



Variable Geometry in the Area of Freedom Security and Justice
The Danish and British opt-out in practice

To what extent do the opt-outs of Denmark and the United Kingdom in the Area of Freedom, Security and Justice limit their influence on its internal development and external projection?

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Abstract

From the establishment of the European integration in the 1950s towards the present, the EU was subject to a major modification of the loose intergovernmental project into a supranational construct, implying the willingness of its members to dedicate themselves to the transfer of national competences, hence the delegation of a great degree of their sovereignty to the Union. During the last decade, the incipient and sensitive Area of Freedom, Security and Justice turned into one of the major integration projects of the Union. Simultaneously, this has also led to differentiated integration, mirrored in the Danish, British and Irish abstention from this area. Laying the focus on the single abstaining states, the emphasis on the benefit of autonomy is held against the costs of exclusion, namely the lost influence on the policy direction and future development of the AFSJ. A Europe of varying pace, implying internal fragmentation resulting in legal disputes, constitutes the present reality under the AFSJ. As addressed in the following paper, the Danish and British opt-out position will be reflected on the internal and external dimension of the AFSJ. Not only the crosscutting nature of the two dimensions, but also the differences between the countries' opt-outs raises the question regarding the effectiveness of the entire policy area and the degree of input those outsiders retained. Especially the incorporation of the external dimension of the AFSJ adds the notion of the Union as an actor at the global stage, striving for unity. To evaluate the relation between the internal differentiated cooperation and external embodiment of the EU, the limits and possibilities of each opt-out is analysed and evaluated on the degree of influence and benefit, the countries maintained.

List of Abbreviations

ADS	Approved Destination Status
AFSJ	Area of Freedom Security and Justice
ATV	Airport Transit Visa
CTA	Common Travel Area
EAW	European Arrest Warrant
EC	European Communities
ECJ	European Court of Justice
EU	European Union
EUROSUR	European Border Surveillance System
MEP	Members of the European Parliament
OLP	Ordinary Legislative Procedure
SIS	Schengen Information System
TEU	Treaty Establishing the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
US	United States of America
UNTOC	United Nations Convention against transnational Crime
VIS	Visa Information System
VWP	Visa Waiver Program
QMV	Qualified Majority Voting

Table of Content

<i>Cover Sheet</i>	
<i>Abstract</i>	
<i>List of Abbreviations</i>	
1. Introduction and Outline	1
2. The Methodology	3
3. The Theoretical Framework	3
3.1. Definition of Variable Geometry	4
3.2. Definition of Influence	4
3.3. Related Theories - The Integration Dilemma Assumption	5
4. Variable Geometry in the Area of Freedom, Security and Justice	5
4.1. The British opt-out	8
4.1.1. The British opt-out - Pre Lisbon	8
4.1.2. The British opt-out - Post Lisbon	10
4.2. The Danish opt-out	10
4.3. Conclusion	13
5. Internal Implications: The Danish and British opt-outs in practice	14
5.1. The EU Visa and Asylum Policy	15
5.1.1. Short-stay Visa	15
5.1.2. The Visa Information System	16
5.1.3. The Schengen Information System	17
5.1.4. The Dublin System	17
5.2. The Danish and British participation in the AFSJ Agencies	18
5.2.1. Eurojust	18
5.2.1.1. The European Arrest Warrant System	19
5.2.2. Europol	20
5.2.3. FRONTEX	20
5.3. Conclusion	22
6. External Implications of the Danish and British opt-outs: Relations with 3rd countries	23
6.1. The European Neighbourhood Policy	24
6.1.1. Readmission Agreements	24
6.1.2. Visa Facilitation Agreements	25
6.2. International Agreements	25
6.2.1. Association Agreements	25
6.2.1.1. Mixed Agreements	26
6.2.2. The Visa Waiver Program	26
6.2.3. Approved Destination Status Agreements	27
6.2.4. The Splitting of Decisions	27
6.3. Conclusion	28
7. General Conclusion	29
<i>Bibliography</i>	

1. Introduction and Outline

Resolved to continue the process of creating an ever closer Union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.¹

The quote stated above, derived from the Preamble of the Treaty Establishing the European Union, manifests the major goal of the Union: cooperation, convergence and harmonization through the creation of an 'ever closer Union' for the benefit of its citizens. Moreover, and because of its outstanding nature, also the relatively new policy field on the Area of Freedom, Security and Justice of the EU, is mentioned in the Preamble where it is held that the Union is "*Resolved to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union.*"²

Revising those significant quotes, promoting further integration and unity, questions and doubts arise related to those ambitious goals: How much sovereignty can states transfer to the Union? Is an ever-closer Union in the AFSJ even possible or do some states have to be left behind? Is an abstention of some countries for the sake of efficiency mandatory? Those questions circulate around the problem of a closer Union versus differentiated integration. Moreover, the logic of integration that can lead to harmonization clashes directly with the demand for national flexibility and opt-outs. The Union, facing obstacles to combine the interest of all 27 member states under one common umbrella has to rethink its future direction: towards closer convergence or the exclusion of some members, voluntarily or non-voluntarily.

The AFSJ constitutes a prime example of such a rational rethinking. As Fletcher points out, this policy area, combining domestic security and criminal cross-border issues, is experiencing a demand for credibility and solidarity. However, while some Member States participate fully in the activities of the Union in this policy area, some participate only partly and others have dropped out completely.³ This process can be summarized by the term 'Variable Geometry', a concept, similar but distinguishable from the notion of 'Multi-speed Europe' and 'Europe a la carte'.⁴ Due to the sensitivity of national security, justice and rights regarding the freedom of its citizens, the policy field of the AFSJ is standing out of the usual policy pattern: the Union grants the UK, Ireland and Denmark a special position on adoption and cooperation in this policy area. Variable Geometry in relation to the AFSJ describes a situation, unique in the context of the European integration process, whereby Denmark, the UK and Ireland have decided, in principle, not to participate in. For this reason, new concerns arise, regarding the impact of such a special position for Denmark, Ireland and the UK, but also for the overall perception of the EU as an unified actor at the global stage: does standing out necessarily imply being left out? Do Denmark, Ireland and the UK play any role in the policy development of the AFSJ? Do they even participate, and if yes, what is the legal basis for those actions? How is this action compatible in relation to 3rd countries, not members to the Union?

In conclusion, those questions posed by the opt-out of those member States build up to the research question of this study, concerning the possible trade-off between influence and autonomy, resulting from Variable Geometry: *To what extent do the opt-outs of Denmark and the United Kingdom in the Area of Freedom Security and Justice limit their influence on*

¹ Preamble. TEU (2009).

² Preamble. TEU (2009).

³ Fletcher, M. (2009). Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdoms' Opt-Outs. *European Constitutional Law Review*, pp. 71-89.

⁴ As further described in section 3.1. of this paper.

its internal development and external projection? The idea of an implied loss of influence due to the reclamation of autonomy seems to be a straightforward concept. Nevertheless, the reality is more nuanced than that and this hypothesis does not capture the entire picture. Moreover, the concept of the autonomy-influence trade-off in international organizations, especially the European Union and its fragmented integration, became a crucial field of research for many scholars.

Thus the available literature on this topic is immense, but not united on this question. One of the most prolific scholars in this field is Rebecca Adler-Nissen, who published several articles, dealing with the Variable Geometry and especially the Danish position under the AFSJ. In a particularly interesting article, this author predicts through the cross-validation of interviews with EU officials from all member states, that the opt-outs do not diminish a country's influence under the AFSJ.⁵ The incentive for Adler-Nissen's study gave an article by Olsen and Pilegaard, who predict that a loss of influence is not necessarily the result of opting-out of Union policies.⁶ Lindhal and Naurin come in their article to the same prediction as Adler-Nissen.⁷ Those two authors focus more on the direct impact on the status of a diplomat from an opt-out country in Brussels. Their study results in a rejection of the assumption that opting-out also implies exclusion from the decision-making process in the EU.⁸

The large number of researchers that came to a different conclusion is not ignorable. One of them is Helen Wallace, who states in her article that an opt-out gives immunity from disliked EU legislations, but also diminishes those countries' influence on the legislation process.⁹ According to this article, an opt-out leads directly to a loss of influence. Mauritzen and Wivel come to the same conclusion in their book, implying an influence loss through a precedent loss of voting rights, created through the opt-out and exclusion from the decision-making process.¹⁰ On top of this, Warleigh predicts that the positive aspect of flexible integration is the implied abstention from disliked EU legislation. Nevertheless, according to Warleigh, the concept also features the negative aspect of a ban of the country from the 'concentric inner circle' of the Union, positioning itself into an 'outer group' attributed with less decision-making power than the intimate inner group.¹¹

As it emerges from the literature review, the sentiments of the scholars are split between the weighting power of the positive and the negative aspects of an opt-out. Whether the negative effect of the Variable Geometry outweighs the positive ones is difficult to define. For this reason, the aim of this paper is to depart from the theoretical predictions and hypothesis towards an outline of the practical reality and the application of the opt-outs. The relationship between opting-out and being left behind at the policy negotiations by the other EU member states as well as opt-in possibilities, circumventing the opt-out will be the focus of this paper.

To answer the Research Question, this paper will be structured in the following manner. Firstly, some major empirical choices and steps will be explained. Secondly, the 3rd Chapter deals with the theoretical framework of this paper. The 4th Chapter defines the Variable Geometry in the AFSJ, its historical development and manifestation in the Treaties. The sub-

⁵ Adler-Nisse, R. (2009). Behind the Scenes of Differentiated Integration: Circumventing Opt-Outs in Justice and Home Affairs. *Journal of European Public Policy*, 16 (1), pp. 62-80. (p.68).

⁶ Olsen, Pilegaard (2005). The Cost of Non-Europe? Denmark and the Common Defence and Security Policy. *European Security*, 14 (3), pp. 339-360. (p.355).

⁷ Naurin, D. Lindhal, R. (2010). Out in the Cold: Flexible Integration and the Status of Euro opt-outs. *European Union Politics*, pp. 485-509.

⁸ Naurin, D. Lindhal, R. (2010). Out in the Cold: Flexible Integration and the Status of Euro opt-outs. *European Union Politics*, pp. 485-509. (p.491).

⁹ Wallace. (1997). At Odds with Europe. *Political Studies*, 45 (4), pp. 677-688. (p.682).

¹⁰ Mouritzen, H. Wivel, A. (2005). *The Geopolitics of Euro-Atlantic Integration*. Routledge. (p.36).

¹¹ Warleigh A. (2002). Towards network democracy? The potential of flexible integration, in: Farrel M, Fella S and Newman M (eds) *European Integration in the 21st Century. Unity in Diversity?* London: Sage. (p.108).

sections of this chapter will outline the Danish and British opt-out position under the AFSJ. The 5th chapter focuses on the internal, the 6th on the external dimension of the AFSJ. In those two chapters, the British and Danish participation in operations, measures and agencies of the AFSJ will be defined. The last chapter will summarize the findings and give a short outlook on the future's development of the Danish and British opt-out position, based on the results of the study.

2. The Methodology

The core of this study lies in the relationship between the opt-out and the expected loss of influence. Even though Ireland, the UK and Denmark hold opt-outs under the AFSJ, the study leaves Ireland out, for the reason of simplicity: the opt-out structure of Ireland and the UK are extremely similar¹² and decisions on the application of each opt-out replicate each other.¹³ In addition, the UK and Ireland maintain a Common Travel Area, introducing external border controls, even on citizens of the EU.¹⁴ As a consequence of the existing similarities and ties between the countries opt-out, Ireland is formally excluded.

Focusing on the AFSJ, it becomes obvious that the policy field is highly multifaceted: Internal security, freedom and justice imply not only internal cooperation among the states, but also external actions, designated to fulfil internal goals through the dialogue with 3rd countries. Hence, the division of the AFSJ into an internal and external dimension seems to be a straightforward idea to unscramble the complexities of the area. Practically, the cutting of clear lines is not that simple. Nevertheless, guided by the formal structure and content of the Lisbon Treaty in relation to the AFSJ,¹⁵ it is possible to shed some light on the two dimensions: The internal dimension contains the Visa policy, an harmonization project of the Union. In addition, the EU agencies Eurojust, Europol and FRONTEX for internal cooperation have to be mentioned as the operators in this area. The external dimension incorporates the European Neighbourhood Policy and International Agreements. Even though both dimensions seem to be extremely complex and profound, the added value and expressiveness of this paper through the inclusion of both dimensions is intense.

On this background, the following study will reflect and compare the participation of Denmark and the UK in the internal and external dimension of the AFSJ to inquire the relationship between the opt-outs and the possible influence loss.

3. The Theoretical Framework

The following section will present the theoretical framework, including the definition of the type of differentiated integration under the AFSJ, according to the conceptualization of two eminent scholars in this field. The definition of the concept of influence will also be pointed

¹² Protocol No. 21 (1997) Article 2, states that neither the UK, nor Ireland are bound by Title V TFEU. In addition, the Protocol No.21 is valid for both countries, implying the same rules and structures of the opt-outs.

¹³ Decision for the UK: Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, 2000/365/EC, OJ L 131, 1.6.2000, p.43; Council Decision of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland, 2004/926/EC, OJ L 395, 31.12.2004, p.70. Equal Decision for Ireland: Council Decision of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, 2002/192/EC, OJ L 64, 7.3.2000,p.20.

¹⁴ Joint Statement by the UK and Ireland to maintain the Common Travel Area, adopted and confirmed in 2011.

¹⁵ Title V TFEU, Part 3, is concerned with the internal action under the AFSJ. Title V TFEU, Part 5, with the external action.

out. In addition, an important theory is illustrated, directly related to the concept of Variable Geometry and the Research Question.

3.1. Definition of Variable Geometry

First of all, Tuyschaever clarifies that three types of differentiation can be defined: ‘Multi-Speed Europe’, ‘Variable Geometry’ and ‘Europe a la Carte’. He defines the type of differentiated integration by five different indicators:¹⁶

- Actual & Potential Differentiation
- Inter- & Intra-State Differentiation
- Temporary & Non-Temporary Differentiation
- General & Specific Differentiation
- Positive & Negative Differentiation

Considering the opt-outs under the AFSJ, it is possible to define the type of differentiation through the application of the indicators, given by Tuyschaever: the opt-outs are actual; the differentiation regime is established for the present. They are non-temporary; no end-point of the opt-out is given, in contrary to the concept of ‘Multi-Speed Europe’. In addition, they are specific, concerning only the policy area under the AFSJ, in contrast to the notion of ‘Europe a la Carte’. Due to their nature of being an abstention from cooperation, they are also negative. And of course, it is dealt with inter-state differentiation; some entire Member States of the EU abstain.

Variable Geometry is the term to use if those criteria apply, as stated by Tuyschaever.¹⁷ Martenczuk affirmed the concept,¹⁸ adding the notion that in the case of Variable Geometry, the participation of all members is not the final and necessary goal, because the opt-out allows the participating countries to work more efficient in their policy-making than with an impeding member, not willing to cooperate.¹⁹

In addition, Martenczuk defines the concept of ‘Multi-Speed-Europe’ as the mildest form of differentiated integrations, while ‘Europe a la Carte’ is the strongest one. For this reason, ‘Variable Geometry’ seems to be the midway between those two concepts, for two reasons, as already mentioned by Tuyschaever: the opt-outs are limited to certain policy areas, but no end-point of the opt-out is established.²⁰ Nevertheless, Martenczuk refers to the opt-in possibility under the AFSJ, which moves the concept of ‘Variable Geometry’ closer to the concept of ‘Europe a la Carte’, because this established flexibility introduces a sense of pick-and-choose standard in this policy area.²¹

3.2. Definition of Influence

The focus of this paper lies directly on the relation between Variable Geometry and the level of influence, Denmark and the UK enjoy under the AFSJ. First of all, it is focused on the internal influence on the development of the AFSJ, the decision-making process and participation in AFSJ instruments. Secondly, it will be examined how the opt-outs affect the

¹⁶ Tuyschaever, F. (1999). *Differentiation in European Law*. London: Hart Publishing, pp. 119-124.

¹⁷ Tuyschaever, F. (1999). *Differentiation in European Law*. London: Hart Publishing, pp. 119-129. (p.126).

¹⁸ Martenczuk, B. (2009). Relations of the EU: The Experience of Justice and Home Affairs. In B. Martenczuk, *Justice, Liberty and Security: New Challenges for EU External Relations*, pp.493-523. VUBPress Brussels University.

¹⁹ Martenczuk, B. (2009). Relations of the EU: The Experience of Justice and Home Affairs. In B. Martenczuk, *Justice, Liberty and Security: New Challenges for EU External Relations*, pp.493-523. VUBPress Brussels University. (p.495).

²⁰ Ibid.

²¹ Martenczuk, B. (2009). Relations of the EU: The Experience of Justice and Home Affairs. In B. Martenczuk, *Justice, Liberty and Security: New Challenges for EU External Relations*, pp.493-523. VUBPress Brussels University. (p.496).

external projection of the AFSJ; with respect to the relation with 3rd countries.

Through the study of literature, dealing with the complex definition of influence, it became clear that not only the concepts of influence and power, but also participation are interconnected. As defined, influence describes the power of an actor to interfere without the direct authority.²² Reflected on the AFSJ, the opt-out countries abstain, in principle, from the cooperation and in response lack the policy-influencing authority. To what degree this definition reflects the reality under the AFSJ will be further analysed in the following sections. Due to the difficulty to define actual power, the focus lies on the level of participation of a country that could, according to Paul Pierson and Theda Skocpol,²³ correspond to the degree of influence a country possesses. Therefore, the countries' participation in the different policy fields of the AFSJ is the established indicator of influence.

3.3. Related Theories - The Integration Dilemma Assumption

Of major importance is the inclusion of the Integration Dilemma Assumption, setting this study into a broader context, highlighting the consequences an opt-out entail. The Integration Dilemma Assumption focuses directly on the fundamental aspect of the research question; in particular the loss of influence due to an abstention.

The core of this theory, termed by Adler-Nissen,²⁴ is based on the hypothesis that a country obtaining an opt-out gains autonomy and sovereignty on the one side, but loses a great degree of influence on the policy area and its future development on the other one. The jeopardy brought by the non-transfer of power is perceived as risky for the influence of the country on future developments of the policy area in question, because a country, obtaining an opt-out right, is formally excluded from the negotiation processes. As a result, the implied cost of losing power could actually outweigh the benefit of autonomy, introduced through the opt-out.

In accordance with the analysis of the internal and external dimension of the AFSJ, this paper will try to develop an outlook on the significance and explanatory power of the Integration Dilemma Assumption for the Variable Geometry in the AFSJ.

4. Variable Geometry in the Area of Freedom, Security and Justice

The roots for cooperation in the EU concerning its common security, freedom and justice lie in the adoption of the Schengen Agreement, abolishing internal borders among West Germany, the Benelux countries and France in 1985. The Convention on Implementing the Schengen Agreement transferred those high goals into practice in 1990. This demonstrates an example of enhanced cooperation by the members, tired of the lack of consensus in the Union on the competence to abolish the internal borders during the late 1980s.²⁵

During the conference on the Maastricht Treaty, two years after the successful implementation of the Schengen Agreement, first steps towards a Union umbrella on border issues were taken: The intergovernmental area of Pillar III on Justice and Home Affairs was introduced.²⁶ By 1997, all EU members, except the UK and Ireland, signed the Schengen Agreement, which led to the mandatory incorporation of the Schengen Acquis into the Union

²² As defined by the Merriam-Webster Dictionary. Retrieved on the 23rd of June 2012.

<http://www.merriam-webster.com/>

²³ Pierson, Skocpol (2002). Historical Institutionalism in Contemporary Political Science. pp.693-721. *New York: W.W. Norton.*

²⁴ Adler Nissen, R. Gammeltoft-Hansen, T. (2010). Straightjacket or Sovereignty Shield? The Danish Opt-Out on Justice and Home Affairs and Prospects after the Treaty of Lisbon. In M. Hvidt, *Danish Foreign Policy Year Book* (pp. 137-162). Copenhagen: Danish Foreign Policy Year Book.

²⁵ Craig, G. de Burca, (2003). *EU Law: Text, Cases and Materials* (3rd Edition ed.). Oxford: Oxford University Press.

²⁶ Treaty on European Union (1992), in *Official Journal of the European Communities (OJEC)*. 29.07.1992, No C 191. [s.l.]. ISSN 0378-6986.

framework due to the crossover structure of both documents. For example, Visa requirements were dealt with in Article 20 of the Schengen Agreement and simultaneously in the 3rd Pillar of the Maastricht Treaty. In addition, the transfer of 3rd Pillar issues into the First Pillar by the Treaty of Amsterdam in 1997 was agreed on, indicating first steps towards a supranational policy area, completed by the adoption of the Lisbon Treaty in 2009.

Analysing this development in detail, it is observable that the former 3rd Pillar topics including the free movement of people in the Schengen area, external border control, judicial cooperation in civil matters, immigration and asylum, were adopted on an unanimous decision-making basis before the Treaty of Amsterdam, based on the principle of intergovernmentalism. The shift towards supranational governance by the transfer of those issues into the 1st Pillar, ruled by QMV, decreased the actual voting power of each member. In 2009, the Lisbon Treaty abolished the Pillar structure and announced the QMV as the ordinary legislative procedure for most of the AFSJ policies.²⁷

Consequentially, the question arises how this development resulted in the Variable Geometry in the AFSJ. Basically, it has to be said that the transfer of sovereignty by the member States to the Union necessarily implies a gain of power for the EU, but also a loss of influence and independency for the members.²⁸ In general, two major changes during the history of the AFSJ increased this effect: first, the transformation of the area towards supranational governance. Secondly, the establishment of the AFSJ as a shared competence. Both steps imply more Union involvement. To assume that the acceptance of this step is self-evident clearly underestimates the states drive for autonomy. This rejection on the transfer of powers to the Union leads to the Danish and British participation under the AFSJ; two states, enjoying a special opt-out position.

To evaluate the impact of those transformations, a look into the legal structure of the AFSJ is mandatory.

Three major documents define the legal framework of the AFSJ, : The Schengen Agreement is the framework for the abolition of internal borders.²⁹ The Convention on Implementing the Schengen Agreement sets up the practical steps. Nowadays, the Lisbon Treaty constitutes the major legal framework of the AFSJ: Title V TFEU outlines the operational areas of the AFSJ, its mechanisms, institutional structure, but also a backdoor for enhanced cooperation.³⁰ Four important documents, complementing the legal basis of the AFSJ are the Protocol 19 and 20 on the incorporation of the Schengen acquis into the EU Framework and the Protocols 21 and 22, regarding the special position of Denmark, the UK and Ireland.

To improve the development of the AFSJ related legislation, the Union adopted in 2006 the 'Schengen Border Code' to replace articles of the Schengen Convention by new EU legislation.³¹ Worth mentioning is also the Dublin System, featuring the Dublin³² and

²⁷ Title V, TFEU (2009).

²⁸ Adler Nissen, R. Gammeltoft-Hansen, T. (2010). Straightjacket or Sovereignty Shield? The Danish Opt-Out on Justice and Home Affairs and Prospects after the Treaty of Lisbon. In M. Hvidt, *Danish Foreign Policy Year Book* (pp. 137-162). Copenhagen: Danish Foreign Policy Year Book.

²⁹ Article 1, Schengen Agreement (1985).

³⁰ Article 73, TFEU (2009).

³¹ 'Schengen Borders Code': Council Regulation 562/2006/ EC of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, OJ L 105, 13.4.2006, pp. 1-32.

³² Also known as Dublin II Regulation, replacing the Dublin Convention, established in 1997 and into force for all twelve signatories. Establishing Dublin II Regulation: Council Regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1-10.

EURODAC Regulation,³³ concerned with the status of asylum seekers and related fields of action.

Referring to the legal provisions of the AFSJ in the Treaties, Article 3(2) of the Treaty of the European Union states as a one of its core objectives the AFSJ.³⁴ To realize this goal, the Union enjoys a shared competence³⁵ in the field of the AFSJ.³⁶ In relation to the Unions' external action, the EU enjoys implied external powers under article 216 TFEU. Additionally, Article 3(2) TFEU introduces the option that the EU might also possess exclusive external powers. '*For the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence*'.³⁷ In other words, the Union appears to have the exclusive right to conclude agreements on behalf of its members with 3rd countries and other organizations to contribute to the effectiveness and establishment of internal measures under the AFSJ; however, interpretations vary according to the comprehensiveness of this article.³⁸

For now, taking a closer look at the policy fields of the AFSJ, the two dimensions are striking. First of all, Title V TFEU, Part 3, lies down the formal section on internal action of the AFSJ. This area includes visa and asylum issues, the cooperation of the domestic police forces and judiciary, but also the management of the common external borders. All those issues imply the cooperation within the Union among its Members. Part 5, TFEU, deals with the external action under this policy umbrella, comprising international agreements and the European Neighbourhood Policy, giving rise to the mandatory communication and exchange with 3rd countries.

To illustrate the intervenes of those two area, the EU visa policy constitutes a fitting example: Visa issues are dealt with under Part 3, listing the scope of action of the EU, on which basis, for example, regulations on visa exempted countries can be concluded.³⁹ Nevertheless, Part 5 introduces Visa Facilitation Agreements, signed by the EU and a 3rd state that grants its citizens a short-term visa without the implied application process for such a document. Those countries are 'visa-exempted'. This short outlook constitutes a perfect example for the implied external action under the AFSJ to fulfil the internal goals, like in this case, Visa exemption for entire countries.

To closure this legal outline of the AFSJ, it has to be mentioned that the legal complexity of the AFSJ is profound. Realizing that the UK and Denmark add through their special opt-out position even more intricacy to this area reveals the special nature of this policy field. For this reason, a look at the outcome of this sovereignty and competence transfer is necessary to distinguish the Danish from the British case, regarding the historical development and motivation behind each opt-out position, which will follow in the upcoming section of this paper.

³³ Eurodac Regulation: Council Regulation 2725/2000/EC of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316 , 15/12/2000 p. 1-10.

³⁴ Article 3(2), TEU (2009).

³⁵ As defined by Article 2(2), TFEU (2009).

³⁶ Article 4 (2j), TFEU (2009)

³⁷ Article 3(2), TFEU (2009).

³⁸ Eckes., C. (2011). *Working paper 2011: A European Area of Freedom, Security and Justice: A Long Way Ahead?* Uppsala: Uppsala Universitet. (p.10).

³⁹ Article 77, TFEU (2009). Example of a regulation, based on Article 77, TFEU (2009): Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21.3.2001, pp. 1-7.

4.1. The British opt-out

As mentioned before, the UK and Ireland maintain a Common Travel Area, not subject to the jurisdiction of the Schengen zone. A cornerstone on the British relation towards the AFSJ was the preservation of the CTA through the non-signature by Margaret Thatcher in the 1980s of the Schengen Agreement to avoid the lifting of the islands borders. In consequence, the UK is not bound by measures adopted under this umbrella. Taking a look at the Union's political development, it becomes striking that in 1992, the conservative government rejected the transfer of national competences regarding security and criminal related matters, to the Union.⁴⁰

In 1997, the incorporation of the Schengen acquis into the EU legal framework by the Treaty of Amsterdam was not blocked by the UK, not only due to the shift in the government towards the pro-European Labour Party,⁴¹ but also essentially due to the obtainment of three protocols, preserving the British abstention from the 3rd Pillar.⁴²

Indicator for a recent rethinking process of the opt-out position is the British adoption of parts of the Schengen acquis dealing with police and judicial cooperation in April 2000,⁴³ explainable due to the advantages the cooperation and communication system of the AFSJ offer. Even though the UK also partly joined the Schengen Information System, the country stayed outside an essential part of the acquis: the external border controls, which are until present governed by the Irish and British CTA.

4.1.1 The British opt-out - Pre Lisbon

Article 14 EC Protocol

The Protocol No.20 Integrating the Schengen acquis into the EU legal framework⁴⁴ states that the British and Irish Common Travel Area continues,⁴⁵ granting those countries the right to introduce external border controls on other EU citizens.⁴⁶ In return, the Schengen states were allowed to exercise border checks on persons, entering the area from the UK and Ireland.⁴⁷

The Title IV Protocol

The Protocol 21⁴⁸ secured the British abstention from Title IV EC.⁴⁹ The Protocol states that the UK is not bound by measures adopted by the EU, featuring Title IV EC as the legal basis.⁵⁰ In addition, ruling case law by the ECJ referring to matters under Title IV as well as international agreements, concluded on this basis were also not applicable to the country.⁵¹

However, the Protocol also stated the opt-in possibility: The UK can opt-in, *ex ante* or *ex post*. Firstly, they can opt-in within three months after the first publication of the legislative proposal by the Commission.⁵² Secondly, they can also opt-in, after the measure is already

⁴⁰ Baker D., Gamble A, Ludlam S; (1994), The Parliamentary Siege of Maastricht 1993: Conservative Divisions and British Ratification, in *Parliamentary Affairs*, 47(1), pp.37-60.

⁴¹ Fletcher, M. (2009). Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdoms' Opt-Outs. *European Constitutional Law Review*, pp.71-89. (p.79).

⁴² Adler-Nissen, R. (2009). *A Political Sociology of Sovereignty: Treaty Opt-Outs and the Doxa of an Ever Closer Union*. University of Copenhagen, Department of Political Science. Copenhagen: University of Copenhagen.

⁴³ Adler-Nissen, R. (2009). *A Political Sociology of Sovereignty: Treaty Opt-Outs and the Doxa of an Ever Closer Union*. University of Copenhagen, Department of Political Science. Copenhagen: University of Copenhagen. (p.16).

⁴⁴ Known as the Art 14 EC Protocol.

⁴⁵ Article 2, Protocol No.20 (1997).

⁴⁶ Article 1, Protocol No.20 (1997).

⁴⁷ Article 3, Protocol No.20 (1997).

⁴⁸ Known as the Title IV Protocol.

⁴⁹ Nowadays Title V TFEU. The EC Treaty grants the opt-out in the areas of immigration, asylum and civil law. The Lisbon Treaty adds the abstention from policing and criminal law. Therefore, the UK abstains nowadays from the entire Title V TFEU.

⁵⁰ Article 2, Protocol No. 21 (1997).

⁵¹ *Ibid.*

⁵² Article 3, Protocol No. 21 (1997).

adopted.⁵³ The great advantage of this opt-in is that it did not imply any strict rules or approvals by other members, before the UK could join.

The greatest uncertainty, regarding this rule was the possibility by the UK to opt-in and to block the negotiation process. This counterproductive step was supposed to be avoided through the prohibited opt-in after the negotiations on the proposal have been going on for a 'reasonable period of time'.⁵⁴ Obviously, this vague formulation lacks some expressed fixity. Concluding, it is striking that the UK had an input on the negotiation process and could possibly influence the AFSJ development through the case-by-case pick and choose right, granted by this Protocol.

The Schengen Protocol

In addition, Protocol 19, integrating the Schengen acquis into the EU legal framework states that the UK could opt-in to some or all Schengen provisions, but faces the mandatory unanimous approval of all other members of Schengen.⁵⁵ The Council adopted a major decision, regarding Article 4: The UK is required to participate in all the provisions and measures, building up on parts of the Schengen Agreement, into which the UK previously already opted-in.⁵⁶ Article 5 of the Protocol enabled the UK and Ireland to participate in Schengen-building measures through the notification of the Council President in a 'reasonable period of time'.⁵⁷ This participation was not subject to the approval of all other Schengen States.

In the light of the foregoing, it is obvious that clashes between the single Protocols can arise: What is the legal basis of a measure adopted under the AFSJ? Is there any possible opt-in option for the UK?

The following section will review a ruling by the ECJ, dealing with exactly this problem. Only the Biometric Passport Case will be mentioned⁵⁸ and not the FRONTEX Case,⁵⁹ because the reasoning of the ECJ was identical in both cases.

*The Biometric Passport Case*⁶⁰

In 2004, the UK referred a Council Regulation on the EU-wide harmonisation of the Biometric Passport⁶¹ to the ECJ, requesting the annulment of this act and therefore also its legal basis on Title IV EC, exploiting Article 5 of the Schengen Protocol and Article 3 of the Title IV Protocol. The Court rejected this request, stating that the opt-in possibility is only valid if the UK has previously accepted the section of the Schengen acquis, underlying this measure. Therefore, the Court defined the establishment of the Biometric Passport Harmonization as a Schengen-building measure, in line with Article 5 of the Schengen Protocol.

According to the Councils' definition of the passport harmonisation as a Schengen-building measure, the case falls under the Schengen Agreement, confirmed by the ECJ.⁶² If the measure would have been classified as an act, based on Title IV EC, the UK could have, without any difficulties, opted-in.

The quintessence of this ruling is that the UK can only opt-in to Schengen-building measures if the country already opted-in to the underlying part of the acquis, the measure is build on.

⁵³ Article 4, Protocol No. 21 (1997).

⁵⁴ Article 4(a), Protocol No. 21 (1997).

⁵⁵ Article 4, Protocol No 19 (1997).

⁵⁶ Council Decision 2000/356/EC, OJ L 131, 1.6.2000, p.43; Council Decision 2004/926/EC, OJ L 395, 31.12.2004, p.70. (Equal Decision for Ireland: Council Decision 2002/192/EC, OJ L 64, 7.3.2000,p.20.).

⁵⁷ Article 5, Protocol No. 19 (1997).

⁵⁸ Case C-137/05 *United Kingdom v Council* [2007] ECR I-11593.

⁵⁹ Case C-77/05 *United Kingdom v Council* [2007] ECR I-11459, in detail referred to in Section 5.2.3.

⁶⁰ Case C-137/05 *United Kingdom v Council* [2007] ECR I-11593.

⁶¹ Council Regulation (EC) No 2252/2004 of 13 December 2004, OJ L 385, 29.12.2004, p.1.

⁶² Case C-137/05 *United Kingdom v Council* [2007] ECR I-11593, Para 55 et seq.

Establishing this ruling as a benchmark against the loose ‘pick-and-choose’ principle of the UK, it becomes visible that the countries flexibility to opt-in to Title V TFEU and Schengen-building measures under the AFSJ is strictly constrained.

4.1.2 The British opt-out - Post Lisbon

Taking a look at the Lisbon Treaty, altering Title IV EC into the new Title V TFEU, all three Protocols were kept in the following manner: Firstly, the Schengen Protocol got revised and incorporated the recent case law.⁶³ In addition, the UK retains the new right to opt-out Schengen building measures, even though they already accepted its underlying acquis.⁶⁴ Rules guiding the special procedure in such a case, authorizing enhanced cooperation among all other members, is also provided for in the revised Protocol.⁶⁵

The AFSJ Protocol replaces the former Title IV EC Protocol, adjoining an abstention from police and criminal matters to the former opt-out of immigration, asylum and civil. This clarifies that the UK has achieved an opt-out for the entire policy area of the AFSJ. The procedure for an opt-in remains the same even though the UK can be expelled in case of counterproductive blocking of a policy negotiation, from the process,⁶⁶ disposing the uncertainties of Art 4(a) of the Protocol Title IV EC, mentioned above. In conclusion, the Lisbon Treaty enriched and enhanced the flexibility the UK enjoys: the country was able to maintain, but also to enhance its opt-outs to new policy areas. In addition, the UK applied for an opt-in to judicial and police related matters and the Schengen Information System, approved by the Council in May 2000, leading to the implementation of the relevant Schengen acquis sections by the UK.⁶⁷

Nevertheless, there are estimated around 133 measures, related to the judicial and police cooperation that have been left unamended by the Lisbon Treaty. A five-year transitional period is determined for those instruments, until the EU infringement and ECJ jurisdiction will apply to those measures.⁶⁸ The end-point of this period is the 30th November 2014. As stated in an official paper by the House of Lords, the Union demands a decision by the UK to opt-in to those ‘left-overs’ or to abstain completely at last on the above-mentioned date.⁶⁹

The general conclusion will give a short estimation on the expected outcome of this decision, but also the entire future development of the British opt-outs. Central will be the question about the benefit of the UK, resulting from its opt-out or whether this abstention implies more of a loss for the country, referring to the UKs’ influence at the EU negotiation process, but also the effective and uniform enforcement of EU law.

4.2. The Danish opt-out

First of all, Denmark is a party to the Schengen Agreement,⁷⁰ but not bound by Title V TFEU.⁷¹ But of course, matters are not always that straightforward. Therefore, it is advisable

⁶³ Case C-137/05 *United Kingdom v Council* [2007] ECR I-11593., Case C-77/05 *United Kingdom v Council* [2007] ECR I-11459, into Article 5(1), Protocol No.19 (1997).

⁶⁴ Article 5(2), Protocol No.19 (1997).

⁶⁵ Article 5(3),(4), (5), Protocol No.19 (1997).

⁶⁶ Article 3(2), Protocol No. 19 (1997).

⁶⁷ Approved by the Council Decision 2004/926/EC OJ C 191, 29/07/1992, p.61, into effect in UK. The SIS participation got delayed due to the development of the SIS II system.

⁶⁸ Miller, V; (2012). The UK 2014 jurisdiction Decision in EU Police and Criminal Justice Proposals, *House of the Common Library* (p.2).

⁶⁹ Miller, V; (2012). The UK 2014 jurisdiction Decision in EU Police and Criminal Justice Proposals, *House of the Common Library* (p.3).

⁷⁰ Signed in 1995 by the Danish government, into effect in 2001.

⁷¹ Article 1 & 2, Protocol No.22 (1997).

to take a closer look at the possible loopholes and exceptions on the Danish participation in the AFSJ.

To provide the historical context of the opt-out development, the starting point for the special Danish position under the AFSJ has to be defined as the public rejection in the referendum on the Maastricht Treaty in 1992. Even though and especially in contrast to the UK at those times, the Danish government supported the Treaty and further integration,⁷² but the Danish public rejected the transfer of powers on migration and border issues to the Union.⁷³ Reasons for the conduction of the referendum lie in the Danish Constitution, declaring a referendum as obligatory if sovereignty is delegated to international organizations.⁷⁴ This rather exceptional constitutional paragraph, securing national autonomy, constitutes a major benchmark of the Danish position towards the EU, regarding the transfer of powers.

To come back to the adoption process of the Maastricht Treaty, it is important to mention that seven out of the eight Danish political parties adopted a 'national compromise' in October 1992.⁷⁵ This internal conciliation led to its translation into the Edinburgh Agreement for an external acceptance by the Union. This induced in response a new positive public referendum in 1993 and adoption of the Maastricht Treaty by Denmark.⁷⁶ As mentioned earlier, the national compromise was translated into the Edinburgh Agreement and kept valid after the transfer of the Schengen Agreement into Title V TFEU through the Protocol No 22, annexed to the Treaties.

*The Schengen Protocol:*⁷⁷

Denmark did sign the Schengen Agreement in 1996, like all other countries of the Nordic Passport Union.⁷⁸ Article 1 of the Schengen Protocol states that Denmark participates full in the Schengen Area, but is legally only bound by Schengen-building measures adopted under this document as an obligation under international law, not EU Community Law; what the incorporation of the Schengen acquis into the EU legal framework in 1997 would have necessarily implied.⁷⁹ Article 3 refers to the Danish Protocol and the provisions on the authorisation for participation in measures, featuring the Community Law as the legal basis, but constitute a development or implementing act of the Schengen acquis.⁸⁰

*The Danish Protocol*⁸¹

The first Article of the Danish Protocol clarifies the abstention of Denmark from measures taken under Title V TFEU. No international agreement, adopted on this legal basis and ruling by the ECJ regarding those acts is valid for Denmark.⁸² Regarding measures based on Title V TFEU as the legal basis, but building upon the Schengen acquis is according to Article 4(1) of the Danish Protocol within 6 months adoptable for Denmark.⁸³ In addition, Denmark is able

⁷² Krunke, H. (2005). From Maastricht to Edinburgh: The Danish Solution. *European Constitutional Law Review*, 1 (3), pp.339-356. (p.340).

⁷³ Nohlen, D. & Stöver, P. (2010) *Elections in Europe: A data handbook*, p.525.

⁷⁴ Article 20(2), The Constitutional Act of Denmark (*Danmarks Riges Grundlov*).

⁷⁵ Krunke, H. (2005). From Maastricht to Edinburgh: The Danish Solution. *European Constitutional Law Review*, 1 (3), pp. 339-356.

⁷⁶ Krunke, H. (2005). From Maastricht to Edinburgh: The Danish Solution. *European Constitutional Law Review*, 1 (3), pp. 339-356. (p.345).

⁷⁷ Protocol No.19 (1997)

⁷⁸ The Nordic Passport Union, introduced in 1952, allows the citizens of the countries of the 'Nordic Bloc' (Denmark, Finland, Sweden, Norway, Iceland) to travel without a passport or even a residence permit throughout the area.

⁷⁹ Article 1, Protocol No.19 (1997).

⁸⁰ Article 3, Protocol No.19 (1997), on Schengen-building measures.

⁸¹ Protocol No.22 (1997).

⁸² Article 1 & 2, Protocol No.22 (1997).

⁸³ Art 4(1), Protocol No 22 (1997).

to abandon its opt-outs partly and fully.⁸⁴ Available provisions for the possible introduction of an opt-in are prepared for in the Annex of the Danish Protocol.

Those two documents clearly set out the legal guidelines for the Danish treatment under the AFSJ. But even though Denmark asked for a special role, a complete abstention exceeded clearly their demands, especially regarding civil matters.⁸⁵ For this reason bilateral Parallel Agreements can be adopted by the Union as one party of the agreement and Denmark as the other one. The process of their development and rules, will be clarified in the following paragraph:

Parallel Agreements, The Case of The Brussels I Convention:

In 2000, Denmark participated in the negotiation process concerning the Europe wide application and recognition of judgements on civil and commercial matters. The results of the round were expressed through the adoption of a Council Regulation.⁸⁶ But due to the Danish abstention from Title IV EC that served as the legal basis for this act, the country was not able to adopt this regulation, even though the Danish government was supportive on the outcome of the negotiations. For this reason, based on Article 218 TFEU,⁸⁷ a Parallel Agreement between the EU and Denmark was embraced. Even though the content is the same as the one in the Regulation, this document comprises an obligation for Denmark under international law, not Community law.⁸⁸ In this case, it is dealt with an ‘exemption from an exemption’, complicating the legal situation under the AFSJ.⁸⁹ Rules for those Parallel Agreements are rather vague: Firstly, they shall be exceptional and of a transitional nature. Secondly those agreements shall be in the interest of the entire community. Thirdly, the long term-goal, implied through the granting of Parallel Agreements is the abolishment of the Danish Protocol on its opt-outs.⁹⁰ At present, the EU concluded three Parallel Agreements with Denmark, even though the country applied for six.⁹¹ This reluctance on the conclusion of those agreements can be interpreted as the Councils’ check on an emerging ‘pick-and-choose’ attitude of Denmark, starting to originate through the possibility of this loophole.

⁸⁴ Article 3, Protocol No. 22 (1997).

⁸⁵ Martenczuk, B. (2009). Relations of the EU: The Experience of Justice and Home Affairs. In B. Martenczuk, *Justice, Liberty and Security: New Challenges for EU External Relations* (pp. 493-523). VUBPress Brussels University. (p. 506).

⁸⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23.

⁸⁷ Former Article 300 EC.

⁸⁸ Even though Article 218 TFEU does not cover in its sense the conclusion of International Agreements between the EU and one of its Members, it is used as the legal basis for Parallel Agreements. According to Article 218 TFEU, those Agreements are binding on all Members, a situation clearly impossible if the Denmark is treated as a third country. This fact marks the conclusion of Parallel Agreements as doubtful, regarding their defensiveness based on Article 218 TFEU.

⁸⁹ Adler-Nissen, R. Gammeltoft-Hansen, T. (2010). Straightjacket or Sovereignty Shield? The Danish Opt-Out on Justice and Home Affairs and Prospects after the Treaty of Lisbon. In M. Hvidt, *Danish Foreign Policy Year Book* (pp. 137-162). Copenhagen: Danish Foreign Policy Year Book. (p.144).

⁹⁰ As stated by the Commission. In practice, the Commission grants the authority to negotiate such an agreement with Denmark to the Council. (Adler Nissen, R. Gammeltoft-Hansen, T. (2010). Straightjacket or Sovereignty Shield? The Danish Opt-Out on Justice and Home Affairs and Prospects after the Treaty of Lisbon. In M. Hvidt, *Danish Foreign Policy Year Book* (pp. 137-162). Copenhagen: Danish Foreign Policy Year Book., (p.146)).

⁹¹ Adopted Parallel Agreements: Dublin II (Council Regulation (EC) No 343/2008 of 18 February 2003), Eurodac (Council Regulation (EC) No 2725/2000 of 11 December 2000), Brussels I (Council Regulation (EC) No 44/2001 of 22 December 2000), Service of documents on cross-border cases (Council Regulation (EC) No 1348/2000 of 29 May 2000). Rejected Parallel Agreements: Bruxelles II (Council Regulation (EC) No 2201/2003 of 27 November 2003), Regulation on Insolvency Proceedings (Council regulation (EC) No 1346/2000 of 29 May 2000).

The Lisbon Treaty maintained and confirmed all Danish opt-outs. In addition, Parallel Agreements are still a valid option under Art 218 TFEU.⁹² During the last years, voices arose that demanded a public referendum on the possible opt-in of Denmark into the AFSJ. The former Premier Minister Rasmussen was in favour of such a step,⁹³ but under the new government, led by Helle Thorning-Schmidt, no serious steps towards a vote have been taken.⁹⁴

Summarizing, the Danish position under the AFSJ is extraordinary, especially with regard to the Parallel Agreements. Keeping this in mind, and adding the fact that Denmark held in the first semester of 2012 the Council Presidency, the countries' influence on the AFSJ's internal and external direction could have changed during the last 6 months, stimulating the Danish revision and liberalization of its opt-outs, as promoted by the Prime-Minister Helle Thorning-Schmidt.⁹⁵ An indicator for this change was the introduction of AFSJ issues in the Council Agenda: among the four major goals of the Presidency, the establishment of a 'safer Europe' is mentioned; intended to be realized through closer cooperation between the Schengen States, the enhancement of the effectiveness of the external border controls and the harmonization of the Common Asylum Policy.⁹⁶ Nevertheless, the Danish government also mentions on its Presidency website that 'Because of our justice and home affairs opt-out, we will not be able to benefit fully from the advantages of this cooperation.'⁹⁷ How far this Danish involvement in AFSJ matters and the mentioned reformative goals can be realized, even though Denmark is not cooperating fully in this area will be further analyzed in the following general conclusion. Additionally, the focus will lie on the level of flexibility, the country enjoys under the AFSJ.

4.3. Conclusion

Throughout the analysis of the AFSJ and its historical development towards differentiated integration, reflected in the Danish and British opt-out, the complexity of the legal structure of the policy area was highlighted, revealed in two major findings: first, the cross-cutting nature of the Schengen Agreement and Title V TFEU led to the intermixture of policy areas and their legal basis. Even under conditions with no national opt-out, this matter of fact could impede the smooth decision-making process under this policy umbrella. Secondly, the Danish and British opt-outs are extremely diverse. On the one side, Denmark is from a formal perspective participating closer with the EU through its adoption of the Schengen Agreement. On the other side, the UK rejects the Schengen Agreement and also Title V TFEU and stays in principle completely out of this policy area. Nevertheless, the UK has obtained an opt-in right, enhancing the flexibility of its cooperation under the AFSJ. A privilege that does not

⁹² Even though the criticism on Parallel Agreements is striking: Firstly, the conclusion of those agreements could decrease the incentive for Denmark to abandon its opt-outs. Additionally, the Protocol No 22 (1997) denies any opt-in possibility for Denmark. For this reason, the Agreements could be understood as subverting the rules, set by the Protocol. (Martenczuk, B. (2008). Variable Geometry and the external Relations of the EU: Experience of Justice and Home Affairs, in in: Bernd Martenczuk/Servaas van Thiel (ed), Justice, Liberty, Security: New Challenges for EU External Relations, VUB Press, Brussels 2008 p.493-525., (p.507)).

⁹³ See: S og R raser over Lokkes EU-nol. (in Danish). Danmarks Radio. 2009. Retrieved on the 1st of April 2012. <http://www.dr.dk/Nyheder/Politik/2009/04/14/150742.htm>.

⁹⁴ See: Brand, Constant (13.10.2011). Denmark scraps border-control plans. *European Voice*. Retrieved on the 18th of April 2012. <http://www.europeanvoice.com/article/2011/october/denmark-scraps-border-control-plans/72315.aspx>. Danes Assess Reversion of EU Exemptions: Angus Reid Global Monitor. Retrieved on the 8th of May 2012. http://www.angus-reid.com/polls/32375/danes_assess_reversion_of_eu_exemptions/.

⁹⁵ Brand, Constant (13.10.2011). "Denmark scraps border-control plans". *European Voice*. Retrieved on the 1st April of 2012. <http://www.europeanvoice.com/article/2011/october/denmark-scraps-border-control-plans/72315.aspx>

⁹⁶ Ministry of Foreign Affairs of Denmark, the Council Presidency, The Priorities of the Danish EU Presidency, Retrieved on the 13th of June 2012. <http://um.dk/en/politics-and-diplomacy/denmark-in-the-eu/the-danish-eu-presidency-2012/the-priorities-of-the-danish-eu-presidency/>

⁹⁷ Ibid.

apply to Denmark.

Through the evaluation, based on the legal position of both states and each type of ‘opt-in’, the UK seems to be in a better position than Denmark. Nevertheless, Denmark can conclude Parallel Agreements; even though only three out of the six agreements, Denmark applied for, were established. Although the ECJ rejected twice an opt-in demand by the UK, the Danish opt-out seems to be subject to a highly restrictive and locked down legal situation. Exactly for this uncertainty about the limits and possibilities each opt-out implies, a glimpse into the practical implications of this differentiated integration has to be taken. Focus shall not only lie on whether the two states participate in a certain policy area, but also why they are enabled to do so.

5. Internal Implications: The Danish and British opt-outs in practice

The internal dimension of the AFSJ is codified in Part 3 TFEU. This chapter stretches from the common asylum, migration and visa policy to judicial and police cooperation, also amplifying the external border management. The first chapter of Part 3 TFEU deals with the general outline of the AFSJ: its aims⁹⁸ and means,⁹⁹ the role of the Unions’ institutions¹⁰⁰ and a backdoor for voluntarily enhanced cooperation among the members.¹⁰¹

The second chapter outlines the possible EU legislations on border checks, asylum and migration. Border issues are dealt with in Article 77 TFEU. The following articles of this subsection set the objectives of the field¹⁰² and defines the decision-making rule as the OLP¹⁰³ for Visa issues,¹⁰⁴ external border controls and rules regarding 3rd countries nationals travelling in the Union. Unanimously, the Union can adopt measures regarding passports, identity cards and residence permits.¹⁰⁵ Of importance is that internal border controls are forbidden,¹⁰⁶ as defined by the Schengen Agreement.¹⁰⁷ Based on this chapter, an important EU agency was introduced: FRONTEX, to secure the external border control of the EU territory, operating since the 3rd October 2005.¹⁰⁸

Article 78 TFEU introduces the common asylum policy, meant to be implemented in accordance with the Geneva Convention.¹⁰⁹ In this field, the OLP also applies to policies, introducing a common asylum system, common standards on the protection of refugees and partnerships with 3rd countries to manage the migration inflow.¹¹⁰ This section highlights that

⁹⁸ Article 67(2), TFEU (2009).

⁹⁹ Article 67(3), TFEU (2009).

¹⁰⁰ Article 69, 70, 71, 76, TFEU (2009).

¹⁰¹ Article 73, TFEU (2009).

¹⁰² Article 77(1), TFEU (2009).

¹⁰³ Article 77(2), as defined by Article 294 TFEU (2009).

¹⁰⁴ The Schengen Agreement introduced Visa issues on the European agenda, manifested in Title II Chapter 3 of the Convention Implementing the Schengen Agreement (1985), Short-stay: Article 9-17 TFEU, Long-stay: Article 18 TFEU.

¹⁰⁵ Article 77(3) TFEU (2009).

¹⁰⁶ Article 77 (1) TFEU (2009).

¹⁰⁷ Article 1, Schengen Agreement (1985).

¹⁰⁸ Established by Council Regulation (EC) 2007/2004/ (26.10.2004, OJ L 349/25.11.2004) having regard to the Treaty establishing the European Community. Amended by the Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers. Amended by the Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union.

¹⁰⁹ Article 78(1), TFEU (2009).

¹¹⁰ Article 78(2), TFEU (2009).

the internal dimension intervenes with the external one, as for the relations, outside the Union, with 3rd states to control the inflow of asylum seekers.

With regard to Immigration policies defined in Article 79 TFEU,¹¹¹ the Union can adopt rules on the uniform design of long-term visa, entry and residence regulations, but also residence permits. Competences to adopt policies that combat illegal migration and human trafficking are also existent.¹¹² Based on this chapter, it is clarified that the Union has the exclusive competence to set the rules for short-term visa.¹¹³ The competence for long-term Visas lies still with the member states and their jurisdiction. Dealing with immigration, relations to third countries seem to be of major importance. For this reason, this section of the Treaties lies down the procedure for the conduction of Readmission Agreements,¹¹⁴ clarifying the responsibility of repatriation of 3rd country nationals back to their country of origin or transit. In 2010, the EU Visa Code came into force, summarizing all regulations and rules on the common visa policy. On top of this, the Code is meant to increase the transparency of this policy area.¹¹⁵

In the following sections, the application of the EU Visa Policy on Denmark and the UK will be examined, as well as the countries participation in the three major agencies of the AFSJ.

5.1. The EU Visa and Asylum Policy

The EU short-stay visa policy, at the first look territorially bound to the Schengen Area, comprises a major part of the Unions' internal harmonization and integration project. Especially the systems for information exchange and cooperation are highly developed instruments, creating a desire to participate, even by non-Schengen states as outlined in the upcoming sections.

5.1.1 Short-Stay Visa

The focus on Visa policies of the Union is of major importance for this analytical part: First of all the distinction is made between short-term¹¹⁶ and long-term Visa.¹¹⁷ The Union adopted in 2009 the earlier mentioned Visa Code, defining the type of short-term visa, a foreigner can apply for.¹¹⁸ In this context, the EU adopted a regulation, defining Visa-exempted countries.¹¹⁹ As listed in the regulation, Airport Transit Visa, allow the holder to enter from the airport

¹¹¹ Article 79, TFEU (2009).

¹¹² Article 79(2), TFEU (2009). In accordance with the Ordinary Legislative Procedure.

¹¹³ The Common Consular Instructions, OJ C326 of 22.12.2005, General Provisions, Scope. (based on Chapter 3 (Section 1&2) of the Convention implementing the Schengen Agreement (1985).

As further defined by Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ L 243, 15 September 2009, p. 1), three types of short term-visas can be issued: Airport Transit Visas (Council regulation No. 810/2009 of 13 July 2009, Annex IV Council of the European Union), Local Border Traffic at EU External Borders Visa (EU regulation no 1931/2006) and Uniform/Schengen Visa. Non-Schengen Countries citizens, as listed in annex I of the Council Regulation 539/2001, need a Visa. Non-Schengen States with no Visa requirements: listed in annex II of the Council Regulation 539/2001.

¹¹⁴ Article 79(3), TFEU (2009).

¹¹⁵ Visa Code Regulation: Council Regulation 810/2009/EC establishing a Community Code on Visas, OJ L 243, 15 September 2009, (p. 1).

¹¹⁶ Exclusive Union competence, Schengen/Uniform Visa.

¹¹⁷ Exclusive Member State Competence, the EU can only adopt regulations regarding the uniform design of Passports and Residence Permits.

¹¹⁸ Visa Code Regulation: Council Regulation 810/2009/EC No establishing a Community Code on Visas, OJ L 243, 15 September 2009, p. 1.

¹¹⁹ Council Regulation EC No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement OJ L 81, 21.3.2001, p. 1. Exemptions are possible through Visa Facilitation Agreements or other bilateral agreements, dealt with in Section 6.1.2.

international transit area into the Schengen transit zone without entering the Schengen area. The Transit Visa permit the occupant to transfer through the Schengen country in question for round about 5 days. Local Border Traffic Visa at the external borders authorizes the holder to move within 30km of the border area between two countries through a ‘multiple-entry’ visa.¹²⁰ A short-stay Visa entitles the applicant to stay in the Schengen states for about 90 days maximum. Circulation Visa are issued for about a year for business related entries, following an invitation letter by one of the Schengen states, to members of aircraft companies and also persons with an ‘special’ business-related interest into the Schengen territory. The long-stay visa, applicable for stays longer than 3 months, are issued by the Member States.¹²¹ The regulation, mentioned above sets the conditions on the application procedure for either a short-stay or transit visa. In addition, another major regulation has to be mentioned, harmonizing the format of the visa EU-wide.¹²²

For now, focusing on the Danish and British opt-out in those areas, it has to be clarified that the UK is not participating in the EU short-stay visa policy for a simple reason: they are not a signatory of the Schengen Agreement and maintain their own CTA with Ireland. In consequence, the country is excludable from the EU short-stay visa system. Not only that Denmark is a member of the Schengen area, and for this reason inevitable party to the adoption of a common short-stay visa code, on top of this, the Danish Protocol¹²³ clearly announces that the opt-out from Title V TFEU is not valid for Visa related measures.¹²⁴ These measures contain legislations on the uniform visa format and determinations on persons, requested to hold a visa.

5.1.2. The Visa Information System

Worth to mention is also the Visa Information System, introduced in 2004 and mainly used by FRONTEX. The system, established to enhance the effectiveness of the information exchange and cooperation between the Unions’ Member States, but also to prevent ‘visa shopping’,¹²⁵ contains communications on 3rd country nationals, qualified to require a visa.¹²⁶

Basically, the VIS constitutes a Schengen instrument, in other words a Schengen-building act.¹²⁷ This fact makes the differential situation between the UK and Denmark due to the latter ones’ participation in the Schengen area apparent: Denmark was able to adopt this system,¹²⁸ the UK was not. Nevertheless, highlighting that the UK does not participate at all in the EU visa policy, the abstention from the VIS is self-evident. An opt-in, based on the previous adoption of the underlying *acquis*, composed of the entire EU visa policy, would be legally

¹²⁰ Granted in case of occupational reasons. By virtue of Council Regulation No 1931/2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, OJ L 405, 30.12.2006, p. 1-22. Denmark as a Schengen state is in no need of this visa type, due to the only neighbouring country being also a Schengen state (Germany).

¹²¹ Article 18, Convention Implementing the Schengen Agreement (1985).

¹²² Council Regulation 1683/95 of 29 May 1995 laying down a uniform format for visas, OJ L 164, 14/07/1995, pp.1-4.

¹²³ Protocol No 22 (1997).

¹²⁴ Article 6 (Part III), Protocol No 22 (1997).

¹²⁵ The concept of Visa Shopping describes the application for a visa by one candidate in several Schengen states, after being rejected by the first state.

¹²⁶ VIS Decision: Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System, OJ L 213, 15.6.2004, p. 5-7, all Schengen and Schengen-associated states are mandatorily requested to apply the system.

¹²⁷ Council Regulation No 767/2008/EC of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13.8.2008, (p. 60-81 Preamble, Paragraph 26).

¹²⁸ Based on Article 3, Protocol No.19 (1985).

possible. Despite, from a practically point of view, the UK would have been forced to abolish its own CTA with Ireland and in consequence also its 'external borders' to the Union.

5.1.3. The Schengen Information System

Of major importance for the police cooperation in the EU is the SIS 1+,¹²⁹ primarily used by Europol. The aim of the system is the exchange of information about persons and pieces of property; established for security related issues like the external border control, inter-state law enforcement and of course, national security.¹³⁰ Recently, a new revised System is under construction: the SIS II, planned to be implemented by 2013.¹³¹

The United Kingdom is one of the active users of the SIS, made possible by the unanimous approval of the British opt-in request in March 1999 to parts of the Schengen acquis, namely amongst other things,¹³² the SIS. This was made possible through Article 5, Protocol No 19, granting the UK the opt-in to parts of the Schengen acquis. Even though the Council accepted the British proposition,¹³³ the participation is subject to certain limits: First of all, the British participation shall not impede the consistency of the acquis in its entity.¹³⁴ Secondly, the UK has no access to personal immigration data of 3rd country nationals, on whom a national court published an alert.¹³⁵ Only the provisions on criminal law and policing are accessible for the UK. Reason for this lies in the British non-participation in the EU immigration policy. Due to the limited approval to participate in the three above-mentioned areas, immigration policies got formally excluded; hence access to this subject-related data is denied.

On the other side, Denmark participates fully in the SIS, which composes a Schengen-building measure, adoptable for the country as stated in Article 3 of Protocol No.19, integrating the Schengen acquis into the EU legal framework.

5.1.4. The Dublin System

Dealing with the refuge and migration policy under the AFSJ, the Dublin System has to be explained in more detail as a system realizing the Unions goals regarding immigration and

¹²⁹ Legal basis: Article 92-119 of the Convention Implementing the Schengen Agreement (1990).

¹³⁰ Recently, a new system is developed (SIS II), implemented by 2013. Proposal for a Council Regulation on migration from the Schengen Information System (SIS1+) to the second generation Schengen Information System (SIS II), COM/2012/081 final.

¹³¹ Council Decision 2008/839/JHA of 24 October 2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II), OJ L 299, 8.11.2008, p. 43-49.

¹³²The UK also requested to participate in the AFSJ police and judicial cooperation in criminal matters and the fight against drugs, especially cross-border drug trafficking.

¹³³ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ L 131, 1.6.2000, p. 43-47. Ireland also requested an opt-in, approved by the Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, OJ L 64, 7.3.2002, p. 20-23.

¹³⁴ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ L 131, 1.6.2000, p. 43-47, Preamble. This resulted into a second Council Regulation, defining the practical implications for the British opt-in to police and judicial cooperation to harmonize the British law in accordance with the EU law to promote the consistent application of Title V TFEU: Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland, OJ L 395, 31.12.2004, p. 70-80.

¹³⁵ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ L 131, 1.6.2000, p. 43-47, (Preamble).

The Concept and Background of the Alert System: Convention on Implementing the Schengen Agreement, (1990) Article 96. Reason for this is an implied threat to the national security of a Member State through the presence of the alien under suspicion, (Article 96(2)(3)).

asylum. The Dublin Regulation is designated to the proper treatment of asylum seekers, in line with the Geneva Convention, to prevent the multiple asylum application and to identify the country responsible for the applicant.¹³⁶ The Eurodac Regulation governs the effective ‘comparison of fingerprints’, thus the identification of asylum applicants.¹³⁷

Even though Denmark and the UK were among the first signatories of the Dublin Convention in 1990, their future participation did not process as modest as expected. The UK was able to opt-in the new Dublin Regulation and the Eurodac Regulation, mentioned above due to the legal basis of those acts in Title V TFEU.¹³⁸

A decision by the Council made it also possible for Denmark to ‘adopt’ the Dublin and Eurodac Regulation.¹³⁹ On that account, those two regulations were transformed into a Parallel Agreement between the Union and Denmark. Even though those agreements constitute for Denmark an obligation under international law and not Community law,¹⁴⁰ the content, measures and instruments are identical in both documents.

5.2. The Danish and British participation in the AFSJ Agencies

The AFSJ agencies, established for the efficient cooperation regarding judicial, criminal and external border issues among the national authorities of the European Union, reflect the daily working basis of the AFSJ. For this reason, all of them qualify for an evaluation of the practical implications of the opt-outs and the potential British and Danish participation.

5.2.1. Eurojust

The third chapter of Title V outlines the judicial cooperation in civil matters, the fourth the one in criminal matters. In both chapters, two major rules regarding the EU judicial cooperation are manifested: the mutual recognition of judgements and the resulting approximation of the domestic laws for the establishment of a harmonized system.¹⁴¹ The focus of this section lies on the information exchange between the national authorities as well as on the compatibility of rules concerning the access to justice.¹⁴² The fourth chapter on the judicial cooperation in criminal matters defines also the different fields of operation¹⁴³ and the policy process.¹⁴⁴ Most important in this section is the formation of Eurojust, an EU agency, introduced to coordinate the national investigation to enhance the cross-border effectiveness of the domestic prosecuting authorities.¹⁴⁵

¹³⁶ Also known as Dublin II Regulation, replacing the Dublin Convention, established in 1997 and into force for all twelve signatories. Establishing Regulation: Council Regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1-10.

¹³⁷ Council Regulation 2725/2000/EC of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316, 15/12/2000 P. 1-10.

¹³⁸ Legal Basis of the Dublin Regulation and Eurodac Regulation: Article 63 EC (nowadays Article 78/79 TFEU), applicable to the opt-in right under Article 3, Protocol No 21 (1997).

¹³⁹ Council Decision 188/2006/EC of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and Council Regulation (EC) No 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 66, 8.3.2006, p. 37.

¹⁴⁰ The legal basis for the Council Decision 188/2006/EC lies in Article 218 TFEU (former Article 300 EC) on the conclusion of international agreements by the Union with 3rd states.

¹⁴¹ Article 81(1), 82(2) TFEU (2009).

¹⁴² Article 81(2), TFEU (2009). Rules regarding this field can be adopted through the OLP.

¹⁴³ Article 82(2), 83(1) TFEU (2009).

¹⁴⁴ Article 82(3), 83(3) TFEU (2009).

¹⁴⁵ Article 85(1), TFEU (2009), as established by the Council Decision 2002/187/JHA of 28 February 2002.

First of all, Denmark and the United Kingdom participate in the activities of this EU agency, created to cope with serious crime in the European territory.¹⁴⁶ It is even said that the UK and Denmark are in the group of the major users of the system.¹⁴⁷ Taking a closer look at the adoption process and mechanisms of Eurojust, a significant and exemplary insight onto the practical implication of the opt-outs is provided. The Council Decision, establishing Eurojust has its legal basis in Article 31 EC of Title IV,¹⁴⁸ an area in which nowadays neither the UK nor Denmark officially participate.

Denmark, not bound by Article 31 EC, conducted a Parallel Agreement regarding its participation in judicial and criminal matters with the Union. In consequence, this step enabled the country to participate in Eurojust and other judicial related mechanism as an obligation under international law.¹⁴⁹ As mentioned at the beginning of this section, the UK does not participate in what is recently Article 82, 83 and 85 TFEU,¹⁵⁰ but has an opt-in right for measures, adopted under this umbrella. However, at the time of the adoption of the Council decision, establishing Eurojust, the UK had no opt-out right,¹⁵¹ which eliminates the need to opt-in. In consequence, the UK was entitled to adopt the act as all other States of the Union.

An interesting point will be the future development of Eurojust: It is planned that a new legislative proposal will be discussed by the Union, based on Article 85 TFEU, establishing new regulations related to Eurojust.¹⁵² Nowadays, the UK obtained an opt-out for cooperation in this area, granted through the Lisbon Treaty. Nevertheless, the UK could easily opt-in. However, Denmark will be excluded due to the non-existence of such an opt-in clause. In result, the country is only bound by acts, directly related to the old Eurojust decision; it concluded a Parallel Agreement for. The implications for further fragmentation and differentiated integration under the AFSJ are striking: Denmark will still be bound by the Eurojust Decision, while loosing the legislative base for further cooperation.

5.2.1.1. The European Arrest Warrant

The European Arrest Warrant, adopted in 2002,¹⁵³ is dedicated to the cooperative inter-state arrest and transfer of criminal suspects, issued by a Member State and therefore directly related to the work of Eurojust and the inter-state cooperation in judicial matters.

In this case, the UK opted-in to the measure for the same reason as for the Eurojust

¹⁴⁶ Recently, the Danish representative to the agency is Jesper Hjortenber and Andrew Cooks is the delegate of the United Kingdom.

¹⁴⁷ House of Lords, European Union Committee (2004). 23rd Report of Session 2003-04 Judicial Cooperation in the EU: the hole of Eurojust Report with Evidence *by the Authority of the House of Lords in London: The Stationery Office* (p.25).

¹⁴⁸ Nowadays: Article 82, 83, 85 TFEU (2009).

¹⁴⁹ Due to the opt-out of Title V TFEU by the Danish government and the resulting non-participation in two major regulations, contributing to the judicial cooperation in criminal matters, the EU and Denmark concluded two Parallel Agreements outside the Community law and subject to international law. 1. EU regulation: Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160, 30.6.2000, p. 37-52, corresponding Parallel Agreement: Council Decision 2006/326/EC (OJ 2006 L 120 p. 23). 2. EU regulation: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 012, 16/01/2001 P.1-23, corresponding Parallel Agreement: Council Decision 2006/325/EC (OJ 2006, L 120 p. 22).

¹⁵⁰ The former Article 31 EC, the Eurojust and Europol Decision were based on.

¹⁵¹ Which got nowadays introduced through the Lisbon Treaty. For further information see section 4.2.1. of this paper.

¹⁵² Jeney P; (2012), The future of Eurojust. Published by Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament.

¹⁵³ Council Framework Decision 20E02/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, (p.1).

decision,¹⁵⁴ because the legal basis for this act was the same.¹⁵⁵ Denmark adopted the Decision, but simultaneously participated in negotiations, regarding a Nordic Arrest Warrant System with the Scandinavian states in 2005.¹⁵⁶ This intra-Nordic extradition can be understood as an efficiency increasing ‘extension and enlargement’ of the EAW Framework Decision, contributing to its objectives and therefore compatible with the States’ obligations under the EAW.¹⁵⁷

5.2.2. Europol

The fifth chapter of Title V TFEU outlines the cooperation of the domestic police forces.¹⁵⁸ Rules on harmonized investigation techniques, information exchange and staff-related matters can be adopted by the OLP.¹⁵⁹ Moreover, the Council can adopt cross-border operations unanimously.¹⁶⁰ The major mechanism of this area is Europol,¹⁶¹ established in 1998 and transformed into an EU Agency in 2010, enhancing its powers.¹⁶²

Denmark and the UK are also full participants of Europol, based on the same principles and reasoning as in case of their Eurojust participation. Nevertheless, one aspect regarding the Danish Council Presidency in 2002 is of extremely interesting nature: The introduction of the Danish Protocol,¹⁶³ providing amendments to the objectives of Europol. This Protocol, conceptualized throughout the Danish Presidency, reflects the input and support of the Danish Council President for closer cooperation and the efficiency enhancement of Europol.¹⁶⁴

5.2.3. FRONTEX

The most important aspect about the FRONTEX cooperation is manifested in its founding Council regulation as a Schengen-building measure under the provision of Title V TFEU.¹⁶⁵ Therefore, the legal situation seems straightforward: Denmark can notify the Council within six months after the initiative whether it wants to participate.¹⁶⁶ Up to the present, Denmark has not done so. Nevertheless, Denmark took part in several FRONTEX operations¹⁶⁷ and

¹⁵⁴ Opt-in through Part 3&4 of the United Kingdom Extradition Act 2003 (c.41), into force on the 1st January 2004.

¹⁵⁵ Article 31 and 34 Title IV EC (nowadays, Article 82, 83, 85 TFEU, Article 34 EC got repealed).

¹⁵⁶ Nordic States, subject to the intra-Nordic extradition: Denmark, Finland, Sweden, Norway and Iceland, The Nordic Arrest Warrant, Council Document No. 5573/06 of 24-01-2006, into force in 2007.

¹⁵⁷ The Nordic Arrest Warrant, Council Document No. 5573/06 of 24-01-2006, p.2.

¹⁵⁸ Article 86(1), TFEU (2009).

¹⁵⁹ Article 86(2), TFEU (2009).

¹⁶⁰ Article 89, TFEU (2009).

¹⁶¹ Article 88(1), TFEU (2009).

¹⁶² Council Decision 2009/371/JHA, 06.04.2009.

¹⁶³ Not to be mistaken with the Protocol No. 22 (1997). (called in the preceding section 4.2. the ‘Danish Protocol’).

¹⁶⁴ ‘The Danish Protocol’: The Protocol drawn up on the basis of Article 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), amending that Convention OJ C 002, 06/01/2004 P. 3-12.

¹⁶⁵ As defined by the ECJ in Case C-77/05 United Kingdom v Council [2007] ECR I-11459, (Paragraph 86).

¹⁶⁶ Protocol No 22 (1997) Art 4(1), as additionally stated in the Preamble, point (35) of the *Council Regulation (EC) 2007/2004/ (26.10.2004, OJ L 349/25.11.2004) having regard to the Treaty establishing the European Community*. Valid for: Council Regulation (EC) 2007/2004/ (26.10.2004, OJ L 349/25.11.2004) having regard to the Treaty establishing the European Community. Council Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers. Council Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

¹⁶⁷ FRONTEX operations: Focal Points, Type: Air (2009) and ZEUS, Type: Sea (2009).

provided experts for its elaboration,¹⁶⁸ due to the application of FRONTEX as a part of the Schengen acquis.¹⁶⁹

The British position toward FRONTEX seems quite simple: due to the fact that the Regulation is a Schengen-building measure, the UK is formally excluded, even though the UK participated already in joint actions before the introduction of the FRONTEX regulation.¹⁷⁰ Nevertheless, the British government applied for participation in the regulation, but got rejected by the Council.¹⁷¹ For this reason the UK forwarded the case for an annulment of the regulation and a change in legal basis to the ECJ. This request got rejected by the ECJ for the following reason: the UK could only use Article 5(1) of the Schengen Protocol and adopt the regulation, if the government also opt-in the underlying part of the Schengen acquis, the measure was build on.¹⁷² This point reveals that being no full party to Schengen complicates the position for the UK.¹⁷³ Nevertheless, the UK can join some actions, decided by the FRONTEX management board.¹⁷⁴ Therefore, the UK sends national experts to the agency¹⁷⁵ and enjoys limited access to the FRONTEX Visa Information System (VIS)¹⁷⁶ due to a Council decision in 2006.¹⁷⁷ Ground for access is the information exchange between law enforcement agencies for criminal investigation.¹⁷⁸ No VIS access is provided for national security related issues.¹⁷⁹ Additionally, the UK is allowed to ‘cooperate’ with the FRONTEX members under the status of a 3rd state,¹⁸⁰ able to attend meetings of the FRONTEX management board.¹⁸¹

Recently, the Commission is working on a scheme to enhance the cooperation between national authorities and FRONTEX, called European Border Surveillance System. The first proposal refers to the Schengen Border Code as its offspring, dividing the action plan into three phases: the interconnection of national authorities, the establishment of common tools

¹⁶⁸ Example: CIRAM operation (2003), elaborated by nine Member State experts, including a Danish representative.

¹⁶⁹ Wolff, S.; (2008), Border management in the Mediterranean: internal, external and ethical challenges, Cambridge Review of International Affairs, Volume 21, Number 2, June 2008. (p.260).

¹⁷⁰ Jorry, H. (2007) Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward? In Challenge Liberty Security Research Paper No.6. (p.10).

¹⁷¹ The request to participate was build upon Article 5(1) of the Schengen Protocol No.19, (1997).

¹⁷² Case C-77/05 United Kingdom v Council [2007] ECR I-11459, pr. 41.

¹⁷³ House of Lords: European Union Committee 9th Report of Session2007-08. (2008). FRONTEX: the EU external borders agency Report with Evidence. *The Authority of the House of Lords London: The Stationery Office.* (Paragraph 45).

¹⁷⁴ Council Regulation No. 2007/2004, Article 20 § 5, op. cit., note 6.

¹⁷⁵ Ilkka Laitinen, Memorandum submitted by External Border Agency, Select Committee on the European Union, London: House of Lords, 2 November 2006, (p. 12).

¹⁷⁶ Access VIS: Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218, 13/08/2008, p.12. Limited Access VIS: Specifically Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386, 18.12.2006, p.89.

¹⁷⁷ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386, 18.12.2006, p.89.

¹⁷⁸ Article 3(1) and 2 of the Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386, 18.12.2006, p.89.

¹⁷⁹ Article 2(A) of the Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386, 18.12.2006, p.89.

¹⁸⁰ Article 12 of the Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, p. 1–11.

¹⁸¹ Article 23(4) Council Regulation (EC) 2007/2004/ (26.10.2004, OJ L 349/25.11.2004) having regard to the Treaty establishing the European Community.

and an integrated network between the countries and the responsible EU agencies.¹⁸² The final regulation¹⁸³ states the parts of Title V TFEU, dealing with the establishment of a management system for the EUs' external borders, as its legal basis.¹⁸⁴ It is also named that the measure constitutes a development of the underlying Schengen Acquis, into which the UK previously did not opt-in. For this reason, the UK will be excluded, in accordance with the related Council Decision.¹⁸⁵ According to the Protocol No 22, Denmark can either choose to abstain and not to be bound by the regulation¹⁸⁶ or to join the adoption process,¹⁸⁷ due to the measures' nature as a Schengen-building act under Title V TFEU.

Summing up, the proposal on the establishment of EUROSUR clarifies the Danish and British position: Denmark could adopt the measure,¹⁸⁸ while the UK is formally excluded.¹⁸⁹ Whether the UK will forward more cases to the ECJ to apply for an annulment and the British participation is doubtful, regarding the ruling of the FRONTEX case that set a benchmark for the British position and participation in Schengen-building measures.

5.3. Conclusion

First of all, the best example for the application of the opt-outs are the EU agencies, where on the one side, the UK is able to participate in Europol and Eurojust, because the introduction of the agencies were based on an old, non-opt out Treaty article. Denmark was entitled to join through the conclusion of a Parallel Agreement. On the other side, the British FRONTEX participation got denied and confirmed by a judgement of the ECJ, based on the lacking opt-in right to the underlying Schengen acquis, while Denmark could participate due to their prior signature of the Schengen Agreement. In conclusion, is Denmark better off and the UK warned by the ECJ, not to exploit their opt-in right?

This conclusion lacks two major aspects: First the FRONTEX Management Board permits the UK to participate partially in the agency. Secondly, extending the emphasis also on the EU Visa and Asylum Policy, the UKs' strong efforts to take part in the information systems became striking, resulting in the unanimous approval of the British opt-in to the SIS in 2000 by all other Member States.

Having the British incentives behind those conspicuous efforts on the one hand, the Member States intentions to grant the UK such an extraordinary position on the other one, the explanation of both will just lead to speculations. Even though, those two phenomenon shall be kept in mind, especially when referring to the level of influence, with regard to those informal practices, those countries maintained throughout the process of differentiated integration under the AFSJ.

¹⁸² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Examining the creation of a European border surveillance system COM/2008/0068 final, not published yet in the OJ.

¹⁸³ Commission Proposal for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR), COM (2011) 873 final, 2011/0427/COD, Brussels, 12.12.2011.

¹⁸⁴ Article 77(2)(d), TFEU (2009).

¹⁸⁵ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ L 131, 1.6.2000, p. 43. (the same applies for Ireland: Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, OJ L 64, 7.3.2002, p. 20).

¹⁸⁶ Article 1 & 2, Protocol No. 22 (1997).

¹⁸⁷ Article 4(1), Protocol No.22 (1997).

¹⁸⁸ Preamble Paragraph 10 of the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR) COM (2011) 873 final. Paragraph 10 is based on Protocol No 22 (1997) Art 4(1).

¹⁸⁹ Preamble Paragraph 11 of the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR) COM (2011) 873 final. Paragraph 11 is based on the Council Decision 2000/356/EC, OJ L 131, 1.6.2000, p.43; Council Decision 2004/926/EC, OJ L 395, 31.12.2004, p.70.

From this perspective, the participation of Denmark in the instruments of the EU Visa policy, as well as their input to Eurojust during the Danish Presidency¹⁹⁰ seem to be straightforward and not only in line with the Union policy, but also supportive and conducive to the policy area. Nevertheless, if the EU will adopt the new regulation on Eurojust, the Danish participation will be shattered, resulting into a final decision by the country: complete abstention or full participation through the disposal of the opt-outs. For this reason, to what regard can the Danish opt-out position be understood as flexible integration? A question, easier to answer through the focus on the British pick-and choose attitude, even though the country, which is formally positioned outside the Schengen Agreement and Title V TFEU, was put back into place by the ECJ judgements.

6. External Implications of the Danish and British opt-out: Relations with 3rd countries

The following section will emphasize the instruments of the ENP and the Danish and British possibilities for participation. From the same angle, light will be shed on International Agreements, concluded by the EU.

Part 5 of Title V TFEU, laying down the rules guiding the conclusion of International Agreements with 3rd states, defines the external action field of the AFSJ.¹⁹¹ Association Agreements, linking trade, political and social cooperation between the Union and 3rd countries comprise also a major part of the Unions' external action.¹⁹² Important for the classification of Association Agreements is the possibility to introduce security-related sections into those agreements, as for example Readmission Clauses, normally established through a single Readmission Agreement.¹⁹³ Consequently, the close linkage and overlapping nature of Readmission and Association Agreements becomes striking. Moreover, Visa Facilitation Agreements are also of major importance for the Union.¹⁹⁴ Those Agreements between the Union and 3rd States harmonise short-term Visa¹⁹⁵ requirements for entire non-EU states.¹⁹⁶ To clarify the situation it is also important to mention the linkage between

¹⁹⁰ Referring to the Danish Council Presidency in 2002.

¹⁹¹ Article 216 (1), 216(2), TFEU (2009).

¹⁹² Article 217, TFEU (2009).

¹⁹³ Article 79 (3), TFEU (2009).

¹⁹⁴ Commission Communication of 12 May 2004, 'European Neighbourhood Policy: Strategy Paper' Com (2004)373 final. By now, the Union has concluded nine Visa Facilitation Agreements with Albania (Agreement between the European Community and the Republic of Albania on the facilitation of the issuance of visas (Official Journal of the European Union, 19 Dec. 2007, Nr. L 334/85)), Bosnia and Herzegovina (Agreement between the European Community and Bosnia and Herzegovina on the facilitation of the issuance of visas (Official Journal of the European Union, 19 Dec. 2007, Nr. L 334/97)), Georgia (Agreement between the European Union and Georgia on the facilitation of the issuance of visas (Official Journal of the European Union, 25 February 2011, Nr. L 52/34)) Macedonia (Agreement between the European Community and the Former Yugoslav Republic of Macedonia on the facilitation of the issuance of visas (Official Journal of the European Union, 19 Dec. 2007, Nr. L 334/125)), Moldova (Agreement between the European Community and the Republic of Moldova on the facilitation of the issuance of visas (Official Journal of the European Union, 19 Dec. 2007, Nr. L 334/169)), Montenegro (Agreement between the European Community and the Republic of Montenegro on the facilitation of the issuance of visas (Official Journal of the European Union, 19 Dec. 2007, Nr. L 334/109)), the Russian Federation (Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation (Official Journal of the European Union, 17 May 2007, Nr. L 129/27)), Serbia (Agreement between the European Community and the Republic of Serbia on the facilitation of the issuance of visas (Official Journal of the European Union, 19 Dec. 2007, Nr. L 334/137)) and the Ukraine (Agreement between the European Community and Ukraine on the facilitation of the issuance of visas (Official Journal of the European Union, 18 Dec. 2007, Nr. L 332/68)) Those agreements can include agreements to grant the residents of the contracting party to travel freely for a period between 3 and 6 month throughout the 25 Schengen states.

¹⁹⁵ Exclusive competence of the EU; The Common Consular Instructions, OJ C326 of 22.12.2005, p.1.

¹⁹⁶ Annex I and II of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21.3.2001, p. 1-7, defining whose countries nationals require a visa.

Readmission and Visa Facilitation Agreements, both mechanisms of the European Neighbourhood Policy.¹⁹⁷ Visa Facilitation Agreements can be understood as the payback to 3rd countries for the repatriation of their nationals. This relation will be examined in more detail in the following section, dedicated to the ENP.

6.1. The European Neighbourhood Policy

First negotiations on Readmission Agreements started in 2001 as an instrument of the ENP to manage the inflow of illegal immigrants while simultaneously establishing a good relation with the Unions' closest neighbouring countries.¹⁹⁸ Due to struggles during the negotiation process of those agreements, the Union realized that the willingness of 3rd countries to accept the EUs request of the repatriation of illegal immigrants was linked to certain demands. Thereby, Visa Facilitation Agreements were introduced, granting 3rd countries nationals visa free short-term residence in the EU territory.¹⁹⁹ This reciprocal exchange of rights and duties between the countries links not only the internal and external dimension of the AFSJ but also its instruments: the Visa Facilitation Program is used to achieve an acceptance of Readmission Agreements by the non-EU states. As proposed by the Treaties, the consistent application of EU law would imply the mandatory participation or abstention of the EU Member States in both instruments. In the following section, it will be clarified whether this is the case for Denmark. Regarding the UK, its participation is complicated and dependant on the countries' abstention from EU visa polices.

6.1.1. Readmission Agreements

From a theoretical perspective, neither the UK nor Denmark is bound by the Unions' Readmission Agreements.²⁰⁰ Reason for this lie in the legal basis of the agreement in Title V TFEU, which lead to the formal exclusion of Denmark and the UK.²⁰¹ Due to the fact that those agreements do not comprise Schengen-building measures under Title V TFEU; the opt-in to those legislations was, according to the Danish Protocol,²⁰² legally impossible.²⁰³ At this point the advantage of the UK towards Denmark becomes extremely visible: the UK was able to opt-in to all Readmission Agreements, ever concluded by the Union²⁰⁴ due to their simple case-by-case opt-in right to Title V TFEU legislations.²⁰⁵ As a result of the lacking Danish

¹⁹⁷ ENP Outline: Communication from the Commission to the Council and the European Parliament - Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, Brussels, COM/2003/0104 final, established by Communication from the Commission European Neighbourhood Policy Strategy Paper, Brussels, COM 2004/373 final.

¹⁹⁸ Building upon Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country and Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements.

¹⁹⁹ Kruse, Trauner; (2008) EC Visa Facilitation Agreements: A New Standard EU Foreign Policy Tool?, in *European Journal of Migration and Law* 10 (2008) 411-438. (p.12).

²⁰⁰ The UK: Article 1 Protocol No. 21(1997), Denmark: Article 1 Protocol No22 (1997).

²⁰¹ Article 79(3) TFEU on the conclusion of Readmission Agreements. This Article is part of the formal opt-out of the UK and Denmark. This part of the Treaty was incorporated from Pillar III into Pillar I during the development of the Treaty of Amsterdam, granting the Union to conclude on the behalf of its Members Readmission Agreements with 3rd states.

²⁰² Article 4(1), Protocol No22 (1997).

²⁰³ Manifested in the COREPER decision: SI (2000) 249 of 17.3.2000.

²⁰⁴ Kruse, Trauner; (2008) EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood, in CEPS Working Document No. 290, CASE Network Studies and Analyses No. 363. CASE – Center for Social and Economic Research, Warsaw, 2008 Publisher: CASE-Center for Social and Economic Research on behalf of CASE Network.

²⁰⁵ Article 3 and 4 Protocol No 21 (1997). Example for this is the Readmission Agreement with Hong Kong (Council doc. 9225/02-Hong Kong, 21.5.2002) and the one with Macao (Council doc. 10148/03/Macao, 27.5.2003). Interesting is that the Irish government rejected not only a Readmission Agreement with Macao, but also Albania, standing against the acts of the UK.

opt-in possibility, many Readmission Agreements feature a joint declaration on Denmark, promoting the conclusion of bilateral agreements between Denmark and the country, subject to the Unions Readmission Agreement.²⁰⁶

Nevertheless, a Readmission Clause, introduced to an Association Agreement, which is also a common possibility under the external action umbrella of the EU, would due to its legal basis, outside Title V TFEU,²⁰⁷ be adoptable for Denmark as well as for the UK. Through this technique, the opt-outs are circumvented, contributing to the representation of the EU at the global stage.

6.1.2. Visa Facilitation Agreements

Neither the UK nor Denmark are bound by the Visa Facilitation Agreements, as stated in the Preamble of each agreement.²⁰⁸ As a measure, based on Title V TFEU, those Agreements are build on the same legal basis as Readmission Agreements. For this reason, the case is simple: The UK could opt-in, Denmark cannot. The non-participation of the UK in the Schengen Area and the consequential abstention from EU visa policies lead to the British disclaimer to join Visa Facilitation Agreements.

Even though the UK is territorially excluded from the Schengen Area, the EU supports the British conclusion of bilateral Agreements for simplified and even exempted visa requirements with 3rd states, as well as Denmark is encouraged to do so.²⁰⁹

6.2. International Agreements

Even though the Protocols on the Danish and British abstention from Title V TFEU state the non-application of international agreements for Denmark and the UK concluded on this legal base, this is not solely the applied principle governing this area, as reflected in the following section.

6.2.1. Association Agreements

Association Agreements constitute a major regulatory element of the Unions external cooperation with third countries. This is one aspect, explaining the British and Danish support for those linkages and their full participation in this area. Those measures are based on Article 217 TFEU, where it is held that '*the Union may conclude with one or more third countries or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure*'.²¹⁰ Possible variations of those agreements are EEA agreements, introducing a common economic area, Partnership Agreements with the former Central Eastern European States before the 'Big-Bang' enlargement in 2004. Stabilisation and Association Agreements were concluded with the Balkan States as well as Development and Association Agreements, dedicated to developmental programs and humanitarian aid. Additionally, Free Trade Agreements introduce a common trade area between the Union and 3rd states.

Nevertheless, they all share the same legal basis, outside Title V TFEU, not subject to the opt-out of the UK as well as Denmark, making it possible for the two states to adjoin the

²⁰⁶ Kruse, Trauner; (2008) EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood, in CEPS Working Document No. 290, CASE Network Studies and Analyses No. 363, CASE – Center for Social and Economic Research, Warsaw, 2008 Publisher: CASE-Center for Social and Economic Research on behalf of CASE Network. (p.10).

²⁰⁷ Article 217, TFEU (2009).

²⁰⁸ Example: Visa Facilitation Agreement with Russia OJ 2007 L 129.

²⁰⁹ Kruse, Trauner; (2008) EC Visa Facilitation Agreements: A New Standard EU Foreign Policy Tool?, in *European Journal of Migration and Law* 10 (2008) 411–438. (p.14).

²¹⁰ Article 217, TFEU (2009).

negotiations and conclusion of the agreements. Regardless that the legal basis is formally outside Title V TFEU, the content of the Association Agreements touches upon parts of Title V. For this reason, their bindingness and liability for Denmark and the UK is questionable.

6.2.1.1. Mixed Agreements

Even though the case on the conclusion of International Agreements seems to be clear, the existence of Mixed Agreements²¹¹ complicates the situation. Pursuant to the Danish and British abstention from Title V TFEU, no international agreement concluded on this basis is applicable neither to the UK nor to Denmark.²¹² For this reason, those countries were transformed into 3rd country parties in the negotiation rounds: The EU territory is limited to the Community minus Denmark and the UK.

Contrary to the above-mentioned guidelines, the UK has to participate in those agreements in case of a previous opt-in to internal measures, which could be affected by an international agreement.²¹³ Reason for this lies in the Community principle of the uniform application of Community law.²¹⁴ There is no informal possibility for Denmark to opt-in. According to the nature of the mixed agreements, including Community and Member State competences, Denmark is permitted to conclude agreements on its own behalf. The only restriction to this perfect example of abstention from EU law is the principle of loyalty,²¹⁵ manifested through legislations, communicating between Denmark and the EU.²¹⁶ Thereby, Denmark is advised to abstain from agreements that could jeopardize with related Union law.

6.2.2. Visa Waiver Program

The Visa Waiver Program, established by the United States Government in 1986, entitles the contracting parties nationals to travel throughout the US for about 90 days without the request for a short-term visa. Recently, 36 States participate, including Denmark and the UK.²¹⁷ The VWP constitutes a bilateral agreement between the US and the applicant states. For this reason, the EU is formally excluded from the negotiation process. Nevertheless, the EU promotes the participation and inclusion of its members in the VWP.²¹⁸

²¹¹ Due to the shared competence between the Union and the Member States, both entities participate at the negotiations for new international agreements under the AFSJ (most of them are Association Agreements) as equal parties.

²¹² Article 1, Protocol No. 21 (1997). Article 1, Protocol No.22 (1997).

²¹³ Due to the British opt-in to the Brussel I Regulation, a large number of directives, decisions and international agreements are subject to the mandatory opt-in by the UK. Hix, J. Mixed Agreements in the Field of Judicial Cooperation in Civil matters, in: Bernd Martenczuk/Servaas van Thiel (ed), Justice, Liberty, Security: New Challenges for EU External Relations, VUB Press, Brussels 2008 p.211-256 (p.234).

²¹⁴ ECJ, Case 22/70, *Commission/Council*, (1971) ECR 263. (ERTA Case).

²¹⁵ Article 4, TFEU (2009).

²¹⁶ Council Decisions of 20.9.2005 on the signing of these agreements OJ L 299, 16.11.2005, p.61, and OJ L 300 17.11.2005, p.53 (on jurisdiction and recognition of judgements in civil and commercial matters), Council Decision of 27.4.2006 on the conclusion of these agreements OJ L 120, 5.5.2006, p.22 and p.23 (on the service of judicial and extrajudicial documents in civil and commercial matters) deploy the provisions of the Brussel I Regulation & Regulation (EC) 1348/2000 of 29 May 2000 on insolvency proceedings OJ L160, 30.6.2000, p.1. Those two regulations are not applicable for Denmark, leading to the Danish possibility to conclude own international agreements, relating to the content of the above-mentioned regulations. For this reason, Article 5 of the mentioned agreements determine that Denmark will not enter into any intentional agreement that could effect the two regulations.

²¹⁷ As defined by the State Department Visa Waiver Country List and the DHS country list, the UK was the first country to participate in the program, joining the VWP in June 1986. Denmark joined in 1991.

²¹⁸ As communicated in the Statement of the Council in the Europe US Visa Waiver Program Legislation, 7338/08, Brussels, 5 March 2008.

6.2.3. Approved Destination Status Agreements

The EU and China signed in 2004 an ADS Agreement for the simplified application process of short-term visas for Chinese nationals.²¹⁹

Neither the UK, nor Denmark participate for the following reason:²²⁰ Denmark had no formal power to opt-in to this Title V TFEU measure due to its abstention of this part of the Treaty. The UK tried to opt-in, but this request got rejected based on the fact that the act comprises a Schengen-building measure on the EU visa issuance system.²²¹ As referred to earlier, the UK cannot opt-in to measures without accepting the underlying part of the Schengen acquis. As a consequence, Denmark and the UK obtained separately ADS Agreements with China.²²²

6.2.4. The Splitting of Decisions

The adoption process of the Protocol of the UN Convention against transnational Crime on the Smuggling of Migrants by Land, Sea and Air illustrates a possible strategy, binding all Member States to one agreement, based on two different legal foundations.²²³ Due to the fact that the Protocol falls under the scope of Title IV EC, an adoption based on this legal basis would imply the Danish and British abstention due to their opt-out position.²²⁴ Corresponding to the importance of the Convention and the lacking legal feasibility to split the legal basis, a loophole was found to ratify a Danish and British participation: To avoid the splitting of the decision into one document featuring a Title IV EC legal basis for the Community and one for the opt-out countries, outside Title IV EC, the Council decided to adopt the decision for the entire Union, outside Title IV EC. As stated in the Council Decision,²²⁵ for the entire Community, the measure was based on Article 179 EC and 181a EC,²²⁶ serving as the legal basis, not subject to the Title IV opt-out.²²⁷ This last example illustrates a possible strategy for

²¹⁹ Council Decision concerning the signing of the Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China on visa and related issues concerning tourist groups from the People's Republic of China (ADS), OJ LS 83, 20.3.2004, p.12 legal basis: 216, 77 TFEU.

²²⁰ Council Decision concerning the signing of the Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China on visa and related issues concerning tourist groups from the People's Republic of China (ADS), OJ LS 83, 20.3.2004, p.12 legal basis: 216, 77 TFEU, non-participation manifested through Article 1(a) of the Agreement.

²²¹ Council Decision 2004/265/EJ, OJ L 83 20.3.2004, p.12.

²²² The UK/China Approved Destination Status (ADS) Memorandum of Understanding (MoU), signed on 21 January 2005. The Denmark/China Approved Destination Status (ADS) Memorandum of Understanding (MoU), signed in 2004.

²²³ Also known as the 'Smuggling Protocol'. The same applies for the UNTOC on the Preservation, Suppression and Punishment of Trafficking in Persons (The Trafficking Protocol).

²²⁴ Martenczuk, B. (2008). Variable Geometry and the external Relations of the EU: Experience of Justice and Home Affairs, in in: Bernd Martenczuk/Servaas van Thiel (ed), Justice, Liberty, Security: New Challenges for EU External Relations, VUB Press, Brussels 2008 p.493-525. (p. 516-517).

²²⁵ 2006/616/EC: Council Decision of 24 July 2006 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 Organized Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community, OJ L 262, 22.9.2006. (Same Decision for the Trafficking Protocol: 2006/618/EC: Council Decision of 24 July 2006 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 Organized Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community, OJ L 262, 22.9.2006, p. 44-50).

²²⁶ Nowadays Article 209 TFEU and 211 TFEU.

²²⁷ Two decisions, for each 'party' were adopted, but to avoid a misunderstanding between the parties on the practical implications of those decisions, only one declaration of competence and only one instrument for its fulfilment were adopted. Martenczuk, B. Variable Geometry and the external Relations of the EU: Experience of Justice and Home Affairs, in in: Bernd Martenczuk/Servaas van Thiel (ed), Justice, Liberty, Security: New Challenges for EU External Relations, VUB Press, Brussels 2008 p.493-525. (p.517).

the Union to cope with the consequential complexities and difficulties of multilateral agreements exceeding Title V TFEU.

6.3. Conclusion

One major point of critique during the recent development of the external dimension of the AFSJ constitutes the lacking uniformity of the Unions' Members as one actor at the global stage.²²⁸ Even though most of the remarks refer to the foreign political attitude and bilateral actions of the States and not directly to the participation in Union policies, the latter point is of major importance for the uniform application of EU law and efficiency of its instruments.

From this perspective, the ENP constitutes the major example of such an unbalanced policy application. The UK participates in Readmission Agreements, which are of a beneficial nature, while Denmark is excluded. The participation in the cost-related Visa Facilitation Agreements abstain both countries. Nevertheless, Readmission Clauses are introduced into Association Agreements, enabling the UK and Denmark to participate. Those linked agreements were planned to establish a reciprocal and balanced relationship between the Union and their neighbouring countries. Is this still possible if two countries step out of line and gain such a special position?

Not only the inter-connectedness of both agreements constitute an imbalance in its partial application by the UK. Also the fact that the UK is not part of the Schengen Area and its implied visa policy, raise the question of the general justification for the British partial participation, granting the country only the benefits of the created European neighbourhood relations. Evaluating the Danish participation, arguing from the perspective that the legal situation of Denmark under the AFSJ did not allow for an adoption of the VFP and the Readmission Agreements, it is essential that the limits of the Danish participation under the AFSJ are emphasized. Nevertheless, Denmark is at least abstaining from both instruments of the ENP and for this reason not gaining an unbalanced and inequitable benefit. Taking this evaluation one step further, it becomes obvious that the Danish non-participation in especially the VFP leads to disharmonies inside the common EU Visa policy, the country is subject to. All in all, while realizing that two entire countries abstain from a major part of the ENP, doubts arise concerned with the uniform representation of the EU in its neighbourhood that impeding the effectiveness of cooperative alliances.

Reflecting those strict abstentions from cooperation on the example of the participation of both countries in International Agreements, another disparity becomes salient: in this case, loopholes were found and used to enable the British and Danish participation in many of those agreements. The possibility to split decisions into one adoptable part for the Union and one for the opt-out countries was introduced. On top of this, the UK and Denmark successfully participated in all Association Agreements, which lie outside Title V TFEU. The legal basis of those agreements, not subject to the opt-outs, made it possible for both countries to participate, even though the content of all Association Agreements touches upon the content Title V TFEU, introducing doubts about their legal liability.

At the first glance, it seems impossible that a policy area could be more complex and mixed up. But in the end, taking a closer look at this area full of extraordinary loopholes, circumventions and opt-ins, the Union will be perceived and recognized as a more united entity from the outside due to the increased participation of the opt-out countries. At this point, the increased internal workload shall not be left out of sight, because the endeavour and

²²⁸ Examples of literature dealing with the uniform representation of the Union and the global stage: Meunier, S. and Kalypsa Nicolaidis (1999), Who Speaks for Europe? The Delegation of Trade Authority in the EU. *JCMS: Journal of Common Market Studies*, 37: 477-501. Schneider, G. and Seybold, C. (1997), Twelve tongues, one voice: An evaluation of European political cooperation. *European Journal of Political Research*, 31: 367-396. Smith, K. E. (2006), Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations. *JCMS: Journal of Common Market Studies*, 44: 113-137.

related struggles by the Union to keep their Members united could be weighted against the value of unity itself under the AFSJ.

7. General Conclusion

Referring to the Unions' goal of integration, cooperation and convergence, manifested in the Treaties, it is crucial to stress that the compliance with these principles under the AFSJ is not self-evident. The AFSJ has to be dealt with from a different point of view: Not only that national border and visa policies are sensitive topics, also the criminal law and prosecution of suspects are delicate issues, lying at the very heart of each national system. Due to this extraordinary nature of the AFSJ, it shall be kept in mind, that the aim of this paper is not to judge the integration process itself, pushing the UK and Denmark into a blocking outsider position or celebrating their quest for sovereignty. More important is the actual reality of the opt-outs, their implication for the Unions internal legal system and their effect on the external embodiment of the EU in relations to the wider world.

As seen from an analytical point of view, it is obvious that the UK has a major, undeniable advantage towards Denmark: the British opt-in right to Title V TFEU. The Danish possibility to conclude Parallel Agreements, outside the Unions legal structure, seems to be a bagatelle compared to the loose pick-and-choose right of the UK, minimally restricted through the ruling case law.²²⁹

On top of this, most of the EU legislation builds-upon Title V TFEU, like the newly proposed Eurojust Regulation.²³⁰ In response, those acts lack a clear basis as Schengen-building measures. Additionally, as started by the Treaty of Amsterdam, the Lisbon Treaty absorbed, repealed and finalized most of the Schengen instruments and policy areas. For this reason, it can be said that sooner or later, the Schengen Agreement will become extinct as a legal document for the policy development, but of course not as the basis of the Schengen Area. A step towards this direction was taken on the 7th June of 2012, through the Danish Council Presidencies' announcement to introduce a new Schengen Evaluation Mechanism, to enhance the compliance with the new Schengen rules, as well as the possible temporarily closure of the EUs' internal borders in case of a threat to public policies or the internal security.²³¹ First of all, its legal basis is questionable,²³² but also the introduced abandonment of the Parliaments legislative powers, granting the MEPs only the right to be 'informed' and not involved, raised major concerns.²³³

Nevertheless, what matters is not only the formal opt-out structure of each country or its practical implications: The behaviour and position of Denmark and the UK towards the entire concept and model behind the AFSJ is of major importance.

Preliminary, it can be said that the opt-out position of the UK arose from a demand,²³⁴ while in Denmark, unforeseen circumstances; namely the rejection of the Maastricht Treaty;²³⁵ lead to this extreme act.

Taking a closer look, it is salient that the British government, especially interested in the information systems of the AFSJ, restlessly pushing for opt-ins, forwarding cases to the ECJ while simultaneously extending their opt-out position during the Lisbon Treaty negotiations,

²²⁹ The FRONTEX Case, The Biometric Passport Case, examined in Section 4.1.1.

²³⁰ Based on Article 85 TFEU, examined in Section 5.2.1.

²³¹ European Commission – Press Release, Schengen: EU Commission proposes a European approach to better protect citizens' free movement, Brussel, 16. September 2011.

²³² Article 77(2) TFEU is defined as the legal basis, As stated in the amended Commission proposal for a Regulation European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, Brussels, 16.9.2011 COM (2011) 559 final.

²³³ Pascouau Y., (2012). The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock, the European Policy Center, 31.1.2012.

²³⁴ Examined in detail in Section 4.1.

²³⁵ Examined in detail in Section 4.2.

can not be seen as a strong supporter of the AFSJ. The definition of a user of the AFSJ, promoting the policy processes of interest, as for example the development of the SIS II, seems to be of a better fit.

Contrasting, the Danish government was from the beginning on a supporter of the project, pushing for the acceptance of the Maastricht Treaty through extraordinary national political processes. Even though the Danish Constitution seems to be the watchdog of the countries sovereignty transfer, this fact does not alter the basic Danish position.²³⁶ Most visible that the initial support was not weakened during the last decades is the dedication of the Council Presidency 2012 to many basic topics of the AFSJ, even though the performance of its Presidency is questionable. Reason for this lies in the distinction between theoretical dedication and the practical realization of the announced goals. Even though the changes, introduced by the new Schengen Evaluation Mechanism are of a content related nature, this proposal is caught in a deadlock through the protest of the MEPs and also the dispute surrounding its legal basis. Measuring the Danish Presidencies achievement on this background is delicate, but the locked up situation definitely does not comprises a highlight of it. Nevertheless, this behaviour is clearly distinguishable from the aggressive British push for increased flexibility and autonomy, which contributes to the self-made outsider role of the UK.

For this reason, the influence on the internal implications of the AFSJ lies not only within the legal position, but also the behaviour of each opt-out state. As a country, lacking the opt-in right, but supporting the integration process without the full benefit of this engagement positions Denmark at a completely different stance than the UK, whose behaviour reflects more an attitude, supporting further differentiated integration. Thereby the Integration Dilemma Assumption,²³⁷ frequently repeated by Adler-Nissen in her work, lacks the dimension of norms, values and ideals, a country represents and supports at the EU stage that opens doors for influence and participation.

After clarifying the internal implications of the opt-outs, the impact of the introduced Variable Geometry of the AFSJ on the external projection of the Union as an entity at the global level has to be defined. Unified externally while being internally fragmented; is that even possible? The earlier mentioned loophole strategy of splitting decisions, or adopting international agreements outside the Title V TFEU framework, even though the content involves its topic, circumvents the opt-outs, leading to the validation of international agreements for Denmark and the UK, seem to be the attempt to appear as united as possible for the outer world. Nonetheless, the ENP is the major example that this strategy is not possible in all policy areas. Concluding that the British participation in Readmission Agreements, while abstaining the EU visa policy and the VFP, reflects well the Unions' endeavours to represent itself unified, underestimates the problem.

During the assessment of the internal and external dimension of the AFSJ it was noticeable that the UK manoeuvred itself into the outsider role, while Denmark maintained to strive for involvement to the concentric circles of the EU as, due to its restricted opt-in chances, the real outsider.

Nevertheless, the internal and external area seems extremely fragmented, intricate and messy. For this reason, it is no surprise that disputes between the different documents and regulations of the AFSJ arise. Certainly, it is mandatory to resolve those disputes during the future development of the area, even if it is just for the sake of time efficiency and not directly the integration of all Members.

A short estimation on the future development of the opt-out policy of Denmark and the UK will highlight the possible development of the AFSJ: Either way towards closer cooperation and convergence or only a higher degree of fragmentation and differentiation.

Two scenarios are possible for both countries: They abandon their opt-out rights or reform it. A pure maintenance of the recent structure is not possible due to two reasons. Firstly the

²³⁶ Examined in detail in Section 4.2.

²³⁷ Examined in detail in Section 3.3.

demanding British decision by no later than 2014 on the unamended leftovers on criminal and police cooperation asserts pressure on the British government.²³⁸ At this point, a British adoption of the Schengen Agreement seems also extremely unrealistic due to their pegging to their own CTA and implied visa system. Secondly, the missing Danish legal eligibility to participate in the new Eurojust legislation due to its legal basis in Title V TFEU requires action by Denmark.²³⁹ Noticeable for this is that it is impossible to eliminate the repetition of such a legal obstacle in the future if the opt-out structure of the country will not be altered.

As a result, only two directions for both countries are possible: the abolition of the opt-outs or a transformation of those, featuring as many flexible opt-ins and loopholes as possible; also for Denmark.

The first solution pushes the AFSJ towards closer integration of both countries, as reflected in the concept of a 'Multi-Speed Europe'.²⁴⁰ The second one enhances the pick-and-choose right and the fragmentation of the cooperation under the AFSJ, definable as the concept of 'Europe a la Carte'.²⁴¹

A shift towards further fragmentation and differentiation could give rise to spill over effects: the entire attitude of the other Member States could change towards an intelligible demand for the same special treatment as the UK and Denmark enjoy. Even though this remark is of a speculative nature, a movement towards a 'Europe a la Carte' in a Union, struggling nowadays at its very roots of cooperation, could imply resentful implications.

Summarizing, it can be said that the recent opt-out structure under the AFSJ will further complicate the scope of action for the opt-out countries, affecting the efficiency of the policy processes under the AFSJ, internally and externally. For this reason, the recent status quo will not be defensible for the following years.

A last vital aspect, enhancing the focus on the opt-outs, is the questionable degree of flexibility and freedom the Variable Geometry introduced for both countries. The defence of sovereignty to obtain the expected autonomy could be a fallacy. Recently, the two states are not abstaining at all from the AFSJ, as once proclaimed by the Protocols, annexed to the Amsterdam Treaty. During the last ten years, backdoors for cooperation were used by both countries and even newly invented; as the Danish Parallel Agreement strategy illustrates. Beyond that, legal disputes were contested in front of the ECJ, not always for the benefit of the opt-out countries. For this reason, the gains and value of the introduced flexibility do not outweigh the efforts and attempts of both states to take part in the AFSJ, an incipient, but highly developed, innovative and growing policy area, at the very heart of the EU integration and cooperation process.

²³⁸ Examined in detail in Section 4.1.2.

²³⁹ Examined in detail in Section 5.2.1.

²⁴⁰ As further defined in Section 3.1. of this paper.

²⁴¹ Ibid.

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