ARTICLES

THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

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TACKLING MIGRATION EXTERNALLY THROUGH THE EU COMMON FOREIGN AND SECURITY POLICY: A QUESTION OF LEGAL BASIS

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ABSTRACT: The response of the EU's external action to migration challenges is not limited to the use of its migration competences under Title V TFEU, but also extends to CFSP/CSDP instruments, governed by the TEU. As a further illustration of the securitisation approach evidenced in the EU's management of migration, the Union deploys CSDP missions with components and objectives related to strengthening border controls, fighting human trafficking and migrant smuggling, and promoting third countries' capacity-building in these purposes areas. Using CSDP instruments, mainly foreseen to preserve international security, for migration purposes touches upon the horizontal demarcation of EU competences and raises an essential question related to the choice of the correct legal basis in cross-Treaty cases, at a time in which the CFSP still presents some intergovernmental features. This *Article* firstly reviews the legal implications of the recourse to the CFSP instead of AFSJ instruments for migration purposes, addressing and comparing the competence question, decision-making and judicial protection in both policies. This shows how the increasing "normalisation" of the CFSP does not match yet the degree of integration of the AFSJ and its corresponding safeguards.

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Secondly, the ECJ doctrine on the choice of the appropriate legal basis and its "centre of gravity test" is revisited to clarify how its criteria apply to the linkages between CFSP and migration policy. Although a simultaneity of inextricably linked objectives complicates this cross-Treaty delimitation, a strict application of the "centre of gravity test", by which a CFSP tool is instrumentalised to pursue an AFSJ objective, may provide the answer to this controversy.

KEYWORDS: Common Foreign and Security Policy – CSDP missions – migration – Frontex Agency – European Court of Justice – choice of the appropriate legal basis.

I. INTRODUCTION

The importance of the external action on migration has been continuously on the top of the political agenda of EU migration policies for the last two decades now. Cooperation with countries of origin and transit certainly appears essential in approaching a phenomenon of international nature such as migration. The EU has therefore set and intensified cooperation with partner countries through the conclusion of international agreements and other informal instruments on diverse dimensions of migration, such as readmission, fight against irregular migration and migrant smuggling, management of border controls, short-term visa facilitation, as well as financial assistance to third countries in capacity-building on migration management and refugee protection.[1] While this external dimension consolidated, the EU official discourse insisted on fully incorporating migration into other Union's external policies. In that process, the attention was put on how the Common Foreign and Security Policy (CFSP) could contribute to the Union's migration objectives within the Area of Freedom, Security and Justice (AFSJ),[2] mostly through support in the fight against migrant smuggling and border management.[3]

As a consequence, the EU's external response to migration challenges has not been limited to the use of its migration powers under Title V TFEU, but it also extends to the means and instruments of the CFSP, and particularly its Common Security and Defence Policy (CSDP), governed by Title V TEU. In the last decade, we are thus witnessing a

[1] For an overview on these instruments, see, *e.g.* P García Andrade and I Martín, *EU Cooperation with Third Countries in the Field of Migration*, Study (European Parliament 2015) www.europarl.europa.eu. In academic literature, see, among others, S Carrera, T Strik and J Santos Vara (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Elgar 2019); S Carrera and others, *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff 2019).

[2] Council doc. No. 7653/00 of 6 June 2000, Report by the Presidency on European Union priorities and policy objectives for external relations in the field of justice and home affairs, 5; European Union, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (3 March 2005) points 1(6) and 4; European Union, 'The Stockholm Programme. An open and secure Europe serving and protecting citizens' (4 May 2020) point 7; Communication COM(2011)743 from the Commission of 18 November 2011, 'The Global Approach to Migration and Mobility', 4.

[3] Communication COM(2015)240 from the Commission of 13 May 2015, 'European Agenda on Migration', 3 and 5.

stronger securitisation of migration as the EU has been deploying CSDP missions and operations with clear migration-related objectives.[4] This is the case, for instance, of certain civilian crisis management operations in third countries, such as the EU Border Assistance Mission in Libya (EUBAM Libya) or the EU Capacity Building Mission in Niger (EUCAP Sahel Niger), which include migration and border management elements of capacity-building, as well as military missions such as the EUNAVFOR MED Operations Sophia and Irini, specifically focused on combatting migrant smuggling and human trafficking.[5] In this way, the EU is resorting, for (apparently) internal security purposes, to the still intergovernmental instruments of the CFSP and CSDP, traditionally aimed at preserving peace and international security.[6]

Recourse to CSDP instruments for migration objectives touches upon the horizontal demarcation of EU competences between the CFSP and the AFSJ, more particularly the external dimension of the EU migration policy, and thus raises an evident legal question related to the choice of the appropriate legal basis in these cross-Treaty cases. The delimitation of TEU-TFEU policies has not received an unambiguous answer yet neither in legal scholarship nor in the European Court of Justice's case-law. Although the ECJ has addressed a significant number of CFSP-TFEU conflicts, it has still not clarified the interpretation to accord to the mutual non-affectation clause of Article 40 TEU.

With the purpose of revisiting this question and after providing more details on the background of these operations (section II), this *Article* will firstly review the legal implications of the recourse to the CFSP instead of AFSJ instruments for migration purposes (section III). Apart from the political impact these internal-international security linkages may be having in both policies,[7] our analysis will address, from a strict legal perspective, the competence question, particularly regarding the nature of EU powers and the margin of action left to Member States (section III.1); the institutional implications of this choice for decision-making procedures (section III.2), and, finally, the differences regarding ECJ competences and judicial protection in the two policies (section III.3). This will lead us to review, in a second part, the ECJ doctrine on the choice of the appropriate legal basis and

[4] The term "militarisation", sometimes used in this context, would not be adequate strictly speaking since CSDP missions might be of military or civilian nature (art. 42(1) TEU).

[5] The practice of resorting to CFSP/ CSDP missions for internal security purposes is also visible, within the AFSJ, in police and judicial cooperation in criminal matters, as EULEX Kosovo or EUNAVFOR Atalanta illustrate. See, in this sense, A Bendiek and R Bossong, 'Shifting Boundaries of the EU's Foreign and Security Policy: A Challenge to the Rule of Law' (SWP Research Paper 12-2019) 11.

[6] Council Conclusions 14149/16 from the General Secretariat of the Council of 14 November 2016 on implementing the EU Global Strategy in the area of Security and Defence, 5 and 7. See also Council document 7371/22 of 21 March 2022, 'A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security', 15.

[7] M Drent, 'Militarising Migration? EU and NATO Involvement at the European Border' (2018) Clingendael Spectator; N Pirozzi, 'The Civilian CSDP Compact: A Success Story for the EU's Crisis Management Cinderella?' (2018) European Union Institute for Security Studies.

its "centre of gravity test" in order to discern how its criteria apply to the linkages between CFSP and migration policy (section IV).

II. Background: setting CFSP/CSDP missions on migration

In the last decade, the EU has deployed several CFSP/CSDP missions having, within their mandates, migration-related components and purposes, mainly regarding border management, combatting human trafficking and fighting against smuggling of migrants.

Among the recent ones, EUBAM Libya and EUCAP Sahel Niger can be qualified as civilian crisis management operations, while EUNAVFOR MED Operations Sophia and Irini are examples of military missions.

EUBAM Libya was launched in 2013 under Decision 2013/233/CFSP.[8] It was presented as part of the EU support to the post-conflict reconstruction of Libya and principally aimed at assisting the Libyan authorities to develop their capacity to enhance the security of the land, sea and air borders of the country. For this purpose, EUBAM Libya was designed to develop an Integrated Border Management strategy in the long term, through training, mentoring and advising this country's border authorities, including in maritime search and rescue. Its mandate, currently in force until 30 June 2023, has been revised to explicitly refer to the mission's contribution to "disrupt organised criminal networks involved notably in migrant smuggling, human trafficking and terrorism in Libya and the Central Mediterranean region", as well as to its support to UN efforts "for peace in Libya in the areas of border management, law enforcement and criminal justice".[9]

A few years later, the EU set EUNAVFOR MED Operation Sophia, the paradigmatic example of a CSDP military operation with AFSJ-migration aims. Its deployment started in 2015 with the aim of disrupting "the business model of human smuggling and trafficking networks in the Southern Central Mediterranean".[10] It was mandated to identify, capture and dispose of vessels and assets suspected of being used by smugglers and traffickers in accordance with international law of the sea and UN Security Council (UNSC) resolutions for these purposes. The Operation was developed in several phases: a first phase was just focused on information gathering and patrolling on the high seas; the intention, in a second phase, was to conduct boarding, search, seizure and diversion of suspected vessels on the high seas or in the territorial and internal waters of Libya according to an UNSC resolution or with the coastal state's consent; and, in a third phase, to dispose or render the vessels inoperable.[11] The international legal mandate for these

[8] Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya). It has been modified up to 10 times, the latest by Council Decision (CFSP) 2021/1009 of 18 June 2021.

[9] See art. 2 of Decision 2013/233/CFSP cit. consolidated version 1 July 2021.

[10] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), consolidated version 1 October 2019, art. 1(1).

[11] *Ibid*. art. 2(2).

tasks was conferred by UNSC Resolution 2240(2015), which however authorised States and regional organisations, including the EU, to act under strict parameters. These actions were to be undertaken exclusively on the high seas off the coast of Libya – and not within its territorial waters – and only over unflagged vessels when there were "reasonable grounds to believe" were being used for smuggling and trafficking from Libya by criminal networks, or over vessels with nationality provided States and organisations "make good faith efforts to obtain the consent" of the flag State.[12] In 2016, the mandate of Operation Sophia was extended to provide training to the Libyan Coast Guard and Navy in the fight against smuggling and trafficking, and to contribute to the implementation of the UN arms embargo on the high seas off the Libyan coast, in accordance with a second UNSC resolution.[13]

After having suspended its naval activities in 2019 and with a dubious record on both effectiveness and impact, Operation Sophia was repealed in February 2020,[14] and replaced with EUNAVFOR MED Irini, a new military crisis management operation launched on 31 March 2020 for a three-years period.[15] Its main aim relates to the implementation of the UN arms embargo on Libya, the prevention of arms trafficking as well as the illicit export of petroleum from this country. The Operation is mandated to undertake, in accordance with UNSC 2292(2016), inspection of vessels on the high seas off the coast of Libya suspected to carry arms. Among its objectives, it also includes developing capacities and training of the Libyan coast guard in law enforcement at sea, and contributing, as its predecessor Operation Sophia, "to the disruption of the business model of human smuggling and trafficking networks" through information gathering and patrolling by planes.[16]

EUCAP Sahel Niger could also be mentioned as another example of a CSDP mission with migration aims, albeit originally on a more incidental basis.[17] This civil CSDP operation, launched in 2012, focuses on strengthening capacity building of interior security forces of the country mainly in the fight against organised crime and terrorism. Since 2018, its mandate, extended until 30 September 2024, was modified to include the aim of "improving

[12] UNSC Resolution 2240 (2015) of 9 October 2015. On the inception and design of this operation, as well as on the scope of the UN mandate, see S Blockmans, 'New Thrust for the CSDP from the Refugee and Migrant Crisis' (July 2016) Friedrich-Ebert-Stiftung International policy analysis. On the context and specificities of UNSC resolutions, see C Klocker, 'The UN Security Council and EU CSDP Operations: Exploring EU Military Operations from an Outside Perspective' (2021) Europe and the World: A law review 17. See also G Butler and M Ratcovich, 'Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea' (2016) Nordic Journal of International Law 235-259.

[13] Security Council, Resolution 2292 of 16 June 2016.

[14] Council Decision (CFSP) 2020/471 of 31 March 2020 repealing Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA).

[15] Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI).

[16] *Ibid*. arts 1(1) and 5.

[17] Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger).

their capacity to control and fight irregular migration and reduce the level of associated crime",[18] by assisting Nigerien authorities and security forces in the development of policies, techniques and procedures "to effectively control and fight irregular immigration" and "providing strategic advice and training, including on border control, in support of the *Union's objectives on migration*",[19] thus clearly contributing to AFSJ purposes.

It seems this practice of using CSDP missions to advance migration-related objectives has come to stay. In the New Pact on Migration and Asylum presented in September 2020, under the heading "reinforcing the fight against migrant smuggling", the European Commission stated that "Common Security and Defence Policy operations and missions will continue making an important contribution, where the fight against irregular migration or migrant smuggling is part of their mandates". The Pact refers specifically to EUCAP Sahel Niger, EUBAM Libya and EUNAVFOR MED Irini to this effect.[20]

From a legal perspective, recourse to these missions in order to further migration objectives raise several controversial issues, such as, for instance, their judicial accountability or their impact on the fundamental rights of migrants. The focus of this *Article*, however, lies, as stated above, on whether these missions, established under Council decisions adopted pursuant to the CFSP provisions of the TEU, are founded on a correct legal basis or should rather have been based on the EU immigration powers of Title V of the TFEU. To answer this question, we will firstly examine the legal implications that opting for CFSP or AFSJ instruments may have. Regarding the latter and within the common policies on immigration and border controls established under this title, our attention will be centred on the intensive operational powers of the European Border and Coast Guard Agency (Frontex) and its wide mandate to cooperate with third countries in the kind of tasks undertaken by these CSDP operations.

III. CFSP/CSDP missions versus AFSJ instruments

III.1. Competence question

The Union enjoys, more clearly since the Treaty of Lisbon, a real competence to develop a Common Foreign and Security Policy,[21] which covers, quite vaguely, "all areas of foreign policy and all questions relating to the Union's security",[22] including the progressive framing of a common defence policy. These general terms used in art. 24 TEU together with

[18] Arts 1 and 2 of Decision 2012/392/CFSP, as amended by Decision (CFSP) 2018/1247.

[19] Art. 3(c) of Decision 2012/392/CFSP (emphasis added).

[20] Communication COM/2020/609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum, 16. On the Pact, see D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Nomos 2022).

[21] Art. 2(4) TFEU.

[22] Art. 24(1) TEU.

the inclusion of the list of objectives of EU external action *lato sensu* in art. 21 TEU make it certainly complicate to untangle the precise scope of the CFSP.

The existence of a certain correspondence between the drafting of current art. 21 TEU, in particular paras (a) to (c),[23] and the objectives traditionally assigned to the CFSP in former art. 11(1) TEU would allow to consider, as argued by Advocate General Bot,[24] that EU actions which principally pursue one or more of those objectives, especially preserving peace, preventing conflicts and strengthening international security, fall within the sphere of the CFSP. Nevertheless, as Cremona rightly explains, there is nothing in the current Treaties that could support this reading and cannot thus be used to set apart the remaining objectives now listed in art. 21 TEU as if they were alien to this policy.[25] In addition, interpreting current provisions of primary law by reference to the drafting of a previous version of the Treaties is certainly arguable, since this would dilute or even contradict the modifications brought by a Treaty reform.[26] Consequently, CFSP might have now a broader scope.

We indeed see how the introduction of common horizontal objectives for EU external action in art. 21 TEU and the abolishment – at least formally according to art. 40 TEU – of any hierarchy between CFSP and TFEU policies are examples of increasing coherence in EU external relations, but to be more precise, and as Eckes indicates, these are ways of ensuring "coherence through ambiguity".[27] Working with common objectives and protecting both Treaties from mutual interferences complicates indeed differentiation between policies and, by losing distinctive criteria, the choice of the appropriate legal basis becomes even more difficult, thus working against transparency and reducing the ability of citizens to know who is in charge, empowering also the Court to make us dependent on their decisions. Its lack of clarity, the fact that the Court is not consistent and illustrative in its case-law on the criteria to be followed when delineating CFSP and AFSJ certainly preserves this ambiguity.[28]

[23] Art. 21(a) to (c) TFEU refer to safeguarding values, interests, security and integrity; consolidating and supporting democracy, rule of law, human rights and international law; and to preserve peace, prevent conflicts and strengthening international security.

[24] Case C-130/10 *Parliament v Council* ECLI:EU:C:2012:50, opinion of AG Bot, paras 62-64.

[25] M Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Elgar 2018) 15. Note also that the Court has pointed out that the EU policy on development cooperation is not limited to measures aimed at the eradication of poverty, but also pursues the general objectives in art. 21 TEU, such as the one in para. 2(c): case C-180/20 *Commission v Council* ECLI:EU:C:2021:658 para. 49.

[26] C Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014) 64.

[27] C Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press 2019) 98 ff.

[28] *Ibid*.

Regarding its nature, CFSP is usually categorised as a *sui generis* competence, since it appears difficult to include it under the general classification of EU competences. On the one hand, it could be inferred from the specific allocation of CFSP competence in art. 2(4) TFEU that the residual allocation of shared competences does not apply here; and that CFSP is not simply a coordination of Member States policies or just a way of supporting or supplementing national policies, but rather the latter are to support the Union policy according to art. 24(3) TEU.[29] On the other hand, it is possible, in my view, to characterise the Union competence in CFSP as a shared or parallel competence,[30] since Union powers lack preemption effects over Member States' action, as can clearly be inferred from Declarations 13 and 14.[31] Consequently, Member States are not prevented from acting on the same subject as the EU. They are of course bound to respect CFSP provisions and acts, on the basis of the principle of sincere cooperation enshrined in art. 24 TEU.[32] However, infringement procedures against defaulting Member States do not form part of the judicial competences of the ECJ, which does not mean that respect for CFSP is judicially insignificant since national judges must ensure Member States fulfil their obligation under this policy.[33]

Among the different instruments conforming the CFSP and to the exclusion of legislative acts in this policy, our interest focus, of course, in the ability of the EU to deploy civil and military missions in third countries. Indeed, the CSDP, as integral part of the CFSP, provides the operational capacity to this policy through civilian and military assets,[34] supplied, for the time being, by EU Member States.[35] The use by the Union of missions abroad is foreseen, pursuant to art. 42 TEU, "for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter". More specifically, art. 43 TEU clarifies that the tasks for which CSDP missions may be employed comprise joint disarmament operations, humanitarian and rescue tasks, military advice and assistance, conflict prevention, peace-keeping, combat forces in crisis management, including peace-making and post-conflict stabilisation. The objectives of capacity building in border management or in fighting migrant smuggling and human trafficking that the abovementioned examples of CSDP missions fulfil are, in

[29] M Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture' cit. 7.

[30] Depending on whether we are referring to the internal competence to adopt CFSP acts (shared) or to the conclusion of international agreements on CFSP (parallel).

[31] Declarations 13 and 14 state that the CFSP will not affect the responsibilities and powers of Member States in relation to the formulation and conduct of their foreign policy.

[32] See, on its scope within the CFSP, P Van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations' in M Varju (ed.), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer 2019) 286-288.

[33] See A Mangas Martín, 'Sobre la vinculatoriedad de la PESC y el espacio aéreo como territorio de un Estado' (2021) Revista General de Derecho Europeo; also D Thym, 'Holding Europe's CFSP/CSDP Executive to Account in the Age of the Lisbon Treaty' (2011) Serie Unión Europea, CEU 26.

[34] Art. 42(1) TEU.

[35] Art. 42(1) TEU *in fine* and art. 42(3) TEU.

my view, difficult to integrate under the tasks defined in art. 43 TEU. Certainly, the Council, when adopting its conclusions on the implementation of the EU Global Strategy in the area of security and defence, produced a non-exhaustive typology of civilian and military mission, which included, to our effects, "maritime security or surveillance operations" – in which we could classify EUNAVOR MED Sophia and Irini –,[36] as well as "civilian capacity building and security sector reform missions" –[37] such as EUBAM Libya and EUCAP Sahel Niger. Even if it seems complicate to include the Council typology under the umbrella of art. 43 TEU, the list of tasks foreseen in this provision is not presented as *numerus clausus*, so it could be formally argued that migration-related objectives anyhow contribute to strengthening international security in accordance with art. 42 TEU.

Border management, as well as prevention and fighting against irregular immigration and human trafficking are part of the EU policy on border controls and the common immigration policy pursuant to arts 77 and 79 TFEU, respectively. These policies are qualified as shared competences in art. 4(2)(j) TFEU. More precisely, EU competences on borders and immigration are concurrent powers in which pre-emption applies.[38] In addition to these internal competences, the EU clearly enjoys external competences in these fields too, as they can be inferred from both arts 77 and 79 TFEU in application of the ECJ doctrine of implied external powers codified in art. 216(1) TFEU. Regarding the nature of these external competences, EU secondary legislation on external border controls– the Schengen Borders Code – allows us to qualify this field as "an area largely covered" by "common rules" in the sense of *ERTA* exclusivity.[39] This EU exclusive external competence however regards only the normative aspects of border management, since the implementation powers of Member States on border controls are preserved.[40]

If we thus focus on the operational aspects of border management, as these CFSP operations seem to concentrate, Member States still exercise the power to perform border controls, a power which does not belong to their exclusive realm[41] but that they still preserve in

[36] M Acosta Sánchez, 'Sobre el ámbito competencial de las operaciones de paz: el enfoque integral de la operación militar Sophia de la UE ante la crisis migratoria' (2018) Revista del Instituto Español de Estudios Estratégicos 15, 37.

[37] Council Conclusions on implementing the EU Global Strategy in the area of Security and Defence cit. 15.

[38] Art. 2(2) TFEU.

[39] Originated in the landmark judgment in the *ERTA* case C-22/70 *Commission v Council* ECLI:EU:C:1971:32 para. 17, consolidated in subsequent case-law and codified in the last scenario of art. 3(2) TFEU.

[40] See the competence analysis in P García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) CMLRev 157.

[41] Note that the old reference in the EC Treaty to the rules on external border controls to be applied by Member States (art. 62(2)(a) ECT) was supressed by the 2007 Lisbon reform, in art. 77(2)(b) TFEU. In addition, the ECJ has clarified that the reservation included in art. 72 TFEU, regarding the "exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security", must be interpreted restrictively and cannot be understood as a general exception excluding all measures taken for reasons of law and order or public security from the scope of

accordance with EU secondary law.[42] However, the increasing process of integration of the operational aspects is evident, as shown by the executive powers conferred to Frontex in the last reform of its mandate and its competence to cooperate with third countries' authorities. On the one hand, the Agency now disposes of a standing corps, whose members are not only staff seconded by Member States but also Frontex's own statutory staff, with real executive powers of border control.[43] On the other, the Agency may cooperate with the authorities of third countries in the fields of its mandate, which includes providing training and technical assistance in border management, border surveillance, rescue at sea and return, as well as carrying out border management operational activities in their territories.[44]

Comparing competence-related aspects in terms of resources also appears relevant. CSDP missions rely, as indicated above, on assets provided by Member States, and it seems that some of these missions are currently operating at a lower capacity than planned and needed due to the limited political will and capabilities in Member States' governments.[45] By contrast, although Frontex used to rely on the voluntary contributions of Member States in terms of resources for its operations, the reform of the Agency's mandate has included, as stated above, a standing corps of Frontex operational staff based on mandatory national contributions, staff whose profile and training on migration appears to be more specialised than that of national officers in CSDP missions. Additionally, having the possibility to deploy a Frontex operation or a CSDP mission for the same purpose could create the risk of detracting resources away from fields and objectives in which we can only resort to CSDP operations or these have proven to be more effective.[46] For this reason, it can be argued that using CSDP missions may be preferred in order to

EU law: case C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)* ECLI:EU:C:2020:1029 paras 212-216.

[42] See Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), and art. 7 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

[43] See especially arts 54 and 55 of Regulation 2019/1896. For an analysis of the scope of these powers, see D Fernández Rojo, 'Regulation 2019/1896 on the European Border and Coast Guard (Frontex): The Supranational Administration of the External Borders?' in Kotzur and others (eds), *The External Dimension of EU Migration and Asylum Policies: Border Management, Human Rights and Development Policies in the Mediterranean Area* (Nomos 2020) 295-323.

[44] See arts 10, 73 and 74 of Regulation 2019/1896 cit. For further developments, see J Santos Vara, 'The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?' (2023) European Papers www.europeanpapers.eu 985.

[45] See European Council of Refugees and Exiles, 'Migration missions creep? ECRE's assessment of the emerging role of CSDP missions in forced displacement and migration' (Policy Note 2019) ecre.org/wp-content 3.

[46] *Ibid*. 3.

address the security dimension of the root causes of forced displacement – such as insecurity, violent conflicts, or lack of rule of law in general –,[47] instead of intervening in capacity building and training of third countries' authorities in border management, which rather pertains to the specific mandate of Frontex.

A final reference to variable geometry characterising the AFSJ seems necessary. Although the United Kingdom is no longer a Member State of the EU and thus Protocol 21 no longer applies to this country, the special situation of derogation foreseen in that Protocol to the Treaties still applies to Ireland with regard to EU policies within the AFSJ. Protocol 22 foresees a similar reservation in favour of Denmark. With regard, in particular, to Frontex activities, the Agency's founding regulation is considered, in accordance with Protocol 19, to be a measure developing a part of the Schengen acquis in which Ireland – neither the UK before Brexit – does not participate. As the ECJ had clarified, a Member State which is in derogation from that part of the Schengen acquis cannot opt-in into its developments and is thus excluded from the Frontex Regulation.[48] In the context of this *Article*, this means that Ireland and Denmark do not – or, more precisely, cannot – take part in Frontex activities, either within Member States' borders or in third countries' territories.[49] By contrast, CFSP binds, in general terms and with the nuances applicable to this not fully integrated policy, all Member States. Consequently, satisfying migration purposes through recourse to CFSP/CSDP, in which this variable geometry does not apply, can be considered as a distortion, as these two Member States are able to take part in external activities on border management from which they would be excluded under Title V TFEU.[50]

III.2. Institutional implications for decision–making procedures

Decision-making procedures are clearly divergent too between the CFSP/CSDP, as regulated in the TEU, and the AFSJ policies, pursuant to Title V TFEU. Within the former, the Council holds the decision-making power without the initiative role of the Commission as defendant of the Union interest but instead at the High Representative's initiative as *mandataire* of the Council.[51] Most importantly, CFSP acts are adopted without the involvement of the European

[47] *Ibid*. 4.

[48] Case C-77/05 *UK v Council* ECLI:EU:C:2007:803. See, on its implications, JJ Rijpma, 'Case C-77/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported and Case C-137/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported' (2008) CMLRev 835.

[49] We have analysed this subject in P García Andrade, 'La geometría variable y la dimensión exterior del espacio de libertad, seguridad y justicia' in J Martín y Pérez de Nanclares (ed.), *La dimensión exterior del espacio de libertad, seguridad y justicia de la Unión Europea* (Iustel 2012) 87.

[50] This argument would also apply to EU funding of migration-related initiatives and projects, as these Member States participate in CFSP funds but not in AFSJ financing instruments.

[51] Arts 26 and 27 TEU.

Parliament (EP),[52] an unfortunate characteristic of this policy when it comes to acts which, as in our case, establish operations that may so intensively affect the rights of individuals. In particular, CSDP missions are normally adopted on the basis of art. 42(4) TEU, according to which decisions relating to the CSDP, including those initiating a mission, shall be adopted by unanimity in the Council, on a HR or Member State's proposal.[53] Monitoring their implementation is also in the hands of the HR, who, under the Council's authority and in close and constant contact with the Political and Security Committee, is in charge of ensuring coordination of the civilian and military aspects of these missions.[54]

By contrast, EU acts within the external borders management or immigration policies are adopted following the ordinary legislative procedure, in which the Council and the EP act as co-legislators following the Commission's initiative.[55] If the comparison is however established with the procedure to adopt operations coordinated by Frontex to take place in the territory of third countries, Regulation 2019/1896 dictates how the Agency may cooperate with third countries. Operational cooperation and technical assistance may take place between Frontex and border management authorities of a third country through a working arrangement, whose adoption, to be approved by the management board of the Agency and the competent authorities of the country in question, requires the Commission's previous approval and providing detailed information to the EP prior to its conclusion.[56] Besides, the operational plan of any operation deployed on the territory of a third country shall be agreed between Frontex and the third country, in consultation with participating Member States.[57]

Current CSDP missions seem to correspond, in the Frontex context, with operations that imply the deployment to a third country of border management teams with executive powers. In those circumstances, art. 73(3) of Frontex Regulation 2019/1896 requires the conclusion of a status agreement between the Union and the third country, in which the latter provides its consent to the setting up of border control operational activities in its territory and

[52] As explained by Wessel, parliamentary influence in CFSP is not directed towards a concrete decision, but only on the main aspects and basic choices of CFSP through consultation by the HR-VP (art. 36 TEU): RA Wessel, 'Legal Aspects of Parliamentary Oversight in EU Foreign and Security Policy' in J Santos Vara and S Rodríguez Sánchez-Tabernero (eds), *The Democratisation of EU International Relations through EU Law* (Routledge 2019) 137. See his analysis for consideration of the EP as an active player in external action and in this policy in particular.

[53] Note, quite importantly, that EU missions or operations are acts of the Union and that, in spite of their still intergovernmental features, they are not "collectively made by Member States": G Butler and M Ratcovich, 'Operation Sophia in Uncharted Waters' cit. 239.

[54] Art. 43(2) TEU.

[55] Arts 77 and 79 TFEU.

[56] Art. 76(4) of Regulation 2019/1896 cit.

[57] Art. 74(3) of Regulation 2019/1896. Unless a Member State neighbours the country or the operational area of the third country, in which case the operational plan requires the agreement of that Member State.

covers all the necessary aspects to undertake the operation: scope, tasks and powers of members of the team, civil and criminal liability, practical measures regarding the protection of fundamental rights and provisions on the transfer of data. Before the introduction of this new category of agreement in the 2016 reform of the Agency's mandate,[58] and given that the Agency lacks international legal personality to conclude true international agreements,[59] Frontex border management operations in third countries mostly relied on bilateral agreements concluded by a Member State with that country or quite usually on bilateral arrangements assumed by a Member State or even the EU itself, which lacked safeguards inherent to legal certainty. This has surely improved with the conclusion of status agreements by the EU, as binding legal instruments providing for the necessary consent of the third State with regard to the deployment of foreign forces within its territory and the launching of actions, as well as foreseeing the legal safeguards applicable to the tasks and powers of border agents and their responsibility.[60]

The conclusion of status agreements by the EU follows the procedure regulated in art. 218 TFEU, which reflects the supranational division of powers between EU institutions,[61] in which the Commission enjoys the power of initiative and negotiates the agreements as holder of the external representation of the Union, the Council authorises negotiations and decides, by qualified majority,[62] on the signature and conclusion of agreements, while the EP intervenes in the conclusion with its previous approval.[63]

Although the same provision, art. 218 TFEU, also applies to international agreements relating exclusively or principally to CFSP, this policy concentrates most of the exceptional rules within this procedure, such as the HR initiative and negotiating position, the unanimity voting rule in the Council or the absence of EP involvement. Nevertheless, the duty to inform the Parliament in all the stages of the procedure of conclusion of international agreements applies to CFSP agreements too, as clarified by the Court in the *Tanzania* case.[64]

[58] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (no longer in force).

[59] On this issue, see A Ott, E Vos, and F Coman-Kund, 'EU Agencies and Their International Mandate: A New Category of Global Actors?' (CLEER Working Papers 7-2013); J Santos Vara, 'The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls' (2015) European Foreign Affairs Review 118-121.

[60] See J Santos Vara, 'The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?' cit.

[61] See J Helikoski, 'The Procedural Law of International Agreements: A Thematic Journey through Article 218 TFEU' (2020) CMLRev 79.

[62] Art. 218(8) TFEU, as external borders control is not a field in which unanimity is required for the adoption of internal acts (art. 77(2) TFEU).

[63] Art. 218(6)(a) TFEU, as external borders control is a field to which ordinary legislative procedure applies (art. 77(2) TFEU).

[64] Case C-263/14 *European Parliament v Council (Tanzania)* ECLI:EU:C:2016:435.

For the deployment of military CSDP operations in the territory of third countries, the EU must also secure either a UN Security Council authorisation[65] or the third State's consent. While obtaining the former on the basis of Chapter VII of the UN Charter is not always easy,[66] the latter is normally procured through the negotiation and conclusion by the EU of an international agreement on the status of the CSDP mission in the host state.[67] However, in light of the political situation in the third country, this agreement cannot be adopted in all scenarios.[68] This does not mean that Frontex operations are more feasible from a legal perspective, since the exercise of executive powers within the territory of a third country also requires that State's consent or authorisation.[69] But the Agency's operations appear as cooperation activities of law enforcement deployed within the framework of an international agreement between the EU and the third country – the status agreements –, which includes some (limited) safeguards applicable during the operations.[70] Status agreements of CSDP missions rather focus on regulating privileges and immunities of participating staff.[71]

III.3. ECJ COMPETENCES AND JUDICIAL PROTECTION

Finally, as far as judicial protection is concerned, the ECJ enjoys, with the last reforms introduced by the Lisbon Treaty, the whole spectrum of its competences in AFSJ fields. However, in accordance with arts 24 TEU and 275 TFEU, it only holds jurisdiction, regarding the CFSP, to review the legality of restrictive measures affecting physical or legal persons, as well as

[65] As explained above, Operation Sophia was however established by the EU through the adoption of the CFSP decision without the previous UNSC authorisation, which was only asked for later: C Klocker, 'The UN Security Council and EU CSDP Operations' cit.

[66] Note that the Council decision establishing Operation Sophia foresaw the eventual seizure of vessels within the territorial waters of Libya while UNSC Resolution 2240(2015) only authorised action in international waters off the Libyan coast.

[67] See Council document n. 17141/08 of 15 December 2008, 'Draft Model Agreement on the Status of the European Union Civilian Crisis Management Mission in a Host State (SOMA)'.

[68] This appears to be the case of Libya, since, due to the political circumstances in the country, the status agreement of EUBAM Libya has not been concluded yet: European External Action Service EEAS(2021)174 of 19 February 2021, 'EUBAM Libya Strategic Review 2021', 5. A memorandum of understanding would have been signed between EUBAM Lybia and the Libyan Ministry of Justice, while another MoU was adopted between EUNAVFOR Med Sophia and the Libyan Coast Guard to carry out training activities.

[69] Klocker argues that a Frontex operation which uses force within the territory of a third country would also need the UNSC authorisation in case the State does not give its consent. In her view, the EU internal distinction between military action (CSDP) and law enforcement (Frontex) does not change the assessment from an international law perspective: C Klocker, 'The UN Security Council and EU CSDP Operations' cit. 16.

[70] See, *e.g.* the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, done on 7 October 2019. See, to this effect, JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory' (2017) European Papers www.europeanpapers.eu 591 ff.

[71] See the Agreement between the European Union and the Republic of Niger on the status of the European Union mission in Niger CSDP (EUCAP Sahel Niger), done at Niamey on the 30 July 2013.

to monitor compliance with the mutual non-affectation clause of art. 40 TEU and thus precisely to verify the choice of the correct legal basis of Union acts, which is the focus of our attention. As this constitutes, nevertheless, a derogation from the general jurisdiction of the ECJ according to art. 19 TEU and since the EU, also within the CFSP, is founded on the values of equality and rule of law, CFSP exclusions of ECJ competences are to be interpreted narrowly.[72] There is continuous evidence of the ECJ willingness to widen its jurisdiction over CFSP on these bases:[73] firstly, the Court has indeed recognised its competence to issue preliminary rulings on validity as a way, in addition to annulment actions, to review the legality of restrictive measures against natural or legal persons;[74] secondly, it enjoys a general jurisdiction to ensure that the conclusion of international agreements on CFSP respect the procedural requirements of art. 218 TFEU;[75] and, thirdly, it has declared its competence to hear annulment actions and actions for damages against acts of staff management brought by personnel of CFSP bodies and missions.[76] Most importantly, the Court is generously interpreting its competence to adjudicate on CFSP acts imposing restrictive measures, as it has declared actions for damages against these acts admissible for the sake of coherence of the system of legal protection provided for by EU law.[77]

However, although exceptions to the lack of jurisdiction of the Court in the CFSP are indeed expanding, the Court is still not competent to protect, outside the scope of staff's statute conflicts, the rights of individuals affected by CFSP missions/operations with migration purposes.[78] It is true that art. 40 TEU constitutes precisely the legal foundation to verify whether these missions are correctly based on TEU provisions instead of a TFEU legal basis or instrument. However, that ground of jurisdiction may allow the Court to deal with the legality of the mission but not with the affectation of individual rights.[79] We

[72] Case C-455/14 P *H v Council and Commission* ECLI:EU:C:2016:569 paras 40-41; case C-72/15 *Rosneft* ECLI:EU:C:2017:236 paras 74-75.

[73] RA Wessel, 'Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis' in C Kilpatrick and J Scott (eds), *Contemporary Challenges to EU Legality* (Oxford University Press 2020).

[74] *Rosneft* cit. In case C-351/22, *Neves 77 Solution* (pending), the ECJ will have to decide on its competence to issue preliminary rulings on interpretation regarding restrictive measures. See the already published opinion by AG Ćapeta who proposes to reject the Court's jurisdiction: case C-351/22 *Neves 77 Solution* EU:C:2023:907, opinion AG Ćapeta.

[75] Case C-658/11 *European Parliament v Council (Mauritius)* ECLI:EU:C:2014:2025 and *Tanzania* cit.

[76] See case T-286/15 *KF v SatCen* ECLI:EU:T:2018:718 paras 95-97; case *H v Council and Commission* cit. As indicated by AG Bobek, an EU act must fulfil two requirements in order to fall within the CFSP judicial derogation: to be *formally* based on CFSP provisions and also *substantively* correspond to a CFSP measure (case C-14/19 *KF v SatCen* ECLI:EU:C:2020:220, opinion of AG Bobek, para. 61).

[77] Case C-134/19 P *Bank Rafah Kargaran v Council* ECLI:EU:C:2020:793 para. 31 ff.

[78] See S Johansen, 'Human Rights Accountability of CSDP Missions on Migration' (8 October 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[79] CFSP operations are nonetheless subject to certain means of dispute-settlement (*e.g.* art. 16 of the SOMA on EUCAP Sahel Niger provides for amicable settlement, diplomatic means or the appointment of an arbitration tribunal in case of claims for death, injury, damage or loss), but this does not substitute for a judicial review and does not ensure the right to judicial protection enshrined in art. 47 CFR.

will have to be attentive to future ECJ case-law on the CFSP,[80] as well as to the role national courts should play in accordance with the non-limited scope of art. 19 TEU in this regard,[81] and the openness of art. 274 TFEU.[82]

Operations undertaken by Frontex are, on the contrary, subject to the review of legality of the ECJ under art. 263 TFEU, since the Treaty of Lisbon included "acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties" as reviewable acts under the annulment action. Also, bringing failure to act actions under art. 265 TFEU is possible against "bodies, offices and agencies of the Union". However, although obtaining judicial review of the Agency's actions, including its extraterritorial operations, is legally possible,[83] the filing of legal actions by individuals is not devoid of complications, especially when Frontex activities take place in the territory of third countries. Procedural difficulties relate to the legal standing of individual applicants and to whether the Agency's acts deploy legal effects vis-à-vis third parties. Obstacles arise too from transparency limitations as regards certain aspects of the practical implementation of Frontex activities and the multi-actor character of its operations,[84] which truly complicate the judicial protections of individual rights in these settings. Nonetheless and in spite of the restrictive attitude the Court seems to have adopted,[85] the truth is that the potential for judicial review of Frontex actions is, at least on paper, better articulated than the complete absence of jurisdiction regarding CSDP missions for the protection of individual rights.[86]

[80] Another pending case, *KS and KD*, will give the ECJ the opportunity to decide on its competence to hear actions for damages committed in the implementation of CFSP missions: see joined cases C-29/22 P and C-44/22 *P KS, KD* ECLI:EU:C:2023:901, opinion AG Ćapeta.

[81] See, to this effect, P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) ICLQ 27-35.

[82] Recall that, according to this provision, "[s]ave where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States".

[83] See art. 98 of Regulation 2019/1896 in connection to art. 263(5) TFEU.

[84] See S Tas, 'Frontex Actions: Out of Control? The Complexity of Composite Decision-making Procedures' (TARN Working Paper 3-2020); D Fernández Rojo, 'The Introduction of an Individual Complaint Mechanism within Frontex: Two Steps Forward, One Step Back' (2016) Tijdschrift voor Bestuurswetenschappen en Publiekrecht no. 4-5; S Carrera, L Den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability Versus Autonomy?' (2013) European Journal of Migration and Law.

[85] See the order dismissing the action for failure to act against Frontex on admissibility grounds: case T-282/21 *SS and ST v Frontex* as well as the judgment in case T-600/21 *WS v Frontex* ECLI:EU:T:2023:492, in which the General Court also dismissed an action for damages against the Agency because of a lack of evidence of a direct causal link between the damage invoked by the applicants and the conduct of Frontex. Other actions against the Agency are pending before the General Court (case T-136/22 *Hamoudi v Frontex* and case T-205/22 *Naass and Sea Watch v Frontex*).

[86] Estrada-Cañamares highlights how the Council was safer from an annulment action by using a single CFSP legal basis for Operation Sophia: M Estrada-Cañamares, 'Operation Sophia before and after UN Security Council Resolution no 2240(2015)' (2016) European Papers www.europeanpapers.eu 191.

After having thus examined the legal implications of resorting to instruments of the CFSP or AFSJ policies and thus having observed how the increasing "normalisation" of the former does not match yet the degree of integration of the latter, the importance of determining the correct legal basis of these operations appears evident.

IV. The ECJ doctrine on the choice of the appropriate legal basis and the delimitation between CFSP and migration policy

In the search for the correct legal foundation of the kind of operations described above, we should start by examining the consolidated ECJ doctrine on the choice of the legal basis and its "centre of gravity test".[87] Its use is not limited to conflicts among TFEU policies but also applies, as the Court confirmed,[88] to cross-Treaty disputes, such as the one in hand.

This legal question is closely related to the interpretation to be accorded to art. 40 TEU, which prohibits that the implementation of the CFSP affects the application of procedures and institutional powers enshrined in the TFEU and, similarly, excludes that the implementation of TFEU policies affects the application of those set under the TEU for the CFSP. Before the Treaty of Lisbon, former art. 47 TEU protected the *acquis communautaire* from the incursions of the CFSP and the former third pillar, and thus the ECJ gave, in conflicts about legal bases, a default priority to the EC Treaty-based measures in case of acts with double components pertaining to CFSP-EC policies.[89] With its transformation into a *mutual* non-affectation clause, current art. 40 TEU formally accords a symmetric protection to CFSP and TFEU policies, the former being no longer supplementary to the EU external action pursuant in development of the TFEU.

In the post-Lisbon "legal basis litigation", the ECJ has not, quite strikingly, pronounced itself on the interpretation to be given to art. 40 TEU, sometimes simply referring to the provision without further elaboration,[90] whereas in other cases completely ignoring it in its argumentation, as in the *Kazahstan* case.[91] In the latter, the Court applied instead the principle of institutional balance horizontally as if art. 40 TEU was a redundant repetition

[87] I have just sketched this issue in P García Andrade, 'EU External Competences in the Field of Migration' cit.

[88] Case C-91/05 *Commission v Council* (*ECOWAS*) ECLI:EU:C:2008:288 para. 60; case C-130/10 *Parliament v Council* (*UN Sanctions*) ECLI:EU:C:2012:472.

[89] It was precisely former art. 47 TEU which led the ECJ to exclude a dual legal basis CFSP-EC in the *ECOWAS* case, conferring priority to the EC Treaty with the aim of protecting the Community *acquis*.

[90] *Tanzania* cit. para. 42.

[91] Even when the parties use art. 40 TEU in their argumentation, as the Council did: case C-244/17 *Commission v Council* (*Kazahstan*) ECLI:EU:C:2018:662 paras 16 and 19. In this sense, see P Van Elsuwege and G Van der Loo, 'Legal Basis Litigation in Relation to International Agreements: Commission v Council (Enhanced Partnership and Cooperation Agreement with Kazahstan)' (2019) CMLRev 1333-1354; also RA Wessel, 'Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis' cit.

of that principle,[92] but this was probably because the case referred to the conclusion of international agreements and, to that effect, art. 218 TFEU applies to all EU policies.

In a more general sense, Cremona highlights that the focus of art. 40 TEU is not on policy content or on the nature of competences, but rather on procedures and institutional balance. Consequently, since CFSP is characterised by a different institutional balance and instrumental toolkit than TFEU policies, this provision would be designed to ensure that action within each policy field respects its own boundaries and operates within its proper sphere.[93]

In spite of the Court's silence on the value of art. 40 TEU, several AG Opinions have specified that the two non-affectation clauses this provision contains have been formulated in a symmetric way,[94] and therefore do not allow precedence to be granted to competences falling within either the CFSP or the TFEU. When it comes to the choice of the legal basis, this reading requires the application of a "neutral test", such as the "centre of gravity test", which gives the same value to CFSP than to other EU external action policies under the TFEU,[95] as we will now show.

IV.1. Revisiting the ECJ doctrine on the choice of the appropriate legal basis

The choice of the correct legal basis, as the Court has been constantly recalling, presents constitutional significance,[96] since it conditions the legality of the measure, particularly when the procedure foreseen in the correct legal basis is different from the one which has been followed. Indeed, from a constitutional perspective, choosing the legal basis of a measure determines compliance with the principle of conferral, respect for the nature of EU competences, potential preemption of Member States powers, the geographical scope of the measure, as well as the applicable institutional balance and ECJ jurisdiction.[97]

The selection of the adequate legal basis of the Treaties must rest, in accordance with the Court's doctrine, on objective factors amenable to judicial review, which include the aim and content of the measure in question. In case the act has several aims or components, the main or predominant aim/content will determine the legal basis of the act, as dictated by the "centre of gravity test" in which this ECJ doctrine is founded since *Titanium Dioxide*.[98] As the Court has specified, in particular for international agreements concluded by the EU,

[92] P Van Elsuwege and G Van der Loo, 'Legal Basis Litigation in Relation to International Agreements' cit. 1341 and 1344. See *Kazahstan* cit. paras 22, 24 and 30.

[93] M Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture' cit. 8.

[94] Case C-244/17 *Commission v Council* (*Kazahstan*) EU:C:2018:364, opinion AG Kokott, para. 50.

[95] Case C-180/20 *Commission v Council* (*Armenia*) EU:C:2021:495, opinion AG Pitruzzella, para. 35.

[96] Initially in Opinion 2/00 (*Cartagena Protocol*) ECLI:EU:C:2001:664 paras 5-6.

[97] C Eckes, *EU Powers Under External Pressure* cit. 116.

[98] Case C-300/89 *Commission v Council* (*Titanium Dioxide*) ECLI:EU:C:1991:244 para. 17 ff.; case C-211/01 *Commission v Council* ECLI:EU:C:2003:452 para. 39 ff.; *ECOWAS* cit. para. 73 ff.; *UN Sanctions* cit. para. 43 ff.; *Tanzania* cit. para. 43 ff., among others.

it should be verified whether the provisions of the agreement related to each aim or component are "a necessary adjunct to ensure the effectiveness of the provisions of those agreements" which pursue other objectives or components or "whether they are extremely limited in scope".[99] If the elements of the act which "display a link with the CFSP" are such that "do not determine in concrete terms the manner in which the cooperation will be implemented",[100] they are to be considered "incidental" to the main components or aims and the legal basis corresponding to that policy should not be included.

However, when the EU act has several purposes or components which are inextricably linked without one being incidental to the other, the measure will have to be founded on the various corresponding legal basis; a dual legal basis is therefore justified. Nevertheless, as the ECJ doctrine continues to uphold, recourse to a dual legal basis is excluded where the decision-making procedures laid down for each legal basis are incompatible with each other.[101] This criterion led the Court to favour, in earlier case-law, the "more democratic legal basis" as that which ensured a more intensive intervention of the EP.[102] Nonetheless, this does not seem to be upheld in later case-law,[103] particularly after the Lisbon Treaty. The EP's limited role in the procedure to conclude CFSP agreements was neither decisive in the *Tanzania* case.[104] It is however striking that the fact that TFEU legal bases no longer have priority over TEU provisions – that is, that no hierarchy exists between integration and intergovernmentalism in accordance with current art. 40 TEU – also means that the principle of institutional balance is to be accorded preference over the democratic principle.

In the application of this "centre of gravity test", what is also problematic, in my view, is that the Court seems to give more importance to the aim and purpose of the measure over the content, even if the Court insists that one of these criteria does not prevail over the other.[105] This was evident when the ECJ doctrine on the choice of the legal basis was applied in the *Tanzania* case: evaluating the content of the EU-Tanzania agreement on the conditions of transfer of suspected pirates and seized property would have led the

[99] In each of those cases, the existence of that objective or component does not justify it being specifically reflected in the substantive legal basis of the decision to sign or conclude the agreement on behalf of the EU: Opinion 1/19 (*Istanbul Convention*) ECLI:EU:C:2021:198 para. 286. Besides, the criteria used to evaluate the incidental nature of a purpose or component of an act are both quantitative and qualitative, since the Court refers to the number of provisions devoted to it, and the nature and scope of those provisions (para. 287 of Opinion 1/19).

[100] *Kazahstan* cit. para. 45; case C-377/12 *Commission v Council* (*PCA with the Philippines*) ECLI:EU:C:2014:1903 para. 56.

[101] *Titanium Dioxide* cit.; *Commission v Council* cit.; *ECOWAS* cit.; *UN Sanctions* cit.; *Tanzania* cit.

[102] *Titanium Dioxide* cit. para. 20.

[103] See, in this regard, C Eckes, *EU Powers Under External Pressure* cit. 117.

[104] RA Wessel, 'Legality in EU Common Foreign and Security Policy' cit. 17.

[105] *Armenia* cit. para. 33.

Court to conclude this was mainly an instrument of criminal cooperation.[106] However the Court's focus on the aim of the agreement resulted on a CFSP legal basis, since the objectives of the agreement were to combat maritime piracy as a threat to international security. If this was favourable to CFSP in the *Tanzania* case, it would probably be favourable to border and immigration policies in our subject here, considering that EUBAM Libya or EUNAVFOR MED Sophia seemed to predominantly pursue migration objectives.

I also find controversial that the context of the act appears to acquire such an importance in the analysis of the Court within its doctrine on the choice of the correct legal basis. The significance of the criterion related to the context of the analysed measure had already been formalised in previous pronouncements of the Court, in particular in scenarios in which the EU act sought to amend the rules contained in agreements concluded by the Union.[107] However, in those cases, the analysis of the context of the act referred, logically, to the aim and content of those agreements together with an evaluation of the aim and content of the contested measure.[108] In the *Tanzania* case however, more weight was given to the objectives of the Atalanta operation that the agreement intended to implement than to the specific aims of the contested measure, the Agreement with Tanzania. Even more concerning, a great importance was conferred to the previous existence of UNSC resolutions authorising, in that case, the activities undertaken within the Atalanta Operation.[109] Note that UNSC resolutions may also intervene, as explained above, in the migration field, as the one adopted to allow for the inspection of boats on the high seas suspected of undertaking migrant smuggling or human trafficking within Operation Sophia. In my view, it would be extremely problematic if the existence of a UNSC resolution on a given subject would systematically tip the balance in favour of CFSP when the EU acts on it irrespective of the content and aim of the concrete act at stake, when we are dealing with issues that constitute a challenge to both the international security and the internal security of the EU. Consequently, the context of the act, that is the aim and

[106] In this sense, see also C Matera and RA Wessel, 'Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements' (2014) Revista de Derecho Comunitario Europeo 1047-1064. See also our analysis of this case in P García Andrade, 'La base jurídica de la celebración de acuerdos internacionales por parte de la UE: entre la PESC y la dimensión exterior del espacio de libertad, seguridad y justicia' (2017) Revista General de Derecho Europeo 128–160.

[107] This is the series of cases related to the annulment actions brought by the UK against Council decisions adopting the EU position on the development of provisions on coordination of social security of the EEA, the Free Movement of Persons Agreement with Switzerland and the Association agreement with Turkey: case C-431/11 *United Kingdom v Council* ECLI:EU:C:2013:589; case C-656/11 *United Kingdom v Council* ECLI:EU:C:2014:97 and case C-81/13 *United Kingdom v Council* ECLI:EU:C:2014:2449.

[108] *United Kingdom v Council* cit. para. 39.

[109] As Koutrakos highlights, by focusing on the context in which the agreement was concluded, "the Court avoided the complex task of distinguishing between international and EU security and defining the scope of both" in P Koutrakos, 'The Nexus between CFSP/CSDP and the Area of Freedom, Security and Justice' in S Blockmans and P Koutrakos (eds), *Research Handbook in EU Common Foreign and Security Policy* (Edwar Elgar 2018) 296-311.

content of other measures related to it, should not be accorded, in my view, such an importance so as to shade the significance of the aim and content of the act in question.

IV.2. Applying the ECJ doctrine to CFSP/CSDP missions on migration

Security concerns are indeed shared by both policy areas, CFSP and AFSJ. The latter aims at ensuring the internal security of the Union and, particularly, the external dimension of AFSJ policies is precisely designed as a means to safeguard internal security "within the Union".[110] The CFSP – and the CSDP as part of this policy – is arguably aimed, in spite of the current broad formulation of its scope in primary law, at preserving peace, preventing conflicts and strengthening international security. The problem is that the delimitation between threats or challenges to internal security, on the one hand, and to international security, on the other, is increasingly blurred,[111] and thus linkages and overlaps between the two policy frameworks are unavoidable, making difficult to assess to "which security" the measure is contributing.

This broad, holistic conception of security and how international and internal security are more and more inextricably linked may lead to affirm that operations such as the ones examined here, aimed at enhancing third countries capabilities on migration management and combatting migrant smuggling and human trafficking, pursue CFSP and AFSJ aims. Consequently, they should be simultaneously based on CFSP and AFSJ legal bases, for having several components or aims which are inextricably linked without one being incidental to the other. The pertinent question would be therefore whether there is procedural compatibility between both policies and thus whether a dual legal basis CFSP-AFSJ is feasible or not.

As it is well-known, the Court discarded, before Lisbon, a dual cross-pillar legal basis between EC policies and the CFSP, since, in the *ECOWAS* case in which the act could pertain simultaneously to development policy and to CFSP, preference was given to the EC Treaty in accordance to a pro-integration interpretation of the old "one-way" non-affectation clause in former art. 47 TEU. Post-Lisbon, when current art. 40 TEU does not seem to accord that automatic priority to the TFEU over the TEU, the Court of Justice has theoretically accepted the possibility of a CFSP-TFEU legal basis. In practice, however, their respective decision-making procedures have been considered incompatible,[112] excluding thus a joint legal basis.

[110] Council doc. No. 7653/00 cit. 5.

[111] The *Global Strategy for the European Union's Foreign and Security Policy* explicitly states that "[i]nternal and external security are ever more intertwined: our security at home depends on peace beyond our borders" (Council document 10715/16 of 28 June 2016, 'A Global Strategy for the European Union's Foreign and Security Policy', 5 and 12).

[112] *UN Sanctions* cit. para. 47 (combining the ordinary legislative procedure foreseen in art. 75 TFEU with the only information to the Parliament of art. 215 TFEU was incompatible).

As regards the conclusion of international agreements, the combination of both CFSP-non CFSP legal bases has occurred,[113] as in cases of dual legal bases within the TFEU also with respect to internal measures.[114] This appears controversial, in my view, when we are confronted to clear divergences in decision-making procedures, since it leads to the non-application of a procedural requirement of one of the Treaty provisions at stake.[115] Although it could be argued that the conclusion of an international agreement can be jointly based on CFSP-non CFSP provisions because of the common procedure established in art. 218 TFEU,[116] combining, in internal legal acts, the ordinary legislative procedure with CFSP decision-making clearly appears hard to undertake.[117]

In other scenarios, the CFSP-non CFSP components of an agreement may lead to the adoption of two different acts corresponding to TEU and TFEU substantive legal bases, respectively.[118] However, this could be feasible for the conclusion of international agreements only, since the procedural legal basis, art. 218 TFEU, is the same. It seems however more complicate for the adoption of internal measures, particularly, when it comes to operational activities as the ones at hand here. Adopting two different acts, CFSP and AFSJ-based, would mean to set two different operations in practice – a CSDP mission and a Frontex operation – leading to an excessive investment of material and human resources, clear risks of overlap, as well as demarcation and coordination conflicts on the ground.

[113] Pre-Lisbon, this happened in I-III pillar agreements (see RA Wessel, 'Cross-Pillar Mixity: Combining Competences in the Conclusion of EU International Agreements' in C Hillion and P Koutrakos (eds), Mixed Agreements in EU Law Revisited (Hart Publishing 2010), but also, post-Lisbon, in CFSP-TFEU agreements. See, among several examples, the Council Decision 2022/1007 of 20 June 2022 on the conclusion on behalf of the Union of the Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part, which is based on art. 37 TEU, and arts 207 and 212 TFEU; see also the Council decision 2016/342 of 12 February 2016 on the conclusion, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, using both art. 37 TEU and 217 TFEU as material legal bases. See RA Wessel, 'Legality in EU Common Foreign and Security Policy' cit. However, the practice of combining CFSP-TFEU legal bases in the conclusion of global or framework agreements including CFSP provisions might have ended after the Kazahstan case: see P Van Elsuwege and G Van der Loo, 'Legal Basis Litigation in Relation to International Agreements' cit. 1351.

[114] In case C-166/07 *Parliament v Council* ECLI:EU:C:2009:499, the Court concluded on the combination of former art. 159 EC and art. 308 EC, "while complying with the legislative procedures laid down therein, that is to say, both the 'co-decision' procedure referred to in Article 251 EC and the requirement that the Council should act unanimously".

[115] In the case of the agreement with New Zealand mentioned above, the Council decision of signature was adopted by unanimity instead of QMV and on the basis of a joint proposal by the Commission and the HR-VP. As argued by Eckes, this cross-Treaty legal basis "seems to depart from the compatibility requirement as formulated by the Court in *UN Sanctions*", see C Eckes, *EU Powers Under External Pressure* cit. 138.

[116] There is still theoretical incompatibility between EP consent/consultation – no EP intervention or QMV-unanimity in the Council.

[117] RA Wessel, 'Legality in EU Common Foreign and Security Policy' cit. 27.

[118] *Ibid*.; C Eckes, *EU Powers Under External Pressure* cit. 136; P Eeckhout, *EU External Relations Law* (Oxford University Press 2011 second edition) 184.

That cooperation is, in fact, foreseen in the Frontex mandate, in which it is indicated that the Agency shall cooperate with CSDP missions and operations with a view to ensuring the promotion of EU integrated border management standards, situational awareness and risk analysis and, specifically, when cooperating with the authorities of third countries.[119] Nonetheless and even if these references might have not been drafted with the possibility of CSDP missions devoted to migration purposes in mind, Acosta precisely refers, when assessing Operation Sophia, to the difficulties in ensuring coordination with Frontex. [120] In his view, the complexity of the endeavour arose from the CSDP nature of the operation and thus from its peculiar structure and logistics, which required a clarification of its real functions and how to coordinate them with Frontex operations in the region.[121] It is also very relevant, as Acosta highlights, how the assumption of internal security functions and the complexity of the migration phenomenon led to the need of a specific training for the agents participating in Operation Sophia,[122] specialization that is already present in Frontex staff. A more recent example is provided by the working arrangement signed, in July 2022, between Frontex and EUCAP Sahel Niger,[123] by which cooperation is set between the AFSJ Agency and the CSDP mission regarding capacity-building of Nigerien border management authorities, the deployment of experts to operational activities, as well as operational cooperation and information exchange through EUROSUR, all of these tasks clearly pertaining to the specific mandate of Frontex.

IV.3. Alternatives to the "centre of gravity test"

At this impasse, other alternatives to the "centre of gravity test" should be explored in order to determine the most adequate way to govern and organise the deployment of external missions with CFSP-migration purposes.

Firstly, priority could be provided to TFEU provisions through the application of the *lex generalis /lex specialis* principle by which recourse to general CFSP competence would only be possible in the absence of a more specific competence or legal basis.[124] Although

[119] Art. 68(1)(j) and 73(2) of Regulation 2019/1896; arts 77(3) and 78(1) of this Regulation also refer to coordination regarding the deployment of Frontex liaison officers and observers.

[120] M Acosta Sánchez, 'Sobre el ámbito competencial de las operaciones de paz' cit. 40.

[121] The *Global Strategy for the European Union's Foreign and Security Policy* points to how "CSDP missions and operations can work alongside the European Border and Coast Guard and EU specialised agencies to enhance border protection and maritime security in order to save more lives, fight cross-border crime and disrupt smuggling networks", Council document 10715/16 cit. 16.

[122] M Acosta Sánchez, 'Sobre el ámbito competencial de las operaciones de paz' cit. 40.

[123] Frontex, 'Frontex signs Working Arrangement with EUCAP Sahel Niger' (15 July 2022) frontex.europa.eu. The text of the working arrangement has been directly consulted by the author.

[124] M Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge University Press 2008).

some precedents can be found in which the Court applied, when choosing the appropriate legal basis of a measure, a "*lex specialis* test", as a different one from the "centre of gravity test",[125] there are also cases in which the CFSP was rejected to be seen as a general or residual competence only applicable when other competences do not apply.[126]

Other views put the accent on the criterion of the legislative character of the measure in question. The exclusion of legislative acts in art. 24 TEU would be read in a substantive rather than a formalistic way,[127] that is, excluding that the Council *qua* CFSP adopts normative acts of general application which directly affect individuals without the participation of the EP.[128] This could be probably applied to a scenario similar to the *Tanzania* case, in which the measure in question, an international agreement on the transfer of suspected pirates, presented a normative content, but certainly not to operational activities as the ones represented by CSDP missions and Frontex operations.

A third alternative would be to preserve a pro-integrationist reading of art. 40 TEU within the "centre of gravity test". This would be done by interpreting that the one-way protection accorded by former art. 47 TEU to EC policies from CFSP incursions was explained because the principle of conferral already prevented the Community from invading the CFSP area.[129] After the Union's succession to the EC and the suppression of pillars with the entry into force of the Lisbon Treaty, the principle of conferral would have lost that protection effect since all TEU and TFEU policies are now EU competences – with varying degree of intensity in their nature, of course –, justifying the mutual non-affectation sense of current art. 40 TEU. It could be argued that the authors of the Treaties still have the intention of advancing in the integration path and this, together with the protection of certain EU structural principles and fundamental values in which the EU is founded, such as the democratic principle or the rule of law,[130] would continue to tip the balance in favour of the

[125] See RA Wessel, 'Legality in EU Common Foreign and Security Policy' cit. 16. See case C-48/14 *Parliament v Council* ECLI:EU:C:2015:91 para. 49.

[126] M Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture' cit. 14. See *UN Sanctions* cit.; AG Bot indicates that the relationship between art. 75 TFEU and art. 215 TFEU shall not be that of *lex generalis* and *lex specialis*, but must be viewed as one of complementarity (para. 69), implicitly accepted by the Court in its judgment (para. 66).

[127] P Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency' (2010) CMLRev 1003.

[128] C Matera and RA Wessel, 'Context or Content?' cit. 1058.

[129] See C Martínez Capdevila and I Blázquez Navarro, 'La incidencia del artículo 40 TUE en la acción exterior de la UE' (2013) Revista Jurídica de la Universidad Autónoma de Madrid 206 and 216.

[130] Applicable to the CFSP as recalled by the Court: see *H v Council and Commission* cit., *Rosneft* cit., and the *Tanzania* case cit. paras 70-71.

TFEU in case of incompatible procedures within the "centre of gravity test".[131] Consequently, if a measure simultaneously pursues a CFSP and a migration objective, that act should, according to this reading of art. 40 TEU, be based on the TFEU legal basis.

V. Conclusion

The interpretation of the mutual non-affectation clause suggested above is probably not possible in light of the recent Court's approach tending to an increasing "normalisation" and "constitutionalisation" of CFSP within the EU legal order.[132] Within this framework, a strict application of the "centre of gravity test" may nonetheless provide the answer to this legal basis controversy. Indeed, the EU political discourse has insisted for more than a decade that migration should be mainstreamed into the external policies of the Union. This justifies that a CSDP mission, aimed at reinforcing the rule of law in a third country by strengthening their security forces' capacities, may include, as an incidental component, some training and advice on building their migration management system. Certainly, the main or preponderant aim or content of the mission is not migration-related and can be considered to principally contributing to specific CFSP-international security purposes. That could be the case of EUCAP Sahel Mali or EUCAP Sahel Niger at its origins.

Nevertheless, the EU discourse seems to evidence in recent years a certain "instrumentalization" of CFSP/CSDP in favour of migration-related objectives, while developments in practice, Operation Sophia being a case in point, corroborate this. As Koutrakos explains, the CSDP, while being shifted away from the hard end of security and moved closer to its soft end, has been instrumentalised in order to achieve the objectives of other EU policies, and the AFSJ constitutes a clear example.[133] This would be, for instance, the case of an international mission aimed at eminently and directly addressing migration challenges to the security of the Union that come from a certain country or region, such as disrupting international networks devoted to migrant smuggling in the territory of a third country or in international waters, or assisting a third country in reinforcing its migration management or border controls system in order to prevent irregular flows heading to the EU. Under this approach, it would not be a question of simultaneity of objectives, but rather of an AFSJ objective which is being pursued through CFSP tools.

[131] Very interestingly, Contreras García argues in favour of using the TFEU legal basis as a requirement flowing from the principle of consistency of the EU external action, since the competence question or the inter-institutional demarcation of powers better protect that principle within the TFEU: I Contreras García, *La delimitación horizontal entre la PESC y la dimensión exterior del espacio de libertad, seguridad y justicia*, Final dissertation for the Degree in Law, Universidad Pontificia Comillas, April 2020.

[132] See RA Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy' in R Schütze (ed.), *Governance and Globalization: International Problems, European Solutions* (Cambridge University Press 2018); J Santos Vara, 'El control judicial de la política exterior: Hacia la normalización de la PESC en el ordenamiento jurídico de la Unión Europea (a propósito del asunto Bank Refah Kargaran)' (2021) Revista de Derecho Comunitario Europeo 159-184.

[133] P Koutrakos, 'The Nexus between CFSP/CSDP and the Area of Freedom, Security and Justice' cit. 13.

Accepting the instrumental dimension of CFSP means, in my view, that migration and internal security concerns appear to be preponderant over CFSP objectives and thus the "centre of gravity test" would easily solve the conflict in favour of resorting to the TFEU and the AFSJ integrated policies. This would respect the EU constitutional safeguards the authors of the Treaty specifically assigned to the Union's response to migration challenges under Title V TFEU, safeguards which, at least for the time being, appear to be more protective of the values and principles in which the Union is founded than those provided by the CFSP legal framework.