Conflict of Legal Bases and the Internal-External Security Nexus: AFSJ versus CFSP

Mauro Gatti

I. Introduction

Since the Union has conferred powers only, it must tie its measures to Treaty provisions – the so-called "legal bases" – which empower it to act. [1] To determine the correct basis of a measure, one should apply the "centre of gravity" doctrine, whereby the choice of the legal basis must rest on objective factors amenable to judicial review, which include the aim and content of that measure. [2] However, given the functional overlap between EU policies, it is sometimes difficult to identify the appropriate legal basis of a Union act.

The choice of legal bases may seem a question of technical detail, but has significant constitutional implications. [3] The correct allocation of legal bases ensures the appropriate delimitation of EU policies and competences. It also makes sure that the correct procedures are followed, that each institution exercises the powers conferred on it, and that, consequently, the EU's institutional balance is respected. Therefore, to proceed on an incorrect legal basis is liable to render an act invalid, particularly where the appropriate legal basis lays down a procedure for adopting acts that is different from that which has in fact been followed. [4]

Identifying the correct legal basis is particularly problematic in the field of security management. Security is among the main objectives of the

---

1 Opinion of 6 December 2001, 2/00, *Cartagena Protocol*, EU:C:2001:664, para 5.

2 See, *inter alia*, Judgment of 26 March 1987, *Commission* v *Council*, 45/86, EU:C:1987:163, para 11; Judgment of 11 June 1991, *Commission* v *Council* (*Titanium dioxide*), C-300/89, EU:C:1991:244, para 10.

3 Opinion of AG Kokott of 28 October 2015, *Parliament* v *Council* (*Tanzania*), C-263/14, EU:C:2015:729, para 4.

4 Judgment of 14 June 2016, *Parliament* v *Council* (*Tanzania*), C-263/14, EU:C:2016:435, para 43; Opinion of 6 December 2001, 2/00, *supra* note 1, para 5.

Union,[5] and is promoted, in particular, through two policy frameworks: (*i*) The Area of Freedom Security and Justice (AFSJ), dealing *inter alia* with anti-terrorism measures, external border management, judicial cooperation in criminal matters, and police cooperation; (*ii*) The Common Foreign and Security Policy (CFSP), covering all areas of foreign policy and all questions relating to the Union's security, including the Common Security and Defence Policy (CSDP).

A security-related measure may potentially find its legal basis in either of these policy areas. The selection of either an AFSJ or CFSP legal basis may raise constitutional issues, in terms of the principles of access to justice, democratic principles, and institutional balance. [6] The AFSJ, like most Union policies, is managed through procedures that generally reflect the archetypal "Community method". [7] The CFSP, by contrast, is a predominantly intergovernmental decision-making framework, characterised by the limited role played by the Court of Justice,[8] the Commission, and the Parliament. [9] To protect, and circumscribe, the specificities of the CFSP, Article 40 of the Treaty on the European Union (TEU) affirms that this policy must not affect the application of non-CFSP procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of non-CFSP competences (and *vice-versa*).

5 See the preamble of the TEU, pursuant to which the Union should promote "security and progress in Europe and in the world".

6 See Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*), C-658/11, EU:C:2014:41, para 4.

7 The Commission has the (almost) exclusive power of initiative, as well as the power of policy implementation (which it shares with the Member States). The Parliament and the Council, generally acting by qualified majority, share the legislative power. In addition, legal acts fall under the jurisdiction of the Court of Justice.

8 See Articles 24, paragraph 1, TEU and 275 TFEU. In any event, the Court seems to have given a narrow interpretation of restrictions on its jurisdiction in the area of CFSP: see Judgment of 19 July 2016, *H* v *Council, Commission and EUPM,* C-455/14 P, EU:C:2016:569; Judgment of 28 March 2016, *Rosneft,* C-72/15, EU:C:2017:236, paras 58-81. See further the chapters by Pieter Jan Kuijper, Sara Poli, Hugo Flavier and Francette Fines in this volume.

9 Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*), *supra* note 6, para 5.

Although several scholars have investigated the "centre of gravity" doctrine and the CFSP/AFSJ divide, [10] the issue remains unclear. Three post-Lisbon judgments – *Smart sanctions* (2012) [11] and the two so-called *Pirates* cases: *Mauritius* (2014) [12] and *Tanzania* (2016) [13] – may potentially shed some light on this topic. The present contribution analyses the case law, distilling the elements that, according to the Court, may allow EU institutions to properly identify the legal bases of security-related acts. The analysis also elucidates the shortcomings in the reasoning of the Court and suggests alternative solutions that might increase legal clarity.

It is worth noting that the present analysis concerns solely the conflict of AFSJ and CFSP legal bases, and does not address the delimitation of the AFSJ and other EU policies, such as the protection of personal data. [14] Moreover, the analysis does not focus on the cumulating of legal bases. This problem is potentially relevant, [15] but was not essential for solving the aforementioned cases. [16]

---

10 See e.g. A. Engel, "Delimiting Competences in the EU: CFSP versus AFSJ Legal Bases", *European Public Law* 47, no. 1 (2015), 47; G. de Baere, T. Van den Sanden, "Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: The Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action", *European Constitutional Law Review* 12, no. 1 (2016), 85-113; I. Govaere, V. Demedts, "Quelle définition de l'"externe" en matière d'ELSJ? Le cadre et les enjeux", in C. Flaesch-Mougin and L. S. Rossi (eds), *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union européenne après le traité de Lisbonne* (Bruxelles: Bruylant 2013), 489.

11 Judgment of 19 July 2012, *Parliament* v *Council* (*Smart sanctions*), C-130/10, EU:C:2012:472.

12 Judgment of 24 June 2014, *Parliament* v *Council* (*Mauritius*), C-658/11, EU:C:2014:2025.

13 Judgment of 14 June 2016, *Parliament* v *Council* (*Tanzania*)*, supra* note 4.

14 See Opinion of the Court of 26 July 2017, 1/15, *Draft agreement between Canada and the European Union (PNR),* EU:C:2016:656.

15 See, in particular, Judgment of 19 July 2012, *Parliament* v *Council* (*Smart sanctions*)*, supra* note 11, para 47.

16 It is worth noting that *Mauritius* and *Tanzania* cases concern international agreements, which may arguably be founded on both CFSP and non-CFSP legal bases: see F. Naert, "The Use of the CFSP Legal Basis for EU International Agreements in Combination with Other Legal Bases", in J. Czuczai, F. Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice: Liber Amicorum in Honour of Ricardo Gosalbo Bono* (Leiden: Brill | Nijhoff, 2017), 394-423, at 403-409; S. Adam, "The Legal Basis of International Agreements of the European Union in the Post-Lisbon Era", in I. Govaere and others (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden: Martinus Nijhoff, 2014),

The study begins, in section II, by exploring the cause of the difficulties in this sector, namely the potential overlap of AFSJ and CFSP initiatives. Then the paper investigates the recent case law, highlighting the techniques that the Court used to solve the conflict of legal bases between the AFSJ and the CFSP. Section III shows that the Court has primarily adopted a teleological approach, based on the distinction between "internal" and "international" security. Section IV demonstrates that the Court has complemented the teleological approach with a contextual reading of the contested measures. The conclusion elucidates the limits of the case law and suggests alternative solutions (section V).

II. Legal Bases of Security-Related Acts: The AFSJ/CFSP Conundrum

The objectives of the Area of Freedom, Security and Justice and of the Common Foreign and Security Policy are interrelated. Both policy areas are connected, in particular, with the need for security. [17] The CFSP pursues the general objectives of the EU's external action, as set out in Article 21 TEU, including safeguarding the EU's security and preserving peace and international security. [18] The CSDP has slightly more specific objectives, since it is intended to pursue peace-keeping and conflict prevention and to strengthen "international security".[19]

The AFSJ, on the other hand, should generally ensure "a high level of security", as well as the absence of internal border controls and a common policy on asylum, immigration and external border control (Article 67 TFEU). The EU's external action in the AFSJ should arguably contribute to pursuing the general objectives of the EU's policy on foreign affairs (Article 21 TEU), including safeguarding the EU's security and preserving peace and international security.

65, at 78-81; M. Gatti, P. Manzini, "External Representation of the European Union in the Conclusion of International Agreements" *Common Market Law Review* 49, no. 5 (2012), 1703, at 1720-1723.

17 Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*)*, supra* note 6, para 107. See also E. Neframi, "L'aspect externe de l'espace de liberté, de sécurité et de justice: quel respect des principes et objectifs de l'action extérieure de l'Union?", in C. Flaesch-Mougin and L. S. Rossi (eds), *supra* note 10 at 521.

18 Article 21, paragraph 2, letters (a) and (c) TEU.

19 Article 42, paragraph 1, TEU.

Since the aims of the CFSP and the AFSJ seem to overlap, the application of the "centre of gravity" doctrine to security-related acts may be complicated. This is the case, in particular, for anti-terrorism measures. Such measures may pertain to the area of CFSP, because they may pursue foreign policy objectives, given the transnational nature of certain terrorist groups. Indeed, the EU has adopted numerous CFSP anti-terrorism measures over the years. These measures are implemented through a two-stage procedure: first, the Council adopts a CFSP decision providing for restrictive measures against natural or legal persons; then the Council adopts a decision, based on Article 215 TFEU, through which it implements the previous CFSP instrument. The Lisbon reform has complicated the framework by introducing another legal basis for anti-terrorism measures. According to Article 75 TFEU (an AFSJ provision), the Union may define administrative measures with respect to capital movements and payments, "as regards preventing and combating terrorism and related activities". In light of Article 75 TFEU, one may wonder whether recourse to Article 215 TFEU for anti-terrorism measures is still warranted.[20]

The Court of Justice addressed this question in the *Smart sanctions* case. The dispute concerned a Council Decision based on Article 215 TFEU, which provided, *inter alia*, for the freezing of the funds of certain persons allegedly linked to terrorist organisations. The European Parliament submitted that Article 215 TFEU did not constitute a valid legal basis: the decision should have been adopted on the basis of Article 75 TFEU. The Court ruled in favour of the Council, stating that Article 215 TFEU may constitute the legal basis of restrictive measures, including those designed to combat terrorism. *Smart sanctions* seems therefore to resolve, to a large extent, the conflict between Articles 75 and 215 TFEU; however, the solution proposed by the Court is not entirely satisfactory, since it appears to rely on an artificial distinction between internal and international security (see section III below).

A second area of CFSP/AFSJ conflict relates to judicial and police cooperation with third States. Cooperation between judicial authorities is essential in the fight against cross-border threats to security, including terrorism, financial crime and human trafficking. The EU has conducted numerous activities in this sector, including, in particular, the conclusion of two

20 See. A. Ott, "Case C-130/10 European Parliament v. Council of the European Union, Judgment of 19 July 2012, not yet reported", *Maastricht Journal of European and Comparative Law,* no. 4 (2012), 589, at 593.

agreements on the processing of Passenger Name Record (PNR) with Australia and the US. [21] These agreements are founded on Articles 82 and 87 TFEU, [22] which concern judicial and police cooperation (AFSJ). [23] The Union has concluded two other important agreements linked to judicial cooperation, regarding the transfer of suspected pirates apprehended by the CSDP mission EUNAVFOR Somalia (Operation Atalanta) [24] to Tanzania and Mauritius. [25] Unlike the PNR agreements, these agreements were not concluded on the basis of Articles 82 and 87 TFEU, but are founded on Article 37 TEU, the basis for international agreements in the area of CFSP. It is possible to speculate as to whether the Union may validly conclude an agreement on the transfer of prisoners on a CFSP legal basis, even if this matter "undoubtedly has a certain affinity" with the AFSJ. [26]

In fact, the Parliament brought actions contesting the agreements with Mauritius and Tanzania, alleging their incompatibility with the Treaties on several grounds. The position of the Parliament in the *Mauritius* case was not entirely clear: at the hearing, it argued that the agreement with Mauri-

21 See Council Decision 2012/381/EU, OJ 2012 L 186/3; Council Decision 2012/472/EU, OJ 2012 L 215, p. 4. The Union is also seeking to conclude a PNR agreement with Canada. See Proposal for a Council Decision on the conclusion of the EU-Canada PNR Agreement, COM(2013) 528 final. However, the proposed agreement has been found incompatible with primary law in Opinion of 26 July 2017, 1/15, *supra* note 14.

22 It is worth noting that the international agreements concluded by the EU are generally based on at least two legal bases: a substantive legal basis (such as a CFSP or AFSJ provision) and a procedural legal basis (Article 218 TFEU). Since the procedural aspects are not relevant for the present analysis, this paper does not take Article 218 TFEU into account, and refers only to substantive legal bases.

23 In Opinion of 26 July 2017, 1/15, *supra* note 14, the Court held that the agreement with Canada must be based jointly on Article 16, paragraph 2, TFEU and Article 87, paragraph 2, letter a, TFEU; the issue is immaterial for the purpose of the present analysis, which does not deal with data protection (Article 16, paragraph 2, TFEU).

24 Council Joint Action 2008/851/CFSP, OJ 2008 L 301, p. 33, last amended by Council Decision 2016/713/CFSP, OJ 2016 L 125/12.

25 Council Decision 2014/198/CFSP, OJ 2014 L 108, p. 1; Council Decision 2011/640/CFSP, OJ 2011 L 254, p. 1. The EU also concluded agreements with the Seychelles and Kenya, but before the Lisbon reform: see Council Decision 2009/293/CFSP, OJ 2009 L 79, p. 47 and Council Decision 2009/877/CFSP, OJ 2009 L 315, p. 35.

26 Opinion of AG Kokott of 28 October 2015, *Parliament* v *Council* (*Tanzania*), *supra* note 3, para 61.

tius should have been based on both CFSP and AFSJ provisions, [27] yet it was not maintaining by its plea that the agreement should have been founded on a substantive legal basis other than Article 37 TEU. [28] Because of this uncertainty in the applicant's position, the Court did not take a definitive view on the correct substantive legal basis, but concentrated on procedural issues, based on another complaint raised by the applicant. In *Tanzania,* by contrast, the Parliament claimed that the Court should have annulled the decision concluding the agreement with Tanzania, because *inter alia* that agreement should have been based on Article 37 TEU and Articles 82 and 87 TFEU. The Court rejected the Parliament's plea, arguing that the agreement with Tanzania falls predominantly within the scope of the CFSP, and not within the scope of judicial cooperation in criminal matters or police cooperation, and, consequently, the contested decision could legitimately be based on Article 37 TEU alone. [29] To determine the legal basis of the agreement with Tanzania, the Court complemented the teleological approach (see section III) with a contextual interpretation of the contested measure, thereby raising some concerns (see section IV).

III. The Problematic Distinction between Internal and External Security

In order to identify the legal basis of an EU measure, the Court of Justice often tends to put the emphasis on its objectives, rather than focusing on its content. [30] Such a teleological approach is problematic in post-Lisbon external relations, since Article 21 TEU provides for a list of objectives that are common to all EU external actions. In principle, this issue might

---

27 Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*), *supra* note 6, para 40.

28 Judgment of 24 June 2014, *Parliament* v *Council* (*Mauritius*), *supra* note 12, para 44. See further H. Merket, *The EU and the Security-Development Nexus: Bridging the Legal Divide,* Studies in EU External Relations 12 (Brill | Nijhoff, 2016), 289-290.

29 Judgment of 14 June 2016, *Parliament* v *Council* (*Tanzania*), *supra* note 4, para 55.

30 M. Klamert, "Conflicts of Legal Basis: No Legality and No Basis but a Bright Future under the Lisbon Treaty?", *European Law Review* 35, no. 4 (2010), 497, at 505. There are, of course, exceptions, see e.g. S. Poli, "The Legal Basis of Internal Market Measures with a Security Dimension. Comment on Case C-301/06 of 10/02/2009", *European Constitutional Law Review* 6, no. 1 (2010), 137, at 150-151.

be partially resolved by examining the specific objectives of each policy, as listed in the TFEU (e.g. the AFSJ aims at ensuring a high level of security, *ex* Article 67 TFEU).[31] However, such a solution is not available in the case of the CFSP, since, after the Lisbon reform, this policy does not have any objective of its own.

The argument has been made that, since the Lisbon reform has eliminated the CFSP-specific objectives, one should pay less attention to the objectives of a measure when applying the "centre of gravity" doctrine. [32] According to some authors, the teleological indeterminacy of the CFSP may even raise the question of what ultimately remains of this policy after Lisbon. [33] The presumption that "normal" (non-CFSP) EU law should predominate is (allegedly) deeply ingrained in the judicial psyche. [34] Hence, there is a risk that non-CFSP competences might "encroach upon CFSP powers which would endanger the latter's special character". [35] Interestingly, the case law discussed in this paper allays these fears, and actually raises the opposite concern, as this section and the next one will show.

To preserve the specific character of the CFSP, Advocate General Bot proposed a radical solution in *Smart sanctions* and *Mauritius*: identifying "CFSP-specific" objectives. He started from the assumption that certain objectives set out in Article 21 TEU (including safeguarding the EU's security and strengthening international security) are among those "traditionally assigned" to that policy under pre-Lisbon Article 11, paragraph 1,

---

31 See further E. Neframi, "Commentaire de l'article 21 TUE'", in O. Dubos, S. Platon (eds), *Commentaire du Traité sur l'Union européenne* (Berlin: Springer, forthcoming). See also Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*), *supra* note 6, para 88.

32 M. Klamert, *supra* note 30, 505. See also A. Engel, *supra* note 10, 54; P. van Elsuwege, "On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the ECOWAS Judgment of the European Court of Justice", *Columbia Journal of European Law* 15, no. 3 (2009), 531, at 545-546. Cf. Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*), *supra* note 6, para 85.

33 C. Hillion, "A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy", in M. Cremona, A. Thies (eds), *The European Court of Justice and External Relations Law* (Oxford: Hart 2014), 47.

34 P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford: Oxford University Press, 2010), 415-416; see also P. J. Cardwell, "On 'Ring-fencing' the Common Foreign and Security Policy in the Legal Order of the European Union", *Northern Ireland Law Quarterly* 64, no. 4 (2013), 443, at 451.

35 A. Engel, *supra* note 10, 54.

TEU. [36] EU actions that pursue the objective of preserving peace and strengthening international security should consequently be regarded as falling within the sphere of the CFSP. [37] Advocate General Bot's approach has been criticised in the literature, because it seems to contradict the spirit of the Lisbon reform. [38] Had the Member States wanted to insert CFSP-specific objectives, they would have placed them in the CFSP chapter of the TEU.[39] Instead, they set up a list of objectives common to the entire external action – including the CFSP. [40] In any event, Advocate General Bot's theory on the traditional objectives of the CFSP seems not to have fallen on fertile ground, since the Court of Justice did not discuss it in either *Smart sanctions* or one of the subsequent cases.

A second theory introduced by Advocate General Bot – the distinction between internal and international security – has proved more successful. As is well known, "internal and external security are inseparable". [41] The EU's Global Strategy, for instance, expressly affirms that "our security at home depends on peace beyond our borders". [42] Advocate General Bot has acknowledged the interdependence of internal and international security, at least in principle. For instance, in *Smart sanctions* he refused to subscribe to the Council's view that the delimitation of the respective spheres of application of Articles 75 and 215 TFEU should have been based on a distinction between "internal" and "international" terrorists. [43] Furthermore, in *Mauritius* he noted that the distinction between internal and international security "is not always clear", because crime in a certain

---

36 Opinion of AG Bot of 31 January 2012, *Parliament* v *Council* (*Smart sanctions*), C-130/10, EU:C:2012:50, para 63. See also, to that effect, J. Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press, 2016), 215.

37 Opinion of AG Bot of 31 January 2012, *Parliament* v *Council* (*Smart sanctions*), *supra* note 36, paras. 63-64. See also Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*), *supra* note 6, para 87.

38 See further G. De Baere, T. Van den Sanden, *supra* note 10, 106; H. Merket, *supra* note 28, 292.

39 C. Hillion, *supra* note 33, 22.

40 G. De Baere, T. Van den Sanden, *supra* note 10, 106; C. Hillion, *supra* note 33, 22.

41 The Stockholm Programme — An open and secure Europe serving and protecting citizens, OJ 2010 C 115, p. 1, para 7.

42 Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy, http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf, 7.

43 Opinion of AG Bot of 31 January 2012, *Parliament* v *Council* (*Smart sanctions*), *supra* note 36, para 75.

region may pose a threat to both the internal security of the Union and the stability of the region concerned. [44]

On closer inspection, however, it appears that Advocate General Bot did draw a distinction between internal and international security, and argued that the delimitation of the respective spheres of application of the AFSJ and the CFSP should be based on that distinction. In *Smart sanctions,* he took the view that the contested measure was correctly adopted on the basis of Article 215 TFEU on account of its "CFSP" dimension. That dimension derived from the principal objective of the measure: combating "international" terrorism in order to maintain "international" peace and security. [45]

Advocate General Bot rendered the distinction between internal and international security more explicit in *Mauritius*. He noted that measures concerning the AFSJ, whether of a purely internal nature or having an external dimension, must be taken with the aim of furthering freedom, security and justice "inside the Union". [46] Indeed, "Article 67(1) TFEU provides that 'the Union shall constitute an [AFSJ]'". [47] According to Advocate General Bot, this implies that an international agreement on police or judicial cooperation may be based on an AFSJ provision only if such cooperation has a direct link with the aim of the "internal security" of the Union. [48] Advocate General Kokott followed the same approach in *Tanzania*, arguing that the contested measure could be founded on a CFSP provision, since it was intended to promote "international security outside the territory of the Union" and lacked "a specific connection *with security within the European Union*". [49]

Unlike its Advocates General, the Court did not expressly draw a distinction between internal and international security in either *Smart sanctions* or *Tanzania.* Nonetheless, it seemed to implicitly accept the existence of such a distinction, and referred to it in order to justify the use of

---

44 Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*), *supra* note 6*,* para 113.

45 Opinion of AG Bot of 31 January 2012, *Parliament* v *Council* (*Smart sanctions*), *supra* note 36*,* para 72.

46 Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*), *supra* note 6*,* para 109.

47 *Ibid*.

48 *Id.,* para 112.

49 Opinion of AG Kokott of 28 October 2015, *Parliament* v *Council* (*Tanzania*), *supra* note 3, paras 67-67 (emphasis in the original).

CFSP legal bases in both cases. In *Smart sanctions,* the Court held that the AFSJ and the CFSP "pursue objectives which, although complementary, do not have the same scope". [50] While the combating of "terrorism" may well be among the objectives of the AFSJ, the objective of combating "international terrorism" in order to preserve "international peace and security" nevertheless corresponds to the objectives of the external action. [51] In other words, while AFSJ legal bases may be used to fight against terrorism in general (presumably, domestic terrorism), international terrorism is to be fought through external relations instruments.

The CFSP, in particular, can be used to fight against international terrorism, which indeed constitutes a threat to "international security". [52] Therefore, Article 215, paragraph 2, TFEU (a legal basis used to implement CFSP decisions) constitutes the appropriate legal basis for measures directed against suspected terrorists who, "having regard to their activities globally" and to the "international dimension" of the threat they pose, affect fundamentally the Union's external activity. [53] In other words, the "international" dimension of terrorism and the threat it poses to "international" security seem to justify the use of a foreign policy (CFSP) tool in this area. This seems to suggest, *a contrario,* that, when terrorism constitutes a threat for "internal" security, an AFSJ legal basis might be necessary.

In *Tanzania,* the Court seemed more cautious about the distinction between internal and international security, but nonetheless appeared to uphold it. The Court based its analysis mostly on a contextual interpretation of the agreement with Tanzania, arguing that it constitutes an instrument whereby the European Union pursues the objectives of Joint Action 2008/851/CFSP, setting up Operation Atalanta. [54] The peculiarities and shortcomings of this contextual approach are discussed in the next section. It is already important to note, in any event, that the Court accepted that the objective of Operation Atalanta, and consequently the objective of the agreement with Tanzania, is to preserve "international peace and security". Since the agreement with Tanzania promotes "international" security, it

50 Judgment of 19 July 2012, *Parliament* v *Council* (*Smart sanctions*)*, supra* note 11, para 66.
51 *Id.,* para 61.
52 *Id.,* para 63.
53 *Id.*, para 78.
54 Judgment of 14 June 2016, *Parliament* v *Council* (*Tanzania*)*, supra* note 4*,* para 54.

falls predominantly within the scope of the CFSP, and does not require an AFSJ legal basis. [55] The Court thus seems again to accept, albeit implicitly, that the CFSP pursues objectives of international security, while the AFSJ is meant to promote security within the Union.

The distinction between internal and international security, expressly endorsed by the Advocates General and implicitly accepted by the Court, seems to be problematic. In the first place, such a distinction finds only limited support in primary law. The Treaties use the expression "internal security" only to affirm that Union law does not impinge on the Member States' capacity to maintain their "internal security" (Articles 72 and 276 TFEU), and to describe a Committee set up within the Council (Article 71 TFEU). The objectives of the AFSJ encompass, more generally, the maintenance of a high level of "security" (Article 67 TFEU), which is not qualified as "internal". Strengthening "international" security, on the other hand, is explicitly mentioned as a transversal objective of the entire Union's action on the international scene (Article 21 TEU), which therefore includes the external dimension of the AFSJ. Such an objective cannot, therefore, be ascribed solely to the CFSP framework. Strengthening "international security" is, to be sure, an objective of the CSDP, as recognised by Article 42, paragraph 1, TEU, but it does not belong exclusively to the CSDP. In fact, restrictive measures aimed at individuals allegedly involved in terrorist activities might well strengthen international security, as noted by the Court in *Smart sanctions,* but do not have a CSDP legal basis.

In the second place, it may be very difficult to distinguish between threats to internal and international security in practice. Advocate General Bot acknowledged this problem in *Smart sanctions,* by noting that one cannot distinguish between internal and international terrorists, since "terrorism does not recognise borders". [56] Even a terrorist organisation whose targets are limited to a specific geographical area may have international off-shoots, in particular for the purpose of financing its activities. [57] The attacks in Paris and Brussels (2015 and 2016, respectively) confirm that an international terrorist group, such as the so-called Islamic State, may threaten security within the EU. In fact, terrorism has not always been re-

55 *Id.*, para 55.

56 Opinion of AG Bot of 31 January 2012, *Parliament* v *Council* (*Smart sanctions*), *supra* note 36*,* paras 75-76.

57 *Id.*, para 76.

garded as a threat to "international security" in the case law of the Court of Justice. In the *PNR* judgment and, more recently, in Opinion 1/15, the Court held that the international agreements on the transfer of Passenger Name Record data contribute to the fight against terrorism and, consequently, safeguard "public security". [58] Since they pursue such an objective, these agreements should have an AFSJ legal basis (Article 87, paragraph 2, (a), TFEU), as recognised in Opinion 1/15. [59] Considering that terrorism should be fought through an AFSJ measure, one might assume that terrorism constitutes a threat to "internal" security (even if the Court speaks of "public" security).

It may be argued that the targets of the PNR agreements are not different from those of the restrictive measures at issue in *Smart sanctions*. Such targets may include, in particular, the same physical persons, such as members of *Al Qaeda* or the Islamic State. It seems paradoxical that such persons may be considered, in one case, a threat to internal security (*PNR*) and, in another case, a threat to "international" security (*Smart sanctions*). How may two EU measures targeting the same terrorists pursue different objectives, to the point of being based on different Treaty provisions?

A possible solution to this paradox appears, *prima facie*, to lie in the geographical location of the effects of the EU's activities, as suggested by Advocate General Kokott in *Tanzania.* In her view, the agreement with Tanzania does not have a specific connection to security within the EU, because "the cooperation with Tanzania does not seek to combat and prosecute piracy off European coasts, but in the much more distant Horn of Africa". [60] Even this solution, however, appears unsatisfactory on closer inspection. If the agreement with Tanzania had to be concluded on a CFSP basis because the Horn of Africa is "distant", would an identical agreement with a closer country, such as Morocco, have to be based on an AFSJ

58 Opinion of 26 July 2017, 1/15, *supra* note 14, para 81; Judgment of 30 May 2006, *Parliament* v *Council* (*PNR*), C-317/04 and C-318/04, EU:C:2006:346, para 55. See also Opinion of AG Mengozzi of 8 September 2016 in Opinion procedure 1/15, EU:C:2016:656, para 2.

59 The PNR agreement with Canada should also be based on Article 16 TFEU (data protection), see Opinion of 26 July 2017, 1/15, *supra* note 14; however, that provision is not directly related to security and is consequently not relevant for the purpose of the present analysis.

60 Opinion of AG Kokott of 28 October 2015, *Parliament* v *Council* (*Tanzania*), *supra* note 3 , para 67.

provision? [61] Advocate General Bot asked as similar question in *Smart sanctions*: if a terrorist group which usually operates within the EU decides to collaborate with other terrorist groups located outside the EU, do the persons associated with the first group lose their status as "internal" terrorists and become "international" terrorists? [62]

The above considerations suggest that the distinction between internal and international security is, to a large extent, arbitrary. Consequently, it seems to be hardly conducive to transparency and predictability in applying the "centre of gravity" doctrine.

A purely teleological approach is insufficient to solve the conundrum of the legal bases of security-related acts. A more viable solution is offered by the letter of the "centre of gravity" doctrine: the case law requires the interpreter of a measure to examine both its aim and its content. [63] Paying greater attention to the content of the contested measures might have led to quite different outcomes in the recent cases. The content of the agreements at issue in *Mauritius* and *Tanzania* is very close to the AFSJ: as acknowledged by Advocate General Kokott, these agreements contain "a number of provisions that are typical of cross-border judicial cooperation in criminal matters and cross-border police cooperation". [64] Hence, their legal bases should arguably have included Articles 82 and 87 TFEU, as requested by the Parliament. [65] Similar considerations are applicable to *Smart sanctions*. The contested measure concerned the freezing of terrorists' funds, an issue that falls squarely within the scope of Article 75

61 It is true that, in principle, the legal basis which has been used for the adoption of other EU measures which might, in certain cases, display similar characteristics is irrelevant in terms of identifying the legal basis of a measure, see Judgment of 27 February 2014, *United Kingdom* v *Council*, C-656/11, EU:C:2014:97, para 48. However, it would be bizarre if the Union used completely different procedures to conclude virtually identical instruments, for the sole reason that those instruments concern activities which are presumed to take place in different areas.

62 Opinion of AG Bot of 31 January 2012, *Parliament* v *Council* (*Smart sanctions*), *supra* note 36, para 76.

63 See Opinion of AG Wahl of 8 September 2016 in Opinion procedure 3/15, EU:C:2016:657, footnote 43.

64 Opinion of AG Kokott of 28 October 2015, *Parliament* v *Council* (*Tanzania*), *supra* note 3, para 60; see also Judgment of 14 June 2016, *Tanzania, supra* note 4, para 47.

65 Regarding the cumulating of CFSP and AFSJ legal bases in the case of international agreements, see *supra* note 16.

TFEU, an AFSJ provision which deals specifically with the "freezing of funds" of terrorists.

Interestingly, the Court of Justice chose another solution: instead of complementing the teleological approach with an analysis of the content, it focused on the *context* of the contested measures in order to determine their legal bases.

IV. Contextual Interpretation: The Dangers of the "Super-Absorption" of Legal Bases

If teleological interpretation does not permit an easy identification of the legal bases of security-related acts, contextual reading might perhaps be better suited to fulfil the promise of objective review.[66] As Advocate General Kokott noted in *Tanzania,* when applying the "centre of gravity" doctrine, regard must be had to objective factors amenable to judicial review, which include not only the aim and content of the contested decision, "but also the context of that decision". [67] Similarly, Advocate General Bot argued in *Mauritius* that the assessment of the centre of gravity of the measure concerned must also take account of the context of that measure. [68]

Advocate General Bot analysed in detail the context of the agreement with Mauritius, describing its close links with Operation Atalanta. He noted that the agreement organises the modalities for the transfer of suspected pirates and associated seized property from EUNAVFOR to the Republic of Mauritius and frames the conditions for the treatment and prosecution of those persons. [69] The agreement is allegedly essential to the proper implementation of Operation Atalanta, whose mission is to contribute to the deterrence, prevention and repression of acts of piracy. It would be difficult to achieve the objective of the mission "if persons who have committed acts of piracy were not subject to prosecution and could therefore re-

66 M. Klamert, *supra* note 30, 505.

67 Opinion of AG Kokott of 28 October 2015, *Parliament* v *Council* (*Tanzania*), *supra* note 3, para 59. See also Judgment of 27 February 2014, *UK* v *Council*, *supra* note 61, para 50. See also Judgment of 26 September 2013, *UK* v *Council,* C-431/11, EU:C:2013:589, para 48; Judgment of 18 October 2014, *UK* v *Council*, C-81/13, EU:C:2014:2449, para 38.

68 Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*), *supra* note 6*,* para 37.

69 *Id.,* para 59.

sume their criminal activities immediately". [70] The agreement with Mauritius is therefore intrinsically linked to the conduct of the Atalanta military operation, [71] and may even be regarded as an "implementing measure for the Joint Action [2008/851/CFSP], of which it forms an integral part". [72]

The Court of Justice followed a similar approach in *Tanzania*. Unlike its Advocates General, the Court did not expressly affirm that context must be taken into account in the assessment of the centre of gravity. Nonetheless, it did analyse the context of the agreement with Tanzania. According to the Court, the EU-Tanzania agreement is an essential element in the effective realisation of the objectives of Operation Atalanta, since it helps to ensure that pirates do not go unpunished. [73] At the same time, Operation Atalanta is an essential logical precondition for the agreement: "were there to be no such operation, that agreement would be devoid of purpose". [74] This suggests that the aim of the agreement is provide for an instrument – the transfer of pirates – whereby the EU pursues the objectives of Operation Atalanta, namely to preserve international peace and security. [75] Since the Agreement is "merely ancillary to the EUNAVFOR action", the Court concluded that it falls predominantly within the scope of the CFSP. [76]

The contextual interpretation of the agreements with Mauritius and Tanzania embraced by Advocate General Bot and the Court has four main shortcomings. In the first place, the Court and its Advocate General seem to pay too much attention to the context (and the objectives) of the contested measures, and seem to ignore their content, which is no less important, as noted in the previous section.

Second, their contextual interpretation of the contested measures is based on the assumption that promoting "international" security is an objective of the CFSP. As argued in the previous section, however, the distinction between internal and international security is far from straightforward. Even if the contested measures pursued the objectives of Operation

70 *Id.,* paras 71-73.
71 *Id*., para 78.
72 *Id*., para 70.
73 Judgment of 14 June 2016, *Parliament* v *Council* (*Tanzania*)*, supra* note 4*,* para 49.
74 *Id.,* para 51.
75 *Id.,* para 54.
76 *Id.,* paras 51 and 55.

Atalanta, as the Court affirms, they would not necessarily pursue CFSP aims, since the CFSP shares its objectives with the rest of the external action (Article 21 TEU).

Third, the Court and Advocate General Bot appear to overemphasise the connection between the agreements and Operation Atalanta. Contrary to their assertions, the agreements with Mauritius and Tanzania do not seem to be essential to the proper implementation of Operation Atalanta. The persons apprehended by EUNAVFOR can be transferred, not only to third States, but also to the competent authorities of the flag Member States which took them captive. [77] In fact, it is only when the flag Member State cannot, or does not wish to exercise its jurisdiction, that a captive may be transferred to a third State, such as Mauritius or Tanzania. [78] The agreements with third States are indispensable for this purpose, since EUNAVFOR cannot transfer any person to a third State "unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law". [79] It would seem, therefore, that the agreements with Mauritius and Tanzania are not simply a corollary of Operation Atalanta, but constitute an expression of the Member States' policy in criminal matters. Instead of prosecuting the pirates themselves, the Member States decided to outsource such prosecution to third States, via agreements concluded by the European Union and third States. Since the purpose of such agreements is related to criminal justice, it would not have been unreasonable to include at least Article 82 TFEU among the legal bases of those agreements.

Fourth and most importantly, the Court and Advocate General Bot might have paid insufficient attention to the aim and content of the contested measure *per se*. In accordance with settled case law, the choice of the legal basis of an EU act must rest on objective factors, including the aim and content of "that measure". In other words, as noted by the Court, the legal basis for a measure must be determined having regard to "its own" aim and content. [80] In *Tanzania* and *Mauritius,* the Court and its Ad-

77 See Joint Action 2008/851/CFSP, *supra* note 24, Article 12, paragraph 1, first indent. See also the arguments of the Parliament, summarised in para 30 of Judgment of 14 June 2016, *Parliament* v *Council* (*Tanzania*)*, supra* note 4.

78 See Joint Action 2008/851/CFSP, *supra* note 24, Article 12, paragraph 1, first indent.

79 *Id.*, Article 12, paragraph 1, last subparagraph.

80 Judgment of 27 February 2014, *UK* v *Council*, *supra* note 61, para 48.

vocate General defined the legal basis of the contested agreement, not in light of the aim and content of "that measure", but in light of the aim of another measure*:* Joint Action 2008/851. *Tanzania* would thus seem to introduce an exception to the general test on the centre of gravity: the choice of the legal basis of an "ancillary" EU act does not rest on its own aim and content, but depends on the legal basis of another, predominant, act.

This approach is reminiscent of the well-established doctrine of "absorption" of legal bases, whereby the leading objective of a measure absorbs its other components. [81] Pursuant to this doctrine, if an EU act has two components, one of which is predominant and the other ancillary, only the legal basis of the predominant component is used. The recent case law seems to envisage a sort of "super-absorption" of legal bases: if one act is ancillary to another, it should be founded on the latter's legal basis. The external aspect of the AFSJ is thus "absorbed by the exercise of the Union's foreign policy competence to serve the objectives of the CFSP". [82] Such an outcome is allegedly in line with the Treaties (according to Advocate General Bot), since "the requirement of consistency encourages the Council to integrate aspects relating to other Union policies into the CFSP measures which it adopts". [83]

At first sight, it might seem that the principle of external action consistency, set out in Article 21, paragraph 3, TEU, justifies the "super-absorption" of legal bases. [84] Pursuant to the requirement of consistency, the Union should mobilise its different external action competences through a "global approach", [85] in order to pursue its goals and, eventually, to rein-

81 M. Maresceau, *Bilateral Agreements Concluded by the European Community*, Collected Courses of the Hague Academy of International Law (Leiden: Brill | Nijhoff, 2004), 157.

82 Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*)*, supra* note 6*,* para 118.

83 *Id.,* para 24.

84 The word "coherence" arguably describes the content of Articles 21, paragraph 3, TEU and 7 TFEU better than the word "consistency". For the sake of simplicity, the word "consistency" is used here, since it is also used in the English version of the Treaties. See M. Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination,* Studies in EU External Relations (Leiden: Brill | Nijhoff, 2016), 30-32.

85 The expression is borrowed from E. Neframi, "Le rapport entre objectifs et compétences : de la structuration et de l'identité de l'Union européenne", in E. Neframi (ed), *Objectifs et compétences dans l'Union européenne* (Bruxelles : Bruylant 2013), 5.

force the European identity and its independence on the international scene. [86] One of the main obstacles to consistency in EU external relations derives from the fragmentation of decision-making procedures and, in particular, from the *summa divisio* between the CFSP and the rest of the external action. It might be argued, therefore, that the concern for consistency might justify, on some occasions, a certain degree of interference between EU external policies. [87] Consequently, it seems theoretically possible that the Union might occasionally have to integrate aspects relating to other Union policies into the CFSP.

However, it does not seem that such integration was necessary in the *Mauritius* and *Tanzania* cases. The use of CFSP legal bases does not seem to have increased the Union's consistency on the international scene. The EU's external action would have been equally consistent and effective if the Union had chosen to conclude the agreements with Mauritius and Tanzania on the basis of AFSJ provisions (or by using both CFSP and AFSJ legal bases). In fact, the use of AFSJ legal bases would hardly have affected the EU's ability to speak with one voice or to effectively transfer the pirates apprehended by Atalanta. As the integration of AFSJ elements into CFSP acts was not conducive to increased consistency, it does not seem possible to argue that the requirement of consistency justified an expansive interpretation of the scope of the CFSP in these cases.

A proper interpretation of external action consistency actually confirms that AFSJ legal bases were necessary in *Mauritius* and *Tanzania*. The structure of the Treaties suggests that the Union should ensure consistency in its external relations, while maintaining separate external actions. The already-cited Article 40 TEU expressly stipulates that the CFSP should not affect other policies (and *vice versa*). Moreover, Article 21, paragraph 3, TEU stipulates that the Union must ensure consistency between the "different areas" of its external action. Article 7 TFEU similarly affirms

---

86 See I. Bosse-Platière, *L'article 3 du traité UE: recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne* (Bruxelles: Bruylant 2009), 524; E. Neframi, *L'action extérieure de l'Union européenne: Fondements, moyens, principes* (Paris: Librairie générale de droit et de jurisprudence, 2010), 141; I. Bosse-Platière, "L'objectif d'affirmation de l'Union Européenne sur la scène internationale", in E. Neframi (ed), *Objectifs et compétences dans l'Union Européenne* (Bruxelles: Bruylant 2013), 268.

87 See M. Gatti, *supra* note 84, 49-58; R. Wessel, "The Inside Looking Out: Consistency and Delimitation in EU External Relations", *Common Market Law Review* 37, no. 5 (2000), 1135.

that the Union must ensure consistency between its "policies" (in the plural). The combination of Articles 21 and 40 TEU and Article 7 TFEU arguably suggests that the Union should ensure synergy among its different policies to better attain its objectives.

In light of these provisions, a Union action for the repression of acts of piracy (Operation Atalanta) may come under the CFSP, while the more detailed definition of the modalities for the transfer and the treatment of the persons concerned (the agreements with Mauritius and Tanzania) falls outside the scope of the CFSP.[88] It seems indeed reasonable that the Union may enter into agreements on police and judicial cooperation, based on AFSJ legal bases, to support military missions, founded on CFSP provisions. All these activities pursue the same goal, that is, fostering the EU's security, but have different content. They should consequently be conducted separately, on different legal bases, but also consistently.

V. Conclusion

The assessment of the legal bases of EU acts is often problematic, and is particularly complicated in the field of security. The EU pursues the security objective through two policy frameworks: the Common Foreign and Security Policy and the Area of Freedom, Security and Justice.

In its recent case law, the Court has defined the legal basis of security-related acts through a teleological and contextual interpretation of contested measures, shedding some light on this matter. The case law makes it clear that sanctions against "international" terrorists are to be adopted within the CFSP framework. Similarly, it would seem that instruments which are ancillary to CFSP operations may be based on CFSP provisions. The recent case law has perhaps the advantage of preserving a space of action for the CFSP, whose viability had been cast into doubt. The Court might have thus reassured the Member States that it does not seek to "communitarise" foreign policy via the back door, as some precedents might perhaps have suggested. [89]

88 See *a contrario* Opinion of AG Bot of 30 January 2014, *Parliament* v *Council* (*Mauritius*)*, supra* note 6*,* para 57.

89 One may think, in particular, of: Judgment of 28 April 2015, *Commission* v *Council* (*Air Transport Agreement*), C-28/12, EU:C:2015:282; Judgment of 7 Novem-

However, the recent case law may be affected by some shortcomings. In the first place, the Court seems to have identified the legal bases of the contested measures solely in light of their objectives and context, disregarding their content, thereby reducing predictability and transparency in the allocation of legal bases. Second, the recent case law appears to be inspired by an artificial distinction between internal and international security, which is probably unjustified and likely to generate further uncertainty in the application of the "centre of gravity" doctrine. [90] Third, the Court seems to take contextual interpretation too far, to the point of accepting the "absorption" of AFSJ measures by CFSP instruments, thereby contradicting the principle of consistency and blurring the delimitation of EU policies.

Given its shortcomings, the recent case law on security-related measures appears not to ensure a clear and sound demarcation of the CFSP and the AFSJ. Moreover, it could excessively extend the scope of the CFSP, to the detriment of the AFSJ and other policy areas. The recent case law may thus raise fresh concerns about the preservation of formerly Community policies, which had been allayed by the *ECOWAS* case. [91] In the future, the Council might argue, for instance, that certain international cooperation projects are "ancillary" to ongoing CSDP operations and that, pursuant to the *Tanzania* case law, they should be "absorbed" by the CFSP. Thus, a project on security sector reform financed by the Instrument Contributing to Peace and Stability [92] might now be considered as "ancillary" to a CSDP mission providing support for security sector reform in a third country. [93]

---

ber 2014, *Germany* v *Council* (*OIV*), C-399/12, EU:C:2014:2258; Judgment of 20 April 2010, *Commission* v *Sweden* (*PFOS*), C-246/07, EU:C:2010:203.

90 See M. Klamert, *supra* note 30, 505; N. Emiliou, "Opening Pandora's Box: The Legal Basis of Community Measures before the Court of Justice", *European Law Review* 19, no. 5 (1994), 488, 499.

91 Judgment of 20 May 2008, *Parliament* v *Council* (*ECOWAS*), C-91/05, EU:C:2008:288.

92 Parliament and Council Regulation 230/2014/EU, OJ 2014 L 77, p. 1.

93 This might have been the case, for instance, for the project "Support to MoD organization and administration capacity with a view to enable civilian oversight of the defence sector in Central African Republic", which was operative between June 2015 and December 2016, see www.insightonconflict.org/maps/icsp. This project might potentially be seen as ancillary to the CSDP Military Advisory Mission in the Central African Republic, see Council Decision 2015/78/CFSP, OJ 2015 L 13, p. 8 (in particular, Article 1 thereof).

Such a reinforcement of the gravitational attraction of the CFSP is arguably unwarranted and would hardly represent a positive constitutional development in the framework of EU external relations. As the CFSP remains predominantly intergovernmental and is subject to limited judicial overview, its overextension might have a negative impact on access to justice, the EU's democratic principles, and institutional balance.