Justice and Home Affairs. Exposing the Limits of Political Integration

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CHAPTER 15

Justice and Home Affairs

Exposing the Limits of Political Integration

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Summary

The control of entry to, and residence within, national territory, citizenship, civil liberties, law, justice, and order lie very close to the core of the state. Nevertheless, the permeability of borders within the European Union (EU) has prompted cooperation among governments, and in fewer than 20 years, justice and home affairs (JHA) have moved from a peripheral aspect to a focal point of European integration. External events, such as the Arab uprisings in 2011 and the war in Syria starting in the same year, and internal shocks—like the terrorist attacks in Paris (2015); Brussels, Nice, Berlin (2016); Barcelona and London (2017)—have heightened the urgent need for shared solutions. But national agencies concerned with combating crime, fighting terrorism, and managing borders, immigration, and asylum remain reluctant to pool sovereignty in these sensitive areas. The crisis of the Common European Asylum System in 2015 has exposed deep divisions among the member states, and rising politicization, coupled with anti-immigrant and Eurosceptic sentiments, points to the limits of European policy-making in these core areas of statehood.

Introduction

The ambition involved in creating an 'area of freedom, security, and justice' (AFSJ) within the EU may be compared with that which propelled the single market (see Chapter 5). The Treaty of Lisbon (ToL) lists the establishment of an AFSJ second in the general aims of the European Union (Art. 3 TFEU), right after the promotion of peace and well-being, and before the functioning of the single market. In contrast to economic integration, however, which has been at the core of the European integration project since its inception, JHA touches on many issues that are deeply entrenched in national political and judicial systems and have strong affinities to questions of state sovereignty; since the 17th century, the state has drawn legitimacy from its capacity to provide security for its inhabitants (Mitsilegas *et al*. 2003: 7). Cooperation in JHA symbolizes the EU's transition from a primarily economic regulatory polity to a political Union, and it demands attachment to shared values and a sense of solidarity among the member states. The crisis of the Common European Asylum System (CEAS) in 2015 and subsequent antagonisms between the member states have exposed the limits of political unification. While cooperation on JHA has remained high on the EU's agenda, member states have found it easier to agree on securitising the common external borders than on admitting migrants or refugees.

This focus on 'security' rather than 'freedom' or 'justice' in the AFSJ goes along with an emphasis on sovereignty, which limits the scope of supranational solutions. The politicization of issues such as immigration and terrorism in national political debates and electoral campaigns and the diversity of legal traditions and problem constellations in the member states have sustained reservations about transfers of responsibilities to the EU and reluctance to engage in 'hard' supranational legislation. The dominant mode of integration in JHA therefore remains transgovernmental governance. This policy mode combines elements of communitarization based on the traditional 'Community method' with more intergovernmental ones. It is characterized by the relative weakness of legal harmonization and a focus on more operational aspects of coordination between national authorities, usually under the auspices of an independent regulatory agency such as Europol for police cooperation, Frontex for external border controls, or the European Asylum Support Office (EASO) for asylum. Apart from the transgovernmental mode of governance, the second key feature of JHA cooperation is its shift to external relations, with many instruments reaching out to third countries beyond EU borders.

A decade after the adoption of the ToL, it seems that the member states are not willing to exploit the potential for communitarization offered by the treaty's reforms. The ToL strengthened EU competence in JHA; extended the ordinary legislative procedure, as well as the judicial power of the Court of Justice of the European Union (CJEU), to all sub-fields that were formerly intergovernmental; and upgraded the Charter of Fundamental Rights to a legally binding instrument. As the crisis of the CEAS has shown, however, member states have not only been unwilling to engage in deeper integration, they have also largely failed on the implementation of the existing *acquis*. Likewise, the experience of terrorist attacks in Paris, Brussels, Barcelona, and London has heightened the urgent need for shared responses, but these have not led to major empowerments of EU institutions.

This chapter starts with a short review of the emergence and institutionalization of JHA cooperation in the EU treaties; it then presents its key actors and institutional set-up, and discusses the main policy developments and their implementation in the member states.

The institutionalization of justice and home affairs cooperation

The dynamics of this new area of European integration reside both within and outside the EU and its member states. One important internal motor has been the spill-over from the achievement of freedom of movement in the single market (see Chapter 5). The decision in the 1985 Schengen Agreement to extend to France and Germany the open borders that had existed since 1948 between the Benelux countries of Belgium, the Netherlands, and Luxembourg spurred concern about safeguarding internal security and prompted closer cooperation on questions relating to cross-border phenomena such as immigration, organized crime, and drug trafficking. The surge of asylum-seekers in the 1980s which followed the closure of legal channels for economic immigration, the phenomena of organized crime and terrorism, and the end of the cold war, which opened the EU's previously closed eastern border, generated external pressures for closer cooperation.

This intensified coordination could draw on informal intergovernmental cooperation among security services and law-enforcement agencies that had developed since the 1970s. These included the Pompidou Group on drugs, set up in 1972 within the wider Council of Europe, and the Trevi Group created at the December 1975 European Council in Rome to coordinate cooperation against organized crime and terrorism.

In 1990, two important international treaties set the guidelines for future European cooperation. The Schengen Implementing Convention (SIC) devised 'compensatory measures' for the removal of border controls, establishing common rules on asylum, a common visa regime, illegal immigration, cross-border police competences, and a common computerized system for the exchange of personal data (Schengen Information System (SIS)). The Dublin Convention on Asylum, concluded among all EU member states, incorporated the asylum rules of the SIC, including the responsibility of the state in which an asylum-seeker first enters the EU for the examination of an asylum claim. Cooperation among the five initial Schengen states was to turn into a motor for and 'laboratory' of integration and had an influential impact on the subsequent communitarization of cooperation (Monar 2001).

From intergovernmental cooperation to contested communitarization

Justice and Home Affairs were included in the EU treaties for the first time in Maastricht's 'third pillar'. The 'third pillar' included asylum policy, rules regarding controls at the EU external borders, immigration policy, and police and judicial cooperation in civil and criminal matters as 'matters of common interest'. Despite its

loose intergovernmental structure (see Lavenex and Wallace 2005), the 'third pillar' transformed the working practices of interior ministries and police forces, which had remained among the least internationally minded within national governments, leading to the emergence of an intensive transgovernmental network (see Chapter 4). By the mid-1990s, Europol was taking shape as a coordinating agency for cooperation among national police forces, even though the Europol Convention had not yet been ratified by all member states. Four common databases were being put in place: the SIS was already up and running; the Customs Information System was being computerized; and the Europol Information System and Eurodac, the fingerprint database for asylum-seekers, were being developed. Ministries of justice, however, were not yet embedded in a similar European network.

Concerns about the efficacy and democratic accountability of intergovernmental procedures and the prospect of eastern enlargement motivated substantial changes to the framework for JHA in the Treaty of Amsterdam (ToA). A new Title IV transferred migration and other related policies to the first pillar, specifying a number of measures to be adopted within five years (by May 2004, ex-Art. 62(3) TEC). A transition clause according to which supranational decision-making procedures would apply only after adoption of these measures (including co-decision with the EP and qualified majority voting) and limitations on the powers of the CJEU symbolized member states' hesitation towards communitarization. Police cooperation and judicial cooperation in criminal matters remained in a revised and lengthened 'third pillar', replacing the opaque legal instruments of the TEU with well-established, legally binding instruments (with the exception of framework decisions), and the Schengen *acquis* was integrated into the treaties. While the Treaty of Nice (ToN) dealt primarily with the question of how to accommodate the entry of new member states, JHA remained largely unchanged until the ToL.

Justice and home affairs occupied a central stage in the Convention leading to the (failed) Constitutional Treaty and, subsequently, the ToL. The justification for the Lisbon reforms draws heavily on public concerns about internal security and citizens' expectations that the EU should 'do something' about it (e.g. Eurobarometer 2008). The phraseology of an 'area of freedom, security, and justice', first introduced with the ToA, was a precursor of this attempt at 'making Europe more relevant for its citizens' (see Monar 1997; McDonagh 1998). A second reason for the Lisbon changes was dissatisfaction with the weak implementation of agreed commitments.

This deepening of EU competences over JHA has not been uncontroversial. National sensitivities have circumscribed the extent to which these new competences have translated into supranational policies (see later in the chapter), and several member states have opted out of the ToA provisions. Denmark, for example, is a Schengen member and participates in the free movement area, but it is free to adopt relevant EU provisions as international law rather than EU law (thereby avoiding its direct effect and CJEU jurisdiction). Ireland and the UK opted out from Schengen and retained internal frontier controls, but have adhered, on a selective basis, and subject to unanimous agreement by 'insiders', to the flanking measures of the JHA *acquis* such as asylum, police and judicial cooperation in criminal matters, and the SIS.

In addition to these voluntary exemptions from the JHA *acquis*, the flexibility of the AFSJ is exacerbated by internal conditionality mechanisms and the partial opt-ins of several non-member states. The Schengen accession mechanisms constitute a form of compulsory flexibility towards new member states. These states have to first prove their capacity to implement effectively the respective provisions on border management, the fight against organized crime, and anti-corruption before being recognized as having achieved what is often referred to as 'Schengen maturity' by the old members. In the summer of 2020, four EU members were still in the process of qualifying for 'Schengen maturity'—Bulgaria, Croatia, Cyprus, and Romania—notwithstanding positive appraisals by the European Commission and the European Parliament.

The variable geometry of the AFSJ is further enhanced by the participation of four non-EU countries. Norway and Iceland, as members of the pre-existing Nordic common travel area, have been included within the Schengen area, and are fully associated with the Schengen and Dublin Conventions by way of an international agreement. So are Switzerland and Liechtenstein, two countries entirely surrounded by Schengen members, but not (like Norway and Iceland) members of the wider European Economic Area.

Another element of flexibility in the JHA *acquis* is the possibility, introduced by the ToL, for pioneer groups of at least nine member states to engage in enhanced cooperation on certain criminal justice and police cooperation matters within EU treaty structures. Extended opportunities for enhanced cooperation, however, have not prevented individual member states from engaging in selective forms of intergovernmental cooperation outside the provisions of the treaties. One example is the Prüm Treaty, concluded on a German initiative with Austria, Belgium, France, Luxembourg, the Netherlands, and Spain in 2005, aimed at facilitating and widening the conditions for the exchange of data included in the various JHA databases (see section on the proliferation of semi-autonomous agencies and databases later in the chapter) and intensifying operational cooperation between police, law enforcement, and immigration offices. Intergovernmental deals outside the Community framework have also proliferated during the crisis of the CEAS—but this time member states have preferred informal, non-legally binding deals, and these deals have targeted cooperation with third countries of transit for refugees and migrants rather than internal communitarization (see section on the flow of policy later in the chapter). The main innovations of the ToL are summarized in Box 15.1.

BOX 15.1 Changes to JHA in the Treaty of Lisbon

- Article 3 TFEU lists the objective of establishing the AFSJ second in the hierarchy of goals pursued by the EU, right after the promotion of peace and economic well-being.
- The ToL abolishes the earlier pillar structure, extends the ordinary legislative procedure to most former 'third pillar' matters, and lifts most of the existing limitations on judicial control by the CJEU.
- Article 77 TFEU formalizes the goal of integrated border management.

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- Articles 78 and 79 TFEU postulate 'common policies' on asylum and immigration; but the 'right of member States to determine volumes of admission', for example for economic migration, is however 'not affected' (Art. 79(5)), and legislation regarding immigrant integration in the member states is excluded (Art. 79(4)).
- In the field of criminal law, Article 82(1) TFEU codifies the principle of mutual recognition. Article 82(2) introduces an explicit competence for legislation in the field of criminal procedure, while Article 83 strengthens the basis for common measures regarding substantive criminal law.
- Article 86 TFEU opens the possibility for establishing a European Public Prosecutor, subject to a unanimous vote in the Council.
- An Annex introduces national parliaments as guardians of the principles of proportionality and subsidiarity and as participants in the evaluation of the work of JHA bodies and agencies.
- A general safeguard according to which the Union has to 'respect essential state functions including [. . .] maintaining law and order and safeguarding national security' (Art. 4(2)) was introduced.

Politicization, Brexit, and the crisis of the common asylum and Schengen systems

Earlier opt-outs from an increasingly supranational cooperation in the AFSJ indicate that national sensitivities about sovereignty have always affected integration in JHA. Yet, these sensitivities have been exacerbated with the rise of right-wing political parties in many member states. This is because the success of these political parties has rested on a combination of Euroscepticism with anti-immigrant positions. This combination has been interpreted as exposing a new type of societal cleavage in the EU which seriously circumscribes the scope for common EU policies in these sensitive fields (Hooghe and Marks 2018; Hutter, Grande, and Kriesi 2016). How divisive politicization based on this combination of anti-EU and anti-immigrant sentiments can be was demonstrated in the Brexit campaign. A central element in that campaign was the mobilization of fears over a loss of control over immigration due to both EU provisions on the internal free movement of people and an alleged failure of common policies regarding immigration by third-country nationals. This contestation thereby connected two hitherto disjoined areas of EU integration—internal 'mobility' of EU residents and external 'immigration' from third countries—turning intra- and extra-European migration into a common challenge for European integration.

Politicization reached a new peak with the crisis of the CEAS in 2015–16. The war in Syria that started in 2011 had turned into the world's largest humanitarian catastrophe since World War II, according to the UN. While affecting primarily neighbouring countries such as Lebanon, Jordan, and Turkey, in 2015 refugee displacements reached Europe. It soon became apparent that EU instruments developed in the framework of the CEAS were inadequate to deal with large refugee inflows, and that most member states were unwilling, and sometimes unable, to fulfil their

commitments under EU rules. The core of the CEAS, the Dublin and Schengen regulations, proved unsuited to channel the inflows. Visa obligations and strict border control enforcement at the Union's external borders precluded safe and regular access to EU territory, forcing refugees to take perilous routes through the Mediterranean. The Dublin rules that determine the responsibility of the first country of entry for processing asylum-seekers exacerbated distributional conflicts among member states and led to the total collapse of the Greek asylum system—a system which the European Court of Human Rights and the CJEU had already judged dysfunctional in 2011. The lack of solidarity also persisted regarding the Central Mediterranean migration route. Italy was compelled to discontinue its search-and-rescue operation 'Mare Nostrum' in October 2014, after member states refused to share the costs. Frontex's operation 'Triton', which stepped in with a much more limited budget and mandate, proved insufficient and aggravated the situation. In consequence, and encouraged by Germany's decision to suspend Dublin transfers for Syrians, Greece and Italy reverted to a policy of 'waving through' migrants without registering them. Apart from burdening countries further up the route, in particular Hungary, this prompted first Germany, then Austria, Slovenia, Hungary, Malta, France, Norway, Denmark, Sweden, and Belgium to re-introduce controls at their internal borders and hence to suspend one of the EU's major integration achievements: the internal system of free circulation (Lavenex 2018; Niemann and Zaun 2018).

The divisions that emerged during the crisis of the CEAS have not been overcome and point to the limits of political unification in the EU. Member states have been unable to agree on solidarity mechanisms such as distribution keys that would provide assistance to countries at the port of entry to the EU and allocate refugees and asylum-seekers equitably within the Union. The attempt to decide such mechanisms by qualified majority in the Council has met hitherto unprecedented resistance from opposed member states, and some, in particular Hungary, have gone so far as to openly defy EU asylum legislation and jurisprudence.

Unable to fix these internal divisions, the EU has sought solutions externally in the cooperation with third countries. In March 2016, a deal was concluded with Turkey which determines that all refugees and asylum-seekers entering Greece via Turkey will be taken back by the latter on the basis that it constitutes a 'safe third country' for these people. In exchange, Turkey was granted the prospect of a €6 billion aid package, the abolition of visa requirements, and progress in EU accession talks. Commission President Juncker and other politicians repeatedly underlined the success of this European deal. In a 2018 ruling, the CJEU (Cases T-192/16, T-193/16, and T-257/16 *NF, NG and NM v. European Council*), however, rejected EU ownership of the deal—and declared that it had no jurisdiction over this informal arrangement. This argument also applies to subsequent informal deals such as those concluded with the western Balkan countries or Libya, which commit these countries to stem and pull back migrants heading towards the EU. Concluded by the member states on an intergovernmental basis outside the treaty framework, these deals not only elude judicial oversight by the CJEU but also sideline the European Parliament and thus democratic oversight (Carrera, Santos Vara and Strik 2019; Smeets and Beach 2019).

The fragility of the JHA *acquis* was again demonstrated during the Covid-19 pandemic, when EU member states introduced uncoordinated restrictions on intra-EU mobility, practically suspending the Schengen system. The Commission has recognized that, by now, exemptions to freedom of circulation have become the rule rather than the exception, and it has tabled several proposals facilitating the temporary reintroduction of checks at internal borders.

Key actors

Cooperation in JHA has progressed at different levels with, on the one hand, supranational actors being successively empowered by the treaties and, on the other hand, national law enforcement authorities maintaining their autonomy through formal and informal intergovernmental cooperation, leading to a complex patchwork of actors.

Organization and capacities of EU institutions

With the new powers attributed to it by the ToL, the Commission gradually expanded its organizational basis in JHA. It gained the exclusive right to propose legislation in matters formerly under the 'third pillar'. However, the treaty also introduced the possibility of an initiative from a quarter of the EU member states in three areas: judicial cooperation in criminal matters, police cooperation, and administrative cooperation (Art. 76 TFEU). The organizational set-up of JHA in the Commission has changed over time, reflecting the increasing differentiation of the field and also the increasing salience of migration as a distinct policy field. Under the second Barroso Commission, the Directorate-General for Justice, Liberty and Security (DG JLS) was split into DG Home Affairs (HOME) and DG Justice (JUST), and in 2014, the Juncker Commission renamed DG Home Affairs as Migration and Home Affairs. With the nomination of Ursula van der Leyen as new Commission President, migration policy received a further upgrade in the Commission hierarchy. In a rhetorical move similar to the creation of an 'Area of Freedom, Security and Justice' (AFSJ) in the ToA, incoming President von der Leyen announced in September 2019 the creation of a new position of 'vice president for protecting our European way of life' which would include the migration and security portfolios. Unlike the AFSJ, however, this framing of migration policy in terms of 'protecting our European way of life' sparked harsh critiques across political parties, including from the European Parliament. Whereas von der Leyen defended the title in terms of appealing to the European values of democracy and human rights, others accused her of replicating the rhetoric of far-right parties.

The reorganization of the migration portfolio followed a steady increase in the size of the relevant units. The original JHA Task Force established within the Secretariat of the Commission under the TEU counted, in 1998, only 46 full-time employees. In 2008, the size of DG JLS was already comparable to that of DG TRADE or DG MARKT, with 440 employees. By 2012, DG HOME, which had split from DG

JUST, had 352, and five years later, by 2017, already 556 employees on its own. Justice and home affairs expenditure also saw a steep increase. By 2017, spending under the heading 'security and citizenship' amounted to 2% of the overall EU budget (of €165.8 billion), compared to 0.83% in 2012 (Commission 2012*c*). In addition, the EU had turned into the world's largest donor of development and humanitarian aid—with migration management consuming a growing share. This cooperation figures under the heading 'global Europe', which in 2017 accounted for 6% of the total EU budget. This evolution mirrors the growing political priority attributed to JHA, and in particular migration management, in the EU.

The JHA Council inherited from Trevi and from the TEU's third pillar a heavily hierarchical structure of policy-making. It is one of the few areas in the Council that has four decision-making layers. Agendas for JHA Councils are prepared by Coreper II, which meets weekly at ambassadorial level (see Chapter 4). Between Coreper and the working groups, the JHA structure has an additional intermediary level composed of special coordinating committees, which bring together in Brussels senior officials from national ministries, normally meeting once a month. The JHA Council currently has four such coordinating committees: CATS (police and judicial cooperation), SCIFA (Strategic Committee on Immigration, Frontiers and Asylum), COSI (Committee on Internal Security), and the Working Party on Civil Law Matters. Set up initially for a five-year transitional period, these committees of senior national officials, which constitute an anomaly in communitarized (formally 'first pillar') issues, have turned into permanent structures, reflecting the intergovernmental legacy of JHA cooperation. The lowest level is composed of working groups of specialists from national ministries and operational bodies.

Although not foreseen by the treaties, the European Council has occupied a growing importance in JHA through multiannual strategic programming. The ground was laid with the first European Council focused specifically on JHA, held under the Finnish Council Presidency in Tampere in 1999, and the subsequent programmes adopted at the 2004 The Hague and 2009 Stockholm European Councils. These strategic planning documents were devised to counter incrementalism in cooperation and to ensure greater efficiency in implementing agreed commitments. After the end of the Stockholm Programme (2014), the European Council went over to the adoption of 'strategic guidelines for legislative and operational planning within the area of freedom, security and justice' for the years 2014–19. Rather than promoting internal communitarization, these guidelines put the emphasis on the external dimension of EU policies, privileging non-legally binding cooperation mechanisms with third countries that again privilege the influence of the European Council and limit democratic and judicial oversight. European Union agencies in the field of JHA (Frontex, Europol, Eurojust, EASO) and bodies (the Counter Terrorism Coordinator) have also gained in prominence, thereby confirming the preference for horizontal transgovernmental cooperation among member states' authorities over supranational competences.

In sum, the important institutional changes realized in 2005, when the transitional period of the ToA expired, namely the EP's right to co-decision, and the abolition of the last constraints on the CJEU in the ToL, have not resulted in a major

change of decision-making in JHA (Trauner and Ripoll Servent 2015). Member states have been wary of constraining supranational action under the newly acquired powers, and have preferred operational coordination through intergovernmental means over legal integration based on supranational law.

The proliferation of semi-autonomous agencies and databases

This preference for horizontal coordination is also reflected in the proliferation of semi-autonomous special agencies and databases that act as hubs between national law-enforcement systems (see Box 15.2). JHA agencies are mainly concerned with information exchange and coordination among national authorities, often supported by the establishment of databases. Due to their research and in particular risk-analysis activities, they have also developed into important information sources for policy-makers in the Commission and elsewhere. Promoting a collaborative knowledge base, setting up curricular activities for public officials of the member

BOX 15.2 JHA agencies and bodies

- European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), set up in 1993 in Lisbon to provide factual information on European drug problems (www.emcdda.europa.eu)
- European Police Office (Europol), set up in 1999 in The Hague to share and pool intelligence to prevent and combat serious international organized crime (www.europol.europa.eu)
- European Police College (CEPOL), set up in 2000 in Bramshill in the UK, subsequently moved to The Hague, to approximate national police training systems (www.cepol.net)
- European Police Chiefs' Task Force (PCTF), set up in 2000 to promote exchange, in cooperation with Europol, of best practices and information on cross-border crime and to contribute to the planning of joint operations (no headquarters or web page).
- Eurojust, set up in 2002 in The Hague to coordinate cross-border prosecutions (www.eurojust.europa.eu)
- Frontex, set up in 2005 in Warsaw to coordinate operational cooperation at the external border (www.frontex.europa.eu)
- European Fundamental Rights Agency (FRA), set up in 2007 in Vienna as the successor to the European Monitoring Centre on Racism and Xenophobia (EUMC) to provide the Community and its member states with assistance and expertise when implementing Community law relating to fundamental rights (http://fra.europa.eu)
- European Asylum Support Office (EASO), established in 2011 in Valletta, Malta to promote the approximation of national asylum recognition practices (www.easo.europa)
- European Agency for Large-Scale IT Systems (eu-LISA), set up in 2011 in Tallinn, Estonia to manage joint databases in JHA (www.eulisa.europa.eu)

states, and engaging them in joint operations, EU agencies constitute an alternative means of European integration.

The earliest agencies were established on the basis of first-pillar secondary legislation: the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and the European Monitoring Centre on Racism and Xenophobia (EUMC), which in 2007 was replaced by the European Fundamental Rights Agency (FRA). Most subsequent developments, however, took place within the framework of the third pillar. The Europol Convention had been adopted in 1995, but it was not until 1998 that it came into force, after lengthy national ratification procedures; Europol became operational a year later. In 1998, the European Judicial Network was launched, as a predecessor to Eurojust, the 'college' of senior magistrates, prosecutors, and judges which became operational in 2002, to coordinate cross-border prosecutions. The European Council in Tampere in 1999 proposed the creation of two new bodies: the European Police College (CEPOL), based in the UK, to develop cooperation between the national training institutes for senior police officers in the member states; and the European Police Chiefs' Task Force (PCTF) to develop personal and informal links among the heads of the various law-enforcement agencies across the EU and to promote information exchange. In 2009, the European Asylum Support Office (EASO) was created to gather and exchange information on countries of origin and asylum proceedings in the member states. The hope is thereby not only to assist countries in implementing EU asylum directives but also to promote the approximation of recognition practices.

The fastest growing and most contested agency is the Agency for the Management of Operational Cooperation at the External Borders (Frontex), which was upgraded to the European Border and Coast Guard Agency (EBCGA) in response to the 'migration crisis' in 2016. This development is marked by a steadily increasing budget and staff in order to boost operational capacities and to render operations less dependent on member states' voluntary contributions. Established in Warsaw in 2005, Frontex's primary tasks were coordination and risk analysis. A first important extension of its mandate occurred in 2007 with the creation of Rapid Border Intervention Teams (RABITs) as a means of providing swift operational assistance for a limited period to a requesting member state facing a situation of 'urgent and exceptional pressure' at external borders. The 2016 reform was even more significant in terms of resources and competences such as the power to initiate EU repatriation flights for irregular migrants, and more responsibilities countering organized crime, trafficking, and smuggling of human beings, including a far-reaching mandate to cooperate with third countries. The Commission's proposal to grant Frontex a more supranational right to intervene in the control of a member state's borders in case of crisis even without the latter's permission did not gain the support of the Council. However, operational capabilities were once again boosted in 2019 with the decision to grant Frontex an additional staff of 10,000 border guards by 2027. This organizational expansion has been backed by a steep rise in the agency's budget from €19 million in 2006 to €85 million in 2012 and €302 million in 2017—with projections for further considerable increases under the EU's Multiannual Financial Framework (MFF) for 2021–2027. Without doubt, these measures seek to respond to populist

challenges and to document the EU's determination to counter irregular migration. Frontex is supported by the European Border Surveillance System (Eurosur) which uses drones, reconnaissance aircraft, offshore sensors, and satellite remote-sensing to track irregular migration in the Mediterranean.

The fact that Frontex approaches border management from a pre-eminently security-oriented perspective raised concerns early on. Gradually, the Agency has endorsed a Fundamental Rights Strategy and a Code of Conduct. Furthermore, the EU institutions agreed to amend the Frontex Regulation so as to include the requirement to protect fundamental rights. Changes were also introduced to nominate a Fundamental Rights Officer and create a Consultative Forum on Fundamental Rights. The amended rules added obligations to provide training on fundamental rights, to respect the principle of *nonrefoulement* which prohibits the return of refugees to places where their life or physical well-being would be threatened, and to terminate or suspend joint operations or pilot projects in the event of serious or persistent breaches of fundamental rights or international protection obligations. Human rights organizations including the Council of Europe and the European Ombudsman have however found these reforms to be insufficient. The latest reform proposals thus also provide measures to strengthen the internal fundamental rights capacity of Frontex, including the creation of a Deputy Fundamental Rights Officer position, fundamental rights monitors, additional roles for fundament rights staff in different aspects of Frontex's work, and a code of conduct. The complaints mechanism established by the 2016 Regulation is further strengthened, including through the inclusion of responsibility for omissions as well as actions, and through follow-up required from member states when their personnel are subject to complaints. Yet, the fundamental tension between the mandate to fight irregular immigration and the safeguarding of human rights, including allowing access to an asylum procedure, is likely to persist (Mungianu 2016; Perkowski 2019).

With these new EU bodies, the number of joint databases has also proliferated. Databases constitute the core coordination instrument between domestic law-enforcement and immigration authorities and are meant to boost their surveillance capacities over mobile undesired individuals in the common territory. Over time, a sophisticated surveillance system has been devised for the control of the external border. The first generation of databases includes the Visa Information System (VIS), storing personal information (including biometrics) on every visa application; Eurodac, containing fingerprints and personal data of asylum seekers, refugees, or irregular entries; and the SIS and its successor SIS II, containing information on persons who may have been involved in a serious crime or reside irregularly in the EU. These were supplemented by the Entry/Exit System registering all movements in and out of the Schengen area, including fingerprinting, and the Registered Traveller Programme, which facilitates the movement of frequent (business) travellers and thereby establishes a complex system of pre- and post-border screening procedures targeting all foreign visitors to the EU. Originally set up for different purposes and for different types of person, these databases have become increasingly connected, culminating in the proposal adopted after the Paris terrorist attacks of November 2015 for interoperability. Pending adoption, this proposal will allow national law

enforcement authorities to access and match data from the different databases simultaneously, thereby raising concerns about blurring distinctions between criminal subjects and migrants and about the respect of privacy. In December 2012, the EU Agency for Large-Scale IT Systems was created, with the task of managing this increasing array of databases, yet with primarily technical functions.

The flow of policy

JHA integration has been driven by internal developments, such as the quest to compensate for the abolition of internal border controls, and by external shocks, such as terrorist attacks and immigration pressure. Notwithstanding the gradual introduction of supranational decision-making competences, member states have remained hesitant to adopt supranational legislation and have preferred to work towards common objectives through operational and practical integration, as well as cooperation with third countries on the transit routes of migrants and refugees. Even the 'migration crisis' of 2015/16, which exposed the limits of existing instruments and of several member states' capacity to cope with large influxes of migrants and refugees on their own, did not generate sufficient support for major internal reforms, apart from the strengthening of Frontex. In substantive terms, the predominance of interior ministries in the institutional set-up, and the framing of cooperation as necessary for the safeguarding of internal security in an area without internal borders, have privileged security concerns vis-à-vis human rights considerations from the outset. The accession to power of right-wing populist parties in several member states has reinforced this tendency, further reducing support for initiatives that would enhance the protection of migrants' rights, foster solidarity among the member states, or uphold civil liberties.

Asylum and immigration policy

The sense of crisis over immigration and concurrent national reactions in 2015/16 have exposed the limits of the Common European Asylum System and of a migration policy focused primarily on the reduction of (unsolicited) immigration. Yet, attempts to overcome existing deficits through stronger harmonization and supranational burden-sharing mechanisms have failed. Regarding economic migration from non-EU countries, the EU has a more limited mandate than regarding irregular migration or asylum—as the treaties exclude the possibility for the EU to determine volumes of admission of third-country nationals (Art. 79(5) TEU). Coupled with a lack of political will on the part of the member states, this explains why only very few steps have been taken regarding the admission of third-country nationals for the purpose of work.

European Union policy-making for asylum and immigration issues has developed in stages. A first set of directives was adopted under the intergovernmental decision-making procedures during the transition phase provided for in the ToA. Reflecting the lowest common denominator among the member states and providing for a wide

scope of discretion in implementation, these directives were later recast under the ToL. From the outset of cooperation in the mid-1980s, the emphasis has been on the fight against irregular immigration, rather than on which legal immigrants to accept or how to cooperate on asylum (Lavenex and Wallace 2005).

Agreement on which forms of immigration to classify as legal has proved particularly controversial. The first directives have focused on the rights of third-country nationals already resident in a member state: Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents in a member state of the EU, and Council Directive 2003/86/EC on the right to family reunification. In a 2008 Report (Commission 2008*b*), the Commission attested that the latter directive, given its open wording, had had very little impact on member states' policies. The Stockholm Programme's claim to recast the directive has not materialized, and the Commission has issued non-binding guidelines for implementation instead.

Cooperation on legal immigration for work has been even more controversial. A 2001 Commission proposal on the admission of immigrants for the purpose of work and self-employment found no support in the Council (Commission 2001*b*). Instead, the Commission has embarked on a sectoral approach, advancing more limited directives targeting specific, less controversial groups of economic migrants, such as highly skilled professionals, researchers and scientists, seasonal workers, and intra-corporate transfers. The 2009 Blue Card Directive confirms the reluctance of the member states to tie their hands to European immigration rules. Alluding to the US 'Green Card', the Blue Card was originally designed as a means to attract highly skilled migrants from third countries to the EU. In the end, however, the major benefit this instrument would have brought to potentially interested candidates, the automatic extension of free movement rights, was not retained. As a consequence, very few persons have made use of this new legal instrument to enter the EU, and national immigration schemes prevail. Recognizing these limitations, the Commission put forward a proposal for a revised Blue Card Directive in 2016 which has been blocked in the Council ever since.

Arguably, the EU has a stronger mandate in asylum policy. Successively, several directives have been adopted to create common rules on asylum in the member states. The collapse of the Greek asylum system in 2011 and of the EU-wide CEAS in 2015, as well as enduring controversies among frontline countries such as Greece, Hungary, and Italy and other member states, have forcefully exposed the limits of this cooperation. However, calls to fundamentally revise the Dublin system of responsibility allocation have failed (see Box 15.3).

In the light of enduring immigration pressure and the internal resistance to stronger legislative integration, the emphasis of cooperation has moved outwards to the attempt to engage countries of transit and origin in the management of migration flows (Lavenex 2006). Immigration has become a priority in the European neighbourhood policy (see Chapter 19), and now constitutes an increasing focus under the EU's development and humanitarian cooperation with countries in Africa, the Middle East, and beyond. Starting with a narrower focus on the conclusion of readmission agreements, under which third countries agree to take back irregular migrants and cooperate on migration control, this agenda has evolved in

BOX 15.3 Common European Asylum System

- The cornerstone of EU asylum policy is the system of exclusive responsibility for the examination of asylum claims based on the Dublin Regulation of 2013, establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application. This instrument replaces the Dublin Convention and the earlier Dublin Regulation of 2003, and its implementation is linked to the Eurodac database. Its main rule, the allocation of responsibility primarily to the first member state an asylum-seeker enters when reaching the EU, is maintained.
- The mutual recognition of asylum determination outcomes implied by the system of responsibility allocation necessitated minimum standards on reception conditions, the definition of the term 'refugee', and asylum procedures. Corresponding 'Phase I' directives were adopted only after significant delays, and they are riddled with delicate compromises and open questions.
- A Commission Green Paper on the future Common European Asylum System of 2007 (Commission 2007*b*) gave a critical assessment of progress achieved so far and identified the need for fuller harmonization of substantive and procedural asylum law in order to realize a CEAS by 2010. The asylum directives were recast between 2011 and 2013; however, analyses attest to only a few improvements compared to 'Phase I' legislation (Trauner and Ripoll Servent 2015).
- In 2011, the Dublin system collapsed when the European Court of Human Rights and the CJEU, considering the overburdening of Greece as a country of first entry and its failure to comply with refugee law obligations, declared transfer under the Dublin Regulation from other member states to Greece in breach of fundamental human rights. The influx of more than a million Syrian refugees in 2015 mainly through Greece led to the general collapse of the CEAS, with member states openly violating the rules of the Dublin Regulation, reintroducing checks at their internal borders—thereby suspending the Schengen Agreement, and disregarding fundamental standards guaranteed under the asylum directives (Lavenex 2018; Niemann and Zaun 2018).
- Reactions to the crisis have sought to relieve pressure on frontline member states through 'hotspots', that is identification and registration centres for asylum-seekers administered with the help of EU agencies EASO and Frontex. Attempts to decide by qualified majority voting on the relocation of refugee quotas from frontline countries to other member states have led to deep divisions, with Hungary and Slovakia refusing to accept the outcome of the vote. Due to the lack of consensus among the member states, proposals to profoundly overhaul the Dublin system have been abandoned.
- Burden-sharing remains a key challenge. The European Refugee Fund to support reception, integration, and voluntary return measures in the member states increased from €216 million (2000–04) to just under €700 million (2007–13). Its successor, the Asylum, Migration and Integration Fund (AMIF, 2014–20) obtained €3.137 billion—yet most of this money was allocated for emergency measures.
- Cooperation with countries of transit and origin of asylum-seekers has steadily gained in importance and stands in the focus of the recent crisis. Legally non-binding deals have been concluded with third countries committing to take back

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asylum-seekers transiting to the EU (such as with Turkey), or combining development and humanitarian aid with trade facilitation to encourage them to host refugees (such as with Jordan, Lebanon, and Eritrea). Informal cooperation has also intensified with Libya, notwithstanding the deplorable human rights situation in the country (Carrera, Santos Vara, and Strik 2019).

response to shortcomings of existing approaches. The first 'Global Approach to Migration' of 2005 introduced the instrument of Mobility Partnerships comprising cooperation on irregular migration, legal migration, and development. Cooperation on asylum was added in response to the Arab uprisings in the 2011 'Global Approach to Migration and Mobility'. The latest instruments, adopted in the wake of the 2015/16 crisis, the 'European Agenda on Migration' (2015) and the 'Partnership Framework Approach' (2016), declare migration management as a top foreign policy priority, which will be pursued using all foreign policy instruments that the EU has as its disposal, including development, trade, security, and other foreign policies. While some third countries have successfully played on these new priorities to extract benefits from the EU, the idea of shielding EU member states from undesired migration flows has also provoked tensions in external relations.

Police and judicial cooperation

The dominance of non-binding instruments and the focus on operational cooperation have traditionally been strong in the fields constituting the former third pillar, namely police and judicial cooperation. With the ToL, stronger communitarization has also made its way into these core aspects of state sovereignty. In practice, however, cooperation has remained fragmented and based on the horizontal coordination of national authorities rather than supranational centralization. As in the case of migration, developments in police and judicial cooperation have been driven by both internal dynamics and external pressure. The 9/11 terrorist attacks on the US in 2001 prompted the European Council to adopt the EU Action Plan on Combating Terrorism, and the bombings in Madrid (March 2004) and London (July 2005) led to the establishment of a special EU Counter-Terrorism Coordinator (European Council 2005*a*) and well as strategic documents such as the 2005 EU Counter-Terrorism Strategy (Council 2005*a*) and Strategy on Radicalization and Recruitment into Terrorism (Council 2005*b*), and on terrorism financing (Council 2008). In the wake of the ToL, the EU adopted the Internal Security Strategy (ISS) in 2010, with the aim of creating a high-level body for the coordination of operational internal security cooperation in the EU, a long-perceived deficit in the field when viewed in comparison to external security and its powerful Political and Security Committee (PSC, see Chapter 17). The ISS embraced a wide mandate with a view to creating coherence in this fragmented field, and it includes terrorism, serious and organized crime, cyber-crime,

cross-border crime, violence, and natural and man-made disasters. However, the Council Standing Committee on Internal Security (COSI) introduced with the Lisbon Treaty did not evolve into such a centralized body: gathering at times more than 100 participants from diverse national authorities, COSI reflects the fragmentation of the field, and has proved unsuited to developing leadership over this complex field.

The new wave of terrorist attacks starting in 2015 spurred another round of integration efforts. The European Passenger Name Record Directive, which the European Commission had tabled repeatedly and without success since 2007, was adopted a few weeks after the November 2015 Paris attacks. The European Parliament gave up its long-standing opposition to this directive which commits member states to record passenger details for all flights from third countries destined for the EU. The Parliament's concerns about privacy and civil liberties gave way to the interest of Europol and other law-enforcement agencies in tracking journeys in order to identify potential terrorists' itineraries and places of radicalization. A second long-standing policy proposal that gained traction is the intra-operability of JHA databases agreed in 2019. Overall, however, institutional reforms and legislative steps remained modest. Instead, more innovation was put into the improvement of operational cooperation, in particular with third countries. The sharing of intelligence and capacity-building with third countries intensified considerably, and the EEAS deepened its diplomatic cooperation, also through security specialists deployed to EU delegations, with key third countries in the Middle East and Africa (Monar 2015; Davis Cross 2017).

Police and Judicial Cooperation in Criminal Matters cut across different policy areas that fall within the responsibility of national law and order authorities. The same is true for the fight against terrorism, which, in addition to police cooperation, also touches on financial issues, intelligence cooperation, and external relations. A major motor for closer cooperation has been the adoption of the principle of mutual recognition encompassing the pre-trial (recognition of arrest warrants, evidence warrants, freezing orders, and decisions on bail) and post-trial stages (recognition of confiscation orders, financial penalties, probation orders, and transfer of sentenced persons). The principle of mutual recognition, adopted at the 1999 Tampere European Council and later codified in the TFEU, was seen as an alternative to integration through supranational law. Yet, implementation of these mechanisms soon spurred the need for substantive and procedural harmonization and gradually motivated the use of more formal legal instruments. The ToA abolished the use of legally weak conventions dominant under the TEU and provided for the adoption of the new instrument of framework decisions instead, which however remained fairly general and proved insufficient to approximate domestic legislation. Cooperation post-Lisbon has concentrated on replacing the existing framework decisions with directives and advancing integration in procedural law, with a stronger focus on human rights and, in particular, legal defence rights. Article 83(1) TFEU for the first time grants the EU powers to establish minimum rules concerning the definition of criminal offences and sanctions.

The second motor of integration is operational cooperation through the various JHA agencies. Europol is essentially a criminal intelligence agency, while Eurojust promotes cooperation among the member states concerning investigations and prosecutions. Integration in police matters has also focused on networking and the

development of common operational practices such as through the Police Chiefs' Task Force and CEPOL. These networks are designed to address the main impediment to more effective cooperation among national police forces, which is the need for mutual understanding and trust between highly diverse domestic systems of law enforcement (Occhipinti 2003). With enlargement, both issues—the need for trust and problems associated with diversity—have clearly increased, prompting concern about how to invigorate the operational aspects of police cooperation. The lack of trust and the diversity of member states' legal systems have remained the main obstacles to integration in criminal law matters, as documented in the case of the European arrest warrant (EAW), (see Box 15.4 and Lavenex 2007; Sievers and Schmidt 2014).

The external dimension of police and judicial cooperation has significantly expanded. Europol, Eurojust, and Frontex have all concluded cooperation agreements with a series of European and non-European countries—sometimes enabling them to conduct operations in foreign jurisdictions with the consent of the country concerned. Cooperation with the US has been particularly close and has spurred major controversies, both among EU institutions and between the EU and civil-rights activists, especially in the area of data protection. These controversies are particularly telling for the nature of inter-institutional relations in JHA, the balance between security and human rights considerations, and the role of the EP before and after being granted co-decision power in the legislative process. The 2004 US–EU passenger name record (PNR) agreement, which requires European airlines flying to the US to provide US authorities with information on their passengers, was annulled by the CJEU in 2006 because the EP had not been adequately consulted (Joined Cases

BOX 15.4 European arrest warrant

- The Tampere European Council adopted four basic principles for establishing a common European judicial space: mutual recognition of judicial decisions, approximation of national substantive and procedural laws, the creation of Eurojust, and the development of the external dimension of criminal law.
- The 11 September 2001 terrorist attacks in the US spurred the adoption of the Framework Decision on the European arrest warrant in 2002.
- The European arrest warrant is a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a person being sought for a criminal prosecution or a custodial sentence. It eliminates the use of extradition and is based on the principle of mutual recognition of decisions in criminal matters.
- In the absence of EU harmonization of criminal law and of mutual trust among judicial systems, the implementation of the EAW has encountered difficulties (Lavenex 2007).
- In sum, as in the case of migration, restrictive measures, such as the EAW, have been easier to adopt than those harmonizing the rights of individuals. While the ToL provides a stronger basis for both supranational measures and the protection of human rights, this impact is not yet visible in policy developments.

C-317/04 and C-318/04 *European Parliament v. Council of the European Union and European Parliament v. Commission of the European Communities*). The successor agreement, which remained the same in substance, was adopted under treaty provisions that do not require the EP's opinion. PNR has raised grave concerns among the EP, the European Data Protection Supervisor, and civil liberties groups for failing to comply with European data protection rules. After entry into force of the ToL, the EP, exercising its newly acquired powers, asked for an overhaul of all existing PNR agreements. However, the revised PNR agreements with Australia and the US, which were approved by the EP in 2011 and 2012 respectively, hardly differ from their predecessors in substance (Suda 2013). As indicated earlier, the terrorist attacks in EU countries spurred further acceptance of these surveillance instruments, and facilitated the adoption of the very similar European PNR Directive in 2016. In sum, the dynamic external dimension of judicial and police cooperation underlines the blurring of distinctions between notions of internal and external security. As with efforts to combat immigration, they move JHA cooperation closer and closer to traditional domains of the CFSP (see Chapter 17).

The challenge of implementation

Notwithstanding the generally weak legal character of most policy instruments, implementation has remained a challenge in JHA. Limits on the jurisdiction of the CJEU have compounded this deficit.

As a response, the Commission decided to introduce half-yearly 'scoreboards'—reports monitoring progress in implementing the treaty and programme provisions under the ToA. Under the Hague Programme, the 'Scoreboard Plus' was introduced which, being published openly on the Commission's website, contained detailed information on implementation deficits by individual member states, and thus tried to induce compliance by 'naming and shaming'. This practice was however abandoned under the Stockholm Programme without justification. Problems with implementation of shared policies have multiplied in recent years, as exemplified by the implementation of asylum directives, as in the case of Greece or, more recently, Hungary (see Box 15.3); the high number of infringement procedures for late transposition launched under virtually every adopted directive; and the decisions by multiple member states to suspend the Schengen *acquis* by reintroducing checks at their internal borders in the wake of the Arab Spring in 2011 and again from 2015. It is likely that JHA infringement cases will therefore account for a large share of the CJEU's future jurisprudence under its newly acquired powers.

Conclusion

Initially justified in limited terms as compensatory measures for the abolition of internal border controls, cooperation in JHA, now framed as the creation of an 'area of freedom, security, and justice', has been elevated to a central objective of the EU.

Under the ToL, the objective of an AFSJ figures second after the overall commitment to peace promotion, and before the internal market, environmental, or social policies. This priority has translated into the gradual widening of supranational competences, yet cooperation has continued to focus on transgovernmental operational coordination among fragmented national authorities rather than through the development of supranational legislation and centralized powers. Next to this emphasis on horizontal cooperation among the member states which largely preserves their sphere of sovereignty, the second important dynamic in the evolution of JHA cooperation is its shift towards external relations, and its gradual rapprochement with the CFSP.

Terrorist attacks and immigration pressures have kept JHA high on the EU agenda. The crisis of the CEAS of 2015/2016 has exposed the limits of existing instruments, and political controversies have shaken up the foundations of European unification. The rise of right-wing, anti-immigrant, and Eurosceptic political parties all over Europe has led to a hitherto unprecedented level of discord and politicization in the EU. The irony is that while supranational actors and above all the Commission depend on efficient problem-solving in order to uphold the legitimacy of European integration, thereby prompting it to propose ambitious reforms, in this political climate, member states show even less inclination towards transfers of sovereignty. The uncoordinated propagation of national controls and mobility restrictions at EU internal borders during the Covid-19 pandemic, putting a further strain on the Schengen system of free circulation, is a powerful signal of states' enduring sovereign prerogatives. The consequences of this dilemma of increasing pressure but decreasing support for joint solutions are more transgovernmental muddling through and an approach that privileges the security interests of the member states vis-à-vis broader considerations of human rights or foreign relations.

FURTHER READING

For fairly comprehensive overviews of the JHA generally and EU migration policy more specifically, see the Handbooks by Ripoll Servent and Trauner (2018) and Weinar, Bonjour, and Zhyznomirska (2018). Mitsilegas (2018) gives an excellent introduction to EU criminal law cooperation. The edited volume by Carrera, Santos Vara, and Strik (2019) provides an up-to-date analysis of the crisis of EU asylum and migration policy with a focus on its external dimension.

Carrera, A., Santos Vara, J., and Strik, T. (eds.) (2019), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Cheltenham: Edward Elgar).

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