Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 30 January 2014[1]

Case C-658/11

European Parliament
v

Council of the European Union

(Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates from the European Union-led naval force to the Republic of Mauritius — Common foreign and security policy (CFSP) — Area of freedom, security and justice — Development cooperation — Choice of legal basis — Article 218(6) and (10) TFEU)

1. The present action calls on the Court, in the context of the fight against piracy off the coast of Somalia, to clarify the boundary between three fields of the European Union's external action, namely the common foreign and security policy (CFSP), the external dimension of the area of freedom, security and justice (AFSJ) and development cooperation.

2. This case demonstrates once again, in particular after the judgment of 19 July 2012 in *Parliament* v *Council*,[2] which concerned the fight against international terrorism, that despite the formal disappearance of the pillars the entry into force of the Treaty of Lisbon has not obviated the need to delimit the respective scopes of the Union's different policies.

3. This is a delicate task as the objective of security is at stake. That objective is common to the CFSP and to the AFSJ. It is also linked to development cooperation policy in so far as security constitutes a necessary precondition for the development of the States concerned.

4. It is nevertheless essential to define the respective boundaries of the Union's policies because of the specific nature of the CFSP compared with the Union's other policies.

5. That specific nature is characterised, in particular, by the limited role played by the European Parliament in the CFSP. From this point of view, setting clear criteria to define the scope of that policy in relation to the other fields of the Union's external action represents a certain constitutional challenge.

6. By its action, the Parliament claims that the Court should annul Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer.[3]

1 — Original language: French.

2 — Case C-130/10 [2012] ECR.

3 — OJ 2011 L 254, p. 1, 'the contested decision'.

7. The contested decision is based on Article 37 TEU and on Article 218(5) and (6) TFEU.

8. Under Article 37 TEU, which is part of Chapter 2 of Title V of the EU Treaty, laying down 'Specific provisions on the [CFSP]', '[t]he Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter'.

9. Article 218 TFEU contains rules on the negotiation, signing and conclusion of international agreements. It is worded as follows:

'1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the [CFSP], shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

...

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the [CFSP], the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the ... Parliament in the following cases:

...

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the ... Parliament is required.

...

(b) after consulting the ... Parliament in other cases. ...

...

10. The ... Parliament shall be immediately and fully informed at all stages of the procedure.

...'

10. In support of its action, the Parliament puts forward two pleas in law.

11. By its first plea in law, the Parliament claims that the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer [4] does not relate exclusively to the CFSP within the meaning of the second subparagraph of Article 218(6) TFEU, since the aim and the content of the Agreement are also linked to judicial cooperation in criminal matters, police cooperation and development cooperation and the ordinary legislative procedure applies to those areas. Therefore, the decision to conclude the Agreement should have been taken after obtaining the consent of the Parliament in accordance with Article 218(6), second paragraph, (a)(v) TFEU.

12. By its second plea in law, the Parliament argues that the Council has violated Article 218(10) TFEU by failing to inform it immediately and fully at all stages of the procedure.

13. By order of the President of the Court of 5 June 2012, the Czech Republic, the French Republic, the Italian Republic, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council.

14. The Commission was granted leave to intervene in the oral procedure in support of the Parliament.

I – The plea in law alleging a violation of the second subparagraph of Article 218(6) TFEU

A – *The interpretation of the notion of agreement relating exclusively to the CFSP*

15. The Parliament advocates a narrow interpretation of the notion of agreement relating exclusively to the CFSP. In its view, the Council is authorised to conclude an international agreement without obtaining consent from or consulting the Parliament only in exceptional circumstances and only if, because it does not contain any elements relating to other Union policies, that agreement relates exclusively to the CFSP.

16. The Parliament argues that the Agreement at issue in the present action contains components relating to three different Union policies, namely the CFSP, police and judicial cooperation in criminal matters, and development cooperation. In its view, it is sufficient for one of those components to be present in the Agreement, even in a secondary or incidental manner, for the obligation to obtain the consent of the Parliament to be applicable. In such circumstances, the Agreement cannot, in the view of the Parliament, be considered to relate exclusively to the CFSP.

17. The Council argues, however, that the Agreement has no component other than the CFSP component, either as a main or an incidental component. Even if such components were identifiable, they would be merely incidental, with the result that they would not require another legal basis. Since the chosen legal basis relates, from a substantive point of view, exclusively to the CFSP, it should be inferred that, from a procedural point of view, the Agreement 'relates exclusively to the [CFSP]' within the meaning of the second subparagraph of Article 218(6) TFEU and the Parliament is not therefore required to give its consent for the Council to be able to adopt the decision concluding that Agreement.

18. Like the Council and the Member States which have intervened in the present case, I consider that an agreement 'relates exclusively to the [CFSP]' within the meaning of the second subparagraph of Article 218(6) TFEU where the decision concluding that agreement is founded solely on a substantive legal basis relating to the CFSP, to the exclusion of any other substantive legal basis.

4 — 'The Agreement'.

19. In my view, it would be inconsistent to examine the question of the applicable procedure for the conclusion of an international agreement in isolation from the preliminary question of determining the substantive legal basis which confers upon the Union the competence to adopt such an agreement, since these two questions are closely linked. Such a disconnection would result in a twofold examination, requiring new criteria to be defined in order to determine whether or not an agreement relates exclusively to the CFSP, with unclear results which would create legal uncertainty.

20. It is therefore necessary to determine the substantive legal basis authorising the Union to adopt an international agreement before determining the procedural legal basis. This approach is also confirmed by the Court's case-law, according to which 'it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure'. [5]

21. In assessing whether or not an agreement relates exclusively to the CFSP, it is therefore of little importance, contrary to the claims made by the Parliament, that the agreement in question also relates, in a secondary manner, to fields other than the CFSP. It is not therefore sufficient for an agreement to relate in an accessory or indirect manner to fields other than the CFSP for consultation of or prior consent from the Parliament to be required under Article 218(6) TFEU.

22. Contrary to the wish of the authors of the treaties to confer on the Parliament a limited role in matters relating to the CFSP, the interpretation suggested by the Parliament would require it to be consulted or for its consent to be obtained for the adoption of nearly all international agreements. In so far as, under the second subparagraph of Article 21(3) TEU, the Union must ensure consistency between the different fields of its external action and between these and its other policies, it is rare that an agreement concluded in the field of the CFSP does not concern other Union policies, at least indirectly.

23. As the Council rightly points out, the Parliament's view would amount to requiring the Parliament's consent for many agreements founded solely on a CFSP legal basis since such agreements often have some relationship with other Union policies given the existence of general, cross-cutting external relations objectives and the requirement of consistency. For instance, the well-recognised interrelationship between security, development and human rights means that it would very often be possible to argue that measures taken in one of these three areas will also have some effect on the other two areas and, in that sense, also relate to those areas for the purposes of the application of Article 218(6) TFEU. Clearly, that is not what the treaties envisage. On the contrary, the treaties have not abolished or merged the different Union policies and the corresponding legal bases through which these horizontal objectives are to be achieved, and each measure remains distinct and subject to its own legal basis and decision-making rules.

24. The requirement of consistency encourages the Council to integrate aspects relating to other Union policies into the CFSP measures which it adopts. The presence of such aspects, if they are incidental, does not permit the inference that the centre of gravity of the measure does not relate to the CFSP. The horizontal objectives and the requirement of consistency of the Union's external action do not nullify the particularities of each of the Union's policies, just as their complementarity does not nullify the specific nature of each policy.

25. Agreements under the CFSP may include purely incidental aspects of other Union policies where these are so limited in scope that they do not justify an additional legal basis. Consequently, such agreements would exclusively relate to the CFSP, also for the purposes of Article 218(6) TFEU.

5 — *Parliament* v *Council*, paragraph 80.

26. Contrary to the claims made by the Parliament, the difference between the wording of Article 218(3) TFEU and the wording of the second subparagraph of Article 218(6) TFEU cannot alter that view.

27. It is true that under Article 218(3) TFEU the High Representative of the Union for Foreign Affairs and Security Policy must submit recommendations to the Council 'where the agreement envisaged relates *exclusively or principally* to the [CFSP]'.[6] The wording of that provision thus mentions two categories of agreements envisaged, those relating exclusively to the CFSP and those relating principally to that policy. The Parliament infers from the existence of those two categories in Article 218(3) TFEU that Article 218(6) TFEU does not allow the Council to conclude an agreement without the Parliament's involvement if the agreement relates only principally to the CFSP, but not exclusively to the CFSP.

28. It should be noted, however, that the two abovementioned provisions cover two distinct stages of the procedure in relation to international agreements. The first provision concerns the determination of the institution or the person responsible for submitting recommendations to the Council with a view to the opening of negotiations concerning an agreement envisaged. The second, on the other hand, concerns the procedure for the conclusion of such an agreement.

29. In addition, and more fundamentally, I take the view that the difference in wording highlighted by the Parliament cannot support its argument since it is contrary to the system on which Article 218(6) TFEU is based.

30. Article 218(6) TFEU establishes symmetry between the procedure for adopting measures internally and externally. In other words, that provision is based on a parallelism between the Parliament's powers internally and its powers externally. It would be contrary to the letter and the spirit of that provision to confer on the Parliament greater powers for the adoption of a decision concerning the signing and the conclusion of an international agreement than it enjoys for the adoption of an internal measure which has no such object.

31. Furthermore, the interpretation advocated by the Parliament would affect the institutional balance established by the Treaty of Lisbon, which envisages a limited role for the Parliament in defining and implementing the CFSP, whether through unilateral measures or international agreements.

32. As the Czech Republic states, Article 218(6) TFEU constitutes a procedural provision, whose aim is to guarantee that the 'external' powers of the European Parliament correspond to its 'internal' powers, that is, that it enjoys the same powers in relation to a given subject irrespective of whether the subject in question is to be regulated by internal measures or by external measures.

33. Specifically, the aim of the phrase '[e]xcept where agreements relate exclusively to the [CFSP]' in the second subparagraph of Article 218(6) TFEU is to guarantee that, where an external measure is not founded exclusively on a legal basis falling within the CFSP, but is founded simultaneously also on one or more other legal bases, the European Parliament enjoys the same powers as those which it would hold in the case of an internal measure founded also on legal bases other than the legal basis covering the CFSP.[7]

6 — My italics.

7 — For an example of a measure based on more than one legal basis, see Council Decision 2012/308/CFSP of 26 April 2012 on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia (OJ 2012 L 154, p. 1). That decision is based on the combined provisions of Articles 37 TEU and 31(1) TEU and Articles 209 TFEU, 212 TFEU, point (a) of the second subparagraph of Article 218(6) TFEU and the second subparagraph of Article 218(8) TFEU.

34. Where, applying the test relating to the centre of gravity of the measure in question, it is found that the Agreement is rightly based on Article 37 TEU, which therefore constitutes its sole legal basis, it would have to be concluded that, from a procedural point of view, the Agreement relates exclusively to the CFSP within the meaning of Article 218(6) TFEU.

35. It follows from this analysis, linking the interpretation of the second subparagraph of Article 218(6) TFEU to the choice of the substantive legal basis, that in order to ascertain whether the contested decision concerns an agreement relating exclusively to the CFSP within the meaning of that provision, which was therefore legitimately adopted without consulting or obtaining the consent of the Parliament, it must be examined whether the appropriate substantive legal basis for that decision is actually — and solely — Article 37 TEU.

B – *The choice of the substantive legal basis of the contested decision*

36. The choice of the appropriate legal basis for a Union measure has constitutional significance.[8] That choice determines the procedure to be used for the adoption of such a measure, whether it concerns the Union's internal action or its external action.

37. According to settled case-law, the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and content of that measure.[9] If examination of that measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.[10] The assessment of the centre of gravity of the measure concerned must also take account of the context of that measure.

38. Since the purpose of the contested decision was the signing and the conclusion of the Agreement on behalf of the Union, that decision should be examined in conjunction with the Agreement.

39. In the present case, the assessment of the centre of gravity of the contested decision raises the question whether the decision and the Agreement come solely under the CFSP or whether they also concern, inextricably and to an equivalent degree, the AFSJ and/or development cooperation, with the result that the decision should have been founded on more than one legal basis, corresponding to those different Union policies.

40. At the request of the Court at the hearing, the Parliament stated that, in its view, the contested decision should have been founded on the following substantive legal bases, namely, in addition to Article 37 TEU, Articles 82 TFEU, 87 TFEU and 209 TFEU.

41. In my view, both the context of the Agreement and its aim and content suggest that the contested decision appertaining thereto should be founded solely on the substantive legal basis of Article 37 TEU.

42. In my analysis to show that the substantive legal basis of the contested decision was appropriate, the aim and the content of the decision and of the Agreement cannot be examined in isolation, but must take account of the measures to which they refer and with which they establish a connection.

8 — Opinion 2/00 [2001] ECR I-9713, paragraph 5.

9 — See, inter alia, Case C-137/12 *Commission* v *Council* [2013] ECR, paragraph 52 and cited case-law.

10 — Ibid., paragraph 53.

43. It should be noted in this regard that both the contested decision and the Agreement make reference to resolutions of the United Nations Security Council [11] and to Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast. [12]

44. In the light of the development of piracy off the coast of Somalia and the threat that it poses to international security, the Security Council has adopted several resolutions on this subject, including Resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008).

45. In its Resolution 1814 (2008), the Security Council stated that 'the situation in Somalia continues to constitute a threat to international peace and security in the region'. [13] Paragraph 11 of that resolution calls upon 'States and regional organisations, in close coordination with each other ..., to take action to protect shipping involved with the transportation and delivery of humanitarian aid to Somalia and United Nations-authorised activities'.

46. In its Resolution 1816 (2008), the Security Council declared that it was 'concerned by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation'. [14] It also noted that 'the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region'. [15]

47. Against this background, the Security Council called for international cooperation to combat piracy. In particular, it encouraged 'States interested in the use of commercial maritime routes off the coast of Somalia, to increase and coordinate their efforts to deter acts of piracy and armed robbery at sea in cooperation with the Transitional Federal Government'. [16] The Security Council also urged 'all States to cooperate with each other, with the [International Maritime Organisation (IMO)] and, as appropriate, with the relevant regional organisations in connection with, and share information about, acts of piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia, and to render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law'. [17]

48. In its Resolution 1838 (2008), the Security Council further called upon 'States interested in the security of maritime activities to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft, in accordance with international law, as reflected in the [United Nations Convention on the Law of the Sea, signed at Montego Bay (Jamaica) on 10 December 1982 [18]]'. [19]

49. Aside from the military aspect, this international cooperation extends to the repression of acts of piracy. Thus, in its Resolution 1816 (2008), the Security Council called upon 'all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of

11 — 'The Security Council'.

12 — OJ 2008 L 301, p. 33. Joint Action as amended most recently before the present action was brought by Council Decision 2010/766/CFSP of 7 December 2010 (OJ 2010 L 327, p. 49), 'the Joint Action'.

13 — Final recital in the preamble to that resolution.

14 — Second recital in the preamble to that resolution.

15 — Twelfth recital in the preamble to that resolution.

16 — Paragraph 2 of Resolution 1816 (2008).

17 — Paragraph 3 of that resolution.

18 — Convention entered into force on 16 November 1994 and concluded and approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1, 'the United Nations Convention on the Law of the Sea').

19 — Paragraph 2 of that resolution.

persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing provision and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution'. [20]

50. The Security Council thus encouraged the strengthening of international cooperation with a view to the more effective repression of acts of piracy, '[n]oting with concern that the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice'. [21]

51. In order to put into effect the Security Council resolutions and to contribute to international cooperation to combat piracy, the Union adopted the Joint Action. It is based on Article 14 EU, the last subparagraph of Article 25 EU and Article 28(3) EU.

52. Article 1 of the Joint Action, entitled 'Mission', provides, in paragraph 1:

'The ... Union … shall conduct a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the … Security Council ... in a manner consistent with action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea ... and by means, in particular, of commitments made with third States, hereinafter called "Atalanta" in order to contribute to:

— the protection of vessels of the [World Food Programme (WFP)] delivering food aid to displaced persons in Somalia, in accordance with the mandate laid down in [Security Council] Resolution 1814 (2008).

— the protection of vulnerable vessels cruising off the Somali coast, and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in [Security Council] Resolution 1816 (2008).'

53. Under Article 2 of the Joint Action, entitled 'Mandate':

'Under the conditions set by applicable international law, in particular the United Nations Convention on the Law of the Sea, and by [Security Council] Resolutions 1814 (2008), 1816 (2008) and 1838 (2008), Atalanta shall, as far as available capabilities allow:

...

(e) in view of prosecutions potentially being brought by the relevant States under the conditions in Article 12, arrest, detain and transfer persons suspected of intending, as referred to in Articles 101 and 103 of the United Nations Convention on the Law of the Sea, to commit, committing or having committed acts of piracy or armed robbery in the areas where it is present and seize the vessels of the pirates or armed robbers or the vessels caught following an act of piracy or an armed robbery and which are in the hands of the pirates or armed robbers, as well as the property on board;

...'

20 — Paragraph 11 of that resolution. See also paragraph 14 of Resolution 1846 (2008).

21 — Ninth recital in the preamble to Resolution 1851 (2008).

54. Article 10 of the Joint Action, entitled 'Participation by third States', is worded as follows:

'1. Without prejudice to the decision-making autonomy of the [Union] or to the single institutional framework, and in accordance with the relevant guidelines of the European Council, third States may be invited to participate in the operation.

...

3. Detailed modalities for the participation by third States shall be the subject of agreements concluded in accordance with the procedure laid down in Article 37 of the Treaty. … Where the [Union] ... and a third State have concluded an agreement establishing a framework for the latter's participation in EU crisis management operations, the provisions of such an agreement shall apply in the context of this operation.

...

6. The conditions for the transfer to a State participating in the operation of persons arrested and detained, with a view to the exercise of jurisdiction of that State, shall be established when the participation agreements referred to in paragraph 3 are concluded or implemented.'

55. Lastly, mention should be made of Article 12 of the Joint Action, entitled 'Transfer of persons arrested and detained with a view to their prosecution', under which:

'1. On the basis of Somalia's acceptance of the exercise of jurisdiction by Member States or by third States, on the one hand, and Article 105 of the United Nations Convention on the Law of the Sea, on the other hand, persons suspected of intending, as referred to in Articles 101 and 103 of the United Nations Convention on the Law of the Sea, to commit, committing or having committed acts of piracy or armed robbery in Somali territorial waters or on the high seas, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred:

— to the competent authorities of the Member State or of the third State participating in the operation, of which the vessel which took them captive flies the flag, or

— if that State cannot, or does not wish to, exercise its jurisdiction, to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.

2. No persons referred to in paragraphs 1 and 2 may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.'

56. As is stated in recital 3 in the preamble to the contested decision, the Agreement was adopted in order to implement Article 12 of the Joint Action. The Agreement also lays down the modalities for the participation by a third State in the Atalanta operation pursuant to Article 10(3) and (6) of the Joint Action.

57. In the present proceedings, it is common ground that, in the light of its objective and its content, the Joint Action comes under the CFSP. In my view, the same is true of the Agreement and the contested decision which are an extension thereof. I cannot see, in particular, why the very principle of the participation of third States in the Union action for the deterrence, prevention and repression

of acts of piracy off the coast of Somalia and the rule that the transfer to a third State of arrested persons is subject to compliance by that State with international law, in particular as regards human rights, should come under the CFSP while the more detailed definition of the modalities for the transfer and the treatment of the persons concerned falls outside the scope of the CFSP.

58. I will now examine the precise substance of the Agreement to which the contested decision relates.

59. The Agreement organises the modalities for the transfer of suspected pirates and associated seized property from the European Union-led naval force (EUNAVFOR) to the Republic of Mauritius, frames the conditions for the treatment and prosecution of those persons, and specifies the assistance provided to the Republic of Mauritius by EUNAVFOR.

60. Article 1 of the Agreement, entitled 'Aim', provides:

'This Agreement defines the conditions and modalities for

(a) the transfer of persons suspected of attempting to commit, committing or having committed acts of piracy within the area of operation of EUNAVFOR ...;

(b) the transfer of associated property seized by EUNAVFOR from EUNAVFOR to [the Republic of] Mauritius; and

(c) the treatment of transferred persons.'

61. Article 3 of the Agreement sets out the general principles governing the modalities and the conditions for the transfer to the Republic of Mauritius of suspected pirates detained by EUNAVFOR and associated property seized by EUNAVFOR. It provides inter alia that the transfer of such persons to the competent law-enforcement authorities of the Republic of Mauritius may not be carried out before those authorities decide. In addition, under Article 3(5) of the Agreement, '[a]ny transferred person shall be treated humanely and in accordance with international human rights obligations, embodied in the Constitution of [the Republic of] Mauritius, including the prohibition of torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial'.

62. Article 4 of the Agreement contains rules on the treatment, prosecution and trial of transferred persons. Those rules include the right to trial within a reasonable time, the right to a fair trial and the guarantee of the presumption of innocence. In addition, Article 5 of the Agreement prohibits the death penalty for transferred persons.

63. Article 6 of the Agreement concerns records and notifications. It provides inter alia that EUNAVFOR must provide detention records to the Republic of Mauritius with regard to any transferred person, that the Republic of Mauritius is responsible for keeping an accurate account of all transferred persons, and that the records must remain available to the Union and EUNAVFOR.

64. In addition, Article 7 of the Agreement describes the assistance that EUNAVFOR provides to the Republic of Mauritius with a view to the investigation and prosecution of transferred persons. Thus, EUNAVFOR assists the Republic of Mauritius, among other things, by handing over detention records drawn up pursuant to Article 6(2) of the Agreement, processing evidence and producing statements or affidavits by witnesses.

65. Article 7(3) of the Agreement provides that '[a]s far as such resources are not provided through other financial donors, the Parties shall develop, subject to the applicable procedures, implementing arrangements on financial, technical and other assistance to enable the transfer, detention, investigation, prosecution and trial of transferred persons. These implementing arrangements shall

also aim at covering technical and logistical assistance to [the Republic of] Mauritius in the fields of revision of legislation, training of investigators and prosecutors, investigative and judicial procedures, and particularly, arrangements for storage and handing-over of evidence and appeal procedures. In addition, these implementing arrangements shall aim at providing for the repatriation of transferred persons in case of acquittal or non-prosecution, their transfer for completion of sentence in another State or their repatriation after serving their prison sentence in Mauritius'.

66. Furthermore, Article 10(1) of the Agreement states that '[f]or the purposes of the application of this Agreement, operational, administrative and technical matters may be the subject of implementing arrangements to be concluded between competent [Republic of] Mauritius authorities on the one hand and the competent [Union] authorities, as well as the competent authorities of the Sending States, on the other hand'. Under Article 10(2)(f) of the Agreement, those implementing arrangements may cover, inter alia, 'the provision of technical support, expertise, training and other assistance referred to in Article 7 upon request by [the Republic of] Mauritius in order to achieve the objectives of this Agreement'.

67. Lastly, Article 11(2) of the Agreement provides that the Agreement 'shall remain in force until termination of the [Atalanta] Operation as notified by EUNAVFOR'.

68. It is clear from this description of the Joint Action and the Agreement that there is a close link between the military operation provided for by the former and the provisions on the transfer and the treatment of suspected pirates contained in the latter.

69. The agreements concluded by the Union under Articles 10(3) and 12(2) of the Joint Action seek to respond to the Security Council resolutions to combat piracy off the coast of Somalia and thus contribute to international cooperation in that field. The Joint Action and the Agreement, taken together, constitute an appropriate and consistent response to the requests made by the Security Council.

70. As the Italian Republic points out, it is the Joint Action that provides that, in order to ensure the greatest success of activities to repress and prevent the acts of piracy in question, it is essential to reach the necessary agreements with the States in the region and to involve them also in exercising jurisdiction over suspected persons. The Agreement may therefore be regarded as an implementing measure for the Joint Action, of which it forms an integral part. It should be noted in this regard that under Article 28(1) TEU '[w]here the international situation requires operational action by the Union, the Council shall adopt the necessary decisions[, which] lay down ... the conditions for their implementation'. The fact that the Agreement forms an integral part of the conditions for the implementation of the Joint Action constitutes a strong indication that it is connected with the CFSP.

71. It must also be stressed that transfer agreements are essential to the proper implementation and effectiveness of the military operation established by the Joint Action.

72. As the French Government states, the fight against piracy is not limited to the arrest of suspect pirate vessels but extends to the transfer and trial of suspects. Thus, although the activities of transferring and prosecuting suspects covered by the Agreement do not strictly constitute military activities, the fact still remains that those activities are intrinsically linked to the Atalanta military operation.

73. The objective of the Atalanta mission is to contribute to the deterrence, prevention and repression of acts of piracy. In that mission, it is necessary not only to protect vessels, but also, where necessary, to arrest suspected pirates and then to hand them over to the competent authorities. It would be difficult to achieve the objective of the mission if persons who have committed acts of piracy were not subject to prosecution and could therefore resume their criminal activities immediately.

74. As the Italian Republic points out, if the identification and capture of suspected pirates were not translated into trials that were at once both swift and effective and respectful of human rights, the Joint Action itself would have no practical effect. It would otherwise not have any effective deterrence and would be incapable of definitively resolving the problem of piracy off the Somali coast.

75. Agreements like those at issue in the present case are essential to the conduct of the military operation decided upon by the Union. The continuity between operational activities and legal activity was identified at a very early stage as one of the centres of gravity of that military operation. Without such continuity, prosecutions of pirates are made more difficult, or even impossible. The operational effectiveness of the activities is then undermined and the expected deterrent effect of the Union's action is reduced to almost nothing. [22]

76. The fight against piracy includes an important security and military dimension which must necessarily go hand-in-hand with an equally important law-enforcement and judicial aspect. [23] That is why the international community has been engaged in signing transfer-for-trial agreements with States in the region, in the spirit of global sharing of the burden and for operational reasons having to do with the advantages of transfer nearer to the place where the offence was committed. [24]

77. The Parliament itself also acknowledged, in its resolution of 10 May 2012 on maritime piracy, [25] that 'further piracy with impunity is an obstacle to deterrence'. [26]

78. In the light of the foregoing, the Agreement follows on from the resolutions of the Security Council and the Joint Action, and is intrinsically linked to the conduct of the Atalanta military operation. I will now show that the objective pursued by the Agreement, like the Joint Action, falls within the scope of the CFSP.

79. From the point of view of their objective, the Joint Action and the Agreement are instruments by which the Union took action decided upon within the Security Council intended to preserve international peace and security. As is provided for by the Security Council resolutions and Article 12(2) of the Joint Action, the aim of the Agreement is more specifically to reconcile the effective fight against piracy off the coast of Somalia with respect for fundamental rights.

80. Piracy off the coast of Somalia represents a threat to international security and regional stability. The Union's action is intended to combat this form of international crime which has grown in scale in the Indian Ocean, in particular off the coast of Somalia and the Horn of Africa. As the Parliament stated in its resolution of 10 May 2012 on maritime piracy, piracy 'is a growing threat both to human life and the safety of seafarers and other persons, as well as to regional development and stability, the marine environment, world trade, all forms of maritime transport and shipping, including fishing vessels, and to the delivery of humanitarian aid'. [27]

81. The Union action thus seeks to safeguard the security of maritime navigation in that busy international transit area. In this regard, the action pursues an objective of protecting international security off the coast of Somalia. It also promotes stability and peace in the region.

22 — See the statement by Lenoir, D., 'Atalante et l'action de l'Union européenne contre la piraterie', at the third round table on action, intervention, sanctions at the study day on 7 December 2009 on 'Piracy: "strategic threat" or epiphenomenon?', organised by the Fondation pour la recherche stratégique, p. 61.

23 — See Bosse-Platière, I., 'Le volet judiciaire de la lutte contre la piraterie maritime en Somalie: les accords de transfert conclus par l'Union européenne avec des États tiers', *Les différentes facettes du concept juridique de sécurité — Mélanges en l'honneur du Professeur Pierre-André Lecocq*, Université Nord Lille 2, 2011, p. 101.

24 — See the Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia (paragraph 65).

25 — 2011/2962(RSP).

26 — Paragraph 10.

27 — Recital C in the preamble to that resolution.

82. From the point of view of the Union, the paralysis of maritime traffic in the Red Sea and off the Gulf of Aden would make piracy a strategic problem. That maritime route is considered to be essential for supplies to Europe. More broadly speaking, the international mobilisation against acts of piracy shows that piracy may potentially affect all merchant ships from different parts of the world and therefore constitutes a threat to international peace and security.

83. In my view, the objective of combating piracy off the coast of Somalia in order to preserve international peace and security having due regard to human rights, within the framework of the international cooperation initiated by the Security Council, falls within the scope of the CFSP.

84. It should be noted in this regard that such an objective is consistent with the aims of the Union's external action, as set out more specifically in Article 21(2)(a) to (c) and (h) TEU. Under that provision:

'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, [28] with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

...

(h) promote an international system based on stronger multilateral cooperation and good global governance'.

85. It is true that the objectives set out in Article 21(2) TEU constitute horizontal objectives of the Union's external action, even though none of them are expressly attributed to the CFSP. It is made particularly difficult to identify CFSP objectives since, first, Article 23 TEU, which is part of Chapter 2 concerning specific provisions on the CFSP, refers to the horizontal objectives of the Union's external action mentioned in Article 21(2) TEU and, second, Article 24(1) TEU gives a particularly broad and general definition of the area of the CFSP. Under that provision, '[t]he Union's competence in matters of [the CFSP] shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence'.

86. Nevertheless, it is essential to define the boundaries between the CFSP and the Union's other policies. This obligation stems from the application of the clause that the Union's competences in the field of the CFSP must not affect its competences in respect of other Union policies and vice versa, as laid down in Article 40 TEU.

87. To that end, it should be noted, first of all, that the abovementioned objectives of the Union's external action, namely the objectives set out in Article 21(2)(a) to (c) and (h) TEU, are among those that are traditionally assigned to the CFSP. I would point out in this regard that the objectives mentioned in that provision essentially correspond to those that were assigned to the CFSP under Article 11(1) of the EU Treaty prior to its amendment by the Treaty of Lisbon.

28 — Charter signed in San Francisco (United States) on 26 June 1945.

88. Second, in so far as Article 21(2) TEU sets out the common objectives of the Union's external action, that provision should be read in conjunction with the more specific provisions applicable to each policy in order to determine the Union policy to which a certain objective is more specifically related.

89. With regard, in particular, to the objective of preserving international peace and strengthening security, *Parliament* v *Council*, militates in favour of it being related to the CFSP.

90. In that judgment, the Court linked the objective of combating international terrorism and its financing in order to preserve international peace and security to the field of the CFSP on the basis of not only Article 21(2)(c) TEU and the first subparagraph of Article 24(1) TEU, but also Article 43(1) TEU.

91. As in that case, the fact that the Agreement constitutes one of the instruments by which the European Union takes action at international level which was the subject of numerous Security Council resolutions and was indisputably intended to preserve international peace and security is an important factor in the formation of the view that that Agreement can be linked to the sphere of the CFSP. [29]

92. Under Article 37 TEU which, it should be borne in mind, constitutes the substantive legal basis of the contested decision, the Union may conclude international agreements in all areas of the CFSP, including, therefore, in the field of the common security and defence policy (CSDP), which, under Article 42(1) TEU, is an integral part of the CFSP.

93. I take the view that, as the necessary extension of the Atalanta military operation, pursuing the same objective of preserving international peace and security, the Agreement falls within the sphere of the CSDP.

94. Under Article 42(1) TEU, the CSDP 'shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.'

95. The content of the tasks of the CSDP is specified in Article 43(1) TEU, under which '[t]he tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.'

96. The Parliament states that it does not see how the tasks of the representatives of the Union and EUNAVFOR under the Agreement, such as conducting the transfer of persons and property, handing over evidence, facilitating prosecution and trials, revision of legislation, training of investigators, and providing financial, technical, logistical and other assistance to the Republic of Mauritius, could fall under any of the specific CSDP tasks referred to in Articles 42 TEU and 43 TEU. Even though it acknowledges that those tasks might contribute to the overall objective of strengthening international security and are a consequence of military operation Atalanta, the Parliament considers that their very nature and specific objectives go beyond that for which the military operation Atalanta was established.

29 — See, to this effect, *Parliament* v *Council*, paragraph 76, and point 66 of my Opinion in that case.

97. On the contrary, I take the view that the list of CSDP tasks in Article 43(1) TEU is broad enough to cover all the provisions of the Agreement and, accordingly, to conclude that that Agreement is an integral part of a CSDP task.

98. Even if it were thought that transferring and prosecuting suspects do not, by their nature, constitute military activities, it should be borne in mind that one of the important characteristics of the CSDP, which is evident from Articles 42(1) TEU and 43(1) TEU, is that it is not limited to the use of military means, in that provision is also made for the use of civilian means, in particular in crisis management tasks. [30]

99. According to the Parliament, the fact that the Agreement seeks to combat a form of crime by means of instruments similar to those used in police cooperation and judicial cooperation in criminal matters under Title V of Part Three of the FEU Treaty relating to the AFSJ means that the contested decision should also be founded on legal bases in that title, namely Articles 82 TFEU and 87 TFEU.

100. The Commission claims that the principal aim of the Agreement is to prevent the Member States concerned having to conduct criminal proceedings themselves. The Agreement facilitates cooperation between the authorities of the Member States and the authorities of the Republic of Mauritius by establishing a legal and practical framework for handing over suspects to the coastal third State with a view to investigation and prosecution by the latter. Accordingly, the objective and the content of the Agreement justified the use of Article 82 TFEU as the legal basis for the conclusion of the Agreement in view of its nature, being essentially intended for judicial cooperation. The fact that military personnel are involved in implementing the Agreement does not in any way alter the conclusions reached by the Commission. It states that in order to determine the appropriate legal basis the nature of the envisaged activity is crucial, whereas the nature or the capacity of the actor is not important.

101. I believe that the arguments put forward by the Parliament and by the Commission are incorrect.

102. In support of the first aspect of its argument, the Parliament claims that combating crime is not the specific objective or task of the Union within the CFSP or the CSDP, but a field covered by the AFSJ. It also states that only the fight against terrorism is mentioned in Article 43(1) TEU.

103. However, in my view, the statement made in that provision that the CSDP tasks may contribute to the fight against terrorism does not mean that such tasks cannot also contribute to the fight against other forms of crime.

104. Furthermore, as the Council rightly states, the fight against international crimes constituting threats to international security and taking place outside the Union's territory is a matter falling within the CFSP, including, as an integral part thereof, within the CSDP through crisis management operations where relevant.

30 — As was already stated in the 'European security strategy — A secure Europe in a better world', adopted in Brussels on 12 December 2003, 'none of the new threats is purely military; nor can any be tackled by purely military means. Each requires a mixture of instruments' (p. 7).

105. It should be noted in this regard that the Union has conducted several missions to reform the security sector under the CSDP, particularly civilian missions, in order to tackle threats to security including threats stemming from criminal activities, and a number of police and 'rule of law' missions. [31] However, such missions have not been regarded as related to the AFSJ, and rightly so in my view. Operations conducted as part of those missions may seek to maintain or restore public order. The envisaged tasks may include training and support for security personnel and assistance in drafting laws. [32]

106. The arguments put forward by the Parliament and by the Commission in fact show that the distinction between the CFSP and the external dimension of the AFSJ should be clarified.

107. The distinction between these two Union policies is made difficult because they are both connected to the imperative of security. [33] The objectives of safeguarding the security of the Union and strengthening international security are assigned to the Union as objectives of the Union's external action under Article 21(2)(a) and (c) TEU. At the same time, ensuring a high level of security is also an objective of the AFSJ in accordance with Article 67(3) TFEU.

108. However, a clear distinction must be drawn between the respective scopes of the CFSP and the AFSJ in its external dimension.

109. As the Council states, measures concerning the AFSJ, whether of a purely internal nature or having an external dimension, must be taken with the aim to further freedom, security and justice inside the Union. Indeed, Article 67(1) TFEU provides that '[t]he Union shall constitute an [AFSJ]', which is also reflected in Article 3(2) TEU. Thus, under the latter provision, '[t]he Union shall offer its citizens an [AFSJ] without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

110. The construction of an AFSJ for the citizens of the Union requires the Union to exercise its external competence. [34] For example, Article 79(3) TFEU confers on the Union an explicit external competence to conclude readmission agreements. In addition, on the basis of Article 216 TFEU the Union may conclude international agreements on police or judicial cooperation, in particular where this is necessary in order to achieve one of the AFSJ objectives.

31 — Mention can be made, for example, of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (OJ 2008 L 42, p. 92); the assistance provided for Iraq under Council Decision 2010/330/CFSP of 14 June 2010 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX-IRAQ (OJ 2010 L 149, p. 12); Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR) (OJ 2012 L 187, p. 40); and Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger) (OJ 2012 L 187, p. 48).

32 — Since the Santa Maria da Feira European Council on 19 and 20 June 2000, the Union has developed the civil dimension of the CSDP. The purpose of operations undertaken within that framework has been to provide post-conflict States or States with weak institutions with assistance enabling them to consolidate the rule of law and/or to develop their capacity for combating organised crime or controlling their external borders more effectively. See Trauner, F., 'The internal-external security nexus: more coherence under Lisbon?', Occasional Paper, ISS, March 2011, p. 16.

33 — See Neframi, E., 'L'aspect externe de l'espace de liberté, de sécurité et de justice: quel respect des principes et objectifs de l'action extérieure de l'Union?', *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union européenne après le traité de Lisbonne*, Bruylant, 2013, p. 509, particularly p. 521.

34 — The Hague Programme: strengthening freedom, security and justice in the European Union (OJ 2005 C 53, p. 1) thus states that all powers available to the Union, including external relations, should be used in an integrated and consistent way to establish an ELSJ (paragraph 4, last paragraph).

111. Consequently, it is on the basis of the objectives laid down in Article 3(2) TEU and Article 67 TFEU that it is possible to identify the external dimension of the AFSJ. In other words, the external dimension of the AFSJ is functional and instrumental having regard to the objectives set out in those provisions. [35] The internal and external policies in the field of the AFSJ are inextricably linked. In order to define the substance of the external aspect in the field of the AFSJ, utmost account should be taken of the internal policy functions of the AFSJ. [36]

112. Accordingly, whilst the construction of that area may require external action on the part of the Union, an agreement must, if it is to be able to be regarded as falling within the AFSJ, have a close link with freedom, security and justice within the Union. In other words, the connection with the AFSJ is justified where there is a direct link between the aim of the internal security of the Union and the judicial and/or police cooperation which is developed outside the Union. On the other hand, a Union action must be connected with the CFSP where the objective of that action is, first and foremost, peace, stability and democratic development in a region outside the Union. [37]

113. Of course, the distinction is not always clear as it is true that the development of a form of crime in a certain region may pose a threat to both the internal security of the Union and the stability of the region concerned. [38] As is evident from, among other things, the Stockholm Programme, [39] adopted by the European Council in 2010, internal and external security are inseparable. Addressing threats, even far away from our continent, is essential to protecting Europe and its citizens. [40]

114. Nevertheless, in my view, because this Union action forms part of an international cooperation initiative launched by the Security Council and seeking above all to combat a threat to international peace and security, that action must be adopted within the framework of the CFSP.

115. In the present case, the Agreement, which, as I have explained, forms part of an action decided upon at international level to combat acts of piracy off the coast of Somalia in order to guarantee international peace and security in that area, does not, in my opinion, cover a situation with a sufficient link to the construction of the AFSJ.

116. Contrary to the claim made by the Parliament, the fact that the Agreement facilitates cooperation between EUNAVFOR and the law-enforcement authorities of the Republic of Mauritius and that it covers activities that are similar to police or judicial activities does not constitute a sufficient connection to the AFSJ.

117. In my view, it is wrong to state that because the judicial treatment of individuals is at stake, that is sufficient to bring the Union action within the scope of the policy relating to the AFSJ, in this case in its external dimension. The CFSP may involve recourse to police or judicial means of achieving its objectives. The use of such instruments is not crucial in itself provided that those instruments serve the objective of safeguarding international peace and security, which is unquestionably part of the CFSP, as I have shown, and not the AFSJ objective.

35 — See Govaere, I., and Demedts, V., 'Quelle définition de l'"externe" en matière d'ELSJ? Le cadre et les enjeux', *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union européenne après le traité de Lisbonne*, Bruylant, 2013, p. 489, particularly p. 497.

36 — Ibid., p. 508.

37 — See de Biolley, S., 'Coopération policière de l'Union européenne', *Jurisclasseur Europe*, fascicule 2680, paragraph 114.

38 — Idem.

39 — The Stockholm Programme — An open and secure Europe serving and protecting citizens (OJ 2010 C 115, p. 1).

40 — See paragraph 7 entitled 'Europe in a globalised world — the external dimension of freedom, security and justice'. The European Council states that it 'recognises that CSDP and many external actions in the area of freedom, security and justice have shared or complementary objectives. CSDP missions also make an important contribution to the Union's internal security in their efforts to support the fight against serious transnational crime in their host countries and to build respect for the rule of law' (paragraph 7.1). For that reason, the European Council 'encourages greater cooperation and coherence between the policies in the area of freedom, security and justice and CSDP to further these shared objectives' (idem).

118. The missions undertaken by the Union within the framework of the CSDP show that the traditional instruments of the AFSJ can be mobilised to serve the objectives of the CFSP. Thus, the international missions decided upon by the Union with a view to preserving peace, preventing conflicts and strengthening international security are facilitated by the possibility of having recourse to civilian means, such as strengthening the judicial system and police services of the third States concerned.[41] The external aspect of the AFSJ is thus absorbed by the exercise of the Union's foreign policy competence to serve the objectives of the CFSP.[42]

119. Lastly, I would point out that the finding that the Agreement seeks to protect the rights of suspected pirates and the fact that it refers to a future agreement between the parties to determine the implementing arrangements for the technical and logistical assistance provided by the Union to the Republic of Mauritius in the fields, inter alia, of revision of legislation, training of investigators and prosecutors, and investigative and judicial procedures does not allow that Agreement to be classified in the field of the AFSJ. Those components of the Agreement seek to ensure the protection of human rights and the consolidation of the rule of law, which are among the objectives of the CFSP. In this regard, it would be paradoxical if the wish of the parties to the Agreement to ensure that the effective repression of acts of piracy is not to the detriment of the fundamental rights of their perpetrators contributed to that Agreement falling outside the scope of the CFSP, which, like the Union's other policies, is subject to respect for fundamental rights.

120. The military operation conducted by the Union necessarily leads to the arrest of pirates. Defining the arrangements for the treatment of such persons after their arrest and their fate is obviously part of the operation itself. However, the only lawful treatment of the arrested persons is for them to be tried. With this in mind, enabling States to which pirates are handed over to bring their procedures into conformity with international human rights law constitutes the final but essential phase of the military operation conducted within the framework of the CFSP.

121. In the light of the foregoing, the Council rightly took the view, when it adopted the contested decision, that the decision did not come under the AFSJ in its external dimension, and that it was not therefore required to have recourse to one of the legal bases relating to that Union policy.

122. In my view, the Agreement also does not include a development cooperation component which might justify recourse to a legal basis in Part Five, Title III, Chapter 1 of the FEU Treaty.

123. In its judgment of 20 May 2008 in *Commission* v *Council*,[43] the Court ruled that 'a concrete measure aiming to combat the proliferation of small arms and light weapons may be adopted by the Community under its development cooperation policy only if that measure, by virtue both of its aim and its content, falls within the scope of the competences conferred by the EC Treaty on the Community in that field'.[44] According to the Court, '[t]hat is not the case if such a measure, even if it contributes to the economic and social development of the developing country, has as its main purpose the implementation of the CFSP'.[45]

41 — The synergy between the traditional instruments of the AFSJ and the CFSP, in its CSDP dimension, is stressed in the 'Internal security strategy for the European Union: Towards a European security model', adopted by the Justice and Home Affairs Council on 25 and 26 February 2010 and approved by the European Council on 25 and 26 March 2010, which states that it is 'very important to strengthen the participation of law-enforcement agencies and justice, freedom and security bodies at all stages of civilian crisis-management missions, so that they can play a part in resolving conflicts by working together with all other services involved on the ground (military, diplomatic, emergency services, etc.)' (p. 30). There is therefore a close link and a complementarity between the external dimension of the AFSJ and the CSDP. Whilst cooperation with third States is crucial for achieving the Union's internal security objectives, similarly, CSDP missions may serve the objectives of the AFSJ not only by providing information relevant to internal security, but also by contributing to the stability of the Union's neighbours (see, with regard to this aspect, Wolff, S., and Mounier, G., 'The external dimension of JHA: A new dimension of EU diplomacy', *Freedom, Security and Justice after Lisbon and Stockholm*, TMC Asser Press, 2011).

42 — See Neframi, E., op. cit., p. 527.

43 — Case C-91/05 [2008] ECR I-3651.

44 — Paragraph 71.

45 — Paragraph 72.

124. However, as I have explained, it is the CFSP that forms the centre of gravity of the Agreement and of the contested decision.

125. Under the second subparagraph of Article 208(1) TFEU, 'Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty'.

126. As the Council points out, Article 208(1) TFEU refocused the scope of development cooperation with the result that the key element of the Union's development policy is poverty reduction and eradication. In addition, the second subparagraph of the last sentence of Article 208(1) TFEU states that '[t]he Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries'. The Union's other policies, such as the CFSP, must therefore take account of the objectives of development cooperation and may therefore contribute to those objectives, which is consistent with the requirement of consistency of the Union's external action. Consequently, the simple fact that a measure coming under the CFSP is likely to have positive incidental effects on the development of a third State does not make it a measure falling within the scope of development cooperation within the meaning of Article 208 TFEU.

127. Of course, under the treaties which preceded the Treaty of Lisbon, the Court gave a relatively broad interpretation to what is covered by development cooperation.[46] However, such a broad understanding does have certain limits. In particular, a distinction must be drawn between measures which are aimed at development and measures which pursue other objectives of the Union, such as CFSP objectives. Accordingly, strengthening the judicial capacities of the Republic of Mauritius is not an end in itself, but is aimed at the effective repression of acts of piracy which pose a threat to international peace and security, having due regard to the fundamental rights of the perpetrators of those acts.

128. Any assistance provided under the Agreement, in particular the assistance mentioned in Article 7(2) and (3) of the Agreement, will relate to the transfer of suspected pirates with a view to the effective repression of acts of piracy and to the capacity of the Republic of Mauritius to implement the Agreement in accordance with international human rights law. It should also be noted that the provision, under Article 10(2)(f) of the Agreement, of technical support, expertise, training and other assistance referred to in Article 7 of that Agreement is solely 'in order to achieve the objectives of [that] Agreement'. Consequently, the assistance provided for by the Agreement does not go beyond the objectives for which the Atalanta operation was set up. Accordingly, its objective is certainly not the development of the Republic of Mauritius and it does not therefore constitute a development measure coming under Articles 208 TFEU and 209 TFEU.

129. The type of assistance is not the determining factor and none comes by nature under development cooperation.[47] In this regard, assistance such as 'technical and logistical assistance to [the Republic of] Mauritius in the fields of revision of legislation, training of investigators and prosecutors, investigative and judicial procedures'[48] may be provided perfectly well within the framework of the CFSP, and in particular the CSDP, as has been shown above, in order to ensure security and to promote human rights and the rule of law.

130. Accordingly, as I cannot identify a development cooperation component in the Agreement, the contested decision was rightly based on Article 37 TEU without a supplementary legal basis relating to development cooperation.

46 — See Case C-268/94 *Portugal* v *Council* [1996] ECR I-6177, paragraphs 23 to 29 and 37 to 39; Case C-403/05 *Parliament* v *Commission* [2007] ECR I-9045, paragraphs 56 to 58; and *Commission* v *Council*, paragraphs 64 to 70.

47 — See, to this effect, *Commission* v *Council*, paragraphs 104 and 105.

48 — See Article 7(3) of the Agreement.

131. Since the contested decision was rightly founded solely on a legal basis relating to the CFSP, the Agreement appertaining thereto must be considered to relate exclusively to the CFSP within the meaning of the second subparagraph of Article 218(6) TFEU. The adoption of the decision concluding that agreement did not therefore require consent from or consultation of the Parliament.

II – The plea in law alleging a violation of Article 218(10) TFEU

132. By its second plea in law, the Parliament alleges that the Council failed to keep it 'immediately and fully informed at all stages of the procedure' in contravention of the requirements under Article 218(10) TFEU.

133. The Council claims that this plea in law is inadmissible in so far as, with respect to an agreement relating exclusively to the CFSP, the Court has no jurisdiction to rule on whether or not it complied with the information obligation laid down in that provision. In the alternative, should the Court accept jurisdiction to rule on whether the Council complied with that provision, the Council claims that it cannot be held liable for a violation of Article 218(10) TFEU.

134. Under the second subparagraph of Article 24(1) TEU, the Court 'shall not have jurisdiction with respect to [the provisions on the CFSP], with the exception of its jurisdiction to monitor compliance with Article 40 [TEU] and to review the legality of certain decisions as provided for by the second paragraph of Article 275 [TFEU]'.

135. In addition, the first paragraph of Article 275 TFEU states that the Court does not have jurisdiction 'with respect to acts adopted on the basis of [the provisions relating to the CFSP]'. However, under the second paragraph of Article 275 TFEU, 'the Court shall have jurisdiction to monitor compliance with Article 40 [TEU] and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the [EU] Treaty'.

136. It is clear from these provisions that although the Court does not, as a rule, have jurisdiction in matters relating to the CFSP, the CFSP does not escape the scrutiny of the European Union judicature completely.

137. It is not disputed that Article 218 TFEU lays down the rules relating to the negotiation and conclusion of all international agreements. In particular, the rule provided for in Article 218(10) TFEU according to which '[t]he ... Parliament shall be immediately and fully informed at all stages of the procedure' applies in all areas of EU law. Whilst that provision is therefore applicable in particular in respect of international agreements concluded by the Union in matters relating to the CFSP, it is certainly not a provision relating to the CFSP within the meaning of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU. This first ground of lack of jurisdiction cannot therefore be accepted.

138. In addition, even though, as I showed above, the contested decision undoubtedly constitutes a measure adopted, from a substantive point of view, on the basis of provisions relating to the CFSP within the meaning of the first paragraph of Article 275 TFEU, this does not, in my opinion, mean that the Court should decline jurisdiction to review whether the Council complied with a procedural rule like that provided for in Article 218(10) TFEU which is applicable to all international agreements and whose application to international agreements concluded in matters relating to the CFSP is not expressly precluded.

139. Although, in my view, the principle that the Court has jurisdiction to review whether the Council complied with Article 218(10) TFEU must be accepted, where it is faced with an agreement relating exclusively to the CFSP as in the present case the Court must, in its review, nevertheless take account of the specific nature of the rules and procedures to which the CFSP is subject in accordance with the second subparagraph of Article 24(1) TEU.

140. It is true that, as the Court held in *Parliament* v *Council*, 'participation by the Parliament in the legislative process is the reflection, at Union level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly'.[49] However, at the same time, the Court could only find that the framers of the Treaty of Lisbon had made the choice to confer 'a more limited role on the Parliament with regard to the Union's action under the CFSP'.[50]

141. One of the specific rules and procedures in matters of the CFSP is that, under the second subparagraph of Article 218(6) TFEU, consent from or consultation of the Parliament are not required where the agreement in question relates exclusively to the CFSP.

142. In my view, it follows that the procedure and the provision of information from which the Parliament is to benefit under Article 218(10) TFEU must differ according to whether or not the agreement in question relates exclusively to the CFSP. In other words, I consider that the Council can legitimately be expected to provide the Parliament with information relating to an international agreement more quickly and in fuller detail where the Parliament is required to give its consent or to be consulted pursuant to the second subparagraph of Article 218(6) TFEU than where consent from or consultation of the Parliament is not required. In order to give an informed opinion, the Parliament must necessarily have sufficiently detailed information in good time and it would be justified in refusing to give its consent to a decision concluding an agreement in the absence of such information.

143. In each case, I consider that the Court's review of compliance by the Council with the information obligation under Article 218(10) TFEU must therefore take account of the nature of the agreement in question and the powers enjoyed by the Parliament under the second subparagraph of Article 218(6) TFEU to influence the substantive content of that agreement.

144. Having said that, accepting that the intensity of the information obligation under Article 218(10) TFEU may vary depending on the Parliament's involvement in the procedure for the conclusion of international agreements does not necessarily mean that the Parliament is deprived of sufficient information where the agreement in question relates exclusively to the CFSP. Even though its intensity may vary depending on the case, the information obligation under Article 218(10) TFEU is generally applicable, including in matters of the CFSP.

145. Furthermore, it should not be forgotten that, even though it has a limited role in the field of the CFSP, particularly where an agreement relates exclusively to the CFSP, the Parliament nevertheless has a right of scrutiny over that policy, as is clear from, inter alia, Article 36 TEU.[51]

146. I will now examine the question of when the Parliament was informed of the negotiation and the conclusion of the Agreement.

49 — Paragraph 81.

50 — Paragraph 82.

51 — Thus, the first paragraph of Article 36 TEU provides that '[t]he High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the ... Parliament on the main aspects and the basic choices of the [CFSP] and the [CSDP] and inform it of how those policies evolve. He shall ensure that the views of the ... Parliament are duly taken into consideration. Special representatives may be involved in briefing the … Parliament.' The second paragraph of Article 36 TEU goes on to state that the Parliament 'may ask questions of the Council or make recommendations to it and to the High Representative. Twice a year it shall hold a debate on progress in implementing the [CFSP], including [the CSDP].'

147. On 22 March 2010, the Council authorised the High Representative of the Union for Foreign Affairs and Security to open negotiations with a view to concluding transfer agreements with several third States, including the Republic of Mauritius.

148. By letter of the same date, the Council informed the President of the Parliament of that decision, stating that it would keep him informed in due course of the conclusion of the transfer agreements in question.

149. The negotiations resulted, on 12 July 2011, in the adoption of the contested decision, by which the Council authorised the signing of the Agreement.

150. The Agreement was signed on 14 July 2011.

151. The contested decision and the Agreement were published in the *Official Journal of the European Union* on 30 September 2011.

152. By letter dated 17 October 2011, the Council informed the President of the Parliament of the adoption of the contested decision and of the signing of the Agreement.

153. The Parliament alleges that the Council, first, failed to keep it informed in the course of the negotiating phase of the Agreement and, second, waited more than three months before communicating to it the contested decision and the Agreement.

154. In my view, these complaints cannot result in the annulment of the contested decision.

155. First, I consider that Article 218(10) TFEU requires the effective provision of information by the Council to the Parliament. Thus, the information obligation under that provision could not, in my view, be considered to have been satisfied solely by the publication of a Council decision in the *Official Journal of the European Union*. However, I note that the Council informed the President of the Parliament directly and personally of the opening of negotiations, then of the adoption of the contested decision and the signing of the Agreement.

156. Second, as I have already pointed out, where the agreement concerned relates exclusively to the CFSP, the Council cannot be required to inform the Parliament in such full detail as where consent from or consultation of the Parliament were required. In particular, in so far as the Parliament was not required to give its opinion on the content of the Agreement, it was not compulsory to inform it about the progress of the negotiations.

157. Third, with regard to the period of three months which elapsed before the Council communicated the contested decision and the Agreement to the Parliament, I would point out that it would have been more in keeping with the spirit of Article 218(10) TFEU if the Parliament had been informed before the publication of the contested decision and the Agreement in the *Official Journal of the European Union*. However, given that, for the reasons set out above in relation to the fact that the Agreement relates exclusively to the CFSP, the period in question neither infringed the Parliament's prerogatives nor could influence the content of the Agreement, I consider that the conditions for establishing a violation of Article 218(10) TFEU are not met.

III – Conclusion

158. In the light of all the foregoing considerations, I propose that the Court should:

— dismiss the application, and

— order the European Parliament to pay the costs and the Czech Republic, the French Republic, the Italian Republic, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the European Commission to bear their own costs.