

# The Area of Freedom, Security, and Justice

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## Reader's Guide

This chapter looks at one of the most recent European policies, Justice and Home Affairs (JHA), and its subsequent transformation into the Area of Freedom, Security, and Justice (AFSJ). The AFSJ comprises policy areas such as immigration and asylum, and police and judicial **cooperation**, some elements of which were found prior to the **Lisbon Treaty** in the EU's third **pillar**. The chapter focuses first on the early years of cooperation in this policy area and provides an introduction to the **Schengen Agreement**. It then reviews the procedural steps taken first by the **Maastricht Treaty** (1993), then at **Amsterdam** (1999), and subsequent institutional developments culminating in the Lisbon Treaty. The second half of the chapter concentrates on policy output, again looking at steps taken with Maastricht, Amsterdam, and Lisbon, but also in the landmark **Tampere European Council** meeting, the **Hague Programme**, and most recently the **Stockholm Programme**. Two sections of the chapter then review in more detail EU migration and asylum policy before and since the EU migration crisis which began in 2013. The chapter argues that, although some progress has already been made towards **Europeanizing** AFSJ policy, this field continues to be laced with **intergovernmentalism**. As demonstrated in this chapter, numerous challenges remain to be resolved within this broad policy domain.



## Introduction

Cooperation in the Area of Freedom, Security, and Justice (AFSJ) has undergone a remarkable ascent from humble beginnings to a vibrant EU policy. One of the newest additions to the EU mandate, it seeks to engage the European Union in the fields of immigration and asylum policy, and police and judicial cooperation. Because of the sensitive nature of the issues involved, cooperation has been slow and difficult. However, it has resulted in a body of policies that apply across the EU's internal and external borders, and which have locked previously inward-looking national authorities into a multilateral process. This has involved significant political compromise, which led to the introduction of a complicated mix of **Communitarized** and intergovernmental institutional procedures peculiar to this field. The EU is now developing a complex immigration and asylum **regime**, albeit one severely challenged by the recent migration crisis, and is also making progress on police and judicial cooperation. Particularly after the conclusion of the **Amsterdam Treaty**, the EU's capacity to reach collectively binding decisions in this field has improved considerably, creating momentum towards further cooperation and increasing concerns about the creation of a '**Fortress Europe**' into which access is increasingly restricted. However, many challenges and tensions remain to be resolved.

## Preludes to cooperation

If, in the late 1960s, government ministers responsible for home affairs and justice were told that they would

soon need to consult with fellow European ministers while formulating policies on immigration, asylum, judicial, and police matters, they would no doubt have found this a very unlikely and undesirable prospect. Yet, during the 1980s and 1990s, issues falling within their mandate have increasingly become of collective EU concern, provoking efforts to deal with them at the European, rather than exclusively at the national, level. Beginning in the mid-1970s and accelerating in the 1980s, these clusters were increasingly incorporated into the collective political agenda, leading to the creation of new, overlapping forums discussing these issues (see Box 22.1).

There were two broad sets of catalysts that drove this development. The first was the consequence of increased cross-border movements into and across Europe. After the Second World War, Western Europe became an area of immigration. Cross-border movements increased, straining border patrols and causing delays at points of entry. With this came growing concerns about transnational crime because of weak border controls and a lack of effective communication among European national law **enforcement** agencies. The second catalyst was the revitalization of the European integration agenda after the signing of the **Single European Act (SEA)** in 1986 (see Chapter 20). The removal of internal EU border controls was written into the 1957 **Treaty of Rome**, even though this had not been fully realized by the early 1980s. With this goal back on the agenda, attention turned to the need to create external Community borders, and to develop common and coherent rules on access. Early efforts targeted three groups: the citizens of the European Community, and then Union, whose freedom of

movement within the EC/EU was to be secured; long-term EU residents of third countries—that is, non-EU citizens who had relocated to the EU and who held residence and work permits; and **third-country nationals (TCNs)**, including labour migrants and refugees seeking to enter the collective territory of the EC/EU. Early efforts to cooperate were launched not by the EU, but by the **Council of Europe (CoE)**, the membership of which comprised both East and West European countries. Judicial matters were raised often at CoE meetings. While the CoE's work was significant, the drawbacks of its processes, including slow and 'lowest common denominator' policy output, were also clear.

Cognizant of the shortcomings of the CoE, member states set up the '**Trevi Group**' in 1975 as an informal assembly to deal with cross-border terrorism through **closer cooperation** among EC law enforcement authorities. Trevi was a loose network rather than an institution, and the meetings concluded in non-binding **consultations** on organized international crime, including drug and arms trafficking. Subsequently, several other groups were established, including the Judicial Cooperation Group, the Customs Mutual Assistance Group, and the Ad Hoc Groups on Immigration and Organized Crime. These groups spanned the four JHA policy clusters that were gradually becoming Europeanized: immigration policy; asylum policy; police cooperation; and judicial cooperation.

### KEY POINTS

- Cooperation in Justice and Home Affairs was not foreseen in the Treaty of Rome.
- The Council of Europe (a non-EC institution) was the main forum for the discussion of JHA issues, but it worked slowly and its output was meagre.
- The Trevi Group was created in 1975 as a loose network within which terrorism might be discussed at the European level.
- The Trevi Group led to the setting up of similar groups in related areas.

## The Schengen experiment

Perhaps the most ambitious project of these early years was Schengen. In 1985, a number of EC member states decided to do away with border controls. This was formalized in the 1985 Schengen Agreement and later the 1990 Schengen Implementation Convention.

Belgium, the Netherlands, and Luxembourg (the 'Benelux' countries), along with Germany, France, and Italy, created a new system that would connect their police forces and customs authorities. They also created the **Schengen Information System (SIS)**, an innovative, shared database that stored important information (such as criminal records and asylum applications), and which was accessible by national law enforcement authorities. Schengen's primary objective was to develop policies for the Community's external borders that would eventually remove the EC's internal borders. This was an ambitious goal of which the UK, Ireland, and Denmark remained sceptical. Despite Schengen involving only some member states, it became a model for the EC (and later the Union) as a whole.

Within the Schengen framework, significant progress was made in each of the four emergent areas of cooperation. With respect to asylum, Schengen instituted a new system for assigning responsibility to review asylum claims to one state to stop multiple asylum applications and reduce the administrative costs of processing duplicate asylum claims. Schengen also provided the groundwork for an EU-wide visa policy through a common list of countries the citizens of which would need an entry visa, also introducing uniform Schengen visas. There was more modest output in judicial cooperation, with the easing of extradition procedures between member states. Finally, Schengen involved cooperation on law enforcement. However, since most of this work fell outside the EC decision-making structure, it was conducted away from the scrutiny of the general public and their elected representatives (see Box 22.2).

### KEY POINTS

- The 1985 Schengen Agreement was a commitment by a subset of EC member states to remove controls at their internal borders.
- Steps were taken by the Schengen members to agree on common rules on their external borders, for example, on visa policy.
- For those countries involved, Schengen allowed national civil servants in these fields to become accustomed to European-level cooperation.
- Significant progress was made in each of the four emergent areas of cooperation within Schengen.

### BOX 22.1 CATALYSTS FOR EARLY COOPERATION IN JUSTICE AND HOME AFFAIRS (JHA) MATTERS

Linked to immigration	Increase in cross-border movements between Western European countries
	Increase in labour and family unification migration into Western European countries
	Increase in applications for asylum
	Concerns about cross-border organized crime
Linked to the <b>European integration</b> project	Undesirable impacts of delays at borders on economic activities
	Desire to complete the creation of the <b>Single Market</b> by gradually removing controls at the Union's internal borders
	Recognition of the necessity to develop common measures to apply to the external borders before doing away with controls at the internal borders



## BOX 22.2 WHAT IS SCHENGEN?

Named after the small Luxembourg border town where a subset of the member states of the then EC resolved to lift border controls, the Schengen system is a path-breaking initiative to provide for ease of travel between member states. In 1985, France, Germany, and the Benelux countries signed the first Schengen Agreement and were later joined by nine other EU members, bringing the total number of participating states to 15. The Schengen accords sought to remove controls on persons, including third-country nationals (TCNs), at their internal borders while allowing member states to reintroduce them only under limited circumstances. Member states agreed to develop common entry policies for their collective territory, to issue common entry visas, to designate a responsible state for reviewing asylum claims, and to combat transnational crime jointly. They also created a novel database—the Schengen

Information System (SIS)—to exchange information between the member states on certain categories of individual and property. Because the original SIS was designed to interlink at most 18 countries, a new version, SIS II, was launched, made necessary by the enlarged EU. In 2018 the 26 Schengen countries are: Austria; Belgium; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; the Netherlands; Norway; Poland; Portugal; Slovakia; Slovenia; Spain; Sweden; and Switzerland. Four of these countries (Iceland, Liechtenstein, Norway, and Switzerland) are not members of the EU. Two EU countries (the UK and Ireland) are not part of the Schengen system, although they have recently chosen to **opt in** on an issue-by-issue basis. Bulgaria, Croatia, Cyprus, and Romania are obligated to join but implementation is still pending.

## Maastricht and the ‘third pillar’

Efforts intensified in the early 1990s to shift decision-making towards the European institutions. With the implementation of the Treaty on European Union (TEU) in 1993, Justice and Home Affairs (JHA) was incorporated into the European Union, forming its third pillar. The TEU identified the following areas of ‘common interest’: asylum policy rules applicable to the crossing of the Union’s external borders; immigration policy and the handling of third-country nationals (TCNs); combating drug addiction and drug trafficking; tackling international fraud; judicial cooperation in civil and criminal matters; customs cooperation; police cooperation to combat and prevent terrorism; and police cooperation in tackling international organized crime. The Treaty also created a new institutional home for the groups that had been set up in earlier decades and created a decision-making framework. However, this new JHA pillar was the product of an awkward inter-state compromise. In the run-up to Maastricht, while most member states supported bringing JHA matters into the Union, they remained divided over how this should be done. Some argued that JHA should be handled within the first pillar, as a **supranational** policy; others preferred to keep this sensitive field as a largely intergovernmental dialogue.

Title VI TEU reflected the institutional consequences of this political compromise. With the third pillar, the Treaty established an intergovernmental negotiating sphere that marginalized the Community

institutions, particularly the European Commission, within the JHA decision-making process. This third pillar set-up diverged significantly from standard decision-making in the EC. The key decision-taking body became the JHA Council. The European Commission’s usual function as the initiator of European legislation (see Chapter 10) was diminished by its shared right of initiative in JHA and the role of the European Parliament (EP) did not extend beyond consultation, a situation that led to accusations that JHA exemplified the Union’s **democratic deficit** (Geddes, 2008; Uçarer, 2014; Bache et al., 2014; see also Chapter 9). The Court of Justice of the EU (CJEU), the body that might have enhanced the **accountability** and judicial oversight of policy, was excluded from jurisdiction in JHA matters (see Chapter 13).

Although bringing JHA into the EU was an important step, critics of the third pillar abounded. Two sets of interrelated criticisms were advanced. Critics lamented the lack of policy progress in the post-Maastricht period. The problem was that the post-Maastricht institutional arrangements were ill equipped to handle the projected, or indeed the existing, workload falling under JHA. The decision-making framework was cumbersome, with often non-binding policy instruments necessitating long-drawn-out (and potentially inconclusive) negotiations. All decisions in the third pillar had to be reached unanimously and this led to deadlock. When **unanimity** was achieved, the result was often a lowest-common-denominator compromise that pleased few. Negotiations continued to

be secretive and the EP remained marginalized, particularly problematic at a time when the Union was trying hard to improve its image vis-à-vis its citizens.

## KEY POINTS

- The Maastricht Treaty, which came into effect in 1993, created a ‘third pillar’ for Justice and Home Affairs.
- The institutional framework put in place for JHA was intergovernmental and cumbersome.
- Key institutions such as the EP and the Court were marginalized in JHA decision-making.
- The JHA framework was subject to much criticism in the mid-1990s.

## Absorbing the third pillar: from Amsterdam to Lisbon

In the run-up to the 1999 Amsterdam Treaty, proposals for reforming Justice and Home Affairs (JHA) included the following: enhanced roles for the Commission, EP, and Court of Justice; the elimination of the unanimity rule; and the incorporation of the Schengen system into the European Union. As with Maastricht, there was a fierce political debate over these issues.

The challenge was to make the Union ‘more relevant to its citizens and more responsive to their concerns’, by creating an ‘area of freedom, security and justice’ (AFSJ) (Council of the European Union, 1996). Within such an area, barriers to the free movement of people across borders would be minimized without jeopardizing the safety, security, and human rights of EU citizens. The Amsterdam compromise led to three important changes. First, parts of the Maastricht third pillar were transferred to the first pillar, or ‘Communitarized’. Second, the institutional framework for issues that remained within the third pillar was streamlined. And third, the Schengen framework was incorporated into the Union’s **acquis communautaire**.

## New first-pillar issues under Amsterdam

The Communitarization of parts of the erstwhile third pillar was the most significant development at Amsterdam with respect to JHA matters. These provisions

called for the EU Council to adopt policies to ensure the free movement of persons within the Union, while concurrently implementing security measures with respect to immigration, asylum, and external border controls. The Treaty also specified new decision-making rules. A transition period of five years was foreseen, during which unanimity was required in the JHA Council following consultations with the EP. After five years, however, the Commission would gain an exclusive right of initiative, member states losing their right to launch policy instruments. While the EP’s access to the decision-making procedure would still be limited to consultation in most cases, an automatic shift to the **co-decision** procedure (now the **ordinary legislative procedure**, or OLP), which would give the EP much more of a say, was foreseen in the area of uniform visa rules and the procedures for issuing visas. The Court of Justice would receive a mandate for the first time, allowing it to undertake **preliminary rulings** in policy areas falling within the first pillar in response to requests by national courts (see Chapter 13). Despite these improvements, however, the new Amsterdam architecture turned out to be a formidable maze created through masterful ‘legal engineering’ for political ends and opaque even for seasoned experts.

## The left-over third pillar: cooperation in criminal matters

The Amsterdam reforms left criminal matters in the third pillar. The amended Title VI included combating crime, terrorism, trafficking in persons and offences against children, illicit drugs and arms trafficking, corruption, and fraud. The Treaty envisaged closer cooperation between police forces, customs, and judicial authorities, and with **Europol**, the European Police Office (see ‘Post-Maastricht developments in policy’), seeking an approximation of the criminal justice systems of the member states as necessary.

While the new Title VI essentially retained the intergovernmental framework created at Maastricht, the Commission obtained a shared right of initiative for the first time—an improvement over its pre-Amsterdam position. The EP gained the right to be consulted, but that was all. The Treaty constrained the Court in a similar fashion in that it recognized its jurisdiction to issue **preliminary rulings** (see Chapter 13) on the instruments adopted under Title VI, but importantly made this dependent on the **assent** of the member states. While the Commission, Parliament, and Court



were to continue to struggle to play an active role in the third pillar, the Council retained its dominant decision-making function and unanimity remained the decision rule used in third-pillar legislation.

### Absorbing Schengen

After much debate, Schengen was incorporated into the EU by means of a protocol appended to the Amsterdam Treaty. The Protocol provided for the closer cooperation of the Schengen 13 (that is, the EU15 minus Ireland and the UK) within the EU framework. With this development, cooperation on JHA matters became even more complicated, involving various overlapping groupings. There were those EU members that agreed to be bound by the Amsterdam changes (the EU12); Denmark chose to **opt out** altogether, and the UK and Ireland would remain outside unless they chose to opt in. Moreover, there were actually 15 signatories to the Schengen agreement (the Schengen 15), of which 13 were EU members and two were not (Iceland and Norway). The two members of the EU that remained outside the Schengen system, the UK and Ireland, decided to take part in some elements of Schengen, including police and judicial cooperation. Of the 12 countries that subsequently joined the EU in 2004 and 2007, nine joined the Schengen area fully in 2007. Non-EU Switzerland partially joined Schengen in December 2008. This makes for quite a complex system: of the current 26 members, 22 are EU members and four (Iceland, Liechtenstein, Norway, and Switzerland) are not. Four current EU members (Bulgaria, Croatia, Cyprus, and Romania) are in line to join. Two current EU members (the UK and Ireland) remain outside the Schengen area and three non-EU microstates (Monaco, San Marino, and the Holy See) are de facto Schengen members because they maintain open borders with their neighbours. One could argue that the incorporation of Schengen into the *acquis communautaire* did not result in desired simplification, but rather maintained, if not amplified, the convoluted system of the early 1990s. Not surprisingly, some now regard this particular aspect of the AFSJ as the ultimate example of a **multi-speed**, or 'à la carte', Europe.

The Treaty of Nice made few substantial changes to these institutional developments, although it did extend the shared right of initiative for the Commission in the otherwise intergovernmental (residual) third pillar.

### 'Normalizing' AFSJ: the Constitutional Treaty and the Lisbon Treaty

The **Convention on the Future of Europe** and the 2003–04 intergovernmental conference (IGC), culminating in the October 2004 signing of the **Constitutional Treaty** (CT), marked the next, if incomplete, stage in JHA reform. The CT provided for the 'normalization' of JHA by abolishing the pillar structure, greater use of **qualified majority voting (QMV)** except for judicial and police cooperation in criminal matters (JPCCM). It retained the shared right of initiative for the Commission and the member states in judicial cooperation in criminal matters, but foresaw proposals coming from coalitions composed of at least 25% of the membership of the Union. These were all efforts to streamline the decision-making process while preserving a diminished capacity for member states to block decisions. The CT further provided for a role for national parliaments to monitor the implementation of JHA policies and for a **judicial review** of compliance by the ECJ. Finally, the Constitution retained the British and Irish opt-ins, and the Danish opt-out.

However, the CT was rejected in referendums in France and the Netherlands. The AFSJ provisions were later given a new life in the Lisbon Treaty, signed on 13 December 2007. The Lisbon Treaty contains all of the major innovations pertaining to AFSJ that were present in the CT, and underscores its salience by placing it ahead of **economic and monetary union (EMU)** and the Common Foreign and Security Policy (CFSP) in the Union's fundamental objectives. The Lisbon Treaty also incorporates the Prüm Convention (sometimes referred to as 'Schengen III') into the *acquis communautaire*. It foresees jurisdiction for the Court of Justice of the EU (CJEU) to enforce all AFSJ decisions apart from provisions adopted under the post-Amsterdam third pillar. As of December 1, 2014, the normal powers of the Commission and the CJEU now extend to all areas of AFSJ. The EP will operate with OLP (formerly co-decision) authority in almost all cases. However, the Lisbon Treaty's transformative provisions were also brought about by compromises. Opt-outs and opt-ins remain for Denmark, the UK, and Ireland (see Table 22.1), now complicated further by the looming Brexit. These concessions are criticized as moving further towards a multi-speed Europe. Nonetheless, the Lisbon Treaty represents the most significant reform of AFSJ to rectify vexing institutional problems that were created by Maastricht.

Table 22.1 JHA/AFSJ cooperation: from Trevi to Lisbon

	Pre-Maastricht JHA pillar	Post-Maastricht third pillar	Post-Amsterdam first pillar (Communitarized areas of former third pillar) Immigration; asylum; Police and Judicial Cooperation in Civil Matters	Post-Amsterdam third pillar Police and judicial cooperation in criminal matters	Lisbon Treaty
	Title VI TEU, Article K	Title IV TEC, Articles 61–69	Title IV TEC, Articles 61–69	Title VI TEU, Articles 29–42	Title IV TEC, Articles 61–69 Consolidated pillars
European Parliament	No role	Limited role, consultation	1999–2004 Co-decision	Consultation	Ordinary legislative procedure
European Court of Justice	No jurisdiction	No jurisdiction	Referral for an obligatory first ruling for national last-instance courts	Preliminary rulings for framework decisions and decisions after 1 December 2014	Jurisdiction to enforce all AFSJ decisions after 1 December 2014
Council	No direct role	Dominant actor	Dominant but Commission and EP ascendant	Dominant actor	Shared power position 'Enhanced cooperation' possible
Commission	Consultative Occasional observer at intergovernmental meetings	Shared right of initiative with member states except judicial and police cooperation (no right of initiative)	Shared right of initiative (member states asked the Commission to assume an exclusive right for asylum issues)	Shared right of initiative (previously impossible)	Exclusive right of initiative
Decision-making mechanisms	Intergovernmental negotiations Non-binding decisions in the form of resolutions Binding decisions in the form of treaties	Unanimity rule on all issues	Council acts unanimously on proposals from Commission and member states for the first five years Opt-in (UK, Ireland), opt-out (Denmark)	Council acts unanimously on proposals from Commission and member states	QMV for most decisions Opt-out (Denmark on judicial cooperation) Opt-ins (UK and Ireland)

Note: This covers asylum policy, the crossing of the external borders of the EU, immigration policy and the handling of third country nationals, combating drug addiction and trafficking, tackling international fraud, judicial cooperation in civil and criminal matters, customs cooperation, and police cooperation to combat and prevent terrorism and organized international crime.



## KEY POINTS

- The Amsterdam Treaty sought to address the shortcomings of the third pillar by bringing immigration and asylum, as well as judicial and police cooperation in civil matters, into the first pillar. The third pillar, cooperation in criminal matters (police and judicial cooperation), remained intergovernmental.
- Schengen was incorporated into the Treaty, but this did not result in simplification given the overlapping memberships involved in this agreement.
- The **Nice Treaty** added few changes to the Amsterdam set-up and extended a right of shared initiative to the Commission in the third pillar.
- The **Lisbon Treaty** entailed the most significant reform of justice and Home Affairs to date. It made important strides in normalizing this policy domain in the aftermath of the failed Constitutional Treaty.

## Policy output: baby steps to bold agendas

There have been several spurts of policy since the beginnings of cooperation on Justice and Home Affairs (JHA), building on the early pre-Maastricht efforts, but gathering momentum after Maastricht and Amsterdam. More recently, in addition to making progress on the four main dossiers (immigration, asylum, police cooperation, and judicial cooperation), the European Union has acknowledged the importance of the external dimension of JHA and has embarked on attempts to export its emergent policies beyond the Union.

### Post-Maastricht developments in policy

After Maastricht, member states first focused on rules to apply to third-country nationals (TCNs) entering the Union territory. The Council formulated common rules in this area for employment and education, and recommended common rules for the expulsion of TCNs. It also recommended a common format for 'bilateral readmission agreements' (which would allow for the deportation of TCNs) between member states and third countries. Agreement was also reached on the format of a uniform visa, as well as on a list of countries the nationals of which required a visa to enter EU territory. These relatively unambitious agreements sought to develop comparable

procedural steps for the entry, sojourn, and expulsion of TCNs.

The most notable development in asylum was the conclusion of the 1990 Dublin Convention, which designated one member state as responsible for the handling of an asylum claim, resting on the concepts of safe countries of origin and transit into the EU, rejecting applications lodged by the nationals of countries deemed safe or by those who had passed through safe countries en route to EU territory. Refugee rights activists frowned upon these policies as dangerously restrictive and warned that such rules could potentially weaken refugee protection.

Work began on the European Dactyloscopy (EU-RODAC)—that is, fingerprinting—system, which would allow member states to keep track of asylum seekers, as well as on the negotiation of a common framework for the reception of individuals seeking temporary protection status in Union territory. The Maastricht Treaty also embarked on the ambitious agenda to create a European Police Office (Europol) to enhance police cooperation and information exchange in combating terrorism and the trafficking of drugs and human beings. Based in The Hague, Europol became operational in October 1998. Ministers of the member states also signed an agreement to create a Europol Drug Unit to assist in criminal investigations.

### Amsterdam and beyond

Following Amsterdam, progress accelerated, aided by a European Council dedicated exclusively to JHA. The goal of this summit, which was convened in Tampere (Finland) in October 1999, was to evaluate the impact of Amsterdam and to discuss the future direction of cooperation. Included in the 'Tampere milestones' were a reiterated commitment to the freedom of movement, development of common rules for the fair treatment of TCNs, including guidelines for dealing with racism and xenophobia, the convergence of judicial systems, and the fostering of **transparency** and democratic control. Among the more far-reaching goals were better controls on, and management of, migration and the deterrence of trafficking in human beings.

On matters of immigration and asylum, Tampere advocated a 'comprehensive approach', closely linked to the combating of poverty, and the removal of the political and economic conditions

that compel individuals to leave their homes. It was argued that JHA/AFSJ policies should be linked closely to tools of foreign policy, including development cooperation and economic relations. This called for intensified cooperation between countries of origin and transit to address the causes of flight, empowering neighbouring countries to offer adequate protection to those in flight and speeding up the removal of undocumented immigrants from Union territory.

EU member states committed themselves to creating a Common European Asylum System (CEAS), including standards for reviewing claims and caring for asylum applicants, and comparable rules for refugee recognition. The Commission was designated as the coordinator of policy proposals dealing with asylum and soon introduced numerous proposals, including on reception conditions for refugees, and a common set of minimum standards for the review of asylum claims, as well as common family reunification schemes for refugees. The Union also approved the creation of the European Refugee Fund, designed to aid EU recipient states during massive refugee influxes, such as those experienced during the fallout from Bosnia and Kosovo. By this point, the Dublin Convention had taken effect, and the EURODAC system was now functioning. The creation of the CEAS was in progress.

In matters of judicial and police cooperation, still third pillar issues, a European Judicial Area (EJA) was foreseen in which the **mutual recognition** of judicial decisions and cross-border information exchange for prosecutions, as well as minimum standards for civil procedural law, would be ensured. Furthermore, the European Union's Judicial Cooperation Unit (Eurojust), composed of national prosecutors, magistrates, and police officers, was created. Eurojust would aid national prosecuting authorities in their criminal investigations of organized crime. A European Police College (CEPOL), which would also admit officers from the **candidate countries**, and a European Police Chiefs Task Force (PCTF) were also planned. Priorities were established for fighting money laundering, corruption, euro counterfeiting, drug trafficking, trafficking in human beings, the exploitation of women, the sexual exploitation of children, and high-tech and environmental crime, designating Europol as the lead agency in these efforts. Importantly, Tampere also established **benchmarks** and set deadlines for the accomplishment of

its goals, which enlivened the policy process. The Commission tabled new and revised initiatives relating to asylum procedures: on reception conditions for asylum seekers; on the definition and status of refugees; and on a first-pillar instrument to replace the Dublin Convention.

The next phase of cooperation involved creating an integrated border management system and visa policy, complete with a Visa Information System (VIS) database to store the biometric data of visa applicants, a common policy on the management of migration flows to meet economic and demographic needs, and the creation of the EJA. The Hague Programme that was subsequently adopted in November 2004 called for the implementation of the CEAS and the gradual expansion of the European Refugee Fund. The Council Secretariat's Situation Centre (SitCen), which would provide strategic analyses of terrorist threats, was endorsed and Frontex, responsible for securing the external borders of the EU, was created. The Hague Programme invited greater coordination on the integration of existing migrants, and, for the external dimension, stressed partnership with countries of origin and/or transit, and the conclusion of further readmission agreements as necessary. The Hague Programme arguably gave policy-making a push, resulting in the adoption of hundreds of texts in 2007 alone.

The Hague Programme was followed by the Stockholm Programme to guide AFSJ cooperation for 2010–14, which echoes the political priorities of its predecessors: promoting **European citizenship** and fundamental rights; an internal security strategy to protect against organized crime and terrorism; integrated border management; a comprehensive Union migration policy; completing the CEAS; and integrating these priorities into the external policies of the EU. It foresees an expansion of Europol, as well as several other measures in the police cooperation realm, and further empowers Frontex.

As the 1990s progressed, the planned **enlargements** projected the collective territory outwards, making it necessary to discuss JHA/AFSJ matters with the Union's *future* borders in mind. Member states began to involve certain third countries in some of their initiatives, attempting to solidify EU border controls by recruiting other countries to tighten their own controls (Lavenex and Uçarer, 2002). This involved entering into **collective agreements** with countries of origin and transit. These attempts to recruit neighbouring



### BOX 22.3 STRAINS ON SCHENGEN AND THE FREEDOM OF MOVEMENT: THE EFFECTS OF DOMESTIC POLITICS

Schengen is arguably the most important multilateral mechanism that jump-started the AFSJ. However, it came under strain as a result of the **Arab Spring** at a time when the EU was facing a significant crisis of the euro, its other most visible achievement. In May 2011, Schengen's provisions were temporarily suspended between Italy and France, and border checks were reinstated. The crisis was precipitated when Italy, not happy with the lackadaisical support that it received from the EU in the face of migrants arriving in Lampedusa and elsewhere to flee the upheaval in North Africa, issued about 22,000 travel documents to arrivals. Given the absence of border controls, these travel documents would allow arriving North Africans to travel onward, including to France. Despite Schengen being based on mutual recognition of entry and travel permits throughout the Schengen area, France refused to recognize the Italian documents as valid, reinstated border checks, and started sending individuals with these documents back to Italy. Unrelatedly, Denmark, citing a perceived increase in cross-border crime, also briefly reinstated controls at its Schengen borders. This was a concession to the anti-immigration **Danish People's Party**, on the cooperation of which the government relied in the legislative process. Meanwhile, while the initial stand-off de-escalated between France and Italy, President Sarkozy announced in March 2012, from the campaign trail (a month before critical national elections in France), that France might pull out of Schengen unless the EU stemmed undocumented migration. As with Denmark, this was in an effort to curry favour with nationalist, anti-immigration, and far-right electorate and political parties. Suddenly, it appeared that domestic politics and electoral cycles in these three EU member states, complicated by international developments, were poised to undermine Schengen and what it represented. Ultimately, no politician wants to be blamed for

the collapse of Schengen and the reinstatement of cumbersome border checks. That being said, this brief episode, which Schengen weathered, nonetheless showed that it is vulnerable.

In November 2014, the UK Prime Minister, David Cameron, sparked additional controversy in an op-ed in the *Financial Times* by arguing that 'Free movement within Europe needs to be less free' and announcing limits to the rights of EU member migrants through quotas and other measures. Adding to the already difficult interactions with the UK brought on by the plans for a UK referendum on membership in the EU, this occasioned sharp critique from the European Commission as well as other EU members such as Germany on the grounds that such a move would be incongruent with the freedom of movement of EU citizens protected by common market provisions. Cameron's rhetoric should be placed in the context of the 2014 EP elections during which the anti-EU and populist **UKIP (United Kingdom Independence Party)** received more votes than any other British party, showing once again that domestic politics and posturing has important consequences. Cameron's decision to hold a referendum further galvanized UKIP's efforts in converting anti-immigration sentiment into Brexit votes, which itself further complicated freedom of movement in Europe. During the summer of 2015, when Schengen was marking its 30th anniversary, hundreds of thousands of asylum seekers, mainly from Syria, entered into the EU. Many EU states temporarily reintroduced border controls either completely or partially. Such suspensions of the Schengen system were in effect in Austria, Denmark, France, Germany, Norway, and Sweden in 2018 and may be extended into 2019. These difficulties further highlight the strains on the collective management of migration flows.

countries to adopt close variations of the EU's emergent border management regime were particularly pronounced in Central and Eastern Europe (CEE), the **Maghreb**, and the Mediterranean basin, because of the proximity of these areas to the EU. North African, Mediterranean, and **African, Caribbean, and Pacific (ACP) countries** were also steered towards adopting policies to ease migratory pressures into the Union. To these ends, in addition to the readmission agreements negotiated by its member states, by 2015, the EU itself implemented 17 readmission agreements with third countries ranging from Albania,

Cape Verde, Russia, to Turkey and Ukraine. Frontex also plays a crucial role by engaging countries that are on the EU's land borders in the southeast and the Western Balkans, and on its maritime borders in the Mediterranean. Such deployments, with operational names such as 'Hermes', 'Triton', and 'Poseidon', frequently occur in the Mediterranean, particularly near Malta, Italy, and Greece with their exposure to North Africa. Securing and maintaining these processes have been difficult, frequently intertwining the domestic politics of the affected countries with those of the EU (see Box 22.3).

### KEY POINTS

- Since Maastricht, significant policy progress has been made in the fields of immigration, asylum, police, and judicial cooperation, even though policy output has fallen short of initial expectations.
- Policy-making focused on developing common rules for travel within and entry into the Union, **harmonizing** policies offering protection to asylum seekers and refugees.
- It also led to the creation of better information exchange and cooperation between law enforcement officials, and the development of mutual recognition of judicial decisions within the EU.
- The Hague and Stockholm Programmes gave policy-making a push by calling for the implementation of a common asylum system, and stressed partnership with countries of origin and/or transit.

### EU migration and asylum policy before the migration crisis

The Common European Asylum System (CEAS) was the product of the aforementioned 1999 Tampere summit. It is the EU's response to its international obligations to provide humanitarian protection to refugees and a functioning asylum system across the EU (see 'Amsterdam and beyond' earlier). CEAS seeks to address three challenges. First, it addresses the practice which leads asylum seekers whose application for asylum is denied in one member state to apply for asylum in another EU country. This is often termed 'forum shopping'. Second, it addresses the problem of differential asylum outcomes in different member

states, leading asylum seekers to gravitate towards those countries where their application is more likely to be approved. Third, it addresses the variety of social benefits for asylum seekers that exist across EU member states, which also draws refugees to gravitate towards one particular jurisdiction.

The agreement taken at Tampere established that CEAS would be implemented in two phases: in the first phase, the adoption of common minimum standards in the short term should lead to a common procedure and a uniform status for those granted asylum, which would be valid throughout the Union in the longer term. Thus this 'first phase' of the CEAS, which lasted from 1999 to 2004, established the criteria and mechanisms for determining the member state responsible for examining asylum applications. This replaced the earlier regime governed by the 1990 Dublin Convention, and which included the establishment of the EURODAC database for storing and comparing fingerprint data; the definition of common minimum standards to which member states had to adhere regarding the reception of asylum-seekers; rules on international protection and the nature of the protection granted; and procedures for granting and withdrawing refugee status (see Box 22.4).

In the 2004 Hague Programme, second-phase instruments and measures were foreseen by the end of 2010, highlighting the EU's ambition to go beyond minimum standards and develop a single asylum procedure with common guarantees and a uniform status for those granted protection. In the 2008 European Pact on Immigration and Asylum, this deadline was postponed to 2012. The Lisbon Treaty, which entered into force in December 2009, changed the situation by

### BOX 22.4 THE DUBLIN CONVENTION

The Dublin Convention was first agreed in January 1990. Now in its third incarnation, the so-called Dublin III Convention entered into force in July 2013, with the aim of establishing a common framework for determining which member state decides an asylum seeker's application. This is intended to ensure that only one member state processes each asylum application. The criteria for establishing responsibility runs, in hierarchical order, from family considerations, to recent possession of a visa or residence permit in a member state, to whether the applicant has entered the EU irregularly or regularly. The arrival of numerous migrants and asylum seekers

in the EU since 2013 and their concentration in particular geographical areas, has exposed the weaknesses of the Dublin System, however, since it establishes that the member state responsible for examining an asylum application will tend to be the country of the first point of irregular entry. In May 2016, the Commission presented a draft proposal the Dublin IV Regulation—to make the Dublin System more transparent and to enhance its effectiveness, while providing a mechanism to deal with the disproportionate pressure placed on countries on Europe's southern borders, such as Greece, Italy, Malta, and Spain. Progress has been slow and problems remain.



transforming the measures on asylum from establishing minimum standards to creating a common system comprising a uniform status and uniform procedures. Since Lisbon, Article 80 TFEU has also introduced the principle of solidarity and has provided for the fair sharing of responsibility among member states. EU asylum actions should, where relevant, contain appropriate measures to give effect to the solidarity principle. The new treaty also significantly altered the decision-making procedure on asylum matters by introducing the ordinary legislative procedure (OLP) as the standard procedure. Although the Commission had tabled its proposals for the second phase of CEAS as early as 2008–09, negotiations progressed slowly. Accordingly, the 'second' phase of the CEAS was adopted only after the entry into force of the Lisbon Treaty.

Set up in 2005 and revised in 2012, the Global Approach to Migration and Mobility (GAMM) is the external dimension of the EU's migration policy. It is based on a partnership with third countries and is designed to address the management of legal migration from outside the EU, the prevention and reduction of irregular migration, enhancing international protection and asylum policy, and the relationship between migration and development. The GAMM's primary focus is the Southern Mediterranean and the Eastern Partnership. Under the 'more for more' mechanism, the EU tries to persuade third countries to strengthen their border controls, restrict their visa policy, and readmit irregular migrants with incentives such as trade benefits, visa facilitation, or financial support. This is a controversial approach, and the GAMM has been criticized for omitting criteria on human rights in the selection of partner countries and for the absence of a mechanism for monitoring or suspending cooperation.

#### KEY POINTS

- CEAS was designed to meet three key challenges facing asylum policy across the EU.
- CEAS was intended to be introduced in two phases: the first would introduce common minimum standards; the second would set up a common asylum policy.
- The Global Approach to Migration and Mobility has sought to externalize the EU's migration policy. This has proven especially controversial.

## The migration crisis and the EU response

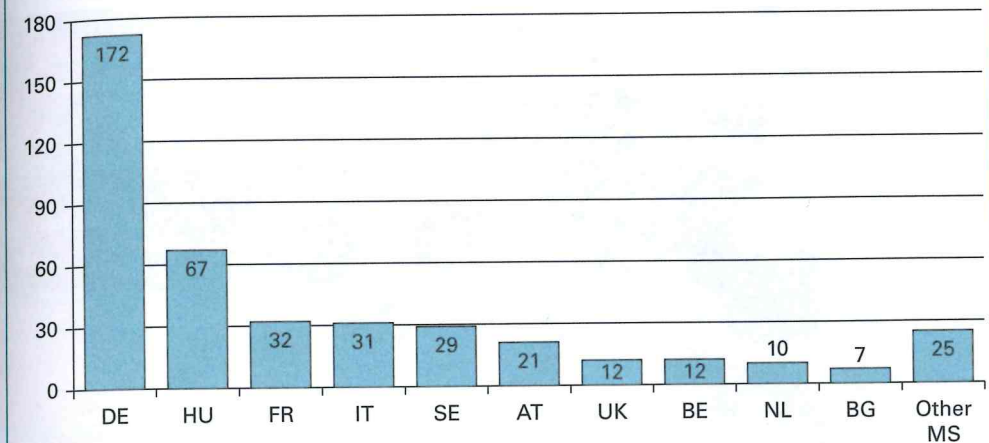
The origins of the EU migration crisis can be traced back to several points in recent history. For the purposes of this account, the events of 3 October 2013 are taken as a significant moment. On that day, a boat carrying refugees and other migrants sank near the Italian island of Lampedusa with the loss of more than 360 lives. This would be the first of many later tragedies in the Mediterranean. By 2015, the EU had begun to see large numbers of arrivals fleeing the wars in Syria. During this year, 2.5 million people entered and claimed asylum in Europe, with around half of them Syrian. Other nationalities also continued to make their way to the southern European border states, including Eritreans, Somalians, Iraqis, and Afghans. In August and September 2015, hundreds of thousands of refugees began to arrive in Germany, some having travelled on foot across Europe (see Figure 22.1).

The long and dangerous journeys undertaken overland led to death for many people as they attempted to cross the Mediterranean on the Western, Central, and Eastern routes, with most of them falling victims of people smugglers and exploitation.

There are several ways to interpret this 'crisis'. The dominant narrative provided by the EU institutions sees this issue as both a humanitarian and a security crisis. This has presented the EU and its member states with a challenge to its inadequate common migration and asylum policies, not least because the EU's responses to a security crisis are unlikely to fit well within the range of responses one might expect as a consequence of a humanitarian crisis. While numerous official documents and commentators have emphasized the need to balance the need for security with the obligation to protect human rights, this tends to be easier said than done (see Box 22.5). The EU at first appeared to be paralysed and there was little agreement at member state level on how to respond to the 'crisis'. Although on paper there was an agreed plan for the relocation of refugees across the EU, not all member states followed it.

Angela Merkel, the Chancellor of Germany, took a stand by announcing in August 2015 that Syrians were refugees and were welcome in Germany. The Dublin Regulation was suspended in Germany, so that asylum applications received there would be treated on a 'first country of application' basis. However, most of

Figure 22.1 Asylum applications per member state, in thousands, January–June 2015



Source: European Parliamentary Research Service Blog (2016) *EU Migratory Challenge: Possible Responses To The Refugee Crisis* available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/568312/EPRS\\_BRI\(2015\)568312\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/568312/EPRS_BRI(2015)568312_EN.pdf)

#### BOX 22.5 THE HUMANITARIAN RESPONSE

Italy launched a Search and Rescue (SAR) operation, entitled 'Mare Nostrum' (our sea) in the autumn of 2013, following the Lampedusa shipwreck. Mare Nostrum resulted in saving more than 100,000 lives. It lasted for a year, costing the Italian government €1.4 m. However, when Italy asked the EU for support, none was forthcoming. The operation ceased in 2014 and the EU replaced it with Operation Triton, supported by 21 countries, which had limited aims and resources, operating only in the waters near the Libyan coast. It rescued fewer people. Triton was succeeded by Operation EUROMEDFOR, later known as Operation Sophia. SAR has been seen by many politicians and political commentators as being a 'pull factor' for migrants.

In 2017 and 2018, the EU (controversially) provided substantial funds to (and has trained) the Libyan Coastguard to conduct operations to rescue people from Libyan waters, then to return them to detention centres in Libya. This policy and related actions has been denounced by many organizations as amounting to 'pushbacks' which are contrary to international obligations under the Geneva Convention. The gap in SAR has been filled, as far as possible, by NGOs, private individuals and humanitarian groups, who have saved many lives. But NGOs are finding it increasingly more difficult to do their SAR work, as destination countries such as Italy seek to regulate and limit their work to contain arrivals.

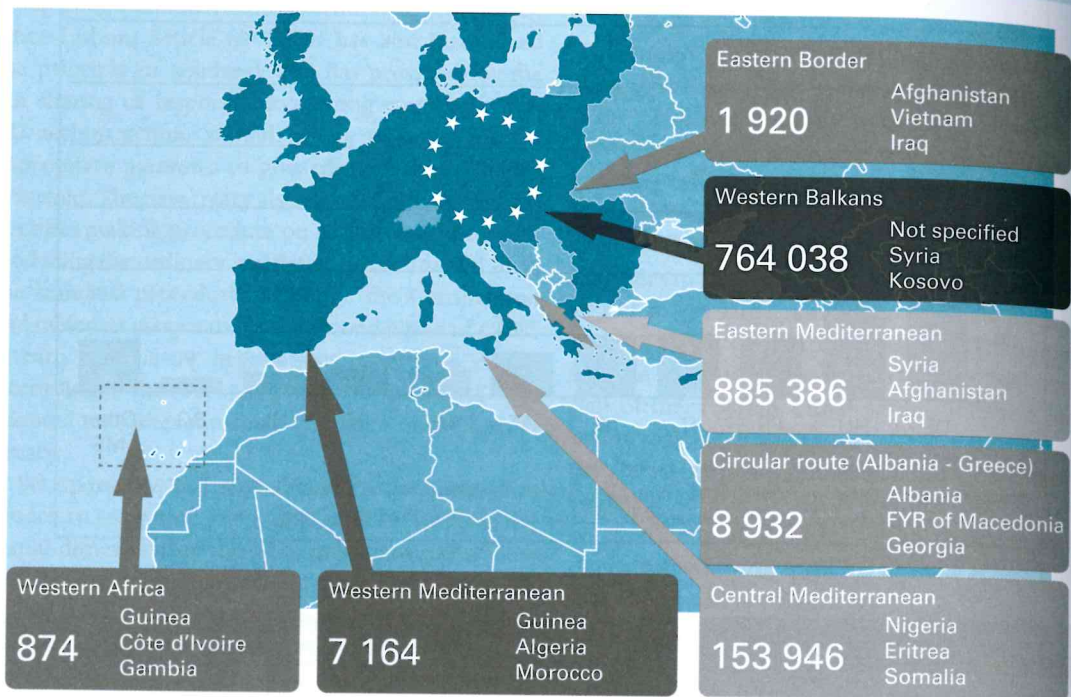
the other EU countries did not follow suit. The result was that around 890,000 people arrived in Germany in 2015 to seek asylum, the large majority having travelled through Greece via the land border with Turkey or the Greek islands, then making their way across mainland Greece, through various routes through the Former Yugoslav Republic of Macedonia, Serbia, Hungary, and Austria to Germany. The 'Balkan Route' became a humanitarian corridor, but was seen by the EU as a weak link in the external border and a security risk, rather than an escape route for those fleeing wars and conflicts and or poverty.

Most member states sought to strengthen and militarize their borders in response to the crisis. The EU adopted measures to tackle smuggling and trafficking, creating hotspots in Italy and Greece and externalizing border control to the countries of North and West Africa (see Figure 22.2).

This policy approach and response is premised on the view that the 'root causes' of migration can be identified and addressed to prevent the emigration of people towards Europe. More recently this concept has become one of addressing the 'drivers' of migration. The externalization of migration policies



Figure 22.2 Detections of undocumented border crossings in the EU (2015)



Source: European Parliamentary Research Service Blog (2016) *EU Migratory Challenge: Possible Responses To The Refugee Crisis* available at <https://eupthinktank.eu/2015/09/07/eu-migratory-challenge-possible-responses-to-the-refugee-crisis/fig-1-detection-s-of-illegal-border-crossing-in-the-eu/>

has also included the externalization of protection responsibilities, as migration and asylum policies become conflated.

The ways in which the ‘crisis’ has been framed in the media has also strengthened the hand of populist movements and intensified anti-immigration views. As a consequence, political elites at EU and national levels responded by trying to control immigration (see Chapter 27 on Brexit). Reduced immigration numbers and lower numbers of deaths continue to serve as central policy aims as well as indicators of policy success. When presented without context, this obscures the fact that many deaths continue to occur on land, in the deserts, in detention centres, and en route during migration journeys. In the absence of legal routes, the most dangerous journeys have become the only option for many who seek protection and/or a life in Europe.

In view of the migratory pressure in the Mediterranean since 2013, the Commission launched the European Agenda on Migration in May 2015, which included several measures. One of the most high

profile was the ‘Hotspot’ approach, set up between the European Border and Coast Guard Agency (EASO) and Europol, which helped frontline member states to identify, register, and fingerprint incoming migrants. The hotspot approach is also meant to contribute to the implementation of the emergency relocation mechanisms for a total of 160,000 people in need of international protection. It was proposed by the Commission to assist Italy and Greece, in particular. Relocation is meant as a mechanism to implement in practice the principle of solidarity and fair sharing of responsibility, as mentioned in the previous section. However, relocation rates have been lower than expected and relocations have been implemented slowly (see Table 22.2). The relocation scheme applied to eligible asylum seekers arriving in Greece and Italy between September 2015 and September 2017. Based on the arrival figures at the time and the expectation that they would continue at the same rate, member states agreed to support Greece with the relocation of 63,302 persons in need of international protection and Italy with 34,953 persons.

Table 22.2 Member States' support to the Emergency Relocation Mechanism (As of 12 June 2018)

Member States	Relocation	
	Relocated from Italy	Relocated from Greece
Austria	44	×
Belgium	471	700
Bulgaria	10	50
Croatia	22	60
Cyprus	47	96
Czech Republic	×	12
Denmark	×	×
Estonia	6	141
Finland	778	1,202
France	635	4,394
Germany	5,435	5,391
Greece	×	×
Hungary	×	×
Ireland	×	1,022
Italy	×	×
Latvia	34	294
Lithuania	29	355
Luxembourg	249	300
Malta	67	101
Netherlands	1,020	1,755
Poland	×	×
Portugal	356	1,192
Romania	45	683
Slovakia	×	16
Slovenia	81	172
Spain	235	1,124
Sweden	1,392	1,656
United Kingdom	×	×
Norway	816	693
Switzerland	920	580
Liechtenstein	×	10
Iceland	×	×
TOTAL	12,692	21,999

Source: European Commission (2018) available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_relocation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf)

The CEAS has proved to be largely unsuccessful because of blockages and resistance at member state level arising from the adoption of anti-migrant policies by national governments. Governments in Poland and Hungary have refused to implement the EU’s new asylum system; and the Austrian government, before taking over the EU Council Presidency in July 2018, promised to end the emergency relocation mechanism. These blockages have resulted in a crisis for Greece and Italy, as refugees and migrants have been prevented from moving out of their countries of arrival. Indeed, it is now almost impossible for refugees to enter an EU country legally with the purpose of seeking asylum.

These policies have largely proved inadequate to deal with the migration and refugee flows they were designed to address. The fact that cooperation has been successful only with respect to the creation and management of the EU’s external border has led some commentators to observe that it works only at the level of the lowest common denominator (see Box 22.6). The EU’s immigration and asylum regime now focuses on: (i) highly skilled labour migration; (ii) the control of immigration; (iii) a Common European Asylum System (CEAS); and (iv) the internalization and externalization of European migration policy in the form of the European Agenda on Migration. This has also resulted in the externalization of the EU’s protection responsibilities (see ‘Towards a Security Union?’).

**BOX 22.6 THE EU–TURKEY REFUGEE AGREEMENT**

Under the terms of the EU–Turkey Refugee Agreement, all irregular migrants or asylum seekers crossing from Turkey to the Greek islands are returned to Turkey, following an individual assessment of their asylum claims in line with EU and international law. Most of these refugees are Syrian. For every Syrian being returned to Turkey, another Syrian will be resettled to the EU from Turkey. As of mid-2018, however, only 916 irregular migrants have been returned from Greece to Turkey, while more than 4,000 Syrian refugees have been resettled from Turkey to the EU. In parallel, the EU makes available significant resources available to Turkey under its Facility for Refugees in Turkey (€6 bn for 2016–19). Boat arrival numbers in Europe along the eastern Mediterranean route have dropped dramatically since the deal was signed, though the Agreement has been challenged by migration and human rights activists.



The EU institutions claim to have little independent room for manoeuvre in the face of political challenges at national level. The appointment in Italy at the end of May 2018 of Matteo Salvini, the leader of the far-right party, the 'League', as the Minister of the Interior is a case in point. Salvini's first visit in his new role was to the port of Pozallo in Sicily (which is a key arrival port for refugees and other migrants travelling from Libya). He declared that Italy would reduce its spending on refugee reception conditions for hundreds of thousands of refugees. Meanwhile, the German Chancellor, Angela Merkel, was seeking consensus on European asylum reform (*Agence Europe*, 4 June 2018) but saw little chance of the EU member states reaching agreement on reforms to the CEAS, or to the Dublin System. 'We need a common asylum system and comparable standards for determining who should be granted asylum and who should not.' She added: '... in the last phase of development, we need a common European refugee authority to handle all asylum procedures at the external borders on the basis of a uniform European asylum law' (*Agence Europe*, 4 June 2018).

The Commission's view is that creating such an authority is a long-term objective. In the short term, the Commission has already proposed making the European Asylum Support Office (EASO) a European agency with certain European powers, notably in crises, and in allocating migrants among the member states on the basis of quotas. The European Commission progress report on the European Agenda on Migration provides clear evidence that migration and asylum policies have become increasingly conflated within a narrative of 'crisis'.

By mid-2018 the EU and its member states had entered a phase in which humanitarian aid to refugees and other migrants was being criminalized. For example, in May 2018, three Spanish firefighters were due to appear in court in Greece, charged with the illegal transportation of persons without administrative permission to enter Greek territory. If convicted, they risk up to ten years in prison. At the same time, states were refusing to accept responsibility for people rescued from the sea. Politicians in Italy were arguing for the end of the common policies (Dublin and the CEAS) which have resulted in both Italy and Greece becoming 'holding pens' for hundreds of thousands of migrants and refugees. Austria and Denmark were calling for asylum

applications to be processed outside the EU, in the Balkan countries. In June 2018, the German coalition that was formed months after the September 2017 elections came to the brink of collapse as Merkel's coalition partner and CDU's Bavarian sister CSU, and in particular its leader Horst Seehofer who serves as the Minister of Interior, precipitated a political crisis by problematizing Germany's asylum policy. A compromise that involved adopting policies that seemed intended to displace the problem onto Austria and Italy was reached to save the coalition. In these circumstances, in both the EU and its member states, it is difficult to see how future migration and asylum policies can be seen as embodying fundamental values at the core of the EU, and this arguably calls into question the legitimacy of the entire European project.

The question is posed as to whether member states failed intentionally, or unintentionally, to achieve coherence in protecting human rights in migration and asylum cooperation. The future of what remains of a Common European Asylum System remains a challenge for the EU as a whole. This matters for the EU's global reputation too. As Elizabeth Collett suggested at the beginning of 2017:

*The European Union will be overtly switching to a transactional, normative-averse approach to partnership that values migration flows over stability, which is in turn more important than democracy and rule of law. It will also be sending a signal that protection is optional. This is a trade-off that has been creeping up for several years, and likely has now become politically unavoidable, but will have ripple effects for Europe's voice on the international stage and its relations with neighbouring countries (Collett, 2017).*

#### KEY POINTS

- Attempts to create a common asylum system have largely been unsuccessful.
- The EU's main success has been in constructing a strengthened external EU border.
- At first the EU appeared paralysed when faced with the migration crisis.
- The 'crisis' narrative is a result of the longer-term framing of migration of non-EU citizens as a problematic security issue.

## Towards a Security Union?

'Europeans need to feel confident that, wherever they move within Europe, their freedom and their security are well protected, in full compliance with the Union's values, including the rule of law and fundamental rights', opined the European Commission in its 2015 communication to the Council and the Parliament on the 'European Agenda on Security' for 2015–20. In less than a year after its adoption, the March 2016 coordinated suicide attacks in Brussels prompted Commission President Juncker to insist that the EU needs a genuine Security Union by improving information exchange and strengthening external borders. A good deal of police cooperation is necessary to achieve these ends. At the same time, such cooperation has its drawbacks and critics, even within the EU institutions, and certainly within civil liberties circles. For instance, the EU, while it now has broader powers in this arena, has simultaneously lamented a genuinely common approach to internal security, and the data protection hazards that accompany such initiatives. The Passenger Name Record (PNR) system is a case in point. In 2016, the EU adopted a directive on the use of PNR within the context of its counter-terrorism efforts. PNR collects data such as personal information and itinerary on international passengers and, as such, could be helpful in flagging potential threats. At the same time, in order to collect information on potential threats, non-threatening individuals would also see their information compiled, and possibly shared within and outside the European Union as the EU has PNR agreements with the United States, Canada, and Australia. Parliament resisted this European Commission initiative long and hard until it was satisfied that adequate data protection measures were incorporated into it. Ultimately, although the institutional framework on police cooperation has become simpler since TFEU, police cooperation (along with judicial cooperation in criminal matters) remains more loosely incorporated into the EU than the other planks of AFSJ.

The European Agenda on Security identifies three key priorities and challenges for the near future: fighting terrorism, disrupting organized cross-border crime, and tackling cybercrime. This takes us all the way back to the beginning of this chapter. JHA/AFSJ cooperation owes its genesis partly to the efforts of the Trevi Group, the main goal of which was to establish cross-border cooperation in the fight against

organized crime and terrorism. These matters were subsequently incorporated into the Union. Europol was created to facilitate the apprehension and prosecution of transborder criminals, and established jointly accessible databases to enhance police cooperation. The Commission began work in late 1999 to develop an instrument that would outline the Union's position on terrorism, covering terrorist acts directed against member states, the Union itself, and international terrorism.

The EU's focus on terrorism heightened following the 11 September 2001 ('9/11') attacks. The events in the USA prompted the EU to move speedily towards adopting anti-terrorist policies already in preparation. In October 2001, the Council committed the Union to adopting a common definition of terrorist offences, a common decision on the freezing of assets with links to suspected terrorists, and establishing the **European Arrest Warrant (EAW)** designed to replace the protracted extradition procedures between EU member states with an automatic transfer of suspected persons from one EU country to another. The Council urged better coordination between Europol, Eurojust, intelligence units, police corps, and judicial authorities, and announced work on a list of terrorist organizations. The Union called for increased vigilance for possible biological and chemical attacks, even though such attacks had never previously occurred in the EU. Finally, linking the fight against terrorism to effective border controls, the European Council insisted on the intensification of efforts to combat falsified and forged travel documents and visas (European Council, 2001). The focus on anti-terrorism measures intensified yet further after the 11 March 2004 attacks in Madrid. While no stranger to terrorist attacks from separatist Basque militants, Spain's trauma sharpened the attention to terrorism. The EU and its member states subsequently negotiated a number of cross-border initiatives to enhance their collective capabilities to combat terrorism. Among these was the Prüm Convention of 2005 which enabled signatories to exchange DNA, fingerprint, and vehicle registration data to combat terrorism. The possibility that violent acts could be perpetrated by ill-integrated migrants—highlighted by the widely publicized murder of Theo van Gogh, a prominent Dutch film director, at the hands of a Muslim who held dual Dutch and Moroccan citizenship—rekindled the integration debate. Fears about 'home-grown' terrorism hit another high with the 7 July 2005 ('7/7') London bombings and later with the



attack on the French satirical weekly *Charlie Hebdo* on 7 January 2015, some of the perpetrators of which were also thought to be involved in March 2016 Brussels attacks.

The Union is now working on improving its information exchange infrastructure to help with its anti-terrorism efforts. Along with a second-generation Schengen Information System (SIS II), a new EU Visa Information System (VIS) is now operational all over the world. Possessing interactive capabilities, SIS II includes additional information on 'violent trouble-makers' (including football hooligans, but potentially also political protesters) and suspected terrorists, and also stores biometric information (digital pictures and fingerprints) and EAW entries. In turn, the VIS collects and stores data from all visa applications in all member states, including biometric data such as digital photos and all ten fingerprints—something that is criticized for potentially falling foul of data protection measures.

The EU also now has a directive on combatting terrorism, which was adopted in 2017 and replaces previous post-9/11 framework decisions. This directive offers a common definition of terrorist offences and criminalizes undertakings to prepare for terrorist acts, such as travelling abroad for training or aiding and abetting terrorist activities. The Commission also prepared, in consultation with national experts, EU agencies and Interpol, a set of common risk indicators for foreign terrorists in an effort to assist in the work of national border personnel. A European Counter Terrorism Center (ECTC) launched in January 2016 within Europol to assist member states in fighting terrorism and radicalization. In 2016, the Commission also put forth an action plan for measures against financing terrorism, including asset freezing, anti-money laundering measures, and cooperation between financial intelligence units from member states. These measures can also be used to combat other types of transnational organized crime. In the coming years, the Commission envisions EU legislation on, for example, stemming illicit cash movements, counterfeiting, and the movement and sale of cultural goods to achieve financing of terrorist activities. With respect to radicalization, in 2016, the Commission identified areas of cooperation between member states, including countering online terrorist propaganda and hate speech, addressing radicalization in prisons, and promoting inclusive education and inclusive societies. The Commission also set up financial assistance to

support rehabilitation, de-radicalization, and training programmes. Finally, the Commission proposed cooperation with the External Action Service cooperation with third countries in matters of security and counter-terrorism, deploying experts to the EU delegations of a number of Middle-East and North African (MENA) countries as well as Nigeria. To address the third realm of priorities, namely cybersecurity, the EU adopted a Cybersecurity Strategy in 2013 and also created several institutions to enhance cooperation between member states. These efforts have also yielded some policy instruments creating a common European criminal law framework against cyber-attacks.

While the attention directed towards anti-terrorist, organized crime, and cybercrime measures is certainly warranted, the EU's efforts in this field have already attracted criticism from civil liberties and migrants' rights advocates (Statewatch, 2011). Activists caution against a possible backlash against migrants of Arab descent and argue against closing the EU's outer doors even more tightly. Anti-Islam and xenophobic rhetoric displayed by various groups, such as **Pegida (Patriotic Europeans against the Islamisation of the West)** in Germany, and political parties such as the **Front National** in France, capitalize on violence that can be linked to persons of migrant origin and raise concerns about further securitization of migration and asylum in Europe. As in the post-9/11 USA, European anti-terrorism measures have attracted sharp criticism from civil libertarians in Europe, who also remain sceptical about closer anti-terrorism cooperation between the USA and the EU for data protection reasons. In terms of academic analysis, it is highly inadvisable to conflate migration, security, and terrorism, even though all three are areas that fall under the mandate of AFSJ. In essence, the challenge in Europe is similar to that in the US: developing policy instruments that meet security needs while protecting the civil liberties of individuals residing in the EU territory. The events of 11 September 2001, 11 March 2004, 7 July 2005, 7 January 2015, and 22 March 2016 and more seem to have brought JHA cooperation full circle to its Trevi origins. It is certain that this dossier will remain very lively, if controversial, in the future, preserving the security narrative that sits uneasily in a multi-religion, multi-ethnic, and multi-origin Europe. At the same time, while we can chart quite a bit of progress in these highly sensitive and sovereignty-inspiring fields, the security union of which the Commission speaks is still far off.

## KEY POINTS

- Cooperation in the Area of Freedom, Security, and Justice (AFSJ) has developed a significant external dimension, particularly vis-à-vis the EU's neighbours.
- The enlargement of the Union not only pushes its borders (and therefore the AFSJ) eastwards, but also commits applicant countries to adopt Justice and Home Affairs (JHA) rules before their accession.
- AFSJ policy output also has an impact on countries that are not part of the enlargement process.
- How to respond to terrorism is a key challenge facing the EU and its member states.

## Conclusion

Cooperation in Justice and Home Affairs (JHA) has come a long way since its obscure beginnings in the 1970s. It currently occupies a prominent and permanent position in EU **governance**. The European Commission now has a more active role, facilitated by the creation within it of two new Directorates-General. The status of the European Parliament and the Court of Justice of the EU has also improved since Amsterdam and Lisbon. Matters discussed in this field continue to strain the sovereign sensibilities of the EU member states and the policy remains intrinsically intergovernmental. However, few believe that the European Union can achieve its **common market** goals without making significant progress in the Area of Freedom, Security, and Justice (AFSJ). As the events of 11 September 2001 in the USA and the attacks in Madrid, London, Paris, Brussels, and the summer of 2015 clearly demonstrate, the tackling of transborder issues so typical of this dossier demands coordination and cooperation beyond the state. AFSJ is still a young field compared to the other more established **competences** of the EU. And yet, it demonstrates significant institutional change over time while maintaining consistent policy thrusts.

The EU must contend with a number of important, and sometimes conflicting, challenges specific

to AFSJ cooperation. In order to lift internal border controls on people moving within the EU, the Union must articulate and implement policies to manage its *external* borders. These policies should foster the freedom of movement of EU citizens and third-country nationals within the Union. They should also spell out common rules on the entry of TCNs. To demonstrate its commitment to basic human rights and democratic principles, the EU must protect TCNs against arbitrary actions, uphold their civil liberties, encourage inclusiveness, and deter acts of violence against them. To maintain the rule of law, the Union must press forward with judicial and police cooperation, while ensuring the privacy and civil liberties of those living in the EU. To live up to its international obligations, the EU must keep its policies in line with its pre-existing treaty obligations, particularly in the field of refugee protection. To protect its **legitimacy** and to improve its public image, the EU must take pains to address issues of transparency and democratic deficit. Finally, it must undertake these endeavours without raising the spectre of an impenetrable 'Fortress Europe', which some argue already exists. The challenges facing the policy remain substantial.

## ? QUESTIONS

1. What are the catalysts that have led to the Europeanization of Justice and Home Affairs/Area of Freedom, Security, and Justice policy?
2. What have been the impediments to effective cooperation in JHA/AFSJ matters?
3. If the issues dealt with in JHA/AFSJ can also be addressed through unilateral decisions by individual countries, or by bilateral agreements concluded with interested parties, why is there such an effort to develop multilateral and collective responses in this field?



4. What are some of the lingering shortcomings of JHA/AFSJ cooperation?
5. What is meant by 'normalizing' JHA/AFSJ and how does the Lisbon Treaty contribute to such 'normalization'?
6. How effective has the EU's response to the migration crisis been?
7. How is the European Union dealing with terrorism?
8. What has prompted work towards a European security union? What are some opportunities and challenges for such efforts?



## GUIDE TO FURTHER READING

Geddes, A. (2008) *Immigration and European Integration: Beyond Fortress Europe?*, 2nd edn (Manchester: Manchester University Press) A very accessible and well-informed single-authored study of the EU's immigration regime.

Kaunert, C. (2011) *European Internal Security: Towards Supranational Governance in the Area of Freedom, Security, and Justice* (Manchester: Manchester University Press) A comprehensive recent volume that assesses European internal security and integration.

Peers, S. 'Legislative updates', *European Journal of Migration and Law*—various issues (for example, (2012) 'Legislative update, The Recast Qualifications Directive', *European Journal of Migration and Law*, 14/2: 199–221). These legislative updates capture the policy output, as well as providing insightful discussions of the decision-making process.

Ripoll Servent, A. and Trauner, F. (eds) (2018) *The Routledge Handbook of Justice and Home Affairs Research* (New York, NY: Routledge) A comprehensive edited volume that offers theoretical, institutional, and substantive analyses of the developments in AFSJ.

Trauner, F. and Ripoll Servent, A. (eds) (2015) *Policy Change in the Area of Freedom, Security and Justice: How EU Institutions Matter* (New York: Routledge) An edited volume that explores the role of EU institutions in the making of policy in various AFSJ issue areas.



## WEBLINKS

[https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights\\_en](https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights_en) and [https://ec.europa.eu/commission/priorities/migration\\_en](https://ec.europa.eu/commission/priorities/migration_en) The European Commission's pages on AFSJ.

<http://www.consilium.europa.eu/en/topics/home-affairs/> and <http://www.consilium.europa.eu/en/topics/justice/> The EU Council's websites for home affairs and justice.

[http://www.europarl.europa.eu/committees/libe\\_home\\_en.htm](http://www.europarl.europa.eu/committees/libe_home_en.htm) The page for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

<http://www.migpolgroup.com> The website of the think tank, Migration Policy Group, including the monthly *Migration News Sheet*.

<http://www.statewatch.org> Statewatch, a non-governmental organization, provides a critical approach to the EU's AFSJ.