decision 2009/315/JHA), and the provisions on freezing property or evidence (Council Framework Decision 2003/577/JHA). A European Criminal Records Information System (ECRIS) (Council Decision 2009/316/JHA) has recently been set up, but it only covers EU nationals, with a feasibility study being undertaken on an EU Police Records Index System (EPRIS) (Commission of the European Union, 2010a).

Given that much organised and serious crime is conducted for the purpose of making money the EU's anti-money laundering and the new proceeds of crime provisions are key to combating both drugs trafficking and THB inside the EU. If a cross border law enforcement operation is going to be truly effective with a third country, then these aspects must also be built into the AFSJ third country relationship. Already in place within the EU is a Council Decision on cooperation between asset recovery offices (Council Decision 2007/845/JHA). Similar provisions need to be put in place in relations with third countries, recognising that not all will be effectively following the FATF approach to anti-money laundering provisions. Many of the countries to the

east of the EU, who are members of the Council of Europe, use the MONEYVAL system in order to combat money laundering.

It has been argued by many that while the law enforcement side of the AFSJ has been quick to develop, the 'freedom' and 'justice' aspects of this policy area are much in need of further development. The post-Lisbon EU legal framework now gives much greater say to both the Commission and the European Parliament in this area. It is to be expected that both the 'freedom' and 'justice' elements will now develop rapidly within the EU. A Procedural Rights road map[19] has already been drafted. It is expected this area will develop rapidly. At the time of writing, there is a directive in place giving the right to translation and interpretation services (Directive 2010/64/EU), and a proposed directive on the right to access to a lawyer in criminal proceedings, and the right to communicate with one on arrest (European Parliament and Council of the European Union, 2011b). In addition there is already a directive in place dealing with the right to legal aid in cross border civil and commercial matters (Council Directive 2002/8/EC). Should it prove necessary, it can be expected that one will follow for criminal matters. Some of the procedural rights of individuals, in the absence of the person concerned at the trial, are already provided for (Council Framework Decision 2009/299/JHA). While framework decisions are inherently flawed, when contrasted with the post-Lisbon regulations and directive, nevertheless, as pointed out in the *Pupino* case, national courts are 'required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light to the wording and purpose of the Framework Decision' (Case C-105/03 *Maria Pupino*).

Current proposals for legislation of relevance to the investigation/ pre-trial proceedings include a green paper on the *ne bis in idem* (double jeopardy) principle (Commission of the European Union, 2005), a green paper on procedural safeguards for suspects and defendants in criminal proceedings (Commission of the European Union, 2003), and what was a proposal for a Council Framework decision on procedural rights (Proposal for a Council Framework Decision 2004). This latter document will probably re-emerge as a proposed directive, post-Lisbon. There is also some work ongoing on 'the feasibility of an index of third-country nationals convicted in the European Union' (Commission of the European Union, 2006a).

Already in place is a framework decision on supervision measures as an alternative to provisional detention (Council Framework Decision 2009/829/JHA). At the sentencing stage of a criminal trial provisions deal with 'the taking into account of convictions in Member States of the European Union in the course of new criminal proceedings' (Council Framework Decision 2008/675/JHA). Also on the EU statute book is a framework decision on the mutual recognition of financial penalties (Council Framework Decision 2005/214/JHA), and proposals on the mutual recognition of disqualifications arising from criminal convictions (Commission of the European Union, 2006b). At green paper stage are provisions on the mutual recognition of criminal sanctions (Commission of the European Union, 2004a).

6. Fundamental rights and due process

As relevant to an effective trial and conviction in any of the EU member states is the issue of fundamental rights and due process rights. The EU Charter of Fundamental Rights, in particular chapter six, which deals with justice, becomes immediately relevant, and has gained full treaty status post Lisbon. In addition the provisions of the ECHR are also relevant, whether that is through individual member states membership of the ECHR, or the much anticipated accession of the EU itself to the convention. The EU's Fundamental Right's Agency has been tasked, by the Stockholm Programme Action Plan, to cover the domain of judicial and police cooperation in criminal matters in its multiannual framework.

Many procedural issues in the context of a criminal trial have already been dealt with by the ECJ in the context of other policy areas of the EU, in particular what is now EU Competition Law. For example the role of legal advice during an investigation was recognised in the *Hoechst* case (Cases 46/87 and 227/88, para. 16). The right not to self-incriminate in a criminal case was dealt with, as an aside in the *Orkem* case (Case 374/87 para. 26), which itself was focusing on a commercial matter. The issue of legal professional privilege was dealt with in *AM&S Ltd.* (Case 155/79, para. 18), which recognised the 'giving of independent legal advice' 'for the purposes and in the interests of the client's rights of defence' as long as 'they emanate from independent lawyers,' with the lawyers not to be 'bound to the client by a relationship of employment'. Many relevant provisions in the development of the CJEU's approach to the AFSJ post-Lisbon will build on these and similar lines of pre-existing ECJ case law. It is clear from the ECJ ruling in Grand Chamber, in the 2008 *Kadi and Al Barakatt* case (Joined Cases C-402/05 P and C-415/05 P) that the ECJ, now the CJEU, makes no distinction between commercial and criminal case law before it, in

the development of its legal principles. The *Kadi* judgment, on appeal, made liberal references to pre-existing commercial/ trade related case law in the development of its argument in the context of counter-terrorist financing.

The ECJ *Kadi* ruling involved the freezing of suspected terrorist financial assets pursuant to UN Security Council resolutions. It held that despite the fact that it was not for the then ECJ "to review the lawfulness of such a resolution adopted by an international body" (para. 287), there had been a breach of the rights of defence and the right to effective judicial review of the implementation of the UN measures within the then EU legal framework (paragraph 353). As stated by the Court, 'the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States' (para. 335). Interestingly the ECJ referred to 'a complete system of legal remedies and procedures' based on the then EC treaty, enabling 'the Court of Justice to review the legality of acts of the institutions' (para. 281). Many would question whether the complete system of legal remedies is already in place in the context of cross border justice and law enforcement. There is, however, no doubt that the CJEU, post Lisbon, will endeavour to fill any remaining gaps in this area, to include cross border justice and law enforcement issues which may arise with third countries, with all EU measures needing to ensure that they are fully lawful and fully consistent with 'fundamental rights' (para. 304). The ECHR is also to have 'special significance' in this context (para. 304).

The ECJ in *Kadi*, did acknowledge the sensitivity of the matter in question, and the 'over riding considerations to do with safety or the conduct of international relations,' (para. 283) but that it was the role of the Court to 'apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice' (para. 344). In this context it is important to note that individuals, even third country nationals, gain rights under EU law under agreements concluded by the Union with third countries, where the wording and purpose of the agreement 'contains a clear and precise obligation which is not subject, in its implementation or effect, to the adoption of any subsequent measure' (Case C-162/00 *Land Nordrhein-Westfalen*, para. 19).[20] Agreements between the EU and third countries in the context of cross border law enforcement will, no doubt, be sufficiently precise for both EU nationals and third country nationals to 'gain rights' under these agreements.

7. Conclusion

EU structural issues are the first obstacle to be overcome in developing the external relations of the AFSJ. No only does Cremona's 'Chinese wall' between the CFSP and the AFSJ need to be carefully negotiated, but so too do the differences between the special legislative procedure for cross border law enforcement deployment, and the

ordinary legislative procedures appropriate for the rest of the AFSJ. In addition the differentiation between 'justice' and 'home affairs' in the Stockholm programme will also pose a problem. The internal focus of the EU's 'justice' provisions are not easily disentangled from the EU's 'home affairs' provisions, which have been set some very ambitious external targets in the Stockholm Programme.

In addition to the awkward structural issues, the very different organisational set up, legal framework and tools of the CFSP and the AFSJ will pose problems. Unless we are merely addressing the issue of disruption of transnational crime, then the entire EU law enforcement and justice framework (which itself is still in a development stage) will need to be engaged with when developing agreements with willing third countries. In addition, willing third countries might not be in a position to deliver on their commitments to the EU in this area.

The objectives of the Stockholm Programme are justified by the crime patterns on the ground. However, the development of an effective legal and organisational framework is opening a Pandora's box of legal issues, none of which can be ignored if the objective of effectively bringing a transnational criminal to court, in order to obtain a safe conviction is to be achieved. It is clear that the lawyers and policy makers working on this area of EU development are going to be very busy in the years to come.

References:

Barkan, M. (2012) The Role of the European Court of Justice in the Field of Common Foreign and Security Policy After the Treaty of Lisbon: New Challenges for the Future, in: P.J. Cardwell, (Ed.) *EU External Relations Law and Policy in the Post-Lisbon Era*, 97-118 (The Hague: TMC Asser Press/ Springer,)

Case C-440/05 *Commission* v *Council* [Ship Source Pollution] [2007] ECR I9097

Case C-91/05 *Commission* v *Council* (SALW) [2008] ECR page I-03651 (ECOWAS).

Case C-459/03 *Commission* v *Ireland* [2006] ECR I4635

Case C-265/03 *Igor Simutenkov* v *Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2005] ECR, I-02579.

Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285.

Case T-315/01 *Kadi* v *Council and Commission* 2006 ECR II-3649.

Case T-306/01 *Yusuf and Al Barakatt International Foundation* v *Council and Commission* [2006] ECR II-3533.

Case C-162/00 *Land Nordrhein-Westfalen* v *Beata Pokrzeptowicz-Meyer*, [2002] ECR page I-01049.

Case C-149/96 *Portugal* v *Council*, [1998] ECR 1999 page I-08395.

Case C-69/89 *Nakajima All Precision* v. *Council* [1991] ECR I-2069.

Opinion 1/91 [1991] ECR I6079,

Case 374/87 *Orkem* v *Commission* [1989] ECR I-3283.

Case 70/87 *Fediol* v *Commission* [1989] ECR 1781.

Cases 46/87 and 227/88 *Hoechst AG* v *Commission* [1989] ECR 2859.

Case 155/79 *AM&S Europe Ltd.* v *Commission* [1982] ECR 1575.

Commission of the European Union (2010a) *Communication from the Commission to the European Parliament and the Council - Overview of information management in the area of freedom, security and justice*, COM(2010) 385.

Commission of the European Union (2010b) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme*, Brussels, COM(2010) 171, 8.

Commission of the European Union (2008) *Commission staff working document accompanying the communication from the Commission to the Council - Review of EU-Russia relations pursuant to conclusions of the Extraordinary European Council of September 1, 2008* {COM(2008) 740 final}, SEC(2008) 2786.

Commission of the European Union (2006a.) *Commission working document on the feasibility of an index of third-country nationals convicted in the European Union*, COM (2006) 359 final.

Commission of the European Union (2006b.) *Communication from the Commission to the Council and the European Parliament- Disqualifications arising from criminal convictions in the European Union*, COM (2006) 73 final.

Commission of the European Union (2005) *Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in criminal proceedings*, COM (2005) 696 final.

Commission of the European Union (2004a) *Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, COM (2004) 334 final.

Commission of the European Union (2004b) *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*, COM (2004) 328 final.

Commission of the European Union (2003) *Green Paper from the Commission, Procedural Safeguard for Suspects and Defendants in Criminal Proceedings throughout the European Union*, COM (2003) 75.

Council of the European Union (2011) *Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings – first implementation report/update of information on Member States' external action*, Brussels, 4 July 2011, 12401/11, 25.

Council of the European Union (2010) *Implementing the Strategy for the External Dimension of Justice and Home Affairs: Global Freedom, Security and Justice - Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings; Towards Global EU Action against Trafficking in Human Beings* - final version, Brussels, 25 February 2010.

Council of the European Union (2006) *Council Conclusions on the Architecture of Internal Security*, 9596/06 JAI 271 CATS 104.

Council of the European Union (2005) *Council Conclusions of 12 October 2005 on intelligence-led policing*, 10180/4/05 CRIMORG 56 ENFOPOL 75.

Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, *Official Journal.* No. L 138/14.

Council Decision 2009/371/JHA establishing the European Police Office, *Official Journal.* No. L 121/37.

Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, *Official Journal.* No. L 93, 07/04/2009, 33.

Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, *Official Journal.* No. L 348, 24/12/2008, 130.

Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, *Official Journal.* No. L 332, 18/12/2007, 103.

Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *Official Journal.* No. L 63/1.

Council Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee, *Official Journal.* No. L 27/1.

Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, *Official Journal.* No. L 332, 18/12/2007, 103.

Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, *Official Journal.* No. L 26, 31/01/2003, 41.

Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, *Official Journal.* No. L 294, 11/11/2009, 20.

Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, *Official Journal.* No. L 93, 07/04/2009, 23.

Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, *Official Journal.* No. L 81, 27/03/2009, 24.

Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, *Official Journal.* No. L 350, 30/12/2008, 72.

Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, *Official Journal.* No. L 220, 15/08/2008, 32.

Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *Official Journal.* No. L 76, 22/03/2005, 16.

Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *Official Journal.* No. L 335, 11/11/2004, 8.

Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *Official Journal.* No. L 196, 02/08/2003, 45.

Council Framework Decision 2002/584/JHA on the European Arrest Warrant, *Official Journal.* No. L 190, 18/07/2002, 1.

Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime adopted 26 June 2001, *Official Journal.* No. L 182/1.

Council of Europe (2001) Second protocol to the European Convention on Mutual Assistance in Criminal matters 1959

Cremona, M. (2008) Defining competence in EU external relations: lessons from the Treaty 'reform process,' in: A. Dashwood and Maresceau, M. (Eds.) *Law and Practice of EU External Relations; Salient Features of a Changing Landscape*, pp.34 -69 (Cambridge: Cambridge University Press).

Directive 2014/41/EU of the European Parliament and of the council of 3 April 2014 regarding the European Investigation Order in criminal matters, *Official Journal.* No. L 130, 01/05/2014 p.1.

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *Official Journal.* No. L 101, 15/04/2011, 1.

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, *Official Journal.* No. L 280, 26/10/2010, 1.

Declaration (No 6) on the establishment of a policy planning and early warning unit (Annexed to the Treaty of Amsterdam).

Euro-Mediterranean Conference (1995) Barcelona Declaration, adopted at the Euro-Mediterranean Conference, 27th and 28th November 1995.

EU Convention on Mutual Assistance in Criminal Matters, 2000.

European Council (2009) *Stockholm Programme – An open and secure Europe serving the citizen*, 2nd December 2009, 17024/09, JAI 896.

European Parliament and Council of the European Union (2012) Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, COM(2012) 85.

European Parliament and Council of the European Union (2011a) *Proposal for a Regulation of the European Parliament and of the Council establishing a European Neighbourhood Instrument*, COM (2011) 839 final.

European Parliament and Council of the European Union (2011b) *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, COM(2011) 326.

Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, Al Barakaat International Foundation* v *Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, [2008] ECR I-6351.

Ratcliffe, J. (2008) *Intelligence-Led Policing*, (Cullompton: Willan,)

Schengen Convention 1990.

Treaty on the European Union.

Treaty on the Functioning of the European Union.

UN (2000a) *Convention on Transnational Organised Crime (Palermo Convention)* 2000.

UN (2000b) *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime, Annex II to the Palermo Convention 2000*.

Van Elsuwege, P. (2008) The four Common Spaces, new impetus to the EU-Russia Strategic Partnership, in: A. Dashwood and Maresceau, M. (Eds.) *Law and Practice of EU External Relations; Salient Features of a Changing Landscape*, 334-359 (Cambridge: Cambridge University Press).

[1] About to be given a new, post-Lisbon legal basis in Proposal for a Regulation of the European Parliament and of the Council establishing a European Neighbourhood Instrument, COM (2011) 839 final.
[2] Developed pursuant to the Barcelona Declaration, adopted at the Euro-Mediterranean Conference, 27th and 28th November 1995.
[3] http://www.coe.int.
[4] http://www.osce.int
[5] In particular, Algeria is a member of the Euro-Med arrangements, but not those of the ENP.
[6] This phase in period is five years after the coming into force of the Lisbon Treaty(now expired), as provided in Protocol (No 36) on Transitional Provisions, Article 10.1 and 3 attached to the post Lisbon TEU and TFEU.
[7] The current set of Special Representatives have been posted to; Afghanistan, Bosnia & Herzegovina, Central Asia, the Horn of Africa, Human Rights, Kosovo, the Middle East Peace Process, the Sahel and the South Caucasus & crisis in Georgia.
[8] http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-5998&language=EN.
[9] Comprehensive Operational Strategic Planning for the Police
[10] EU Police Chiefs Task Force.
[11] The EU's rules on data security are set out in Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, OJ L 141, 27/05/2011, 17, while Europol continues to maintain its own, but very similar provisions in Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information, OJ L 332/17.
[12] For Europol, provided for by Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121, 15/05/2009, 37, for Eurojust by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138/14, and for the balance of the AFSJ by Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, 60. See further on this O'Neill, M.; The Issue of Data Protection and Data Security in the (Pre-Lisbon) EU Third Pillar, JCER Volume 6, Issue 2, 211-235.
[13] http://www.coe.int/t/dghl/cooperation/capacitybuilding/police_en.asp .
[14] http://www.osce.org/spmu.
[15] Along with Jordan and Israel.
[16] Whose membership comprises Albania, Bosnia & Herzegovina, Bulgaria, Croatia, Greece, Hungary, FRY Macedonia, Moldova, Montenegro, Romania, Serbia, Slovenia and Turkey http://www.secicenter.org/.
[17] Whose membership comprises Azerbaijan, Kazakhstan, Kyrgyz Republic, Russian Federation, Tajikistan, Turkmenistan and Uzbekistan. http://www.caricc.org/index.php?lang=english.
[18] http://www.cepol.europa.eu, accessed 26th January 2012, Ref: 05/2012/CEPOL.

[19] Which was adopted 30th November 2009, and incorporated in the Stockhom Action Plan, COM (2010) 171 of 20.04.2010.
[20] See also Case C-265/03 *Igor Simutenkov* v *Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2005] ECR I-02579.