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The Development of the EU as an Internal Security Actor

Providing internal security for its own citizens is among the essential public goods any state has to deliver and ranks high among its primary sources of legitimacy. The fact that in recent years the EU has emerged as an actor in its own right in this area is therefore of enormous significance to the European integration process. Under the rather colourless and technical-sounding label of justice and home affairs – only recently, with the Treaty of Amsterdam, upgraded to that of an 'area of freedom, security and justice' – EU action in internal security-relevant areas such as immigration policy, the fight against cross-border crime and judicial cooperation is now based on an extensive range of treaty objectives, several multi-annual action plans, improved legal instruments, and specific institutional structures both at the EU and at the national level. No other EU policy-making area has, in fact, grown to any similar extent during the past decade.

Future historians may well regard this as no less an important development of the 1990s than the introduction of Economic and Monetary Union and a Common Foreign and Security Policy. They may also be tempted to regard this development as a phenomenon of the 1990s only, starting largely with the entry into force of the Maastricht Treaty in 1993. Yet some internal security issues have actually been dealt with at the European level almost since the beginning of the integration process. For more than forty years cooperation on these issues remained a preserve of intergovernmental cooperation, first completely outside of the EC integration process, then, from the mid-1970s on, increasingly linked to the EC framework but still retaining its intergovernmental basis. The predominance of intergovernmentalism ensured that maximum weight was given to the different basic attitudes, changing priorities and perceptions of national governments. This has resulted in an

erratic and fragmentary development of cooperation on internal security issues at the European level that even the Treaty of Amsterdam was unable to wholly overcome. In order to understand the actual role that the EU is playing today in the internal security field, its potential as well as its limits, one has to take a closer look at the specific factors which can account for the remarkable but also tortuous and incomplete development of the EU as an internal security actor. It makes sense to start with the obstacles and negative development factors which affected and limited – and often enough continue to do so – cooperation and common action in this area.

Obstacles and negative development factors

Internal security as a central element of the legitimacy and sovereignty of the nation-state

One of the most fundamental obstacles to European integration in the sphere of internal security lies in the fact that it touches the very nerve of the modern nation-state. Since the seventeenth century all major European theories of the state have been based on the assumption that the state finds its central justification in the provision of security to its inhabitants, against both external and internal threats. EU JHA covers most of the possible 'internal' threats to the individual and some of the external, such as international terrorism, organised crime and drug trafficking. In earlier political philosophy, security to be provided by the state was mainly understood in a physical sense, but later theories extended its meaning to security through the protection of fundamental rights and the guarantee of a number of basic living and working conditions. With the potential exception of anarchism no major current of political thinking has ever questioned this fundamental function of the state. Liberals and neo-liberals may find powerful arguments for limiting the role of the state, but they do not dispute the state's functional role in protecting fundamental rights and the rule of law. The Marxist critique of the capitalist state may well claim that it fails to provide the right type of security because it protects the wrong conditions, but even this critique presupposes that the people's state ought to provide security for the people.

The view that the state exists to guarantee the security of its inhabitants, their persons and their property, found its classic expression in Thomas Hobbes' *Leviathan*. According to Hobbes the state ('Common-Wealth' or 'Civitas') finds its motive and justification in the creation of a 'Common Power' able to defend its members both against invasion

from without and against other members of the Common-Wealth and to act in all 'those things which concerne the Common Peace and Safetie'.[1] It is from this function of the state to guarantee 'Common Peace and Safetie', Hobbes argues, that people's consent to the state and their corresponding obligation to obey it derives. This means that the protection of the individual's security emerges as the central source of legitimacy for the state and state action in general. Similar arguments can be found in John Locke's *Second Treatise of Government*, which places greater emphasis on the rule of law ensuring the individual's security,[2] and in Jean-Jacques Rousseau's *Du contrat social*,[3] which identifies the defence and protection of the person and the property of each citizen as the central rational of the 'Social Contract'.

These references to the classics of European political theory may at first sight seem somewhat removed from today's political reality. Yet even a brief look at the constitutional documents of European countries reveals how much this security-providing function of the state has become part of the constitutional foundations of the modern state. Whether it is the British *Bill of Rights*, the *Déclaration des droits de l'homme et du citoyen* as referred to in the Constitution of the French Fifth Republic, the German *Grundgesetz* or the relevant constitutional document of any other Member State of the EU, the concept of the state providing protection to its citizens or inhabitants is always present as a central principle and element of legitimacy. Since the nineteenth century the state has certainly acquired a whole range of other functions that provide sources of legitimacy for its growing powers and bureaucracies, the provision of basic economic and social welfare being only the most notable example. Yet the security-providing function of the state remains as fundamental as ever, and opinion polls reveal that 'internal security' regularly comes high on the list of the major concerns of European citizens.[4]

For European integration in JHA all this means that any transfer of powers to the EU institutions in this area of policy-making takes away from some of the most fundamental functions and reasons of being of the modern state and seems to threaten part of its legitimacy. The example of the many failed attempts since the 1950s to arrive at some degree of integration in the field of military security has shown how resilient established concepts and traditions of the state as a provider of security can be. The situation is not much different in the 'internal' security field covered by JHA. There are many who continue to argue that integration in this area is fundamentally incompatible with the very existence of a nation-state and national government. The former British Home

Secretary (1990–2) Kenneth Baker made this point very clear when he wrote that his government's 'collision course' with the European Community over frontier controls, one of the central questions of JHA in the EU, 'will be the ultimate test of "Who governs?" the national or the supranational state'.[5]

The situation is not made easier by the relevance of many issues of JHA to traditional concepts of state sovereignty. Sovereignty in the classic sense of a state's supreme law-making and law-enforcement power will clearly be affected by integration in JHA which extends to major areas of national law-making and law-enforcement. Yet this sort of erosion of traditional sovereignty has been an essential part of the European integration process and all Member States of the EU have endorsed it by accepting the basic principles of the EC legal order as enshrined in the Treaties. Yet integration in JHA touches upon at least four major areas which were largely exempted from the supranational elements of the Founding Treaties: border controls, measures relating to public order, including all aspects relating to national police forces, criminal law approximation and the rules governing the entry and admission of third country nationals. Of these, border controls are probably the most sovereignty-sensitive issue because full and independent control over national borders has since at least the nineteenth century been seen as an important element of sovereignty as control over national armed forces and the national currency. The issue has obviously also a security dimension, and it is because of both the sovereignty and the security dimension that the British Government has so far preferred to stay outside of the Schengen border control system that is based on the abolition of internal border controls. Yet the other areas have also given rise to concerns over national sovereignty: in France, for instance, in relation to the possible impact of European harmonization in JHA on national public order measures, and in Spain in respect of national controls on and entry conditions of third country nationals.

Yet while all of these objections may be understandable and even legitimate in the light of well-established concepts of the state and its role, one also has to see that their basis in reality has become much less solid than it used to be when these concepts were originally developed. In areas such as transnational organised crime the nation-state on its own is simply no longer capable of taking all necessary measures for the internal security of its citizens. Globalisation, economic interpenetration and increased technical sophistication reduce national measures more and more often to powerless gestures. The concept of sovereignty itself seems less and less meaningful at a time when global financial

transactions, multinational company structures and ungovernable communication networks like the Internet do not any longer pay any attention to that territorial dimension of sovereignty which finds its expression in physical frontiers.

Whatever the actual limitations of national sovereignty may be, however, many European governments continue to perceive JHA as a sovereignty-sensitive area, and as a result are reluctant to lose control over central JHA issues to supranational institutions. As a result intergovernmental cooperation instead of supranational integration was the preferred method for achieving progress on JHA issues until well into the 1990s, and even the changes introduced by the Treaty of Amsterdam – to which we will come back later – retain many intergovernmental features.

The differences between national legal and administrative systems in the JHA sphere

While the obstacles to integration in internal security matters dealt with in the previous section may be regarded as being of a more ideological nature, the difficulties posed by differences between the systems and traditions of the European countries in the JHA sphere could hardly be more real and substantial. Nearly all areas of JHA are covered by extensive and well-established national legislation which is in most cases firmly rooted in long-standing legal traditions, constitutional norms and long-accepted concepts about the administration of justice and the maintenance of public order. This means that any attempt to establish common basic principles or rules, to harmonise certain procedures, or even only to ensure mutual recognition of decisions taken by the authorities of another European country will not only immediately encounter a host of technical difficulties because of the differences in legal rules, procedures and terminology, but is also likely to give rise among the national administrations and practitioners concerned to almost instinctive reactions against such European 'interferences' with well-established national approaches, basic concepts and traditions. Legal establishments tend anyway to be, as one distinguished Irish lawyer put it, 'notoriously resistant to change', but if one adds nationalism to this factor 'you get an exceptionally potent brew'.[6]

One might think that this sort of problem is not new in the history of the European integration process and that the example of the successful EC legislation on the completion of the Internal Market shows that with sufficient political will these difficulties can be overcome. Yet the JHA area is a much more difficult target for legal and political integration

because its objects are not merely the activities and rights of companies and 'citizens' as economic actors but a whole range of issues directly affecting the rights and the security of individuals and having major implications for public order at the national level. The carrying out of border controls on persons, the handling of personal data in cross-border law enforcement cooperation and the rights of persons in extradition procedures are only a few examples where JHA issues can have a major impact on citizens' rights. As a result possible changes to national legal rules and policy approaches tend to be much more sensitive in terms of their likely political implications, which make governments less inclined to overrule technical and non-technical objections raised by officials of the relevant ministries, members of the judiciary or police forces.

It would be futile to try, in the framework of this chapter, to give an overview of all main differences between national systems that have been generating obstacles to the development of the EU as an actor in internal security matters. Yet a few examples can show the nature and the extent of the problem.

Probably the most fundamental cleavage in European legal culture is that between the civil law tradition (with its emphasis on codified law) and the common law tradition (with its emphasis on precedent). From the twelfth century, English common law emerged as a different legal system, which developed almost in complete separation from the (Roman) civil law tradition that remained the basis of the legal systems on the continent. Over the next centuries the common law tradition spread first to Wales, then to Scotland and later to Ireland, creating an effective split in European legal development which lasts to the present day.[7] The division between civil and common law extends to fundamental concepts of the nature of law and of the role of courts as the following – admittedly rather simplified – juxtaposition shows.

The civil law tradition rests on the assumption that only a written code can provide adequate guarantees to laws. This code provides the basis for the social order and is shaped by the state on behalf of the people. The courts have to apply the law by strictly adhering to the wording of the code, having only a limited discretion of interpretation when it comes to filling in the inevitable blanks left by the code. According to the common law tradition, on the contrary, law is not what has been enacted by the state legislature but what the courts consider to be the law. Each court decision interprets the meaning of the law in a given case either by following a previous court decision (precedent) or by developing a new reasoning which – if not overturned by a higher court – becomes a precedent of its own. Since the inevitable differences between

the cases require most of the time new differentiations in reasoning and decision the body of the law grows day-by-day, not being dependent on legislative changes.[8]

Another major difference between common law and civil law countries is to be found in the area of criminal justice: in common law criminal proceedings follow the *adversarial* system which is based on the assumption that the courtroom procedure is a contest between two equal parties aiming to resolve a dispute before an impartial and passive judge, with a jury pronouncing one version of the events to be the truth. 'Truth' is supposed to emerge through the efforts of persuasion made by prosecution and defence. Criminal proceedings in the civil law countries, by contrast, follow the *inquisitorial* system which is based on an investigation of an event and the persons involved carried out by the state which is represented both by a 'fact-collecting' public prosecutor and an independent judge actively involved in truth-finding. Here, 'truth' is supposed to be established by the judge (in some cases with the help of a jury) on the strength of the case brought by the prosecution and any counter-evidence presented by the defence. As a result civil law systems generally attach greater importance to the pre-trial (evidence-collecting and *dossier*-establishing) stage of proceedings than common law countries, whereas in the latter the *public hearing* is the crucial stage in proceedings.[9] This entails substantial differences in fundamental procedures, especially as regards the collection and presentation of evidence. Unlike the common law family, civil law systems, for instance, often use court experts to assist the court on technical questions.

As a consequence of these differences in basic concepts and procedures cooperation between Ireland and the United Kingdom and the other EU Member States in JHA matters is hampered not only by frequent technical difficulties but also sometimes by difficulties of mutual understanding caused by the different legal cultures. This problem was reflected in evidence given by British Home Secretary (1992–7) Michael Howard, not known as a Euro-enthusiast, in the House of Lords in January 1998: referring to his experiences in negotiations with European partners on matters of judicial cooperation, Howard said that 'we were frequently thought to be from another planet by representatives of the other Member States' and that these considered our behaviour as 'absolutely outlandish'.[10]

Yet the fundamental differences *between* the civil law and common law families are far from being the only difficulty in the legal sphere. Not only have the nordic legal systems their own rather distinctive characteristics, but there are also major differences to be found *within* each

family of law as a few examples from the civil law countries may show. As regards discovery in civil procedures in Portugal, for instance, all relevant documentary evidence relevant to either of the parties must be disclosed within a given time limit. In France, however, lawyers are not obliged to disclose unhelpful documents in court without being asked. As regards rules on sentencing in criminal proceedings the penal laws of some civil law countries (e.g. Luxembourg) provide for both maximum and minimum sentences, some only for minimum sentences for certain types of crime (e.g. Germany), some for maximum sentences only (e.g. the Netherlands) and some for mandatory sentences for certain types of crime (e.g. Italy).

Especially in the area of transborder criminality, effective cooperation between the Member States has been made difficult by major differences in substantive national laws. As regards white-collar offences such as bankruptcy fraud, insider trading and fake security, for instance, many violations still do not fall under criminal law but under civil or administrative law, which still varies considerably from one country to another. Cooperation at the European level has also been hampered by substantial differences as regards the definition of offences such as money laundering, investment fraud and participation in criminal organisations.[11]

Another major obstacle is the different administrative structures at the national level which often make it difficult to identify adequate counterparts if it comes to defining rules and mechanism for cooperation and common procedural standards. This applies in particular to the structural differences in the administration of justice and in the organisation of police forces. A few examples may again highlight the extent of the difficulties.

The courts system in the civil law countries is profoundly different from that prevailing in the common law countries. It lacks the compact and unitary structure which is, for instance, strikingly evident in the Irish case with its clear single hierarchy of *District Courts*, *Circuit Courts*, *High Court* and *Supreme Court*. In France, for instance, there are three highest courts topping a rather complex system of lower courts, one for ordinary civil and criminal questions (*Cour de cassation*), one for administrative problems (*Conseil d'état*) and one for conflicts of jurisdiction between administrative courts and ordinary judicial courts (*Tribunal des conflits*). In neighbouring Germany there are no less than five courts at this level, one each for ordinary civil and criminal (*Bundesgerichtshof*), administrative (*Bundesverwaltungsgericht*), labour (*Bundesarbeitsgericht*), social matters (*Bundessozialgericht*) and tax (*Bundesfinanzhof*), with each

of these coming on top of three levels of lower courts, none of which matches exactly the competences and role of its French counterpart. In Italy there are a *Corte di Cassazione* and a *Consiglio di Stato* with similar competences as their French counterparts but the structure of the subordinate courts is not identical, and there is a separate highest court for fiscal jurisdiction (*Commissione tributaria centrale*). In spite of the common civil law tradition and an increasing convergence on three levels of appeal the court structure in continental Europe therefore presents a picture of extreme diversity.

As regards the structure of police forces the main differences between the EU Member States are due to different degrees and forms of organisation of centralised and decentralised policing. In some countries, particularly in Austria, Denmark, Greece, Ireland and Portugal, policing is highly centralised with a single national police force which is administered by the competent ministry (Ministry of Justice in the Danish and Irish cases, Ministry of Interior in Austria and in Greece). In other countries, however, policing follows a much more decentralised pattern: in the United Kingdom there are 52 county or city based police forces under their Chief Constables and local Police Authorities. The running of the local forces is monitored by the Home Office and there are some central services such as the National Criminal Intelligence Service (NCIS) but most of these central services are still considered to be mainly supporting structures for the work of the local forces. A considerable degree of decentralisation is also to be found in Germany because under the German constitution policing falls within Länder competence. The organisational features of the Länder police forces are rather similar, and there two major federal services, the Federal Crime Office (*Bundeskriminalamt*) and the Federal Border Guard (*Bundesgrenzschutz*), but each state has its own police law and approach to policing, and the forces at state level are firmly under the control of the individual Länder ministries of interior. A high level of decentralisation also exists in Spain where there are both forces with nation-wide jurisdiction (*Policia nacional* and *Guardia Civil*) and 17 'autonomous' regional police forces (*Policia autonomica*).

The picture of European policing is further complicated by an enormous variety of the competences of police forces. In France both the *Police nationale* and the *Gendarmerie nationale* are responsible for criminal and public order policing. Yet the former is part of the Ministry of Defence and employed mainly for policing the land areas of France, whereas the latter comes under the Ministry of Interior and is concentrated on urban and industrial areas, with special forces for investigation and prosecution duties (*Police judiciaire*), intelligence gathering (*Renseignements généraux*), rioting (*Compagnies républicaines de sécurité, CRS*) and for border controls (*Police de l'air et des frontières, PAF*). In Italy, by contrast, national police forces are based on completely different principles of organisation and competences. The *Carabinieri* have some, but not all of the duties of the French *Police nationale*, but their territorial distribution is more in line with that of the *Gendarmerie nationale*. In addition, the division of tasks between the *Carabinieri* and the *Polizia di Stato* (often seen as a rival) is frequently not altogether clear, and the situation is further complicated by the existence of the police force of the Ministry of Finance (*Guardia di Finanza*) which is responsible for enforcing tax, excise, customs and tariff legislation. The resulting variety of actors make European policing a very 'crowded policy space' indeed,[12] and often police cooperation among the EU countries is affected by difficulties in identifying and bringing together the right interlocutors at the national level.

The differences between national policy approaches in the JHA sphere

Some of the problems stemming from legal and administrative differences between the national systems are clearly of a more technical nature. They can be – and often enough have been – resolved at the technical level if the political will to achieve progress is sufficient. Yet the situation is much more difficult if these differences reflect fundamentally different national policy approaches. There are a number of internal security-related JHA issues on which the EU Member States continue to pursue different approaches which are often rooted in traditional national concepts of public order, an actual or perceived public consensus or simply long-established national policies. In these cases the political obstacles to reaching consensus on even only limited procedural aspects can be much more important than any of the legal or administrative difficulties. Such fundamentally different national approaches have become apparent especially in relation to border controls, criminal justice cooperation, the fight against drugs and police cooperation.

Since the 1980s an increasing number of governments have come to accept the abolition of controls on persons at borders between the EU Member States (that is 'internal' border controls) as a central element of the European integration process. Most of the arguments raised against this objective have concentrated on the anticipation of increased internal security risks due to the relaxation of border controls and the enormous practical difficulties of agreeing among the Member States on

common 'compensatory' measures for offsetting any possible negative effects in respect to internal security. Yet the five Member States who in 1985 in the context of the Schengen Agreement decided to go ahead with the abolition of internal border controls, the Schengen group (the Benelux countries, France and Germany), and the eight other Member States who have joined Schengen since, have taken the view that these risks can be effectively minimized through adequate compensatory measures such as increased external border controls and surveillance measures on the territory instead of at internal borders. They have ceased to regard internal border controls between their countries as a vital element of their internal security, and their position is that the political and economic advantages of abolishing the latter far outweigh the possible disadvantages which they consider manageable. All British governments, on the other hand, have so far continued to consider controls on persons at all border crossing points a central element of their approach to internal security, assuming that abolition of border control would lead to a significant increase in organised crime, drug smuggling, terrorist attacks and illegal immigration. As a result of this different approach the United Kingdom and Ireland (which due to the *Common Travel Area* with the United Kingdom followed *nolens volens* the British position) have not only stayed outside of the Schengen border control system but also frequently adopted positions on other issues – on asylum and immigration policy questions, for instance – which differed considerably from those of their continental partners.

This major difference in approach to controls on persons at borders is, however, not only due to different risk assessments. It also reflects different understandings of the role of borders and controls on persons. On the continent borders are far from being considered an obvious source of security because in the past they were frequent sources of conflict and pathways for military invasions. The insular geographical position of the United Kingdom, however, and the fact that the last successful military penetration of its 'borders' goes back as far as the invasion by William the Conqueror in 1066 means that 'borders' are regarded as a much more stable and security-providing element of national history and identity. A difference of similar importance relates to controls on persons and their impact on individual liberty. In most of the continental EU countries citizens are obliged to carry national identity cards which they have to produce whenever required by police officers. Controls on persons within the territory are considered to be almost natural, by many even as a reassuring, aspect of the state authorities' effort to ensure the security of their citizens. In the United Kingdom,

however, there is a long-standing tradition of limiting state control over individuals living and moving within the territory. It goes back as far as the Magna Carta but found its main ideological development in the eighteenth century when Britons started to look upon their country as the 'land of the free' in contrast with the absolutist regimes on the continent.[13] While identity controls on persons coming into the country are considered perfectly legitimate and even necessary, the introduction of identity cards and increased identity controls within the territory which could be necessary as a result of the removal of internal border controls would almost certainly encounter major public opposition.

Cooperation in matters of criminal justice has encountered difficulties because of different approaches to territoriality. The United Kingdom has traditionally seen territoriality as the main guiding principle of its criminal justice cooperation with European partners. Taking the view that an offender is best brought to trial and punished in the state in which the offence was committed, the United Kingdom has shown a clear preference for extradition and mutual assistance, has been less keen on the transfer of the execution of criminal judgments, and has been for a long time opposed to the transfer of criminal proceedings as an element of cooperation. In civil law countries, on the other hand, territoriality is often superseded by a preference for bringing an offender to trial within the community to which he belongs, which may be in a different state from that where the offence was committed. Yet difficulties in this area cut across the dividing lines of the different traditions of civil and common law countries. In contrast to the Scandinavian countries and the Netherlands, for instance, France, Germany and the United Kingdom have traditionally shown a clear preference for the responsibility for criminal proceedings and the execution of judgments to remain with the requesting state instead of being transferred to the requested state.[14] All this implies rather different approaches to the basic principles and aims of cooperation at the European level.

Fundamental differences in national policy approaches have also surfaced in the fight against drugs. While all the EU Member States are firmly committed to the fight against drug trafficking their strategies for fighting drug addiction differ substantially. The two extreme poles of the range of different national approaches are the Dutch and Swedish drug policies. In the Netherlands drug addiction is primarily seen as a public health rather than a criminal problem. A purely repressive policy has many negative effects such as the social exclusion of addicts, more underground drug circles and increased health risks through poor quality. The Dutch approach aims instead at a 'normalisation' of drug use by

allowing addicts – within certain limits – to live a 'normal' life. This means that drug addicts found in the possession of relatively small amounts of drugs are not prosecuted unless they are suspected of dealing, that small-scale retailing of drugs in 'coffee shops' and certain youth centres is tolerated, and that the addict is supported by active care facilities and a number of social and public health measures. In Sweden, by contrast, the use of drugs – even in smallest quantities – is prohibited and subject to criminal law. Under Sweden's zero tolerance law-enforcement approach addicts have been traditionally considered to be a danger both to themselves and to society, and all those found in possession of drugs have either to face prison sentences or to submit themselves to enforced treatment.[15] Here again the different policy approaches are rooted in different national traditions and attitudes, the Dutch approach being based on the idea of a social state providing all possible support to the citizens rather than regulating their morals, the Swedish approach reflecting the idea of a paternalistic welfare state committed (as in the case of Swedish alcohol policy traditions) to freeing society from the scourge of drugs. The policies of all the other Member States can be situated somewhere between the extremes of 'normalisation' and 'criminalisation', with some (like Ireland) being closer to the Dutch model, others (like France) being close to the Swedish model. As a result of these differences it has been extremely difficult for the EU Member States to agree on comprehensive common strategies in the fight against drugs, and political controversies over national drugs policies have on more than one occasion severely disrupted cooperation at the European level.

In the area of police cooperation the integration process in JHA has been affected by fundamental differences between Member States' aims. In reaction to obvious shortcomings of national police activities in the fight against cross-border crime some European governments were already in the 1980s prepared to consider the establishment of a European police organisation (Europol) with comprehensive operational powers which should come above existing national police forces. From 1988 on German Chancellor Helmut Kohl, in particular, repeatedly advocated the creation of some sort of European counterpart to the American FBI. Yet many of the EU countries (including the United Kingdom) continue to regard policing as an exclusive national prerogative and are extremely reluctant to go beyond improved information exchange mechanisms and occasional joint operations at the European level. As a result of these differences Europol came fully into being only after considerable delays in 1998 and has so far remained largely limited to information exchange and analysis tasks.

Positive development factors

The Council of Europe experience

None of the three founding treaties of the European Communities (ECSC, 1951; EEC and EAEC, 1957) gave any competences to the newly established Community institutions in the sphere of justice and home affairs. The founding Member States were clearly not yet prepared to consider any incursion on their sovereignty in these fields. There was only one exception: in the framework of the EEC Treaty the Member States agreed on the free movement of workers (now Article 39 TEC) as one of the 'four freedoms' of the common market. As a result a range of EC legislative acts were gradually adopted in the 1960s and 1970s which forced Member States to harmonise some of their national rules and practices regarding entry, movement and residence. Yet this harmonisation did not extend to non-nationals of EC countries, it left existing border controls largely unchanged and it had, at least initially, only very limited implications for internal security.

Yet at the time the Communities were established another European organisation existed already which was in a position to address some issues of relevance to internal security: the Council of Europe. Established in 1949 to 'achieve greater unity between its Members for the purposes of safeguarding and realising the ideals and principles which are their common heritage', the mandate of the Strasbourg-based Council of Europe, which now comprises 40 European countries, includes the maintenance and the development of the rule of law in Europe. It was created as an organisation for voluntary cooperation among European countries sharing a number of fundamental values but retaining their full sovereign powers. As a result it has none of the supranational characteristics of the EC/EU system and relies on intergovernmental agreements, conventions needing national ratification and the sponsoring of 'specialised' conferences such as the Conference of European Ministers of Justice. Its main decision-making body, the Committee of Ministers, represents the interests of the Council's member states and can only address 'recommendations' to the national governments as to the action required (Article 15 of the Statute). The 'resolutions' or 'opinions' adopted by the Parliamentary Assembly, which represents the national parliaments, are not binding on the Committee of Ministers, and the relatively small Secretariat plays an essentially administrative role. Yet what from the point of view of the integrated EC/EU system would appear as a rather weak set of instruments and institutions proved to be an advantage at a time when the

EC Member States were not yet willing to bring major areas of JHA into the mainstream integration process within the EC. It provided them with a framework in which they could work for the establishment of a number of basic principles and procedures on relevant JHA issues within a purely intergovernmental framework which had the additional advantage of involving a wider circle of European countries.

Right from the beginning a substantial part of the Council's work has been dedicated to the establishment of fundamental elements of a pan-European legal and judicial space with a strong emphasis on legal instruments in the fight against cross-border crime. Many of the results achieved in this area continue to be central points of reference for the development of the EU as actor in internal security matters. There is a whole range of Council of Europe Conventions which the EU Member States consider to be so essential for the development of EU action in the context of the 'area of freedom, security and justice' that they have defined them as part of the *acquis* which the applicant countries will need to adopt and fully implement as part of their obligations of membership. The agreements reached in the framework of the Council of Europe have been particularly important in the area of judicial cooperation in criminal and penal matters. Texts now being part of the Union *acquis* include the European Convention on Extradition (1957, including the Additional Protocols of 1975 and 1978), the European Convention on Mutual Legal Assistance in Criminal Matters (1959, including the Additional Protocol of 1978), the European Convention on the International Validity of Criminal Judgments (1970), the European Convention on the Transfer of Proceedings in Criminal Matters (1972) and the Convention on the Transfer of Sentenced Persons (1983). Yet the Council of Europe also provided the framework for substantial agreements in the fight against terrorism (European Convention on the Suppression of Terrorism, 1977) and organised crime (European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990). Many of these conventions have become points of departure for more comprehensive measures adopted by the EC Member States or (later) by the EU. In this sense the Council of Europe prepared some of the legal ground on which JHA cooperation between the Member States developed during the 1980s and 1990s. This is particularly true for judicial cooperation in criminal matters where most of the intergovernmental texts agreed on by the Member States before the Treaty on European Union (such as the Convention on the Transfer of Proceedings in Criminal Matters of 6 November 1990 and the Convention on the Enforcement of Foreign Criminal Sentences of 13 November 1991) relied heavily on previous conventions and negotiations within the Council of Europe framework.

The Council of Europe also provided another positive impetus. The often protracted negotiations on the conventions, which were affected by all the substantial differences between the national legal systems mentioned earlier, provided national administrations with an increasing experience in cooperation with other European countries, led to a better understanding of the particular systemic differences and difficulties in partner countries, and created gradually a more favourable climate for cooperation on internal security issues. Traditionally the national ministries of interior and of justice have been rather inward-looking institutions, with only limited experience in and inclination to extended European cooperation. Yet in the area of judicial cooperation in the fight against crime as well as in a number of other areas the Council of Europe led to what the great French lawyer Paul Reuter described as the 'progressive emergence of a European mentality'.[16]

The experiences of the EC/EU Member States with the Council of Europe were not only positive, however. Due to its larger membership (which included an increasing number of countries of the 'wider' Europe such as Turkey, Cyprus and Malta) and the purely intergovernmental basis of the organisation's proceedings, even negotiations on more technical questions could take many months, often years. After the signing of a convention a further couple of years could pass by before it had been ratified by all the signatories. The diverging interests and legal systems of members also meant that in the course of the negotiations many of the originally more ambitious proposals had to be dropped or watered down in order to make a final agreement at all possible. In some areas, such as extradition, the agreements reached within the Council of Europe fell well short of the expectations of some of the EC Member States. Although the EC Member States themselves often failed to agree on common positions within the Council of Europe (the United Kingdom, for instance, ratified the 1957 extradition convention only in 1991) they had increasingly to realise – especially during the 1980s – that some of the interests they had in common could not be adequately pursued within the larger framework of the Council of Europe with its greater diversity of interests and lengthy negotiation procedures. As a result the Council of Europe, after having played an important ground-breaking role for cooperation between the EC Member States, also provided them with an incentive to move beyond its structural limitations by setting up their own framework and procedures for addressing internal security-relevant JHA issues.

Increasing transnational challenges to internal security

With all the negative factors identified in the previous section, more powerful incentives than the Council of Europe experience were needed for the EC Member States to move towards closer cooperation or even integration in internal security matters. These incentives emerged first through a number of increasing transnational challenges to what had traditionally been considered purely national internal security, and up to the present day these challenges are among the most important driving forces of integration in JHA.

Historically it was international terrorism that emerged as the first major transnational challenge, leading the Member States to engage in closer cooperation on internal security issues. The first half of the 1970s saw a dramatic increase in terrorist threats to the Western European countries. A major part of these came from the Middle East, dramatically highlighted during the Olympic Games in September 1972 by the murder of 11 members of the Israeli team by a group of Palestinian terrorists. The heightening tension in the Middle East after the Yom Kippur War of October 1973 seemed to drastically increase the risk of infiltration by Middle Eastern terrorist networks. At the same time several European countries also had to face major internal terrorist threats.[17] In the United Kingdom the Irish Republican Army launched a number of bloody bombing campaigns culminating in the bombings in Aldershot (1972), London (1973–4), Guildford and Birmingham (1974). Germany had to cope with increasing terrorist activities by the extremist Baader-Meinhof Group and later by the Rote Armee Fraktion which found their apex in the kidnapping and murder of the German business leader Hans Martin Schleyer in September/October 1977. Throughout the 1970s Italy was affected by a range of terrorist attacks both by the left-wing terrorists of the Red Brigade (culminating in the murder in May 1978 of former prime minister Aldo Moro) and later also by fascist terrorists (culminating in the particularly bloody bombing of the Bologna railway station in August 1980). Although on a much smaller scale, terrorist threats developed during the 1970s also in France (Breton and Corsican separatists) and the Netherlands (South Moluccan nationalists). Traditionally such internal terrorist activities had been considered merely from an 'internal' security point of view. Yet it became more and more clear during the first half of the 1970s that these terrorist groups not only frequently used bases in other European countries, both for preparing attacks and for hiding, but that some of them also actively cooperated on the procurement of arms and munition, training and the sharing of intelligence. These links became particularly obvious during the Schleyer kidnapping in Germany in 1977 when Palestinian terrorists hijacked a Lufthansa plane to put additional pressure on German authorities to free the imprisoned members of the German Rote Armee Fraktion.[18]

With terrorism emerging in this way as a challenge to their internal security which could no longer be effectively dealt with by purely national measures, the EC countries felt the need to add to the existing international cooperation structures (mainly in the context of the UN) action against terrorism at the European level. Although useful as a forum for wider European cooperation, the Council of Europe with its heavy and lengthy procedures seemed not the most appropriate framework. As a result the EC Member States proceeded for the first time to the setting up of a cooperation structure in JHA of their own: during a first meeting of the EC Ministers of Justice and Home Affairs in Rome on 1 December 1975 it was agreed to introduce regular mechanisms for the sharing of information on internal security problems (especially terrorism) and for the consideration of further measures of cooperation. The informality of this first meeting was reflected in the name given to the new structure: TREVI, which was a reference both to the venue of the meeting near the famous Trevi fountain and to the participating Dutch minister Fonteijn (Dutch 'fountain'). Only later was the term TREVI reinterpreted into being an acronym for the French *terrorisme, radicalisme et violence internationale*. Formally established following to a resolution adopted by the ministers in Luxembourg on 29 June 1976, TREVI was an even weaker structure than the Council of Europe. It was not based on any formal treaty provisions, was not supported by any permanent institution and had a much narrower mandate. It operated outside of the framework of the European Communities on a purely intergovernmental basis as part of the foreign policy cooperation process European Political Cooperation. It consisted initially of only two working groups, comprising senior officials from national ministries, senior police officers and intelligence personnel, one (TREVI I) dealing with international terrorism, the other (TREVI II) with general public order issues and the organization and training of police forces. Regular meetings at the ministerial level were also foreseen, but during the first ten years these were less regular and also less substantial than originally envisaged.[19] Yet in spite of its limitations TREVI provided the EC Member States with a framework in which they could gradually develop their cooperation, and became the forerunner of the much more comprehensive mechanisms which were built up from the second half of the 1980s onwards. In this way the threat of terrorism during the 1970s,

which – although far from vanishing – was slightly less prominent on the European agenda in the 1980s and the 1990s, acted as an effective trigger for the launching of closer cooperation on internal security issues between the EC Member States.

Slightly later than in the case of terrorism a similar 'Europeanisation' of internal security threats also developed in two closely interrelated areas: the fight against drug trafficking and against international organised crime. During the 1970s most of the EC Member States had to face increasing drug problems which were mainly due to the wider availability and falling prices of heroin and LSD. In the early 1980s the situation was worsened by a massive influx of cheaper cocaine from South America.[20] The Member States continued to pursue different approaches to the problem of drug addiction, but drug trafficking being a cross-border crime *par excellence*, more efficient international cooperation appeared to be one of the most promising instruments on this side of the drugs problem. The Member States were also worried by a number of changes in international drug trafficking routes that seemed to indicate a partial relocation of the trade to Europe in response to the upgrading of anti-drugs measures in the US under the Reagan administration. There was evidence, for instance, that the Colombian cartels, which during the 1980s led the way in applying industrial-style transport to drug trafficking, tried to diversify their markets with a particular emphasis on Europe.[21] Different frameworks of international cooperation against drug trafficking existed already. The most important of these was cooperation within the UN which was based on the 1961 Single Convention on Narcotics and led in 1988 – with active participation of the EC countries – to the signing of the United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances. But due to its global scope and huge membership the UN framework seemed hardly capable of addressing sufficiently the particular problems and challenges in Europe.

In many ways linked to drug trafficking, although a major problem of its own, was the increasing transnational threat posed by organised crime. In the Europe of the 1950s and 1960s organised crime was still largely regarded as primarily a national problem. Italy certainly had a major problem with its powerful and well-organised Mafia families, but even this was seen as mainly an Italian problem, and in most of the other EC Member States the incidence of organised crime was rather limited. In the 1970s and 1980s, however, the expansion of international drug trafficking, the growth of international trade and financial transactions, and the increasing economic interpenetration in Western Europe led to a spread of cross-border activities of organised crime

groups almost everywhere in Europe. A report by the Council of Europe identified in 1985 drug and firearms trafficking, economic crime – including money laundering, trafficking of stolen art objects and the sexual exploitation of women as the main areas in which European organised crime was developing.[22] Several of the EC Member States reacted to the increasing challenges with the creation of special police squads with specific powers, techniques and equipment, and the suppression of organised crime became an issue for national political debates.[23] In February 1985 the Italian President-in-Office, Formigoni, expressed before the European Parliament the Member States' concerns about the links between organised crime, drug trafficking and terrorism.[24] More international cooperation was clearly needed. The traditional framework for such cooperation, the world-wide police organisation Interpol, no longer appeared adequate. It was criticised at the time for having failed to respond to the new patterns of international crime, and for using outdated systems of information and documentation.[25] Stepping up bilateral cross-border cooperation and the activities in the framework of the Council of Europe were also not considered a sufficient response. On 21 June 1985 the TREVI ministers (of justice and home affairs) therefore decided to establish a third working group (TREVI III) on drugs and organised crime. TREVI III was to focus on the methods of fighting all forms of international organised crime, with particular emphasis on drug and arms trafficking and the links to international terrorism. The creation of TREVI III was a major step towards wider police cooperation between the EC Member States. Its existence and work prepared the ground for the establishment of Europol in the 1990s.

At the beginning of the 1990s another set of interrelated JHA issues forced its way onto the European agenda: migratory pressure and its effects. Throughout the 1980s international migratory flows had been increasing due to military conflicts, political persecution, a significant worsening of economic conditions in many Third World countries, population growth and the widening gap between living conditions in the poor and the prosperous regions in the world. At the beginning of the 1990s it was estimated that nearly 20 million refugees were fleeing from war and persecution and over 100 million 'economic migrants' were trying to escape from poverty by leaving their countries.[26] Perceived as a haven of peace, stability and prosperity, the Community and its Member States were a destination of choice for many political refugees and economic migrants. From the late 1980s on it also seemed – and in fact also often was – much easier to reach one of the EC countries

because of the increased permeability of borders within Europe which followed the disintegration of the Communist bloc in Central and Eastern Europe, and the abolition of most border controls within the Community.

While many of the hundreds of thousands of people from Europe and other countries who tried to enter the Community in these years were doubtless fleeing from war and persecution others were primarily motivated by economic reasons. Yet, with the EC Member States allowing for legal immigration only in exceptional circumstances, the economic migrants tried to use the same entry gate as the 'real' political refugees by claiming political asylum in huge numbers. From 1987 to 1992 the number of asylum applications in the (at that time) 12 EC Member States rose from 132,799 to 556,391. Germany's then particularly generous asylum system and its geographical position made it the primary target of this assault on political asylum, and over the same period Germany registered a rise of applications from 57,379 to 438,191, so that in 1992 the German share of the influx reached 78.76 per cent of the total for the EC-12. The numbers in other Member States were less dramatic but still significant: Britain, for instance, had thirteen times more applications in 1991 than in 1987, Spain three times more, and in France, Italy and the Netherlands applications nearly doubled during the same period.[27] In addition most Member States experienced increasing problems with clandestine immigration, illegal visa overstays and illegal employment of non-EC workers. Although not an internal security 'threat' in the traditional sense, this massive influx of asylum seekers and immigrants had clearly some destabilising political and social effects. Right wing groups in several Member States (such as the French *Front National*, the German *Republikaner* or the Flemish *Vlaams Block*) tried – not without success – to capitalise on what they presented as a danger to national identity, a threat to jobs and an outrageous exploitation of scarce national social security resources. In some Member States, in particular in Germany, the beginning of the 1990s saw a sharp rise of anti-foreigner violence and often locally concentrated outbursts of xenophobia and hate crime.[28] In addition, the national asylum and immigration authorities were often simply not capable of coping with the drastically increased numbers which led to huge administrative problems, additional expenditure and unwelcome concentrations of foreigners in certain city areas.

As a result of these problems several Member States started to regard asylum and immigration issues increasingly as a European problem. It became obvious that illegal immigrants and bogus asylum seekers – and the criminal organisations involved in illegal immigration – exploited both the differences between the national systems and the dismantling of internal borders within the Community. Germany, as the country most affected by these problems, took the lead in pressing for the development of a common European asylum and immigration policy. During the 1990/91 Intergovernmental Conference (IGC) Germany failed in a first attempt to communitarise at least some areas of asylum and immigration policy, but it succeeded with support from a number of other countries such as Italy, the Netherlands and Spain in bringing asylum and immigration into the intergovernmental framework which the new Treaty on European Union (TEU) created for JHA cooperation. The asylum and immigration problem played a major role during the IGC, and Title VI TEU (which later became known as the 'Third Pillar' of the European Union) owes its existence to a considerable extent to the migratory pressures that several Member States were experiencing at that time. In this sense it was again an 'external' challenge which helped to trigger this major new step of the development of JHA cooperation between the Member States.

The 'spillover' effect of economic and political integration

The impetus given to cooperation on a number of internal security or related issues by the 'external' factors mentioned above has been reinforced by a number of 'internal' factors linked to the progress of economic and political integration. Among those the effects of the gradual completion of the Internal Market have been – and continue to be – of particular importance.

Two of the 'four freedoms' introduced by the EEC Treaty of 1957, the free movement of goods and (even more) that of persons, always had potentially considerable internal security implications because their full implementation required the dismantling of internal borders. Yet for well over two decades these implications remained largely theoretical. Although much progress was achieved during the 1960s and 1970s in implementing the free movement of goods, internal border controls and a complex set of customs formalities persisted. The right to free movement of certain categories of persons (workers, students) was also much developed, but this progress did not extend to all persons and did not lead to the abolition of controls on persons at internal borders. During the 1960s the Member States started to cooperate on some internal security issues arising from economic integration under the EEC Treaty which led, *inter alia*, to the Naples Convention which established a

number of principles and rules for cooperation between customs authorities on issues such as prohibitions, restrictions and controls. Yet progress was limited to a few areas there, remained very much at a technical level, and was not followed up by any more comprehensive common policy-making.

From the mid-1970s onward the abolition of internal border controls was increasingly discussed as a necessary element of a 'Europe of the citizens' in which individuals would be able to travel freely across borders without being all the time reminded that 'Europe' meant little at border crossings. By the beginning of the 1980s European citizens had still seen little more than a gradual move from regular to random checks at border points and an agreement on a common EC format (not document) for passports reached in 1981/82. National governments largely continued to think in terms of national internal security spaces which were both defined and controlled through their respective borders. This traditional approach, however, was fundamentally challenged in the mid-1980s with the launch of both the Schengen process and of what became known as the 'Internal market programme'.

The relaunch of the integration process which started with the successful conclusion of the Fontainebleau European Council (June 1984) brought the uncompleted aim of free movement to the forefront of European Politics. Both of the committees set up at Fontainebleau made in 1985 proposals with major implications for the area of internal security, the Dooge Committee by proposing the completion of the Internal Market before the end of the decade, and the Adonnino Committee by insisting on the importance of free movement of persons for the creation of a 'Europe of the citizens'. The recommendations of both committees questioned more or less directly the existing system of internal borders. Faced with an obvious reluctance of some Member States to commit themselves to the abolition of internal border controls, France, Germany and the three Benelux countries signed on 14 June 1985 the Schengen Agreement which provided for the gradual abolition of controls and a broad range of compensatory measures in main areas of JHA. This major initiative coincided with the submission by the Commission in June 1985 of its famous 'White Paper' on the completion of the Internal Market. Aimed at the complete removal of all remaining obstacles to trade within the EC until the end of 1992, the White Paper proposed not only the abolition of all internal border controls but also a whole range of compensatory measures in areas such as immigration, asylum, external border controls and policies on visas and drugs. While the Schengen Convention was presented largely as a political project, the Commission's proposals

were embedded in the mainly economic rationale of the completion of the Internal Market. Yet the logic behind both proposals was largely the same. The abolition of internal border controls was presented as one of the most important steps for the further development of the integration process, justifying the whole range of common JHA measures which would be needed to offset the potential of new internal security risks linked to the dismantling of internal borders.

None of the major proposals made in 1985 was crowned with immediate success. The Schengen countries had to struggle for five years before they were able to agree on the Convention Implementing the Schengen Agreement (CISA) of 1985 which was only signed on 19 June 1990. In contrast with the 1985 Schengen Agreement, which had been largely programmatic on the compensatory JHA measures, the CISA was drawn up as the basis for the practical functioning of Schengen, a function which it fulfils up to the present day. In 142 Articles the CISA sets out detailed rules on the abolition of controls at internal borders, the crossing of external borders, visas, movements of aliens, the responsibility for the processing of applications for asylum, police cooperation, extradition and other matters of criminal justice cooperation, on narcotic drugs, firearms and ammunition, the Schengen Information System (SIS), transport and movement of goods and the protection of personal data. A further five years were to pass by before the CISA entered into force on 26 March 1995, making the Schengen system finally fully operational.

In the EC framework the Commission's proposals relating to the abolition of border controls met strong opposition from some Member States, especially the United Kingdom. As a result the aim of an 'area without internal frontiers' was inserted in a rather vague form in Article 8a TEC when the Treaties were revised by the Single European Act of 1986. The loopholes left in the Treaty allowed the British Government to argue that the free movement of persons applied to EU citizens only, not to third country nationals, with the result that because of the impossibility of separating EU citizens from third country nationals without checks at borders internal controls could be maintained. The Commission also failed to convince the Member States that compensatory measures in JHA necessary to offset possible negative effects of the completion of the Internal Market should be adopted by the Community. The Member States preferred to keep these measures entirely in the intergovernmental sphere where they could rely on the existing TREVI structure.

Yet from 1986 onward the implementation of the Internal Market programme generated a need for common action by the Member States which went far beyond the measures which had been sketched out in

the Commission's White Paper. Although the Member States – with the exception of the Schengen countries – could not agree on the full abolition of internal border controls, the reduction of border checks on transports of goods, the simplification of customs procedures, a partial relaxation of internal border controls on persons in most Member States and a number of other measures aimed at eliminating remaining physical obstacles to free movement, led the Member States to look for a host of compensatory measures to offset potential internal security risks resulting from the increased freedom of movement within the Internal Market. Most of the governments found themselves urged by senior police officers and other experts to take action against the potential new threats posed by transnational crime, terrorism and illegal immigration.[29] The existing TREVI structure proved to be too narrow a framework for the much increased need for cooperation. From 1986 to 1991 the Member States created over twenty new intergovernmental bodies dealing with specific JHA issues arising from the completion of the Internal Market.[30] The most important of these were TREVI 1992 (a new TREVI working group dealing with the internal security consequences and police cooperation issues arising from the abolition of internal border controls), the Ad Hoc Immigration Group (covering asylum, immigration and external border control issues), the Mutual Assistance Group '92 (MAG '92), often better known under its French abbreviation 'GAP '92' (focusing on customs authorities' measures to prevent the smuggling of prohibited goods such as drugs, arms and pornographic material), the Coordinators' Group on the Free Movement of Persons (which dealt with the general implications of free movement and had to coordinate the work of some of the other bodies) and the Comité européen de la lutte anti-drogue, CELAD (looking at improved cooperation and measures in the fight against drugs). The Commission was associated with the work of these groups but – the framework being intergovernmental – had no formal role in the decision-making process.

The proliferation of intergovernmental groups and committees led to some positive results. One was that regular contacts and cooperation was established between parts of the national administrations which had hitherto seen little or no involvement in the European process. This was the case, for instance, with most of the sections in the ministries of interior which were in charge of asylum and immigration issues. Yet in areas with established patterns of cross-border cooperation a new dynamic of cooperation also emerged. This applied, in particular, to police cooperation where at the beginning of the 1990s the Member States had not only to deal with the consequences of the completion of the Internal Market but to face new threats posed by organised crime in Central and Eastern Europe, the Soviet Union and (later) its successor states which also came with new forms of crime such as the smuggling of nuclear material. In June 1990 the interior ministers, on the basis of work carried out in the TREVI context, reached a political agreement on the setting up of Europol as an information exchange and analysis agency which would have no operational powers but would facilitate the interaction between national police forces. This was followed in August the same year by the establishment of an Ad Hoc Working Group on Europol (AHWGE), the fifth TREVI working group, whose recommendations led to the agreement in December 1991 to create the Europol Drugs Unit (EDU) as a precursor to Europol.

Yet the system of entrusting the various internal security issues arising from the Internal Market process to more and more intergovernmental ad hoc groups also had serious disadvantages. There was no overall strategy and framework, few established procedures existed, there was little coordination, and many of the intergovernmental bodies hardly knew about each other's work. Often enough the mandate given to a particular group was rather broad and did not sufficiently take into account the task of other groups. This led to considerable overlaps and the results achieved in one group being in part put into question by the work of other groups. While this already slowed down decision-making quite considerably, the situation was made worse by the need to achieve consensus even on minor details, any majority voting being ruled out by the intergovernmental basis of these groups. As a result progress was generally very slow, and in some of the more difficult areas – such as immigration – it was even hardly discernible.

The major treaty reforms of the 1990s: from Maastricht to Amsterdam

Progress and deficits of the Third Pillar

At the beginning of the 1990s some Member States had become rather dissatisfied with the extended but fragmented and disorganised system of intergovernmental cooperation which had emerged since 1986. This was particularly true for Germany which – feeling particularly exposed to the effects of the new permeability of borders in Central and Eastern Europe – wanted to see more progress at the European level in the fight against illegal immigration and transnational crime. The German government played a key role in bringing the obvious inadequacies of the existing structures in coping effectively with both the requirements of

a borderless Internal Market, and the mounting external challenges, to the Member States' internal security on the agenda of the 1990/91 Intergovernmental Conference. During the Conference two camps opposed each other. Whereas one group – including Germany, Belgium, Italy, the Netherlands and Spain – advocated a communitarisation of a wide range of JHA matters, another group – consisting mainly of the United Kingdom and Denmark – defended the idea of only a limited range of JHA areas to be brought into the Treaties in the form of an intergovernmental pillar. In the end the latter group prevailed with its insistence on a separate intergovernmental pillar for JHA, but the former got its way on bringing a comprehensive range of JHA areas into the new Treaty. An attempt by the Schengen members to have their system incorporated into the EU failed, mainly because of British opposition.

With the introduction of intergovernmental Title VI TEU on cooperation in the fields of justice and home affairs into the Maastricht Treaty on European Union – which entered into force on 1 November 1993 – the so far rather fragmented cooperation between the Member States on matters relating to internal security attained a new quality: Article K.1 TEU provided for the first time a formal treaty basis for the adoption of measures in the areas of border controls, the combat against unauthorised immigration and fraud on an international scale, judicial cooperation in criminal matters and police cooperation for the purposes of preventing and combating terrorism, drug-trafficking and other serious forms of international crime. The new Third Pillar was also vested with specific instruments – Joint Actions, Joint Positions and Conventions (Article K.3 TEU) – a senior Coordinating Committee (Article K.4) and a number of special procedures regarding decision-making, information on the European Parliament and financing. All this clearly meant a significant step forward for the development of the Union as an actor in the domain of internal security.

The most significant change brought about by the Maastricht Treaty, however, was not the introduction of detailed provisions on institutions and procedures but the fact that through the treaty changes internal security issues were for the first time brought into the mainstream integration process. All major EU institutions now had some formal role to play in JHA (though rather limited in the case of the European Parliament and the Court of Justice), and – in the broader context of JHA – internal security issues became part of the Union's political agenda. This generated its own dynamic: from 1993, expectations on the part of several Member States, the European Parliament, the Commission and even some third countries for the Union to take action on relevant internal security

issues, started to rise significantly. More ambitious proposals were introduced, debates on a variety of internal security related matters took place in the European Parliament and media coverage became more extensive. As a result not only did the above-mentioned deficits become more apparent, but so also did the common challenges the Member States had to face, in areas such as organised crime and illegal immigration.

Yet already at the time of their entry into force the provisions of Title VI TEU were criticised because of their intergovernmental basis, the inadequacy of some of its instruments and its deficits in terms of democratic and judicial control.[31] The actual performance of the Third Pillar then seemed to justify most of these early criticisms: although some progress was achieved under the Third Pillar – such as the final establishment of Europol and the agreement on basic principles and objectives in the fight against drug trafficking and organised crime – its overall performance was rather poor. The absence of any clear objectives (Article K.1 TEU only declared the above-mentioned areas to be Matters of Common Interest), the unchallenged predominance of unanimity in the decision-making, the Commission's limited right of initiative, the unclear legal status of Joint Actions and Joint Positions, controversies over judicial control by the Court of Justice and the lengthy ratification procedures needed for conventions all contributed to very few legally binding texts being adopted and implemented.[32] The absence of any more comprehensive common policy-making even in areas such as the fight against illegal immigration and organised crime, where many Member States were confronted with increasing problems, was increasingly seen as a major failure. With the near completion of the Internal Market on 1 January 1993 the discrepancy between the single 'economic' area in the Union on the one hand and the persisting twelve (from 1995 fifteen) different 'judicial' and 'policing' areas on the other became all the more apparent and attracted increasing criticism both at the national and the European level.

A further weakness of the Third Pillar was the continuing exclusion from the EU of the Schengen system, which did not help with the development of a common EU approach towards internal security challenges. By the mid-1990s time seemed more than ripe to the Schengen members which had grown to 13 of 15 Member States to put an end to the parallel development of Schengen outside of the Union framework, which had by that time become more problematical than at the beginning of the process. The Schengen system could not only point to some major successes. One of those was clearly the SIS, the operational core-piece of the entire Schengen system which started to work in 1995. The SIS

emerged as an effective computerised information system enabling designated national authorities of the Schengen members to use an automated search procedure giving access to reports on persons and objects compiled in all the Schengen countries for the purposes of border checks and controls, other police and customs checks carried out within the country, and the issuing of visa and residence permits. What had first appeared as little more than a useful technical facility became in practice a central instrument of border safety and law enforcement. It was only through the use of the SIS that the authorities of one Schengen member were enabled to carry out checks which also took into account the internal security interests of the other Schengen members in terms of wanted persons, persons who should be refused entry, and stolen or missing vehicles or objects. The SIS became therefore *a conditio sine qua non* of the whole Schengen system and one of the most tangible proofs that the Schengen process has in fact created what may be called a 'common internal security area' comprising the territories of all Schengen members.

With the further growth of activities in the JHA sphere the risk of inconsistencies and the need for cumbersome coordination between the Third Pillar and the Schengen system was likely to increase. Yet it was also the prospect of the next enlargement which led some Schengen members, especially France, to insist strongly on an early incorporation of Schengen into the EU. With most of the Central and Eastern European countries (CEECs) still having a long way to go to meet the basic legal, procedural and technical standards of JHA cooperation within the Schengen framework it was feared that it might become much more difficult, perhaps even impossible, to have these standards accepted by the whole EU after accession. Concerned by the particular risks of illegal immigration and organised crime in Central and Eastern Europe, the Schengen members wanted to ensure that the CEECs would need to meet their own internal security standards before the EC rules of free movement could become applicable to them. Making Schengen part of the Union *acquis* before the next enlargement (and thereby part of the conditions for accession) seemed clearly the most effective way of protecting the Schengen system against potential negative effects of the Eastern enlargement.

The breakthrough of the Treaty of Amsterdam

Both the obvious weaknesses of the Third Pillar and the increasing transnational challenges in JHA led to a comprehensive debate on the reform of Title VI TEU. In the run-up to the 1996/97 IGC there was

widespread agreement in the capitals and the EU institutions on the need for a streamlining of decision-making, the introduction of new objectives and instruments and improved judicial control, although opinions varied on whether this should be achieved by communitarisation and on the issue of an incorporation of Schengen into the EU.[33] The reports of the Union institutions on the functioning of the Union Treaty (April/May 1995) and the Reflection Group's Report (December 1995) converged to a remarkable extent on the identification of the shortcomings of the Third Pillar. They also revealed, however, major cleavages as regards its reform. The Council favoured a minimalist approach which was not shared by the Commission and the European Parliament. Some Member States (especially the United Kingdom and Denmark) were opposed to the major overhaul and at least partial communitarisation favoured by Austria, the Benelux countries, Germany and Italy. As a result the prospects for a substantial reform of the Third Pillar seemed rather limited when the IGC began in March 1996.

As the IGC developed, however, JHA emerged as one of the central areas of the negotiations. The cleavages among the Member States' positions and approaches were, it is true, still enormous. Apart from the differences of position regarding communitarisation there was a whole range of staunchly defended national interests which needed to be accommodated. Among these were the British and (*nolens volens*) Irish non-participation in the Schengen border control system, the special position of Denmark as a Schengen member opposing further communitarisation, French concerns about jurisdiction of the Court of Justice on national measures relating to internal security and German concerns about the asymmetrical effects of international migratory pressure on Germany. Yet a favourable combination of interests and changed circumstances allowed this complex knot of diverging interests to be partially untied in the final phase of the negotiations. Austrian, French and German concerns about the implications of the approaching enlargement to the CEEC, the Schengen Group's strong insistence on an incorporation of Schengen into the Union and a more flexible attitude of the newly (in May 1997) elected British and French Governments led the Amsterdam European Council of June 1997 to decide on more numerous and comprehensive changes in JHA than in any other areas covered by the Treaties.

The scope of the Amsterdam reforms – which entered into force on 1 May 1999 – has been spectacular, both in terms of sheer volume – over 100 new or amended treaty provisions, six protocols and 20 declarations in the annex – and substance: major areas of justice and home

affairs – such as asylum, immigration and border controls – have been communitarised, mainly in the form of an entirely new Title of the EC Treaty (IV). The entire Schengen system has been incorporated into the EU, putting an end to 14 years of development outside of the EC/EU context and making the Schengen external border control *acquis* part of that of the EU which all future Member States will have to take on. An impressive range of new objectives has been introduced, both for the communitarised areas and those remaining under Title VI TEU (criminal justice and police cooperation), many of which are subject to a deadline of five years. New, more suitable instruments have been introduced for the remaining intergovernmental areas, and for the first time the Court of Justice has been given substantial powers of jurisdiction on most aspects of JHA. All these reforms have been placed under the new heading of the Union as an Area of Freedom, Security and Justice (AFSJ) that adds a new programmatic element to the European construction.

The extent of the progress the Treaty of Amsterdam has brought in terms of developing the capabilities as an actor in internal security is particularly reflected in the range of new objectives. The first and most important of these is amended Article 2 TEU, fourth indent, which elevates the maintenance and development of the Union as an Area of Freedom, Security and Justice to one of the main objectives of the Treaty, on a par with the establishment of economic and monetary union, the implementation of a common foreign and security policy and the progressive framing of a common defence policy. Explicit reference is made in this context to 'Appropriate Measures' in several areas of relevance to internal security such as external border controls, the prevention and combating of crime and immigration. It should be noted that 'security' has been placed before 'justice' in the title of the AFSJ which can be taken as an indication that cooperation on internal security matters has been considered more important than judicial cooperation. The major emphasis put on internal security issues has also become clear from a later clarification by Council and Commission of what the term 'freedom' in the title AFSJ means. In the December 1998 (Vienna) Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice both institutions declared that the Amsterdam Treaty opens the way to giving freedom 'a meaning beyond free movement of persons across internal borders' and that this includes the 'freedom to live in a law-abiding environment' protected by effective action of public authorities at the national and European level.[34] The notion of 'freedom' being assured through the provision of effective law enforcement clearly reinforces the strong security rationale of the AFSJ.

Linked to Article 2 TEU are a whole range of more detailed objectives of relevance to internal security in other parts of the Treaties. Most of these are to be found under Title VI TEU, that is, what remains of the old intergovernmental Third Pillar. According to Article 29 TEU measures in the field of police and judicial cooperation in criminal matters are 'aimed at a high level of safety'. This objective is to be achieved by 'preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud'. Article 29 provides to that effect for closer cooperation between police forces, judicial authorities and other competent authorities as well as – 'where necessary' – approximation of rules on criminal matters. Articles 30 and 31 TEU specify in more detail the elements of Common Action by the Member States in matters of police and judicial cooperation in criminal matters respectively. As regards the former a broad range of areas are listed in Article 30(1) which include, for instance, operational cooperation, data collection, training and common evaluation of investigative techniques. Article 30(2) deals mainly with cooperation through Europol. Although the new provisions do not provide for the introduction of operational powers for Europol, they nevertheless represent a clear step forward because a number of clear and deadline-linked objectives (five years) are set for the further development of Europol. By virtue of Article 30(2)(a), (b) and (c) the European police organisation shall be enabled to 'encourage' the coordination and carrying out of specific investigative actions by competent authorities of the Member States, to 'ask' the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime, and to promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime. This clearly goes beyond the rather passive role – largely limited to information exchange – which had been assigned to Europol in the first half of the 1990s. Article 31 TEU provides, *inter alia*, for common action on enforcement of judicial decisions, the facilitation of extradition between the Member States, the prevention of conflicts of jurisdiction in criminal matters and the adoption of minimum rules relating to the constituent elements of criminal acts in the fields of organised crime, terrorism and drug trafficking.

Objectives of relevance to internal security have also found their way into the newly communitarised areas of Title IV TEC on 'Visas, asylum, immigration and other policies related to free movement'. Article 62

TEC provides for measures relating to the absence of controls on persons at internal borders, the crossing of external borders – including standards and procedures in carrying out checks on persons – and the definition of the conditions under which third country nationals shall have freedom to travel within the EU. Article 63(3) TEC establishes a Community competence to act in the area of immigration policy which includes conditions of entry and residence measures against illegal immigration and illegal residence, including repatriation of illegal residents. By virtue of Article 61(a) and 63 TEC has to adopt corresponding measures within five years of the entry into force of the Treaty (that is until 2004). This means that the Community method of combining integration objectives with deadlines for their achievement, used successfully, for instance, in respect of the establishment of the Common commercial policy and the completion of the Single Market, has for the first time been extended to matters of relevance to internal security.

As regards objectives the Amsterdam Treaty has clearly brought a major breakthrough for the EU as internal security actor. It should be noted, however, that the new provisions are rather vague in some key areas such as drug trafficking and financial and economic crime and that some issues of particular importance, such as the question of extra-territorial evidence in judicial cooperation in criminal matters, are not mentioned at all. The more detailed provisions are in several cases less ambitious than the objective of establishing an AFSJ would suggest. Article 32 TEU provides, for instance, that the Council shall lay down the 'conditions and limitations' under which the authorities referred to in Article 30 and 31 TEU may operate in the territory of another Member State. Having regard to the fact that cross-border cooperation and operation is going to be one of the central conditions of progress in the areas of police and judicial cooperation in criminal matters, this provision appears as being rather negative in tone and lacking substance.

Objectives need adequate instruments, and these were missing under the 'old' Third Pillar with its emphasis on coordinated political Positions rather than legally binding measures. The Amsterdam Treaty has brought major improvements in this respect.[35] In the newly communitarised areas the former Third Pillar instruments are now replaced by the EC legal instruments. Yet at the same time the instruments in the remaining intergovernmental areas of Title VI TEU have been substantially improved. With the Framework Decisions of Article 34(2)(b) TEU, a new instrument has been created for the purpose of 'approximation of the laws' which is binding upon the Member States as to the results to be achieved but also leaves to national authorities the choice of form and method. This means that Framework Decisions are rather similar to EC directives, except in that they are legal acts outside of the Community legal order and do not entail any direct effect. This instrument is clearly more appropriate to the legislative needs of police cooperation and judicial cooperation in criminal matters than Common Positions or the former Joint Actions. Article 34(2)(c) now provides for the new instrument of Decisions for any other purpose than approximation of laws which is consistent with the objectives of Title VI. Decisions are to be binding on the Member States, but, again, any direct effect is excluded. With the Decisions a general-purpose legal instrument has been introduced which is adapted to the needs of a variety of measures requiring legal action. Conventions have been maintained as an instrument under Title VI TEU, but some effort has been made to shorten the period between their adoption and their entry into force which had been a serious problem under the old Third Pillar. Article 34(2)(d) TEU provides that Member States shall begin ratification procedures within a time limit set by the Council. It has also been stipulated that, unless conventions provide otherwise, they shall enter into force as soon as they are adopted by at least half the Member States. This puts additional pressure on Member States to proceed with ratification.

The Amsterdam Treaty has also for the first time created a capacity of the Community/Union to act internationally on matters of justice and home affairs. According to the 'doctrine of parallelism' the Community's implied powers in external relations extend potentially to any subject matter which falls within the scope of the Community's explicit powers in internal matters. As a result the Community is now in principle in a position to enter into formal agreements with third countries on all matters under Title IV TEC. This means, for instance, that the Union could conclude agreements with third countries in the area of the fight against illegal immigration. Although both the legal bases and the procedures are different, a treaty-making possibility has also been introduced for police and judicial cooperation in criminal matters. Article 38 TEU provides that agreements referred to in Article 24 TEU may cover matters falling under Title VI. This means that in the context of the 'new' Third Pillar the Council can make use of the common foreign and security policy provisions enabling it to negotiate and conclude agreements between the Member States (not the community) and third countries. This treaty-making possibility has opened up entirely new perspectives for the Union to develop also into an actor on internal security issues in the international context which is particularly relevant in the fight against organised crime.

The one area where the Treaty of Amsterdam has clearly not brought any real breakthrough in developing the Union as an actor in internal security is that of decision-making procedures. In the fields of police and judicial cooperation in criminal matters (Title VI TEU) all of the different types of acts mentioned above must be adopted by unanimity. The only exception provided for is that of Article 34(2)(c) TEU, which allows for measures implementing a Decision to be taken by qualified majority. With majority voting being limited to implementing measures and subject – according to Article 34(3) – to a 'double' qualified majority of 62 votes out of 87 which must be cast by at least 10 Member States, this clearly does not make a major contribution to enhancing the Union's decision-making capacity in the internal security field. The unanimity rule also applies to the relevant communitarised areas, such as border controls and the fight against illegal immigration. However, Article 67(2) TEC provides that after a transitional period of five years (that is in 2004) the Council shall take unanimously a decision with a view to making all or parts of the Title on free movement governed by the Article 251/TEC ('co-decision') procedure which provides for qualified majority voting. It should be noted that this potential passage to majority voting remains subject to a unanimous decision on which the Council can perfectly well fail to agree. The Commission's currently only shared right of initiative – which reduces the Commission's possibilities to serve as the central driving force in the decision-making process – will automatically become an exclusive one in the communitarised areas after the transitional period, but will remain non-exclusive in police and judicial cooperation in criminal matters.

Problematic for the Union's decision-making capacity in the internal security field is also the unprecedented degree of differentiation which the Amsterdam Treaty has allowed for within the AFSJ. The United Kingdom and Ireland have secured an opt-out from measures under Title IV TEC and the incorporated Schengen *acquis*. Article 3 of the Amsterdam Treaty 'Protocol on the position of the United Kingdom and Ireland' offers both Member States an opt-in possibility for the adoption and application of any measure proposed under this Title at the latest three months after the proposal has been made, an option which both have made use of several times since the entry into force of the Amsterdam Treaty. The opt-out from the Schengen system is also mitigated by an opt-in possibility into parts of the *acquis*, a possibility which both countries have made use of in respect of most of the non-border control related aspects of the Schengen system. Yet the Union's only two non-Schengen Members continue not to be part of the Schengen border

system which amounts to a significant cleavage within the Union in terms of common action on internal security and additional complications in the decision-making process. The complexity of the AFSJ has been further increased by the Amsterdam 'Protocol on the Position of Denmark' which grants Denmark as a Schengen an 'opt-out' from Title IV TEC which provides that Denmark has six months to decide whether it will implement any Council decision building on the Schengen *acquis* into national law, in which case this decision will not be binding under Community but only under public international law, probably the most peculiar arrangement of the entire Treaty. All this means that as a result of the Amsterdam compromises only 12 of the 15 Member States participate wholly and unconditionally in the build-up of the AFSJ, so one cannot yet speak about an emerging 'single' internal security zone.

Yet in spite of the weaknesses on the decision-making side and the fault lines of differentiation the Treaty of Amsterdam has marked a decisive breakthrough in the development of the European Union as an internal security actor. It has made internal security part of the new fundamental integration project of the AFSJ and has equipped the Union with wide-ranging objectives, adequate instruments and a strengthened single institutional set-up. Taken together these reforms have created, for the first time in the history of the Western European integration process, a significant capacity to act at the European level in reaction – and even anticipation – of major challenges to the internal security which European citizens have a right to claim from their governments.

Two areas which are figuring very prominently on the agenda of the AFSJ are organised crime and illegal immigration. Yet they are not 'security issues' in the traditional sense and have made their way onto the EU's agenda as a security actor through a process of 'securitisation' which will be analysed in the following chapter.