

The internal-external security nexus: more coherence under Lisbon?

Florian Trauner

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Summary

Since the entry into force of the Treaty of Amsterdam, the EU has intensified its efforts to establish closer coordination between the internal and external dimensions of the EU's security policies – i.e. between the fields of justice and home affairs (JHA) and foreign and security policy – based on the assumption that this serves the interests of all actors involved. More inward-looking actors, typically from the ministries of the interior and justice in individual Member States, believe that they can strengthen their internal problem-solving capacities if the EU uses its foreign policy instruments and capabilities in a targeted and focused way to improve internal security and to engage third countries in achieving its goals in the JHA domain. At the same time, JHA expertise and actors have become an indispensable resource for traditional foreign policy actors in terms of dealing with today's security challenges and achieving the EU's main foreign policy objectives, such as promoting the rule of law and preventing state failure.

This *Occasional Paper* seeks to analyse the issue of coherence and complementarity between EU internal security policies and external relations/foreign policy, focusing on the impact of the Lisbon Treaty on existing political and institutional challenges. A key political challenge has been that the mainstreaming of internal security objectives in EU external relations, frequently driven by a security rationale that relegated human rights and civil liberties-related issues to secondary status, has risked undermining the stated normative principles of EU foreign policy-making. At an institutional level, the EU has had difficulties in living up to the expectations of its ambitious strategic papers, not least due to the tendencies of each Council formation (Justice and Home Affairs, Foreign Affairs Council) to protect its own turf.

The paper argues that the EU can address the institutional and political challenges by strengthening existing coordination mechanisms and fully exploiting the possibilities which the Lisbon Treaty offers. The European Parliament, now a legislative actor equal in standing with the Council in the Area of Freedom, Security and Justice (AFSJ), should become more engaged in the process of negotiating international agreements in the

JHA field and the Council should no longer sideline its priorities in relation to issues such as readmission of third-country nationals and data protection involving high stakes in the sphere of human rights and civil liberties. The problem of insufficient institutional cooperation between the Justice and Home Affairs and Foreign Affairs Councils can be tackled by, firstly, establishing a strong JHA expertise in the European External Action Service and, secondly, involving the JHA Council structures in a more comprehensive and systematic way in the planning and conduct of CSDP civilian crisis management missions and in CFSP thematic and geographical working groups. The paper concludes by underlining that the EU's success in moving towards comprehensive coherence will also be determined by the political will and ability of internal and foreign policy actors to overcome their habit of thinking in different security mindsets and to develop a shared understanding of European security challenges.

Introduction

In a traditional understanding, the field of ‘internal/domestic security’ (crime, public order, political stability) tended to be considered as separate from ‘external/foreign’ security (external peace, military engagement) regardless of acknowledged interdependencies (external peace promotes internal stability and vice versa).¹ The involvement of different security actors, the police and law enforcement agencies on the one side and diplomacy and the military on the other, contributed to the relative independence of each security field. But the increasingly transboundary nature of issues such as organised crime and terrorism, the challenge of uncontrolled migration and fundamental changes in the way societies are organised, have blurred the boundaries of the internal/external security divide. The EU has responded to this development by establishing closer coordination and cooperation between the institutions and actors chiefly concerned with internal security and those dealing with external security.² According to the external JHA strategy adopted by the Council in December 2005, the policy field of justice and home affairs should become a ‘central priority’ of the EU’s external relations and the EU ensure a ‘co-ordinated and coherent approach’.³

This *Occasional Paper* seeks to analyse the issue of coherence and complementarity between EU internal security policies and external relations/foreign policy, focusing on the impact of the Treaty of Lisbon on existing political and institutional challenges. It is argued that the EU can move towards comprehensive coherence and address the difficulties stemming from diverging security interests and logics of cooperation of internal and foreign policy actors by strengthening existing coordination mechanisms and fully exploiting the possibilities of the Lisbon Treaty. The paper is informed by the current academic and political discussion on the closer internal-external security nexus and seeks to contribute to it by applying a

1. Ferruccio Pastore, ‘Reconciling the Prince’s two “arms”: internal-external security policy coordination in the European Union’, *Occasional Paper* no. 30 (Paris: European Union Institute for Security Studies, October 2001).

2. One of the first articles analysing this development in relation to the EU was that by Ferruccio Pastore (2001), *op. cit.* in note 1. An important reference remains the work of Didier Bigo, in particular ‘Internal and external security(ies), the Möbius ribbon’, in Mathias Albert et al (eds.), *Identities, Borders and Orders* (Minneapolis: University of Minnesota Press, 2001). For more recent contributions, see note 4.

3. Council of the European Union, *A Strategy for the External Action of JHA: Global Freedom, Security and Justice*, doc. 15446/05, Brussels, 6 December 2005.

policy-oriented perspective and providing an analysis of the institutional consequences of the Lisbon Treaty in this field of research.⁴ In addition to the investigation of relevant primary and secondary literature, the study builds upon a series of semi-structured expert interviews conducted with officials and politicians of different EU institutions in October 2010.⁵

The analysis proceeds in four steps. Elaborating on the EU's strategy and objectives, the first section discusses the state of play in terms of coordinating internal and external security policies at EU level. This is followed in the second section by an investigation of the main political and institutional challenges underlying these efforts. The third section examines how the amendments introduced by the Treaty of Lisbon impact on these challenges and have changed the dynamics of cooperation in the EU, using the case of the European Parliament's engagement in external counter-terrorism cooperation as an illustration. The paper concludes by proposing three policy recommendations on how to better involve the European Parliament in international negotiations in the JHA field and to improve the coordination mechanism at different levels of the EU's institutional framework.

4. For a discussion on the academic interest in the closer internal-external security nexus, see Johan Eriksson and Mark Rhinard, 'The Internal-External Security Nexus: Notes on an Emerging Research Agenda', *Cooperation and Conflict*, vol. 44, no. 3, pp. 243-67 (Special Issue). In recent years, several edited volumes and Special Issues have been dedicated to this topic: see Thierry Balzacq (ed.) *The External Dimension of EU Justice and Home Affairs - Governance, Neighbours, Security* (Basingstoke: Palgrave, 2009); Bernd Martenczuk and Servaas van Thiel (eds.), *Justice, Liberty, Security: New Challenges for EU External Relations* (Brussels: VUB Press, 2009); Xymena Kurowska and Patryk Pawlak, 'The Politics of European Security Policies: Actors, Dynamics and Contentious Outcomes', in *Perspectives on European Politics and Society*, vol. 10, no. 4, 2009 (Special Issue); and Sarah Wolff, Nicole Wichmann and Gregory Mounier, 'The External Dimension of Justice and Home Affairs - A Different Security Agenda for the EU?', *Journal of European Integration*, vol. 31, no. 1, 2009 (Special Issue).

5. In total, eleven interviews were conducted – four with Council officials, three with Commission officials, one with the MEP Jan Philip Albrecht of the EP's LIBE committee, and three with officials of permanent representations of EU Member States. With the exception of the interview with the MEP, all interviews were conducted under the principles of confidentiality and anonymity.

1. Coordinating internal-external security policies: a priority for the EU

Following a reluctant start, the EU has improved its profile as an actor in the field of internal security and expanded the scope of policy-making in the field of justice and home affairs. Within a comparatively short time-frame, this policy field has gone from being the subject of rather loose intergovernmental cooperation to becoming a key priority of the EU's political and legislative agenda.⁶ The Lisbon Treaty stipulates that the Union 'shall offer its citizens an area of freedom, security and justice' as the second of its fundamental treaty objectives (article 3, par. 2 TEU). It is important to note that the competences of the EU in the Area of Freedom, Security and Justice (AFSJ) are not applicable in all member states. When the Amsterdam Treaty integrated the Schengen *acquis* into the framework of the EU, the United Kingdom and Ireland obtained opt-outs although they have preserved some opt-in arrangements. Denmark has signed the Schengen agreement but may choose whether or not to apply any new measure adopted under the communitarised parts of the Schengen *acquis*.

Not all policies subsumed under the AFSJ are security-related, e.g. judicial cooperation in civil matters, yet the objective of providing European citizens with a high level of security has driven the cooperation and been the dominant one, if compared to the other objectives of providing 'freedom' and 'justice'.⁷ The EU's cooperation on internal security has been characterised by an *exclusive* and *defensive* logic of cooperation, meaning that EU ministers of justice and home affairs have been predominantly concerned with removing or containing perceived threats.⁸ They have developed a

6. See Sandra Lavenex, 'Justice and Home Affairs', in Helen Wallace, Mark Pollack and Alasdair Youngs (eds.), *Policy Making in the European Union* (Oxford: Oxford University Press, sixth edition, 2009) and Jörg Monar, 'Cooperation in the Justice and Home Affairs Domain: Characteristics, Constraints and Progress,' in *Journal of European Integration*, vol. 28, no. 5, 2006, pp. 495-509.

7. Monar, *op. cit.* in note 6, pp. 497-99, and Valsamis Mitsilegas, Jörg Monar and Wyn Rees, *The European Union and Internal Security: Guardian of the People?* (Basingstoke: Palgrave, 2003), pp. 85-86.

8. Malcolm Anderson and Joanna Apap, 'Changing Conceptions of Security and their Implications for EU Justice and Home Affairs Cooperation', CEPS *Policy Brief* no. 26, Centre for European Policy Studies, Brussels, p. 3; for an analysis of the cooperation culture of police officials working in an international context, see Didier Bigo, *Polices en réseaux: l'expérience européenne* (Paris: Presses de Sciences Po, 1996).

common understanding of security threats based on working out how a safe inside can best be protected from an unsafe outside.⁹

The EU's interdependence with other regions is indeed substantial. As a report on the state of European internal security in the year 2010 noted, 'most threats to the internal security of the EU either originate outside Europe or have a clear nexus to other parts of the world. All heroin and cocaine consumed in Europe, for example, is trafficked here from a different continent. So, too, in the case of the estimated 900,000 illegal migrants entering the EU each year, while Colombian, Nigerian, Russian, Albanian, Turkish and other non-EU groups have important roles in organised crime activity in the region'.¹⁰

Against this background, the EU has started to view engagement abroad as an indispensable tool to maintain a high level of internal security, in addition to measures at or within the EU borders. The EU's external relations network and foreign policy capabilities haven't been increasingly viewed as a valuable means to tackle internal security challenges at their origin and to enhance the 'leverage' on third countries identified as their source or on transit countries. 'The EU should use its significant relationship with third countries as an incentive for them to adopt and implement relevant international standards and obligations on JHA issues. Countries should be aware that the nature of their relationship with the EU will be positively affected by their level of cooperation, given the central importance of these issues for the EU and its Member States'.¹¹ In other words, if third countries refrain from cooperating on issues such as counter-terrorism or illegal migration, this will have an impact on their eligibility to receive financial assistance and/or opportunities to forge closer ties with the Union.

The cooperation culture of EU foreign policy actors is based on a more inclusive logic, emphasising the value of closer regional cooperation and integration in terms of 'structural' conflict management and pre-

9. Jörg Monar, 'The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs', *Journal of Common Market Studies*, no. 39, 2001, pp. 747-64.

10. See 'The State of Internal Security in the EU. A joint Report by EUROPOL, EUROJUST, and FRONTEX', available at <http://www.europol.europa.eu/index.asp?page=news&news=pr100719.htm> (accessed 23 September 2010).

11. Council of the European Union, *A Strategy for the External Action of JHA: Global Freedom, Security and Justice*, doc. 15446/05, 6 December 2005, Brussels.

vention.¹² Their interest in establishing closer internal-external security policy coordination relates to the fact that JHA expertise and actors have become central to dealing with the global challenges which the EU faces. Unlike the Cold War era where a major security threat constituted the nuclear confrontation between East and West, present security challenges are more diverse, less identifiable and less predictable, whether these take the form of extremist groups, organised crime networks, failing states or technical systems exposed to the risk of a technical and human error, or a cyberattack.

As the European Security Strategy (ESS) highlighted, none of the new security threats is purely military, nor can they be tackled by purely military means.¹³ EU foreign policy objectives such as restoring good government in the neighbourhood and fostering democracy and the rule of law worldwide would require a mixture of political, economic, and military means and the expertise of actors such as policemen or judges. Therefore the ESS called for a closer coordination between justice and home affairs and external relations. ‘The best protection for our society is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order.’¹⁴

Developing thematic and geographic priorities

The development of EU internal and external security strategies has evolved in a rather incremental and hybrid fashion, influenced by the interventions of a series of actors which, at times, failed to develop a shared vision of the EU’s strategic ends.¹⁵ Despite this rather problematic evolution and the lack of a ‘grand strategy’ for the present European

12. Malcolm Anderson and Joanna Apap, op. cit. in note 8, at p. 3. See also Paul Cornish and Geoffrey Edwards, ‘Beyond the EU/NATO dichotomy: the beginnings of a European strategic culture,’ *International Affairs*, vol. 77, no. 3, July 2001, pp. 587-603.

13. Council of the European Union, *A Secure Europe in a Better World - The European Security Strategy*, 12 December 2003, Brussels, p. 7.

14. Ibid, p. 6.

15. Ursula C. Schröder, ‘Strategy by Stealth? The Development of EU Internal and External Security Strategies’, in *Perspectives on European Politics and Society*, vol. 10, no. 4, pp. 486-505.

security framework,¹⁶ the EU has sought to develop a more strategic approach in relation to the coordination of its internal-external security policies.

The beginnings of the EU's efforts to systematically integrate JHA issues into its external relations/foreign policy date back to the European Council summit in Tampere in 1999, which first acknowledged the need for 'stronger external action' in the field of JHA.¹⁷ When the EU started to develop priorities and policy objectives for external relations in the JHA field in 2000, the Council underlined that 'the aim is certainly not to develop a "foreign policy" specific to JHA. Quite the contrary'.¹⁸ The necessity to extend the focus of external action to the JHA field should be assessed against clear criteria, notably whether it is relevant for the realisation of the objective of creating an internal security area; whether it provides 'added value' to the action of Member States and to the general objectives of the EU's external policy (such as restoring the rule of law or fighting organised crime); whether the objectives can be achieved within a reasonable time period; and whether there is a possibility of long-term action and commitment.¹⁹ A central issue has been the lack of formal legal competences for external action in the JHA field.²⁰ The EU has therefore relied on 'express competences' in areas such as trade, development, association and CFSP for achieving JHA-related objectives and/or on 'implied external competences' based on the EU's internal powers in the JHA field.²¹

Whereas the guiding criteria outlined in the wake of the Tampere European summit are still of relevance, some of the geographical and thematic priorities were subsequently modified or changed. The key document of the relevant *acquis* became the 'Strategy for the External Dimension of JHA: Global Freedom, Security, Justice'²² adopted in December 2005,

16. Jolyon Howorth, 'Implementing a "grand strategy"', in Álvaro de Vasconcelos (ed.), *What ambitions for European defence in 2020?* (Paris: European Union Institute for Security Studies, 2009).

17. European Council, *Presidency Conclusions*, Tampere, 15 and 16 October 1999.

18. Council of the European Union, *European Union priorities and policy objectives for external relations in the field of justice and home affairs*, doc. 7653/00, 6 June 2000, Brussels.

19. *Ibid.*

20. Marise Cremona, *EU External Action in the JHA Domain: A Legal Perspective*, EUI Working Papers, Law 2008/24, European University Institute, Florence, p. 7.

21. Over time, the European Court of Justice has clarified the conditions when 'implied external competences' can be assumed. For more details see Cremona, *op. cit.* in note 20, pp. 5-8.

22. Council of the European Union, doc. 15446/05, *op. cit.* in note 3, p. 5.

which defined geographical and thematic priorities as well as ‘underlying principles’ for external action in the JHA field, notably the concept of Partnership, the use of conditionality and the application of a differentiated and flexible approach towards regional groupings and/or individual third countries. The document states that JHA external action should focus on those third countries with which cooperation has been a priority for the EU, notably with candidate and neighbouring countries and the strategic partners USA and Russia. With other countries, the EU’s cooperation should concentrate on single JHA issues only, e.g. counter-narcotics cooperation with Afghanistan.²³ In terms of thematic priorities, the Council suggested concentrating on fighting terrorism, organised and serious crime (in particular drugs and human trafficking), the better management of migration, and addressing weak governance and state failure in third countries. To achieve the objectives outlined in the external JHA strategy, the Council called for a range of so-called Action-Oriented Papers covering specific priority countries, regions or themes.²⁴

The EU’s Internal Security Strategy adopted in February 2010 and the Stockholm work programme for 2010-2015, with its 14-page chapter on ‘Europe in a Globalised World – The External Dimension of Freedom, Security and Justice’, have reiterated the ‘crucial’ importance of working closely in the JHA domain with third countries and international organisations given that ‘internal and external security are inseparable’.²⁵ Although the emphasis has remained on the EU’s neighbourhood and the strategic partners the US and Russia, the geographic focus has been explicitly extended also to more remote regions and countries, in particular Africa (on migration management and fighting drug trafficking), China and India

23. Ibid.

24. Since 2006, five Action-Oriented Papers have been developed. These documents contain unusually precise instructions, including a timeframe by which each recommended action should be implemented, and call for the regular monitoring (every eighteen months) of the current state of play of the implementation. See Council of the European Union, *Action-Oriented Paper on Improving Cooperation, on Organised Crime, Corruption, Illegal Immigration and Counter-terrorism, between the EU, Western Balkans and relevant ENP countries*, doc. 9272/06, Brussels, 12 May 2006; Council of the European Union, *Action-Oriented Paper on Implementing with Russia the Common Space of Freedom, Security and Justice*, doc. 13629/06, Brussels, 16 October 2006; Council of the European Union, *Action-Oriented Paper Increasing EU support for combating drug production in and trafficking from Afghanistan, including transit routes*, doc. 9370/1/06, Brussels, 22 May 2006; Council of the European Union, *Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings; towards Global EU Action against Trafficking in Human Beings*, doc. 11450/2/09, Brussels, 21 September 2009, and Council of the European Union, *Action-Oriented Paper: Strategic and concerted action to improve cooperation in combating organised crime, especially drug trafficking, originating in West Africa*, doc. 5069/1/10, Brussels, 2 February 2010.

25. Council of the European Union, *The Stockholm Programme - An open and secure Europe serving and protecting the citizens*, doc. 16484/1/09, Brussels, 25 November 2009, pp. 119-33; and Council of the European Union, *Internal Security Strategy for the European Union: Towards a European Security Model*, doc. 5842/2/10, 25 February 2010.

(on counter-terrorism), Afghanistan and Iraq (on illegal migration and re-admission), and others. According to the EU's Internal Security Strategy, 'it is necessary to build relationships with other countries [than EU neighbours] through a global approach to security, working closely with them and, when necessary, supporting their institutional, economic and social development. This system of working will mean establishing opportunities for dialogue through areas of mutual interests, concerns, and the possibilities for cooperation that can be identified in each case'.²⁶ A novelty of the Stockholm programme is to include a particular section on Human Rights, following the European Council's request for a Human Rights Action Plan that should clarify how to proceed in controversial situations, e.g. with regard to the respect of the principle of *non-refoulement* or the EU's cooperation with partner countries that still use the death penalty.²⁷

The different forms of EU internal-external security policy coordination

A central component of the external JHA strategy is to use existing cooperation frameworks to mainstream JHA issues in the EU's external relations. The Stabilisation and Association Agreements, which the EU signed with Western Balkan countries, and the ENP Action Plans with neighbouring countries contain substantial JHA components that provide for intense cooperation on issues such as reinforcing the rule of law, migration and asylum, money laundering and illicit drugs. Although the EU's JHA strategy contains important similarities in the way in which it is applied both to the Western Balkans and ENP participating states, the EU enjoys the leverage that derives from the incentive of future membership only in the Western Balkans.²⁸ In the wake of the terrorist attacks of 9/11, the Council also agreed to include counter-terrorism issues in the cooperation with third countries and multilateral fora (such as the Asia-Europe Meetings – ASEM) and to review existing trade and cooperation agreements with the possi-

26. Council of the European Union (5842/2/10), op. cit. in note 25, p. 16.

27. The principle of *non-refoulement* is laid out in article 33(1) of the 1951 Convention on the Status of Refugees (known as the Geneva Convention) which states that 'no contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

28. On the differences that characterise the EU's modes of interactions with neighbouring states, see the individual contributions in Wolff, Wichmann and Mounier and Thierry Balzacq, op. cit. in note 4, and Florian Trauner, *The Europeanisation of the Western Balkans: EU Justice and Home Affairs in Croatia and Macedonia* (Manchester: Manchester University Press, 2011).

bility of incorporating special clauses on anti-terrorism.²⁹ Under Spanish presidency, the European Council requested in 2002 that any cooperation, association or equivalent agreement should incorporate standard clauses on joint migration management and readmission of irregular migrants.³⁰

Besides mainstreaming internal security objectives in external cooperation frameworks, the EU may seek to intensify the cooperation with third countries in specific issue areas, e.g. by signing an EC visa facilitation and readmission agreement that offers facilitated travel opportunities for certain categories of the target country's population (such as students and businessmen) in exchange for closely cooperating in the field of irregular migration and return.³¹

Of particular relevance have been the JHA-related agencies, which the Council asked 'to enhance appropriate operational co-operation with priority countries'.³² Since Europol concluded a first data-sharing agreement with the USA in December 2001, the agency has negotiated nineteen cooperation agreements with third countries and international organisations that regulate the reception and transmission of Europol information and the conclusion of confidentiality agreements.³³ Eurojust signed a cooperation agreement on judicial cooperation with the USA and Switzerland and has entered, regardless of political and data protection concerns, into negotiations with the Russian Federation.³⁴

In developing its external relations, the EU's border management agency Frontex has focused on accession and candidate countries and, after that,

29. Council of the European Union, *European Union Action Plan to Combat Terrorism – Update of the Roadmap*, doc. 13909/1/02, Brussels, 14 November 2002.

30. Council of the European Union, *Presidency Conclusions*, doc. 13463/02, Seville, 21 and 22 June 2002.

31. Florian Trauner and Imke Kruse, 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?', *European Journal of Migration and Law*, vol. 10, no. 4, pp. 411-38.

32. Council of the European Union (15446/05), op. cit. in note 3, p. 7.

33. Europol concluded operational agreements with Australia, Canada, Croatia, Iceland, Norway, Switzerland, the US and Interpol and strategic agreements with Albania, Bosnia and Herzegovina, Colombia, the FYR of Macedonia, Moldova, Russia, Turkey, Serbia, Montenegro, the World Customs Organization and the UN Office on Drugs and Crime. Europol also signed agreements with other EU bodies such as Frontex. The strategic agreements regulate the exchange of operational and technical information but exclude the exchange of personal data. For a detailed analysis of the external role of Europol, see Gregory Mounier, 'Europol: A New Player in the EU External Policy Field?', in *Perspectives on European Politics and Society*, vol. 10, no. 4, pp. 582-602.

34. Council of the European Union, *Cooperation Eurojust and Switzerland - Approval by Council*, doc. 9345/08, Brussels, 14 May 2008; Council of the European Union, *Judicial cooperation between the European Union and the Russian Federation - Information from Eurojust on the state of play regarding the cooperation agreement between Eurojust and the Russian Federation*, doc. 11458/09, Brussels, 29 June 2009; Council of the European Union, *The Eurojust Agreement on judicial cooperation between the EU and the USA*, doc. 5070/07, Brussels, 8 January 2007.

on countries determined by risk analyses as the main countries of origin or transit of irregular migrants.³⁵ The joint operations carried out by Frontex in the Mediterranean have operated not only in the high sea but also in the maritime waters of African states to dissuade small, wooden boats laden with would-be immigrants from setting off from the African coast. The agency's cooperation with third countries is not limited to the implementation of joint operations. At the EU's eastern land border, Albanian, Croatian, Moldavian, Russian, Serbian and Ukrainian border guard officers were also involved in their planning and evaluation phase, in addition to implementation.³⁶ In November 2010, Frontex established its first 'Rapid Border Intervention Team' of 175 border-control specialists to be deployed at the Greek-Turkish border, which has turned into 'the migrant world's gateway to Europe'.³⁷ The cooperation with Turkey on the issue of illegal immigration has not been devoid of frictions, however. The Greek Prime Minister George Papandreou accused Turkey of not respecting a bilateral readmission agreement and of 'interfering' with the surveillance of the EU's Southern borders by Frontex.³⁸

The link between the external dimension of the AFSJ and the CSDP has become closer in the field of CSDP civilian crisis management. Since the 2000 Feira European Council, the EU has developed a civilian dimension of CSDP (formerly ESDP) and has launched a variety of operations in the Western Balkans, South Caucasus, Africa, the Middle East and Asia.³⁹ Internal security objectives have featured prominently in many of them, notably with regard to border management (e.g. EUBAM to Moldova and Ukraine; EUBAM Rafah), rule of law (e.g. EULEX Kosovo; EUJUST *Themis*/Georgia), police (e.g. EUPOL PROXIMA/FYROM; EUPM Bosnia and Herzegovina) and security sector reform (e.g. EU SSR Guinea-Bissau; EUSEC RD Congo). The EU's objective has been to provide countries in

35. In 2009, Frontex signed seven working agreements with third countries, including one with the State Border Committee of Belarus. See Frontex, General Report 2009, Warsaw, 2009.

36. *Ibid.*

37. Elena Becatoros, 'Greece: Europe's gateway for illegal immigration', *The Associated Press*, 4 November 2010.

38. The Prime Minister made this statement before the deployment of the Frontex Rapid Intervention Team, hence referring to previous Frontex activities. He further maintained that 'this practice gives the impression that Turkey is trying to hamper our common action to combat clandestine immigration'. See Nathalie Vandystadt, 'Immigration: EU and Turkey agree to enhance cooperation', *EuroPolitics*, 9 November 2009.

39. Giovanni Grevi, Damien Helly and Daniel Keohane (eds.), *European Security and Defence Policy: the first ten years (1999-2009)* (Paris: European Union Institute for Security Studies, 2009) and Agnieszka Nowak, 'Civilian crisis management: the EU way', *Chaillot Paper* no. 90 (Paris: European Union Institute for Security Studies, June 2006).

post-conflict situations or characterised by weak institutions with assistance to consolidate the rule of law and/or to develop capacities in relation to fighting organised crime or controlling external borders more effectively.⁴⁰

Another way of using CFSP instruments for achieving EU objectives in the field of internal security is to engage with other international organisations, notably with the United Nations and the Council of Europe. This policy is related to the EU's general commitment to effective multilateralism based on the understanding that to be able to respond to global security challenges the international system needs 'functioning international institutions and a rule-based international order'.⁴¹ The EU has actively sought to draw the cooperation on JHA-related issues into existing multilateral structures, such as counter-terrorism with the United Nations Counter-Terrorism Committee Directorate (UN CTED) or refugee protection with the United Nations High Commissioner for Refugees (UNHCR). In addition, these organisations have provided the EU with a framework to promote common values and priorities and/or develop new international criminal law standards. With regard to a major international convention in the field, the United Nations Convention on Transnational Organised Crime and its Protocols signed in Palermo in 2000, the EU was able to play an influential role by adopting a joint position aimed at coordinating the Member States' position in the negotiations and ensuring that the provision of the Convention would be in line with pre-existing Community and Union law standards.⁴²

40. Gregory Mounier, 'Civilian Crisis Management and the External Dimension of JHA: Inceptive, Functional and Institutional Similarities', *Journal of European Integration*, vol. 31, no. 1, pp. 45-65.

41. European Security Strategy, op. cit. in note 13.

42. Valsamis Mitsilegas, 'The External Dimension of EU Action in Criminal Matters', *European Foreign Affairs Review*, no. 12, 2007, pp. 457-97.



2. Comprehensive coherence: political and institutional challenges

The growing institutionalisation of EU internal-external security policy coordination and the multiplication of activities under the external dimension of JHA point to progress in establishing a more ‘holistic’ approach towards European security; however, this development is accompanied by a range of political and institutional challenges. Whereas the central political challenge has been to ensure coherence between different values and priorities underlying the establishment of a closer internal-external nexus, the major institutional challenge has related to implementing a more efficient coordination and cooperation among the different actors of the Union.⁴³

Reconciling internal security concerns with normative EU foreign policy aspirations

The EU’s activities in pursuit of the abolition of the death penalty and in the related fields of good governance and human rights promotion have led scholars to describe the EU as a ‘normative power Europe’.⁴⁴ Since the emergence of the Common Foreign and Security Policy (CFSP), the EU has subscribed to the objective of developing and consolidating democracy and the rule of law and respecting human rights and fundamental freedoms.⁴⁵ One of the major challenges for the EU has been to ensure that the mainstreaming of internal security objectives in the EU’s external relations does not undermine the normative aspirations of EU foreign policy-making.

The institutionalisation of the external dimension of the AFSJ has been driven by a security rationale which frequently relegated the protection

43. For a general discussion on comprehensive coherence in EU foreign policy-making, see Álvaro de Vasconcelos (ed.), *A strategy for EU foreign policy*, Report no. 7, European Union Institute for Security Studies, Paris, July 2010, pp. 12-14.

44. Ian Manners, ‘Normative Power Europe: A Contradiction in Terms?’, *Journal of Common Market Studies*, vol. 40, no. 2, 2002, pp. 235-58; and Ian Manners, ‘Normative Power Reconsidered: Beyond the Crossroads’, *Journal of European Public Policy*, vol. 13, no. 2, 2006, pp. 182-99. For a critical discussion, see Adrian Hyde-Price, “‘Normative’ Power Europe: A Realist Critique”, *Journal of European Public Policy*, vol. 12, no. 2, pp. 217-34.

45. Article J1, Title 5, TEU-Maastricht.

of human rights and fundamental freedoms to a secondary place. The practice of the EU's border management agency Frontex of intercepting immigrant-carrying vessels not only in the high seas but also in the maritime waters of African countries such as Senegal and Mauritania and sending them directly back to the local authorities has been criticised as a violation of the principle of *non-refoulement* and a way to circumvent the refugee protection regime established in European Community legislation.⁴⁶ It has been a major and recurrent concern of the European Parliament that external cooperation objectives in the JHA field were implemented at the expense of human rights considerations, pointing to lack of 'human rights clauses' in readmission agreements with third countries such as the Russian Federation (known for its weak human rights record) or to disputed practices of EU Member States of extraditing persons to countries where they might suffer torture and/or the death penalty.⁴⁷

In a similar vein, linking areas such as humanitarian aid and development assistance with migration control and counter-terrorism was seen to contribute to the 'securitisation' of these areas.⁴⁸ This link is conceptually based on the 'root causes' approach which is preventive in nature and strives towards eliminating the causes of irregular migration, instability and radicalisation. Under this approach, the EU seeks to abolish the circumstances that led people to migrate or join a terrorist group by using development and humanitarian aid and economic cooperation. The use of these instruments for JHA-related purposes, however, might divert them from their original intention – in the case of development aid, the realisation of the Millennium Development Goals, to the fulfilment of which the EU and its Member States have subscribed.⁴⁹

46. Sergio Carrera, 'The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands', CEPS Working Document no. 261, Centre for European Policy Studies, Brussels, March 2007; and Julien Jeandesboz, 'Reinforcing the Surveillance of EU Borders: the future development of FRONTEX and EUROSUR', Challenge Research Papers no. 11, Centre for European Policy Studies, Brussels, 2008.

47. European Parliament, *Report on an Area of Freedom, Security and Justice: Strategy on the external dimension, Action Plan implementing the Hague programme*, doc. A6-0223/2007, 11 June 2007; European Parliament, *Report on the proposal for a Council decision concerning the conclusion of the Agreement between the European Community and the Russian Federation on readmission*, doc. A6-0028/2007, Brussels, 5 February 2007.

48. Daniel Keohane, 'The Absent Friend: EU Foreign Policy and Counter-Terrorism', *Journal of Common Market Studies*, vol. 46, no.1, pp. 125-46, at pp. 142-3. There is extensive literature on the processes of securitisation, see e.g. Jef Huysmans, 'The European Union and the Securitization of Migration', *Journal of Common Market Studies*, vol. 38, no. 5, pp. 751-77.

49. The author would like to express his thanks to Luis Peral for drawing his attention to this point.

The need to properly balance internal and external priorities is particularly evident in the EU's neighbourhood, where the EU has struggled to reconcile the different security logics of internal and foreign policy actors.⁵⁰ In simplified terms, the main principle of the EU's foreign and security policy is advancing regional integration and good neighbourly relations in the wider European region, whereas the EU justice and home affairs ministers have been primarily guided by their interest in keeping problems out and the external border closed. The EU has risked creating the image of a self-centred Europe mainly concerned with its own security and reducing unwanted migration. A particularly salient point has been the EU's reluctance to live up to the promise of 'promoting the free movement of persons' voiced at the launch of the European Neighbourhood Policy.⁵¹ In countries such as the Ukraine, the EU's refusal to reward alignment efforts with EU standards in the JHA field and progress in the democratic transition with a timetable or a precise roadmap for visa-free travel has contributed to an increasing sense of alienation towards the European Union.⁵²

Departing from an inside-out perspective, the EU's increased international activities in the JHA field might also have negative reverberations on human rights and civil liberties standards in individual European countries. The publicly most salient cases have concerned EU-US relations on internal security, and included the use of European countries by the CIA for the transportation and illegal detention of terrorist suspects and the inadequate legal safeguards for EU citizens in cases of personal data being transferred to third countries, in particular with regard to Passenger Name Record (PNR) and SWIFT

50. This argument is inspired by the discussion on the interplay of values and security in the EU's neighbourhood and of freedom and security in the EU in general. See Gergana Noutcheva, Karolina Pomorska and Giselle Bosse (eds.), *Values versus Security? The Choice for the EU and its Neighbours* (Manchester: Manchester University Press, forthcoming 2011) and Thierry Balzacq and Sergio Carrera (eds.), *Security Versus Freedom? A Challenge for Europe's Future* (Aldershot: Ashgate, 2006).

51. Commission of the European Communities, *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*, COM (2003) 104, Brussels, 11 March 2003, at p. 4. For an analysis of the EU's strategy on visa facilitation and re-admission in the neighbourhood, see Trauner and Kruse, op. cit. in note 31.

52. Andrew Rettman, 'EU risks losing Ukraine, minister warns', *EUobserver.com*, 28 April 2010. See: <http://euobserver.com/?aid=29960>. In November 2010, the EU developed an Action Plan towards visa liberalisation for Ukraine in an attempt to mitigate these problems. The Action Plan, however, has retained the diction of the EU-Ukrainian visa facilitation agreement in declaring that the establishment of a visa-free regime would be a 'long term perspective'. Also, the wording of 'Action Plan' instead of 'Road Map' used for the Western Balkans reflects the EU's reluctance to subscribe to a timetable and to politically commit to visa-free travel.

data as well as to the compilation of telecommunication records by the FBI.⁵³

Realising institutional coherence

Institutional coherence has different dimensions and may concern the inter-level relationship (between actors at national and EU-levels), the inter-institutional level (relations among EU institutions, e.g. between the Council and the Parliament), and the intra-institutional level (internal politics of EU institutions, e.g. between different Council structures).⁵⁴

Inter-level coherence (between actors at national and EU-levels)

The main responsibility to ensure inter-level coherence has been with the Presidency of the Council. Since 2001, following the model of the Swedish, Belgian, Spanish and Danish presidencies, the external relations in the JHA field have been structured by multi-annual work programmes.⁵⁵ The 2008 document of the French, Czech and Swedish Presidencies highlighted that its main purpose is to strengthen the ‘strategic dimension [and to] serve as a standard reference and as a roadmap alike’.⁵⁶ Despite the adoption of these documents – some observers described them as ‘paper tigers’⁵⁷ – it has been a challenge for the Council to establish a long-term strategic approach *vis-à-vis* certain thematic and/or geographical issues, instead of proliferating short-term, emergency-driven activities under different presidencies.

These difficulties could be clearly observed with the Action-Oriented Papers, promoted at their launch as an innovative tool to strengthen coher-

53. European Parliament, *Report on an Area of Freedom, Security and Justice: Strategy on the external dimension, Action Plan implementing the Hague programme*. A6-0223/2007, 11 June 2007; European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, A6-0020/2007, 30 January 2007; European Parliament, *Subject: New developments concerning the CIA extraordinary rendition programme and secret prisons on EU soil*, Parliamentary questions, O-0160/09, 8 December 2009; and Amnesty International, *Open Secret: Mounting Evidence of Europe’s Complicity in Rendition and Secret Detention* (London: Amnesty International Publications, 2010).

54. Thomas Christiansen, ‘Intra-institutional politics and inter-institutional relations in the EU: Towards coherent governance?’, *Journal of European Public Policy*, vol. 5, no. 3, pp.747-69, table at p. 748.

55. Council of the European Union, *Multi-Presidency programme for external relations in the JHA field (2001-2002)*, doc. 10741/01, Brussels, 12 July 2001.

56. Council of the European Union, *JHA External Relations Multi-Presidency Work Programme*, doc. 10546/08, Brussels, 1 July 2008.

57. See Wolff, Wichmann and Mounier, op. cit. in note 4, p. 13. The authors referred in particular to the multi-annual work programmes adopted at the beginning of the century.

ence between different actors, at national and EU levels. The papers have frequently been drafted by groups known as ‘Friends of the Presidency’, implying that not all Member States but only those interested in the subject were involved. Although this procedure allowed for flexibility and a swift adoption, it resulted in not all Member States perceiving their implementation as a priority. With regard to the Action-Oriented Paper on the Western Balkans, for instance, speedily developed under the Austrian presidency in just four months, only 13 Member States and Europol contributed to the first progress report.⁵⁸ In the second report, published in May 2008, 16 Member States and some EU bodies reported on the state of the implementation. This report reflected a growing frustration among the participating states by stating that the low turnout ‘limits substantially the scope and hinders seriously the value of the exercise’.⁵⁹ The EU has not managed to fully exploit the possibility of the Action-Oriented Papers.⁶⁰

Inter-institutional coherence (relations between different EU institutions)

The key question with regard to inter-institutional coherence has been to establish close cooperation across the different security policies legally and institutionally separated from one another. Until the entry into force of the Lisbon Treaty, the EU’s ‘pillar structure’ legally separated not only justice and home affairs from the EU’s foreign and security policies but also implied distinct legal instruments and competences within the Area of Freedom, Security and Justice (Title IV TEC-Nice and Title VI TEU-Nice). This construction has implied complicated decision-making procedures and brought up questions about the proper choice of legal basis for international agreements in the JHA field.⁶¹

58. Council of the European Union, *Report on the state of implementation by Member States and EU bodies of Action-Oriented Paper on Improving Cooperation on Organised Crime, Corruption, Illegal Immigration and Counter-terrorism, between the EU, the Western Balkans and relevant ENP countries*, doc. 15013/1/06, Brussels, 21 November 2006.

59. Council of the European Union, *Second report on the state of implementation by Member States and EU bodies of Action-Oriented Paper on Improving Cooperation on Organised Crime, Corruption, Illegal Immigration and Counter-terrorism, between the EU, the Western Balkans and relevant ENP countries*, doc. 8827/1/08, Brussels, 8 May 2008.

60. This assessment was officially made in the 2008 JHA external work programme. See Council of the European Union (10546/08), op. cit. in note 56, p. 3.

61. For more details see Cremona, op. cit. in note 20; Patryk Pawlak, ‘The External Dimension of the Area of Freedom, Security and Justice: Hijacker or Hostage of Cross-pillarization?’, *Journal of European Integration*, vol. 31, no. 1, pp. 25-44, and Stephan Stetter, *EU Foreign and Interior Policies: Cross-Pillar Politics and the Social Constructions of Sovereignty* (London: Routledge, 2007).

A prominent example was the European Parliament's decision to bring the Passenger Name Record (PNR) Agreement concluded between the EU and the US in May 2004 before the European Court of Justice (ECJ), suggesting that its right of consultation was not adequately respected and that the transfer of EU citizens' data runs counter to existing EU data protection laws since the US authorities did not ensure an adequate level of protection for PNR data delivered by Member States.⁶² In its judgement of 30 May 2006, the ECJ did not follow the EP's line of argumentation but annulled the agreement due to a wrong choice of legal basis. Personal-data processing operations would fall under the remit of criminal law, the EU's third pillar, and not within the EC first pillar law. The inter-institutional conflict and the annulment undermined the EU's credibility as an international actor in the JHA field and as a result 'the position of the EU *vis-à-vis* its international partners was shaken seriously'.⁶³

Intra-institutional coherence (between e.g. different Council structures)

The body given the overall responsibility to ensure coherence across the Council work in internal security and external relations has been the Committee of Permanent Representatives (COREPER).⁶⁴ In 2008, under French Presidency, the Council additionally established a special *ad hoc* Support Group on external JHA issues (JAIEX) within the Council Working Group of Foreign Relations Counsellors (RELEX). The working group has special information-sharing and coordination functions and convenes, on a monthly basis, JHA and RELEX counsellors to examine issues in relation to the external dimension of JHA. Although the JAIEX group has yielded added value,⁶⁵ it has struggled to define its proper institutional standing in the Council. There has been a lack of regular reporting to and from relevant RELEX and JHA working groups and the inclusion of JAIEX group members in regional working parties has so far mainly been confined to

62. European Parliament, *European Parliament resolution on transfer of personal data by airlines in the case of transatlantic flights: state of negotiations with the USA*, Brussels, 9 October 2003, and House of Lords, *The EU/US Passenger Name Record (PNR) Agreement*, Report with Evidence, European Union Committee, 21st Report of Session 2006-07, London, 2007. For an academic discussion of the PNR case, see Javier Arigomaniz, 'When the EU is the "Norm-Taker": The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms', *Journal of European Integration*, vol. 31 no. 1, pp. 119-37 and Pawlak, op. cit. in note 61, pp. 37-39.

63. Pawlak, op. cit. in note 61, p. 38.

64. Council of the European Union (doc.15446/05), op. cit. in note 3.

65. Interviews with Council officials, October 2010. Under Swedish Presidency, it was transformed into a permanent working group.

the ones on transatlantic relations, Eastern Europe and Central Asia and the Western Balkans.⁶⁶ In 2010, a discussion started on how to strengthen the mandate of JAEIX, focusing on establishing more systematic information-sharing mechanisms.⁶⁷

In counter-terrorism, a topic of a particularly cross-cutting nature, the Council has created the position of a Counter-terrorism Coordinator, currently occupied by Mr. Gilles de Kerchove, to coordinate the work of the Council, to maintain an overview of all the instruments at the Union's disposal and to foster the dialogue with third countries. A comparable position was announced in the Stockholm Programme in the field of human trafficking.⁶⁸ Lacking formal powers and competences, the strong point of the Counter-terrorism Coordinator is to have 'the ear of and access to' the EU interior ministers who, according to interviews in the Council, trust his knowledge and experience.⁶⁹ The chances of the EU Anti-trafficking Coordinator succeeding in a similar way are believed to be lower, mainly due to the fact that the Commission has managed to install this newly established position within its structures.⁷⁰

Particularly close cooperation and coordination between the JHA Council and the Foreign Affairs Council has been required in the field of CSDP civilian crisis management. The relationship works in both directions. On the one hand, the EU interior ministers have sought to influence the definition of the CSDP mission's mandate and objectives to use these second-pillar capabilities in a targeted and focused way for protecting the EU's internal security regime. As noted in the JHA external dimension strategy, 'it is also important that European Crisis Management Operations, and in particular Civilian Crisis Management Operations, tackle issues such as organised crime and corruption'.⁷¹ On the other hand, the Foreign Af-

66. Interview, Council official, 5 October 2010. See also Jörg Monar, 'The EU's Externalisation of Internal Security Objectives: Perspectives after Lisbon and Stockholm', *The International Spectator*, vol. 45, no. 2, pp. 23-39, at pp. 28-29.

67. Council of the European Union, 'Summary of conclusions of the meeting of the JHA-RELEX Working Party (JAEIX) on 15 January 2010', doc. 5645/10, Brussels, 1 February 2010, pp. 5-6.

68. Council of the European Union (doc. 16484/1/09), op. cit. in note 25.

69. Interviews with Council officials, October 2010. For an interpretation of the work of Gilles de Kerchove, see Hugo Brady, 'Intelligence, emergencies and foreign policy: the EU's role in counter-terrorism', Centre for European Reform, London, 2009, p. 18. See also Daniel Keohane, op. cit. in note 48, at pp. 132-34, for an analysis of the difficulties for the former Counter-terrorism Coordinator de Vries in exerting political leadership.

70. Same interviews.

71. Council of the European Union (doc. 15446/05), op. cit. in note 3, p. 4.

fairs ministers who are in charge of CSDP missions have to rely on their colleagues from the Justice and Home Affairs Council to fill the civilian crises management missions with judges, prosecutors, police officers or civilian administrators. With the quickly growing number of CSDP civilian missions, one difficulty has been that the ‘progress in the supply of civilian capabilities has been permanently outpaced by increase in demand, with much larger and more complex missions having been planned and deployed’.⁷²

Following the suggestions of a ministerial advisory group on the future of European home affairs policy to consider ‘a prior consolation as well as a post-evaluation of missions’ of the JHA Council as ‘indispensable’,⁷³ the EU has started a process of developing closer cooperation between the JHA and CSDP spheres. Although the ideas are comprehensive, ranging from regular cooperation between CIVCOM and relevant JHA structures over joint planning and evaluation of the missions to the inclusion of Europol and Eurojust personnel in CSDP missions,⁷⁴ their actual realisation has lagged behind and has strongly differed across the various operations.⁷⁵ To date, the closest cooperation has taken place in the EU rule-of-law mission in Kosovo. A cooperation mechanism has been realised allowing for the exchange of personal data between Europol and EULEX-Kosovo, via volunteering Member States.⁷⁶

The European Commission, taking its decision collectively and as a college, is characterised by a high level of coordination and cooperation between the different Directorates-General. However, a major issue of intra-institutional coherence has concerned the decision of the second Barroso

72. Grevi, Helly and Keohane (eds.), op. cit. in note 39, p. 109. The authors proceed by warning that ‘if the level of ambition that has driven ESDP civilian crisis management in the last few years is sustained in the future, the capabilities-expectations gap is liable to grow larger’.

73. Council of the European Union, *Freedom, Security, Privacy - European Home Affairs in an open world - Report of the Informal High-Level Advisory Group on the Future of European Home Affairs Policy (“The Future Group”)*, doc. 11657/08, Brussels, 9 July 2008.

74. Council of the European Union, *Comprehensive report – Develop and strengthen the cooperation between Justice and Home Affairs and Civilian Crisis Management of the European Security and Defence Policy*, doc. 15880/09, 13 November 2009; and Council of the European Union, *CIVCOM advice on draft recommendations from the Police Chiefs on the discussion paper “Develop and strengthen the cooperation between Justice and Home Affairs and Civilian Crisis Management within the European Security and Defence Policy”*, doc. 14417/1/09 REV 1, Brussels, 19 November 2009.

75. Interview, Council officials, October 2010. As the EUISS report on the first ten years of ESDP notes, ‘engagement [between CSDP and JHA actors] has remained piecemeal’. See Grevi, Helly and Keohane, op. cit. in note 39, at p. 104.

76. Council of the European Union, *Adoption of draft conclusions of the Council of the European Union on possible cooperation mechanism between civilian ESDP missions and EUROPOL as regards the mutual exchange of information*, doc. 15771/08, 14 November 2008.

Commission (2010-2015) to split the JHA field into a portfolio for Home Affairs (headed by the Commissioner Cecilia Malmström) and another for Justice, Fundamental Rights and Citizenship (under Commissioner Viviane Reding). Previously responsible for the entire JHA field, the department for International Affairs remained in DG Home Affairs, so that DG Justice is now without a specialised service coordinating its international activities (in fields such as data protection) and serving as a possible interface with the newly created European External Action Service (see next section).⁷⁷

77. Interview with senior EU Member State official, 6 October 2010.



3. Prospects after the Lisbon Treaty

This section shifts attention to the question of how the amendments introduced by the Lisbon Treaty have affected the EU's quest for comprehensive coherence. Following an elaboration of the treaty's legal changes, the example of the European Parliament's involvement in EU external counter-terrorism cooperation is used to illustrate the altered institutional dynamics of the post-Lisbon era.

The legal changes

The changes introduced by the Lisbon Treaty have the potential to influence the delicate balance between internal security concerns and normative foreign policy aspirations by reiterating the value-based nature of the EU in general and its foreign and security policy in particular. The values on which the EU has been founded have already been acknowledged in previous treaties yet the Lisbon Treaty, building on the groundwork of the Constitutional Treaty, develops them in a clearer and more comprehensive way.⁷⁸ EU external action should be guided 'by the principles that have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law' (article 21 TEU). The promotion of these values is defined as an official objective of the EU within Europe as well as in its external relations. The protection of the Union's values is also strengthened by introducing the Charter of Fundamental Rights into European primary law.

Importantly, the Lisbon Treaty has enhanced the democratic and parliamentary oversight mechanism by abolishing the 'pillar structure' and transferring police cooperation and judicial cooperation in criminal matters to the Community pillar (Title IV TFEU). The definition of the 'ordinary legislative procedure' as the standard decision-making method in the AFSJ has also strengthened the role of the European Parliament and

78. Juan Santos Vara, 'The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty', Paper presented at the conference 'The Lisbon Reform Treaty: Internal and External Implications', The Hebrew University, Jerusalem, 13-14 July 2008, p. 21.

the Commission and enlarged the jurisdiction of the European Court of Justice (ECJ).⁷⁹ The European Parliament has become fully involved in the definition of Europol and Eurojust's structure, operation, field of action and tasks and has acquired, together with national parliaments, an enhanced role in scrutinising the agencies' activities both inside and outside the Union. It has now also the power to strike down any kind of international agreements that fall under the remit of the newly *communitarised* policies (article 218 TFEU).

The difficulties which the EU experienced in defining the correct legal basis and pillar for international criminal law agreements (see previous section) are likely to disappear. The EU's new single order and legal personality make it easier for the EU to negotiate with third countries and conclude these agreements on behalf of the Union. The fragmented nature of EU external action has been tackled by pooling the overall responsibility for institutional coherence in the position of the High Representative of the Union for Foreign Affairs and Security Policy, who is also a Vice President of the Commission. Appointed High Representative by the European Council in November 2009, Catherine Ashton has an extensive mandate to ensure coherence in the EU, including with regard to the conduct of the Union's foreign and security policy, the representation of the EU in international organisations and conferences, the establishment of the European External Action Service (EEAS), the chairmanship of the Foreign Affairs Council and the coordination of the Commission's external relations portfolios.

The question of how to use these possibilities has already arisen with regard to the creation of the EEAS, which has been one of Catherine Ashton's most important tasks. It was uncertain whether the service should be constituted exclusively of diplomats or include experts from other policy areas such as from justice and home affairs. The Lisbon Treaty only cryptically refers to officials of 'relevant departments' of the General Secretariat and seconded diplomats from EU Member States (article 27

79. There are, however, some exceptions to the ordinary legislative procedure, e.g. with regard to the creation of the European Public Prosecutor's Office (article 86, par. 1 TFEU). Also, the Commission does not have the exclusive right of initiative in police cooperation and criminal justice, where legal acts might also be adopted on an initiative of a quarter of the Member States (article 76 TFEU). The ECJ has only a limited competence for a transitional period of five years with regard to all acts that have been adopted before the entry into force of the new treaty. For a detailed legal analysis of the legal changes in the JHA and CFSP/CSDP fields, see Gerda Falkner (ed.), 'EU Policies in the Lisbon Treaty: A Comparative Analysis', Working Paper No. 03/2008, Institute for European Integration Research of the Austrian Academy of Sciences, Vienna, 2008.

(3) TEU). JHA counsellors have been lobbying to have JHA-related staff considered as ‘relevant’ in this context, pointing to the ‘added value that could be achieved by including specific JLS competence in EU delegations in strategic partner countries’.⁸⁰

Although providing for new opportunities to strengthen institutional coherence, the Lisbon Treaty has not remedied all existing challenges and, in some aspects, even created new ones. Since the High Representative is also the Vice President of the Commission responsible for the coordination of the Commission’s external relations portfolios, the *primus inter pares* principle, under which the College of Commissioners works, has been broken and a hierarchical order established between a member of the College (the Vice President) and those Commissioners responsible for external relations.⁸¹ The Lisbon Treaty has maintained distinct legal bases and competences for the Area of Freedom, Security and Justice (TFEU-Lisbon) and Common Foreign and Security Policy (TEU-Lisbon) and been relatively vague about how to govern the operational cooperation between the spheres. This concerns particularly the solidarity clause of article 222 TFEU, which states that ‘the Union and its Member States shall act jointly in a spirit of solidarity if a Member States is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilize all the instruments at its disposal, including the military resources made available by the Member States [...]’. With its cross-cutting and comprehensive nature, the solidarity clause has the potential to become an umbrella term for future EU cooperation on crises and disasters. As Sarah Myrdal and Mark Rhinard suggest, the EU should therefore not only establish short-term implementation mechanisms, but also carefully examine situations in which the clause might be triggered and elaborate on how it can be used, in a long-term perspective, to embark on a journey towards ‘Europeanised’ crisis cooperation.⁸² Other legal questions at the boundary between the AFSJ and CFSP concern the issues of data protection and restrictive measures against individuals and groups, for which

80. Council of the European Union (doc. 16484/1/09), op. cit. in note 25.

81. Jozef Batora, ‘Foreign Policy’, in: Falkner, op. cit. in note 79, at p. 48, referring to Graham Avery, ‘Europe’s Future Foreign Service’, *The International Spectator*, vol. 43, no. 1, pp. 29-41.

82. Sarah Myrdal and Mark Rhinard, ‘The European Union’s Solidarity Clause: Empty Letter or Effective Tool? An Analysis of Article 222 of the Treaty on the Functioning of the European Union’, *UI Occasional Paper* no. 2, Swedish Institute for International Affairs, 2010, p. 16.

parallel provisions exist in the TFEU and TEU.⁸³ These unclear regulations risk creating inter-institutional tensions in terms of deciding the legal basis.

The case of the European Parliament and external counter-terrorism cooperation

On 11 February 2010, in the first consent vote on an international agreement in the post-Lisbon era, the European Parliament withheld its approval to the conclusion of the provisional EU-US Financial Messaging Data Agreement aimed at more effectively countering terrorist financing. To veto a fully-agreed international agreement is a highly unusual, in this particular case possibly even a 'historic' decision,⁸⁴ which highlighted the altered institutional dynamics in place since the entry into force of the Lisbon Treaty.

The European Parliament's rejection interrupted the exchange of bank data via the SWIFT network for half-a-year, until a newly negotiated agreement, with extra privacy and oversight provisions, was accepted by the European Parliament in July 2010. In taking its veto decision, the European Parliament defied intense pressure from Washington, EU Member State governments and the European Commission. The former French counter-terrorism judge Jean-Louis Bruguière, appointed by the European Commission as an 'eminent person' representing the EU in the United States in the SWIFT dossier, published on the same day as the EP's LIBE committee voted on the agreement (4 February 2010) a report confirming the value of the Terrorist Finance Tracking Programme (TFTP) as well as the US Treasury Department's compliance with agreed safeguards.⁸⁵ Hillary Clinton, the US Secretary of State, and Timothy Geithner, US treasury

83. With regard to data protection legislation, the Lisbon Treaty has included a new CFSP provision in article 39 TEU, while another possible legal basis for adopting data protection legislation is article 16 TFEU. The second case includes parallel provisions and an 'unclear relationship' between article 75 TFEU and article 215 TFEU (which involves a CFSP decision) regulating the adoption of restrictive measures against individuals and groups. See Cremona, *op. cit.* in note 20, pp. 18-19.

84. Jörg Monar, 'The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications', *European Foreign Affairs Review*, vol. 15, no. 3, pp. 143-53.

85. In 2006, it was revealed that US security agencies had secretly monitored European bank transactions as part of the 'war on terror' approach pursued by the Bush administration after the terrorist attacks of 9/11. Following strong criticism, the US agreed with the EU on unilateral commitments for the Terrorist Finance Tracking Programme including that the banking records would be processed exclusively for investigating terrorism and be deleted after a predefined time period. The 2010 EU-US agreement became necessary following changes in the structure of SWIFT (the company moved its storage centre for its European data from a server in the US to a server in Switzerland).

chief, contacted Jerzy Buzek, the president of the European Parliament, and underlined that the contentious arrangement would be ‘instrumental’ in preventing terrorist attacks and a veto ‘would be a potentially tragic mistake’.⁸⁶

The decision of the European Parliament derived from two principal considerations, the first of which related to the substance of the EU-US agreement. The EP considered the data protection safeguards and oversight mechanism to be insufficient and called for enhanced possibilities for legal redress, a clearer definition of the scope for fighting terrorism and the designation of a judicial public authority in the EU that would assume overall responsibility for processing the requests from the US Treasury Department.⁸⁷ A second factor, however, related to the EP’s desire to provide the Council and Commission with an institutional lesson on no longer sidelining the EP’s international priorities in the JHA field and in external relations in general. According to the German MEP Jan Philip Albrecht, who sits on the parliament’s civil liberties committee, ‘we set an example. Such a decision was overdue. In recent years, the EP has adopted several resolutions on cases such as the PNR-Agreement, in which it pointed to the incompatibility of these agreements with constitutional and data protection law. These resolutions were simply ignored by the Council. This was an intolerable situation which has altered with the Treaty of Lisbon’.⁸⁸

The EP’s reluctance to accept the SWIFT agreement was not a one-off incident. In May 2010, the EP reiterated its demands for a better balance between security, on the one hand, and data protection and civil liberties, on the other, by postponing its consent vote for formal conclusion of the EU-US and EU-Australian PNR agreements regulating the transfer of personal data of passengers flying through or into these countries. The Parliament called for the definition of general standards in relation

86. Ian Traynor, ‘MEPs block US security access to personal banking data’, *The Guardian*, 12 February 2010.

87. European Parliament, ‘Recommendation on the draft Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program’, A7-0224/2010, Brussels, 5 July 2010.

88. Personal interview, Brussels, 5 October (author’s translation). The EP’s decision in the SWIFT case was also influenced by the Council’s decision to vote on the Interim Agreement on 30 November 2009 – one day before the entry into force of the Lisbon Treaty. The last straw was that the agreement was in consequence not formally forwarded to the Parliament for consent until 25 January 2010, officially due to translation problems, which meant that only one week remained before the SWIFT agreement provisionally entered into force. For more details, see Monar, op. cit. in note 84, pp. 144-45.

to legal limits, data protection standards, and the retention period to be respected by third countries requesting PNR data.⁸⁹ When presenting its recommendations for negotiation directives for the new PNR agreements with the US, Australia and Canada, the European Commission therefore suggested strengthening privacy rules and limiting the use of PNR data strictly to fighting terrorism and serious transnational crime.⁹⁰ As the responsible Commissioner Cecilia Malmström underlined, ‘the principles reflect very much the resolution adopted by the parliament in May calling for increased privacy, monitoring and safeguards’. It seems that the European Parliament has quickly succeeded in putting its stamp on external counter-terrorism cooperation under the treaty procedures of the post-Lisbon era. This development will require further research attention, particularly in the light of the fact that the European Parliament is seeking to reinforce its position in the EU’s external relations in general.⁹¹

89. European Parliament, ‘MEPs want rules on PNR data transfers to non-EU states’, Press Release 69751, Brussels, 5 March 2010.

90. European Commission, ‘European Commission adopts an EU external strategy on Passenger Name Record (PNR)’, Press Release IP/10/1150, Brussels, 21 September 2010.

91. In April 2010, the European Parliament opened its first Liaison Office in Washington, designed to strengthen the links between European parliamentarians and lawmakers in the US Congress. It is the first such office in a country outside the EU, begging the question whether the EP is seeking to establish a kind of ‘parliamentarian diplomacy’.

Conclusions and recommendations

In the last decade, the EU has sought to establish a more strategic approach towards internal-external security policy coordination, reflected by the adoption of a specific external JHA strategy and the creation of new institutions tasked to foster the exchange of information and coordination among JHA and RELEX experts. This policy has crystallised in manifold ways, including the mainstreaming of issues such as counter-terrorism and readmission in the EU's external cooperation frameworks and enhanced operational cooperation between the Union's JHA-related agencies and third countries. A central challenge underlying this development has been to ensure the coherence of actors at different institutional levels (inter-level, inter-institutional and intra-institutional) and to better balance internal security concerns and normative foreign policy aspirations. The EU has displayed a tendency to overly emphasise security-related aspects, while neglecting the human rights and civil liberties implications of its external actions.

This paper has argued that the amendments introduced by the Lisbon Treaty have enhanced the EU's possibilities to ensure institutional coherence and are also likely to impact on the delicate balance between internal security concerns and foreign policy values by placing more emphasis on value-based foreign policy and empowering supranational institutions, notably the European Parliament, which have consistently promoted a stronger focus on the defence of human rights and civil liberties. The European Parliament has quickly demonstrated its willingness to use the newly-gained powers and made its agreement to international agreements in the field of external counter-terrorism cooperation conditional on its demands being met.

Adapting to the new institutional dynamics of the post-Lisbon era and moving towards comprehensive coherence therefore requires:

(1) Involving the European Parliament in negotiations on international agreements in the JHA field

To prevent the European Parliament from again using the ‘nuclear’ veto option against international agreements in the JHA field, the Commission and the Council should strengthen the EP’s involvement in the negotiations on these agreements. According to the EP-Commission framework agreement for 2010-2015, the Parliament should receive ‘immediate and full information [...], at every stage of negotiations, on international agreements [...] involving the consent procedure’.⁹² However, there are political concerns in the Council that sensitive information will leak to the public, if the EP is indeed fully informed at every stage of the negotiation process.⁹³ A compromise might be to provide only a limited number of MEPs including the rapporteur and the shadow rapporteur with access to sensitive information about the state of negotiations. It might be useful to have a look at how the relationship between the executive and the legislative in relation to the handling of sensitive information is regulated in other settings. In the US, for instance, the President might choose to report on intelligence activities only to a set of eight leaders of the Congress, colloquially referred to as the ‘Gang of Eight’.⁹⁴

(2) Establishing a strong JHA expertise in the European External Action Service

To make the EEAS play a central role in terms of strengthening the cooperation with third countries in the field of EU internal security, close cooperation is required between the structures of the Commission Directorates-General for Home Affairs and for Justice (the latter currently lacking a department for international affairs) and the geographical and thematic directorates of the EEAS in Brussels. The EU’s foreign policy chief Catherine Ashton might appoint a senior EEAS official as special representative for internal security, who would then participate in meetings of the newly

92. European Parliament, ‘Resolution on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term’, RSP/2010/2540, Brussels, 9 February 2010.

93. Interviews with Council officials, Brussels, October 2010.

94. The experience of the US, however, also demonstrates the problems that can arise with such a practice. When the Bush administration refused to brief any member of Congress other than the Gang of Eight (who were forbidden to share the information) on a warrantless domestic spying programme of one of its intelligence agencies, this was seen as an attempt to deprive the Congress of its proper legal rights.

established Internal Security Committee (COSI).⁹⁵ Also, the JHA expertise should be enhanced in EU delegations. At the time of writing, the US and Russia were the only countries for which it was agreed to include specialised JHA counsellors in the EU delegations.⁹⁶ Such specialised counsellors might present added value to the diplomatic staff of other delegations too, in particular in those countries where the Union has high stakes in specific issue areas (e.g. counter-narcotics), is involved in complex negotiations on international agreements in the JHA field and/or is running substantial JHA-related assistance programmes (such as in Afghanistan, Pakistan or Columbia).

(3) Strengthening existing coordination mechanism

The EU has repeatedly called for the development of a ‘coordination culture’, at every level of the decision-making process and among the different formats in which external relations in the JHA field are taking place.⁹⁷ One way to improve coordination would be to strengthen the mandate of the JAIEX working group responsible for JHA-RELEX coordination, turning it into a genuine information-sharing platform and enhancing its possibilities for policy-shaping. This would imply involving JAIEX members more systematically in CFSP geographic and thematic working parties as well as at CIVCOM meetings. In general, the process of engaging JHA actors more comprehensively in the planning and conduct of civilian CSDP crises management missions could optimise the EU’s efficiency in the mission areas, e.g. by more closely involving Europol, establishing cooperation mechanisms between police liaison officers and civilian CSDP missions and realising common training activities.⁹⁸

Although established for particular situations of disasters, emergencies and crises, the EU might seize the opportunity of defining implementation arrangements for the solidarity clause of article 222 TFEU to tackle existing coordination challenges in the field of internal and for-

95. This idea was advanced by Hugo Brady, *op. cit.* in note 69, p. 27.

96. Interviews with Council officials, Brussels, October 2010.

97. See, for example, Council of the European Union (doc. 10546/08), *op. cit.* in note 56, p. 4.

98. A range of proposals have been discussed at EU level in this respect, see Council of the EU (doc. 15880/09) *op. cit.* in note 74. However, the EU is only starting to tackle the obstacles to cooperation between CSDP police missions and Europol, e.g. their different legal basis which impedes the establishment of a more systematic information-sharing framework.

eign policy.⁹⁹ The Clause's requirement that the 'European Council shall regularly assess the threats facing the Union' can be used to intensify the cooperation between the institutions responsible for threat and risk assessment in foreign and security policy (such as SitCen) and internal security (Europol, Frontex). The Political and Security Committee (PSC) and the Committee on Internal Security (COSI), which the Solidarity Clause asked to jointly assist the Council in defining implementation arrangements, might strengthen their cooperation in general in order to develop a more holistic view of European security challenges and to reconcile the concerns and priorities of internal and foreign policy decision-makers.

In sum, the changes of the Lisbon Treaty have created new possibilities to deal with the institutional and political challenges presented by a closer EU internal-external security nexus. However, ensuring comprehensive coherence ultimately depends not only on the smooth functioning of the institutional framework; it also depends crucially on the political will and ability of the relevant policy-makers to overcome their tendency to think according to distinct security mindsets and act in their own separate spheres instead of developing a shared and more balanced approach towards European security challenges.

99. For a detailed discussion of the solidarity clause, see Myrdal and Rhinard, *op. cit.* in note 82.

Annex

Abbreviations

AFSJ	Area of Freedom, Security and Justice
CFSP	Common Foreign and Security Policy
CIA	Central Intelligence Agency
CIVCOM	Committee for Civilian Crisis Management
COREPER	Committee of Permanent Representatives
COSI	Standing Committee on Operational Cooperation on Internal Security
CSDP	Common Security and Defence Policy
DG	Directorate General
EC	European Community
ECJ	European Court of Justice
EEAS	European External Action Service
ENP	European Neighbourhood Policy
EP	European Parliament
ESDP	European Security and Defence Policy
ESS	European Security Strategy
EUBAM	European Union Border Assistance Mission
EUJUST Themis	European Union Rule of Law Mission to Georgia
EULEX Kosovo	European Union Rule of Law Mission Kosovo
EUPOL Proxima/FYROM	European Union Police Mission in the former Yugoslav Republic of Macedonia
EUROPOL	European Union Police Office
EUSEC RD Congo	European Union advisory and assistance mission for security reform in the Democratic Republic of Congo
FBI	Federal Bureau of Investigation
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
JAIEX	Justice and Home Affairs – External Relations Ad Hoc Support Group
JHA	Justice and Home Affairs
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of the European Parliament
PNR	Passenger Name Record

PSC	Political and Security Committee
RELEX	Relations extérieures (External Relations)
SitCen	Situation Centre
SSR	Security Sector Reform
SWIFT	Society for Worldwide Interbank Financial Telecommunications
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TFTP	Terrorist Finance Tracking Programme
UN CTED	United Nations Counter-Terrorism Committee Executive Directorate
UNHCR	United Nations High Commissioner for Refugees

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