

Challenges and complexities in the protection of fundamental rights in the EU's Area of Freedom, Security and Justice*, **

*Retos y complejidades en la protección de los Derechos Humanos
en el Espacio Europeo de Libertad, Seguridad y Justicia*

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Abstract: It is well known by now that the uneasy coupling of freedom, security and justice in the former third pillar of the European Union often has turned out detrimental to the protection of fundamental rights. In the Area of Freedom, Security and Justice (AFSJ), being one of the most rapidly developing areas of European integration, security matters seem almost by definition to be prioritized over fundamental rights concerns. While the ‘Lisbonization’ of the AFSJ brought with it both institutional and substantive improvements, several fundamental rights challenges still remain. The Treaty of Lisbon can therefore be said to have resulted in something of a dual image in respect of fundamental rights protection. The article aims at

* Recibido el 17 de abril de 2015, aceptado el 17 de junio de 2015.

** The research leading to this article has received funding from the European Commission's Seventh Framework Programme (FP7/2007-2013) under the grant agreement FRAME (project n.º 320000). This article builds upon the discussions of the research report ENGSTRÖM, V. and HEIKKILÄ, M., “Fundamental Rights in the Institutions and Instruments of the Area of Freedom, Security and Justice”, 2014. The report is available on-line at <http://www.fp7-frame.eu/> (last retrieval 24/02/2015).

identifying the most important current challenges. These challenges range from systemic concerns (such as the coherence of EU action or inadequate mainstreaming of fundamental rights) to more concrete issues (for example, concerning the responsibilities of individual agencies). The article seeks to demonstrate that fundamental rights concerns are present at multiple levels. In addition, the article will consider the impact of certain recent developments in the AFSJ on the protection of rights.

Keywords: EU, fundamental rights, area of freedom, security and justice, coherence.

Resumen: *Está ampliamente reconocido que el difícil encaje entre los conceptos de libertad, seguridad y justicia del antiguo tercer pilar de la Unión Europea a menudo ha resultado perjudicial para la protección de los derechos fundamentales. En lo que se refiere al Espacio de Libertad, Seguridad y Justicia (ELSJ), que es una de las áreas en las que se ha producido más rápidamente la integración europea, parece que los asuntos de seguridad se priorizan sobre los problemas de derechos fundamentales casi por definición. Mientras que la ‘Lisbonización’ del ELSJ trajo consigo mejoras tanto institucionales como sustantivas, aún quedan pendientes varios retos de derechos fundamentales. Por ello, se puede decir que el Tratado de Lisboa ha originado una especie de imagen dual en materia de protección de los derechos fundamentales. Este artículo tiene como objetivo identificar cuáles son los retos actuales más importantes. Estos retos van desde preocupaciones sistémicas (como la coherencia de la acción de la UE o la insuficiente integración de los derechos fundamentales) a cuestiones más concretas (por ejemplo, con relación a las responsabilidades de las distintas agencias). El artículo, por tanto, pretende demostrar que los problemas de derechos fundamentales están presentes en múltiples niveles. Asimismo, el artículo analizará el impacto que ciertos desarrollos recientes del ELSJ han tenido sobre la protección de los derechos.*

Palabras clave: *derechos fundamentales, Espacio de Libertad, Seguridad y Justicia, coherencia.*

I. Situating fundamental and human rights within the AFSJ

Ever since the entry into force of the 1997 Treaty of Amsterdam, the European integration process has included an Area of Freedom, Security and Justice (AFSJ). Today, AFSJ cooperation is part of the core of European integration as defined in Article 3(2) of the Treaty on European Union (TEU). The more detailed treaty provisions regarding the area can be found in the Treaty on the Functioning of the European Union (TFEU), which in Title V addresses the various justice and home affair (JHA) policies: Border checks, asylum and immigration (Chapter 2), judicial cooperation in civil matters (Chapter 3), judicial cooperation in criminal matters (Chapter 4), and police cooperation (Chapter 5).

The AFSJ consists of several diverse policy fields. What the JHA policies have in common is that they often touch upon matters that lie at the very heart of member state sovereignty and for this reason are highly politicised.¹ The AFSJ also essentially concerns matters that affect the rights and obligations of individuals. These two dimensions of the AFSJ cooperation reflect the tension between collective security and individual rights (justice) inherent in many JHA policies.² As noted by Monar, the “rather technically sounding term ‘justice and home affairs’ should not make one forget that the EU is dealing here with issues relating to the most invasive forms of state action, such as deprivation of liberty, refusal of entry at borders, expulsion and uncovering of personal data”.³ It is no coincidence therefore that both the protection of fundamental rights and the JHA policies have developed hand-in-hand within the Union.⁴

Today, the obligation to respect fundamental rights within the EU’s AFSJ primarily stems from Article 6 TEU, which is the general fundamental rights provision in EU law, and Article 67 TFEU, which establishes that the Union shall constitute an AFSJ with respect for fundamental rights and the different legal systems and traditions of the member states. Furthermore, as regards external action, Article 21(1) TEU stipulates that the Union’s action on the international scene shall be guided by the principles which have inspired its own creation, including the universality and indivisibility of human rights and fundamental freedoms. This is significant as many JHA policies have a pronounced external dimension.⁵ From a coherence perspective, it is important to note that there is an inbuilt distinction in the institutional structure of EU governance between *external* human rights and *internal* fundamental rights. In the Council there are, for example, two different preparatory bodies depending on whether the issue is connected

¹ E.g., MONAR, J., “The Institutional Framework of the AFSJ: Specific Challenges and Dynamics of Change” in MONAR, J. (ed.), *The Institutional Dimension of the European Union’s Area of Freedom, Security and Justice*, Peter Lang, Brussels, 2010, p. 23.

² E.g., PEERS, S., *EU Justice and Home Affairs Law*, third edition, Oxford University Press, Oxford, 2011, p. 1.

³ MONAR, J., “The Area of Freedom, Security and Justice”, in VON BOGDAND Y, A. and BAST, J. (eds.), *Principles of European Constitutional Law*, second edition, Hart Publishing/Verlag CH Beck, Oxford/München, 2010, p. 553.

⁴ RAULUS, H., “Fundamental Rights in the Area of Freedom, Security and Justice”, in WOLFF, S., GOUDAPPEL, F. and DE ZWAAN, J. (eds.), *Freedom, Security and Justice after Lisbon and Stockholm*, T.M.C. Asser Press, The Hague, 2011, p. 213.

⁵ Furthermore, many AFSJ measures affect third country nationals within the Union. Cf. GUILD, E., CARRERA, S., DEN HERTOOG, L. and PARKIN, J., “Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office”, report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2011, p. 7.

to external human rights (the Working Group on Human Rights, COHOM) or internal fundamental rights (the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons, FREMP).⁶ This division has been identified as one reason behind the fact that there today are JHA fields where the Union has a clear external human rights policy but a corresponding developed internal fundamental policy is lacking (for example, violence against women) and vice versa (for example, migration).⁷

II. The dual image of progress in fundamental rights protection after the Lisbonization of the AFSJ

The 1992 Treaty of Maastricht created the three-pillar EU structure. Initially, all JHA cooperation took place in the intergovernmental third pillar. Early JHA cooperation was criticized for secrecy (justified with the sensitive nature of the JHA cooperation) and accountability deficits (lacking parliamentary scrutiny and judicial control).⁸ The 1997 Treaty of Amsterdam transferred certain JHA matters to the supranational first pillar (immigration, asylum and civil law issues), but left others behind in a reformed third pillar. A central goal in the 2007 treaty reforms was to address the critique raised against the JHA decision-making and thereby to improve the Union's JHA infrastructure. Eventually, the Treaty of Lisbon abolished the pillar structure and brought JHA law-making within the so-called ordinary legislative procedure.⁹ This significantly enhanced the role of the European Parliament in the decision-making. The Treaty of Lisbon

⁶ See e.g., FRA, *Council of the EU Discusses Coherence of Internal-External Fundamental Rights' Policies*, press release of 7 October 2014: <http://fra.europa.eu/en/event/2014/council-eu-discusses-coherence-internal-external-fundamental-rights-policies> (last retrieval 03/02/2015).

⁷ See further, e.g., KJAERUM, M., *Speech by FRA Director Morten Kjaerum to the Council of the EU Working Group on Human Rights (COHOM), Brussels, 7 October 2014*: <http://fra.europa.eu/en/speech/2014/internal-external-coherence> (last retrieval 03/02/2015). In relation to children's rights, Cullen has noted that in certain questions (e.g., the right to education) the Union has external action, even though a corresponding internal policy is lacking. According to her, this may entail legitimacy problems. CULLEN, H., "Children's Rights", in PEERS, S. and WARD, A., *The EU Charter of Fundamental Rights: Politics, Law and Policy*, Hart Publishing, Oxford, 2004, pp. 338-339.

⁸ E.g., DOUGLAS-SCOTT, S., "The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?" in BARNARD C. and ODUDU O. (eds.), *Cambridge Yearbook of European Legal Studies*, vol. 11, 2009, pp. 57-58.

⁹ Articles 289 and 294 TFEU.

did also, among other things, extend the jurisdiction of the Court of Justice of the European Union (CJEU) in JHA matters.¹⁰

Murphy and Acosta Arcarazo have pointed out that there is a “tendency in EU law scholarship to over-emphasize novelty and to pronounce a new dawn with each new treaty”,¹¹ and the Treaty of Lisbon is no exception in this respect. Numerous scholars have considered the “Lisbonization” of the AFSJ, and commonly arrive at rather positive assessments of the reform.¹² Yet, as every treaty is a political compromise, even after the Treaty of Lisbon the AFSJ continues to be a highly complex and politically contentious policy-area. There are also elements of the former pillar divide that have survived such as special decision-making procedures.¹³ Unanimity is, for instance, required when the Council votes on issues relating to passports and certain family matters.¹⁴ The treaty also allows for opt-outs for some countries.¹⁵ This, in combination with so-called brake and accelerator clauses,¹⁶ entail that the applicable JHA rules are not necessarily the same for all member states. The Treaty of Lisbon has also fortified the problems of supranational EU decision-making in the AFSJ, and especially problems stemming from regulatory competition and unclear inter- and intra-institutional division of competencies.¹⁷ In the institutional landscape of the AFSJ also the prominent role of the European Council as

¹⁰ Part Six, Title I, Chapter 1, Section 5 TFEU. See further e.g., CARRERA, S., DE SOMER, M. and PETKOVA, B., “The Court of Justice of the European Union as a Fundamental Rights Tribunal – Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice”, *CEPS Paper in Liberty and Security in Europe*, No. 49, 2012, p. 6.

¹¹ MURPHY, C. C., and ARCARAZO, D. A., “Rethinking Europe’s Freedom, Security and Justice” in ARCARAZO, D. A., and MURPHY, C. C. (eds.), *EU Security and Justice Law: After Lisbon and Stockholm*, Hart Publishing, Oxford, 2014, p. 1.

¹² Guild and Carrera e.g., talk about changes that “will revolutionise the way in which the AFSJ works” and that the treaty marked a “‘before and after’ point in the making of the EU’s AFSJ”. GUILD, E. and CARRERA, S., “The European Union’s Area of Freedom, Security and Justice Ten Years On” in GUILD E., CARRERA, S. and EGGENSCHWILER, A. (eds.), *The Area of Freedom, Security and Justice Ten Years On – Successes and Future Challenges under the Stockholm Programme*, Centre for European Policy Studies, Brussels, 2010, pp. 2-3.

¹³ MONAR, J., *op.cit.*, note 3, p. 568.

¹⁴ Articles 77(3) and 81(3) TFEU.

¹⁵ On the special position of Denmark, Ireland and United Kingdom, see Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, OJ C 326/295 of 26 October 2012, and Protocol (No 22) on the Position of Denmark, OJ C 326/299 of 26 October 2012. Also see e.g., PEERS, S., *op. cit.*, note 2, pp. 73-88.

¹⁶ See further articles 82, 83, 86 and 87 TFEU.

¹⁷ See further ENGSTRÖM, V. and HEIKKILÄ, M., *op. cit.*, note **, Ch. II.

the prime strategist raises its own set of uncertainties.¹⁸ Finally, it should be noted that much AFSJ action is not legislative, but executive or operational. Such action is often managed by domestic authorities or EU executive agencies, such as Europol (the European Police Office) and Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union).¹⁹ As will be considered further below, the emphasized role of agencies raises its own set of concerns.

The fundamental rights infrastructure of the Union is another area where the Treaty of Lisbon entailed a more far-reaching overhaul.²⁰ The amended Article 6 TEU transformed the Charter of Fundamental Rights of the EU (Fundamental Rights Charter) into a legally binding document by proclaiming that the Charter “shall have the same legal value as the Treaties”.²¹ Furthermore, Article 6(2) states that the “Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms” (ECHR). This has been found to be highly significant in order to ensure coherence and consistency in the application of human rights in Europe.²² Article 6 TEU also provides that fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states shall continue to constitute general principles EU law. In all, this infrastructure has been characterized as a complex “tripartite interwoven system for the protection of fundamental rights”.²³ The Union’s Fundamental Rights Agency (FRA) has emphasized the need to continue to develop the Union’s fundamental

¹⁸ These will be considered further below in section IV.2.

¹⁹ See further e.g., DOUGLAS-SCOTT, S., *op.cit.*, note 8, pp. 59-60, and MONAR, J., “Experimentalist Governance in Justice and Home Affairs” in SABEL, C. F., and ZEITLIN, J. (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford University Press, Oxford, 2010, pp. 239-240.

²⁰ See further e.g., DOUGLAS-SCOTT, S., “The European Union and Human Rights after the Treaty of Lisbon”, *Human Rights Law Review*, Vol. 11, No. 4, 2011, p. 645 ff.

²¹ Article 6(1) TEU. Also see Charter of Fundamental Rights of the European Union, OJ C 83/389 of 30 March 2010.

²² POLAKIEWICZ, J., “EU Law and the ECHR: Will the European Union’s Accession Square the Circle?”, *European Human Rights Law Review*, Issue 6, 2013, p. 593.

²³ BLANKE, H.-J., “The Protection of Fundamental Rights in Europe”, in BLANKE, H.-J. and MANGIAMELI, S. (eds.), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action*, Springer, Berlin/Heidelberg, 2012, p. 163. Also see e.g., BAZZOCCHI, V., “The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice” in DI FEDERICO, G. (ed.), *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument*, Springer, Dordrecht, 2011, pp. 183-184, and DOUGLAS-SCOTT, S., *op. cit.*, note 20, p. 645 ff.

rights infrastructure, and has, *inter alia*, suggested the creation of an EU fundamental rights policy cycle.²⁴

The Lisbonization of the AFSJ therefore reveals a two-fold image: On the one hand, the AFSJ has become part of the general constitutional scheme of EU decision-making and as such, the AFSJ is subject to constitutional checks (including fundamental rights compliance). On the other hand, the AFSJ continues to be a policy area that displays many institutional peculiarities. The highly contentious nature of many AFSJ policies is the explanation for many of these AFSJ features which in turn give rise to fundamental rights challenges.

III. Different types of fundamental rights concerns

1. Introduction

There are many different types of challenges to the realization of fundamental rights within the AFSJ. To begin with, it should be noted that each and every AFSJ policy raises its own set of fundamental rights concerns. Likewise, the activities of practically all AFSJ actors can be approached as a question of impact upon and/or contribution to the protection of rights. Challenges that arise from the activities of single actors, or that are the result of legislative action (or inaction) in a particular policy area, are also the ones that are more easily addressed. By way of an example, the fundamental rights concerns that the activities of Frontex have given rise to have been met, for example, through closer cooperation with the UNHCR, the adoption and monitoring of a fundamental rights strategy, the establishment of a fundamental rights officer, and the adoption of a code of conduct.²⁵ Yet, while these steps all serve to increase the likelihood that Frontex better respects fundamental rights in performing its tasks, they do not address problematic dimensions of the agencification phenomenon. The account below will take hold of systemic challenges that have been identified by both scholars and EU institutions. These challenges can be thought of as more enduring and therefore more difficult to overcome, and relate to the ideological perception of AFSJ cooperation, institutional structures, and the level of political (dis)agreement.

²⁴ FRA, *An EU Internal Strategic Framework for Fundamental Rights: Joining Forces to Achieve Better Results*, 2015.

²⁵ ENGSTRÖM, V. and HEIKKILÄ, M., *op. cit.*, note **, pp. 45-46.

2. Ideological challenges

If there is one distinctive feature of AFSJ governance that should be singled out as the most prominent feature, many would probably choose the use of institutional governance structures outside the main EU bodies.²⁶ In the AFSJ, agencies play a central role and perform tasks of a technical, scientific, operational and/or regulatory nature. Although agencies in the AFSJ often lack formally binding powers, their impact can be tangible.²⁷ Agencies are major producers of EU soft law, which has a clear policy-making significance and therefore also fundamental rights relevance.²⁸ Agencies have due to these reasons been found to be new sources of authority at the EU level, which, being an additional governance layer in between the member state and Union, transform the classical understanding of the boundaries of executive and administrative power.²⁹

The various AFSJ agencies perform different types of tasks and consequently give rise to different types of fundamental rights concerns, which have been well documented in AFSJ literature.³⁰ However, the more interesting point from an ideological perspective is the agencification phenomenon as such. Extensive reliance on agencies can in itself be regarded as a conscious choice (and not an inevitability following from the particularities of AFSJ cooperation), in that agencies represent a very distinct form of governance. The merits and demerits of agencies should therefore be assessed in comparison with other ways to govern.³¹ One of the consequences of extensive use of agencies is the framing of AFSJ

²⁶ On the constitutional framework for the creation of agencies and delegation of powers to them, see e.g., HOFMANN, H. C. H., and MORINI, A., “Constitutional Aspects of the Pluralisation of the EU Executive through “Agencification””, *European Law Review*, Vol. 37, No. 4, 2012, p. 419 ff.

²⁷ See further e.g., EKELUND, H., “Making Sense of the ‘Agency Programme’ in Post-Lisbon Europe: Mapping European Agencies”, *Central European Journal of Public Policy*, Vol. 6, No. 1, 2012, p. 26, and CURTIN, D., *Executive Power of the European Union: Law Practices, and the Living Constitution*, Oxford University Press, Oxford 2009.

²⁸ E.g., SHAPIRO, M., “Independent Agencies” in CRAIG, P. and DE BÚRCA, G. (eds.), *The Evolution of EU Law*, second edition, Oxford University Press, Oxford, 2011, p. 115, and GUILD, E., *et al.*, *op. cit.*, note 5, p. 101.

²⁹ GUILD, E., *et al.*, *op. cit.*, note 5, pp. 89-91.

³⁰ For an overview and classification of EU agencies, see e.g., EKELUND, H., *op. cit.*, note 26, p. 26 ff.

³¹ This opens up the question as to whether the improvements made are enough to counterweight the governance problems that still remain. Some authors actually contend that the added value of agencies still remains to be demonstrated. See WOLFF, S. and SCHOUT, A., “Frontex as Agency: More of the Same?”, *Perspectives on European Politics and Society*, Vol. 14, Issue 3, 2013, p. 305.

policy-making and implementation as “technical issues”. According to the Commission, the technical and scientific assessments made by the agencies is their real *raison d’être*, and further, that: “The main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations”.³² The production of technical expert knowledge is therefore a feature that provides legitimacy and epistemic authority to agencies. By way of an example, the JHA agencies produce threat assessments and identify priorities for implementing the Internal Security Strategy (ISS) through the so-called policy cycle. These threat assessments, through the involvement of COSI (Standing Committee on Internal Security), become background information for the political decision-making of the JHA Council.³³

Yet, relying on knowledge produced by agencies in the political decision-making process is not problem-free. Firstly, there is no conceptual clarity on what knowledge stands for. This can affect the reliability of the knowledge produced.³⁴ Terrorism, for example, is an area where there is a lack of scientific and political consensus on appropriate policy priorities, which makes the production of “good knowledge” utmost challenging.³⁵ Secondly, the agencies’ participation in the knowledge-production makes the question of participation in and inclusiveness of the work of agencies central. In this respect, overly strong representation of stakeholders such as law enforcement bodies and security industries, in comparison to academics and especially social science and humanities, has raised concern. Such an imbalance in the knowledge production may result in a prioritizing of security issues to the detriment of fundamental rights.³⁶ Furthermore, the use of seemingly

³² European Commission, Commission Communication: The Operating Framework for the European Regulatory Agencies, COM(2002) 718 final, p. 5. See also HOFMANN, H. C. H., and MORINI, A., *op. cit.*, note 26, p. 421.

³³ See further e.g., European Commission, The EU Internal Security Strategy in Action: Five Steps towards a More Secure Europe, COM(2010) 673 final, CARRAPIÇO, H., and TRAUNER, F., “Europol and Its Influence on EU Policy-Making on Organized Crime: Analyzing Governance Dynamics and Opportunities”, *Perspectives on European Politics and Society*, Vol. 14, No. 3, p. 357 ff., and PARKIN, J. “EU Home Affairs Agencies and the Construction of EU Internal Security”, *CEPS Papers in Liberty and Security in Europe*, No. 53, 2012, pp. 4-5.

³⁴ PARKIN, J., *op. cit.*, note 33, pp. 31-32, and 38.

³⁵ Cf. BOSSONG, R., “EU Cooperation on Terrorism Prevention and Violent Radicalization: Frustrated Ambitions or New Forms of EU Security Governance?”, *Cambridge Review of International Affairs*, Vol. 27, Issue 1, 2014, p. 66 ff.

³⁶ PARKIN, J., *op. cit.*, note 33, pp. 33 and 40.

technocratic knowledge as a basis for policy making can, in fact, disguise political disagreement.³⁷

A phenomenon that is closely connected to this technocratisation of AFSJ matters is the securitization of policy-making. In the balancing between the values (and policies) of freedom, security and justice, security often permeate the other two. A security-emphasis has been identified by Labayle and De Bruycker, for example, in the fight against terrorism, in the proliferation of automatic data transfer mechanisms, as well as in the treatment of asylum seekers.³⁸ Also the UN Special Rapporteur on the Human Rights of Migrants has observed an imbalance in favour of security concerns in respect of irregular migration.³⁹ The link to technocratisation derives from the fact that a labelling of an issue as a security-matter seemingly moves that particular issue beyond political debate. A securitisation of policies also means emphasising prevention, which in turn requires risk-assessments and information flows about risks, data processing, exchange of information, and the enactment of networks of security experts.⁴⁰ Framing JHA issues as security/intelligence matters calls for secrecy and confidentiality in working methods when gathering, processing and disseminating information.⁴¹

³⁷ HOFMANN, H. C. H., and MORINI, A., *op. cit.*, note 26, p. 422. The adoption of the ISS and its management within the COSI has also been seen to stand in contrast with previous approaches (which placed great emphasis on public debate at parliamentary level), essentially turning the clock back to a more technocratic approach. LABAYLE, H., and DE BRUYCKER, P., “Towards the Negotiation and Adoption of the Stockholm Programme’s Successor for the Period 2015-2019”, report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2013, p. 14. Also see RIJPM, J. J., “Institutions and Agencies: Government and Governance after Lisbon” in ARCARAZO, D. A. and MURPHY, C. C. (eds.), *EU Security and Justice Law: After Lisbon and Stockholm*, Hart Publishing, Oxford, 2014, p. 72.

³⁸ LABAYLE, H., and DE BRUYCKER, P., *op. cit.*, note 37, pp. 12-14.

³⁹ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, UN Doc. A/HRC/23/46, 24 April 2013, para. 31. Perhaps some encouraging signs, at least in respect of data protection standards, can be found in CJEU case law. In the Joined Cases *Digital Rights Ireland and Seitlinger and Others* from April 2014, the CJEU took a firm stance on the balancing between security and fundamental rights concerns in respect of the protection of personal data. Judgment of 8 April 2014 in *Digital Rights Ireland* respectively *Seitlinger and Others*, C-293/12 and C-594/12.

⁴⁰ TUORI, K., “A European Security Constitution?” in FICHERA, M. and KREMER, J. (eds.), *Law and Security in Europe: Reconsidering the Security Constitution*, Intersentia, Cambridge 2013, pp. 62-66.

⁴¹ PARKIN, J., *op. cit.*, note 33, pp. 35-38 with more detailed examples, and GUILD, E., *et al.*, *op. cit.*, note 5, pp. 99-100.

Eventually, the framing of agencies as mere depoliticised ‘coordinators’ or ‘facilitators’ also has implications on their autonomy.⁴² Democratic accountability has not been found as necessary in relation to agencies as in connection to many other bodies and institutions, and legal accountability has not always been given proper attention. In cases of alleged unlawful actions, including fundamental rights breaches, the scope of agency responsibility has, in fact, often been mundane.⁴³

3. Institutional challenges

As already touched upon above, the Treaty of Lisbon addressed many institutional problems connected to the AFSJ decision-making. Yet, the institutional framework still raises concerns relating, among other things, to the competence of AFSJ actors, the possibility of individuals to enforce their rights, and the fundamental rights framework itself. As to the first of these, it should be noted that the TFEU does leave room for interpreting the scope of AFSJ action. For example, Article 77(3) TFEU introduces an element of ambiguity to the definition of EU competence in respect of border checks, asylum and immigration policies.⁴⁴ While such ambiguity in itself does not constitute a fundamental rights issue, it can bring with it problems of allocating responsibility.

More typically, however, the difficulties of allocating responsibility arise in connection to agencies. The functions and tasks of agencies are usually settled in secondary legislation.⁴⁵ However, agencies have also

⁴² It should, however, be noted that it is not only agencies that have been “technocratized.” Also, for example, the European Parliament has been accused of having become subject to depoliticisation to the detriment of scrutiny and democratic accountability. CARRERA, S., HERNANZ, N., and PARKIN, J., “The ‘Lisbonisation’ of the European Parliament – Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice”, *CEPS Papers in Liberty and Security in Europe*, No. 58, 2013, p. 36.

⁴³ These observations have been made in respect of Frontex and Europol. GUILD, E., *et al.*, *op. cit.*, note 5, p. 8

⁴⁴ Article 77(3) TFEU reads: “If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament”. Also see CRAIG, P., *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford University Press, Oxford, 2010, p. 351. Also see HOFMANN, H. C. H., and MORINI, A., *op. cit.*, note 26, p. 426.

⁴⁵ E.g., Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European

implicitly expanded their tasks (at different levels of legal formality).⁴⁶ As some agencies have few formal powers, they have been driven to expand their powers and activities through soft law and policy actions, such as funding research, gathering data and analysing information, developing training and exchanging and pooling best practices.⁴⁷ Fundamental rights protection mechanisms often have difficulties in dealing with such tools.⁴⁸ An uncertainty surrounding the exact extent of competence of agencies also follows from a lack of detailed definition of tasks in the legislation.⁴⁹ Yet another source of uncertainty is the delegation of powers to agencies as it is not always clear whether it is an EU institution or member states that is the source of the delegation. The source of the delegated authority is important to assert in order to be able to pinpoint who is the ultimate bearer of responsibility for fundamental rights violations. A blurring of responsibilities also affects the possibilities of individuals to obtain access to justice in cases of alleged breaches of rights. The situation is especially troublesome for third-country nationals (for example, in the area of immigration and border control), who due to lack of information and extraterritorial mechanisms often have difficulties to get redress.⁵⁰ A practice of delegating acts has also been criticised for escaping democratic oversight by the European Parliament.⁵¹

Another set of institutional questions that can be raised concern matters of supervision and accountability. First of all, despite the institutionalisation of the role of national parliaments for the good functioning of the Union in Article 12 TEU, national parliaments are not involved at early stages

Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1 of 20 November 2011, and Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11 of 29 May 2010.

⁴⁶ See e.g., MARIN, L., “Policing the EU’s External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border”, *Journal of Contemporary European Research*, Vol. 7, No. 4, 2011, p. 468, POLLAK, J. and SŁOMINSKI, P., “Experimentalist but Not Accountable Governance? The Role of Frontex in Managing the EU’s External Borders”, *West European Politics*, Vol. 32, No. 5, 2009, p. 904, BUSUIOC, M., and GROENLEER, M., “Beyond Design: The Evolution of Europol and Eurojust”, *Perspectives on European Politics and Society*, Vol. 14, No. 3, 2013, p. 285.

⁴⁷ PARKIN, J., *op. cit.*, note 33, p. 39 (Parkin especially mentions Eurojust as an agency that has a more limited mandate and that due to this has relied on informal powers).

⁴⁸ See e.g., CARRERA, S., DEN HERTOOG, L. and PARKIN, J., “The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability *versus* Autonomy?”, *European Journal of Migration and Law*, Vol. 15, 2013, pp. 351-355.

⁴⁹ GUILD, E., *et al.*, *op. cit.*, note 5, pp. 19, 26, and 95.

⁵⁰ GUILD, E., *et al.*, *op. cit.*, note 5, pp. 92, 103-104, and 110.

⁵¹ CARRERA, S., HERNANZ, N., and PARKIN, J., *op. cit.*, note 42, p. 15.

of policy shaping and once they are engaged, national parliaments have been noted to focus more on national matters than on scrutiny of AFSJ policies or agencies as such. National parliaments can also lack of access to information, as well as resource problems in coping with the volume of JHA legislation.⁵² The European Parliament has also come to face a dilemma concerning its identity both as co-legislator and watchdog of fundamental rights and democratic scrutiny.⁵³ In addition, the fundamental rights monitoring of the European Parliament (and more specifically that of the LIBE Committee) suffers from under-developed and fragmented tools.⁵⁴ In respect of agencies, the oversight by the European Parliament has been accused of being incident-driven,⁵⁵ suffering from a lack of information,⁵⁶ being weak as far as scrutiny is based on receiving annual reports and work programmes, and insufficient as far as the summoning of executive directors is concerned.⁵⁷

Secondly, in respect of judicial accountability, the main concern relates to the position of individuals before the CJEU. As a point of departure Article 263 TFEU grants the CJEU jurisdiction over all AFSJ measures.⁵⁸ As Article 6 TEU asserts fundamental rights protection as a general principle of EU law this means that fundamental rights considerations apply when assessing the interpretation and validity of AFSJ measures as well as member states implementation of those measures.⁵⁹ The CJEU's possibility to consider fundamental rights violations is limited to situations where

⁵² See e.g., HILLEBRAND, C., "Guarding EU-Wide Counter-terrorism Policing: The Struggle for Sound Parliamentary Scrutiny of Europol" in KAUNERT, C. and LEONARD, S. (eds.), *European Security, Terrorism and Intelligence: Tackling New Security Challenges in Europe*, Palgrave Macmillan, Basingstoke, 2013, p. 112. and TRAUNER, F., "The European Parliament and Agency Control in the Area of Freedom, Security and Justice", *West European Politics*, Vol. 35, No. 4, 2012, p. 784.

⁵³ CARRERA, S., HERNANZ, N., and PARKIN, J., *op. cit.*, note 42, pp. 1-2.

⁵⁴ CARRERA, S., HERNANZ, N., and PARKIN, J., *op. cit.*, note 42, p. 2.

⁵⁵ BUSUIOC, M., *European Agencies: Law and Practices of Accountability*, Oxford University Press, Oxford, 2013, p. 154.

⁵⁶ WILLS, A., *et al.*, "Parliamentary Oversight of Security and Intelligence Agencies in the European Union", report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2011, p. 81.

⁵⁷ E.g., GUILD, E., *et al.*, *op. cit.*, note 5, pp. 25 and 29-30. Also see European Commission, Commission Communication: On the Procedures for the Scrutiny of Europol's Activities by the European Parliament, Together with National Parliaments, COM(2010) 776 final.

⁵⁸ In relation to the substantive jurisdiction, Article 276 TFEU, however, excludes from the Court's mandate the "jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

⁵⁹ See e.g., PEERS, S., *op. cit.*, note 2, p. 103.

institutions, bodies, offices and agencies of the Union and of the member states *are implementing Union law*.⁶⁰ The CJEU is hence not a general fundamental rights court, even though its case law in such matters already is substantial.⁶¹

In principle, an individual can file a complaint with the CJEU for failure to comply with the Fundamental Rights Charter. The central procedure is action for annulment.⁶² However, such a complaint can only be filed against an EU act directed at him/her and which is of direct or individual concern. One drawback with the procedure is that it might be difficult for a person to show that he/she is directly affected by the act, especially since legislation by its nature establishes general rules, and when it comes to agencies, they mainly seem to coordinate or assist member states.⁶³ As regards requests for preliminary rulings, it is up to national courts (and not individuals) to decide whether to bring such requests to the CJEU.⁶⁴ The same limitation applies to requesting the Commission to bring proceedings against member states.⁶⁵ As to quasi-judicial mechanisms, the Ombudsman's lack of power to award legally binding remedies has been singled out as a potential (although somewhat controversial) possibility of enhancing the avenues of individuals.⁶⁶ Another envisaged way of ensuring that individuals can file complaints on

⁶⁰ Article 51(1) of the Fundamental Rights Charter. In the *Åkerberg Fransson* judgment, the CJEU held that that: "Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter." Judgment of 26 February 2013 in *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 21.

⁶¹ On the CJEU and AFSJ, see further e.g., RAULUS, H., *op. cit.*, note 4, pp. 234-237, and DOUGLAS-SCOTT, S., "Freedom, Security, and Justice in the European Court of Justice: The Ambiguous Nature of Judicial Review" in CABELL, T., EWING, K. D., and TOMKINS, A. (eds.), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford University Press, Oxford, 2011, pp. 276-293.

⁶² Article 263 TFEU.

⁶³ For this reason, Guild *et al.* conclude that compensation for damages (340 TFEU) may actually offer the individual greater opportunities, even if the same complications apply in this case. GUILD, E., *et al.*, *op. cit.*, note 5, pp. 83-86.

⁶⁴ Article 267 TFEU.

⁶⁵ Article 258 TFEU (also see Article 259). Also see FRA, [Annual Report] *Fundamental Rights: Challenges and Achievements in 2011*, 2012, pp. 20-21.

⁶⁶ On the European Ombudsman, see e.g., TSADIRAS, A., "The European Ombudsman's Remedial Powers: An Empirical Analysis in Context", *European Law Review*, Vol. 38, 2013, p. 52, and VOGIATZIS, N., "Exploring the European Council's Legal Accountability: Court of Justice and European Ombudsman", *German Law Journal*, Vol. 14, No. 9, 2013, p. 1661.

alleged violations of their rights by EU institutions has been the accession of the EU to the ECHR – a step that yet remains to be taken.⁶⁷

A further institutional challenge in the AFSJ relates to transitional provisions. Such provisions can, most notably, be found in Protocol 36 to the TFEU, which limited some of the most far-reaching AFSJ treaty innovations for a period of five years (1 December 2009 to 1 December 2014).⁶⁸ Article 10 of Protocol 36 specifies that the powers of the CJEU and of the European Commission in the field of police cooperation and judicial cooperation in criminal matters were to be restricted in relation to matters which had been adopted before the entry into force of the Treaty of Lisbon. This meant that the Commission could not start infringement proceedings against member states and that the CJEU did not have jurisdiction to review and answer questions from the member states' national courts on the interpretation of these subject matters during the transitional period (except if the member states have accepted such jurisdiction optionally).⁶⁹ As will be considered further below, Protocol 36 has not completely lost its significance, despite the end of the transitional period.

Finally, it should be observed that much of the AFSJ governance, both at the highest programming level and the agency implementing level, is best characterized as soft law governance. The fact that agencies do not issue binding acts, but merely remain limited to coordinating tasks, makes agency action escape review before the CJEU, unless the acts of EU agencies produce legal effects towards third parties.⁷⁰ In addition, as soft law governance circumvents the formal law-making process, the one obvious loser out is the European Parliament.⁷¹

⁶⁷ FRA, *op. cit.*, note 65, pp. 23-24 and 33.

⁶⁸ Protocol (No 36) on transitional provisions, OJ C 326/322 of 26 October 2012. Also see e.g., DE CAPITANI, E., "Metamorphosis of the Third Pillar: The End of the Transition Period for EU Criminal and Policing Law", *EU Law Analysis* [blog], 10 July 2014, and PEERS, S., "Childhood's End: EU Criminal Law in 2014", *EU Law Analysis* [blog], 29 December 2014.

⁶⁹ Protocol (No 36), *op. cit.*, note 68, Article 10. Also see MITSILEGAS, V., CARRERA, S., and EISELE, K., *The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?*, report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2014, pp. 12-13.

⁷⁰ Article 263 TFEU. See further e.g., HATZOPOULOS, V., "Casual but Smart: The Court's New Clothes in the Area of Freedom, Security and Justice (AFSJ) after the Lisbon Treaty" in MONAR, J. (ed.), *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice*, Peter Lang, Brussels, 2010, pp. 149-150.

⁷¹ STEFAN, O., "Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance", *Maastricht Journal of European and Comparative Law*, Vol. 21, No. 2, 2014.

As to the fundamental rights framework itself, one core actor in political monitoring of fundamental rights issues is the Union's FRA. While largely appreciative of its achievements, the external evaluation of FRA's first five years notes several areas of concern. Among the issues identified are, for example, the limits that the mandate and the Multi Annual Framework set to what the FRA can undertake (excluding judicial and police cooperation in criminal matters),⁷² and what advice it can bring forward (for example, FRA could have a stronger position in the legislative process by not being dependent on requests from the main EU bodies for having an input), a clarification and prioritisation of the role in respect of different stakeholders, and an improvement of its usefulness for member states.⁷³ Also the Strategic Guidelines for Legislative and Operational Planning for the coming years within the AFSJ, adopted by the European Council in June 2014, underline the importance of mobilising the expertise of FRA.⁷⁴ This emphasis ties neatly to a call for stronger engagement of independent external experts and civil society organisations in legislative processes for conducting fundamental rights evaluations.⁷⁵ It has also been argued that the EU should conduct more general human rights compatibility checks, that is, not only focus on adherence to the Fundamental Rights Charter.⁷⁶

⁷² The Commission proposed that the agency could work in the areas of police cooperation and judicial cooperation in criminal matters. The Council did not endorse this approach and decided to exclude these two major fields of competence of the Union from the agency's multiannual framework, which determines the thematic areas on which it can work during the period 2013-2017. Council Decision 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights, OJ L 79/1, 21 March 2013, Article 3. See also European Commission, Report: 2012 Report on the Application of the EU Charter of Fundamental Rights, COM(2013) 271 final, 8-9.

⁷³ RAMBOLL, *Evaluation of the European Union Agency for Fundamental Rights: Final Report*, 2012, pp. 95-98. See also TOGGENBURG, G. N., "Fundamental Rights and the European Union: How Does and How Should the EU Agency for Fundamental Rights Relate to the EU Charter of Fundamental Rights?", *EUI Working Paper*, No. 13, 2013.

⁷⁴ OJ C 240/13 of 24 July 2014, para. 11.

⁷⁵ FRA, [Annual Report] *Fundamental Rights: Challenges and Achievements in 2013*, 2014, p. 11. Even a "shift in attitude surrounding consultation" has been called for. See e.g. BUTLER, I. D. J., "Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission", *European Law Review*, Vol. 37, No. 4, p. 403.

⁷⁶ See further REGIONAL OFFICE FOR EUROPE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, *The European Union and International Human Rights Law*, 2011, pp. 17-18.

4. *Political challenges*

Challenges connected to the processes through which EU law and policies are adopted and implemented are, for example, the uneven and incoherent implementation of EU law and problems connected to the mainstreaming of fundamental rights into EU policies. As to the latter, FRA has recently called for a more comprehensive mainstreaming of fundamental rights, and argued for elevating fundamental rights to a permanent policy consideration rather than an *ad hoc* and crisis-driven concern.⁷⁷ There are, however, political realities that have hampered such mainstreaming. One of these is the strong security-orientation of JHA cooperation. It is also possible to identify a struggle of ownership over AFSJ policy-making both as regards different EU institutions, but also in relation to member states. In this struggle the actors involved appear to place different emphasis on fundamental rights issues.

In many AFSJ policy fields, EU integration has proceeded through directives or framework decisions which demand domestic implementing legislation and which grant member states a certain freedom in the implementation. This leeway is typically provided for through vague formulations and clauses safeguarding the compatibility of domestic law.⁷⁸ In relation to migration law instruments, Wiesbrock has, for example, argued that what characterises them is the “significant discretion” they grant member states.⁷⁹ Integration in the JHA field is furthermore often based on mechanisms such as mutual recognition and minimum rules, both of which underline the independent position of member states. In relation to, for example, EU criminal law, where a common European criminal justice area has not yet materialized, member states are the ones who adopt the criminal law based on which individuals are prosecuted.⁸⁰ For this reason, a key challenge for European integration in the AFSJ is how to make *national* legal systems interact well.⁸¹ For example in respect of mutual recognition

⁷⁷ An obligation to mainstream fundamental rights can in certain respects even be traced to the TFEU. See e.g., Articles 8, 9, and 10 TFEU. FRA, *op. cit.*, note 75, pp. 12–13 with more detailed suggestions on elements to be included in this framework.

⁷⁸ WIESBROCK, A., “Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty”, *Maastricht Journal of European and Comparative Law*, 2013, Vol. 20, No. 3, p. 425.

⁷⁹ WIESBROCK, A., *op. cit.*, note 78, p. 424.

⁸⁰ KLIP, A., *European Criminal Law – An Integrative Approach*, second edition, Intersentia, Cambridge, 2012, p. 470.

⁸¹ MITSILEGAS, V., “The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual”, *Yearbook of European Law*, 2012, p. 320.

and mutual trust, the most critical question from the fundamental rights perspective becomes to what extent member states must trust each other when it comes to ensuring fundamental/human rights.⁸² While there is “no longer a blind insistence of mutual trust”⁸³, it is, however, noteworthy that the “CJEU [has] placed the threshold for rebutting the presumption of compliance with fundamental rights very high”⁸⁴

As regards the relationship between institutional actors in AFSJ policy-making, it is worth noting that a key issue in many AFSJ policy instruments (for example, the multiannual Stockholm Programme on the development AFSJ cooperation) is the need for more coherence and cooperation between AFSJ actors.⁸⁵ In this respect a differentiation can be made between intra-institutional incoherence (within individual EU institutions such as different Council formations and preparatory bodies) and inter-institutional incoherence (between different EU institutions).⁸⁶ Coherence issues may also arise from lack of coordination with external actors. The external dimension of AFSJ activities will meet with concurrent activities of other organisations, such as the United Nations and the Council of Europe. The possibility of conflict, for example, with the Council of Europe has been noted to have grown significantly as the EU has begun legislating in areas that are also the subject of Council of Europe conventions. This may create situations of overlap and even double standards. The area of judicial cooperation in criminal matters has been singled out as an area where clashes are especially likely (both organisations are e.g., engaged in combating human trafficking and terrorism).⁸⁷

⁸² PEERS, S., *op. cit.*, note 2, p. 686. As to Greece, see e.g., *Case of M.S.S. v. Belgium and Greece*, Judgment, Application No. 30696/09, European Court of Human Rights, 21 January 2011.

⁸³ HERLIN-KARNELL, E., “European Criminal Law as an Exercise in EU ‘Experimental’ Constitutional Law”, *Maastricht Journal of European and Comparative Law*, Vol. 20, No. 3, 2013, p. 459.

⁸⁴ NANOPOULOS, E., “Trust Issues and the European Common Asylum System: Finding the Right Balance” *Cambridge Law Journal*, Vol. 72, Issue 2, 2013, p. 279 (there must be indications of “systemic deficiencies”).

⁸⁵ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115/8 of 4 May 2010.

⁸⁶ TRAUNER, F., “The Internal-External Security Nexus: More Coherence under Lisbon?”, *European Union Institute for Security Studies Occasional Paper*, No. 89, 2011, pp. 5-6, and 22.

⁸⁷ See CORNU, E., “The Impact of Council of Europe Standards on the European Union” in WESSEL, R. A., and BLOCKMANS, S. (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations*, Asser Press/Springer, The Hague, 2013, p. 128, and MATERA, C., “The Influence of International Organisations on the EU’s Area of Freedom, Security and Justice: A First Inquiry” in WESSEL, R. A., and BLOCKMANS, S. (eds.), *Between Autonomy and Dependence: The EU Legal Or-*

Another expression of the institutional competition in the AFSJ is the occasional reluctance of the Commission to act upon the resolutions and initiatives of the European Parliament (despite an explicit obligation in Article 225 TFEU).⁸⁸ The Commission has also refused to follow Council strategies in all respects.⁸⁹ As all main EU bodies have also launched documents defining their own political priorities, already the setting of the priorities for the AFSJ has been characterized by institutional struggles. Some authors have, in fact, claimed that there has not been one EU AFSJ policy, but a plurality of AFSJ policy agendas.⁹⁰ In this plurality of initiatives, the European Parliament in particular has become seen as the EU's human rights watchdog.

IV. Recent developments

1. *The end of the transitional period for EU criminal and policing matters*

As mentioned above, the transitional provisions envisaged in Article 10 of Protocol 36 to the Treaty of Lisbon limited the Lisbonization of the AFSJ up to the 1 December 2014 in respect of police and judicial cooperation in criminal matters. These limits mainly concerned the enforcement powers of the European Commission and judicial scrutiny by the CJEU. As the transitional period has now ended, the jurisdiction of the CJEU has been extended and the European Commission will be entitled to bring proceedings to the court. This can be characterized as a move from 'intergovernmentalism' to 'supranationalism' in respect of police and criminal justice cooperation. As the European Commission will be able to scrutinise the implementation by member state authorities of EU police and criminal justice law and to launch infringement proceedings before the

der Under the Influence of International Organisations, Asser Press/Springer, The Hague, 2013, p. 269. For a more detailed account of the relationship, see e.g., KOLB, M., *The European Union and the Council of Europe*, Palgrave Macmillan, Basingstoke, 2013. An interesting special feature of the relationship between the EU and the Council of Europe is the insertion of so-called disconnection clauses in Council of Europe agreements, which guarantee the prevalence of EU law. DE WITTE, B., "EU Law: Is It International Law?" in BARNARD, C., and PEERS, S. (eds.), *European Union Law*, Oxford University Press, Oxford, 2014, p. 192.

⁸⁸ CARRERA, S., HERNANZ, N., and PARKIN, J., *op. cit.*, note 42, pp. 27-28.

⁸⁹ CARRERA, S., and GUILD, E., "The European Council's Guidelines for the Area of Freedom, Security and Justice 2020 Subverting the 'Lisbonisation' of Justice and Home Affairs?" *CEPS Essay*, No. 13/14, 2014, p. 4.

⁹⁰ CARRERA, S., and GUILD, E., *op. cit.*, note 89, p. 5.

CJEU, and as the preliminary ruling procedure of the CJEU is extended to this policy area as well, these changes have been seen to bring about greater legal certainty in the AFSJ and a closer focus on the correct and timely implementation of AFSJ measures.⁹¹

The 1 December 2014 did, however, not bring all special arrangements to an end. The UK will retain its privileged position as Protocol 36 provides for special ‘opt-out/opt-in’ possibility for the UK and the possibility to escape the exercise of the broadened powers of the Commission and the CJEU.⁹² In this sense, the legal uncertainty concerning the UK’s participation in criminal justice matters continues, with a fragmenting effect on the policy area. This lack of coherence can also have negative implications on the protection of fundamental rights and the operation of the EU system of mutual recognition in criminal matters.⁹³ It should be added that specific rules also continue to apply to Ireland and Denmark in the AFSJ through Protocols 21 and 22.⁹⁴

2. *The Adoption of the Strategic Guidelines*

The framework for cooperation in the AFSJ is set through five-year political programmes adopted by the European Council. Out of previous programmes, the Tampere and Hague programmes have been characterized as strongly security-oriented, whereas the Stockholm Programme was more geared towards fundamental rights.⁹⁵ The Stockholm Programme was recently replaced by new Strategic Guidelines for Legislative and

⁹¹ MITSILEGAS, V., CARRERA, S. and EISELE, K., *op. cit.*, note 69, pp. 21-22.

⁹² Protocol (No 36), *op. cit.*, note 68, Article 10(4) states that “the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions...”. On the 24 July 2013 the UK notified the Council that it wishes to opt out of all Union acts in the field of police and judicial cooperation in criminal matters. Council of the European Union, “UK notification according to article 10(4) of Protocol No 36 to the TEU and TFEU”, 12750/12, 26 July 2013. In November 2014 the UK notified the Council of the acts to which it opts-in. Council of the European Union, “Notification of the United Kingdom under Article 10(5) of Protocol 36 to the EU Treaties”, 15398/14, 27 November 2014.

⁹³ MITSILEGAS, V., CARRERA, S. and EISELE, K., *op. cit.*, note 69, pp. 38-39.

⁹⁴ Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, OJ C 326/295 of 26 October 2012, and Protocol (No 22) on the Position of Denmark, OJ C 326/299 of 26 October 2012.

⁹⁵ See European Council, Presidency Conclusions, Tampere, 15-16 October 1999, the Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53/1 of 3 March 2005, and The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115/8 of 4 May 2010. Also see e.g., MURPHY, C. and ACOSTA ARCARAZO, D., *op. cit.*, note 11, pp. 5-6.

Operational Planning in the AFSJ (2015-20) adopted by the European Council in June 2014.⁹⁶ These strategic guidelines “build [...] on the past programmes” and note that “the overall priority now is to consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place”.⁹⁷

Input into the drafting process of the 2014 Strategic Guidelines was provided by, amongst others, the Commission⁹⁸ and the European Parliament.⁹⁹ While expectations towards the new multiannual programme were high, initial reactions express disappointment. The guidelines have been characterized as a “missed opportunity” with a limited added value.¹⁰⁰ The guidelines have also been seen to reflect a “pre-Lisbon Treaty mindset among the EU member states and the Justice and Home Affairs Council” due to the undemocratic and non-transparent way in which they were adopted.¹⁰¹ It has also been feared that they might constitute an obstacle for further development of the AFSJ. The guidelines do emphasize that it is “crucial to ensure the protection and promotion of fundamental rights” and that it is “essential to guarantee a genuine area of security for European citizens”.¹⁰² Yet, despite this, the guidelines have been accused of failing to acknowledge the relevance of the legally binding Fundamental Rights Charter and more generally the role and impact of fundamental rights in AFSJ cooperation, including the EU’s future accession to the ECHR.¹⁰³ The critique raises fears of re-introducing a stronger security mindset, but also of reversing the achievements of the ‘Lisbonization’ of the AFSJ.

The discussion surrounding the 2014 Strategic Guidelines exemplify some of the general institutional challenges with AFSJ law- and policy-making. Above all, the adoption of the guidelines gives rise to the question of ownership over AFSJ policy-making. Disagreement between the European Council/Council, the Commission and the European Parliament

⁹⁶ OJ C 240/13 of 24 July 2014 (‘2014 STRATEGIC GUIDELINES’).

⁹⁷ 2014 STRATEGIC GUIDELINES, *op. cit.*, note 96, para. 3.

⁹⁸ European Commission, Commission Communication: “An Open and Secure Europe: Making It Happen”, COM(2014) 154 final, and European Commission, Commission Communication: “The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union”, COM(2014) 144 final.

⁹⁹ European Parliament resolution of 2 April 2014 on the mid-term review of the Stockholm Programme. Also see e.g., FRA, *Fundamental Rights in the Future of the European Union’s Justice and Home Affairs*, 31 December 2013.

¹⁰⁰ DE BRUYCKER, P., “The Missed Opportunity of the “Ypres Guidelines” of the European Council Regarding Immigration and Asylum”, *MPC Blog* [blog], 29 July 2014.

¹⁰¹ CARRERA, S., and GUILD, E., *op. cit.*, note 89, pp. 1 ff, and 6.

¹⁰² 2014 STRATEGIC GUIDELINES, *op. cit.*, note 96, para. 4 and 10.

¹⁰³ CARRERA, S., and GUILD, E., *op. cit.*, note 89, p. 7.

over ownership of AFSJ planning has become something of a characteristic feature of the policy area, and raises question-marks concerning the role of the European Council in the AFSJ.

One of the most significant institutional changes brought about by the Treaty of Lisbon was the elevation of the European Council into an official EU institution, and with that, the confirmation of the European Council's role as the supreme AFSJ strategist.¹⁰⁴ Article 68 TFEU hereby states that: "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice". At the same time, Article 15(1) TEU is clear on denying the European Council a legislative role. This opens up the question of the relationship between the European Council's policy planning and the Commission's right to initiate secondary EU legislation and to adopt action plans.¹⁰⁵ The current discussion on the merits and demerits of the 2014 Strategic Guidelines seems to be yet another expression of an ever ongoing search for proper balance between main EU bodies in AFSJ law- and policy making. The marked brevity and vagueness of the 2014 Strategic Guidelines (in particular in comparison with the Stockholm Programme), means that the guidelines fail to expressly address many fundamental rights concerns in the AFSJ. On the other hand, the brevity and openness of the guidelines leaves the door open for later specification. As many actors will be active in that specification, the future path of the Union's AFSJ is therefore difficult to foresee based on the guidelines alone.¹⁰⁶

¹⁰⁴ Also see e.g. RITTELMEYER, Y-S., "The Institutional Consecration of the European Council: Symbolism beyond Formal Texts", in FORET, F. and RITTELMEYER, Y-S. (eds.), *The European Council and European Governance: The Commanding Heights of the EU*, Routledge, London and New York, 2014, p. 34.

¹⁰⁵ PONZANO, P., HERMANIN, C. and CORONA, D., "The Power of Initiative of the European Commission: A Progressive Erosion?", *Notre Europe*, No. 89, 2012, pp. 42-43. CARRERA, S., "The Impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders: The Struggles over the Ownership of the Stockholm Programme" in GUILD, E. and MINDERHOUD, P. (eds), *The First Decade of EU Migration and Asylum Law*, Martinus Nijhoff Publishers, Leiden/Boston 2012, p. 249. The European Parliament has on its part held that it has "the right to come back with specific proposals when it is consulted on the legislative action programme". European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council — An area of freedom, security and justice serving the citizen — Stockholm programme, para. 153.

¹⁰⁶ See further ENGSTRÖM, V., and HEIKKILÄ, M., "Lisbonizing Back and Forth? Strategic Planning and Fundamental Rights in the AFSJ", in *European Yearbook on Human Rights*, 2015 (forthcoming).

3. *EU Accession to the ECHR*

As noted above, the accession of the EU to the ECHR has been perceived as particularly important, given the obstacles that individuals face in bringing a case to the CJEU, and the absence of other proper mechanisms of ensuring respect of individual rights.¹⁰⁷ The accession has been regarded as especially significant for the AFSJ, as the European Court of Human Rights (ECtHR) has by far a more well-established case law in many AFSJ areas than the CJEU. The jurisdiction of the ECtHR also allows the court to focus in a direct and general fashion on the infringement of the rights of the individual. Through accession to the ECHR, the EU will be bound by the ECHR and individuals will be entitled to file applications for infringements against the EU and its institutions instead of filing applications solely against member states for the implementation of EU law.¹⁰⁸

The TEU establishes an obligation for the Union to accede to the ECHR, and a draft Agreement on the Accession of the EU to the ECHR was accepted on 5 April 2013.¹⁰⁹ The hopes of accession did however suffer a serious set-back in December 2014, when the CJEU delivered its Opinion 2/13. In this opinion, the CJEU ruled (for the second time) that the EU could not accede to the ECHR on the basis of the current accession agreement.¹¹⁰ As a result of the Opinion, the accession process is now halted. The judgment has been called “an unmitigated disaster” from the point of view of human rights protection, not only because of the rejection, but above all considering the conditions that the CJEU sets for the renegotiation of the accession.¹¹¹ Accession in compliance with the CJEU’s judgement is seen to make it impossible to provide effective

¹⁰⁷ See e.g., POLAKIEWICZ, J., *op. cit.*, note 22, p. 605 and in respect of agencies, e.g. DE MOOR, A. and VERMEULEN, G., “Europol and Eurojust” in WILLS, A. *et al.*, *Parliamentary Oversight of Security and Intelligence Agencies in the European Union*, report to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2011, 374-395, p. 384. See also GRAGL, P., *The Accession of the European Union to the European Convention on Human Rights*, Hart Publishing, Oxford, 2013.

¹⁰⁸ In general, see GRAGL, P., *op. cit.*, note 107, and PIRIS, J.-C., *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge University Press, Cambridge, 2010, pp. 163-166.

¹⁰⁹ Article 6(2) TEU. Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final report to the CDDH, 2013.

¹¹⁰ The first being Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 28 March 1996, European Court Reports 1996, p. I-1759

¹¹¹ PEERS, S., “The CJEU and the EU’s Accession to the ECHR: A Clear and Present Danger to Human Rights Protection”, *EU Law Analysis* [blog], 18 December 2014.

external control of EU actions.¹¹² From the point of view of the individual whose rights are violated, this means that their position continues to be unsatisfactory, and the fulfilment of Article 6(2) of the TEU that “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedom” remains a distant promise.¹¹³

V. Conclusions

The institutional structure of JHA cooperation has been reformed numerous times over the years. The AFSJ is today part of the general constitutional system of EU law- and policy-making, and the Fundamental Rights Charter which is now part of EU law, has elevated protection of human rights within the Union significantly. It may even be argued that there is today a rather widespread fundamental/human rights awareness within the Union; a development that can be noticed also in the AFSJ. On the other hand, the AFSJ continues to be a policy area that is characterised by institutional peculiarities and novel forms of governance. Further, a ‘Lisbonization’ of the AFSJ has not only introduced the rule of law (and with it, an emphasis on the protection of fundamental rights), but has also exported the flaws of EU governance into this former third pillar. These flaws become particularly pronounced in the AFSJ, due to the sensitivity of the policies from a national sovereignty perspective, while at the same time of direct concern for the rights of individuals. The end of transitional periods, the planned EU accession to the ECHR, and the adoption of a new multiannual programme to guide AFSJ law- and policy-making raised high hopes for the development of a more solid and coherent fundamental rights framework within the AFSJ. While the disappointing outcome by no means renders the idea of a human rights-friendly AFSJ a lost cause, it does confirm the AFSJ as an area still very much in development. An improvement of the protection of fundamental rights will therefore continue to require efforts on multiple levels.

¹¹² PEERS, S., *op. cit.*, note 111, and DOUGLAS-SCOTT, S., “Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice”, *Verfassungsblog* [blog], 24 December 2014.

¹¹³ It is, however, noteworthy that 37 Council of Europe conventions and protocols are open for EU participation (out of which the EU is a party to 11). On the EU-Council of Europe relationship, see CORNU, E., *op. cit.*, note 87, p. 113. The EU should also “strive to transpose those aspects of Council of Europe Conventions within its competence into European Union Law”, Council of Europe, Committee of Ministers, Action Plan, CM(2005) 80 final, 17 May 2005, Guideline No. 5.