

The EU as an International Actor in the Domain of Justice and Home Affairs*

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I Introduction

When justice and home affairs (JHA) were for the first time introduced by the Treaty of Maastricht (1993) as a policy-making domain of the EU, no provision was made for cooperation of the Union with third countries. This imposed serious restrictions on the scope of EU action in justice and home affairs because in areas such as police cooperation, the fight against international organized crime, and asylum and immigration, the effectiveness of internal action often depends to a large extent also on parallel external action. In the years following the entry into force of the Treaty of Maastricht, EU action on external JHA aspects remained limited to efforts by the Presidency to ensure a minimum of coordination between national positions on the international stage and a number of formally adopted common positions. The Union's deficits in this respect became all the more apparent because after 1993 many third countries, among these all the associated countries of Central and Eastern Europe, the USA and Canada, expressed considerable interest in close cooperation and even the conclusion of agreements with the Union in the fields covered by Title VI. It was only with the Treaty of Amsterdam (1999) that the Union acquired for the first time a capacity to act internationally in the domain of justice and home affairs. Since then external relations in the JHA domain have been a rapidly growing part of the EU's international relations, a fact very much underlined by the so-called 'multi-presidency programmes' on JHA external relations which the Council has been adopting since 2001.¹

* This article is a revised version of a paper which was presented – with the help of a travel grant awarded by the British Academy – at the founding conference of the European Society of International Lawyers (ESIL) at the Villa La Pietra in Florence on 14 May 2004. The author would like to thank Christophe Hillion (University College London) and Hans G. Nilsson (General Secretariat of the Council of the European Union) for their most helpful comments on the original paper.

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¹ For the latest update see Council of the European Union, *Presidency: JHA External Relations Multi-Presidency Programme*, Council document 5097/04 of 7 January 2004.

This article will provide an analysis and evaluation of the current state of development and the limits of the EU as an international actor in this domain. It will start with a look at the legal basis for EU action as defined in the Treaties, proceed with an analysis of the decision-making procedures and their problems, provide then a survey of the main types of external action undertaken so far and conclude with a critical assessment of the EU's action capabilities and their problems.²

II The Legal Bases for External EU Action in the Domain of Justice and Home Affairs

The question of the external competences of the EU in the JHA domain is made more complicated by the fact that this domain is essentially split between the 'communitarized' areas falling under the first pillar (Title IV TEC: asylum, immigration, border controls and judicial cooperation in civil matters) and those falling under the third pillar (Title VI TEU: police and judicial cooperation in criminal matters). The legal basis for external EU action in the first-pillar areas is therefore different from that in the third-pillar areas.

1. The Domain of Title IV TEC

The provisions of Title IV TEC do not provide for any explicit external powers of the EU in the communitarized JHA fields. One can assume, however, that the Community can act in those externally on the basis of the general external competence as it has evolved from the EC Treaty provisions and the case law of the European Court of Justice. The Court established in its earliest case law that the EC has legal capacity to enter into international commitments within the whole field of objectives defined in the Treaty. According to the relevant case law of the Court, the authority to conduct external relations may either be explicitly stated in the Treaty or result implicitly from provisions of the Treaty.³

Because of the absence of explicit external powers, the question of implied powers is crucial in the communitarized JHA fields. It emerges from the

² In its current version the paper does not take into account the additional dimension of complexity of EU external relations in the JHA field generated by the 'opt-out' provisions granted to the United Kingdom, Ireland and Denmark which could easily fill a paper on its own.

³ Case 22/70 (AETR/ERTA) *Commission vs. Council* [1971] ECR 263, Joined cases 3,4 and 6/76 *Kramer, Cornelius and others* [1976] ECR 1279 and Opinion 2/91 (Re: ILO Convention) [1973] ECR I-1061.

Court's case law that implied powers can only be assumed if three conditions are fulfilled: first (as can be taken from the *AETR* and *Kramer* cases as well as the *WTO Agreement Opinion*),⁴ there must be *objectives* of the Community for whose achievement the external action is to be undertaken; second (as can be taken, inter alia, from the *Rhine Navigation Agreement*⁵ and *ECHR*⁶ *Opinions*), there must be *explicit internal powers* of the Community on the matter on which external action is to be undertaken; and third (as it can be taken from the *Rhine Navigation Agreement Opinion*⁷, the *WTO Agreement Opinion*⁸ and, most recently, the *Open Skies* cases⁹), it must be *necessary* for the Community to act externally for the achievement of the respective objectives. It should be added that, according to the Court's reasoning in the *Open Skies* cases (which builds on the *Rhine Navigation Agreement Opinion*), an implied external power can even exist without any prior exercise of the corresponding internal powers if the exercise of the external power is necessary for the attaining of a Community objective.¹⁰ All three of the above conditions can be considered as fulfilled in the case of the communitarized JHA area.

While not establishing comprehensive common policy competences in these fields, the Treaty provides for a range of more or less clearly defined individual objectives in areas in which complementary external action can be envisaged – such as common measures on illegal immigration and residence, including repatriation of illegal residents (Article 63(3)(b) TEC). The Community is also vested with corresponding powers regarding these objectives, and has been exercising these powers through the adoption of a growing number of legally binding texts in the Title IV TEC areas. It can be argued that the largely successful implementation of the five-year Tampere programme until the end of April 2004 has already generated a set of common

⁴ Case 22/70 (*AETR/ERTA Commission vs. Council*) [1971] ECR 263; Joined cases 3,4 and 6/76 *Kramer, Cornelius and others* [1976] ECR 1279; Opinion 1/94 (Re: Competence of the Community to conclude international agreements concerning services and the protection of intellectual property rights) [1994] ECR I-5267.

⁵ Opinion 1/76 (Re: Draft Agreement for a Laying-up Fund for Inland Waterway Vessels) [1977] ECR 741.

⁶ Opinion 2/94 (Re: Accession of the Community the European Convention for the Protection of Human Rights and Fundamental Freedoms) [1996] ECR I-1759.

⁷ Opinion 1/76 (Re: Draft Agreement for a Laying-up Fund for Inland Waterway Vessels) [1977] ECR 741.

⁸ Opinion 1/94 (Re: Competence of the Community to conclude international agreements concerning services and the protection of intellectual property rights) [1994] ECR I-5267.

⁹ Cases C-467/98 *Commission vs. Denmark* [2002] ECR I-9519; C-468/98 *Commission vs. Sweden* [2002] ECR I-9575; C-469/98 *Commission vs. Finland* [2002] ECR I-9627; C-471/98 *Commission vs. Belgium* [2002] ECR I-9681; C-472/98 *Commission vs. Luxembourg* [2002] ECR I-9741; C-475/98 *Commission vs. Austria* [2002] I-9797; C-476/98 *Commission vs. Germany* [2002] ECR I-9855.

¹⁰ See Case C-467/98 *Commission vs. Denmark* [2002] ECR I-9519, paragraphs 56–57.

internal rules, especially in the fields of asylum, immigration and civil law cooperation,¹¹ which provide a substantial basis for implied external powers.

While the substantive requirements of the ‘necessity test’ remain one of the most controversial elements of the ‘implied powers doctrine’,¹² there can be little doubt that the *effet utile* argument that lies at the heart of the implied powers doctrine also applies to these JHA fields. This is particularly obvious in the domain of asylum and immigration policy which requires cooperation with third countries both to control asylum and immigration flows and to facilitate the return of rejected asylum seekers and illegal immigrants. One could clearly argue – along the lines of the Court’s reasoning in the *Rhine Navigation Agreement Opinion*¹³ – that it would be impossible to achieve some of the objectives defined in Title IV TEC without parallel external action. Arguably external action thus justified extends to the negotiation and conclusion of agreements with third countries or international organizations on the basis of Article 300 TEC, but also to the maintaining of appropriate relations with the UN, the Council of Europe, the OECD and other international organizations in accordance with Articles 302–304 TEC.

Practice has so far confirmed the assumption of external EC implied powers in the domains of Title IV TEC. The key example are the readmission agreements concluded¹⁴ or under negotiation¹⁵ with several third countries considered to be major countries of origin of illegal immigration. These agreements have been formally based on Article 63(3)(b) TEC in conjunction with Article 300 TEC.¹⁶ Article 63(3)(b) TEC provides for measures on illegal immigration and illegal residence, including repatriation of illegal residents, but does not explicitly mention readmission agreements or any other

¹¹ See Communication from the European Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations, COM(2004) 401, 2 June 2004, which also includes a Commission staff working document (SEC(2004)680) which lists the important legislative instruments adopted.

¹² A useful recent analysis is provided in Rass Holdgaard, ‘The European Community’s Implied External Competence after the Open Skies Cases’ (2003) 8 EFA Rev, pp. 370–372 and 383–384.

¹³ Opinion 1/76 (Re: Draft Agreement for a Laying-up Fund for Inland Waterway Vessels) [1977] ECR 741.

¹⁴ Readmission agreements have so far been concluded with Hong Kong (2002), with Macao (2003) and Sri Lanka (2003). An agreement with Albania was initialled on 18 December and is awaiting formal conclusion. Only the agreement with Hong Kong has so far entered into force.

¹⁵ Readmission agreements are currently under negotiation with Russia, the Ukraine, Morocco, Pakistan, Algeria, China and Turkey.

¹⁶ See Council Decision of 17 December 2003 concerning the conclusion of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China on the readmission of persons residing without authorization (204/80/EC), OJ L 17/23 of 14 January 2004.

external measures. The same legal basis has been chosen for the inclusion of readmission clauses in the ('mixed') Political Dialogue and Cooperation agreements with the group of Central American countries comprising Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama and with the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela) which were signed on 15 December 2003 and also for the readmission clause in the EU association agreement with Syria which was expected to be signed at the beginning of May 2004 but has now been delayed because of controversies over the wording of a chemical weapons clause.

As to the nature of external Community competence in the areas of Title IV TEC, there are clearly no provisions in the Treaty which suggest an a priori exclusivity. Yet according to the well-established case law of the Court on pre-emption exclusivity can also result from the pre-emptive effects of the exercise of Community powers at the internal level, and according to the Court's *ILO Convention Opinion*¹⁷ this doctrine of pre-emption applies to the whole range of EC Treaty objectives – therefore also to those of Title IV TEC. It should also be recalled that the Court has held in the *WTO Agreement Opinion* that the Community, whenever it has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries (which clearly is the case with several of the instruments adopted in the asylum and immigration areas) or expressly conferred on its institutions powers to negotiate with non-member countries, acquires an exclusive external competence in the spheres covered by those acts.¹⁸ It can indeed be argued that in order not to endanger the principle of supremacy of EC legislation in the fields of asylum, immigration, border controls and judicial cooperation in civil matters, the matters covered by this legislation will necessarily entail a pre-emptive effect also on external action by Member States on these matters and an exclusive competence of the Community. This means, for instance, that in the domain of judicial cooperation in civil matters, the Community has acquired, as a result of the adoption of the Brussels I and II Regulations,¹⁹ exclusive external competence regarding uniform jurisdiction rules and the recognition and enforcement of judgements in all civil and commercial as well as matrimonial and parental responsibility matters covered by these Regulations – a rather wide field indeed.

¹⁷ Opinion 2/91 (Re: Convention No. 170 of the International Labour Organization concerning safety in the use of chemicals at work) [1973] ECR I-1061.

¹⁸ Opinion 1/94 (Re: Competence of the Community to conclude international agreements concerning services and the protection of intellectual property rights) [1994] ECR I-5267, paragraph 95.

¹⁹ OJ L 12 of 16.01.2001 and OJ L 338 of 23 December 2003.

2. *The Domain of Title VI TEU*

In the JHA areas covered by Title VI TEU, the competence basis for external action is rather different. Article 38 TEU provides that agreements referred to in Article 24 TEU may cover matters falling under Title VI. This means that in the context of the third pillar, the Council can make use of the CFSP provision enabling it to negotiate and conclude agreements with third countries or international organizations. According to Article 24 the Council can authorize the Presidency to open negotiations ‘when it is necessary to conclude an agreement with one or more States or international organizations in the implementation of this Title’ which shall then be concluded by the Council. This opens up – the terms ‘necessary to conclude’ leaving a wide margin of discretion – the whole domain of Title VI TEU to international treaty-making, a very substantial step forward in comparison with the ‘old’ pre-Amsterdam third pillar.

Yet, as is well known, Article 24 TEU must be seen in conjunction with the peculiarity that here a treaty-making procedure has been established without the EU itself having been formally granted legal personality. Does this mean that only the Member States collectively but not the EU can conclude such agreements? Such an interpretation seems to be supported not only by Declaration No. 4 to the Final Act of the Treaty of Amsterdam which explicitly states that Article 24 TEU shall not imply any transfer of competence from the Member States to the European Union but also by Article 24(5) TEU which by stating that no agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedures clearly points to national ratification procedures. It should also be mentioned that Article 12 TEU does not list agreements under the instruments of the CFSP, suggesting that these are not to be considered as external instruments of the Union as such. All this seems to support an interpretation, at least originally also shared by the Legal Service of the European Commission, according to which not the Union as such can conclude such agreements but only the Council in the name of the Member States.

There are, however, three major counter arguments to this interpretation. The first is that the objectives defined in Title VI TEU for whose attainment the negotiations and conclusions of agreements may be ‘necessary’ in accordance with Article 24 TEU are objectives of the Union and not only of a collective of the Member States. To put this into more concrete terms: according to Article 29 TEU it is the Union’s objective to ‘provide citizens with a high level of safety’ within the AFSJ, an objective which is to be achieved through ‘common action’ in the fields of police cooperation and criminal justice. If for the achievement of this objective and the effectiveness of ‘common action’ an

agreement with third countries or an international organization is considered necessary, the legitimacy of such action still stems from the Union's treaty-defined objectives and tasks, and not from the Member States.

The second major counter argument is that according to Article 24 TEU it is the Council – i.e. an institution of the Union and not the Member States as a group – which decides on the opening of negotiations, authorizes the Presidency to conduct those and also concludes the agreement. Nothing in this crucial provision suggests that the Council only does so on behalf or in the name of the Member States. In addition, Article 24(6) TEU, newly introduced by the Treaty of Nice, provides that agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union, a provision which seems difficult to reconcile with the idea of an agreement concluded in the name of the Member States which would ultimately only bind the Member States. With Union institutions deciding on, conducting and concluding negotiations on an international agreement in line with Union objectives, it would clearly be inconsistent with the logic of the Treaty to regard international agreements coming out of this process as being concluded in the name of the Member States.

A third counter argument can be based on one of the major revisions to Article 24 TEU introduced by the Treaty of Nice: According to Article 24(2) TEU unanimity is required in the Council only in cases in which the agreement covers issues for which unanimity is required for the adoption of internal decisions. While the unanimity requirement remains predominant in the areas of Title VI TEU, Article 34(2)(c) TEU provides for an exception as qualified majority voting shall be used for any measures implementing decisions adopted for purposes other than approximation of the laws and regulations of the Member States. At least in principle this opens up the possibility of majority voting in the negotiation and conclusion of international agreements on matters of Title VI – which would be incompatible with the idea of an agreement concluded in the name of the Member States.²⁰

While there is clearly a regrettable degree of ambiguity in the Treaty provisions, a reasonably strong case can therefore be made for the argument

²⁰ For a detailed discussion of these and other counter arguments see Stephan Marquardt, 'La capacité de l'Union européenne de conclure des accords internationaux dans le domaine de la coopération policière et judiciaire en matière pénale' in Gilles de Kerchove and Anne Weyembergh (eds), *Sécurité et justice: enjeu de la politique extérieure de l'Union européenne*, (Editions de l'Université de Bruxelles, Brussels, 2003), pp. 185–187. It has also been argued that the removal by the Treaty of Nice of the reference to the Member States ('to them') in Article 24(5) TEU (provisional application of an international agreement while one or more Member States are in the process of ratifying it) suggests that an agreement based on Article 24 TEU applies to the Union and not the Member States (Editorial (2001) 38 CML Rev, p. 827). Yet this interpretation is not absolutely compelling as the wording clearly leaves open the possibility of a provisional applicability only to Member States.

that agreements based on Article 24 TEU can indeed be considered as concluded in the name of the Union. This argument is further strengthened by the fact that – starting with the Agreement between the European Union and the Federal Republic of Yugoslavia on the activities of the European Union Monitoring Mission (EUMM) in the Federal Republic of Yugoslavia concluded in September 2001²¹ – the Council has in fact concluded several agreements on the basis of Article 24 TEU which are formally designed as being concluded between the European Union and the respective third country. This practice has also been extended to the domain of Title VI through the conclusion of an extradition and a mutual legal assistance agreement between the Union and the USA on 25 June 2003²² and the conclusion on 20 December 2003 of an agreement between the Union and Iceland and Norway on the application of certain provisions of the EU Convention of 29 May 2000 on Mutual Assistance in Criminal Matters,²³ to which we will return in more detail later.

While it seems difficult to contest any longer that the Union has indeed acquired a competence to negotiate and conclude agreements in the domains of Title VI TEU, nothing suggests that this competence can be considered as ‘exclusive’: there are no provisions in the Treaty which grant any a priori exclusivity to external EU powers in this domain, and the Court’s case law on exclusivity based on implied powers and pre-emptive effects generated by internal EC measures does not apply to Title V/VI measures. It is certainly true that the Member States are bound by the agreements based on Article 24, and that the loyalty obligation of Article 11(2) TEU should prevent them from adopting any measures contrary to such agreements. Yet any existing international obligations a Member State may have, for instance through previously concluded bilateral agreements, are not invalidated by an EU agreement, and Member States remain, in principle, free to enter into new commitments with third countries in the same domain as long as these do not contradict the provisions of the EU agreement. One may therefore describe the Union’s treaty-making powers under Title VI best as ‘parallel’ powers.

As regards other forms of external action, Article 37 TEU provides that within international organizations and at international conferences in which they take part Member States shall defend the common positions adopted under the provisions of Title VI TEU. Articles 18 and 19 TEU are made applicable to this defence of common positions, which means that, again, external action in the domains of Title VI TEU is regulated by CFSP provisions. While the obligation to defend common positions is clearly assigned to the Member States – which is inevitable as the Union as such is not a party to any international organization so far – it should be noted that Articles 18(1)

²² OJ L 181/27 of 19.7.2003 and OJ L 181/34 of 19 July 2003.

²³ OJ L 26/3 of 29 January 2004.

and 18(3) TEU define it as the task of the Presidency to ‘represent the Union’ and to ‘express the position of the Union’. While this implies again some sort of actor capability of the Union, it can clearly not be understood in a legal sense. So far the Union is not yet a party to any international organization or standing conference, and the absence of a formal legal personality would surely make it very difficult for being granted any full membership status. This clearly limits the Union’s capacity to act in such international fora.

III Decision-making Procedures

As in the case of the external competences, there are also differences between the decision-making procedures applicable to the JHA domains under the first and third pillars.

1. *The Title IV TEC Areas*

Decision-making procedures for agreements to be negotiated for matters falling under Title IV TEC are governed by Article 300(1) TEC which provides that the Commission shall make recommendations to the Council which then authorizes the Commission to open and conduct these negotiations, which in practise is done on the basis of a negotiation mandate adopted by the Council. In accordance with Article 300(3) TEC the Council concludes the agreement after consultation in the European Parliament, acting during the entire process from the decision to open the negotiations to their conclusion by qualified majority, except in the cases in which unanimity is required for the adoption of internal rules (Article 300(2) TEC). As unanimity was required for measures in most of the JHA domains under Title IV TEC until the end of the five year transitional period provided for by the Treaty of Amsterdam, unanimity has been the prevailing decision-making mode until end of April 2004. As a result of the end of the transitional period, the Treaty of Nice reforms and an agreement reached on common rules and basic principles in the asylum area in the JHA Council on 29/30 April 2004 (which was a precondition for moving towards the application of the co-decision procedures with qualified majority²⁴), the situation has changed substantially since the beginning of May 2004 with only a few areas – mainly immigration and judicial cooperation on family law matters – still falling under the unanimity requirement.

As regards practice, the already mentioned readmission agreements may be taken again as an example: these have all been based on Article 63(3)(b) TEC which in accordance with Article 67 TEC falls under the unanimity

²⁴ Article 67(5) TEC.

requirement for the adoption of internal rules. With explicit reference being made to Article 300(2)(1) TEC the Council has in each case concluded these agreements after formal consultation of the European Parliament as provided for by Article 300(3) TEC.²⁵

The Parliament's Report on the Hong Kong readmission agreement deplored the fact that it had not been consulted or kept informed during the negotiation process and that it found itself in the position of having to deliver its opinion after the agreement had been initialled and after the Council had already adopted a decision authorizing the signing of the agreement.²⁶ The European Parliament may have been in a position to challenge the applicability of the consultation procedure in that case as the agreement provides in Article 17 for the establishment of a joint Readmission Committee²⁷ which could be regarded as a 'specific institutional framework' in the sense of Article 300(3), second indent, requiring the Council to seek the Parliament's assent before conclusion. Admittedly, however, this would have been very much of a borderline case before the Court as it is not entirely clear from the wording of Article 17 whether the Readmission Committee has the power of taking itself legally binding decisions on implementation issues.

It should be noted that the passage to qualified majority voting and the co-decision procedure in most of the areas of Title IV TEC after the end of the transition period creates a certain asymmetry between the European Parliament's powers on internal and external measures in this domain. To give a concrete example: while the European Parliament will have full rights under the co-decision procedure for the adoption of internal measures on asylum based on Article 63(1) TEC, the procedure for concluding agreements with third countries or international agreements defined in Article 300(3) TEC, which will be applicable to international agreements in this domain, provides only for consultation of the European Parliament. Only in the case of agreements which entail an amendment of an act adopted on the basis of the co-decision procedure has the Council to obtain the Parliament's assent.²⁸

2. The Title VI TEU Areas

In the Title VI TEU areas – as pointed out before – Article 38 TEU provides for the applicability of the procedure defined in Article 24 TEU. According

²⁵ See the Council decision of 17 December 2003 to conclude the readmission agreement with Hong Kong, OJ L 17/23 of 14 January 2004.

²⁶ European Parliament document no. A5-0381/2002 (Report of 7 November 2002, Rapporteur Graham R. Watson), p. 7.

²⁷ OJ L 17/30 of 24 January 2004.

²⁸ Article 300(3) TEC, second indent.

to this procedure, the Council authorizes the Presidency to open negotiations with third countries or international organizations and concludes such negotiations on a recommendation by the Presidency. This means that – in contrast to negotiations regarding Title IV TEC matters – the Presidency and not the European Commission has both the initiator and the negotiator roles in the process, although Article 24(1) TEU provides that it may be ‘assisted’ by the Commission ‘as appropriate’.

The standard decision-making rule for agreements under Article 24 TEU is unanimity. Yet, as mentioned earlier, Article 24(4) TEU provides specifically for agreements falling within the scope of Title VI TEU that when an agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures the Council shall act by qualified majority in accordance with Article 34(3) TEU. It should be noted that this refers to the ‘double qualified’ majority as defined in Article 34(3) TEU and not the ‘standard’ qualified majority applied in the EC context. The likelihood of such agreements based on a qualified majority decision seems rather low, though, as qualified majority voting can only be applied to measures implementing formal ‘decisions’ adopted on the basis of Article 34(2)(c) TEU. These ‘decisions’ can only be adopted by unanimity.

The prevailing unanimity requirement clearly reduces the effectiveness of the EU as an international negotiator in the JHA domain. The necessary internal consensus-building process can not only cause delays in the negotiations but also makes it very difficult to react quickly and flexibly to the course of the negotiations and opportunities which might arise. The least common denominator effect also tends to drastically reduce the substance of any common negotiation positions which can have a negative impact on the scope of the negotiated agreement. The whole process is also a very laborious one, and, as one practitioner has put it, the elaboration of a ‘common position’ demands ‘so much energy’ for often such ‘poor results’ that Member States often enough do not want to bother.²⁹

Another problematic aspect of the Article 24 TEU procedure is the absence of any role for the European Parliament which – by contrast with Article 300 TEC – does not even need to be consulted. This glaring absence of the Parliament from treaty-making under Article 24 TEU can be explained by the extreme reluctance of Member States to grant the Parliament any formal say regarding international agreements on CFSP matters – for which Article 24 has been primarily designed. While one may find some justification for this rigorous exclusion of the Parliament from potential CFSP agreements – foreign policy agreements are in many countries considered to fall under

²⁹ See Emmanuel Barbe, ‘L’influence de l’Union européenne dans les enceintes internationales’ in Gilles de Kerchove and Anne Weyembergh (eds), note 20 above, pp. 212–213.

the exclusive authority of the executive branch of government – this non-involvement of the Parliament appears hardly justifiable when it comes to agreements in the JHA domains of Title VI TEU which, whether relating to matters of police or to judicial cooperation in criminal matters, can clearly directly affect the rights and freedoms of citizens.

Unfortunately the Council has already made full use of this exclusion of the European Parliament: the two agreements concluded between the EU and the USA on extradition and mutual legal assistance in criminal matters on 25 June 2003, which were the first agreements based on Articles 38 and 24 TEU,³⁰ were not submitted to the Parliament for consultation. This caused a storm of anger in the Parliament and widespread criticism inside and outside of the Parliament about the absence of adequate democratic control over the negotiation and conclusion of agreements with potentially major implications for citizens' rights and freedoms. The agreements were considered particularly sensitive because of the death penalty in the USA, the treatment by the USA of prisoners in the Guantanamo Bay prison camp, and a refusal by the USA to include in the agreement a reference to the International Criminal Court. The Parliament's reaction was all the more strong as the negotiations had been conducted under a veil of secrecy. This had also seriously affected possibilities for scrutiny by national parliaments, only some of which had been allowed to examine the relevant documents in confidence during the negotiations. The British House of Lords European Union Committee refused the British Government's request to scrutinize the agreements on a confidential basis. They were finally only declassified in May 2003, which left national parliaments less than a month before the agreements were approved by the Council at the beginning of June.³¹ As a result adequate, democratic control was ensured neither at the European nor at the national parliamentary level. It can, of course, be argued that national parliaments had in principle the possibility to block the conclusion of the agreements, but quite apart from the practical problems indicated above they can only hold their own governments to account and not the Council and its collective decision-making as such. This could only be done by the European Parliament which – so far – has no effective means for doing so. This must be regarded as a serious 'constitutional' gap in the procedures for negotiating agreements in the domain of Title VI TEU.

³⁰ See Council Decision of 6 June 2003 concerning the signature of the two agreements, OJ L 181/25 of 19 July 2003.

³¹ See on this issue Valsamis Mitsilegas, 'The New EU-US Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' (2003) 8 EFA Rev, pp. 524–525.

IV The Main Categories of External Action in the JHA Domain Thus Far

External action undertaken by the EU in the JHA domain so far can be divided into four main categories:

1. Agreements in the Domain of Title IV TEC

These agreements have so far been limited to the already mentioned readmission agreements, several of which are in the course of being negotiated.³² These agreements do not only establish the principle of mutual readmission of persons residing without permission but also provide for a range of important procedural elements such as the recognition of means of evidence regarding nationality and permanent residence, transfer modalities and modes of transportation, transport and transit costs, and data protection.³³ The agreements also provide for the establishment of a joint Readmission Committee which can take legally binding decisions on the implementation of the Agreement. The Community is represented on this Committee by the European Commission ‘assisted by experts from Member States’.³⁴

The Community is also in the process of becoming a contracting party to two important UN international legal instruments covering matters of Title IV TEC which highlight its potential for common action also in international organizations: the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 United Nations Convention Against Transnational Organised Crime, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the 2000 United Nations Convention Against Transnational Organised Crime.³⁵ In both cases the Commission went to great length to justify Community participation in the Protocols,³⁶ referring not only to the legal bases of Articles 62(2) TEC

³² See note 2 above.

³³ See the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China on the readmission of persons residing without authorization, OJ L 17/25 of 14 January 2004.

³⁴ Article 17 of the Agreement with Hong Kong.

³⁵ After being approved without amendment, the proposal for the Decision for the Community to conclude these Protocols is currently awaiting formal adoption by the Council.

³⁶ See Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime (COM(2003) 512-2) and Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime (COM2003) 512-3).

– measures at external borders – and 63(3) TEC – measures on immigration policy – but also to existing *acquis communautaire*, in particular, Articles 26 and 27(1) of the Convention implementing the Schengen Agreement of 14 June 1985,³⁷ supplementing secondary legislation³⁸ and – because of the Protocols’ provisions regarding the control of identity documents – Community legal instruments regarding visas.³⁹ It also made reference to the fact that some of the obligations laid down in the Protocols were in line with the Community’s ongoing negotiations on the conclusion of agreements with third countries on the readmission of persons illegally entering or staying on the territories of Member States. Corresponding declarations on Community competence have been attached to the two Protocols.

2. *Agreements in the Domain of Title VI TEU*

So far only three agreements of this category have been signed: The EU–US Agreement on extradition⁴⁰ (June 2003), the EU–US Agreement on mutual legal assistance⁴¹ (June 2003) and the agreement between the Union and Iceland and Norway on the application of certain provisions of the EU Convention of 29 May 2000 on Mutual Assistance in Criminal Matters⁴² (December 2003). Although the US side had initially raised some questions over the legal capacity of the Union to conclude these agreements,⁴³ the agreements were in the end signed on behalf of the European Union, and the same applied to the EU–Iceland/Norway agreement.

The signing of the EU–US agreements amounted to a first recognition of the treaty-making capacity of the Union in the Title VI TEU domain by a third country. Yet while these are clearly EU agreements, their entry into force has been made dependent on the prior drawing up of written instruments between the individual Member States and the USA on the applicability of bilateral legal assistance and extradition agreements.⁴⁴ The two agreements are in fact not replacing existing bilateral arrangements but supplementing them. The scope of the agreements is a relatively broad one as the extradition agreement covers extradition for any offence punishable by a deprivation of liberty of a

³⁷ OJ L 239/19 of 22 September 2000.

³⁸ Such as Council Directive 2001/51/EC of 28 June 2001, OJ L 187/45 of 10 July 2001.

³⁹ In particular Council Regulation (EC) 1683/95, OJ L 164/1 of 14 July 1995 on a uniform visa format, as amended by Regulation (EC) 334/2002, OJ L 53 of 23 February 2002.

⁴⁰ OJ L 181/27 of 19 July 2003.

⁴¹ OJ L 181/34 of 19 July 2003.

⁴² OJ L 26/3 of 29 January 2004.

⁴³ Stephan Marquardt, note 20 above, p. 189.

⁴⁴ Article 3(2) of the Agreement on Extradition and Article 3(2) and (3) of the Agreement on mutual legal assistance.

maximum of one year or more in both the requesting and the requested state⁴⁵ and as the Agreement on Mutual Legal Assistance applies to any offence without a penalty threshold being specified. These agreements could well become a model for the negotiation and conclusion of similar agreements with other international partners of the EU. The agreement with Iceland and Norway is of a more specific kind as it reflects the status of the two countries as associate members of the Schengen system.

A special sub-category of agreements falling within the domain of Title VI TEU are agreements concluded with third countries and international organizations by special agencies set up on the basis of Title VI TEU. So far this type of agreement has been concluded only by the European police organization Europol, but the cross-border prosecution agency Eurojust and the European Police College (CEPOL) have also been vested with possibilities to act in the external relations sphere, as have to a lesser extent structures like the European Judicial Network and the European Crime Prevention Network.⁴⁶ The external relations of Europol merit a brief closer look:

Article 42(2) of the Europol Convention⁴⁷ enables Europol to establish and maintain relations with third States and third bodies. The applicable procedure was defined in a separate Council Act of 8 November 1998 which provides for an explicit treaty-making power of Europol with third countries and non-EU bodies.⁴⁸ According to Article 2(1) and (2) of the Council Act, the Council decides by unanimity on the country or body with whom such an agreement is to be negotiated. In the following authorization given to the Director of Europol, the Council can specify 'conditions' which in practice means a negotiation mandate. The agreement arrived at in the end can only be concluded on the basis of a unanimous Council decision. It may not be surprising that no reference is made in this provision to either to the European Commission or the European Parliament. In a Council Decision of 27 March 2000, authorization was indeed given to the Director Europol to start negotiations with a total of 23 third countries and several international bodies (including ICPO-Interpol) on the receipt of information, transmission of information and the secondment of liaison officers.⁴⁹ Among the countries listed in Article 2 of the Decision, which has in the meantime been added to, figured prominently and for obvious reasons the candidate countries with whom as part of the pre-accession process a series of agreements were

⁴⁵ Article 4(1) of the Agreement on Extradition.

⁴⁶ On the external relations' 'potential' of these other bodies, see Hans G. Nilsson, 'Organs and Bodies of the Third Pillar as Instruments of External Relations of the European Union' in Gilles de Kerchove and Anne Weyembergh (eds), note 20 above, pp. 205–209.

⁴⁷ OJ C 316/2 of 27 November 1995.

⁴⁸ OJ C 26/19 of 30 January 1999.

⁴⁹ OJ C 106/1 of 13 April 2000.

concluded, as well as Norway and Iceland because of their special position as ‘associated’ Schengen members. Yet the most extensive range of arrangements with any third country so far was negotiated with the USA, very much under the impact of the 11 September 2001 terrorist attacks.

Already on 6 December 2001 a first agreement was signed between the Director of Europol, Jürgen Storbeck, and US Ambassador Rockwell Schnabel, on the exchange of both strategic and technical information in the fight against a broad range serious forms of international crime and the exchange of liaison officers.⁵⁰ Although this agreement did not yet provide for the exchange of data on persons, it was presented as a first step to be followed by a more comprehensive agreement, and its significance was underlined by the presence of US Secretary of State Colin Powell at the signing. Still, in December 2001 the Council agreed on a mandate for Europol to negotiate a second agreement with the USA including the exchange of personal data. Yet these negotiations were not without difficulties. A range of NGOs expressed major concerns about a potential undermining of EU data protection rules, and several Member States were not satisfied with the initial guarantees offered by the USA regarding their data protection rules (which are significantly lower than in the EU). A further problem was the question of Europol’s immunity in the case of US citizens seeking compensation for injury suffered as a result of transfers of data by Europol. After the US Government had given additional reassurances in a letter clarifying the content of relevant US legislation on data protection, the agreement was eventually signed in Copenhagen on 20 December 2002.⁵¹ In both cases no consultation of the European Parliament took place, which generated similarly strong negative reactions as in the case of the EU–US extradition and legal assistance agreements.

This type of ‘agency agreement’, which could also be concluded by Eurojust, cannot be regarded as a desirable form of developing external relations in the domain of Title VI TEU: although these agreements may touch upon sensitive issues – such as the forwarding of personal data on EU citizens to third country authorities – they raise serious questions about adequate parliamentary and – because of the limited role of the ECJ under the Europol Convention – judicial control and even transparency and legal certainty as none of these agreements have been published in the EU Official Journal. There is clearly a risk here of a ‘grey zone’ of external relations in the JHA domain emerging which cannot be in the interest of the democratic legitimacy and legal quality of the ‘area of freedom, security and justice’.

⁵⁰ Council document no. 14586/01.

⁵¹ Council document no. 15231/02.

3. 'Cross-pillar' Agreements in the JHA Domain

In many cases external action in the JHA domain inevitably touches upon areas falling under more than one of the Union's three pillars. As a result agreements concluded with third countries or international organizations can extend to any combination of pillars, the first and the second, the first and the third, the second and the third, or indeed all three pillars. An example for the last type has already been given: the ('mixed') Political Dialogue and Cooperation agreements with the group of Central American countries comprising Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama⁵² and with the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela)⁵³ which were both signed on 15 December 2003 and cover subject matters partially related to JHA issues under all three pillars. Yet there is also the example of the first/third cross-pillar scope of the agreements concluded with Norway and Iceland because of their status as non-EU participants in the Schengen system.⁵⁴ A further opportunity for a cross-pillar agreement has been missed as the agreement currently under negotiation with Switzerland regarding the implementation of the Schengen *acquis* in the domain of the fight against fraud is negotiated as a 'mixed' Community/Member State agreement⁵⁵ although it could (and – in the interest of the Union's coherence and effectiveness as an international actor – should) have been negotiated as a Community/Union agreement on the basis of Articles 300 TEC and 24/38 TEU.

It is in the context of negotiations on such cross-pillar agreements with international partners that the disadvantages of the Union's pillar structure become particularly obvious. Different strings of decision-making bodies (committees and working parties) in the Council are in charge of preparing and monitoring the negotiations – which often leads to coordination problems. It also happens that in one and the same article of an international legal instrument one aspect falls under Title IV TEC and another under Title VI TEU, which not only requires an enormous coordination effort between Commission, Presidency and Member States on the side of the EU but is also often difficult to fully understand by the negotiation partners.⁵⁶

It should also be mentioned that agreements with a cross-pillar dimension in the JHA domain could generate controversies over the appropriate legal

⁵² <europa.eu.int/comm/external_relations/ca/pol/pdca_12_03_en.pdf>.

⁵³ <europa.eu.int/comm/external_relations/andean/pol/agreement.pdf>.

⁵⁴ See, in particular, the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176/36 of 10 July 1999) and subsequent acts related to that.

⁵⁵ Council document no. 9717/02.

⁵⁶ A point particularly highlighted by Emmanuel Barbe, note 29 above, p. 213.

basis – Title IV TEC or Title VI TEU – for certain aspects covered by the agreements. There have been a number of such controversies regarding internal legal measures, for instance over penal law measures regarding environmental crime, illegal immigration and money-laundering where the borderline between first and third pillar areas of competence is indeed difficult to draw.⁵⁷ Such internal problems over the appropriate legal basis could well spill over into the external relations domain and emerge as a complicating factor in the negotiation and conclusion of agreements. The Court may sooner or later – on the basis of Articles 64 and 47 TEU – be called upon to settle an internal dispute in this respect.

4. The Inclusion of JHA Objectives in Political Relations with Third Countries and International Organizations

Besides their growing importance for conventional relations with third countries and international organization, JHA objectives have also been increasingly included in the agenda of external political relations of the EU. Besides including issues such as the fight against illegal immigration and trafficking in human beings in ‘political dialogue’ meetings with third countries, this has become particularly obvious in the intense diplomatic activity displayed by the Union after the terrorist attacks of 11 September 2001.

It started with CFSP ministerial Troika visits on the subject of the fight against terrorism to several Middle East countries, Saudi Arabia, Pakistan and Iran from 24 to 28 September 2001, followed by visits to Uzbekistan, Turkmenistan and Tajikistan from 30 October to 2 November, and a second high level round of visits by Guy Verhofstadt and Romano Prodi to the Middle Eastern countries, India and Pakistan in November 2001. Efforts in Central Asia were continued, inter alia, by a tour of the Regional Directors Troika from 10 to 14 June 2002. The EU also convened on 20 October 2001 a meeting of the European Conference dedicated to the combat against terrorism which brought together not only the candidate and EFTA countries but also the Balkan countries of the Stabilisation and Association Process, the Russian Federation, Moldavia and Ukraine which was effectively used to shore up support for the international coalition against terrorism. Both the ministerial level meeting of the Euro-Mediterranean partnership on 5/6 November and the ministerial week of the UN 56th General Assembly in mid-November 2001 were as well used not only for intense bilateral and multilateral efforts on maintaining the fragile international coalition but also

⁵⁷ See on this problem Jörg Monar, ‘Auf dem Weg zu einem Verfassungsvertrag: Der Reformbedarf der Innen- und Justizpolitik der Union’ 26 1/03 *Integration*, pp. 35–36.

to achieve progress on some concrete issues such as tougher measures in the fight against the financing of terrorist activities. Another example for the EU's multilateral efforts was the 'Copenhagen Declaration on Co-operation against International Terrorism' adopted on the occasion of the 4th Asia–Europe Meeting in Copenhagen on 23–24 September 2002 by the EU and its ASEM partners. Bilateral cooperation was also stepped up with Russia, inter alia, through the decision to set up a network of contact points for the fight against terrorism, negotiations on an agreement with Europol, and the discussion of further common action at a EU–Russian ministerial meeting in Moscow on 5 November 2002. The Council also agreed on a systematic evaluation of the EU's relations with third countries in the light of their possible support for terrorism with the possibility not only of incorporating terrorism clauses into trade and cooperation agreements with third countries⁵⁸ but also taking measures on the technical assistance side and other trade instruments ('carrot and stick' approach). During 2002 special clauses on anti-terrorism were then actually inserted into agreements with Algeria, Chile and Egypt, and a special exchange of letters on this issue was attached to a new cooperation agreement with Lebanon,⁵⁹ constituting a major move towards 'mainstreaming' of the fight against terrorism in conventional relations with third countries.⁶⁰

The 'European Security Strategy' adopted by the Council in December 2003 has identified international terrorism and organized crime (including its involvement in illegal immigration) as being among the key threats to the European Union and has explicitly included police and judicial means amongst the mixture of instruments required to counter these threats.⁶¹ This is a further indication of the Union's move towards the integration of JHA objectives and instruments in its foreign and security policy agenda.

V Conclusions

The JHA domain is one of the fastest growing parts of the Community/Union *acquis*: from the entry into force of the Treaty of Amsterdam on 1 May 1999

⁵⁸ The Council reached on 17 April 2002 agreement on the language to be used in anti-terrorism clauses in agreements with third countries (Council document no. 7750/02).

⁵⁹ See Council document no. 13909/1/02 REV 1, Annex p. 22.

⁶⁰ On these and other external measures in the fight against international terrorism, see Jörg Monar, *Die EU und die Herausforderungen des internationalen Terrorismus. Handlungsgrundlagen, Fortschritte und Defizite* in Werner Weidenfeld (ed.), *Herausforderung Terrorismus. Die Zukunft der Sicherheit* (Verlag für Sozialwissenschaften, Wiesbaden, 2004) pp. 136–172; and Jan Reckmann, *Außenpolitische Reaktionen der Europäischen Union auf die Terroranschläge vom 11. September 2001* (Lit Verlag, Münster, 2004), pp. 53–67.

⁶¹ Council of the European Union, *A Secure Europe in a Better World: The European Security Strategy*, Brussels, 12 December 2003, pp. 4, 5 and 7.

to end of 2003 the Council adopted no less than 500 texts (i.e. nearly 10 per month),⁶² an increasing percentage of which – in contrast with the pre-Amsterdam third pillar – are legally binding. This prodigious activity, which because of the range of ambitious objectives is likely to continue, not only increases the potential for external action in this domain – not in the least because of Community implied powers and the pre-emptive effects of internal action – but it also increases the need for complementary external measures and common positions in international relations.

On the basis of the Treaty of Amsterdam provisions – and an institutional practice which has bypassed the ambiguities regarding the Union's legal personality – some of this potential has already been realized and the Community/Union has emerged as an international actor of its own in the JHA domain which it clearly had not been before 1999. The increasing number of agreements concluded, common action in international organizations and the inclusion of JHA objectives in the foreign and security policy agenda are powerful indicators of that. Yet there are also a number of constraints and problems.

The – at least until the end of the transitional period – dominating unanimity requirement has rendered the negotiation process very cumbersome on the EU side and made it more difficult to arrive at substantial common positions and agreements. The pillar division is a complicating factor from the perspective of negotiation partners, generates problems of internal coordination and could potentially lead to conflicts over the applicable legal basis. While the absence of an explicit legal personality of the Union has so far not prevented the Union from negotiating and concluding international agreements in the domain of Title VI TEU, it must certainly be regarded as an obstacle to any potentially desirable full membership of the Union in international organizations or conferences. The agreements concluded between JHA 'special agencies' and third countries – so far limited to Europol – appear as some sort of a 'grey zone' of EU external relations which raises questions about adequate democratic and judicial control. Last but not least, there is a problem of serious democratic deficit as regards scrutiny of agreements negotiated and concluded in the domain of Title VI TEU which can, after all, have considerable implications for the rights and freedoms of citizens.

Some of these constraints and problems – though not all – will be removed if the Draft Treaty establishing a Constitution for Europe, which was adopted by the Union's Intergovernmental Conference on 18 June 2004, passes the hurdles of the ratification process: the abolition of the pillar structure, the introduction of a single legal personality for the European Union, the international representation of the Union in the JHA domain only through the

⁶² Information kindly given by Hans G. Nilsson, Head of Judicial Cooperation, General Secretariat of the Council of the European Union.

Commission,⁶³ the extension of Union competences in areas such as asylum, immigration and criminal law and the significant expansion of qualified majority voting in the JHA areas would certainly strengthen the Union's capacity to act effectively in this domain at the international level. The Draft Treaty also provides that the European Parliament's consent would be required for any agreements covering fields to which either the 'ordinary' legislative procedure applies, or the 'special' legislative procedure where consent by the Parliament is required, which covers nearly the entire JHA domain.⁶⁴ This would greatly enhance the democratic legitimacy of external EU action in the JHA domain which is likely to expand considerably over the next few years.

⁶³ See Article III-227(3) of the Provisional Consolidated Version of the Draft Treaty establishing a Constitution for Europe, Council of the European Union: CIG 86/04, Brussels 25 June 2004.

⁶⁴ *Ibid.*, Article III-227(6).