



20 Years Anniversary of the Tampere Programme

Europeanisation Dynamics of the EU Area of Freedom,
Security and Justice

Sergio Carrera, Deirdre Curtin and Andrew Geddes



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Europeanisation Dynamics of the EU Area of
Freedom, Security and Justice

EDITED BY

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of the Council
of the European Union



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PREFACE

EUROPEAN AREA OF FREEDOM, SECURITY AND JUSTICE – COMMON VALUES AS THE GATEWAY FOR FUTURE DEVELOPMENT

Malin Brännkärr

Twenty years ago, Finland, a relatively new member state of the European Union, held the Presidency of the Council of the European Union for the first time. At the time, European integration had reached a new stage and the Tampere European Council held an important meeting in which a groundbreaking decision was made. This decision profoundly changed the European Union and subsequently created a Union of Freedom, Security and Justice.

In 2019, the Finnish Presidency coincides with the 20th anniversary of the adoption of the Tampere Milestones in the European Council Conclusions of October 1999. Since the very beginning, it was clear that the European area of freedom, security and justice could only be built based on a shared commitment to human rights, democracy and the rule of law. Furthermore, the same basis serves as the foundation for any future development of EU Justice and Home Affairs.

After Tampere, Justice and Home Affairs soon became the fastest developing policy field in the union, and fundamental rights, stable institutions and well-functioning justice systems became more and more important during any ongoing accession

process. For two decades now, the area of freedom, security and justice has been built with remarkable achievements. Simultaneously, the European Union has expanded by way of the accession of new Member States. In the multi-annual programmes of Tampere, The Hague and Stockholm, the European Council has guided further steps to be taken in the field of Justice and Home Affairs. Once again, we are at a crossroads, and I thank CEPS and the European University Institute (EUI) for taking this opportunity to jointly discuss new milestones and paths to follow.

The Finnish Presidency in 2019 also coincides with a new institutional set up. We decided to use the opportunity to invite EU Justice and Home Affairs ministers to identify and explore key issues for future development, based on the new Strategic Agenda adopted by the June 2019 European Council. Moreover, the new European parliament started its work and the President-Elect of the new Commission has published her political guidelines for the future. I myself approach the future from the perspective of common European values. For the development of Justice and Home Affairs, a strong foundation of our common values is perhaps more important today than ever before. Therefore, the first priority of the Finnish Presidency was to strengthen the toolbox that contributes to strengthening the protection of fundamental rights, democracy and the rule of law in the Union.

With a view to the new strategic agenda and the political guidelines of Ms Ursula von der Leyen, it seems clear that European leaders have also recognised the particular importance of our core values. Common values are the basis for mutual trust and confidence between Member States, and European cooperation in the field of Justice and Home Affairs relies heavily on mutual trust between Member States.

The Tampere European Council endorsed the principle of mutual recognition to become the cornerstone of judicial cooperation meaning that our focus has been, and still is, on smooth, direct and effective cooperation between authorities within the EU. There is no need for cross-checking human rights compliance due

to the fact that we have trust in one another. For the past decade, EU-legislators have established an impressive set of common minimum standards for criminal procedural rights in order to further strengthen trust between Member States.

This has truly been a remarkable achievement. The importance, as well as the effects, of mutual trust and common values reaches far beyond just the area of Justice and criminal law. Mutual confidence and the presumption of compliance, by other Member States, with EU law and fundamental rights has also been, for instance, at the core of all efforts to build a Common European Asylum System. At the same time over the years, in the field of civil law, the EU has taken decisive steps towards abolishing the *exequatur*, thus abolishing barriers hampering mutual recognition.

However, in recent years, the European Court of Justice has been asked, on a number of occasions, to interpret the boundaries of mutual confidence and mutual recognition. For the future development of the area of freedom, security and justice, it is crucial that the aforementioned balance between mutual confidence and mutual recognition is maintained. The Court has repeatedly confirmed that the rebuttal of the principle of mutual trust should only occur in exceptional circumstances. In reality, today, mutual trust between Member States has been challenged in many ways.

In the area of Justice, the Court has identified important issues that entail the potential to challenge mutual trust and mutual recognition – we have to keep a close eye on these warning signs. For instance, poor prison conditions can become an obstacle for mutual recognition, and thus, weaken cooperation between Member States. During the Finnish Presidency, discussions have continued on ways to tackle the aforementioned problem. The EU can be an important forum for sharing best practices in this field, both in regards to detention as well as to its alternatives. This initiative has received a positive response in the Council and there seems to be genuine support within the Member States in further discussing the increased use of alternative measures.

One important manifestation of our common values is the Charter of Fundamental Rights. The Charter's influence has been significant in the field of Justice and Home Affairs and the evolving case law of the Court of Justice has been of great relevance to further development, for instance as regards any initiative affecting everyone's right to the protection of personal data. The rapid development of digital innovations has largely reshaped our society and economies in the 21st century, and we have every reason to believe that the said development will continue to develop going forward. Simultaneously, for instance, this evolution has created new legal issues relating to the processing of our personal data. The Court has tackled these questions in a number of landmark cases, many of which are now reflected in the EU's recently modernised legal framework on data protection.

Particularly, in the field of freedom, security and justice, we need better understanding of both the advantages as well as the challenges that come with digitalisation. For instance, we need to take into account artificial intelligence and other automation when planning the future. Furthermore, we need to take into account digitalisation as a whole with all of its manifestations, for example, in relation to new technologies, 5G Networks and hybrid threats. We need to consider how we can most effectively utilise digitalisation and respond to the challenges that arise with it, while at the same time maintaining our common values.

Therefore, the Charter is not only an important expression of our common values; it also continuously confirms the commitment of the EU to uphold these values. The Charter needs to be effectively implemented so that all Europeans can fully enjoy their rights. Thus, more work needs to be done to give the Charter greater visibility and to enhance its active use and application at national level as well. This has also been one of the topics on the Presidency agenda of Finland and was on the agenda of the EU Justice Ministers meeting on 7 October 2019 in Luxembourg. Furthermore, Finland considers it important that the work towards the EU's accession to the European Convention on Human Rights continues.

Overall, it can be said that the protection of our common values concurrently means the protection of the system of mutual recognition in the EU, and at the core of our common value base is the rule of law. The rule of law can be described as the backbone of the modern constitutional democracy and a prerequisite for the protection of all fundamental values listed in Article 2 of the Treaty on European Union. In other words, the rule of law acts as a conjunctive glue that holds the Union together as well as affects every aspect of the Union's work, from fundamental rights to a well-functioning single market.

We need to reinforce the EU's existing rule of law toolbox. Although we can proudly proclaim all the significant leaps forward we have taken since the Tampere Milestones, we must be careful not to take any steps backwards. Thus, inaction is not an option, if we truly are to stay true to our common values. I therefore welcome the Commission's recent commitment to strengthen the rule of law and to establish a new annual reporting mechanism.

Freedom requires a genuine area of justice – this was also one of the key messages of the Tampere Milestones. A genuine area of justice is real when people feel comfortable approaching courts and authorities regardless of the Member State. Moreover, it is real when criminals cannot exploit differences in the judicial systems of Member States. Furthermore, it is real when judgments and decisions from all Member States are respected and enforced. In a genuine European area of justice, individuals should not be prevented or discouraged from exercising their rights. We always have to remember that we are building a Europe not for institutions, not for Member States, but for our citizens. The effectiveness, independence and quality of national justice systems are key aspects of the rule of law, and they play a key role in the European area of freedom, security and justice.

The necessity of our common value base is multidimensional. Take for example the field of security. We need to set our sights on a comprehensive approach to ensuring security. Internal security is a product of a chain of actions and actors. In order to combat

cross-border crime, this chain must work effectively. Security requires an efficient chain of criminal proceedings, thus well-functioning cooperation in criminal matters between Member States is essential. In 2002, as requested by the Tampere European Council, Eurojust was established to improve judicial cooperation in the fight against serious, cross-border crime. Today, we can proudly proclaim that Eurojust has truly become an important security actor and has helped to build mutual trust between Member States. Therefore, we must continue developing Eurojust, particularly; we need to ensure that Eurojust is ready for the Digital Age. Next year the European Public Prosecutor's Office will join the action alongside Eurojust with a strong authority to protect the Union's budget from fraud.

In conclusion, the aforementioned and its key message can be divided into three equally important points.

First, our initial objective has been to strive for proper functioning of our societies and the policies of the Union. Thus, from the get-go, European integration has been firmly rooted in a shared desire to commit to human rights, democratic institutions and the rule of law. Therefore, our original driving force for a better future needs to be continuously reinforced.

Secondly, we can note with contentment the aftermath of the Tampere Milestones, but we also need to remind ourselves of all of the Milestones yet to be achieved. In other words, we need to constantly reinforce cooperation within the European Union by, among other things, fostering the mutual trust between Member States. As mentioned before, the protection of our common values concurrently means the protection of the system of mutual recognition in the EU.

Thirdly, we should not view our shared common values only as historical building blocks, but as the necessary components for future development, as well as, the enabling forces to build a sustainable Europe and a sustainable future.

I am not sure anybody could have foreseen the current development of the area of freedom, security and justice some 30 years ago. Moreover, even 20 years ago when the area was established, I do not think anybody could have foreseen all the achievements of today. Maybe all the progress achieved today were only dreams back then, or alternatively, maybe all the achievements of today were perceived to be impossible.

The truth is that we have, in fact, achieved many unimaginable things in this area. Therefore, I hope that over the next 20 years, we will continue to achieve more things that are currently unimaginable. Alternatively, at least, I hope our current goals are excessively pessimistic. However, we have to continue to work hard to develop the area and we cannot stop dreaming about the next goals to reach.

INTRODUCTION

SETTING THE SCENE

Sergio Carrera, Deirdre Curtin and Andrew Geddes

2019 corresponded with the 20 year anniversary of the adoption of the Tampere Programme at the European Council Conclusions of October 1999 under the auspices of the Finnish Presidency of the EU. After the entry into force of the Amsterdam Treaty, the Tampere Programme laid down for the first time the multi-annual policy priorities to guide the development of EU Justice and Home Affairs (JHA) policies.

The end of 2019 also coincided with the 10 year anniversary of the entry into force of the Lisbon Treaty, which constituted a milestone in European integration. The Treaty of Lisbon rebaptised the EU JHA policies as the Area of Freedom, Security and Justice (AFSJ). It brought AFSJ policies under democratic scrutiny of the European Parliament, and judicial oversight of the Luxembourg Court. Of particular importance for the AFSJ was the incorporation of the Charter of the Fundamental Rights into EU primary law, on an equal footing with the EU Treaties. AFSJ cooperation is now established and functions on the premise of ‘mutual trust’, which is rooted on and dependent upon the full respect of EU’s core values and legal principles of the rule of law, democracy and fundamental rights.

The ‘Lisbonisation’ of the AFSJ sought to ensuring inter-institutional balance and liberalising the ownership on the multi-annual policy programming and agenda-setting on AFSJ policies.

The new AFSJ decision-making setting was meant to no longer allow for an exclusive prerogative of the JHA Council and national Ministries of Interior, but ensuring the involvement and equal weighting of the European Parliament. The European Council was also transformed into an EU institution, and subject as such to the EU constitutional framework.

This Collective Volume examines and takes stock of the main policy and legislative developments, achievements and progress made during the last 20 years on AFJS cooperation.

The various Chapters review the current facets and latest steps in AFSJ policies. They critically assess the main achievements, unfinished components and challenges. Special focus is paid to the different types of ‘Europeanization’ dynamics, narratives and processes witnessed during the last 20 years, their novelty or continuation, and the ways in which they relate to the EU rule of law, democratic and fundamental rights principles laid down in the Tampere Programme and the EU Treaties.

The Volume is based on the presentations and contributions delivered in a two-day Conference co-organised by CEPS, the Migration Policy Centre (MPC) and the Law Department of the European University Institute (EUI), in cooperation with the Finnish Permanent Representation to the EU on 3 and 4 October 2019 in Brussels. The Conference was an official event part of Finland’s Presidency calendar which run during the second half of 2019.

The Volume is structured into five main Parts. Part I (*The Lisbonisation of EU AFSJ Policies*) examines the main institutional and political AFSJ developments, and their implications, since the Tampere Programme and the ‘communitarisation’ of JHA domains by the Amsterdam Treaty in 1999. The various Chapters address the impacts of *politicization* and ‘*depoliticization*’ dynamics and ‘crises’ in these policy domains. They examine the constitutional importance of the common guiding principles and fundamentals outlined in the Tampere Programme and the Lisbon Treaty, such

as those of inter-institutional balance, solidarity, human rights and the rule of law. Particular attention is paid to the ways in which these legal principles, and the democratic credentials of the EU towards its citizens, have been affected by the increasing role played by crisis-labelling AFSJ politics.

The Parts that follow are AFSJ theme-specific. Part II (*Borders and Asylum*) assesses the main developments, open issues and future priorities in relation to EU border and asylum policies. The Chapters study the state of play of the Schengen area as well as EU external borders policies, with particular focus on Member States' reintroduction of internal border controls and the increasing role of EU agencies such as Frontex. In the area of asylum, the Chapters examine the scope and impacts of the EU Hotspot model, as well as EU informal arrangements with third countries (the 2016 EU-Turkey Statement), and among few EU Member States (the 2019 Malta Declaration on disembarkation and relocations), and their relationship with the UN Global Compact on Refugees (GCR). Particular attention is given to the implications of new legal and policy developments on EU Treaty principles.

Part III (*Irregular and Regular Migration*) covers the major developments and main issues on EU irregular and regular immigration policies. The Chapters examine the EU and national approaches and narratives in countering irregular entries and stay in the Union, as well as expulsion policies, including of EU policies on the expulsions of irregular immigrants. Specific attention is given to the consequences of policies of criminalisation of irregular immigration, search and rescue at sea and of humanitarian assistance, as well as the legal techniques used. The Chapters critically examine the assumptions of EU anti-human smuggling policies as mechanisms for addressing irregular immigration, and third country cooperation arrangements as remote control and delegated containment. On the other hand, Part III also includes an assessment of the EU legal migration acquis since the Tampere Programme and its relationship with the UN Global Compact on Migration (GCM) and international human rights and labour standards.

Part IV (*EU Criminal Justice Cooperation*) first examines the main developments and achievements in EU criminal justice cooperation. Particular attention is given to issues characterizing EU mutual recognition instruments such as the European Arrest Warrant, the European Investigation Order and possible solutions to the challenges that the EU system of mutual recognition faces in light of the principle of mutual trust. The Chapters also discuss challenges such as the digitalisation of criminal investigations and the e-evidence proposals package, the role of criminal law in protecting the environment, the European Public Prosecutor Office (EPPO) as well as the increasingly pressing issues and fundamental rights challenges related to detention and suspects rights in the EU.

Part V (*Police Cooperation*) explores EU's internal security policies and their role and contribution to the fight against crime and terrorism. They pay attention to EU instruments of cross-border law enforcement (police) operational cooperation as well as to the priority given to information exchange (preventive justice) and the interoperability of databases, as well as the involvement of EU agencies such as Europol (and the role of JITs) and eu-LISA. EU law enforcement and data sharing cooperation and agreements with third countries for purposes of fighting crime, and their impacts and compatibility with EU privacy and data protection standards, are given especial emphasis.

PART I
THE LISBONISATION
OF EU AFSJ POLICIES

1. TAMPERE AND THE POLITICS OF MIGRATION AND ASYLUM IN THE EU: LOOKING BACK TO LOOK FORWARDS¹

Andrew Geddes

1. Introduction

“Immigration has Europe in a pickle. With ageing populations and low birth rates, the European Union needs more people. But EU countries are already taking in plenty of foreigners, and many struggle to integrate. Popular resentment of immigration is increasing, and may rise further as economies slow and unemployment climbs. Meanwhile hundreds of illegal migrants risk life and limb on leaky boats to get to Europe every week”.²

While these words could have been written in 2020, they actually appeared in *The Economist* in October 2008 in an article that explored progress made since the Tampere and Hague Programmes of 1999 and 2004 and argued that these had struggled to achieve their objectives, not least because of an unwillingness to consider pathways for regular migration to EU countries. The

1 This chapter draws from research conducted as part of a European Research Council Advanced Grant awarded to Andrew Geddes for the project Prospects for International Migration Governance (MIGPROSP), award number 340430.

2 *The Economist*, ‘Letting some of them in’, 2 October 2008.

article concluded by stating that ‘For now, the illusion of tighter immigration controls confers domestic political benefits, even as its failings are ignored’.

This Chapter looks more closely at the politics of immigration both pre- and post-Tampere to show that policy and institutional developments since the 1990s have been powerfully shaped by events understood or represented as crises. These crises have often centred on numbers of migrants and concern about the potential for large scale migration. In addition to this, since 1999 it is also clearly the case that immigration has become a more important political concern across the EU. There is compelling research evidence that there is a heightened politicisation of migration, meaning relatively high issue salience combined with polarization.³ It has also been shown that immigration and European integration now form part of a new dividing line in European politics with the capacity to shape elections and governments.⁴

The Tampere Programme itself was not the driver of these important political developments that have more profound roots in social and political change in EU member states. The point is that that Tampere and subsequent efforts to develop common migration and asylum policies at EU level, have occurred at a time when immigration has become politicised and also an issue that divides both EU citizens and, of course, the member states.

2. The Constraining effects of Crises

Five distinct elements of the post-Cold War context after 1989 shaped the political context from which emerged the Tampere Programme: greater intensity of migration flows to and within the EU; all EU member states becoming to some extent countries of immigration and emigration; a growing policy role for the EU

3 S. Hutter and H-P Kriesi, *European Party Politics in Time of Crisis*, Cambridge University Press, 2018.

4 L. Hooghe and G. Marks, ‘A post-functionalist theory of European integration: from permissive consensus to constraining dissensus’, *British Journal of Political Science*, 39(1): 1.-23, 2009.

after the Maastricht Treaty came into force in 1993; ostensibly new manifestations of the immigration problem, for example growing concern about irregular flows, people-smuggling and human trafficking; and, finally a more intense politicisation of migration at both member state and EU levels combining both increased issue salience and increased polarisation.⁵

An immediate and specific effect in the early 1990s of the end of the Cold War was to generate concern about the potential for large-scale migration flows to western Europe from the ex-Soviet Union and its former satellite states in central Europe. In an academic account of these events, it was written that since the late 1980s security actors in national interior ministries and associated state-level agencies had already begun to connect their security concerns to potential large-scale flows from eastern Europe. What is more, they began to understand potential flows in terms of a crisis or potential crisis while taking at face value the idea of a 'flood' of immigrants moving to the EU:

The primary component of the crisis was the fall of the Iron Curtain and the subsequent flood of immigrants into the EC, and especially into Germany, which became the chief protagonist in institutionalizing justice and home affairs cooperation in the EU. What made a new EC policy space appear necessary and appropriate was that the two contextual changes coincided. The abolition of national frontier controls within the EC raised concerns about controlling migration and transnational crime, just as several EC states, especially Germany, confronted an immigration crisis.⁶

The break-up of former Yugoslavia led to increased flows of asylum-seekers, again with Germany as a preferred destination. Just over 1.5 million asylum seekers moved to Germany between 1989

5 A. Geddes, L Hadj Abdou and L. Brumat (2020) *Migration and Mobility in the European Union*, 2nd edition, Palgrave Macmillan.

6 W. Sandholtz and P. Turnbull, 'Policing and Immigration: The Creation of New Policy Spaces', in A. Stone Sweet, W. Sandholtz and N. Fligstein (eds.), *The Institutionalization of Europe*. Oxford University Press, p. 199.

and 1994. Framed by the idea of a migration crisis, the German government sought to 'export' the crisis to the EU level. Neighbouring countries to Germany in central and eastern Europe with the carrot of EU membership dangling in front of them were incorporated within the EU framework for migration controls via their designation as 'safe third countries' to which asylum applicants could be returned if they had passed through them on their way to an EU member state. The Dublin Convention of 1992 became a key legal instrument within what is now known as the Common European Asylum System.

By the end of the 1990s, the EU was beginning to elaborate measures on migration and asylum that, while dominated by inter-governmental cooperation as the *modus operandi*, showed that member states were also thinking collectively about migration and that their thinking about the causes and effects of migration – and, of course, who was doing that thinking – was having important effects on actions. The field has become more densely populated since, but it was national interior ministries that set the direction of EU cooperation on migration and asylum. It has been difficult ever since to deviate from the course that was set. Emerging during this period we can see underlying knowledge of the causes and effects of migration that became embedded at EU level and associated with the understanding that there was a major challenge to the external borders of EU member states - some more than others, of course - posed by large scale flows.

Concern about large-scale flows rested on particular understandings of the causes and effects of migration that motivated actions. Before Tampere in the early 1990s we can see the emergent shape of the EU 'policy core' with a focus on stemming those flows defined as 'unwanted' by member state policies.⁷

The 'normality' of EU cooperation on migration and asylum as it developed after the 1990s has been shaped by responses to inter-

7 F. Trauner and A. Servent 'The Communitarization of the Area of Freedom, Security and Justice: Why Institutional Change does not Translate into Policy Change', *Journal of Common Market Studies*, 54(6), 1417–32, 2016.

mittent crises that have centred on concern about real or potential migration flows and their controllability. This quote from an Austrian government official interviewed for the MIGPROSP project (see footnote 1) reflected on conversations with Dutch colleagues and illustrate this point about the influence of past events on current understandings:

I didn't have the feeling that there was really a new discussion [...] I always remember my Dutch colleagues in Brussels, who had been around since the 90s, what we are discussing, what we consider as new ideas, they've already been discussing that in the early 90s ... The difference now is with the crisis and this global attention that is being given with the [Global] Compact, I think this understanding now is also being created on the political level (Interior ministry official, Vienna, January 2018).

Similarly an official from the German Interior Ministry put it to the MIGPROSP research team like this:

we also feel kind of, yes, confirmed in the certain premises we always made. Unfortunately, sometimes not the right conclusions were drawn from the actual knowledge which was available here at the level of experts so that this enormous influx could take place in the dimension we have seen. (Interior ministry official, Berlin, March 2018)

This quote exemplifies the importance of looking back not only to provide a frame of reference but also to provide confirmation of an account of the causes and effects of migration that affects current assessments.

3. Changes in Underlying Politics Dynamics

We now move on to examine some of the quite profound changes in the social basis of European and EU politics that have occurred since 1999 and that have shaped the development of EU migration and asylum policy post-Tampere. The events of 2015 and 2016

when hundreds of thousands of people made perilous sea crossings were a massive humanitarian challenge and also a tragedy in terms of lives lost. The crisis, however understood, also conveyed to many EU citizens images of a loss of control, of disorder and as requiring measures to stem flows. As a European Commission official put it to the MIGPROSP project researchers:

Then you see the massive flows and then you see people walking on roads in Hungary, thousands of people walking and people get afraid, “what’s going on? What have we done?” Then that completely shifts the perception (European Commission official, Brussels, November 2017)

An Austrian government official observed to MIGPROSP researchers a change in attitudes from what he saw as an initial sympathy with the plight of migrants to a growing concern that things were getting out of hand:

I think you can definitely see a shift within the European public perception. The way the refugee crisis was seen in the beginning, it was overwhelmingly positive. In the end, everyone saw that it was getting out of hand and really was a risk to the overall system, straining everybody’s resources. (Austrian government official, Vienna, April 2018)

By 2016, migration had become a highly salient topic in European politics and, for example, played a key role in the UK’s Brexit vote in June 2016, the strong first round vote in the 2017 French presidential elections for Marine Le Pen, the re-entry of the far-right Freedom Party into the governing Austrian coalition in December 2017, the growth in support for the Lega in the March 2018 Italian elections, the anti-migration focus of the victorious Fidesz campaign in the April 2018 Hungarian elections and the salience of the migration issue in the May 2019 European Parliament elections.⁸

These kinds of events informed a particular understanding of

8 J. Dennison and A. Geddes ‘A Rising Tide? The Salience of Immigration and the Rise of Anti-Immigration Political Parties in Western Europe’, *The Political Quarterly*, 90(1), 107–16, 2018.

public attitudes to migration that sees attitudes as becoming more negative and as potentially driving support for anti-immigration political parties that oppose European integration. As an example of this, the former European Commissioner with responsibility for migration, Dimitris Avramopoulos, gave a speech to the EU Migration Forum in 2015 in which he said that:

We need to change the perception of the public opinion on migration. Our biggest concern is the rise of racism and xenophobia, fueled by populist movements across Europe. To communicate the positive contribution of migration, I intend to launch an EU-wide campaign to improve the narrative about migration in cooperation with Member States later this year.⁹

The issue of perception and calls to ‘change the narrative’ have been central to the ways in which governance actors, particularly those in an official role, made sense of migration and of how and why public attention became focused on the issue as this official put it to MIGPROSP researchers:

Yes, but where the light is on normally is also the problem in the sense that, if there is no public perception of a problem in the field of migration, there is no problem in itself. The problem is the public perception of the problem ... You decide how you perceive that issue and what makes it a problem. I need to provide solutions to your perceptions of migration. (Commission official, Brussels, October 2017)

There was broad agreement - rightly or wrongly - that the problem was lack of control and that measures needed to be introduced to restore controls and, as a result, to restore public trust. Understandings of public attitudes to migration play an important role in policy-making as an official from the Austrian interior ministry put it:

9 Avramopoulos, D. (2015) Keynote speech of Commissioner Dimitris Avramopoulos at the first European Migration Forum. Available from: http://europa.eu/rapid/press-release_SPEECH-15-3781_en.htm.

You cannot deny that public opinion has an influence on what we do because of the interaction with the political level [...] So, we must be close to public opinion. We must not follow it, but we must be aware of it and we have to reach conclusions which are at least compatible with public opinion. (Interview with civil servant, Vienna, January 2018)

The credibility of border controls is a key element of the response to public opinion, as understood. As an EU official put it:

Today I have minus 25 per cent arrivals on the Central Mediterranean route. Why? Because the borders are better controlled. So, in the short term it is a false assumption to tell me that the border controls do not work [...] The entire point [...] is we can discuss anything else once the border is up. (Interview, EU official, Brussels, October 2017).

There can be little doubt that this focus on controls has been a fairly constant component of EU migration governance since its inception in the late 1980s driven by concern about large numbers and also by fear of public backlash.

Given their important role, we now look at some key trends in public attitudes to migration. It is commonly assumed that anti-immigration sentiment across the EU is increasing, which can fuel support for anti-immigration movements and that efforts should be made to change peoples' attitudes. Looking more closely at the evidence suggests that there is actually little to suggest that a tide of anti-immigration sentiment is sweeping across the EU. Opposition to immigration is linked to issue salience – the importance people attribute to the immigration issue and not to generalised anti-immigration attitudes. But research evidence also suggests that support for and opposition to both immigration and European integration may be coalescing into a new dividing line, or cleavage, in European politics.

First, there is little to suggest that there is a rising tide of anti-immigration sentiment sweeping across the EU. Attitudes to migration from outside and from within the EU became more

favourable in most EU member states even during the so-called crisis after 2015, as was notably the case in Germany, which was the main destination. We should not take for granted claims that attitudes to migration have become less favourable when evidence suggests greater favourability over time.¹⁰

If attitudes are not becoming less favourable then how do we explain the increased support for anti-immigration political parties? Issue salience plays a powerful role in explaining the success of anti-immigration parties. Salience means the importance that people attribute to the issue. In the Autumn 2018 Eurobarometer survey, immigration was identified as one of the two most pressing concerns by 40 per cent of EU citizens. We shouldn't assume that these 40 per cent were all anti-immigration. It is likely that some were concerned from a more pro-immigration stance. There is, however, a fairly strong correlation between issue salience and support for anti-immigration political parties.¹¹ It isn't necessarily the case that Europeans have become more anti-immigration, but, rather, that latent concerns about immigration among sections of the population were being activated. This helps to explain why at, an aggregate level, attitudes can become more favourable, but, among more specific sections of the electorate, can become more hostile.

Finally, a wider point can be made about politicisation in relation to deeper-rooted patterns of political conflict in Europe. When an issue such as immigration becomes politicised it is more prominent in political debate, but it is also both more salient and there is greater polarisation between political parties on the issue. Research has shown how attitudes to immigration and European integration now form part of a new dividing line, or cleavage, in European politics. This has also been portrayed as a dividing line between the winners and losers of globalisation or as between cosmopolitans and communitarians. The key observation is that significant research evidence suggests that opposition to European

10 Dennison and Geddes, *op. cit.*

11 *Ibid*

integration and immigration now form a durable component of political contestation in Europe and that they can also structure competition between political parties.¹²

4. Conclusion

This Chapter has explored some of the underlying political dynamics that have prefigured and configured the efforts to attain the Tampere objectives and those contained within subsequent programmes and agreements. Two main points have been made. First, that concern about large-scale migration – whether actual or potential – have played a key role in policy development since the 1990s and this seems set to continue. Second, since 1999, it is clearly the case that immigration has become a much more contentious issue in European politics and that this, because of the shift of competences to EU level, has also led to politicisation of European integration. While it is not the case that attitudes to immigration have become less favourable, it is also the case that immigration has now become a powerful dividing line in EU politics between citizens and between member states.

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2. THE APPEAL TO TAMPERE'S POLITICS OF CONSCIOUSNESS FOR THE EU'S AFSJ

Dora Kostakopoulou

1. Introduction

We stand at a privileged position between the past and future on the occasion of the 20th anniversary of the Tampere Programme.. This position enables us to assess the progress of the EU's Area of Freedom, Security and Justice (AFSJ) since the Tampere European Council (15 and 16 October 1999), which adopted the Tampere Programme, the entry into force of the Lisbon Treaty ten years later (1 December 2009) and the Stockholm Programme (2010) while, at the same time, looking forward in the light of the 2030 Global Agenda on Sustainable Development.

The Global Agenda has devised important priorities and targets with a view to 'stimulating action over the next fifteen years in areas of critical importance for humanity and the planet'. Among them is Goal 16 which sets out the aim of creating peaceful and inclusive societies. This includes the provision of access to justice for everyone and the development of 'effective, accountable and inclusive institutions at all levels'.¹ Demonstrating exceptional insight and political leadership, the Tampere Presidency Conclu-

1 UN General Assembly, Transforming Our World: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

sions also addressed this twenty years ago.

The Tampere European Council initiated an ‘agenda of consciousness’ for the EU AFSJ. The timing was perfect. The Treaty on European Union (TEU), which metamorphosed the EU into a political union in 1993, had brought migration, asylum and the residence of long term resident through country nationals within the ambit of the Justice and Home Affairs Pillar of the EU, while it had introduced the institution of Union citizenship in the EC Treaty. The next Treaty, the Amsterdam Treaty, partially ‘Communitarised’ the Justice and Home Affairs Pillar of the TEU by bringing *inter alia* migration and asylum issues into the Community pillar. The Amsterdam Treaty came into force on 1 May 1999 – a few months before the Tampere summit.

When the Heads of State or Government met at Tampere, they agreed that ‘the challenge of the Amsterdam Treaty was to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice available to all. It is a project which corresponds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives’².

For this reason, the adopted ‘Tampere Milestones’ were of constitutional importance for the European Union. They were also normatively important for building ‘inclusive and peaceful societies’ in line with Goal 16 of the Global Agenda mentioned above. Their normative appeal was heightened by the attempted depoliticization of migration and asylum in European societies and a call for the transformation of personal and collective identities in the EU.

2. Tampere’s Politics of Consciousness

Tampere’s Milestone 1 noted that ‘from its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and

2 European Council, Tampere Presidency Conclusions, Brussels 15-16 October, SN 200/99, Milestone 2, pp. 2-3.

the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They also serve as a cornerstone for the enlarging Union'. And Milestone 3 continued:

This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.

Such milestones emphasised that the long-term project of European institutional design is anchored on freedom, human rights, democratic institutions and the rule of law. Tampere highlighted the fact that the EU is a political community based on fundamental values long before the entry into force of the Lisbon Treaty which expressly refers to Union's values in Article 2 TEU. In these milestones we also witness the linkages between internal mobility and the EU's openness to 'Others', that is, to third country nationals seeking 'protection in or access to the EU'.

The formulation of common policies on asylum and migration based on a just and compassionate relationship with the Other were not seen as self-standing; they were correlative with, and co-dependent on, the presence of democratic institutions, respect for human rights and rule of law-based constitutional frameworks. In other words, in Tampere the Heads of State or Government of the Member States awoke the EU's self-consciousness through a

number of reflections on its role in the world and its entanglement with 'Others', that is, third country nationals seeking entry, residence or recognition and equal rights in the EU. The priority of this interrelationship is striking even today; it subverted the language of market integration featuring in European Union documents and other insular monologues.

For the first time, we have had an explicit recognition on the part of the leaders of the EU Member States that 'the Other' cannot be excluded from the internal process of EU's self-development. This interplay between internality and externality created a vision of a different political space. A political space that goes beyond gestures of giving visibility to the claims of migrants and to the plight of refugees and asylum seekers and even beyond declarations of condemnation of their unjust and disrespectful treatment. It was a vision about sharing a political space and, thus, a vision of creating a shared, common, political space based on mutual respect and principled politics.

As Milestone 4 stated, 'the aim is an open and secure Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration of those third country nationals who are lawfully resident in the Union'. In sum, the Tampere milestones showed that the EU is not a self-bounded and self-referential entity; it achieves its presence and purpose through reflection on its aims, objectives and values and on its relationship with its internal and external citizens and subjects. This means that the European integration process cannot be viewed as prior to, and independent from, how the EU regulates the European socio-political space and the role of human beings within it.

3. The Politics of Respect for Fundamental Rights

Ten years later, the AFSJ's Stockholm Programme built on Tampere and adopted a number of ambitious policy orientations and

priorities in order to make the AFSJ a reality. It brought forth a clear 'citizens-oriented' and 'rights-based' perspective and re-balanced 'freedom' in the area of freedom, security and justice.

As the Commission's Action Plan Implementing the Stockholm Programme stated: 'The main thrust of Union's action in this field in the coming years will be 'Advancing people's Europe', ensuring that citizens can exercise their rights and fully benefit from European integration. ...A European area of freedom, security and justice must be an area where all people, including third country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union'. And under Priority 2, entitled 'Ensuring the protection of fundamental rights', it noted: 'The protection of the rights enshrined in the Charter of Fundamental Rights, which should become the compass for all EU law and policies, needs to be given full effect and its rights made tangible and effective. The Commission will apply a "Zero Tolerance Policy" as regards violations of the Charter'.³

Migration and asylum laws and policies had to operate under the shadow of the EU Charter of Fundamental Rights. As regards migration, the Commission observed: 'robust defence of migrants' fundamental rights out of respect for our values of human dignity and solidarity will enable them to contribute fully to the European economy and society. Immigration has a valuable role to play in addressing the Union's demographic challenge and in security the EU's strong economic performance over the longer term. It has great potential to contribute to the Europe 2020 strategy, by providing an additional source of dynamic growth'.⁴ In addition, the Action Plan's Annex on ensuring the protection of fundamental rights included seven concrete actions which had to be implemented by 2011.

3 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, Brussels, COM(2010) 171, p. 3.

4 Ibid, p. 7.

Both Tampere's 'politics of consciousness' and Stockholm's 'politics of respect for fundamental rights' made it clear that breaches of fundamental rights, rule of law and democratic standards were not purely domestic, that is, national, matters. On the contrary, they were, and continue to be, vital issues of common European concern. Such issues need to be dislodged from the anchor of national sovereignty because illiberal practices, infractions in the operation of democracy and human rights violations detrimentally affect the Union, the European Area of Freedom, Security and Justice and the EU's relations with its citizens and subjects. Any departure from the constitutional fundamentals affects both the concrete operation and the legitimacy of the European Union in addition to placing individuals in precarious positions and restricting the exercise of their rights in the European political space.

Tampere and Stockholm, therefore, delineated a principled way forward for many relevant contexts by showing the correlation of issues and their importance for meaningful European cooperation and solidarity and for the betterment of the life words of human beings in the EU. For this reason, I would argue that the present challenge facing the European Union is not so much one of devising new priorities and policy-goals for the AFSJ, but of realising the proclamations of Tampere and Stockholm and implementing the priorities decided by European leaders twenty and ten years ago. It is certainly the case that concrete advances have been made since 1999 and 2009; the EU has now its legally binding 'Bill of Rights' which complements, updates and advances the European Convention on Human Rights. But at the same time, as certain Member States' commitment to liberal democratic values becomes weakened and endangered by the aggressive manifestations of populist neo-nationalism and authoritarian executive rule, Tampere's and Stockholm's explicit call for a pan-European convergence on human connectivity, respect for the rule of law and respect for values becomes pertinent.

In the face of binary oppositions, polarisation and divisions in European societies, increasing manifestations of racism, xenophobia and hate speech and the disrespectful treatment of EU

citizens in certain Member States, EU institutions need to uphold the values of democratic engagement and respect for human rights and the rule of law. This should be done as a matter of principle. For respect for democracy is not tantamount to mobilising consent, mirroring public opinion, and delivering effective executive governance. It is about airing the values of fundamental rights, promoting connectivity among people, individuals, groups, societies and governments, and eschewing rigidly stratified hierarchies among 'us' and 'them' and 'in-betweens'. It is about respect for human dignity and the promotion of open and inclusive societies.

Through concrete deeds, the EU must resist the otherisation of humanity, that is, the tendency of national executives and privileged majorities to separate, discriminate and stigmatise people or to make them non-persons which is prevailing, and expanding, in other parts of the world. It has to do the right thing in all its actions.

For example, every year approximately one third of the newcomers are children – many of them unaccompanied, who are in need of protection and not detention. Some governments have closed their ports to search and rescue boats leaving migrants and refugees, including children, stranded on board often without drinking water and food. There is also a gap between the EU's internal fundamental rights policy and its external commitment to human rights and even with respect to the former significant challenges remain. Tackling racism, discrimination, intolerance and xenophobia is an urgent challenge.

Ensuring that the Member States implement the Charter of Fundamental Rights in their administrative, legislative and judicial procedures and that their actions are Charter compliant, in line with their legal obligation to respect, observe and promote the application of the Charter,⁵ is another significant challenge. As the Commission's Action Plan observed in 2010, 'in a period of change, as the world only starts to emerge from the economic and financial crisis, the European Union has more than ever the duty to

5 Article 51(1) EUCFR and Article 54 EUCFR on the prohibition of abuse of rights.

protect and project our values and to defend our interests. Respect for the human person and human dignity, freedom, equality, and solidarity are our everlasting values at a time of unrelenting societal and technological change. These values must therefore be at the heart of our endeavours.⁶

4. Conclusion

Evidently, the Tampere and Stockholm programmes take us beyond the festival of breaches of the rule of law and the desired untrammelled dominance of executive ideologues we have been witnessing since 2015. We understand where we stand today in comparison to where we stood in 1999 and 2010 and what needs to be done. As a critique of the present and a principled vision for intersocietal and interpolitical life in the future, the Tampere Milestones continue to be impressive!

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6 Action Plan, n. 3 above, p. 2.

3. THE AFSJ TWO DECADES AFTER TAMPERE: INSTITUTIONAL BALANCE, RELATION TO CITIZENS AND SOLIDARITY

Jörg Monar

1. Introduction

While the October 1999 Tampere European Council meeting can be regarded as one of the most important European Council meetings ever in terms of its impact on the subsequent evolution of the EU's Area of Freedom, Security and Justice (AFSJ) the major impetus it has given would not have been possible – and had as its essential basis – another breakthrough for what previously had been called Justice and Home Affairs (JHA) just a few months before: The entry into force of the Treaty of Amsterdam on 1 May 1999 with its major JHA reforms under Title IV TEC and Title VI TEU.

In spite of the limitations of the 1999 reforms in terms of decision-making procedures and 'pillarisation' no subsequent overhaul of the AFSJ, that of the 2009 Treaty of Lisbon included, has come close to the constitutional innovation and opening up of

new political and legal potentialities engendered by the Treaty of Amsterdam. It is the great merit of the Tampere European Council to have acted upon and seized at least some of these potentialities, and have done so rapidly after the entry into force of the new Treaty, and the Finnish Presidency of 1999 should be given full credit for having created the framework for the EU's Heads of State or Government to exercise a leadership which today is all too often missing.

The aim of this contribution is selective, focusing only on three aspects of the evolution of the AFSJ since the momentous year 1999 but each of which can be regarded as being of constitutional importance in both a legal and a political sense: The institutional balance, the relation to the citizen as a beneficiary and the progress made with the principle of solidarity between Member States.

2. The Evolution of the Institutional Balance

The question of the institutional balance is one of particular relevance in the EU context, both constitutionally and for policy-making outcomes, as each of the main policy-making institutions – the European Parliament (EP), the Council, the European Commission and (only formally vested with a legal status as such since the Lisbon Treaty) the European Council - represents a different section of interests and legitimacy.¹ Any shift in the balance means a shift in the balanced interaction between representatives of different interests with their specific claim to legitimacy, rendered all the more important as the EU system is not based on a conventional concept of separation of powers.

In formal terms both the EP and the European Council have been strengthened by Amsterdam and Lisbon reforms, both generally and specifically as regards AFSJ:

1 For a discussion of various aspects of the concept of institutional balance see this regard the Governance (2002). Special Issue on the Institutional Balance and the Future of EU Governance. Governance. *An International Journal of Policy, Administration and Institutions* 15(3): 309-41, and Moskalenko, O. (2016), "The institutional balance: a janus-faced concept of EU constitutional law", *Politeja*, No. 45: 125-144.

The EP has benefited from the extension of co-decision to nearly all AFSJ fields, extended “consent” powers regarding international agreements (218(6) TFEU) as well as the attaining of full co-decision with Council under the budgetary procedure.

The position of the European Council has been reinforced by its formal recognition as an EU institution, enhanced continuity and visibility because of its permanent President, a new quasi-legislative role because of its possibility to intervene in the ordinary legislative procedure in case of the activation of the “emergency brakes” in the criminal justice domain (Articles 82(3) and 83(3) TFEU) and, last but not least, through the now formalized power to define “strategic guidelines for legislative and operational planning” regarding the AFSJ (Article 68 TFEU).

The European Commission’s position, much strengthened by the Amsterdam Treaty, has been less so much by the Lisbon Treaty reforms. While the Council (of Ministers) has not lost any of its previously existing powers, it can be regarded as a relative loser compared to “old third pillar” times, because of the relative strengthening of the positions of both Parliament and European Council, to a lesser extent also because of the reinforcing of the Commission’s right of initiative by both the Amsterdam and Lisbon reforms.

Institutional practice never exactly mirrors treaty changes, and if we look at the evolution of the institutional balance since Tampere the same can also be observed with regard to the AFSJ:

The EP’s ascendancy has not been as substantial and extensive as the treaty changes might have initially suggested. While there was a surge of EP political and scrutiny activism after the passage to co-decision in the “communitarised” (Title IV TEC) AFSJ fields in 2004 – with a strong focus on fundamental rights protection and asylum standards – The Parliament’s changed composition in 2009-2014 legislative term often resulted in European People’s Party (EPP) centered majorities which adopted positions relatively close to those of the Council (such as in the case of the 2013

asylum package). During the last term (2014-2019) the EP then ended up on more than one occasion be outmaneuvered and marginalized by the Council (and indirectly the European Council) such as in the case of the 2015 Council Decision on relocation² where it was left with the unpleasant choice of either insisting on its full legislative co-decision rights or saving the contested relocation scheme. The EP was also sidelined with regard to the decision-making on the EU-Turkey Statement of 18 March 2016³ on the Facility for Refugees, deprived of any real say regarding the cooperation an “readmission arrangements” (different from “readmission agreements”) with countries such as Afghanistan⁴, Ethiopia, Mali, Nigeria and Senegal) and was unable to prevail on the Commission to suspend the EU-US Privacy Shield⁵ because of the ongoing concerns within the EP about adequate fundamental rights protections of data-subjects.

Even some of the apparent breakthroughs for EP priorities in the AFSJ domain, if looked at more closely, cannot be regarded as indicators for a substantial shift of the institutional balance in favour of the EP: One such case was the initial rejection of the EU-US Swift agreement in February 2010 – heralded at the time as a major assertion of the EP’s new external relations powers in the JHA domain - which was, however, followed in June 2010 by the Parliament’s endorsement of an in substance largely unchanged revised version⁶, mainly because of a shift of position by the Group

2 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece OJ L 248, 24 September 2015.

3 European Council document: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

4 The “arrangements” in the case of Afghanistan, for instance, have taken the form of a negotiated but legally not binding “Joint Way Forward” document on readmission agreed with the Islamic Republic of Afghanistan in October 2016 (https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf) on which the EP was not even consulted.

5 Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 on the adequacy of the protection provided by the EU-U.S. Privacy Shield, OJ L 207, 1 August 2016.

6 Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, OJ L 195, 27

of the Alliance of Liberals and Democrats for Europe (ALDE). Another example is the inclusion of the Joint Parliamentary Scrutiny Group (JPSG) in the 2016 Europol Regulation⁷ for which the EP fought hard, but which cannot be regarded as an unqualified strengthening of the EP in the (particularly sensitive) police cooperation domain as it has to share membership of the JPSG with representatives of national parliaments which do not necessarily share its concerns and priorities.

Compared to the Parliament the European Council appears much more as the ‘winner’ of the evolution of the institutional balance since 1999, and this less so because of the aforementioned treaty changes but because of political and institutional practice. Several factors can be identified:

The first is the European Council’s self-affirmed role in broad political and even legislative planning for the AFSJ, as shown first by the initial five-year programmes (Tampere, Hague, Stockholm) then by the 2014 Strategic Guidelines and finally – though in a much less detailed form – by the 2019-2024 “New Strategic Agenda” adopted on 20 June 2019.

Another is the European Council’s unchallenged – and arguably even more and more reinforced role – as supreme crisis manager. After Tampere this was first shown forcefully after the 9/11 attacks, and since repeatedly, with the 2015/16 refugee/migration crisis probably marking the peak so far.

Last but not least the European Council’s heavy weight on the institutional balance is also shown through both its active engagement in using mechanisms/tools outside of the EU legal framework – such as in the case of the 2016 EU-Turkey Statement – and in encouraging and covering the use of such practices by the Council – such as in the case of the “readmission arrangements” with certain countries of origin and the use of the “EU Emergency

July 2010.

7 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol), OJ L 135, 24 May 2016.

Trust Fund for Africa”, launched in 2015, with its mixed financial arrangements in the migration domain, bypassing in that way normal EP scrutiny procedures.

On a number of important issues – such as that of the September 2015 relocation decisions and the repeated authorizations of extensions of the temporary reintroduction of internal border control by several Schengen members subsequent to the 2015/16 crisis – the European Commission has appeared in recent years like an executive agent of Member States’ interests negotiated in European Council sessions rather than an independent initiator and motor of AFSJ policies. Often enough also the Council (of Ministers) has been superseded in crisis situations by the European Council as the main centre of decision-making, being reduced to the role of a ‘super-COREPER’ in terms of either preparing compromises at the Heads of State or Government level or dealing with the ‘fall-out’ of their decisions (or non-decisions) as, again, in the 2015/16 migration/refugee crisis situation.

If the European Council has thus emerged also in the AFSJ context as the institution most benefitting from the evolution of the institutional balance this is not necessarily in all respects a negative evolution – especially when it comes to the need to act decisively, as it was clearly the case in the aftermath of 9/11 and in the 2015/16 Schengen crisis. Given the relative weakness of the European Commission it is difficult to see where else decisive decision-making should come from in today’s EU. However, the ascendancy of the European Council can obviously also be a factor of paralysis in case of persistent failure to arrive at a sustainable consensus – as in the case of the reform of the Dublin system, solidarity in the asylum/refugee policy domain and the Article 7 TEU responses to developments in Poland and Hungary. Needless to say that the lead role the European Council has assumed in the AFSJ domain does also not help with the parliamentary democracy credentials of the EU, at least as far as the EP’s position is concerned.

3. The Relation of the AFSJ to the Citizen as Beneficiary

As a fundamental treaty objective the AFSJ has also the distinction of being so far the only of the fundamental objectives which is explicitly “offered” to the EU’s citizens (Article 3(2) TEU), and a strong reference to citizens as the AFSJ’s intended beneficiaries was also made in paragraph 2 of the Tampere European Council Conclusions and – ten years later - again in the 2009-2014 Stockholm Programme whose primary stated objective was to strengthen the AFSJ “for the benefit of the citizens” and therefore to focus its further development “on the interests and needs of citizens”.⁸

There can be no doubt that within the context of AFSJ the EU is delivering real added value compared to what purely national measures of the Member States could provide in terms of enhanced cross-border freedom, cross-border security and cross-border justice. In spite of its recent controversies and partial suspension the Schengen ‘open borders’ system, which is at the core of the AFSJ, constitutes an important element of ‘freedom’ within the EU. Citizens enjoy a higher degree of protection because of EU internal security and external border management cooperation - with the agencies playing an important role in this respect. Last but not least cross-border access to justice within the EU has been much improved. It has been frequently criticized that EU decision-makers have focused more on internal security and (restrictive) migration management than on ‘freedom’ and ‘justice’ within the AFSJ, but given that migration management and internal security challenges rank high on the list of concerns of EU citizens – as regularly shown by Eurobarometer opinion polls – this focus is surely not without its justification.

Yet, the delivery by the EU on the fundamental treaty objective of the AFSJ remains fragile, patchy and largely remote from the citizens as its designated beneficiaries: It remains fragile because Member States have retained primary competence as well as exten-

8 European Council: The Stockholm Programme - An open and secure Europe serving and protecting the citizens, OJ C 115, 4 May 2010.

sive safeguards protecting national interests under the Treaties. The Schengen system is the primary – though not the only - example for this fundamental fragility of the AFSJ as it has not only been affected since the beginning of the AFSJ by the opt-outs granted to Ireland and the UK but also came close to disintegration during the 2015/16 migration/refugee crisis with five Member States still today applying controls at internal borders. The Schengen ‘open borders’ system remains most visible “freedom” dimension connected with the AFSJ but this visibility cannot any longer be taken as a universally positive one, with many EU citizens in a context of populist fear-mongering, especially since the 2015/16 crisis, regarding the Schengen open borders as a problem and even a threat rather than an element of freedom.

The AFSJ also remains patchy because AFSJ related EU policies have in many cases left wide margins of autonomy to both national legislation and national authorities when it comes to achieve common objectives: While these margins of autonomy have been narrowed in parts of civil and criminal justice cooperation as well as in the asylum field they continue to be significant even in those and remain very large indeed in the internal security and migration management fields.

Last but not least, the EU citizen remains – except in the case of a very limited number of legal instruments establishing enforceable rights (such as the 2003 legal aid Directive⁹) - very much an ‘indirect’ beneficiary of the AFSJ as the above mentioned clear benefits are largely provided to him via the national authorities operationally in charge. The latter can indeed be regarded as the primary direct beneficiaries of the AFSJ because of the extensive facilitation and support which AFSJ legislation, structures and mechanisms offer to the cross-border cooperation between national authorities. This is surely not a negative result as such – quite the contrary when it comes to identify value added of the AFSJ – but it means that the AFSJ remains ultimately fairly remote from and invisible

9 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31 January 2003.

to the EU citizen, with the positive effects of EU legislation and cooperation being largely ‘hidden’ behind the primary delivery of ‘freedom, security and justice’ by national authorities. With respect to the contribution of the AFSJ to the European construction as a whole this seems regrettable as the only of the fundamental treaty objectives with a constitutionally provided link to European citizens appears in practice more like an ‘area’ for Member State cooperation than one for citizens. This makes it unlikely that the AFSJ can help the Union much with its current challenges of contestation and questioned legitimacy.

4. Solidarity as a Constitutional Principle

If one looks at the Tampere European Council Conclusions today one of its most striking ‘blank spots’ is the absence of any explicit reference to EU “solidarity” with regard to the asymmetric pressures Member States may be facing, especially as regards asylum and immigration policy and external border management. However, there is a rather prudently formulated mentioning of at least one solidarity dimension in paragraph 16 where one reads that “the European Council believes that consideration should be given to making some form of financial reserve available in situations of mass influx of refugees for temporary protection”, and it should be mentioned that Article 41 TEU, introduced by the Treaty of Amsterdam, had at the time just opened the possibility to charge JHA administrative and operational expenditure also in the “third pillar” domains to the EU budget.

Yet these were still rather tentative initial steps at the time of Tampere, and the increasing recognition – and codification within the Treaties (especially through the Lisbon reforms, mainly Article 80 TFEU) – of the principle of solidarity which we have seen since can arguably be regarded as one of the most significant constitutional developments in the context of the AFSJ over the last 20 years. Solidarity is, of course, not only a financial issue, and within the AFSJ solidarity is today provided by host of different mechanisms (information sharing, deployment of experts, border guards)

and structures (Europol, Eurojust, the European Border and Coast Guard Agency and Corps, the European Asylum Support Office) well beyond the allocation of supporting financial resources. With major asymmetric pressures on Member States in key policy fields the AFSJ can serve as good indicator for the progress and the persisting limitations of solidarity between Member States within the EU more generally:

On the one hand one can clearly conclude on a significant growth of solidarity instruments and mechanisms in the fields of asylum, migration and external border management. The financial and operational solidarity mechanisms also serve at least to some extent the purpose of providing assistance to the Member States which are subject most to asymmetric pressures, and the overall increase in volume of the financial solidarity instruments under the 2014-2020 Multiannual Financial Framework (MFF) at a time of prevailing austerity both at the European and the national level indicates a higher political priority for solidarity in the JHA domain. It is worth underling also that operational solidarity through the making available of national capabilities (in the context of “joint operations” and the sharing of joint capabilities through the AFSJ agencies) has not only become a very substantial dimension of solidarity within the AFSJ, but arguably also its most sophisticated and-compared to traditional financial assistance instruments-most original form.

On the other hand, however, the limitations of solidarity within the AFSJ remain significant:¹⁰ Although the legal framework has been strengthened by the Lisbon Treaty reforms of 2009 (especially through aforementioned Article 80 TFEU) and recent legislation and financial solidarity instruments have been expanded significantly there are still limitations to the duty to assist or the right to be assisted, and the content of the principle remains only vaguely undefined. The overall EU financial support volume also

10 A critical review of different dimensions of solidarity within the AFSJ is offered by in the special issue TD. Thym and E. Tsurdi (eds) (2017), “Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions”, *Maas-tricht Journal of European and Comparative Law*, Vol. 24: pp. 605-762.

remains rather modest in comparison with the extent of the asymmetric challenges some Member States are facing, and it allows primarily only for 'reactive' short-term emergency and pilot scheme support-which makes it difficult to address more fundamental asymmetric challenges and structural capacity deficits of Member States. A further problem is the comparatively weaker development of solidarity instruments in the fields of police and judicial cooperation in criminal matters relative, although major risk and capacity imbalances between Member States also exist in these fields.

Overall solidarity in the EU justice and home affairs domain can today clearly be regarded as a reality, which it was not yet in any substantive sense at the time of the Tampere European Council twenty years ago, but also as a still fragile and incomplete one. Its progress seems to depend more on pressures reaching the stage where they can put the sustainability of the AFSJ and hence the interests of most or all Member States at risk-as this was the case during the 2015/2016 migration/refugee crisis-rather than a permanent strong commitment to help Member States affected by serious pressures and capacity deficits.

For solidarity in the EU more generally this means that in a policy domain where there are clearly identifiable solidarity needs an essentially functional rationale prevails: Solidarity instruments are primarily considered useful and necessary only to avert systemic risks, and they are consequently mostly designed to address situations in which such risks can become acute. This does not only privilege short-term 'reactive' responses over more long-term 'proactive' policies but also shows that solidarity in the EU is still more of an instrument to address certain functional challenges rather than a community value and constitutional principle.

The next 2021-2027 MFF will largely determine to what extent the EU on its own can become active (or not) on the solidarity side and thus be a crucial test for the Member States' willingness to fill this principle, which is both of major constitutional and policy relevance, with more substance.

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4. TWENTY YEARS LATER: THE LEGACY OF THE TAMPERE CONCLUSIONS

Kimmo Nuotio

The Tampere Summit was a milestone as was the entering into force of the Lisbon Treaty ten years ago. It is the right time today to reflect on both what has been achieved as well as on what should be done in the years to come.¹ In fact, when we read the Tampere conclusions today, we find surprisingly many ideas which continue to be relevant today. Tampere not only set the AFSJ high on the political agenda, but we find important references to a commitment to European values as well: human rights, democratic institutions, rule of law.

The development of EU in its legal dimensions has some interesting features. There have been times of rapid development, and preceded or followed again maybe by years of slow progress. AFSJ has not been an exception. Often, in order to move fast, a sense of crises has been needed. The first years of the new Millenium were marked by a determination as regards AFSJ policies. The difference compared to the Maastricht era, when rather little was achieved, was significant. The fight against terrorism and the measures against organized crime, two high-profile criminal law topics, were suddenly very much in the focus. The framework decision

¹ As regards a first such review, please refer to Frände, D., Liukkunen, U., Sankari, S. and E. Storskrubb (2006).

on Terrorist Offences and on the European Arrest Warrant were passed in 2002 as urgent matters. These negotiations were carried out under heavy pressures. The adoption of the two FD's were a sign of that finally the EU was able to introduce measures which changed the entire legal landscape in the area of legal cooperation in the field of criminal law. The push for reform was strong, even if it was clear that this was not an easy exercise.

Preparations for the constitutional treaty and drafting of Charter on Fundamental Rights and Freedoms were soon started. The Schengen law became part of EU regulations. Eurojust was launched. Both the pace and the level of ambition were breathtaking. Even though the preparations for the Constitutional Treaty failed, the main contents of that draft were included in the Lisbon Treaty, which once again reorganized much of the legal frameworks of this area, and become another milestone.

If we now look back and search for ways to describe the (hi) story of 20 years since the Tampere, what would be the words best to capture the essential about these processes of development? What is the legacy of Tampere?

Especially if we think about the justice and home affairs, we could talk about *maturing*. Before the Lisbon Treaty, the limits of the legislative mandates were unsure and the ECJ had to pass rulings on disputes between the Commission and the Council. The Parliament only had a marginal role. A strong strategic push from the European Council was needed. The protection of the fundamental rights as well as the law-making 'EU constitutional processes' were underdeveloped, which risked leading to imbalances.

The Lisbon Treaty created a much more coherent framework. The (formal) introduction of the Charter of Fundamental Rights and Freedoms was particularly important since the developments of EU Area of Freedom, Security and Justice concerned topics that were particularly sensitive as regards the protection of the rights of the individuals. The aim for the EU to join the European Convention of Human Rights deserves a mention as well, even though this process has faced some rather serious hurdles.

Since the Lisbon times, a legally more balanced approach has prevailed, but the home work of updating the FD's of the Amsterdam era is still far from completed. Maturing thus also means taming of some of the excesses. The post-Tampere period was a period of strong political steering and also of experimenting, and this period become something special also due to the rise of security issues around the globe – a process which was, to some extent, a coincidence.

There were, however, other signs of maturing as well than just the constitutional development: the discussions on the criminal policy principles for the EU should be seen in that light. The new principles that both the Commission and the European Parliament subscribed were also built on scholarly views and the long European legal tradition.² The criminal law scholars had felt that a set of principles should be formulated so that the European law in this area would better fit the ways in which these things were dealt with within the spheres of the member states.

In Tampere, the mutual recognition principle was recognized as the cornerstone principle. The EAW system replaced the burdensome and time-consuming extradition procedures of previous years. Mutual recognition principle was built on mutual trust, or rather, the presumption of mutual trust.

The problem today is, however, that this presumption of mutual trust may sometimes be contested. This is only logical: trust cannot be blind. Experiences of injustice are particularly informative. Amartya Sen has presented the idea that we do not need to know what perfect justice is since as long as we identify injustices, we can navigate our way further.³ We need to be careful in that we address issues of justice and injustice, if we wish to build trust.

2 Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Brussels 20.9.2011, COM(2011) 573 final; European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI).

3 Sen, A. (2009).

As regards the EAW, the European Parliament has in 2014 invited the Commission to initiate a process of amending the FD on the EAW in order to fix a set of obvious problems of the original FD. The fix would include the inclusion of a proportionality test which would help avoid abuse of the EAW. Thus far, the Commission has yet not taken this further.⁴

The issues regarding rule of law problems which have to do with possible interferences in justice in domestic legal systems have further stressed the need to ensure that the rights of the individual are not at stake when the European systems are at work. One of the recent examples of such issues is the EUCJ case LM C216/18 PPU, a request for a preliminary ruling from an Irish court in a case concerning surrender of the suspect to Poland on the basis of the EAW. EUCJ ruled in July 2018 that it is very central that independent courts are able to give full legal protection to the individuals that face a surrender. It thus confirmed the idea that trust cannot be blind, but the legal protection needs to be looked at in the circumstances of the individual case.⁵ In today's Europe the issues relating to the rule of law have become real challenges. At the same time as the legal frameworks on the EU level have matured, paradoxically, the rule of law problems on the national level have become visible and are, for good reasons, receiving increasingly attention.

The principle of mutual recognition has the advantage that it can be used even when the national norms have not been unified. Over the years it has, in any case, become obvious, that the core values need to be shared by all key actors in the field. Otherwise the principle of mutual recognition itself starts losing its rationality. We have been experimenting, and we have learned a lot.

This reminds me of the story of Billy Bixbee who finds a tiny dragon in his bedroom. His mom tells him, "There's no such thing as a dragon!" This only makes the dragon get bigger. He grows, and grows, and grows, until he's bigger than Billy's house. Only when the mom admits that the dragon exists, it starts to shrink. We should be mindful of this lesson and not let the dragon grow

5 Case C216/18 PPU, EUCJ, Judgement 25 July 2018 (Grand Chamber).

too big.

The rule of law principle was the background presupposition behind much collaboration, and one which has become all the more important due to the wide application of legal instruments based on the mutual recognition principle. It has kind of come as a surprise that this principle, which never in fact was clearly legally formulated, no longer can be taken for granted, but requires discussion, explication, and attention.

Another catchword would be comprehensiveness, even holistic approach. This has become increasingly visible through the developments during recent post-Lisbon years. In the latest phase we have started speaking about sustainability, development, and climate change. The references to UN agenda 2030 are getting frequent. European security is no longer an internal matter only, but also has to do with what happens outside of Europe; in Africa, for instance. The links between the EU's internal and external policies have become obvious together with a more global nature of the phenomena to be addressed.

In the UN SDGs rule of law counts as one of the 17 goals. The interesting phenomenon is that in fact rule of law development serves many other goals as well. This is what we have learned from the law and development discussions more generally. So, we are not only seeing consolidation and progress, but we more and more understand the necessity of a holistic approach based on shared values and principles. The trust necessary for the AFSJ to work properly requires a commitment to several ideas at the same time. Rule of law needs to be complied with, but the legal protection requires more than just that: the rights of the individual need to be protected, regardless in which role we face the law. We need rights of fair trial and rights of the defense. But we need services and rights for the victims as well. We need a functioning democracy. There was an awareness of all that already in Tampere, but it all has become more clear over the years.

There are no short term wins you could get by compromising

the core values. Maybe this is the biggest lesson of the entire exercise. There is no security without first making sure that the rights of the individual are effectively protected. We cannot trade off rights and freedoms against more security. There is something peculiar in the way AFSJ was introduced, since we actually started more with topics of security than on rights and justice. The measures against terrorism were leaning towards security, but if we look back, the measures were not that radical and did not change the balance of weights completely. It was still ordinary law, not any emergency legislation. The difference to the approach in the USA was significant.

We find in the European Council Strategic Agenda references to the significance of the protection of the fundamental rights and freedoms of the people. It seems that the approach of the EU is today more strategic, and more visionary than before: EU operates in the world, and brings forward values of sustainability, resilience, development.⁶

When we look at Europe in a global setting, we also start recognizing its profile more clearly. Europe stands out in its commitment to high legitimacy of law. This can be seen, for instance, in the measures against terrorism. The Charter, as well as the position of the European human rights law are renowned examples of the European approach. Europe is maybe even more internationally known for its values than for the individual measures of cooperation between the member states. It seems that the European Council which for long was the central strategic instructor of the policies in the field now already wishes to leave the details more to be dealt with on other fora.

New topics continue arising. The megatrend of digitalization concerns criminal justice as well. Issues of e-evidence are now on the drawing board, as well as e-justice more generally. The Finnish EU presidency has also introduced sustainability as the lead term. We read the following (emphasis, KN)⁷:

6 European Council (2019).

7 Sustainable Europe – Sustainable Future. Finland’s Presidency Program. Presidency of the Council of Europe 1 July – 31. December 2019, p. 11. <https://eu2019.fi/doc->

The EU has a key role *in promoting a comprehensive approach to security in Europe*. By combating cross-border crime and terrorism, and by efficient border management, the EU and its Member States can make the EU a safer place to live. This calls for a reduction in inequalities.

The overall internal security of the EU *should be approached on a broad front*, combining crime prevention with law-enforcement cooperation, judicial cooperation, border management, civil protection and other relevant sectors.

The EU Internal Security Strategy has provided a sustainable framework for concrete cooperation. Now is the time to evaluate its strengths and weaknesses. We need to identify possible threats to internal security in order to strengthen our response, keeping in mind the ever stronger nexus between internal and external security.

Reacting to crime requires full commitment to rule of law. And much more, as inclusive policies, crime prevention, need to be in its place as well. I personally welcome a holistic, comprehensive approach. We need to see that development requires sensitivity as regards breaches or challenges to justice. Amartya Sen in fact has it. There may be a sense in which we are going towards understanding the Area of Freedom, Security and Justice in terms of Senian human development. Even if this may sound a bit as exaggeration, understanding the core values broadly rather than narrowly seems to lead to more sound and balanced view, especially if we look at the long term development.

A global perspective and an integrated and comprehensive approach to security has also been stressed by the president-elect Ursula von der Leyen of the EU Commission.⁸ It follows that Europe should “support Africa in designing and *implementing its*

[uments/11707387/14346258/EU2019FI-EU-puheenjohtajakauden-ohjelma-en.pdf/3556b7f1-16df-148c-6f59-2b2816611b36/EU2019FI-EU-puheenjohtajakauden-ohjelma-en.pdf](https://www.consilium.europa.eu/media/11707387/14346258/EU2019FI-EU-puheenjohtajakauden-ohjelma-en.pdf/3556b7f1-16df-148c-6f59-2b2816611b36/EU2019FI-EU-puheenjohtajakauden-ohjelma-en.pdf)

8 A Union that strives for more (2019), p. 19.

own solutions to challenges such as instability, cross-border terrorism and organised crime". von der Leyen, also, among other things, proposes that the mandate of the EPPO should be broadened to cover terrorist offences. This proposal is interesting in that sense that there are rather few doubts concerning that fact the member states would not have actively investigated and prosecuted terrorist offences.

Anyway, I believe there is much sense in having a broad approach. It is highly important not to see that even many crime phenomena are closely linked with *social issues of exclusion and marginalization*. The first year of the new millennium took the security issues very high on the agenda. Professor Kaarlo Tuori has underlined that often one aspect has dominated the scene in the constitutional development of EU. Security constitutions tell about that; when security is the lead star, constitution gets weaker.⁹ With the Lisbon Treaty the Area of Freedom, Security and Justice has got a more balanced frame, one which promises of a more balanced relationship between the freedom, security and justice.

If 15 years ago it would have been rather strange to talk about anything like a shared European sense of justice, today we are seeing a development which has some potential in that regard. There are two reasons for that: 1) *Europe, as part of the world. The European values seem strong and different, when seen in the global context.* 2) The maturing of the EU in dealing with sensitive issues AFSJ, and the learning that *JHA needs an approach different from the internal market*. It needs an approach, a policy, which recognizes *the need for a non-instrumental approach*.

Criminal law is a product of enlightenment, and the EU policies should be informed by these traditions. And this is what is happening. EU AFSJ needs to be something which is working and effective, but which enjoys a high legitimacy and trust. *Together with the high legitimacy and trust comes also the high effectivity*.

The same tension deserves notice also as concerns the relation-

9 Tuori (2010).

ship between the EU policy-making and the UN sustainable development goals. The point is that the development goals are valuable even for countries which are more developed, since we all need to develop further. We need to be able to tackle new types of threats, security threats etc. Inequalities, poverty, climate change, all these are causing us security threats in the long run. We need to learn from the best practices of our member states how to tackle these. And we all have a lot to do. But we need to be clear about our values. We cannot support sustainable development of our societies, and other societies outside there in the world, unless we build on the values and principles that give the backbone for it all.

The trio joint programme of Romanian, Finnish and Croatian Presidencies from December 2018 carries similar values. With respect to cooperation in the field of justice, the Trio underlines the importance of further advancing mutual recognition. The Trio commits to further promote *e-Evidence* and *e-Justice*. The Trio would also pay attention to the operationalisation of EPPO and to strengthening cooperation with OLAF.¹⁰

Thus, in all, we start to see links between topics that used not to be that clearly connected. Rule of law and mutual recognition. Rule of law and trust. Rule of law and development. Rule of law and sustainability. Rule of law and human rights. Human rights and democracy and rule of law. Human rights and anti-terrorism.

When we refer to an Area of freedom, security and justice, we do not wish to give a priority to any single of the three values. We need freedom *and* security *and* justice, all at the same time. If we adopt a development perspective, it is all about addressing injustices, learning how to do this, for the sake of serving human development, which means, finally freedom. Seeing AFSJ in the context of sustainability makes us see the connections better.

I believe that this becoming visible in the EU documents is the true sign of maturing. The law in this fields needs to draw on legitimacy and shared values as recognized by the member states legal

10 Brussels, 30. November 2018, 14518/18, POLGEN 217. <http://data.consilium.europa.eu/doc/document/ST-14518-2018-INIT/en/pdf>

orders and the foundational documents of the EU and the Council of Europe. When building on that, when being seen in a context, it all becomes easier and clearer. A shared view on the basics helps all the actors to align their actions.

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5. TAMPERE PROGRAMME 20 YEARS ON: PUTTING EU PRINCIPLES AND INDIVIDUALS FIRST

Sergio Carrera¹

Respecting the ‘rules of the club’ and playing one’s proper part in solidarity with fellow Europeans cannot be based on a penny-pinching cost-benefit analysis along the lines (familiar, alas, from Brexiteer rhetoric) of ‘what precisely does the EU cost me per week and what exactly do I personally get out of it?’ Such self-centredness is a betrayal of the founding fathers’ vision for a peaceful and prosperous continent. It is the antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship. If the European project is to prosper and go forward, we must all do better than that.

Advocate General Sharpston Opinion, October 2019²

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- 1 This Chapter is based on S. Carrera (2020), 20 Years Anniversary of the Tampere Programme: Securitization, Intergovernmentalism and Informalisation, *Maastricht Journal of European and Comparative Law*, forthcoming.
 - 2 Opinion of Advocate General Sharpston in Cases C-715/17 *Commission v. Poland*, C-718/17 *Commission v. Hungary* and C-719/17 *Commission v. Czech Republic*, EU:C:2019:917.

1. Introduction: From Justice and Home Affairs to an Area of Freedom, Security and Justice

The 1999 Tampere Programme Conclusions marked the start of a new phase for the EU. Since the entry into force of the Maastricht Treaty in 1993, European cooperation on justice and interior portfolios fell under the label of ‘Justice and Home Affairs’ (JHA). EU JHA policies were placed under the EU’s former ‘Third Pillar’, which meant they escaped EC Treaties’ guarantees and were driven by, first, intergovernmentalism and nationalism; second, a lack of democratic scrutiny by the European Parliament and no judicial control by the Court of Justice of the EU; and third, a weak fundamental rights framework safeguarding individual’s rights (Guild, Carrera and Eggenschwiler, 2010).

The Tampere Programme was anchored in a principled agenda grounded on a commitment to the European integration’s foundations of ‘freedom’, based on the common values of human rights, democratic institutions and the rule of law. It set the objective of an ‘open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments’. The Tampere Milestones signified a first step towards the building of a common EU framework benefiting from EU democratic rule of law and fundamental rights protections. A new label was used – instead of JHA – to better capture that aspiration: an *Area of Freedom, Security and Justice (AFSJ)*.

It took until December 2009, with the entry into force of the Lisbon Treaty, for that goal to find direct expression inside the Treaties, in what is now Title V of the Treaty on the Functioning of the European Union (TFEU) (Articles 67-89). The Lisbon Treaty ‘constitutionalized’ many of the principles and priorities enshrined in the Tampere Programme (Carrera, 2012). The ‘Lisbonization’ of the AFSJ brought a majority of these policies under the Community method of cooperation and shared competence between the EU and Member States.

The intended goal was the liberalization and application of EU democratic rule of law checks and balances over all AFSJ policies, including those related to police and criminal justice cooperation (Carrera, Guild and Balzacq, 2010). This entailed limiting the role and discretion of Member States' Ministries of Interior inside the Council, recognizing the European Parliament's equal role as co-legislator (Carrera, Hernanz and Parkin, 2013), and granting full jurisdiction to the Luxembourg Court to interpret and review the legality of EU and Member States' acts.

The Lisbon Treaty brought another far-reaching contribution. It placed The EU's foundational principles and their substance to the forefront in Articles 2, 3, 4 and 6 of the Treaty on European Union (TEU). This led to the realization that the respect of principles like the rule of law, fundamental rights and non-discrimination is a *condicio sine qua non* for mutual trust and legitimation in AFSJ policies, particularly in those relying on the principle of mutual recognition of decisions.

This also resulted in the conversion of the EU Charter of Fundamental Rights (EUCFR) into the Union's legally binding 'Bill of Rights', which, together with the citizenship of the Union and the AFSJ, aimed at "placing the individual at the heart of its activities". Additionally, the Lisbon Treaty called for EU common policies on asylum, external borders and immigration to be based on the principle of solidarity and fair sharing of responsibility (Article 80 TFEU), and the fair treatment of third country nationals. Article 78(1) TFEU subjects EU asylum policies to a benchmark consisting of an unequivocal compliance with the international human rights principle of *non-refoulement* and the Geneva Refugee Convention.

This Chapter argues that notwithstanding the *principled guidebook* provided by the Tampere Programme, now enshrined and consolidated in the Lisbon Treaty, some of the most important EU legal and policy developments have directly and even consciously contravened and jeopardized these foundational principles. Some policy and legal instruments have been the result of disloyal, unconscious and self-centred ways of cooperation. They have also

meant displacing the individuals' at the periphery of EU AFJS policies.

Policy shaping and making in these policy domains have often been justified 'in the name of crises' affecting some EU Member States and, by association, the EU's own legitimation. Most recent historical instances have included the so-called 'EU 2015 humanitarian and solidarity refugee crisis' or various terrorism acts in several European cities. The politics of crisis utilized by home affairs and security actors can be read as strategies to reinvigorate or 'reinjecting back' ways of doing things at EU venues following similar long-standing logics of past EU *JHA* cooperation and consisting of securitization, intergovernmentalism and informalization.

2. Securitization

'Crises' are well known to serve as political catalysts for the adoption of previously existing and controversial ideas, offering new momentum for their expedited adoption in the name of emergency (Carrera, Santos Vara and Strik, 2019). Crisis are productive and opportunistic. The EU AFJS has been particularly sensitive to 'crisis labelling' and 'events-driven' politics. There is indeed little 'new under the sun' when it comes to the role of 'crises' in policy making and more concretely EU AFSJ cooperation.

It is by now well known that 'crises' have served as key catalysts or motors of Europeanisation dynamics. They have in turn secured continuation and reinvigoration of priorities set by Interior Ministries and EU home affairs actors, which have continued pursuing an *insecurity and policing rationale* over areas as diverse, and heterogeneous from security, as migration, asylum and judicial cooperation in criminal matters (Carrera, 2018).

Latest AFSJ developments show how this insecurity rationale has overtaken a traditional 'judicial cooperation in criminal matters' approach in countering crime. The resulting picture has been a blurring of the security and justice dimensions under the AFSJ rubric, giving preference to security over democratic rule of law

and liberty. Such blurred boundaries are of major concern as they pose profound challenges to the fundamental rights toolbox enshrined in Title VI of the EUCFR (Justice) and, more generally, to the principle of effective judicial and legal protection of individuals' rights envisaged in Article 19(1) TEU. This last provision celebrates the key role of independent justice and judicial review in the AFSJ, which in turn lays at the core of EU rule of law.

Recent legislative and policy developments lend support to this argument: the E-Evidence proposals (Section 2.1), the 2019 EU Interoperability Regulations (Section 2.2) and EU asylum policy (Section 2.3).

2.1. E-Evidence

In April 2018, the European Commission adopted two legislative proposals on the gathering and use of electronic information held by private companies for law enforcement and criminal investigations (European Production and Reservation Orders, EPO-PR or 'E-Evidence'). The proposals would grant Member States' law enforcement authorities extraterritorial jurisdiction to have direct access to individuals' data held by a company in another EU country. The EPO-PR would impose a legal obligation on these companies to allow access to the data sought. As opposed to the model envisaged in the European Investigation Order (EIO), the EPO-PR would operate without any systematic involvement by the judicial authorities in the Member State of execution, that is, where the company is located or providing its services.

The E-Evidence proposals are currently under inter-institutional negotiations. Unsurprisingly, they are proving to be controversial inside the European Parliament in respect of issues such as their overall necessity, lack of proportionality, and incompatibility with EU fair trial and privacy safeguards. The proposals have been presented as an instrument of EU criminal justice cooperation. However, the proposals' aim is one predominantly driven by a law enforcement focus on countering crime, therefore corre-

sponding with ‘police cooperation’. Alienating the role played by independent judicial authorities in the Member State of execution while placing private companies at the epicentre of this model stands at odds with the EU principle of mutual recognition (Carrera and Mitsilegas, 2017).

2.2. Interoperability

Interoperability constitutes another case in point. The EU counts a broad array of information systems and databases holding individuals’ information for various purposes, under the management of the eu-LISA agency. These include the Schengen Information System II (SIS), the Visa Information System (VIS), Eurodac, the European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN), the Entry/Exit System (EES) and the European Travel Information and Authorisation System (ETIAS). The adoption of the EU Interoperability Regulations in 2019 has represented another crucial step forward in *EU databases policy making*.

The Interoperability Regulations aim at increasing the interconnectedness between all existing EU databases and significantly expanding accessibility by national police or LEAs in countering crime, as well as by the Frontex (the European Border and Coast Guard, EBCG) agency. The political goal attributed to the need of checking a person’s identity inside the EU involves expanding the instances in which EU and national security professionals responsible for investigating, detecting and/or prosecuting serious crime or terrorism will have access to and use asylum seekers’ data.

The legal complexity of these Regulations is staggering. Little consideration has been given to the implications of Interoperability and the reframing of Eurodac database as a law enforcement tool over the criminalization of asylum seekers. This runs contrary to the 1951 Geneva Refugee Convention benchmark, which expressly prohibits the penalization of people seeking international protection. The discrimination and stigmatization risks that can be

expected to affect certain groups in society, in particular those of non-national origin and people seeking international protection, have been equally disregarded.

The Interoperability Regulations create an asymmetry in access rights by digital citizens. EU privacy and data protection confer to individuals – irrespective of their legal status – the ownership of their data (Carrera, 2020). The expansionism characterizing the policing of access to EU databases has not been accompanied by an equally expanded access by individuals to justice venues and independent complaint mechanisms in cases where their rights are violated during identity checks. A similar asymmetric gap exists in respect of the increasing operational roles played by Frontex and eu-LISA agencies, the mandates of which should be revised to ensure higher legal, democratic and judicial accountability and an *interoperable justice* framework consistent of independent complaint mechanisms for affected individuals.

2.3. Asylum

A similar securitization logic has contaminated the latest developments on EU asylum policy. A majority of the more recent Commission legislative proposals to reform the EU Dublin Regulation aimed at reframing some already existing EU asylum legal instruments in the Common European Asylum System (CEAS) as security tools characterized by a punitive, containment-driven, criminalizing and expulsions-driven logic (Carrera and Cortinovia, 2019). An illustrative case in point has been the political priority given to prevent and fight the so-called ‘secondary movements’ of asylum seekers inside the EU.

The proposals included procedural and material sanctions, including cutting of judicial and asylum procedures guarantees, increased use of detention and unlawfully restricting access to reception conditions for individuals’ not staying in the state responsible for assessing their asylum claim in line with the EU Dublin Regulation and the ‘first irregular entry’ criterion. They

entail an equally problematic framing of intra-EU mobility or ‘onward movements’ by people seeking international protection as irregular, quasi-criminal and illegitimate. Their compatibility with the right to seek asylum in Article 18 EUCFR is highly questionable, if not illusory.

The EU notion of ‘secondary movements’ has proved to be flawed. It disregards the fact that intra-EU mobility is not always a question of ‘free choice’ or ‘voluntary preference’ by individuals. ‘Mutual Trust’ in the functioning of the CEAS cannot be taken for granted. The Luxembourg Court has confirmed that there is not such a thing like ‘blind trust’ among EU member states on the basis that any of them can be always considered ‘safe’ for asylum seekers. This presumption is rebuttable.

Several cases have shown that, in practice, member states experience major operational and structural deficiencies, which sometimes are even systemic, in their asylum systems. Therefore, there may be very legitimate reasons for people to seek safety elsewhere. These may relate to degrading reception and living conditions, exclusion from social assistance, poverty, insecure residency status, institutional discrimination, the lack of durable life opportunities and family links (Carrera, Cortinovis, Stefan and Luk, 2019).

3. Intergovernmentalism and Informalization

Since 2015, we have witnessed several instances where the European Council and member state governments, making use of crisis-labelling politics, have started to act outside of or in direct contravention to EU Treaty and AFSJ law commitments. The European Council and some EU Member States’ Ministries of Interior have played a crucial role in re-injecting intergovernmentalism – *JHA rationale* – and informal or ‘flexible’ patterns of transnational cooperation in communitarized EU AFSJ policies.

Contrary to preliminary expectations that the European Parliament was the key beneficiary of the ‘Lisbonisation’ of AFSJ policies, the European Council has been in practice the actual

winner. While the European Council has a clear role attributed in the Lisbon Treaty, it is very problematic that it has often acted in direct contravention of EU law and principles laying at the basis of EU constitutional Treaty framework through extra-Treaty and informal methods and tools of cooperation.

EU external relations migration policies have constituted perfect illustrations of these dynamics. There has been a strategic choice by some EU and national leaders – under the auspices of the European Council – to ‘go informal’ and avoid EU Treaties, thereby side-limiting the roles of the European Parliament and the Luxembourg Court in clear violation of the principles of institutional balance and sincere and loyal cooperation. This ‘policy choice’ has also entailed going along with or not feeling responsible for the profound risks that these instruments pose to individuals’ fundamental rights and freedoms.

Paradigmatic examples include the much debated 2016 EU-Turkey Statement (Carrera, den Hertog and Stefan, 2019), the adoption of EU readmission arrangements with some African and Middle-East governments or the use of emergency funding such as the EU Trust Funds (EUTF) for the implementation of policies focused on ‘delegated containment’ and readmission (Carrera, Santos and Strik, 2019). Two common characteristics of these instruments have been their extra-Treaty and extra-EU budget nature, not corresponding with any EU legal acts or international agreements envisaged by the Treaties. The European Council has played a key role in their promotion and validation. They have been able to rely on the indirect complicity and support of the European Commission and EU agencies such as Frontex and EASO in their practical implementation. This is most surprising as this complicity stands in direct contradiction with the Commission’s role as guarantor of the Treaties.

The actual impact of the EU’s indirect financial support through emergency funding (EUTF) and the role played by EUNAVFOR-MED Operation Sophia have been issues of grave concern in respect of the cooperation on ‘migration management’ and

training of Libyan coast guard authorities on intercepting boats in the Mediterranean sea. As a consequence, in practical terms, asylum seekers have been illegally prevented from leaving Libya and many others have lost their lives at sea. This has also meant the violation of the principle of *non-refoulement*, as asylum seekers have been returned to a country that remains in conflict and where there is ample evidence of wrongful international acts and crimes against humanity (Carrera and Cortinovis, 2019b).

These developments may have given the wrong impression to Ministries of Interior and some EU governments that they can successfully act in direct violation of their legal commitments under EU AFSJ law and the Treaties. This has been the case for example of the Schengen Area. Since 2016, adducing the ‘refugee crisis’ as justification, Austria, Germany, Denmark, Sweden and Norway introduced internal border controls and have unlawfully prolonged them beyond the deadline foreseen in the Schengen Borders Code (Carrera, 2019).

Nationalism has also prevailed in relation to reform of the EU asylum policy. The European Council has been here a decisive factor of blockage towards a much-needed legislative reform of the EU Dublin Regulation. It gave preference to a logic of *consensus* or *de facto* unanimity among EU member states during negotiations on some of the CEAS reform files, in clear violation to the Qualified Majority Voting (QMV) rule applicable under the ordinary legislative procedure in asylum policies.

The deadlock in the EU Dublin Regulation reform, along with the former Italian Minister of Interior’s closed-ports policy for boats saved in the Mediterranean, led to the emergence of ‘ad hoc disembarkation and relocation arrangements’ implemented since the summer of 2018, or, more recently, the 2019 Malta Declaration on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism (Carrera and Cortinovis, 2019c).

These extra-Treaty arrangements involved a small group of Member States willing to accept a share of asylum seekers disembarked mainly by NGOs in Italy and Malta on a voluntary basis, with the Commission playing a weak coordination role and EU agencies supporting their implementation. They have also proved to be largely unsuccessful in gaining enough political support by other EU Member States. While proposals for ‘flexible solidarity’ or ‘solidarity à la carte’ may sound appealing, they run a real risk of turning the clock backwards three decades in European integration and re-injecting nationalism into fields that, after the Lisbon Treaty in 2009, are under clear EU competence and scrutiny remits.

Allowing ‘flexibility’ may yet again give the wrong impression to certain EU governments that the EU principle of solidarity in the CEAS can be understood as ‘anything goes’ and freedom to comply with their already existing EU legal commitments depending on what they can get out of it or on some paranoid cost-benefit analysis. The current infringement proceedings started by the Commission against the governments of Poland, Hungary and the Czech Republic for not implementing the 2015 Relocation Decisions substantiates this point.

The EU solidarity principle implies *equality* among all EU Member States. Equal membership rights entail the expectation of equal responsibilities. This was confirmed by the Luxembourg Court in the 2017 ruling on the above-mentioned 2015 Temporary Relocation Decisions against Hungary and Slovakia. The Court made it clear that the EU principle of solidarity means *equal solidarity*, so that EU responses ‘must, as a rule, be divided between *all* the other Member States’.

4. Conclusion

The opening quote to Advocate General Sharpston’s Opinion brings into critical light the main challenges characterizing the latest developments in AFJS cooperation. I fully agree with her that ‘we must all do better than that’. 20 years after the Tampere

Programme, and more than a decade since the Lisbon Treaty, the Europeanization patterns stemming from the politics of crisis and self-centredness have negatively affected and undermined the very essence of EU AFSJ founding principles.

The next phases of EU AFSJ cooperation should give priority to designing and implementing a *principled and consistent course of action*, giving priority to fully and loyally implementing the Lisbon Treaty and its principles, and delivering the EUCFR to individuals (Carrera, 2018).

As Brännkärr writes in the Preface of this Collective Volume, the future of AFSJ cooperation must be approached from the perspective of unnegotiable EU principles, which in her own words, constitute the “conjunctive glue that holds the Union together”. This calls for all EU institutions to unequivocally uphold and better safeguard these principles in practice by walking the talk. It is by putting EU democratic rule of law principles and individuals’ rights *first* that the EU AFSJ can expect legitimation from all the relevant actors involved and from individuals.

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PART II
BORDERS AND
ASYLUM

6. THE EUROPEAN BORDER AND COAST GUARD IN THE NEW REGULATION: TOWARDS CENTRALISATION IN BORDER MANAGEMENT

Juan Santos Vara

1. Introduction

The development of the Area of Freedom, Security and Justice (AFSJ) has led to a multiplication of the activities carried out by EU agencies, which were created to support and reinforce operational cooperation between national authorities. It is not possible to understand the development of the AFSJ without the agencies. The activities carried out by AFSJ agencies are very diverse and have continued to expand in recent years. The large-scale and uncontrolled arrival of migrants and asylum seekers to the EU has led to the expansion of the operational powers of Frontex and EASO beyond original expectations. The activities performed by Frontex and EASO in the last years go beyond mere coordination and they have assumed relevant operational activities which may have negative implications on fundamental rights.

A good illustration is the hotspots set up to manage the massive arrival of refugees to Italy and Greece, developed within the framework of the Agenda for Migration of 2015. Frontex, EASO and Europol work together on the ground with the authorities of Italy and Greece to help them to fulfill their obligations under EU law and swiftly identify, register and fingerprint incoming migrants. These developments point to the gradual emergence of an increasingly ‘integrated European administration.’¹ EU agencies are also called to play a key role in developing the cooperation between the EU and third countries in this field, which increasingly leads to the externalisation of the management of migration and protection obligations.²

The establishment of the European Border and Coast Guard (EBCG) in 2016 was one of the main initiatives adopted by the EU to deal with the asylum and migration ‘crisis.’³ The national authorities of member states responsible for border management, including coast guards to the extent that they carry out border control tasks, the national authorities responsible for return and the European Border and Coast Guard Agency (‘the Agency’) constitute the EBCG.⁴

The creation of the EBCG and the transformation of Frontex

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- 1 *Professor of Public International Law and European Law, Jean Monnet Chair in EU External Action, Coordinator of the European Joint Master’s in Strategic Border Management at the University of Salamanca. This contribution has been written within the framework of the research project on ‘The externalisation and informalisation of the EU migration, asylum and border management policies: new legal challenges’ (EUM-ABEXT), funded by the Spanish Government (RTI2018-099097-B-I00).
De Bruycker, P. (2016), “The European Border and Coast Guard: A new Model Built in an old logic”, *European Papers: A Journal on Law and Integration*, Vol. 1(2): 559-569;
Tsourdi, L. (2016), “Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office”, *European Papers: a Journal on Law and Integration*, Vol. 1(2): 987-1031.
 - 2 See Santos Vara, J. (2015), “The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls”, *European Foreign Affairs Review*, Vol. 20: 118-136.
 - 3 Regulation of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, L 251/1, 16 September 2016.
 - 4 Article 3, Regulation 2016/1624; article 4, Regulation 2019/XXX.

into the Agency of the EBCG did not amount to establishing a real European Border and Coast System that replaced national authorities in charge of border management in each member state. Even though the Regulation on the EBCG has significantly reinforced the tasks conferred upon Frontex, these innovations did not entail a real transformation of its legal nature. The member states continue to retain the primary responsibility for the management of the external borders.⁵ According to de Bruycker, the EBCG is essentially “a new model built on an old logic”.⁶ As it was pointed out by Carrera and den Hertog, the 2016 Frontex Regulation led to transform the former Agency into a “Frontex+”⁷. The changes introduced in the configuration of the Agency could not be qualified as revolutionary but more as a natural evolution in the process initiated in 2004 with the creation of Frontex⁸.

The reliance on voluntary Member States’ contributions of staff and equipment resulted in persistent gaps affecting the support that the Agency could offer to member states. Less than two years after the adoption of the Regulation establishing the EBCG, the President of the European Commission announced on the occasion of his 2018 speech on the State of the Union that the Commission intended to reinforce the EBCG.⁹ On 12 September 2018, the Commission proposed an updated version of the Regulation on the EBCG.¹⁰ The Parliament and Council reached a political agree-

5 Recitals 6 and 5 of the Preamble, Regulation 2016/1624.

6 De Bruycker, *op. cit.*, p. 559.

7 Carrera, S. and L. den Hertog (2016), *A European Border and Coast Guard: What's in a name?*, Brussels: CEPS; Carrera, S. *et al* (2017), *The European Border and Coast Guard. Addressing migration and asylum challenges in the Mediterranean?*, Brussels: Report of a CEPS Task Force.

8 See Rijpma, J. (2016), *The proposal for a European Border and Coast Guard: evolution or revolution in external border management?*, Study for the LIBE Committee of the European Parliament; Santos Vara, J. (2018), “La transformación de Frontex en la Agencia Europea de la Guardia de Frontera y Costas: ¿Hacia una centralización en la gestión de las fronteras?”, *Revista de Derecho Comunitario Europeo*, Vol. 59, 143-186.

9 European Commission, State of the Union 2018 – the Hour of European Sovereignty, 12 September 2018.

10 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council, COM(2018) 631 final, 12 September 2018.

ment on the new proposal in March 2019. The new Regulation on the EBCG was adopted by the Council on 8 November 2019.¹¹ The successive amendments to the Agency's legal framework are "symptomatic of a lack of strategic thinking on the future of border management at EU level".¹²

This Chapter will be devoted to examining the main implications of the new Regulation on the EBCG, which involves a substantial reinforcement of Frontex as regards tasks, human and financial resources with the aim to strengthening the protection of the external borders and restoring the normal functioning of the Schengen area. It will be assessed to what extent this ambitious objective can be reached by reinforcing Frontex. On the other hand, it will be analysed if the new Regulation of the EBCG transforms Frontex into a fully-fledged European Border and Coast Guard system leading to a centralization in the management of borders at European level.

2. The Conferral of Executive Powers on the Agency's Staff

The establishment of a Rapid Reaction Pool of 1.500 border guards by Regulation 2016/1624 was considered a positive step to address emergency situations at the external borders. The creation of the Standing Corps of 10.000 operational staff by 2027 is the main innovation introduced by the new Frontex Regulation. The Standing Corps should enable the Agency to deploy border guards where needed and therefore enhance the Agency's capacity to support member states in securing external border controls.¹³ The enhancement of human and financial resources of individual member states through Frontex can be perceived as a tool of EU

11 Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, 2019/XXX, 23 October 2019.

12 CM1817 Comments on the draft for a new Regulation on a European Border and Coast Guard, (COM (2018) 631 final) and the amended proposal for a Regulation on a European Union Asylum Agency (COM(2018) 633 final), November 2018.

13 Article 54, Regulation on the EBCG (2019).

solidarity and fair sharing.¹⁴

The Standing Corps shall be part of the Agency and will be composed of the following categories of border guards: operational staff of the agency (art. 55), staff seconded from member states to the Agency for a long term deployment (art. 56), staff from member states provided to the Agency for a short-term deployment (art. 57), staff from the member states ready to be deployed for the purposes of rapid border interventions (art. 59). The establishment of the Standing Corps should be fitted in the objective of developing a multiannual strategic policy for European integrated border management.¹⁵

The members of the Standing Corps, including the operational staff of the Agency, are conferred executive powers.¹⁶ The statutory staff of the Agency may perform executive tasks such as the verification of the identity and nationality of persons, the authorisation or refusal of entry upon border check, the stamping of travel documents, issuing or refusing of visas at the border, border surveillance, or registering fingerprints.¹⁷ Providing the Agency's own staff with executive powers is questionable since the primary responsibility for the management of the external borders lies primarily with the member states. It can be argued that article 77(2) (d) TFEU provides the legal basis for any measure necessary for the gradual establishment of an integrated management system for external borders.

It is true that the members of the teams may only exercise executive tasks under the command and control of the host member state and as a rule in the presence of border guards or staff involved in return-related tasks of the host member state. However, such tasks may be performed by the Frontex operational staff in the case that they have been authorized by the host member state to act

14 Tsourdi, L. (2019), "European Conference from Tampere 20 to Tampere 2.0", Pre-Conference Version.

15 See EBCG proposal, Explanatory memorandum, pp. 2-3.

16 Article 54 (3), Regulation on the EBCG (2019).

17 Article 55 (7), Regulation on the EBCG (2019).

on its behalf.¹⁸ Article 77(2) (d) TFEU should be read in conjunction with articles 72 TFEU and 4(2) TEU. According to article 72 TFEU, the EU has to respect the “the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”. Article 4(2) TEU provides also that the maintenance of internal security remains the responsibility of each member state. Therefore, the Treaties lack a clear legal basis for conferring executive powers on the Agency’s own staff.

Frontex is entering uncharted waters with the conferral of executive powers. This new task raises serious concerns as regards judicial control in the case of fundamental rights violations are committed in the context of operations involving Frontex teams. Since Frontex was created to reinforce operational cooperation between national authorities and assist them, the Agency has avoided judicial accountability so far arguing that the member states are responsible vis-à-vis the individuals. The substantial autonomy enjoyed by AFSJ agencies and, in particular Frontex, in developing their activities does not mean that they are immune to judicial controls. The Treaty of Lisbon expressly introduced in Article 263 TFEU the possibility of taking legal action to annul legal acts of the agencies. However, there is sometimes uncertainty as regards the distribution of responsibility between Frontex and the member states involved in the agencies’ activities.

A good illustration is the hotspots set up to manage the massive arrival of refugees to Italy and Greece where EASO, Frontex and Europol work together on the ground with the authorities of member states to help them to fulfill their obligations under EU law. The broadening of powers conferred on Frontex by the new Regulation may exacerbate the problems facing individuals who are victims of human rights violations and try to obtain judicial redress. There is a clear need to reflect on this issue before the exercising of executive powers by Frontex operational staff.

18 Article 82, Regulation on the EBCG (2019).

3. The Emergence of a Supervisory Role

The Agency is called to supervise the effective functioning of the national external borders and detect deficiencies in the management of the national borders. There is a hierarchical relationship placing Frontex above national authorities. Both the 2016 and 2019 EBCG Regulations have equipped the Agency with a mechanism to assess vulnerabilities in the member states' capacities to face challenges at the external borders.¹⁹ In case of non-compliance with the recommendations made by the Executive Director and the decisions taken by the Management Board of the Agency to address the deficiencies identified at the external borders, the vulnerability assessment may lead to the so called 'right to intervene'.

If the member state concerned does not cooperate with the Agency, the Council, acting on the basis of a proposal from the Commission, may adopt a decision by means of an implementing act identifying the measures needed to mitigate those risks and requiring the member state concerned to cooperate with the Agency.²⁰ The implementing power to adopt such a decision is conferred on the Council because of the potentially politically sensitive nature of the measures to be decided. However, if a member state is opposed to the application of certain measures, Frontex has not at its disposal any means to impose them. In practice, intervention will not consist in sending teams from the EBCG to take over the responsibilities or tasks of a particular member state in managing its borders, but in suspending the application of Schengen in relation to the member state concerned on the basis of Article 29 of Regulation (EU) 2016/399.²¹

There is an underlying tension between the new operational tasks bestowed upon Frontex and, in particular, the executive powers and the conferral of a supervisory and intervention role.

19 Article 32, Regulation on the EBCG (2019).

20 Article 42, Regulation on the EBCG (2019).

21 Regulation on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, 23 March 2016.

Frontex would be called to play a double role since it will be involved in implementing EU external border policy and monitoring policy implementation.²² There is a risk of politization of the Agency when conducting the vulnerability exam and identifying the weaknesses in a particular sector of the external border. AFSJ agencies and, in particular Frontex, are not independent from the member states and are not immune to political influences. Member states are represented at the Management Board of Frontex which plays a key role in operationalizing its mandate. It should be further reflected how to ensure the independence of the Agency when supervising the implementation of EU external border policy by the member states.

4. Cooperation Between the Agency and Third Countries

The 2016 Regulation introduced the possibility of carrying out operations on the territory of neighboring third countries subject to a prior agreement concluded by the EU and the third country concerned. The geographical scope of the cooperation with third countries is substantially expanded in the new Regulation since the Agency can develop operational cooperation with any third country. Cooperation between the Agency and authorities of third countries may concern all aspects of European Integrated Border Management, including border control and return activities.²³

When the deployment of border management teams from the standing corps to a third country involves the use of executive powers, a status agreement has to be concluded by the Union with the third country concerned on the basis of Article 218 TFEU.²⁴ The first status agreement was concluded with Albania in October 2018 and a similar agreement was signed with Montenegro in

22 Tsourdi, L. (2018), "Monitoring and Steering through FRONTEX and EASO 2.0: The Rise of a New Model of AFSJ Agencies", *EU Migration and Asylum Law and Policy*, p. 2.

23 Article 73(1), Regulation on the EBCG (2019).

24 *Ibid.*

October 2019.²⁵ The EU is negotiating similar status agreements with North Macedonia, Serbia and Bosnia Herzegovina.

The first joint operation outside the territory of the member states was launched in Albania in May 2019. The deployment of border management teams on the territory of third countries raises complex legal and political questions as regards the legal regimen applicable and the delimitation of responsibilities between the different actors involved in the operations. As a result of the status agreements negotiated so far, Frontex teams can exercise extra-territorial activities in the field of border control and return operations which may affect the fundamental rights of third country nationals. It is not excluded the possibility that operations will develop on the territory of third countries with a questionable human rights record.

According to the status agreements negotiated with Albania and Montenegro, the members of the team enjoy immunity from the criminal jurisdiction of the host member state in respect of the acts performed in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan.²⁶ While the staff from the member states will remain criminally and civilly liable under the laws of their home member state, there is some uncertainty as regards Frontex.²⁷ Since the cooperation with third countries may have serious fundamental rights implications, there is a clear need to carry out a fundamental rights assessment prior to engaging in operational cooperation with third countries.²⁸

25 Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, OJ 43, 18 February 2019.

26 Article 6(3) Status Agreement with Albania and Article 7(3) Status Agreement with Montenegro.

27 See Meijers Committee, *op. cit.*

28 *Ibid.*

5. Redress in Case of Fundamental Rights Breaches

The dynamic evolution of the tasks undertaken by the AFSJ agencies, in particular, by Frontex, and EASO in the last years, has not led the institutions to admit that the agencies' activities may have potential fundamental rights implications. It is considered that these agencies were mainly set up in order to facilitate and coordinate operational cooperation between the authorities of the Member States. Frontex and the Commission have always held that the responsibility for fundamental rights breaches lies exclusively with the member states.

Since the powers of Frontex are mainly directed towards managing the external borders, its activities have raised many complex issues. The respect for the right of asylum, the right to an effective remedy and the principle of non-refoulement may be at stake in the operations coordinated by Frontex. The Agency has undertaken a number of initiatives with a view to integrating fundamental human rights in its activities, such as the development of the Frontex Fundamental Rights Strategy and the establishment of the Frontex Consultative Forum on human rights and the appointment of a Fundamental Rights Officer. The 2016 EBCG Regulation introduced a new complaint mechanism to monitor and ensure respect for fundamental rights.²⁹ The new procedure brings a positive development to deal with human rights violations since the victims have at their disposal a complaint mechanism. However, it is an administrative procedure that cannot substitute the right to an effective remedy under Article 47 of the Charter of Fundamental Rights.

In the new Regulation, the mandate of the Fundamental rights Office is reinforced through the enhancement of its capacities and the creation of the function of the fundamental rights monitors with the task to assess the fundamental rights compliance of operational activities.³⁰ However, the individual complaints mecha-

29 See Article 109, Regulation on the EBCG (2019).

30 Article 110, Regulation on the EBCG (2019).

nism remains an internal oversight that is not impartial or independent. The new Regulation does not give an adequate solution to the question of responsibility for fundamental rights violations occurred in the course of joint operations coordinated by Frontex.

In such context, the exercise of executive powers entailing a wide margin of discretion by Frontex may exacerbate the problems facing individuals who are victims of human rights violations and try to obtain judicial redress. In addition, the fact that the operations can be developed on the territory of third countries raise additional concerns for fundamental rights. The responsibility of Frontex regarding violations of human rights has not yet found a satisfactory solution. It will be difficult to sustain in the future that the responsibility as regards infringements of fundamental rights lies exclusively with member states. The expansion of activities carried out by the AFSJ agencies and, in particular Frontex, would probably continue to raise tensions concerning the right to an effective remedy. It should be further explored how to develop adequate mechanisms for ensuring effective access to justice.

6. Conclusion

The evolution of the Agency should be framed within the process of *agencification* that the AFSJ has experienced over the last years. EU agencies, in particular Frontex and EASO, are called to play an increasing role to respond to the challenges that the EU is facing in the areas of migration, asylum and border management. They are presented by the institutions as instruments to reinforce the implementation of EU law, to enhance solidarity between the member states and to implement cooperation between the EU and third countries. Although both Regulations 2016/1624 and 2019/XXX substantially strengthen the autonomy of Frontex, in particular by granting a supervisory role and executive powers, the member states continue to play a key role in operationalizing its mandate. The member states are very reluctant to transfer new powers to the Agency since EU external border policy touches upon their

sovereignty. Frontex was created to support the member states in the management of external borders and the Agency needs at the same time the support of member states to implement its mandate.

The successive amendments of the Agency's mandate show a lack of a common vision on how the European administration of border management at EU level should develop. The 2019 Regulation does not take the definitive step that will lead in the future to the establishment of a true European system of border and coast guards. Despite the fact that the Commission refers constantly to the Agency as a fully-fledged European border and coast guard system, the EU has not yet developed a real European administration in this area. The new EBCG Regulation does not create a genuine integrated border and coast guard that replaces national border guards and provides for genuine solidarity in the management of external borders.

The EU should progress towards a more centralized model that includes more solidarity among member states in the management of external borders. However, without developing a common asylum and migration policy, the constant amendments of the Agency's mandate will not be the adequate solution in times of crisis and the failures of the Agency could lead to more frustration and a lack of credibility of the EU.

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7. REINSTATEMENT OF INTERNAL BORDER CONTROLS IN THE SCHENGEN AREA CONFLICT, SYMBOLISM AND INSTITUTIONAL DYNAMICS

Galina Cornelisse

1. Introduction

This Chapter addresses Schengen, focusing in particular on the re-instalment of internal border controls by Member States. Since 2015, internal border controls have been reinstalled more than 80 times, with Member States justifying these measures on account of secondary movements of migrants, the threat of terrorism and the situation at the external borders of the EU. Currently, Norway, Denmark, Sweden, France, Germany and Austria have reinstalled internal border controls, either at all internal borders or at specific points such as particular ferry crossings.¹ Many of the current

1 Norway (period from 12 November 2019 - 12 May 2020, Terrorist threats, secondary movements; ports with ferry connections with Denmark, Germany and Sweden); Sweden (period from 12 November 2019 - 12 May 2020, Terrorist threats, shortcomings at the external borders; to be determined but may concern all internal borders); Denmark (period from 12 November 2019 - 12 May 2020, Terrorist threats, organized criminality from Sweden; land border with Germany and with Sweden, ferry connections to Germany and to Sweden); Germany (period from 12 November 2019 - 12 May 2020, Secondary movements, situation at the external borders; land border with Austria;

re-instalments have been in place for a long time, their legal basis alternating between the grounds mentioned in Articles 25, 28 and 29 of the Schengen Borders Code (SBC).²

These provisions provide for the *temporary* re-installment of border control either in case of a serious threat to public policy or internal security in a Member State (Articles 25 and 28), or in case of serious deficiencies in the external border management of a Member State which put the overall functioning of the area without internal border control at risk (Article 29). In both cases, such measures are subject to strict conditions, mainly related to their proportionality and necessity. Moreover, the permitted duration of these measures is limited: In cases of foreseeable events posing a serious threat to public policy or internal security, internal border controls may not exceed a maximum of six months (Article 25), in cases requiring immediate action that period is two months (Article 28). In situations where the serious threat to public policy or internal security is related to deficiencies in the management of the external borders, internal border controls may not exceed a period of two years (Article 29).

As some of the current re-instalments have switched legal bases each time their maximum duration had expired, questions arise regarding their lawfulness. Along similar lines, concerns have been raised regarding the proportionality and necessity of the re-instalments, which are allegedly not well argued by the Member States in their notifications to the Commission. The claim by the Commission that it reviews the notifications carefully therefore seems difficult to substantiate.³ These legal complexities need to be addressed carefully, especially seeing that the Commission has

Austria (period from 12 November 2019 - 12 May 2020, Secondary movements, risk related to terrorists and organized crime, situation at the external borders; land borders with Hungary and with Slovenia; France (period from 31 October 2019 - 30 April 2020, Persistent terrorist threat, upcoming high profile political event in Paris, secondary movements; all internal borders) See https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf

3 EU Observer 12 December 2019, "Revealed: Little Evidence to Justify Internal Border Checks", at <https://euobserver.com/investigations/146897>

recently put forward a proposal for amending the SBC.⁴

Nevertheless, the primary aim of this contribution is not to answer questions regarding the legality of the current re-installments. Instead I will try to zoom out a little bit from the precise procedures and legal requirements for introducing border control as laid down in the SBC, and reflect on the significance of the absence of internal border control for the EU, highlighting its character as simultaneously highly symbolical and deeply functional. I argue that placing too much emphasis on its symbolic dimension, as is often done by the Parliament and the Commission, obscures from sight the changing connotations of territorial borders and border control in contemporary Europe, and has the unintended effect of over-privileging economic interests to the detriment of the protection of those individuals that are mostly affected by changing 'border practices'.

A similar outcome can be seen in the case law on internal border control by the Court of Justice of the EU. The Court, by insisting upon a traditional conception of border control, also attaches great weight to the very tangibility of territorial fault lines, therewith refusing to acknowledge that border control and surveillance have undergone fundamental shifts during the last twenty years. Ironically however, it is precisely Schengen that has facilitated such shifts in border control. Schengen is profoundly two-faced: the portrayal of its symbolic dimension by the Commission and Parliament is complemented by a pragmatic approach and instrumental use by the Member States.

To make this argument I will first discuss the symbolism of Schengen as foregrounded by the Parliament and Commission when they address the absence of internal border control. I will then turn to Schengen's pragmatism as seen in Member States policies – a pragmatism which upon a closer look is firmly linked

4 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders. COM(2017) 571 final, 27 September 2017. Although the Parliament has confirmed its position on the proposal and voted to open inter-institutional negotiations, the Council has not yet taken a position.

to the symbolism of a resilient national border. Current tensions result from the irreconcilability of both approaches. In my conclusions I claim that such irreconcilability does not need to be problematic because conflict is inherent in politics and can be productive. A precondition for such productivity however is that the manifestation of conflict goes beyond contesting views on a symbolism that is modelled on experiences from the past, but it should include opposing views on how Europe can address contemporary global challenges such as economic and social inequality, the regulation of migration, and threats to human security.

2. Schengen as Europe's Greatest Achievement: A Very Tangible Symbolism

Schengen as the area without internal border control has consistently been portrayed as one of Europe's greatest achievements, most notably by the Commission and the Parliament. In official documents by these institutions, a forceful but concise reminder insisting on the great significance of a borderless Europe is generally followed by a substantial discussion on how to strengthen Schengen, and bring about more accountability and transparency. What kind of achievement Schengen precisely represents is almost never made explicit, apart from references to the individual rights of free movement and the popularity that borderless travel enjoys with European citizens.

Unsurprisingly then, such superficial appeals to the significance of Schengen will not result in a productive confrontation of the European institutions with those Member States that reintroduce internal border control: the rights to free movement of persons, goods and services in itself are not negated through the introduction of internal border control.⁵ Moreover, the very fact that these governments are democratically elected and generally enjoy at least some popular support for their border control pol-

5 That free movement and the absence of internal border control are not identical is also apparent from the phenomenon of differentiated integration in this area – some Member States are part of the internal market but do not participate in Schengen.

icies turns the popularity argument into a mere contestation of facts, not of values or visions.

However, while the concrete achievement of Schengen may be the ease of travelling a borderless Europe for the individual citizen, borderless Europe obviously stands for something far larger in a continent that has been defined by centuries of violent struggle over territorial borders. Against the historical rationale of European integration – the prevention of interstate war within Europe – it makes sense to present a borderless Europe as a monumental triumph. In such a narrative, re-installment of internal border controls, especially when done on a large and extended scale, signifies the beginning of the end of the European ideal. What is problematic here is that, while no-one would contest the importance of historical awareness, unreflexive appeals to Schengen as Europe's greatest achievement obscure the fact that the meaning of territorial borders has changed over the years.

Thus, in contemporary Europe, interstate war over territorial fault lines between Member States is unlikely, but intense disagreement over how the border relates to national identity and national security can have profoundly destabilising effects. Insisting on Schengen's symbolism without explicitly linking its significance to the contemporary meaning and functioning of borders then impedes the development of a meaningful discussion about conflicting visions of Europe.

A borderless Europe which is conceptually anchored to the tangibility of territorial borders, without updating that vision so that it may better align with the political reality of contemporary border practices, can also be seen in the case law of the Court of Justice. Thus, while controls at the internal borders are not allowed under article 67 TFEU and Article 20 SBC, the latter instrument does not prohibit checks *within* national territory, provided that their effects are not equivalent to border checks. Article 21 SBC specifies that such equivalent effect is absent if these checks do not have border control as an objective; if they are based on general police information regarding possible threats to public security

and aim to combat cross-border crime; if they are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders; or if they are carried out on the basis of spot-checks. The Court has maintained a very 'territorial' interpretation of the concept of border control, when assessing whether 1) a measure could be designated as border control, or 2) whether it had an equivalent effect. Thus, if checks are carried out, not 'at borders' or 'when the border is crossed', but *inside* the territory of a Member State, those checks do not amount to prohibited border control under Article 20 SBC.⁶ This is even when the duty to carry out checks (imposed by national law on private companies) "is intended to ensure that foreign nationals satisfy the conditions [laid down national law] for crossing the border" and if "those checks are triggered by the crossing of the internal border."⁷

This very narrow interpretation to Article 20 of the SBC does not do justice to contemporary practices where border control is increasingly outsourced, either through privatisation or extra-territorialisation (Rijpma 2018). With regard to measures having an equivalent effect, the Court has held that a power which is exercised in a frontier area "in order to detect persons whose presence is unlawful and aim to deter illegal immigration"⁸ or "to check compliance with the obligation to hold, carry and present identity papers"⁹ pursues objectives that are different from border control. Here the Court discloses a similarly limited understanding of the function of contemporary border control (Cornelisse, 2014), one which does not take account of the fact that security checks and surveillance more generally have taken over the function of the traditional border.

This view on the function of border control is even more striking when regarded in light of Council Implementing Decision (EU) 2017/246, in which the Council has explicitly encour-

6 Case C-412/17, *Touring Tours and Travel*, ECLI:EU:C:2018:1005.

7 See AG Bot in his opinion to *Touring Tours and Travel*, ECLI:EU:C:2018:671, para 85.

8 C278/12 PPU, *Adil*, EU:C:2012:508.

9 Case C188/10 and C189/10, *Melki and Abdeli*, EU:C:2010:363.

aged the Member States “to assess whether police checks would not achieve the same results as temporary internal border controls, before introducing or prolonging such controls.”¹⁰ The legal interpretation of border control by the Court of Justice fits with a political portrayal of Schengen as Europe’s greatest achievement, in that they both make it difficult to address, in the political and legal sphere, that “the promise of a borderless Europe applies only to a privileged group of bona fide travellers and not to those who are seen as the crimmigrant ‘other’” (Aas, 2011; Van der Woude and Van der Leun, 2017, at 41).

3. Schengen’s Pragmatism: Flanking Measures and Economic Interests

Schengen cooperation itself has also contributed greatly to changes in border practices, for example precisely through outsourcing border control, or through the use of modern technologies that conflate the distinction between crime control and border control. Many of these changed border practices have a disparate racial, religious or social impact.¹¹ This perspective on Schengen cooperation also brings another, much more pragmatic side of Schengen to the fore: its instrumental use by Member States in order to attain certain policy objectives.

Schengen’s pragmatism is exemplified first and foremost by its economic rationale: the economic benefits of the absence of internal border control are significant and stretch far beyond a positive impact on the transport sector (European Parliament 2019). The very origins of a borderless Europe can be traced back to economics: the Saarbrücken agreement came into being as a reaction to protests by lorry drivers who blocked the Franco-German border because they were upset about the long waiting

10 Council Implementing Decision (EU) 2017/246 of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk (OJ L 36, 11.2.2017, p. 59)

11 See Den Heijer (2018) on visa policies.

times. The economic foundations for Schengen explain the vision of the Court on what constitutes border control discussed above – such controls are prohibited once they interfere with the smooth travel of economically active citizens and providers of services. ‘Scattered security checks’ (Atger, 2008) based on risk technology generally do not have this effect.

While economic incentives thus pushed for the abolishment of internal borders in the early eighties, the larger political implications of such a project were apparent from the outset: abolishing internal border controls would *presuppose* amongst other things “the gradual application of a common policy on third country citizens” (Adonnino Report, 1985). However, further cooperation with regard to what were originally meant as ‘compensatory measures’ was soon driven by a very different rationale: national concerns over rising immigration by third-country nationals, especially after the fall of the Berlin Wall. The result was that before long the ‘flanking’ measures had acquired a logic of their own. And while supranationalisation could arguably have served as some sort of correction mechanism, insisting on a coherent policy on immigration and asylum for an area without internal borders, the intergovernmental character of Schengen cooperation made sure that states and their governments considered little more than their own national interest in protecting their national borders (Cornelisse, 2014).

The lack of attention for the way in which flanking measures should relate to the proper functioning of a Europe without internal borders has resulted in laws and policies that have no concern for the “structural inequalities and asymmetric shocks”¹² that characterise Schengen (Cornelisse, 2014). Structural inequalities are caused by the considerable variation amongst the Member States regarding their geographical location: not all of them have external land or sea borders, and amongst those who do, considerable differences exist in the feasibility of guarding them ade-

12 Hinarejos uses these terms to discuss the challenges facing the European Monetary Union (Hinarejos, 2013).

quately against unwanted immigration. Asymmetric shocks are shocks that affect some Member States, but not all -the current situation in Greece providing a particularly apt illustration of this. Asymmetric shocks are obviously related to the concept of structural inequalities, in that disparities with regard to geographical particularities make the occurrence of these asymmetric shocks more likely. The Schengen system, where structural inequalities and asymmetric shocks are the order of the day, should have some sort of mechanism to deal with them.

This idea is reflected in Article 80 TFEU, which requires that EU policies on border checks, immigration and asylum are governed by the principle of solidarity and the fair sharing of responsibility. However, since 2015 most efforts at supranationalising Europe's response to the so-called refugee crisis have failed, not in the least because of "mobilisation of national identities by right-wing populist parties" (Börzel and Risse, 2018). Besides, previous legal measures adopted in the area of asylum, most prominently the Dublin Regulation, even exacerbate inequalities between Member States. In the absence of an effective supranational mechanism to deal with structural inequalities and asymmetric shocks, national responses such as re-installment of internal border control are an entirely predictable response.¹³ As long as the roots of the crisis are not addressed, devising ever more stringent procedures, conditions and time limits for such measures – even the introduction of supranational oversight over internal border control – remains a mere fight against symptoms.

This is even more so when measures of re-installment remain marginally motivated and are never subject to scrutiny by a court, also because in this policy field the Commission rather acts a mediator between Member States, and not as guarantor of the

13 A good illustration of such self-evidence can be found in a statements such as by a Danish minister of integration in 2016: "I think we should prolong border control. There is still an uncertain situation in southern Europe, where thousands of refugees and migrants are coming ashore in Sicily. That can create pressure on Danish borders." See <https://www.thelocal.no/20161013/norway-eu-must-accept-extended-border-controls>.

Treaties (Guild et al, 2016). It would be interesting to see how the Court of Justice (or national courts)¹⁴ would assess the proportionality and necessity of re-instalment: in light of the specific characteristics of EU law, these courts would inevitably need to rule on the seriousness of the security and public order threats. Moreover, courts would be required to elaborate upon the relationship between re-instalment of border control and alternative measures, therewith making explicit what Member States are purportedly protecting with internal border control. A mere insistence on the function of border control as firmly linked to the tangibility of territorial borders, or on the symbolic implications of re-instalment cannot take the place of such a legal assessment.¹⁵

4. Conclusion

The portrayal of Schengen as Europe's greatest achievement is deeply linked to Europe's past as a continent defined by violent conflict over territorial borders. But the symbolism of a borderless Europe is in dire need of modernization to be able to engage in a productive conflict over opposing visions of Europe. The insistence on Schengen's symbolism and the occasional emphasis on its perceived economic benefits in the political arena are a weak counterforce to the link made by right-wing populism between national identity, security and the necessity of border control, and they obscure the actual workings of the contemporary border.

Credible proposals regarding the regulation of re-instalment of internal border control can therefore not remain limited to the devising of more stringent procedures and increased supranational oversight if they do not simultaneously recognise the specific forms of violence that contemporary borders give rise to. Such proposals need to be based upon explicit alternatives regarding

14 To my knowledge there are no national legal challenges to the reinstatement of border controls, although such challenges could easily be brought on the basis of EU law (direct effect and primacy).

15 In any case, internal border control does not turn the internal border in all respects into an external border. See Case C-444/17, *Arib*, ECLI:EU:C:2019:220.

the relationship between borders, identity and security. In other words, revising the Schengen Borders Code cannot remain a technical exercise the details of which are only understandable to a select group of experts and subsequently sold to the public as the strengthening of Europe's biggest achievement – for such legislation to be sustainable it should be preceded by a confrontation of competing visions on Europe and its policies regarding global justice, human mobility, and human security.¹⁶

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16 My perception of conflict as productive and inherent to politics builds upon the concept of agonistic pluralism formulated by Chantal Mouffe (Mouffe, 1999).

is Schengen crisis-proof?, Study for the LIBE Committee, European Parliament.

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8. NORMALISING 'THE HOTSPOT APPROACH?'

AN ANALYSIS OF THE COMMISSION'S MOST RECENT PROPOSALS

Giuseppe Campesi

In the 2015 European Agenda on Migration, the 'hotspot approach' was referred to as one of the main immediate actions to support Greece and Italy to 'swiftly identify, register and fingerprint incoming migrants' (European Commission 2015). According to the description provided by Commission's documents, the hotspot approach is ultimately a measure of operational support activated in order to help frontline member countries facing disproportionate migratory pressure in providing to the registration, identification, fingerprinting and debriefing of asylum seekers, as well as return operations. To that end personnel of the European Asylum Support Office (EASO), EU Border Agency (Frontex) EU Police Cooperation Agency (Europol) and EU Judicial Cooperation Agency (Eurojust) are deployed on the ground and work with the authorities of member countries concerned to help to fulfil their obligations under EU law.

The approach has been object of intense criticism, especially for the alleged violations of human rights of migrants and asylum

seekers perpetrated inside so-called hotspot facilities (Amnesty International 2016; European Council for Refugees and Exiles 2017; EU Fundamental Rights Agency 2019). Reports have in particular highlighted horrific reception conditions at disembarkation points, excessive use of force in collecting fingerprints, lack of effective access to asylum procedures and independent monitoring. A report commissioned by the EU Parliament has highlighted, in particular, the risk that pressure to swiftly processing incoming migrants may lead to unlawful returns to unsafe places without proper consideration of individual claims (Neville et al. 2016: 30).

The hotspot approach has also been criticized for its weak legal basis. Many commentators (Casolari 2016; Thym 2016; Neville et al 2016) have emphasized the absence of a specific legal framework regulating the implementation of the approach and the extreme uncertainty regarding the role of different actors involved, especially as regards EU agencies in relation to national authorities. Criticisms have also emphasized the inconsistency between the mandate and competence of EU agencies and their *de facto* roles on the ground (Hoori 2018; Saranti, Papachristopoulou and Vakouli 2018).

The intense scholarly debate generated by the implementation of the hotspot approach has also revealed the existence of some confusion about its exact nature, and this should be considered as another consequence of its weak legal basis. So much so, that some have even described hotspots as chimeric entities (Benvenuti 2018), and others have underlined the multiple dimensions that characterize the approach (Pascucci and Patchett 2018). Hotspots can indeed be regarded either as a procedure, a mechanism called to make migrants' processing after disembarkation more effective and producing a swift division between those eligible for protection and those who must be returned back; or as specific geographical sites, spaces of confinement and detention created near main disembarkation points in order to prevent potential secondary movements of asylum seekers.

This duplicity is clearly reflected in Commission's policy papers and in the very few legal provisions enacted on the hotspots approach into EU law, where the emphasis is apparently placed more on the procedures to be carried out in those places identified as hotspots and less on their spatial configuration. The fact that the first legal provisions on the hotspot approach have been included in the regulation on the European Border and Coast Guard (EBCG) is for instance indicative of a tendency to frame the approach mainly in procedural terms. The regulation establishes the 'Migration Management Support Teams' (MMST) and defines the activities that are to be carried out in 'hotspot areas' but gives very few hints on how the places where the approach is to be implemented are to be organized and managed, just defining hotspot areas as 'an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterized by a significant increase in the number of migrants arriving at the external borders'¹.

In spite of being framed essentially in procedural terms, the hotspot approach also entails a specific re-configuration of space. The use of a term such as 'hotspot' is not neutral in geopolitical terms, quite the contrary it is indicative of a specific spatial thinking (Neocleous and Kastrinou 2016). A hotspot it is always a zone, a space of disorder where a focused intervention is needed. Clearly Hotspot procedures must not be carried out anywhere, but at EU's border sections facing 'disproportionate migratory pressure', but they also entailed a specific physical re-articulation of the border infrastructure, in particular at main disembarkation points. Commission's policy papers (European Commission 2015) suggested providing hotspot areas with 'reception facilities', and made explicit reference to the rules covering the 'reception' of asylum-seekers kept at the border under accelerated and border procedures according to Articles 31(8) and 43 of the Directive 2013/32/EU, and to the rules laid down by Article 18 of the Direc-

1 Article 2(10), Regulation No. 2016/1624.

tive 2008/115/EU for situations in which member countries find themselves having to manage the repatriation of a great number of irregular migrants. In both cases, reference was made to rules allowing for derogation to the ordinary standards on the detention of asylum-seekers and irregular migrants, permitting an easing of procedural guarantees and a significant lowering of the standards relating to reception and detention conditions.

While there was a clear indication that Commission's preferred solution was to create closed and secured facilities in order to prevent secondary movements, thus envisaging a situation protracted confinement at the borders of asylum seekers, the reference made to two directives left member countries concerned with some room for discretion in the implementation of the approach. And indeed, the approach has been implemented differently by Greece and Italy, which have essentially embedded it in the existing national system for first reception.

Whereas in Greece, in particular after the controversial EU-Turkey Statement of March 2016, the implementation of the hotspot approach has entailed a de-facto detention of migrants and asylum seekers in the 5 facilities (Lesvos, Samos, Chios, Leros and Kos) identified as hotspot facilities (European Council for Refugees and Exiles 2017; Papotousi et al. 2018), in Italy migrants remained an average of 5 days in 2017 and 3,5 days in 2018 in the 5 hotspot facilities (Lampedusa, Trapani, Ragusa Pozzallo, Taranto and Messina), under a regime that has been not clearly defined by law, but decided by the police at the local level depending on the circumstances (Garante Nazionale 2017). As a matter of fact, Italy has not conceived hotspots as places of mass detention but has instead used them as a more flexible tool for controlling asylum seekers' mobility (Tazzioli 2017).

The Commission had the opportunity to clarify the legal framework regulating the implementation of the hotspot approach, in particular as regards reception conditions in so-called 'hotspot areas', when published its proposals on the recast of the reception directive (European Commission 2016a) and on the new regula-

tion on asylum procedures (European Commission 2016b). However, while the hotspot approach is never explicitly mentioned, Commission's proposals greatly expand the possibility of keeping asylum seekers in detention near main disembarkation points. In the case of the so-called 'border procedures', the proposed regulation on asylum establishes that the asylum seeker is 'kept in border or transit zones' up to 4 weeks², albeit without specifying under what kind of 'reception' regime. However, it is likely that in Commission's design the facilities installed near main disembarkation points should be detention centres, given that in the proposal on the recast reception directive border procedures are listed among the grounds legitimizing asylum detention³. Moreover, in introducing the proposal on the new regulation on asylum procedures the Commission stated explicitly that border procedures 'normally imply the use of detention throughout the procedure' (European Commission 2016b), thus confirming the impression that hotspot areas must be set up and managed essentially as sites of border confinement for asylum seekers.

According to the proposed regulation, border procedures may also be applied at locations in proximity to border areas⁴, in particular when a disproportionate number of applicants lodge their applications at the border or in a transit zone. This in fact would permit a spatial introversion of borders which is functional to deal with the logistic complications that are likely to arise when thousands of asylum seekers must be kept in a situation of protracted confinement. The scenario of mass detention at the border is therefore explicitly envisaged by the Commission, and hardly the provision included in the Recital No. 42 of the proposed regulation will be a brake on member countries' temptation to abuse of special procedures in order to forcibly keep at the border all migrants arriving by sea⁵.

2 Article 41(3) in European Commission 2016b.

3 Article 8(3)(d), in European Commission 2016a.

4 Recital No. 40 and Article 41(4) in European Commission 2016b.

5 The Recital No. 42 says that 'As long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not per se entail an auto-

The reference to the need of custodial measures is even more explicit in the policy papers and proposals published by the Commission starting from 2018, where the overall objectives of the hotspot approach are also apparently redefined. Whereas in 2015 the approach was presented as a tool for helping the authorities of member countries facing a disproportionate inflow of migrants in fulfilling their obligations under EU law, in 2018 Commission's main preoccupation is to offer a solution for the diplomatic row over search and rescue and disembarkation. This is evident, for example, in the controversial 2018 non-paper on 'controlled centers' (European Commission 2018a), where the Commission, while not explicitly mentioning the hotspot approach, in many respects takes stock of past experience of operational support in so-called hotspot areas to propose a revised version of the approach.

The aim of the measures envisaged by the Commission in response of the European Council conclusion of 28-29 June 2018 was to improve the process of distinguishing between individuals in need of international protection, and irregular migrants with no right to remain in the EU, while speeding up returns. As with the hotspot approach, this would be realized by mobilizing staff from EU agencies in support of member countries with the aim of speeding up the processing of asylum claims, in particular by 'applying rapid procedures available under EU law followed by a quick return procedure in case of negative decisions' (European Commission 2018a). Interestingly, the areas where operational support should be provided were now more explicitly redefined as sites of confinement, and the added value of controlled centres was clearly seen in their capacity of preventing asylum seekers' secondary movements (European Commission 2018a). Needless to say, the legal footing for the establishment of controlled centres was seen in the rules on the detention of asylum seekers processed according to the so-called border procedures.

matic recourse to an accelerated examination procedure or a border procedure' (Recital No. 42 in European Commission 2016b)

The non-paper on controlled centers, however, contained another important innovation that the Commission would have further developed in a more articulated manner. In this document first emerged the idea of the 'border return procedure' that the Commission officially advanced with the publication of the proposal on the recast return directive (European Commission 2018b). The proposed rapid return procedure provides specific, simplified rules applicable to asylum seekers whose application was rejected following a border procedure. As a rule, they will not be granted a period for voluntary return and will have a shorter time-limit to lodge an appeal. In addition, the Commission proposes to ensure the continued detention of failed asylum seekers who were already kept in detention as a part of asylum border procedures⁶.

The assumption is that failed asylum seekers will remain in detention for a further 4 months in the same facilities located near main disembarkation points. Although there is not much clarity on the issue, these should be the very same facilities that were defined as 'controlled centers' by the non-paper of July 2018, which must function, at the same time, as hotspot areas for the implementation of the hotspot procedures envisaged by the EBCG regulation, as detention facilities where asylum seekers subject to border procedures are kept in custody and, lastly, as pre-removal facilities for failed asylum seekers being deported under the new border return procedure.

The multifunctional nature of 'controlled centers' was finally made explicit with the proposal on the new regulation on the EBCG (European Commission 2018c), in which these facilities were defined as centres 'established at the request of the Member State, where relevant Union agencies in support of the host Member State and with participating Member States, distinguish between third-country nationals in need of international protection and those who are not in need of such protection, as well as carry out security checks and where they apply rapid procedures

6 Article 22(7), in European Commission 2018b.

for international protection and/or return⁷.

Interestingly, Commission's proposal apparently maintained a distinction between 'controlled centers' and 'hotspot areas'⁸, providing that MMSTs shall perform their functions in both places⁹, with the only exception that functions performed in 'hotspot areas' should be exclusively related with the 'provid(ing) (of) assistance in screening, debriefing, identification and fingerprinting' in cases of 'existing or potential disproportionate migratory challenge'.

Beyond the confusion created by the multiplication of the sites of migration enforcement, I believe that Commission's policy design is to 'normalize' the hotspot approach. This is why the deployment of MMSTs has been envisaged as no longer circumscribed to cases of disproportionate migratory pressure and limited to assist member countries in screening, debriefing and fingerprinting, but also extended to offer support in the implementation of the rapid asylum and return procedures even outside 'crisis' situations. This in the framework of an approach which relies heavily and explicitly on the protracted detention of migrants and asylum seekers in border areas.

While every reference to controlled centers has been finally removed from the new regulation on the EBCG approved in November 2019¹⁰, the overall policy design is that of encouraging frontline member countries to manage disembarkation procedures by confining migrants at the border, while attributing to EU agencies an ever-greater role in the management of the accelerated procedures relating to identification, asylum processing and return. It is no coincidence that over the last two years, during which the talk on the need to set up 'controlled centers' at the border has been persistent, both Greece and Italy have finally developed plans to strengthen their regulatory framework on asylum detention (Ferri and Massimi 2018; Mouzourakis and Refugee Support Agean 2019).

7 Article 2(24) in European Commission 2018c.

8 See Article 2(23), in European Commission 2018c.

9 Articles 2(19), 10(1)(12), 37(2)(d), and 41 in European Commission 2018c.

10 Regulation No. 2019/1896.

In conclusion, many of the concerns that scholars and activists have been raising over the implementation of the hotspot approach are still extremely relevant. The Hotspot approach is indeed increasingly institutionalized as an asylum and return sub-system where migrants' rights will be protected by sub-standard legal and procedural guarantees, which will be operated, with the increasing involvement of EU agencies, in remote areas where civil society and independent oversight is extremely difficult. Moreover, beside accessing a sub-standard procedure, asylum seekers will be systematically detained.

While clearly in breach of human rights standards, requiring individualized assessment on the necessity and proportionality of every deprivation of liberty, systematic mass detention at the border may be considered as entailing a de-facto criminalization of asylum seekers and, as a consequence, to be contrary to the Refugee Convention prohibiting States to penalize refugees for their irregular entry or status, and to the 1999 Tampere Programme's reaffirmation of the absolute respect of the right to seek asylum, now enshrined in Article 18 of the EU Charter of Fundamental Rights. Finally, one has to wonder what the price of coercion is. Detaining migrants and asylum seekers for months after their arrival, besides being legally questionable, risk to stimulate practices of resistance and disorders within detention facilities, especially given the well-documented poor detention conditions. Encouraging frontline member countries to resort to mass detention at the border will put border police and other security forces under a strong pressure that will greatly increase the risk of an excessive and uncontrolled use of force inside detention facilities.

In light of this, the attempt made by the Commission at normalizing an approach which was originally conceived as an exceptional response to a 'disproportionate migratory pressure', and has been already explicitly denounced as creating 'fundamental rights challenges that appear almost unsurmountable' (EU Agency for Fundamental Rights 2019: 7), it is in many ways extremely questionable.

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9. EU ASYLUM POLICIES THROUGH THE LENSES OF THE UN GLOBAL COMPACT ON REFUGEES

Sergio Carrera and Roberto Cortinovis¹

1. Introduction

EU policy debates on asylum over the course of 2019 have revolved around the need to abandon crisis-led policy-making that had dominated EU policies in the aftermath of the so-called ‘refugee crisis’ from 2015 onward. The EU response to the crisis produced a number of controversial policy developments. Emergency measures adopted during that period, including informal and extra-EU Treaty instruments of cooperation with third countries, ended up bypassing the system of checks and balances foreseen by the EU legal system, raising concerns regarding their compatibility with EU rule of law and fundamental rights principles and standards (Carrera, Santos and Strik, 2019).

These developments stands in direct contradiction with the Tampere Programme’s aim, laid down in its paragraph 4, to establish “an open and secure European Union, fully committed to the

¹ This Chapter draws from research conducted under the ReSOMA project. ReSOMA receives funding from the European Union’s Horizon 2020 research and innovation programme under the grant agreement 770730.

obligation of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity”. They are incompatible with the commitment to the “absolute respect of the right to seek asylum”, ensuring that “nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement* (paragraph 13 of the Tampere Conclusions). This Chapter also argues that the ‘informalisation’ and intergovernmentalism characterizing latest EU policies and initiatives stand at odds with the Lisbon Treaty call for the Union to establish a *common* policy on asylum in Article 78.1 TFEU.

In 2016, the European Commission launched an overall reform of the Common European Asylum System (CEAS), which aimed, among other things, to provide for structural responses to responsibility-sharing issues raised by the refugee crisis by reforming the EU Dublin system (European Commission, 2016a, 2016b). However, none of the proposals for the reform of the CEAS presented by the Commission in 2016 could be finalised before the expiry of the 2014-2019 legislative term due to the choice of member states to stick to a logic of consensus and to discuss the asylum reform as a ‘package’ (Carrera and Cortinovis, 2019a).

The need for a ‘fresh start’ out of the polarized debates of the post-crisis period may be the reason behind the choice of the new President of the Commission Ursula von der Leyen to develop a New ‘Pact on Migration and Asylum’.² In parallel, the adoption of the United Nations Global Compact on Refugees (GCR) in December 2018 and the agenda it lays down to advance responsibility sharing for refugees at the global level fostered a debate regarding the role and contribution of the EU and its Member states in the achievement of the Compact’s objectives over the years to come (Carrera and Cortinovis, 2019b).

In spite of the momentum injected by the agenda of the new Commission and the steering role played by the implementation of the UN GCR, policy developments over 2019 have underlined

2 Ursula von der Leyen, President of the European Commission. Mission letter to Ylva Johansson, Commissioner for Home Affairs, Brussels, 1 December 2019.

how difficult the transition from a ‘crisis-labelling’ policy making in the area of asylum is proving to be. EU policy responses still heavily rely on extra-Treaty, informal and emergency-framing cooperation frameworks and instruments with third countries such as Libya and Turkey. These can hardly be considered as sustainable and international refugee and human rights law-compliant solutions, posing a number of crucial issues concerning their (lack of) consistency with EU democratic rule of law and fundamental rights principles in external action. On the ‘internal side’, *ad hoc* arrangements among few EU Member States for the disembarkation and relocation of asylum seekers rescued in the Mediterranean sea implemented during 2018 and 2019 are a clear manifestation of intergovernmentalism and ‘flexible solidarity’ dominating EU policy responses in the area of asylum in the absence of a structural reform of the CEAS.

2. The External Dimension and Its Containment Bias: Solidarity Towards Third Countries?

The EU and its member states have taken an active role in the consultation process that led to the adoption of the GCR by the UN General Assembly in December 2018. The EU Delegation in Geneva expressed its support to the GCR process, while EU member states have generally aligned with the common statements delivered by the EU Delegation during subsequent negotiating rounds (Gatti, 2018).

The GCR represents the international reference framework for planning and monitoring policy responses to address refugee situations in the future.³ Its main goal is to provide a basis for predictable and equitable responsibility-sharing among all UN Member States and other relevant stakeholders. The GCR core foundation is international refugee protection and international human rights driven. It confirms as its point of departure the existing international protection framework, centred on the cardinal principle of

3 See ‘The Global Compact on Refugees. Final Draft’ (as of 26 June 2018). <https://www.unhcr.org/5b3295167.pdf>

non-refoulement, which lies at the core of the 1951 Geneva Convention and its 1967 Protocol.

The potential added value of the GCR in fostering solidarity and responsibility sharing for refugee protection at the global level, however, face a political environment characterized by the proliferation of multiple instruments and arrangements aimed at preventing access, reducing admission and increasing the expulsion of asylum seekers to countries of transit or origin (Hathaway and Gammeltoft-Hansen, 2015).

During recent decades, European states have developed a complex and diversified matrix of policy, legal and financial instruments to involve third countries in the management of migration, borders and asylum. At the EU level, policies guided by non-arrival and non-admission logics have taken the shape of a common EU visa and border (Schengen) policy, EU readmission agreements and arrangements, carrier sanctions and the inclusion of provisions on 'safe country concepts' in EU asylum legislation (Byrne, Noll and Vedsted-Hansen, 2002; Costello, 2005; Scholten, 2015; Costello, 2016; Costello, 2017; Carrera, 2018).

In the name of the 2015 European Refugee Humanitarian Crisis, EU cooperation with third states on asylum and migration has been re-prioritised, leading to the adoption of a number of non-legally binding political 'arrangements'. There has been a shift in EU policy: from an approach emphasising formal cooperation through legal acts and international agreements, towards another calling for informal channels and political tools or non-legally binding/technical arrangements of cooperation, often linked to emergency-driven EU financial tools, such as EU Trust Funds (Carrera, Santos and Strik, 2019). As a consequence of this policy framework centred on *containment*, refugees and asylum seekers face overwhelming legal and practical barriers in effectively accessing protection in the EU. Savino has rightly pointed out that the resulting paradox is one where EU policies "feed the very same phenomenon of unauthorised arrivals – that the broader EU migration policy intends to curb" (Savino, 2018).

A case in point of the tension between containment and fair responsibility sharing goals in EU asylum policy is the 2016 EU-Turkey Statement (Carrera, den Hertog and Stefan, 2019),⁴ which has been controversially portrayed by some EU policy makers as a ‘model’ to be replicated in cooperation with other major refugee hosting countries. The Statement set up an operative framework under which asylum seekers having irregularly entered Greece via Turkey would be returned to the latter. At the same time, it included the so-called ‘one-for-one’ resettlement arrangement, according to which, for every Syrian returned from the Greek islands to Turkey, another Syrian would be resettled from Turkey to the EU. The Statement was based on the political framing of Turkey as a ‘safe third country’, despite the fact that Turkey maintains a geographical limitation to the applicability of the Geneva Convention (thus it does not recognise full refugee status to non-European asylum seekers), and the wealth of evidence about the human rights violations and rule of law challenges in the country (Amnesty International, 2017; Council of Europe, 2017).

The EU-Turkey statement is an exemplary case illustrating how the containment bias underpinning EU policies often comes with specific forms of mobility and admission for refugees. The Statement in fact provides both containment and mobility elements in its priorities and design, and may be seen as a living instance of a *contained mobility* approach. Such an approach combines aspects of containment – e.g. safe third country rules, border surveillance and interception at sea – with others on mobility, yet a kind of mobility that presents highly selective, restrictive and discriminatory features, e.g. a resettlement component only covering Syrian nationals.

The EU-Turkey Statement took the shape of a political declaration presented in the guise of a press release. The academic literature has expressed concerns about the strategic political ‘non-use’

4 Council of European Union (2016), EU-Turkey statement, 18 March 2016, Press Release 144/16, 18 March, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf>

of EU Treaty instruments through informal arrangements that escape democratic scrutiny by the European Parliament and judicial control by the Court of Justice of the EU in Luxembourg, questioning the compatibility of this approach with the EU Treaty principles of inter-institutional balance and sincere and loyal cooperation (Carrera, den Hertog and Stefan, 2017).

The human rights violations inherent in the practical implementation of the Statement in Turkey and Greece have been well documented (Médecins Sans Frontières, 2019). The selective mobility logic included in the one-for-one resettlement scheme – which only covers Syrians refugees – is contrary to established principles of international refugee law, which lie at the basis of the UN GCR. In particular, the scheme violates the prohibition of non-discrimination based on country of origin as laid down in Art. 3 of the 1951 Geneva Convention (Carrera and Guild, 2016).

The implementation of the ‘deal’ has raised fundamental questions regarding the independence of civil society actors and non-governmental organisations in the hotspots located on the Greek islands. Many civil society actors decided to stop providing services and assistance to asylum seekers and leave the country due to the human rights challenges that the operationalisation of the Statement posed to their ethos, independence and humanitarian assistance principles (Carrera et al., 2019).

On the occasion of the third anniversary of the Statement in March 2019, a group of twenty-five civil society organisations sent an open letter to European leaders, reiterating their concerns about the ‘unfair and unnecessary containment policy’ implemented via the deal, which is still forcing thousands of refugees and asylum seekers to live in degrading conditions in hotspots on the Greek Islands.⁵

5 See NGOs calling on European leaders to urgently take action to end the humanitarian and human rights crisis at Europe’s borders. <https://oxfam.app.box.com/v/3yearsEUTurkeyDeal> At the time of writing, in February 2020, around 36,000 asylum seekers were still facing alarming overcrowding and precarious conditions in reception centres on the Greek islands. See ‘UNHCR calls for decisive action to end alarming conditions on Aegean islands’, 7 February 2020, <https://www.unhcr.org/news/briefing/2020/2/5e3d2f3f4/unhcr-calls-decisive-action-end-alarming-conditions-aegean-islands.html>

Finally, the effectiveness of the ‘deal’ has been largely questioned. The limited number of Syrian refugees that have been returned to Turkey in the framework of the Statement (359 from April 2016 to November 2019), as well as the total number of returns (only reaching about 2,000 over the same period) is a clear demonstration of the legal obstacles associated with unlawfully applying ‘safe third country’ notions in that specific context (UNHCR, 2019).

In addition, the EU-Turkey Statement has not prevented mobility from happening. According to statistics provided by Frontex, in 2019 there were about 82,000 irregular border crossings from Turkey to Greece, in comparison to 56,000 in 2018 and 42,000 entries in 2017 (Frontex, 2020; 2019). In light of the previously identified challenges, the EU-Turkey Statement hardly provide a sustainable and protection-driven model of cooperation and sharing of responsibility with third countries, as it stands at odds with the human rights principles and protection-driven rationale at the basis of EU Treaties and the GCR.

3. Solidarity Among EU Member States: Flexible Solidarity Is No Solidarity

Search and Rescue (SAR) and disembarkation of people rescued in the Mediterranean became once again a thorny political issue during the summer of 2018, after the decision by the Italian and Maltese governments to deny or delay disembarkation in their ports to NGOs and other vessels carrying migrants and asylum seekers found in distress at sea. In the following period, cases of delayed disembarkation were addressed through ad hoc disembarkation and relocation arrangements. These arrangements involved a small group of Member States willing to relocate, on a voluntary basis, a limited share of rescued asylum seekers disembarked in Italy, Malta and Spain (ECRE, 2019; Carrera and Cortinovis, 2019a).

Following lengthy negotiations within the Council of the EU during 2019 on ‘temporary arrangements for disembarkation’, an

initiative led by four Member States (Germany, France, Italy, Malta) resulted in a Ministerial Meeting in Valletta on 23 September 2019. The declaration adopted by the four countries in that context – the so-called ‘Malta Declaration’ – aims to overcome the previous ‘ship by ship’ approach to relocation by setting in place a “more predictable and efficient temporary solidarity mechanism”.⁶ The solidary mechanism foresees inter alia relocation to participating member states of asylum seekers disembarked in Italian and Maltese ports on the basis of pre-declared pledges and through a fast track system taking no more than four weeks. The Declaration was further discussed at the Justice and Home Affairs (JHA) Council meeting of 7 and 8 October 2019, in an attempt to broaden participation in the mechanism to other EU member states.

The intergovernmental nature of the ‘mechanism’ foreseen by the Malta declaration opens up fundamental questions concerning its relationship and compatibility with the EU rule of law framework enshrined in the Treaties. A ‘pick and choose’ approach by member states to the application of the principle of solidarity stands at odds with the well-advanced stage of Europeanisation characterising EU asylum policies.

‘Flexible integration’ and ‘solidarity à la carte’ run the risk of turning the clock back three decades in European integration and re-injecting intergovernmentalism into fields that – after the entry into force of the Lisbon Treaty in 2009 – are under clear EU competence and scrutiny reverts. The principle of solidarity in the field of asylum enshrined in Article 80 TFEU should not be understood as an ‘anything goes’ option for national governments but as an EU constitutional principle driving the establishment and implementation of the CEAS (Moreno-Lax, 2017; Karageorgiou, 2019).

In the 2017 ruling that dismissed the actions brought by Slovakia and Hungary against the emergency relocation decisions adopted by the Council in 2015, the Luxembourg Court made

6 See joint declaration of intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism, <http://www.statewatch.org/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf>

it clear that when one or more Member States are faced with an emergency situation characterized by a sudden inflow of nationals of third countries, EU responses “must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States”⁷

When assessing EU responses in the context of the 2015 humanitarian crisis, it is critical to recall that the Tampere Programme in Paragraph 16 urged “the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States”. Following up on that request, the EU adopted the Temporary Protection Directive (TPD) in 2001 (Peers et al. 2015).⁸

The purpose of the TPD is to set out minimum standards to give temporary protection in the event of a ‘mass influx’ of ‘displaced persons’ from third countries who cannot return to their country of origin, and ‘to promote a balance of effort between Member States’ as regards the consequences of receiving such persons (Art.1).

One of the limitations of the TPD is its complex activation mechanism: its envisaged regime can only be activated if the Council decides to adopt a Decision establishing the ‘existence of a mass influx of displaced persons’. The Council must act by a qualified majority on a proposal from the Commission, which must consider any request to make such a proposal made by any Member State (Art. 5(1)).⁹

A number of explanations have been provided on why the TPR

8 Council directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12.

9 The Directive also includes a number of solidarity and responsibility sharing related provisions. Art 25 (1) states that the Member States “shall receive persons who are eligible for temporary protection in a spirit of Community solidarity”. Art. 26(1) specifies that Member States “shall cooperate with each other with regard to the transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferral”.

Directive has never been used in practice so far, including in context prevailing in the EU since 2015. Previous contributions have underlined how the negotiation of this instrument revealed since the outset deep controversies between member states on issues related to burden-sharing, the relationship between temporary protection and asylum procedures and long-term solutions for the beneficiaries of temporary protection. The cumbersome activation procedure has constituted another reason preventing its use (Deniz Genç and Şirin Öner, 2019).

Finally, the instrument of temporary protection, which emerged in Europe in the 1990s as a response to large influxes into European countries from the former Yugoslavia, was later on recognized by EU actors as incompatible with current EU policies of containing and controlling immigration (Koo, 2016). Guild, Peers and Moreno have in any case argued that the non-use of this Directive has been in fact good news as it posed a serious risk to undermine Geneva Convention standards by offering EU Member States the possibility “to grant considerable numbers of people the lower standards of protection in this Directive instead of refugee status” (Peers et al. 2015).

The background of controversies over solidarity briefly described above is one characterized by major protection dilemmas affecting the current shape of the CEAS. As Vedsted-Hansen (2017) has showed, the CEAS is not only still incomplete in nature in light of the Tampere Programme. It is also characterized by structural protective failures and an unfair and asymmetric distribution model of responsibilities among member countries under the Dublin Regulation. Moreover, current EU asylum law standards enshrined in EU Directives have allowed for the use and misuse of ‘optional clauses’ by Member States to reduce protection standards to beneficiaries of subsidiary protection. If anything, the 2015 humanitarian refugee crisis brought those very challenges into the spotlight (Vedsted-Hansen, 2017).

In 2016, the European Commission proposed a reform of the CEAS, which included a revision of the Dublin regime. The Com-

mission proposal included the introduction of a ‘corrective allocation mechanism’ – taking over the 2015 temporary relocation decisions - that would be activated automatically in cases where a member state has to deal with a disproportionate number of asylum seekers (European Commission, 2016b).

In November 2017, the LIBE Committee of the European Parliament (EP) adopted its report on the Dublin reform as a basis for inter-institutional negotiations (European Parliament 2017). The EP Report envisaged an overhaul of the criteria for allocating responsibility for asylum claims within the EU: deleting the irregular entry criterion, expanding the criteria based on family links, and introducing academic and professional qualifications as relevant criteria. A key component of the EP proposal was the introduction of a distribution mechanism between member states as the default rule when none of the (revised) criteria laid down in the Dublin’s hierarchy apply. Furthermore, the EP report provided applicants with a (limited) choice in the identification of the member state responsible for examining their claim, which represents an absolute novelty in the Dublin procedure.

The reform of the CEAS, however, was put ‘on hold’ during the previous legislative term by persisting disagreements among member states in the Council over issues related to the distribution of responsibility and specifically the introduction of a system of mandatory relocation of asylum seekers. Representatives of the member states gave preference to a logic of consensus and de facto unanimity during negotiations on the CEAS reform files. As underlined by the European Parliament, this choice disregards the Qualified Majority Voting (QMV) rule under the ordinary legislative procedure for asylum-related legislative initiatives foreseen in the Lisbon Treaty (Carrera and Cortinovis, 2019a: 30).

The lack of progress on the CEAS reform has clear repercussions on the ‘external sides’ of EU asylum policy, which are still driven by a predominant home affairs and policing approach focused on containment. Establishing an efficient, sustainable, equitable system for sharing responsibility between member states

is a precondition for honouring the EU's commitment laid down in the Tampere Programme and the EU Treaties to ensuring access to protection and adequate reception standards to the relatively small share of world's refugees that seek protection in Europe. Addressing structural and protection gaps in EU asylum governance is also crucial for ensuring the credibility and legitimacy of EU efforts to promote refugee protection and integration in the main refugee hosting countries in other world regions.

4. Conclusion

The principle of solidarity and fair sharing of responsibility enshrined in Article 80 TFEU implies equality among all EU member states and a common response to asylum challenges. The way forward for the EU should be that of developing its asylum policy based on a paradigm of 'equal solidarity', whereby all EU member states share fairly and equally the responsibility for asylum seekers across the Union. This would translate into the enactment of a set of asylum policies grounded in EU and national constitutive principles and fundamental rights, as a precondition for restoring the legitimacy and credibility of the EU in this area.

Furthermore, the requirement laid down in Art. 78(1) TFEU that the common EU asylum policy must be in accordance with the Geneva Refugee Convention and 'other relevant human rights treaties', implies that the principle of solidarity should not be circumscribed to internal asylum policies but guide the external facets of the CEAS as well. This should go hand in hand with EU efforts to reform its own projection regime in line with international refugee law and the GCR commitments.

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10. SEARCH AND RESCUE AT SEA, NON-GOVERNMENTAL ORGANISATIONS AND THE PRINCIPLES OF THE EU'S EXTERNAL ACTION

Paolo Cuttitta

1. Introduction

In recent years, humanitarian actors supporting migrants have been increasingly harassed, discredited and criminalised by public authorities in different EU countries and regions, both on land and at sea, at external as well as internal Schengen borders (Bellezza and Calandrino, 2017; Carrera, Allsopp and Vosyliūtė, 2018; Fekete, Webber and Edmond-Pettitt, 2017; 2019). This Chapter focuses on non-governmental organisations (NGOs) engaged in search and rescue (SAR) in the Central Mediterranean. Between the end of 2016 and early 2017, the EU Border agency Frontex first suggested that NGOs may be used by smugglers (Robinson, 2016), then claimed they encourage smugglers while not cooperating with the police (Bewarder and Walter, 2017). Following this, similar allegations were made by Italian prosecutors (Reuters, 2017) as well as policymakers from both government (Grignetti, 2017) and opposition (Agi, 2017).

Since then, NGO staff have been prosecuted in Italy (and then Malta) not only for facilitating irregular immigration but also for a range of administrative issues, while NGO vessels and reconnaissance airplanes have been seized or otherwise prevented from carrying out SAR missions (Fra, 2018; 2019). Other NGO ships have been hampered after they rescued people at sea, as permission to disembark was denied or delayed. Finally, NGO assets have been gradually excluded from SAR operations coordinated by the maritime rescue coordination centres (MRCCs) of the coastal states concerned. This is all aimed at facilitating forced returns from international waters by the Libyan authorities and preventing people from reaching EU soil. These developments pose serious challenges to the principles that should guide the EU's external action.

2. Excluding NGO Vessels From SAR Operations

After a period (from 2014, when the first NGO rescue mission took place, to 2016) of effective cooperation with SAR NGOs (Cut-titta, 2018c; Stierl, 2018), the Italian MRCC (I-MRCC), which is managed by the Coast Guard, gradually changed its policy towards NGO vessels (Cuttitta, 2018a; 2018b). While international law requires state authorities, whenever there is a distress case, to avail themselves of any available asset to the maximum extent possible (Papanicolopulu, 2017), I-MRCC started excluding NGO vessels from SAR operations.

As a first step, when NGO ships were the closest to a distress case, I-MRCC started asking them to intervene but refrain from taking people onboard, and only monitor the situation until Libyan patrol boats would arrive and forcibly return the passengers to Libya (Cuttitta, 2017). Thus, NGOs were obliged to de facto passively support deportations. By doing this, I-MRCC also distanced itself from its previous, extensive interpretation of the notion of 'distress', whereby a situation of 'distress' is what triggers the legal obligation to immediately rescue people (Cuttitta, 2018a).

The second step was not to involve NGO ships in SAR operations anymore. Maltese and Libyan authorities also followed this policy. Since the contested establishment of a Libyan SAR region (Santer, 2019) in 2018, European and North African coast guards mostly: a) do no longer entrust NGO vessels with rescue duties; b) do not even send out NAVTEX messages, that are received automatically by all vessels transiting in the relevant area (Mensurati, 2018; Nicolosi, 2019; Tonacci, 2018). NGO vessels are involved only as a last resort. This is aimed at making sure that the Libyan authorities are given priority in their purported SAR region, and can carry out interdictions disguised as rescues (Moreno-Lax, 2017). Indeed, international law requires that a rescue operation ends with the disembarkation in a place of safety, that is “a place where the survivors’ safety of life is no longer threatened, and where their basic human needs (such as food, shelter and medical needs) can be met” (Imo, 2004). Libya is not such a place, since migrants are systematically subjected to violence and abuses there, even from public authorities (United Nations, 2019).

3. Facilitating Pull-Backs to Libya

While not involving NGO vessels opens up the question of the responsibility for any failed rescue that should result from this policy, the practice of supporting pull-backs (Markard, 2016; Pijnenburg, 2018) from international waters to Libya opens up the question of the indirect or even direct legal responsibility of Italy or the EU for these actions. The fact that Italy (Palm, 2017) and the EU (European Commission, s.d.) provide the authorities of the Libyan government of national accord (GNA) with assets as well as training programmes for their officials (Political and Security Committee, 2016), knowing that this will result in forced collective returns, suggests that an indirect responsibility may arise for both Italy and the EU for assisting Libya in committing an internationally wrongful act (Giuffr , 2013; Markard, 2016).

Direct responsibility may arise for pull-backs carried out by Libyan patrol boats if these take place under the actual coordination of the Italian authorities. Several circumstances suggest that this may be the case. One is the fact that no Libyan MRCC exists yet: the EU-funded project supporting its establishment is still at an early stage (European Parliament, 2019). In the absence of an effective Libyan MRCC, a Libyan SAR region arguably only exists potentially, and coordination of pull-backs seem to be actively supported, if not directly coordinated, by the Italian navy ships that have been anchored at the port of Tripoli since August 2017 (Ministero della difesa, 2019; Senato della Repubblica, 2017), as found by an Italian court (Tribunale di Catania, 2018). These issues are currently under the scrutiny of the European Court of Human Rights (ECtHR, 2019; Pijnenburg, 2018) as well as the International Criminal Court (Bowcott, 2019; Shatz and Branco, 2019). As regards Maltese authorities, these seem to have coordinated pull-backs to Libya even directly: through their MRCC and from the Maltese SAR region (Lüdke, 2019).

4. Struggles About Disembarkation

When NGO ships manage to rescue people and take them onboard, public authorities pose increasing obstacles to disembarkation. Disembarkation is often denied or delayed (e.g. by arguing that other states are responsible), and followed by legal proceedings, also including the seizure of the vessel.

Italy decided, first, to disengage from responsibility to coordinate SAR, and identify a place of safety, for events occurring outside its SAR region, thus involving the other Mediterranean coastal states: the first such case was that of the Golfo Azzurro, which had rescued people in the Maltese SAR region in August 2017 (The Maritime Executive, 2017). Since then, when it was brought into play, Malta often denied permission to dock and disembark, arguing that other principles, such as that of the closest port of safety (mostly Lampedusa or Tunisia), should apply.

More generally, both Italy and Malta have often accepted disembarkation only after other countries had formally committed to relocate part of the rescued people to their territories (Carabott, 2019; La Repubblica, 2019a; Ziniti, 2019b). This took often weeks, during which people were forced to wait at sea, and NGO vessels were unable or only partly able to carry out other rescues.

The compliance of such practice with international law is questionable. According to the International convention for the safety of life at sea, whenever a rescue is carried out by a private ship, shipmasters should be released from their obligations with minimum further deviation from the ships' intended voyage.¹

Italy and Malta have also used the flag argument to skip responsibility. Thus, they managed to involve the authorities of flag states in their offensive against SAR NGOs. This issue was first posed only in theory, in June 2017: the Gentiloni government suggested that failure from the EU to provide more support may result in foreign flagged vessels to be denied permission to dock at Italian ports (Ansa, 2017). Similar threats were posed again in March 2018, towards the Spanish-flagged NGO ship *Open Arms* (Guardia Costiera, 2018), and two months later, towards the UK-flagged *Astral* (Brera, 2018). The following government (the first Conti government) put the idea into practice. In August 2018, it said the UK was responsible for the disembarkation of 141 people rescued by the *Aquarius*, the ship bearing a Gibraltar flag and managed by SOS Méditerranée and Médecins Sans Frontières (MSF). The permission to bear the Gibraltar flag was immediately revoked (Yeung, 2018). Short after the vessel was re-registered with Panama, it was de-flagged by the Panama authorities as well (Weaver, 2018). According to the NGOs, Panama was pressured by

1 Significantly, permission to dock was also denied to commercial ships which were only accidentally involved in rescue operations. Italy gave the example with the Danish *Alexander Maersk* and the Italian *Vos Thalassa*, which were both forced to wait for days before they could dock or transfer the rescued to other vessels in 2018 (Rainews, 2018; Lopapa, 2018). The supply vessel *Sarost V* was even refused authorisation to dock by Malta after rescuing 40 people in the Maltese SAR region, under Maltese coordination, and its flag state Tunisia kept it waiting for weeks before allowing disembarkation (Santer, 2018). The Tunisian authorities did the same with the Egyptian *Maridive 601* in 2019 (Tondo and Stierl, 2019).

the Italian government (Kelly, 2018). SOS Méditerranée and MSF resumed SAR operations with a new ship flying a Norwegian flag in 2019.

Similarly, the NGO Sea Eye had to charter a new ship under a new flag after Italy asked the Netherlands to verify the registration of its *Seefuchs*, as well as of another NGO ship, the *Lifeline*. The Dutch authorities replied that the boats were insufficiently registered for them to bear the Dutch flag. Both ships were blocked in Malta. A trial for ‘insufficient registration’ against the *Lifeline* and its captain is still going on (Mission *Lifeline*, 2019). The Netherlands also changed its legislation by introducing new requirements for rescue ships, only to block the Dutch-flagged *Sea-Watch 3* (Sea-Watch, 2019) after the Italian government claimed that the people rescued by the ship of the German NGO *Sea-Watch* should disembark either in the Netherlands or in Germany, in January 2019. However, a Dutch court found that the blockage was unlawful, and the *Sea-Watch 3* could resume SAR operations after a month. The flag issue was raised again by the Italian government against the *Sea Eye*’s *Alan Kurdi* in April (La Repubblica, 2019c) and the *Sea-Watch 3* in June (La Repubblica, 2019b). In August 2019, the Italian government called for the Spanish government to de-flag the *Open Arms*, the rescue vessel of the Spanish NGO *Proactiva Open Arms* (Ziniti, 2019a).

In sum, NGO assets have been systematically blocked not only after rescue operations but even preventively. More specifically, EU countries such as Malta and Spain have not only denied disembarkation: they have also denied NGOs the authorisation to leave their ports to carry out SAR missions (Abellán, 2019). Malta (Sea-Watch, 2018; Ziniti, 2018) and Italy (Mensurati and Tonacci, 2019) also blocked the airplanes used by NGOs to spot vessels in distress.

5. Legal Prosecutions

As of 1 June 2019, the European Union Agency for Fundamental Rights counted 5 ongoing and 8 past legal proceedings (in Italy

and Malta alone) against NGO assets engaged in SAR, while similar proceedings have taken place in Greece as well (Fra, 2019).

The first to be targeted was the NGO Jugend Rettet, whose ship *Iuventa* was seized in August 2017. While accusations seem to rest on weak foundations (Forensic Oceanography and Forensic Architecture, 2018), ten crew members are currently being prosecuted by the Italian judiciary for aiding illegal immigration.

In March 2018, the *Open Arms* refused to hand over to Libyan authorities the people rescued in the would-be Libyan SAR region, as requested by I-MRCC. For this reason, it was seized by the Italian authorities after it was eventually allowed to dock in Pozzallo (Ruta, 2018). More prosecutions followed in 2018 and 2019. Arguably, their proliferation was partly facilitated by the 2002 EU Facilitators' package (Bellezza and Calandrino, 2017; Carrera, Vosyliūtė, Smialowski, Allsopp and Sanchez, 2018; Fra, 2018; Vosyliūtė and Conte, 2018). Unlike the Migrant Smuggling Protocol supplementing the United Nations Convention against Transnational Organized Crime, the EU package does not include a clause exempting those who do not aid for profit but for other (e.g. humanitarian) reasons, thus leaving it to the member states to decide whether to adopt such a humanitarian clause or not.

In Italy, however, since no evidence of collusion with smugglers has ever emerged, the fact that the accused acted in the accomplishment of the higher legal obligation to rescue has always made sure that legal proceedings were discontinued, even in the absence of a humanitarian clause (Masera, 2018). On the other hand, the very fact that NGOs are investigated and prosecuted contributes to criminalising and discrediting them, which results in a decrease in donations (Cusumano and Pattison, 2018), while boat seizures result in a strong reduction of the overall SAR capacity in the Mediterranean.

A role in the process of criminalisation was also played by the 'code of conduct', a private agreement imposed by the Italian government on NGO ships in 2017. The code has little juridical

relevance, if at all, since it cannot prevail over national and international law (Cusumano, 2019; Mussi, 2017). However, together with the increasing aggressions from Libyan patrol boats (Cutitta, 2018a; 2018c), it contributed to discouraging several NGOs, which decided to leave the Mediterranean, while the seizure of the *Iuventa* appeared to be a retaliation act of the Italian judiciary, as it occurred the day after Jugend Rettet announced it would not sign the code (Dearden, 2017). Some of the provisions contained in the code seem to have inspired the decree of the Libyan GNA of 14 September 2019 regulating SAR activities in the would-be Libyan SAR region (Arci, 2019). Few weeks after the decree was issued, a Libyan militia fired warning shots and interfered with a rescue operation carried out by the *Alan Kurdi* (Deutsche Welle, 2019).

6. Separation of Powers

In March 2019, the former Italian interior minister Matteo Salvini publicly called on the judicial authorities to arrest the *Mare Jonio's* crew when the vessel of the NGO *Mediterranea* entered the Lampedusa harbour (Ansa, 2019). This was just one of several interferences from the executive and legislative over the judiciary. Prosecutors were not only pressured to investigate NGOs, but they were also openly intimidated when they started investigating Salvini for kidnapping, as migrants were forced to wait onboard a navy ship in Italian waters before they were allowed to dock and disembark in August 2018. A member of the Parliament publicly threatened to “come and pick [them] up if [they] touch the Captain”² (La Repubblica, 2018). In May 2019, Salvini himself commented on the decision of Agrigento’s public prosecutor to allow disembarkation of the migrants rescued by an NGO vessel by declaring that “if this public prosecutor wants to serve as a minister of interior, he should run for elections” (Il Messaggero, 2019).

Incidentally, attempts from Italian politicians to pressure the judiciary were not new in the field of migration (see Bellezza and

2 Salvini is called “il Capitano” by his followers.

Calandrino, 2017, p. 250, on the pressure to arrest boat drivers as smugglers even if they were just migrants like the other passengers), which further attests to an overheated climate surrounding migration which seriously risks eroding the fundamental principles of the separation of powers and the independence of the judiciary, which are cornerstones of the rule of law.

7. Solidarity

Struggles about which country should take responsibility for the rescued and their disembarkation clearly show a lack of solidarity among the states concerned. This also led the EU to conceive the plan of regional disembarkation platforms, with people rescued in international waters to be disembarked in third countries (Ecre, 2018). The idea, which was rejected by African countries (Boffey, 2019), was a further attempt to circumvent legal obligations towards migrants. Like outsourced forced returns to Libya, it would have been arguably in breach of international law, since countries such as Tunisia and Egypt are, like Libya, not safe.

Since 2018, people rescued by NGOs are mostly allowed disembarkation in Italy or Malta only after their partial redistribution has been accepted by other EU countries. Thus, an informal relocation mechanism has been created, but only on a voluntary basis, and with only little success, since most governments do not keep their promises (Lopapa, 2019; Rt, 2019). Even the joint declaration agreed upon by the governments of France, Germany, Italy and Malta on 23 September 2019 (Valletta Declaration, 2019) only leaves it to the states to agree on relocation arrangements (Carrera and Cortinovis 2019a; 2019b). Importantly, the Valletta Declaration further states that the EU should enhance its “aerial surveillance in the southern Mediterranean in order to ensure that migrant boats are detected early with a view to fight migrant smuggling networks, human trafficking and related criminal activity and minimising the risk of loss of life at sea”, whereby early detection means higher chances to inform Libyan authorities in

time for them to carry out pull-backs. It seems that the only way not to put solidarity among member states under strain is to deny any form of solidarity towards individuals who try to exercise their rights to mobility and asylum.

8. Conclusion

The externalisation of migration and border controls to international waters is part of the EU's external action. According to article 21 of the Treaty on European Union, "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".

The developments outlined in this Chapter show that these principles are being openly defied by public authorities. The rule of law is challenged by the increasing interferences from the executive and legislative towards the judicial branch. Forced returns from international waters pose serious challenges to the principles of international law. 'Indivisible' human rights and fundamental freedoms are in fact divided into two categories: the more deserving, such as the right not to be exposed to the risk of death or abuses and violence by smugglers, and the less deserving, such as the right to leave any country, including one's own (Markard, 2016), the right to asylum and the right not to be subjected to abuses and violence by state authorities.

Solidarity among member states, far from serving as a guiding principle, is downgraded to an option, while solidarity among individuals is systematically discouraged. Finally, the human dignity of those kept hostages for weeks onboard rescue ships is disregarded, and even more so that of the people pushed back against their will to North Africa on behalf of Europe, and subjected there to inhuman treatments and violence.

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PART III
IRREGULAR AND
REGULAR
IMMIGRATION

11. 20 YEARS AFTER TAMPERE'S AGENDA ON "ILLEGAL MIGRATION": POLICY CONTINUITY IN SPITE OF UNINTEDED CONSEQUENCES

Virginie Guiraudon

1. Introduction

In the rather polarized context of EU politics, immigration and asylum have become a matter of “high politics” used by certain government leaders to exacerbate tensions between member states. The issue has received wide media attention since 2015 and there have been several Council meetings dedicated to immigration and asylum. So commemorating the Tampere summit is not just a step back in time, it takes place in a more discreet and consensual context.

In 1999, a few highly specialized *hauts fonctionnaires* of the Council Secretariat well versed in the EU culture of compromise could prepare a summit and its conclusions with little interferences from their own institution or from the 15 member state governments (Mangenot, 2003). It was a different moment than the politicized character of the 2002 Seville summit when the “BAB

trio” (Blair, Aznar and Berlusconi) put the fight of illegal migration at the top of the agenda, calling for instance for a European corps of border police or cutting aid to immigration source countries.

Calling for a “constant review progress” with a Commission “scoreboard” and “the necessary transparency” vis à vis the European Parliament, the Conclusions of the 1999 Tampere summit is an agenda-setting document. It is thus appropriate to ask about the implementation of the various orientations laid out in this blueprint. Although it is forward-looking, the Tampere Programme also reflects the proximate context of the times, which I will briefly outline and analyse before turning to the legacy of Tampere.

This Chapter argues that the policy paradigm set out in the Tampere conclusions was never called into question nor were afferent policy instruments. While it became clear that there were negative consequences to “remote control” with migrants taking dangerous and even deadly routes and entering irregularly, while there was little evidence of the success of cooperation with third countries, especially in the geopolitical chaos South of Europe, there was no reorientation of policy and this inertia led to policy drift.

2. The Tampere Moment

The Tampere conclusions built on a decade or so of cooperation in Justice and Home Affairs (JHA), first through the Schengen Secretariat and working groups and, as of 1994, with a Directorate at the Council Secretariat, which was more active than the very small Commission taskforce. This means that policy inputs on immigration and asylum came from law and order officials and firmly located the issue on a security continuum. Notwithstanding, the text is quite balanced with its first section devoted to numerous references to liberty, “a shared commitment to freedom based on human rights, democratic institutions and the rule of law” and the respect of the right to asylum. Yet, what is striking is the importance of “external action” in the area of immigration, the so-called “global approach to migration.” This was relatively new but it

exemplified the intense intergovernmental activity in this area in that period.

One illustration regards the numerous references to organised crime, and the smuggling and trafficking of persons. In 1999, the civil servants involved in EU JHA circles were involved in negotiating the UN convention on transnational crime and its protocols. Among them, there was the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air. Moreover, several international organizations had been focusing on trafficking of human beings after 1989 and the fall of the Iron Curtain. This was the case of the Geneva-based IOM, which commissioned many reports on the issue and by the mid-1990s offered to repatriate trafficking persons. Similarly, the Vienna-based ICMPD founded in 1993 that served a secretariat of the intergovernmental Budapest process also acquired expertise in the field of smuggling and trafficking. Thus, the emerging EU agenda at Tampere was embedded in a large web of parallel intergovernmental initiatives at the regional and global levels.

Tampere thus established diplomacy as a pillar of JHA. Again, there were proximate events. Negotiations between the EU and 71 ACP countries that will lead to the signing of the 2000 Cotonou agreement were under way and included a clause on readmission. With the coming into force of the 1997 Amsterdam treaty, a Council working party entitled the High Level Working Group on migration and asylum was set up. The HLWG commissioned six "action plans" on cooperation with several source and/or "transit" countries (Morocco, Somalia, Iraq, Afghanistan, Sri Lanka, and Albania). The goals were three-fold: negotiating readmission agreements, transferring the European model of immigration control with the adoption of laws criminalizing illegal migration, and providing operational support from airport liaison officers to the training of border guards and export of equipment.

The Tampere summit consecrated the particular vision of JHA personnel in charge of immigration policy: shifting policy elaboration upwards to the supranational level and outwards to non-EU

states. This has meant intense transgovernmental activities of law and order officials that have monopolized this policy domain and, in parallel, deploying the EU diplomatic capital to enlist third countries and have them implement the European restrictive agenda (Guiraudon, 2003).

3. Fighting “Illegal Migration,” Really? The Elusive Goal of EU Policy

EU policy before and after Tampere has focused on illegal migration and the measures meant to stem the phenomenon. In the Tampere Programme, the term “illegal migration” (“immigration clandestine”, “immigrazione clandestina”) is used, albeit sparingly, but not defined.¹ There is also no explanation of its causes, no discussion of its consequences, and no justification of why it is a EU policy priority. The phrase “illegal migration” is juxtaposed to others such as “organized crime” as something to combat, as a common place. In fact, the phrase itself apposes two different terms: migration, which is a social phenomenon, and the adjective “illegal”, that combined reflect a legal-political reality – the sovereign right of states to decide on the status of non-nationals who enter and stay on their territory.

There is thus something peculiar about wanting to fight illegal migration at the EU level while member states are still solely responsible for granting a legal status in all cases except the short-term visas for Schengen states. Moreover, states decide on ‘who is deported’, in spite of current EU norms such as the 2008 Returns Directive. Supranational constraints when acknowledged come from jurisprudence of the European Court of Human Rights on articles 3 and 8 of the European Convention of Human Rights, respectively on torture and on family life. Similarly, states manage asylum systems with very different rates of recognition and thus numbers of rejected asylum seekers who join the population of

1 The Commission will do so in much detail in a 2001 Communication and subsequent documents. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0672>

potential “illegals” and deportees, and equally different rates of expulsion of those who did not obtain protection. Finally, states decide on the regularization of foreigners, whether they are individual or parts of larger more publicized campaigns. So the main focus of EU policy, “illegal migration” actually depends on national laws and practices.

There is also something odd in the focus on preventing “illegal migration” before persons actually reach the territory of a member state. How can you be “illegal” before you set foot in the EU? The justification was the need to be “proactive,” deter *potential* or *future* illegal entry and stay. In the Schengen codebook, consulates should detect “migratory risks”, persons that claim to want to visit a EU member state but in fact intend to overstay their visa. Very early on, at the signing of the Schengen Agreement, a number of international organizations and NGOs denounced the measures meant to fight illegal migration as targeting all asylum-seekers that could not obtain a passport and visa and thus would be stopped at airports by the personnel of transport companies that wanted to avoid carrier sanctions.

Under the misleading label of the “fight against illegal migration,” the EU policy core focuses on preventing certain types of migrants from reaching EU soil. Since the 1980s, law and order agencies in charge of immigration management in North-western Europe, knew that, once on EU soil, the rule of law and access to a modicum of rights would *inter alia* make it hard to expel migrants. This has not changed.

4. The Tampere Legacy

Since Tampere, the “external dimension” of EU border policy is a key feature of immigration control. It is the dark side of policy-making in contrast with visible bordering and spectacular wall-building, especially since it is often difficult to obtain information on the deals struck or trace the allocation of EU funds. It is also

dark in normative terms by human rights activists as the case of cooperation with Libya under Muammar Ghaddafi and in the current chaos shows.

A key development of the so-called 2015 crisis is a joint statement negotiated by the German and Dutch heads of government with the Turkish Prime Minister and then accepted by other EU leaders signed on 22 March 2016. This is as high-level “high politics” gets in this policy domain, far from the protracted decades-long negotiations between EU Commission civil servants and Moroccan officials on the readmission of third country nationals. This diplomatic solution consisted in convincing a transit country to stem flows and readmit foreigners, in his case Syrian nationals in Turkey, with some financial compensation (6 billion euros). It was also mostly a matter of political expediency.

EU governments were divided in a moment of heightened public attention, unable to agree on reforming key policy instruments (Dublin and Schengen). Turkey appeared as a *deus ex machina*, and the deal was a quick fix to relieve interstate tension. So we should underline that important decisions can bypass the EU institutions supposedly involved in policy-making of immigration, asylum and borders policy. The European Parliament was not even consulted and the Luxembourg Court ruled that it was not competent to examine what it deemed as a “non-EU” agreement made *at the margin* of a European Council meeting.²

2015 with the peak of Syrian arrivals in Europe could have been a turning point and the occasion for reform. Instead, we saw profound rifts within the EU, a “crisis of solidarity” that prevented reform, in particular of the EU asylum system. Otherwise, it was “business as usual” with an increased budget and mandate for Frontex, and more means cooperation to interdict emigration: the 2015 Emergency Trust Fund for Africa to fight the “root causes of irregular migration and displaced persons,” the aforementioned EU-Turkey joint statement of 2016 or the operational help to various Libyan forces or leaders in the Sahel-Sahara region.

2 Joined Cases C208/17 P to C210/17 P.

Can we explain this continuity in policy? Based on classical theories of public policy and EU studies, I briefly outline forward two different kinds of logics, which we could summarily label “bureaucratic and “political.”

Once a policy is set, it is difficult to shift paths (Guiraudon, 2017). Political scientists have long underlined this phenomenon regardless of the concepts that they use (“policy feedbacks,” “path dependence,” “punctuated equilibrium”). Vested interests cling on. In this case, the first to invest in the field of immigration and asylum are Home Affairs ministries and border and security forces. *First come first serve*. This monopoly means that decision-makers process information according to their particular lens or “policy frame” even if it is based on false foundations. The European Commission attempted just after Tampere in a 2000 Communication to develop a utilitarian argument alongside the securitarian frame of immigration by referring to a contested UN report suggesting that immigration was needed to compensate for labor shortages in an aging Europe with low fertility rates. The idea was immediately shot down and the Commission criticized in such a way that it never tried afterwards to do more than accompany the wishes of governments and their powerful Home Affairs ministers.

Second, a related issue regards “sunk costs.” The more you invest in a particular policy option, the harder it is to admit failure. This has been documented in the case of immigration policy and more generally border control, notably in the US case (see Andreas, 2009). The fall of the numbers of unwanted arrivals shows success. However, if numbers rise, stakeholders do not see it as a failure but as proof that more means should be invested to reach the original goal. This is a vicious circle exemplified in the EU case by the increase in budget and personnel for Frontex but also the sums allocated to cooperation with third countries after the 2015 summit in La Vallette.

Third, pooling resources for *distributive* measures that could possibly be useful to all is easier to “sell” to EU governments than *redistributive* measures where it is easier to identify winners and

losers. Getting EU-wide support to step up border controls and to cooperate with transit and origin countries has been easy in the two main legislative bodies, the Council and Parliament. Pooling resources to interdict migrants at the source or on the way potentially benefits all member states and, in fact, little has been done to precisely assess the actual effects of measures. This is not the case of redistributive initiatives like the reallocation of asylum-seekers throughout the EU. We have seen how some governments such as Poland and Hungary have battled including in front of the European Court of Justice not to apply quotas of asylum-seekers. Interstate solidarity within the EU is thus more difficult than allocating EU funds to Turkey, African states or Frontex. Thus, agreement on the external dimension of EU policy masks the crisis of agreements of regulations affecting intra-EU movement, namely the Dublin and Schengen systems.

Fourth, we should interrogate the pre-eminence of the “high politics” of diplomacy to externalize control especially after 2015 in relation to the enduring “low politics” of labor migration. In spite of intense activity at EU level, member states jealously guard their national prerogatives when it comes to regulating the entry and stay of third country nationals. Cooperation on labour migration can be summed up in a watered down “Blue Card Directive” rarely used by member states that still compete for “global talent” with national schemes. Other EU Directives that have sought to approximate the national legislation regarding family reunification, or the status of long-term residents fall short of harmonization.

In brief, operational cooperation at the border and joint diplomatic efforts to stem migrants at the source have been the main focus of member states by default i.e. avoiding EU meddling in internal regulations affecting foreigners. Transgovernmental cooperation mechanisms that involve the buffering and bordering of the EU are more palatable to member state governments. These are presented as a plus rather than as a substitute for national prerogatives.

The goals set at the Tampere Programme were not based on any solid evidence and have enormous costs in diplomatic capital apparently is not important to policy-makers. The external dimension of EU border policy often refers to the link between migration and development and the fallacious idea that EU development aid will contribute to stemming migration flows. Migration scholars hailing from economics or sociology have long demonstrated empirically that migration is more likely from developing rather than from poor countries. Engaging with regimes in source and transit countries in exchange for emigration control has been very costly, and I do not refer it to money but leverage and credibility. What is the cost of migration control when the EU legitimizes regimes in Libya and Sudan? Mainstreaming immigration in international negotiations essentially gives transit countries unwarranted earnings based on their geographical position, (a "*rente de situation*"). They can engage in long, protracted negotiations, as did Morocco with respect to an EU readmission agreement (El Qadim, 2015). In December 2019, President Recep Tayyip Erdogan threatened to let Syrian refugees reach the EU if it condemned the Turkish military incursion into Syria.

5. Conclusion

20 years ago, the Tampere Programme laid out the model for "controlling EU borders." Prepared by the JHA Department of the Council Secretariat, it also called for diplomatic action to enlist third states as sheriff deputies to prevent to the EU or readmit third country nationals. The model is thus one of "remote control" and the erection of a number of locks to prevent unwanted flows inspired in part from North American precedents (Fitzgerald, 2019).

There has been no reorientation of policy, no questioning of the policy paradigm and continuity in policy instruments. The bureaucratic stakes and later private vested interests in the domain of immigration and asylum explain this situation even more

than the evolution of the political make-up of the EU with more member states and more populist governments.

Since 2016, the numbers of irregular crossings in South of Europe published by Frontex are down but deaths at the borders are proportionally on the rise and camps in Greece are still overpopulated. The priority may be to de-escalate the highly politicized and polarized debates within the EU. Yet, it is equally important to acknowledge the perverse effects of the Tampere policy model and do a proper evaluation of its instruments.

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12. MICRO-HARMONISATION OF THE FUNDAMENTAL RIGHT TO AN EFFECTIVE JUDICIAL REMEDY IN THE PROPOSED RETURN DIRECTIVE AND BEYOND: A DANGEROUS PATH?

Elise Muir and Caterina Molinari

1. Introduction

Title V of the Treaty on the functioning of the European Union ('TFEU') opens with the following statement: "the Union shall constitute an area of freedom security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States." This affirmation, contained in art. 67 TFEU sets the Union's shared competence in the Area of freedom security and justice ('AFSJ') on a path of caution, immediately highlighting two features of the field: (i) its far reaching fundamental rights implications; and (ii) its potential for conflicts with national legal system.

This Chapter turns the spotlight on a regulatory technique that amplifies both features, namely detailed (or 'micro'-)harmonisa-

tion of standards of judicial protection at the EU level. Micro-harmonisation of this kind can be limited to minimum standards, or go as far as to impose maximum standards of protection. It is a characteristic of several EU measures the asylum and migration fields of the AFSJ field and it culminates in the surprising level of procedural detail of the proposed recast of the Return Directive (Commission 2018 – ‘Proposed Return Directive’).

The following analysis will explore and problematise the consequences of the use of this regulatory technique to shape the legal regime for the return of irregular migrants. The 1999 Tampere Programme stipulated the goal for the EU to develop “common policies on asylum and immigration” with particular focus on the management of migration flows and “illegal immigration”. The Chapter will identify examples of micro-harmonisation of rules of judicial procedure in the Proposed Return Directive and other instruments in the area of migration and asylum, and then explore its implications for fundamental rights and the legal systems of the member states.

2. Micro-Harmonisation of Rules on Judicial Protection in The Proposed Return Directive: Examples

As mentioned, the micro-harmonisation of standards of judicial protection reaches its apex in the Proposed Return Directive, which contains several examples not only of minimum, but also maximum standards of judicial protection. The most striking provisions are found in Chapter III, entitled “Judicial Safeguards” and, more particularly, in its Art. 16.

First, Art. 16(1) starts by establishing a minimum standard of protection, namely the requirement that an effective remedy against return decisions be offered before a judicial, rather than administrative, authority. However, it immediately goes further, by limiting the number of levels of judicial review to no more than one for rejected applicants for international protection.

Second, Art. 16(3) regulates in detail the suspensory effect of appeals. It requires automatic suspension of the return decision in case of appeal when a risk of refoulement exists, but forbids automatic suspension in all other cases, requiring instead a case-by-case decision. The provision goes as far as to prohibit the concession of the interim relief to rejected applicants for international protection, when (i) the reason for suspension has already formed the object of an examination in the context of an asylum procedure, or (ii) the return decision is the consequence of a decision terminating legal stay already made subject to effective judicial review.

Third, Art. 16(4) establishes a maximum time-limit to challenge return decisions issued against rejected applicants for international protection. The deadline for appeals is set to no more than 5 days, reduced to 48 hours in the context of the accelerated border procedure provided for in Art. 22 of the Proposed Return Directive.

Besides the detailed rules contained in Art. 16, other provisions contribute to the micro-harmonisation efforts of the Proposed Return Directive. In particular, Art. 6(2), (m) to (p), regulates the burden of proof, by creating a rebuttable presumption that the returnee is at risk of absconding in four situations.

The combined effect of all these norms defining detailed rules of judicial procedure is remarkable: very little leeway is left to member states to design the related rules of judicial procedure and the right to an effective remedy is contained within the narrow perimeter set by the provisions examined above.

3. Micro-Harmonisation of Rules on Judicial Protection in the Proposed Return Directive: Peculiarities

The level of micro-harmonisation displayed by the Proposed Return Directive is surprising for several reasons.

First, the Commission's proposal significantly departs from the regulatory technique that characterises legislative instruments currently in force in the area of asylum and migration, by establishing not only minimum, but also maximum standards of protections.¹ This distinguishes the Proposed Return Directive from other instruments which can also be characterised as micro-harmonising rules of judicial procedure, such as the current Return Directive (European Parliament and Council 2008) and the Asylum Procedures Directive (European Parliament and Council 2013). In fact, the current Return Directive (in particular its Art. 13) and the Asylum Procedures Directive (in particular, its Art. 46) set minimum standards of protection concerning suspensive effects of appeals, reasonable length of time-limits to challenge negative decisions before a court, and access to at least a court or tribunal of first instance. Conversely, the Proposed Return Directive attempts to go further, proposing fully harmonised rules of judicial procedure with respect to several essential aspects of the right to an effective remedy, ranging from the number of levels of jurisdiction, to interim relief and to time-limits for appeal.²

Second, the Proposed Return Directive, much as the current Return Directive and the Asylum Procedures Directive, does not contain a fully-fledged non-regression clause. Its Art. 4(3), similarly to Art. 5 of the Asylum Procedures Directive, reads: “[t]his Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies *provided that such provisions are compatible with this Directive*” (emphasis added). This formulation fails to protect national higher standards from backsliding on procedural rights in the name of the effectiveness of EU law. Instead, such a protection is offered in recent micro-harmonising measures

1 The avoidance of full harmonisation, through the establishment of minimum standards only, has been traditionally meant to prevent a harmonisation of procedural standards based on the lowest common denominator (De Bruycker 2005, 56).

2 Several of the Proposal's provisions are nuanced in the partial negotiating position adopted by the Council (Council 2019). For example, the position reverts to a minimum standards on number of levels of jurisdiction and extends the maximum time-limits for appeals in the context of the border procedure to one week, rather than 48 hours.

in another field of the AFSJ, namely judicial cooperation in criminal matters. Non-regression clauses in the field all provide that “[n]othing in [the relevant] Directive shall be construed as limiting or derogating from any of the rights or procedural safeguards that are ensured under [...] the law of any Member State which provides a higher level of protection”,³ without further qualifications (see Mitsilegas, forthcoming).

Third, a striking discrepancy exists between the nature of the Proposed Return Directive as an instrument conceived to set objectives only, and its extremely detailed content, which would have been more attuned to a regulation. This point is well illustrated by a comparison between the Proposed Return Directive and the Proposed Procedures Regulation (Commission 2016). The two instruments share a micro-harmonising approach, which sees the Union setting maximum time-limits for appeals, imposing recourse to accelerated procedures in certain cases and limiting the availability of interim relief. However, the Proposed Procedures Regulation contains less far reaching provisions (e.g. it does not limit the number of levels of jurisdiction), even though it is presented in a form which would have allowed a higher level of detail, i.e. a regulation.

Fourth, the Proposed Return Directive harmonises areas, such as time-limits for appeals, in which the Union’s legislator has so far been reluctant to intervene (Eliantonio and Muir 2015, 191), possibly by reason of the different nature, conditions of admissibility, and formalities to which appeals are subject in the different member states. Such differences arguably make a one-size-fits-all standard difficult to evaluate as to its compliance with the fundamental right to effective judicial protection across the EU (Muir and Molinari 2018, 84).

Finally, the choice to limit the suspensory effects of appeals departs from the usual nature of legislative interventions on

3 Inter alia, Art. 10 Directive on the right to information in criminal proceedings (European Parliament and Council 2010); Art. 13 Directive on presumption of innocence (European Parliament and Council 2016).

interim reliefs. In fact, the EU has traditionally required member states to make interim relief available, so that rights guaranteed by EU law could be protected, pending a final decision.⁴ In this respect, micro-harmonisation in the AFSJ field presents a peculiarity, linked to the perception of high standard of judicial protection as limits to the effectiveness of EU asylum and migration policies (Commission 2018, 4 and recital (20)), rather than as tools to enhance the effectiveness of the related EU policy, as is the case in other fields of EU law.

4. Problematising Micro-Harmonisation of Rules on Judicial Protection

The above characteristics of the Proposed Return Directive - and the choice to micro-harmonise rules on judicial protection more generally - have significant implications on the fundamental rights of third country nationals throughout the EU. They also affect the equilibrium of the multilevel European constitutional space (Pernice 2009), which encompasses potentially competing sources of fundamental rights protection (i.e. national constitutions, the EU legal system, as well as international law guarantees, including those enshrined in the European Convention on Human Rights – ‘ECHR’).

A first consequence of micro-harmonisation of rules on judicial protection in the AFSJ is the potential for the national legislator to roll back higher standards of protection, in order to align on the minimum standards provided for by EU law. Several national decrees or laws adopted in member states such as Italy (Decreets 2017 no. 13 and 2018 no. 113), and France (Law no. 2018-778 of 10 September 2018) to regulate asylum procedures have cut back on guarantees previously accorded to international protection applicants, but not required by the EU *acquis* on asylum. Often, these reforms were explicitly justified in the political discourse by the

⁴ See Eliantonio Muir 2015, 196, referring to the Remedies Directive in the field of Public Procurement (Council 1989) and the Injunctions Directive in the field of consumer protection (European Parliament and Council 2009).

willingness of national governments to align with EU (minimum) procedural standards (Favilli forthcoming; Ministère de l'Intérieur 2018, 4).

A second consequence of micro-harmonisation of rules on judicial protection is the increased likelihood that national safeguards protected by national constitutions be set aside in the name of the effectiveness and unity of EU law. In fact, as affirmed by the European Court of Justice ('ECJ') in its *Melloni* ruling, "where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, *provided that* the level of protection provided for by the Charter, as interpreted by the Court, and *the primacy, unity and effectiveness of EU law* are not thereby compromised" (emphasis added – ECJ, *Melloni* 2013, para. 60). In other words, unity and effectiveness of EU law might displace fundamental rights standards enshrined in constitutional texts. T

The *Melloni* ruling was issued in the field of judicial cooperation in criminal matters, which, since the entry into force of the Lisbon Treaty in 2009, is protected from possible undermining of constitutional standards of protection of fundamental rights by Art. 82(2) TFEU. The latter reads "[...] the European Parliament and the Council may [...] establish minimum [procedural] rules [...]. *Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals*" (emphasis added). No corresponding mechanism to avoid constitutional clashes is envisaged for the asylum and migration aspects of the AFSJ. As harmonising measures adopted at EU level are capable of trumping fundamental rights guarantees enshrined in national constitutions by virtue of the principle of primacy (ECJ, *Taricco II* 2017, para. 47, and *Kolev* 2018, para. 75), increased proceduralisation of asylum and migration law at the EU level is likely to create tensions. For example, Art. 16(1) of the Proposed Return Directive, that limits the number of level of judicial remedies to one, would most likely lead to a clash between primacy of EU law and those national con-

stitutions, such as the Italian one,⁵ which impose higher standards (Muir and Molinari 2019, 56, 90-92.).

A third consequence of micro-harmonisation of rules on judicial protection is a risk for EU secondary measures either to be found in breach of the Charter of Fundamental Rights of the EU ('Charter') or to undermine the Charter right to effective judicial protection through interpretation. The first scenario is undesirable in terms of legal certainty, as it would lead to the total or partial invalidation of the measure in question, with spill over effects on national implementing measures.⁶ An example of a potential Charter breach is the establishment of very short maximum time limits for appeals in Arts 16(4) and 22(3) Proposed Return Directive, which would likely be considered by the ECJ as not "sufficient in practical terms to enable the applicant to prepare and bring an effective action" (ECJ, *Samba Diouf* 2011, para. 66, see Muir Molinari 2018, 83-84).

The second scenario, namely a restrictive interpretation of Charter rights in light of secondary legislation, may have even more disruptive consequences, leading to a reduction of fundamental rights protection across all areas of EU law and trumping higher constitutional safeguards contained in member states legal orders. Moreover, a deferential stance of the ECJ towards legislative choices on procedural standards may lead to incoherence between EU and ECHR standards. In this respect, the recent ECJ's ruling in *Sacko* (ECJ, *Moussa Sacko v Commissione Territoriale per il riconoscimento della protezione internazionale di Milano* 2017) is particularly telling. In *Sacko*, the ECJ qualified the right to be heard in the field of asylum. More particularly, it held that member states can allow courts of first instance to refuse a hearing when reviewing an administrative finding that an international

6 The invalidation of EU measures that strike a balance between fundamental rights and policy objectives runs the risk of leading to a legislative void, that national legislators might find difficult to address. This dynamic is exemplified by the insufficiency of the national measures adopted, to ensure compliance of data retention policies with fundamental rights, after the ECJ annulled the Data Retention Directive (European Parliament and Council 2006) in *Digital Rights Ireland* (ECJ, *Digital Rights Ireland* 2014- see FRA 2017, 164-165).

protection application is manifestly unfounded, if a hearing has been conducted in the context of the administrative procedure and “the factual circumstances leave no doubt as to whether that decision was well founded” (para. 49). In its reasoning, the ECJ relies on the case law of the European Court of Human Rights (‘ECtHR’), but revisits it in a particularly restrictive manner in light of the wording of the Asylum Procedures Directive, which only requires a “full and *ex nunc* examination of both facts and law” by the judicial authority (Art. 46), without mentioning a right to be heard in that context. By omitting to refer to certain parts of the ECtHR’s judgments it itself invoked (i.e. ECtHR, *Jussila v Finland* 2006 and *Döry v Sweden* 2003), the ECJ may be seen, as noted by Favilli (forthcoming) to call into question the presumption that “unless there are exceptional circumstances that justify dispensing with a hearing, the right to a public hearing implies a right to an oral hearing at least before one instance” (ECtHR, *Döry v Sweden* 2003, para. 39). According to the ECJ, the right of defence simply requires that courts be given the possibility to conduct a hearing when the latter is “necessary for the purpose of ensuring that there is a full and *ex nunc* examination of both facts and points of law, as required under Article 46(3) of the [Asylum Procedures] Directive” (para. 49).

The tendency to read fundamental rights restrictively in the context of the interpretation of secondary EU legislation is not unprecedented. The ECJ has already adopted a restrictive interpretation of non-refoulement in order to preserve, to the extent possible, the effectiveness of EU measures aimed at ensuring mutual recognition in the field of asylum. By affirming that only “systemic flaws in the asylum procedure and reception conditions for asylum applicants in [a] Member State” might justify a refusal to transfer the asylum seeker back to that state (ECJ, *N.S. v Secretary of State for the Home Department* 2011, para. 86), the ECJ has initially⁷

7 The distance between the case-law of the two courts was at least partially bridged thanks to the recent acknowledgment by the ECJ that a refusal of transfer would also be justified by “deficiencies [...] which may affect certain groups of people [provided that they] attain a particularly high level of severity, which depends on all the circumstances of the case” (ECJ, *Jawo v Bundesrepublik Deutschland* 2019, paras 87-90, and *Ibrahim at al. v Bundesrepublik Deutschland* 2019, paras 88-89).

adopted a stance that has been perceived as less protective than that upheld by the ECtHR in analogous situations and requiring a case-by-case assessment of the risk of inhuman and degrading treatment (ECtHR, *M.S.S. v Belgium and Greece* 2011, para. 365, and *Tarakhel v Switzerland* 2014, para. 102).

To conclude, micro-harmonisation of rules on judicial protection has the potential to lead to a lowering of fundamental rights standards in member states, as well as to clashes with national constitutional guarantees and the ECHR.

These observations strengthen the concerns raised, in specific fields, by the spillover effects of “incidental proceduralisation”⁸ of EU law (Eliantonio Muir 2015). As in the area of migration and asylum, micro-harmonisation touches procedural guarantees which constitute the substance of the fundamental right to effective judicial protection, the above concerns are particularly pressing: the fundamental right to effective judicial protection constitutes the essential gateway for the protection of all other rights, and thus it is a core tenet of the EU as a rule of law based legal system.

5. Ways Forward

Several good practices and initiatives could mitigate or avoid the risks that micro-harmonisation of procedural rules entails.

On a very general level, the EU legislator should be more mindful of the limitation that subsidiarity, proportionality and respect for the difference in the legal systems and traditions of the member states place on the legitimacy of detailed harmonisation techniques in the area of judicial proceedings, especially in the AFSJ field (Muir Molinari 2018).

8 Incidental proceduralisation can be defined as “the insertion of procedural rules in secondary EU law measures adopted on the basis of provisions enabling the EU to develop a substantive policy” (Eliantonio Muir 2015, 178). It can be contrasted with the adoption of procedural norms in the context of measures which “give specific expression” to a fundamental right (Muir 2014, 223, citing ECJ, *Kücükdeveci v Swedex* 2010).

Second, EU measures in the field should take fundamental rights concerns seriously, attempting to identify in advance potential negative impacts of the proposals on Charter rights and redressing them in the drafting stage. This might allow the institutions to better appreciate the risks of downward spiralling of fundamental rights standards and prevent it through, for example, the insertion of non-regression clauses in the text of proposed legislation. It is particularly regrettable, in this sense, that the entire asylum and migration package of measures proposed by the Commission between 2016 and 2018 has been presented to the EU legislators without any impact assessment, contrary to the Commissions' own guidelines on legislation in fields that touch upon (often absolute) fundamental rights (Commission 2017, 15).

Finally, constitutional and ECHR standards should be taken into serious considerations in the course of the EU legislative process, to avoid proposing measures that might undermine them in the name of effectiveness (Favilli, forthcoming).

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13. 20 YEARS OF 'PARTNERSHIP WITH COUNTRIES OF ORIGIN AND TRANSIT'

Michael Collyer

1. Introduction

In October 1999, I was one year into my PhD on the movement of refugees across the Mediterranean. At the time, the passage that caught my eye in the conclusions of the Tampere European Council was the opening lines of the opening section outlining “A Common EU Asylum and Migration Policy”. Immediately under this main title, sub-section I is headed “Partnership with Countries of Origin”. This contains just two short paragraphs (11 and 12) which expand the sub-heading to “partnership with countries of origin and transit”. Yet these two paragraphs formalised the longstanding and highly influential aim of engaging with non-EU countries for migration related reasons. They contain some of the most ambitious objectives of the entire document. These objectives continue to structure what has become known as the “external dimension” of EU asylum and migration policy. Twenty years ago, this focus shaped my PhD and it has framed most of the research I have undertaken ever since.

The importance of this theme lies in the tremendous potential for positive change such partnerships can bring, both in Europe

itself and well beyond. While these policies have not been without their successes, the direction of travel, particularly over the last five years, has been involved more regressive, repressive measures whose primary goal is the reduction of migration. This is a mistake. Broader engagement around migration is likely to become ever more important and a more open EU will have a much more positive impact on neighbouring countries and the world in general. This Chapter falls into three sections. First, I briefly review the aims set out in the Tampere conclusions and how these have shaped the external dimension of EU asylum and migration policy. Second, I examine the nature of the challenges that this involves and finally I consider evidence for its success, as a tool of migration control and the impacts of migrants and potential migrants themselves.

2. The Origins of the “External Dimension”

The prominence of “partnership with countries of origin and transit”, as the first element of the EU’s Common Asylum and Migration Policy listed in the Tampere conclusions could of course be simply an accident of drafting, but it does have a logical role as a foundation for policy development in this field. The High Level Working Group on Migration and Asylum (HLWG) was established in January 1999 and submitted its first report to the Tampere European Council. At paragraph 12, the conclusions welcome this report and agree to extend the HLWG’s mandate. The HLWG continues to exist and for twenty years it has provided a powerful Council influence on the development of EU policy, particularly in the external dimension.

The two main themes of the external dimension are set out in paragraph 11. The first goal is to improve conditions in migrants’ countries of origin. The link between addressing the conditions that encourage people to leave in the first place and preventing migration occurring is implicit, though not actually articulated in paragraph 11. The objective of “combating poverty, improving

living conditions and job opportunities, preventing conflict and consolidating democratic states and ensuring respect for human rights” in migrants’ countries of origin, suggests an expectation that such changes will lead to less migration. This approach, often referred to as the “root cause” approach but later termed “more development for less migration” continues to influence much EU engagement in this field. The second theme of the external dimension is briefly outlined as “Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development”. “Success” is not defined in these conclusions, but again it is fair to assume given the context that success involves reducing arrivals of migrants and asylum seekers.

Both of these themes build on approaches to tackle migration that have a long history outside the institutions of the EU. The “root cause” approach is usually traced to the early 1980s and the International Conference on Assistance to Refugees in Africa (ICARA) 1981 Geneva, 2 1984. Both of these pledging conferences failed to meet anything like their objectives but introduced the idea that wealthier states bore a responsibility to provide financial assistance to poorer countries hosting the majority of the world’s refugees (Türk and Garlick 2016). The second approach, “co-development” was coined by Sami Nair in a report submitted to the Jospin government in 1997 (Nair 1997) but is widely used to refer back to the *aide au retour* policies pioneered in France in the early 1970s, policies that the Nair report recognises were largely failures.

Given the ambition of the objectives set out in paragraph 11 of the Tampere conclusions, it is perhaps unsurprising that little progress was made for some time. The Commission’s first attempt to analyse the connections between migration and development was widely critiqued as overly focused on security issues. This came in a 2002 Communication on “Integrating Migration Issues in the European Union’s relations with Third Countries” that also examined EU wide repatriation programmes. The objective of developing partnership with countries of origin was repeated at

the 2004 Hague European Council, became part of the 2005-2010 Hague Programme and was addressed in a much more progressive 2005 Communication on migration and development. Yet, it was not until the end of that year, December 2005, that clear policy direction was given to this approach through Global Approach to Migration (GAM) (COM(2007)247), since 2011 the Global Approach to Migration and Mobility (GAMM) (COM(2011)743).

The GAMM still structures the External Dimension of migration and asylum policy. It remains organised into four pillars. The most recent guiding document for the EU's migration strategy is the 2015 European Agenda on Migration (COM(2015)240 final). These four pillars are set out in this document: 1. Reducing the incentives for irregular migration; 2. Border management; 3. A strong common asylum policy; 4. Legal migration. The first of these pillars receives a disproportionate focus in this document and partnership with countries of origin and transit once again is first on the list with the recognition that "many of the root causes of migration lie deep in global issues which the EU has been trying to address for many years." (p7). In practical terms, partnerships with countries of origin and transit have led to the development of nine mobility partnerships and a wider series of readmission agreements. The EU is engaged in a large number of Regional Consultative Processes (RCP), at least five RCPs link countries across the Mediterranean. There has clearly been some evolution since Tampere, although the objectives set out in the Tampere conclusions are still clearly recognisable in the EU's migration strategy, particularly the external dimension.

3. Partnership as a Geopolitical Challenge

The rise in arrivals across the Mediterranean in 2015 further highlighted the significance of the external dimension of EU asylum policy. The EU recognised that by the time people got into boats, it was too late. Rather than stopping people arriving, migration policy is now focused at ways of stopping them leaving in the first

place or at least detaining them in countries of transit along the route. This process had been developing for several decades at member state level even before Tampere but the Tampere conclusions highlighted the direction that EU institutions would move in when they gained the necessary legal competency to become involved.

The collective action that the EU has taken since 2015, including the EU-Turkey statement of March 2016 and the continued expansion of Frontex are a clear indication of the shifting priorities across the EU. Partnerships with countries of origin and transit have become more and more significant as control priorities have moved from migrants arriving in the EU to potential migrants who have yet to arrive. Of course the large scale construction of new infrastructure along border lines that has occurred across Europe since 2015 appear to undermine this idea. Nevertheless, new border walls and fences have proved ineffective at actually preventing the movement of people and reinforce the idea that once people reach the border it's really too late to stop them. Indeed, in some cases this has been the point. The efforts of Hungary's Victor Orban or Britain's Theresa May to construct new border controls has not reflected a widely recognised problem with undocumented migration in their countries but rather an effort to boost opposition to migration for broader political gain and focus attention at actions they were taking to reduce migration.

Such actions help to legitimate the movement of border control away from the physical location of the border, a movement that has been established for some time. This may involve non-state actors, principally private companies and international organisations over which EU institutions have some direct influence. But it also involves various forms of engagement with national governments beyond the EU. Partnership of this nature poses an unusual geopolitical challenge for migration control. On EU territory, member states and their representatives (such as Frontex) have a monopoly on the legitimate use of violence – to borrow Weber's effective formulation. In a migration context this makes detention

and deportation legally legitimate acts when carried out on European territory. The growing range of readmission agreements that are facilitated by the EU can be used to accelerate pre-deportation administrative processes but have no authority once individuals have left EU territory.

In the absence of legitimate violence, the tools that the EU Member States can use for migration control are substantially reduced when migrants or potential migrants are on the territory of other states. Where states do exercise similar levels of violence to detention and deportation on other states' territory it is called something different, such as "extraordinary rendition" to highlight the illegitimacy of the violence involved. Other techniques must therefore be used. Capacity building or provision of equipment or advice for enhancing the effectiveness of border control in neighbouring countries is relatively widespread, although it can generate a backlash if migrants' human rights are flagrantly ignored. Information campaigns are therefore popular and involve educating migrants around the dangers of undocumented migration or the promotion of "safe" (ie. legal) migration, although they are equally problematic, leading to a victim blaming approach and are widely recognised as ineffective anyway. Development aid is probably the most widespread tool of the external dimension of the EU's migration policy. This builds on long established principles by which the ability of wealthy states to intervene directly on the territory of poorer states has been widely recognised. The effectiveness of development to address the root causes of migration has therefore once again become a matter of keen public debate.

4. Partnerships for Development

Partnerships with countries of origin and transit have become more significant within the external dimension of EU migration policy, as the previous section argued. This section turns to the growing role of development within those partnerships. This was foreseen in the Tampere conclusions' reference to codevelopment

and concretised five years later in the first iteration of the GAMM, where “migration and development” formed one of the initial three pillars. This use of development to address migration dates from colonial era assumptions that migration is caused by underdevelopment. If underdevelopment is the cause of migration, it follows that development will reduce that migration. This idea has been powerfully debunked in successive analysis from the early 1990s onwards. Ana Lopez-Sala refers to it as the “preventive” control of migration. Successful development may well reduce migration over a generational timeframe, but in shorter 4-5 year policy cycles development is more likely to increase migration by providing both the means and crucially the motivation to leave.

The Commission has recognised this, at least rhetorically. The year after the more progressive 2005 communication on migration and development, this was referred to by Benita Ferrero-Waldner then Commissioner for External Relations as a “move more in keeping with today’s world. It takes us away from “more development for less migration” to “better managing migration for more development” (Ferrero-Waldner, 2006). This marks an important recognition that “more development” will not lead to “less migration”. Nevertheless, many of her Brussels audience will have understood “better managing migration” to mean “less migration” anyway, so the difference between the two statements is perhaps not as significant as it might first seem. Despite this, the connection between more development and less migration has persisted. Towards the end of 2016, Priti Patel, then the UK’s International Development Secretary (now Home Secretary) wrote of her desire to use Britain’s aid budget to “reduce the pressure for mass migration to Europe” (Patel 2016)

This persistence in the connection between more development has less migration has been encouraged by changing definitions of development, particularly in the 2015 Sustainable Development Goals (SDGs). The 169 targets, spread across the 17 goals include frequent reference to migration, but only one target is *exclusively* about migration: target 10.7. This target sets out to “Facilitate

orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies". For the first time it makes the management (long used as code for "control" or "reduction") of migration an explicit development target. Goal 10.7 is quoted in the 2018 Marrakesh Action Plan, the most recent iteration of the Rabat process that began in 2006, and structures significant goals of EU spending on migration and development. This goes well beyond the "preventative" use of development to provide alternatives to migration. In recent years, much more repressive forms of control have been labelled development.

The first signs of this appear in the 2015 Valletta summit, which built on EU-AU dialogues around migration and offered some indication of priorities for the 2015 European Agenda on Migration. The opening paragraphs of the summit's Action Plan called for "The EU, its Member States and associated countries" to "step up efforts to mainstream migration into their development cooperation". The subsequent plan was organised into five "priority domains": 1. "Development benefits of migration and addressing root causes of irregular migration and forced displacement"; 2. "Legal migration and mobility"; 3. "Protection and asylum"; 4. "Prevention of the fight against irregular migration, migrant smuggling and trafficking in human beings"; 5. "return, readmission and reintegration".

In a 2017 follow up meeting in Valletta, some details of the subsequent spending are discussed. Although the five priority domains cover the full range of EU migration objectives, the large majority (70%) of spending at that stage was devoted to just one, the first objective on migration and development. These activities include plenty of positive development activities, such as youth employment programmes and retraining initiatives. Such activities are clearly welcome whether or not they reduce the "root causes" of migration – and available evidence suggests they will not. Yet the 2017 discussion also highlighted some more surprising activities financed under this domain which do not appear to bear much

relationship to the “development benefits of migration” or indeed to development at all. These included a cooperation agreement signed between Germany and Egypt in July 2016 which “solidifies cooperation in preventing all types of crimes, including terrorism and corruption, as well reinforcing airport security and stemming illegal immigration.” The goal of “reinforcing airport security” may well be a priority for the Egyptian government, but it is only since the 2015 SDGs that it could be legitimately classified as development cooperation with the aim of preventing Egyptians leaving the country.

5. Conclusion: Circles of Friends

The Tampere conclusions initiated EU cooperation around “partnership with countries of origin and transit”. In the 20 years since, the extent to which the EU depends on its immediate neighbours, referred to by Romano Prodi as the EU’s “circle of friends” has become more apparent. This covers a broad array of international cooperation, but certainly since 2015, migration has become one of the more significant issues to be addressed. These conclusions picked up on a debate that was already old when Sami Naïr cautiously coined the term “codevelopment” in 1997. Given the geopolitical restrictions on engaging non-citizens beyond EU territory, this idea of codevelopment has come to the fore, accounting for 70% of resources allocated in the initial two-year review of the 2015 Valletta summit’s action plan. The definition of development has also been strategically shifted to incorporate migration control objectives that it is difficult to describe as development.

Projects funded under the development shift in the external dimension of EU migration policy clearly include plenty of positive development work that is already improving the lives for the poorest people around the world. The fact that in the short term such programmes are likely to increase rather than decrease migration should concern us only to the extent that public confidence in development aid will ultimately be undermined. Yet

the post-2015 return to the “more development for less migration approach” does not only include activities that will result in some benefits, even if they fail in their explicit objectives of preventing migration. It also encompasses a significant broadening of what development is. Target 10.7 of the 2015 SDGs is front and centre of the 2018 Marrakesh Declaration. This explicitly legitimates much more repressive migration control functions to be framed, and financed as development.

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14. WHO IS A SMUGGLER?

Gabriella Sanchez

1. Introduction

In the European narrative of migration, the spectre of the migrant smuggler looms large. As the facilitator of a person's clandestine or irregular journey into a country or territory other than his or her own, the smuggler is systematically portrayed as operating in vast networks of transnational reach, and as driven by the mere desire of financial gain. He (for the smuggler has also been gendered as male) is also portrayed as member of a vast criminal pantheon, working alongside drug traffickers and feared terrorists, whose goals are to cross the EU's borders undetected.

But the descriptions do not stop here. The smuggler, we are told, is inherently heinous, as evidenced by the acts of violence he perpetrates against gullible and vulnerable migrants. Harrowing stories of smugglers who scam migrants of their lives' savings, beat them to death, sell them to brutal desert tribes or into prostitution, push them off of boats on the Mediterranean or force them into freezing lorries, have for years shaped our collective understanding of one of the quintessential predators of late modernity. The frequent reports involving migrant deaths by drowning or suffocation further cement the hate and dislike towards smugglers, who are almost singlehandedly blamed for people's tragic ends.

The pain and victimization endured by men, women and children on the migration pathway must not be denied. There is in

fact no shortage of evidence attesting to the innumerable risks and challenges they endure in their attempts to reach a destination different from the one they left behind. But the claims that blame smugglers alone for migrants' pain and tragedy deserve to be examined, for they do not emerge in a vacuum.

The 1999 Tampere Programme replicated the above-mentioned narratives. The Programme called for the EU to "to combat those who organise - illegal immigration - and commit related international crimes." It added that priority "to detecting and dismantling the criminal networks involved".

This Chapter, based on empirical research on the facilitation of irregular migration and its actors, raises concerns over the dominant narratives concerning smuggling and the smuggler, and the consequences that arise from reproducing them uncritically. It argues that originated by and articulated by states through a criminological lens (Baird & van Liempt 2016), said narratives privilege a punitive stance. While many migrant journeys can indeed be characterized by abuse and violence, the practices articulated as smuggling by law enforcement and other state actors are quite often void of criminal intention, and aim instead at preserving and improving the lives and dignity of those whose only options to travel are irregular, unsafe and undignifying.

2. What Drives the Demand for Smuggling Services?

The forms of abuse, violence and exploitation migrants experience in their journeys have been documented at length by law enforcement, international organizations, scholars and policy analysts. This body of literature shows that said experiences, while often devastating and traumatizing, do not only involve the feared smugglers at the centre of law enforcement and media narratives. In fact, migrants' interactions with people who could be considered less frightening and, in many ways, much more ordinary, also put them at grave risk and mark their entire migratory experience. Law enforcement officials (Bochenek 2017), members of

military forces (Musaro 2017), staff from international organizations (Tazzioli & Garelli, 2018) or state agencies (Weichselbaumer 2017), and even ordinary citizens (Bassel & Emejulu 2018) are often named among those inflicting damage or hurt upon people in transit and among those who have already managed to reach a destination.

It has been however easier to singlehandedly blame smugglers for migrants' victimization, given the often devastating nature of their acts as facilitators of mobility (the incident involving the unnecessary deaths of 39 Vietnamese migrants on the back of a lorry in Essex in the Fall of 2019 being just one of them). But blaming the smugglers obscures the fact that the demand for the services they provide is derived from the growing shortage of safe, legal and dignified paths for migration (IOM, 2017). This is often the result of war or conflict, but also of systematic discrimination, structural marginalization and other forms of widespread inequality (UNODC 2018).

There is growing consensus among scholars that border controls, strict visa requirements and regulations are key factors restricting mobility, leading those unable to fulfil or manage them to pursue the services of actors who for a fee or in-kind payment can facilitate parts of their journeys. Said journeys, however, by virtue of taking place outside of official channels, often rely on precarious means of travel and dangerous or remote trajectories (Andersson 2016), which expose those traveling to increased levels of risk and even death (Mainwaring & Brigden 2016). In other words, it is the lack of safe and legal paths available to pursue migration what drives the demand for smuggling services. The knowledge those behind migrants' journeys possess –many times the result of their accumulated experiences in the context of their own migratory journeys (Achilli 2018, Lucht 2015)—constitutes a valuable service for those who find themselves excluded from accessing the protections provided by visas or passports. In short, those seeking to move but excluded from legal paths to do so require the services offered by facilitators of migrants journeys for

they provide an alternative, if recognizably precarious, mechanism for protection.

And so a question may emerge: if the services facilitators provide are indeed a form of protection, why would migrants opt to obtain it from transnational organized crime, dangerous trafficking networks, mafias, cartels and militias?

A simple and simplistic answer would be that people's desperation is such, that they see no other option rather than exposing themselves to the abuse and exploitation of criminal actors. But the decisions migrants make to embark on a clandestine journey are not simple ones: they are most often taken considering the needs and aspirations of entire families, not the migrant alone (Heidbrink & Statz, 2017; Maher 2018). They also involve considerable investments of time, money and effort (Ayalew et al 2018). Furthermore, there is clear evidence that despite the widespread claims of migrants' journeys as being under the control of sophisticated and complex criminal networks, migrants most often travel with facilitators, brokers and guides recommended to them by friends and family members who have already completed the journey successfully. Traveling within these networks of trust increases the possibilities that the migrant will have access to minimal standards of care and safety during his or her admittedly precarious journey (Zijlstra & van Liempt 2017). In short, explanations that attribute the facilitation of migrant journeys to criminal networks alone are incomplete at best, for they privilege the criminalising narrative of the state over the one that recognizes on the one hand the efforts of migrants and their communities at creating mechanisms for protection, and the decrease of available legal paths for people to move safely.

3. But... What Exactly Does Smuggling Entail?

According to the United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air, the smuggling of migrants constitutes: "the procurement, in order to obtain, directly or indi-

rectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” (UNODC, 2000)

According to Gallagher (2017) the first concerted effort to counter and label as migrant smuggling what the United States and some European countries perceived as an increase in the number of irregular entries into their territories began in the early 1990s. The alleged growth could not be explained as individual efforts on the part of people to enter a country without inspection alone, for these practices purportedly showed signs of complexity and sophistication that could only be traced to organized crime, under this claim the only entity capable of exploiting legislative, policy and law enforcement gaps.

After several years of negotiation and debate, the Smuggling Protocol was signed in the year 2000. It outlined what aimed to be a global definition of migrant smuggling, while also proposing a protection clause aimed to prevent the criminalization of people who had to rely on the services of migrant smugglers in order to reach safety. An additional clause establishing that smuggling required the payment of a “financial or other material benefit” to count as a criminal act was introduced later on in an attempt to prevent the activities of those who facilitated migration for humanitarian or family reunification reasons to be labelled as criminal (UNODC, 2017).

While the Protocol has been widely ratified (a total of 146 States Parties had done so by 2017), a study by the UNODC revealed that few countries had in fact incorporated the definition of smuggling exactly as outlined in the Protocol into their national laws (2017). Furthermore, the same study showed there was abundant and compelling evidence “States Parties [had] distanced+ themselves from the Protocol’s goal of protecting smuggled migrants and ensuring their basic human rights,” (Gallagher 2017) often criminalizing the provision of humanitarian assistance, and charging people with smuggling even when there was no indication they had profited financially from a migrant’s journey. In other words,

while many countries have ratified the Smuggling protocol, few have made attempts to ensure their laws are in line with it. Furthermore, rather than serving as a tool to punish those who abuse migrants in the context of their journeys, the Smuggling Protocol has often served to criminalize migrants themselves (Sanchez 2014), as well as those who provide them with assistance or support seeking no financial benefit (Carrera et al, 2018).

While again, the existence of exploitation, abuse and violence in the facilitation of migrant journeys cannot be denied, there is a growing body of evidence that shows that rather than constituting the efforts of mafias or organized criminal networks, attempts to facilitate migrant journeys are often the result of collective efforts towards mobility and safety that lack any criminal intention (Boza Martinez 2019), and which aim is to reduce the precarity not only of those who travel clandestinely, but of the people they love.

4. So Who Are the So-Called Smugglers?

The term smuggler is not neutral in nature. The people behind migrants' journeys are almost automatically assumed to be criminal. As mentioned earlier, they are also assumed to be male. And the hypervisibility of Libya and Morocco in the European conversations on migration has also led us to label them as foreign, not without racialising them as African or Arab (Sanchez, 2017) even in the absence of images that may confirm such perceptions (forthcoming, Massari & Achilli). The tendency to describe smuggling as an organized crime domain, and as in the case of Libya, as under the control of tribes or militias have further allowed for the perpetuation of the notion of smuggling as male.

A survey of empirical data and caselaw shows men are more likely than women to be as involved in the facilitation of migrants' journeys. Data also show that tasks pertaining to the practice tend to be quite gendered. Men for example are often involved in the execution of activities of more physical but also public nature (piloting boats, recruiting migrants, purchasing and inspecting equipment

to be used in the journeys, etc) (Mabrouk 2010; REACH & Mercy Corps 2018; Ghorbeli 2018).

But women also figure prominently in the empirical and legal record. They work providing room and board for migrants and care for those who are too young, sick or injured to travel (FRAh022); others handle recruitment and economic transactions (AUTx054), or operate office equipment aimed to organize migrants' journeys (PORh003). While this task tends to be performed more often by men, women also transport migrants across locations (AUTx049).

The apparent invisibility of women in the facilitation of migrants' journeys may reside in the fact that while they perform important tasks essential for the sustenance of life (i.e., what feminist scholars have referred to as intimate forms of labour), said tasks often tend to be socially constructed as peripheral or unimportant, or as inherent to women's nature, for they often involve the provision of companionship, support and care (Zhang et al 2007; Vogt 2018). Recent research on the experiences of migration brokers in the trajectories between Senegal and Libya for example, indicate women often spend long periods of time with brokers or facilitators, supporting or assisting them in their tasks while simultaneously performing intimate and emotional labour, which may involve transactional sex, in order to be able to migrate (Migrating out of Poverty, 2019). By virtue of being seen or perceived as ordinary and not meriting compensation or recognition, the tasks women perform may be dismissed as nothing other than unremarkable.

Children and teenagers also perform active roles in the market. They articulate two specific reasons to become involved: offsetting the costs of their own migratory journeys, and generating an income that allows them to provide for themselves and their families, especially when living in disenfranchised or marginalized settings. Researchers have documented how teenagers (in their majority boys) often act as recruiters of other migrants, repair boats, run errands and acts as lookouts (Achilli et al 2017; IOM 2016). Recent work conducted on the Libya-Tunisia border

also indicates that in marginalized and remote communities in the desert, supporting the facilitation of migrants' journeys along with other forms of smuggling constitutes one of the few available forms of labour available to young people (Sanchez & Achilli, forthcoming).

5. If They Are Not Organized Criminals, Then What Leads People to Perform Smuggling Related Tasks?

Simply put, the answer is: inequality. Lacking opportunities for education or employment, men, women and children whose homes are located along the contemporary migration pathway, or even migrants who have become stranded in their attempts to facilitate their own journeys, constitutes those who often enter the smuggling market.

The examples described here – from the role of migrants who capitalize on their own knowledge concerning clandestine journeys, the participation of children and teenagers for a shot at migrating, to the tasks women perform even if trivialized—point to a clear conclusion: participating in the facilitation of migrants' journeys is often a tool to counter economic, social and gender precarity. The legal and the empirical record provide in fact evidence of how those behind migrant journeys tend to be 1. migrants themselves (either stranded or in transit), 2. People experiencing long-standing dynamics of marginalization (tribes and other indigenous groups) and 3. Those disproportionately impacted by inequality (elderly men and women, women and children).

While there are abundant claims of smuggling generating untold profits for its facilitators, these earnings appear to be minimal, sporadic, and to be immediately recirculated into the local economy (Sanchez & Achilli, forthcoming; GBRx016). Al-Arabi (2018) in his work on Libya uncovered that in remote villages in the south of the country, a handful of those who had benefited –even if temporarily –from the provision of migrants' journeys had reinvested their earnings into their communities, and creating new businesses

provided employment opportunities that fostered local wellbeing. Smuggling caselaw from Europe also points at how women used their earnings to cover basic and urgent expenses, like past-due rent or medical care (GBRx016; AUTx045). Together, data indicate the facilitation of journeys has become deeply embedded in local economies along the migration pathway, ordinary people – rather than transnational criminal networks – coming to rely on the income they generate to mitigate the impact of low wages, unemployment and poverty. And that the criminalisation of their actions, rather than protecting migrants or reducing the incidence of crime, further the conditions of precarity that led them to perform smuggling tasks in the first place.

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Caselaw

The smuggling cases cited in this essay came from SHERLOC: an internet-based repository of cases compiled by the UNODC, relevant to the requirements of the Organized Crime Convention, the Protocols thereto and the international legal framework. They all involve prosecutions and appeals related to migrant smuggling offenses. While the cases are available online by entering the codes below, they tend to be anonymised and therefore, no specific names of any of the involved parties are included. Countries are identified. Cases can be accessed at: <https://sherloc.unodc.org/cld>

AUTx045 13Os44/02 (OGH, 26 June 2002) Austria
AUTx054: 12Os157/08t (OGH, 15 January 2009) Austria
AUTx059: 11Os122/07m (OGH, 1 April 2008) Austria
FRAh022 Jugement Nr 713/2009 France
PORh003 Acórdão – Processo 8/00.6ZRCBR.C1 Portugal
GBRx016 R v Monika Slepckova [2010] EWCA 2715 (28 October 2010) United Kingdom

15. EU LEGAL MIGRATION POLICIES SINCE TAMPERE, AND THEIR RELATIONSHIP WITH INTERNATIONAL STANDARDS AND THE UN GLOBAL COMPACT FOR MIGRATION

Ryszard Cholewinski¹

1. Introduction

This chapter discusses the European Union (EU) legal and policy measures on legal migration adopted since the European Council Conclusions, agreed in Tampere, Finland, in October 1999 (the ‘Tampere Milestones’),² which set out the vision and framework for the EU law and policy on asylum and migration. The specific objective of the chapter is to consider how the governance of labour migration and protection of migrant workers from outside the EU since Tampere accords with international standards and the United Nations (UN) Global Compact for Safe, Orderly and

1 The views in this paper are solely those of the author and do not reflect the views of the ILO or any of its constituents.

2 Tampere European Council, [Presidency Conclusions, Towards a Union of Freedom, Security and Justice: The Tampere Milestones](#), 15-16 October 1999.

Regular Migration (GCM),³ the non-binding cooperative framework on international migration adopted by the Intergovernmental Conference in Marrakech, Morocco on 10 December 2018 and endorsed by the UN General Assembly later that same month.

The chapter first reviews the parts of the Tampere Milestones that apply to legal migration and provides a concise overview of the EU legal migration acquis, drawing also on the recent fitness check conducted by the European Commission as well as its reports on the implementation of relevant directives. It then considers this acquis in the context of the legally binding international human rights and labour instruments ratified by EU Member States. The final section examines the acquis in light of the decent work and labour migration provisions of the GCM. While EU member states were fully engaged in the negotiations on the GCM, almost one-third voted against or abstained.

2. The Tampere Milestones and Legal Migration

The Tampere European Council Conclusions laid out the vision for implementation of the provisions of the Amsterdam Treaty, which afforded the EU competence over asylum and migration from third countries.⁴ The Conclusions covered the following themes: partnerships with countries of origin, a Common European Asylum System, fair treatment of third country nationals, and management of migration flows. The third and fourth thematic areas are particularly relevant to labour migration. With regard to the fair treatment of third country nationals, the European Council observed:

18. The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should

3 UN General Assembly (UNGA), 73rd Session, [Global Compact for Safe, Orderly and Regular Migration](#), A/RES/73/195 (11 January 2019).

4 [Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts](#), Official Journal (OJ) of the European Union, 1997, C340/1.

aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia. ...

20. The European Council acknowledges the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. ...

21. The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.⁵

Inherent in these paragraphs, therefore, is the emphasis on fair treatment of lawfully resident third country nationals or, in the context of strong integration measures, affording them comparable treatment to that of EU citizens; ensuring non-discrimination and countering racism and xenophobia; and providing a higher level of rights ("as near as possible to those enjoyed by EU citizens") for long-term lawfully resident third country nationals. Absent from these commitments, however, is any explicit reference to equality of treatment and opportunity for third country nationals with EU citizens and recognition of the rights of migrant workers in an

5 Tampere Presidency Conclusions, op. cit., paras. 18, 20, 21.

irregular situation. As noted below, this raises questions in terms of consistency with respect to the international human rights and labour instruments EU member states have ratified.

As far as management of migration flows is concerned, in addition to immigration control measures,⁶ the European Council called for “the development, in close co-operation with countries of origin and transit, of information campaigns *on the actual possibilities for legal immigration*, and for the prevention of all forms of trafficking in human beings”⁷.

3. EU Legal Migration Acquis

The EU legal migration acquis flows from Article 79 of the EU Treaty⁸ and is applied in a series of sectoral directives applicable to highly skilled third-country nationals (‘Blue Card’ Directive), seasonal workers, intra-corporate transferees, and other migrant workers not covered by these three categories.⁹ While these four groups comprise the majority of third-country nationals working in the EU, they do not apply to third-country national family members of EU citizens who benefit from the provisions relating to free movement of workers. Moreover, students, who can also

6 Namely, addressing irregular migration, adoption of a common policy on visas, closer cooperation and technical assistance between Member States’ border control services, promotion of voluntary return, and conclusion of readmission agreements with third countries.

7 Tampere Presidency Conclusions, op. cit., para. 22 (emphasis added).

8 Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 C 326/47.

9 See respectively Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009 L 155/17; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ 2014 L 94/375; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ 2014 L157/1; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343/1;

work, as well as researchers and third-country national long-term residents, are covered by separate directives,¹⁰ and the directive on the right to family reunification applies to third-country nationals in the EU, who hold a residence permit valid for one year or more and have a reasonable prospect of obtaining permanent residence.¹¹ It should also be recalled that the directives applying to asylum-seekers, refugees and those granted subsidiary protection status contain provisions relating to their access to employment in EU member states.¹² In June 2019, the EU adopted a Regulation to establish a European Labour Authority, *inter alia* to support compliance and cooperation between EU member states in the consistent, efficient and effective application and enforcement of EU law related to labour mobility across the EU, and social security coordination. The Authority's activities cover individuals subject to EU law within the scope of the Regulation, including lawfully resident third country nationals.¹³

While these measures focus broadly on harmonising the conditions for admission, residence and employment in EU member states, the latter retain the sovereign prerogative to decide how many migrants (if any) from third countries should be admitted to their territory for the purpose of employment.¹⁴ The European

10 Directive 2016/801/EU of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and *au pairing* (recast), OJ 2016 L 132/21; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2003 L 16/44.

11 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12, Article 3(1).

12 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, 2013 L 180/96, Article 15; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337/9, Article 26.

13 Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, OJ 2019 L186/21, Preamble, recitals 8 and 13.

14 Treaty on the Functioning of the European Union, *op. cit.*, Art. 79(5): "This Article shall not affect the right of Member States to determine volumes of admission of

Commission has recognised in a number of policy documents, however, the need for the EU to become more attractive to highly skilled migrants (often also referred to as ‘talent’) in response to the expected future demand for skilled labour,¹⁵ and has given particular emphasis to this,¹⁶ including through a proposed revision of the ‘Blue Card’ Directive,¹⁷ although calls to open up more regular labour migration channels for low-skilled workers, have been less pronounced.¹⁸

This need is also evident in the EU Global Approach to Migration and Mobility (GAMM),¹⁹ the EU’s external policy on migration from third countries, in which legal migration features as one of the four key components, along with addressing irregular migration, migration and development, and international protection, as implemented through Mobility Partnerships and Common Agendas for Migration and Mobility (CAMMs) concluded with third countries.²⁰ In addition, member states are also developing legal migration pilot projects, jointly with key partner countries of origin and transit in Africa, and with the support of the European

third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed”.

- 15 European Commission, *A European Agenda on Migration*, COM(2015) 240 final (13 May 2005), p. 14: “Europe is competing with other economies to attract workers with the skills it needs. Changes in the skills required by the EU between 2012 and 2025 are expected to show a sharp increase in the share of jobs employing higher-educated labour (by 23%). Shortages have already been seen in key sectors such as science, technology, engineering and healthcare. Europe needs to build up its own skills base and equip people for inclusion in today’s labour market” (footnote omitted).
- 16 European Commission, *Progress report on the Implementation of the European Agenda on Migration* COM(2019) 481 final (16 October 2019), p. 19.
- 17 European Commission, *Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment*, COM(2016) 378 final (7 June 2016).
- 18 See European Commission, *Enhancing legal pathways to Europe: an indispensable part of a balanced and comprehensive migration policy*, COM(2018) 635 final (12 September 2018), p. 3, which acknowledges skills shortages in occupations requiring less formal skills, such as sales representatives and drivers.
- 19 European Commission, *The Global Approach to Migration and Mobility*, COM(2011) 743 final (18 November 2019).
- 20 According to the GAMM web page, Mobility Partnerships with nine third countries (Armenia, Azerbaijan, Belarus, Cape Verde, Georgia, Jordan, Moldova, Morocco, Tunisia) have been signed to date and two CAMMs (Ethiopia and Nigeria).

Commission, which aim to match new skills for third country nationals with labour market needs in the EU.²¹ It has been argued however, that supporting legal migration to the EU from third countries, which are also the focus of cooperation on irregular migration, will not necessarily result in an influx of the skills the EU needs.²²

4. Human Rights and Labour Standards

While no EU member state has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (ICRMW),²³ they have ratified most of the other core international human rights instruments, which apply to non-nationals, including migrant workers.²⁴ The treaty bodies monitoring the implementation by states parties of these instruments have drawn special attention to the need to protect migrant workers, including in general comments or recommendations.²⁵

EU member states have also ratified the eight ILO fundamental conventions addressing the abolition of forced labour, elimination of child labour, freedom of association and collective bargaining (trade union rights), and non-discrimination in employment.²⁶

- 21 *Progress report on the Implementation of the European Agenda on Migration*, op cit. p. 19. Five pilot projects on legal migration are currently underway with EU funding, to implement circular and long-term mobility schemes for young graduates and workers from selected partner countries (Egypt, Morocco, Nigeria and Tunisia).
- 22 A. Weinar, "Legal Migration in the EU's External Policy: An Objective or a Bargaining Chip?" in S. Carrera et al. (eds), *Pathways towards Legal Migration into the EU: Reappraising concepts, trajectories and policies*, Centre for European Policy Studies, Brussels, 2017, 87-93, p. 92.
- 23 UNGA Resolution 45/158 of 18 December 1990.
- 24 Up-to-date information on ratifications can be obtained from the Dashboard of the Office of the High Commissioner for Human Rights (OHCHR).
- 25 See e.g. Committee on the Elimination of Discrimination Against Women, General recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R (5 December 2008), and Committee on Migrant Workers General comment No. 1 on migrant domestic workers, CMW/C/GC/1 (23 February 2011) and General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2 (28 August 2013).
- 26 The texts of the fundamental ILO conventions as well as other ILO conventions and recommendations are available from ILO NORMLEX – Information System on International Labour Standards.

The 2014 Protocol to the ILO Forced Labour Convention, 1930 (No. 29), which focuses on prevention of forced labour, including in the context of abusive and fraudulent recruitment practices affecting migrant workers, protection of victims of forced labour, and their access, irrespective of their legal status or presence in the national territory, to appropriate and effective remedies, such as compensation, has now been ratified by 17 EU member states,²⁷ out of a total of 42 ratifications to date.

The two migrant worker instruments – Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) – have also been ratified by ten and five EU Member States respectively.²⁸ Other relevant technical conventions, such as the Private Employment Agencies Convention, 1997 (No. 181), which regulates the activities of private labour recruiters and draws special attention to the situation of migrant workers,²⁹ and the Domestic Workers Convention, 2011 (No. 189), which recognises domestic work as work and which sets minimum standards for the protection of all domestic workers, including the many migrant domestic workers in Europe,³⁰ have been ratified by 13 and seven EU member states respectively.³¹ The ILO instruments on social security, which set minimum standards in this field and also provide the framework for portability of social security benefits, are

27 Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Malta, Netherlands, Poland, Spain, Sweden and United Kingdom. Iceland, Norway and Switzerland have also ratified the Protocol.

28 Belgium, Cyprus, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain and United Kingdom have ratified Convention No. 97 and Cyprus, Italy, Portugal, Slovenia and Sweden have ratified Convention No. 143. Norway has also ratified both Conventions.

29 Convention No. 181, op. cit., Article 8.

30 In 2015, the ILO estimated that out of a total of 4.4 million domestic workers in Europe, 2.29 million were migrants. *ILO global estimates on migrant workers: Results and methodology*, ILO, 2015, p. 16 (Table 2.8).

31 Belgium, Bulgaria, Czech Republic, Finland, France, Hungary, Italy, Lithuania, Netherlands, Poland, Portugal, Slovakia and Spain have ratified Convention No. 181, and Belgium, Finland, Germany, Ireland, Italy, Portugal and Sweden have ratified Convention No. 189. Switzerland has also ratified the latter instrument.

also applicable to a number of EU member states.³²

The main difference between these instruments, and particularly the two ILO migrant worker conventions, and the EU legal migration acquis is the fragmentation of the latter into various migrant worker categories, namely highly skilled migrants, seasonal migrant workers, intra-corporate transferees, and other migrant workers not falling into these three categories, as well as students and researchers, which is the “sectoral approach” that the European Commission opted for after the withdrawal of its 2001 proposal for a horizontal framework Directive on economic migration – intended to regulate the entry and residence conditions for all third country nationals exercising paid and self-employed activities – which was not supported by EU member states.³³ The European Commission’s recent fitness check on EU legislation on legal migration recognises the sectoral approach as one of the “internal coherence issues”.³⁴ In effect, the ILO conventions provide for the horizontal approach and also apply to EU citizens given that the definition of a ‘migrant for employment’ or ‘migrant worker’ does not distinguish between EU and non-EU nationals.³⁵ As argued elsewhere, this fragmentation risks infringing the equality principle, both across the measures themselves and in the context of their individual implementation.

32 Social Security (Minimum Standards) Convention, 1952 (No. 102), ratified by 21 EU member states (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, France, Germany, Greece, Ireland, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom); Equality of Treatment (Social Security) Convention, 1962 (No. 118), ratified by seven EU member states (Denmark, Finland, France, Germany, Ireland, Italy, Sweden); Maintenance of Social Security Rights Convention, 1982 (No. 157), ratified by two EU member states (Spain, Sweden). Iceland, Norway and Switzerland have ratified Convention No. 102, and Norway has ratified Convention No. 118.

33 European Commission, *Proposal for a Directive on the Conditions of Entry and Residence of Third-country Nationals for the Purpose of Paid Employment and Self-Employed Economic Activities*, COM(2001) 386 final (11 July 2011). See also European Commission, *Policy Plan on Legal Migration*, COM(2005) 669 final (21 December 2005), p. 5.

34 European Commission, Staff Working Document, Executive Summary of the Fitness Check on EU Legislation on legal migration, SWD(2019) 1056 final (29 March 2019), p. 2.

35 ILO Convention Nos. 97 and 143, op. cit., Article 11.

For example, there are clear distinctions between the more favourable rights afforded highly skilled migrant workers in the 'Blue Card' Directive as compared with those granted lower-skilled migrants in the Single Permit and Seasonal Workers Directives, in particular when it comes to family reunification, access to the labour market for family members, and intra-EU mobility.³⁶ Furthermore, the proposal for the recast 'Blue Card' Directive risks exacerbating these differences as a number of provisions are aimed to improve the ability of the EU to attract and retain highly skilled third-country nationals by affording them and their family members more rights and enhanced labour mobility between EU member states.³⁷

While the recent assessment by the European Commission of the implementation of the Single Permit Directive observes that the equal treatment provisions are generally applied correctly, shortcomings in transposition have been identified in a number of areas, particularly in respect of the export of pension benefits,³⁸ which was already a concern raised in an earlier ILO note published by the EU Council during the negotiations on the draft Directive, which originally aimed to restrict the export of pensions by third country nationals only if their EU member state of residence had concluded a social security agreement with their country of origin.³⁹

36 See also R. Cholewinski, "Labour Migration, Temporariness and Rights" in S. Carra, E. Guild and K. Eisele (eds) *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives on the EU, the US, Canada and beyond*, CEPS: Brussels, 2014, 22-28, p. 26, and R. Cholewinski, "International Perspective on Highly Skilled Migration in Light of the Blue Card Directive and its Transposition in EU Member States" in C. Grütters and T. Strik (eds) *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Nijmegen and Oisterwijk: Centre for Migration Law and Wolf Legal Publishers, 2013, 27-39, pp. 38-39.

37 European Commission, *Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment*, COM(2016) 378 final (7 June 2016), pp. 3 and 10-11.

38 European Commission, *Report to the European Parliament and the Council on Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State*, COM(2019) 160 final (29 March 2019), pp. 9-11.

39 EU Council, *Proposal for a Directive of the European Parliament and of the Council*

On the other hand, in assessing the EU legal migration legislation as a whole, the European Commission's fitness check concludes, as one of the main positive effects of the evaluation, "improved recognition of the rights of third-country nationals (namely the right to be treated on an equal basis with nationals in a number of important areas, such as working conditions, access to education and social security benefits, and procedural rights)".⁴⁰ However, there is little evidence in the fitness check and its supporting documents⁴¹ to evaluate the EU legislation on legal migration against international human rights and labour standards, which is in stark contrast to the study on legal migration prepared for the European Parliament.⁴²

5. Global Compact for Safe, Orderly and Regular Migration

As noted in the introduction, the GCM was endorsed by the UN General Assembly on 19 December 2019. 152 UN member states voted in favour of the GCM, five voted against, and 12 abstained. Three of the five UN member states voting against the GCM were EU member states (Czech Republic, Hungary and Poland), and six EU member states (Austria, Bulgaria, Italy, Latvia, Romania, Slovakia) were among the 12 UN member states abstaining. This meant that one-third of EU member states did not "sign up" to the GCM, in effect making Europe the region most opposed to the GCM.⁴³

The GCM has been heralded as the first comprehensive global

on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment – ILO Note, Doc. 9564/11 (2 May 2011).

- 40 Executive Summary of the Fitness Check on EU Legislation on legal migration, op. cit., p. 4.
- 41 European Commission, *Legal Migration Fitness Check: Final Evaluation Report - Supporting Study* (June 2018), Luxembourg, Publications Office of the European Union, 2019.
- 42 European Parliament, *The cost of Non-Europe in the area of legal migration*, Study prepared by the European Parliamentary Research Service, including CEPS research, Brussels: EU, March 2019.
- 43 Liechtenstein and Switzerland also abstained.

framework addressing all aspects of international migration.⁴⁴ It purports to align itself with international law, and rests on the purposes and principles of the UN Charter and other international law instruments, including relevant ILO Conventions.⁴⁵ The GCM is also based on a set of cross-cutting and interdependent guiding principles, *inter alia* that it is people-centred, recognises respect for the rule of law and due process, is based on international human rights law, is gender-responsive and child-sensitive, and promotes “whole of government” and “whole of society” approaches,⁴⁶ which all resonate with the spirit of legally binding international human rights and labour standards and their application.

While the GCM is also rooted in the 2030 Agenda for Sustainable Development,⁴⁷ there is no organised framework of goals, targets and indicators, as with the Sustainable Development Goals (SDGs), which sets timelines for the achievement of the actions specified.⁴⁸

The scope of the GCM applies to nearly all aspects of migration, with the possible exception of mixed migration, and is thus considerably broader in scope to that of the legally binding UN and ILO migration instruments, which focus on regulating the labour migration process and protection of migrant workers and their families. Indeed, the GCM addresses one particular area that is not the principal concern of these instruments – with the exception where they contain provisions relating to the migration process – namely, the need to make available more flexible pathways

44 K. Newland, “Global Governance of International Migration 2.0: What Lies Ahead”, Migration Policy Institute, Washington, D.C., February 2019, p. 2.

45 GCM, *op. cit.*, Preamble, paras. 1 and 2.

46 GCM, *ibid.*, para. 15. The remaining guiding principles are concerned with international cooperation, national sovereignty and sustainable development.

47 GCM, *ibid.*, para. 6; UNGA, 70th Session, Transforming our world: the 2030 Agenda for Sustainable Development, adopted on 25 September 2015, UN doc. A/RES/70/71 (21 October 2015).

48 Professor François Crépeau, the former UN Special Rapporteur on the human rights of migrants, proposed such a framework as a model for the GCM. See UNGA, Human Rights Council, 35th Session, Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility, A/HRC/35/25 (28 April 2017).

for the admission of regular migrants for the purposes of employment, family reunion and study, which is articulated by its objective 5.⁴⁹ Contrary to views in some quarters, however, the ICRMW, and ILO Conventions Nos. 97 and 143, do not interfere with the state sovereign prerogative to regulate the admission of foreigners into the territory. Even where the question of regularisation of migrants in an irregular situation is raised in these instruments, states parties are only encouraged to give consideration to such a possibility.⁵⁰

Arguably, in addition to its overall non-legally binding nature, the GCM does not undertake anything similar in objective 5, although this position continued to be expressed by some governments, including those of EU member states, namely that the GCM poses a threat to the sovereign right of states to enforce their immigration laws and to secure their borders, and even that it would create a human right to immigration.⁵¹

Decent work and labour migration is spread across a number of GCM objectives, in particular objectives 5 (considered above), 6 (facilitate fair and ethical recruitment and safeguard conditions that ensure decent work), 15 (provide access to basic services to migrants), 16 (empower migrants and societies to realise full inclusion and social cohesion), 18 (invest in skills development and facilitate mutual recognition of skills, qualifications and competences), and 22 (establish mechanisms for the portability of social security entitlements and earned benefits).

49 GCM, *op. cit.*, para. 21, objective 5: Enhance availability and flexibility of pathways for regular migration.

50 For example, see ICRMW, Art. 69(1), "States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist", and Convention No. 143, Art. 9(4), "Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment."

51 S. Carrera, et al., "Some EU governments leaving the UN Global Compact on Migration: A contradiction in terms?", Centre for European Policy Studies (CEPS) Policy Insights, No. 2018/15, November 2018, pp. 1, 6-7.

Given its broad acceptance by UN member states outside of the EU, including by third countries in the EU neighbourhood, the GCM is an important multilateral instrument, which can foster stronger and more comprehensive cooperation on migration, including on labour migration, between these countries and the EU. It is to be hoped, therefore, that the European Commission will continue to see the value of the GCM as well as the international legal standards upon which it rests as setting the framework for wider cooperation on legal migration with third countries despite the reticence of a number of EU member states towards this important non-binding framework.

6. Conclusion

This chapter has attempted to thread together the EU law and policy on legal migration, as originally articulated in the Tampere Milestones and elaborated in the 20 years since their adoption in detailed legal and policy measures, with the applicable human rights and ILO international labour standards, to which most EU member states adhere, and the provisions on decent work and labour migration in the GCM.

There continues to be a normative gap between the fragmented EU approach to addressing legal migration from third countries with international standards and frameworks. On a broader level, this tension runs to the core of state sovereign concerns and the protection of individual human and labour rights, which are also applicable to non-nationals. It is necessary to narrow this gap if indeed the EU is to fulfil the promise in the Tampere Milestones on realizing an area of freedom, security and justice for all, including those third country nationals from outside the EU who seek to enter lawfully to take up employment, study and join family members, and thus contribute to its further economic development and prosperity.

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Part IV
EU CRIMINAL
JUSTICE
COOPERATION

16. 20 YEARS FROM TAMPERE. THE CONSTITUTIONALISATION OF EUROPE'S AREA OF CRIMINAL JUSTICE

Valsamis Mitsilegas

Introduction

The Tampere Conclusions introduced an ambitious programme for the development of European integration in criminal matters, centered primarily around the principle of mutual recognition. 20 years on, we have witnessed the transformation of European criminal law from a marginal, intergovernmental field to one of the most dynamic and constitutionally significant areas of EU law. Indeed, a number of key EU criminal law questions are essentially constitutional law questions.

This Chapter will assess the great steps taken towards the coming of age of EU criminal law as a fully fledged area of EU law. It focuses on the constitutionalisation of Europe's criminal justice area. Four key constitutionalisation developments accelerated by the entry into force of the Lisbon Treaty will be analysed and two main challenges for the future of EU criminal law will be highlighted.

2. The Four Elements of the Constitutionalisation of European Criminal Justice

There are four key dimensions of constitutionalisation in European Criminal Justice related to institutions, competences, principles and rights. In terms of institutions, the entry into force of the Lisbon Treaty signified the supranationalisation of European criminal law, with EU institutions assuming their full EU powers in the field. The contribution of two of these institutions, the European Parliament and the CJEU, has been instrumental in the changing landscape of European criminal law and a greater emphasis on the examination of the impact of EU intervention in the field on fundamental rights. The contribution of the Parliament under codecision to strengthening fundamental rights safeguards in dossiers such as the defence rights and the European Investigation Order Directives and its opposition to the Commission package on digital evidence are key examples in this context. As it will be seen below, the Court of Justice has also been instrumental in examining the constitutional implications of EU criminal law, most notably in the evolution of its case law on mutual recognition and the European Arrest Warrant.

The second element of constitutionalisation involves the clarification and expansion of EU competences in the field of EU criminal law. Clarification of competences has been a request by the Working Group on the Area of Freedom, Security and Justice (AFSJ) at the Convention of the Future of Europe and has occurred in the Lisbon Treaty in the field of substantive criminal law in Article 83(2) TFEU. Here the Treaty introduced two types of criminal law harmonisation: securitised criminalisation (83(1)) and functional criminalisation (83(2)), the latter translating in Treaty terms the case law of the CJEU in the environmental crime and pollution at sea cases.

The extent of the Union's powers to criminalise and the overlap with other Treaty provisions (such as Article 325 TFEU) remain perhaps inevitably contested, but the criminalisation legal basis

has thus far been used selectively by the EU institutions. A key missed opportunity in this context has been to use the Article 83 legal basis to amend EU law in order to decriminalise: a key example in this context is the legislation on the criminalisation of the facilitation of unauthorised entry, transit and residence, where the Commission refused to bring forward amending legislation to address the grave human rights issue of the criminalisation of humanitarianism and stigmatisation of civil society and citizens that the broad scope of current criminalisation entails.

In addition to the clarification of EU competence, the Lisbon treaty has expanded EU competence in the field of EU criminal law leading to the adoption of secondary legislation which has changed and has the potential to fundamentally change further the landscape of EU criminal law. The first example is the introduction of Article 82(2) TFEU, granting for the first time to the EU Express competence to legislate in a number of areas of criminal procedure, including defence rights. While competence under Article 82(2) TFEU can be considered functional (it exists if it is necessary for the effective operation of mutual recognition) in practice it has resulted in wide range harmonisation of defence rights legislation across the EU. The potential of these measures to grant effective protection on the ground and to shift the focus in European criminal Justice in uncritical enforcement to fundamental rights is enormous: many of these provisions have direct effect, the CJEU has already confirmed the application of the principle of effectiveness in their implementation and it is remarkable that the EU has reached a point where it legislated, via secondary law, on human rights.

Another key area of expansion of EU competence has been the introduction of Article 86 TFEU which has led to the adoption for the first time of a Regulation establishing the European Public Prosecutors Office (EPPO). Negotiations have been lengthy and at times tortuous. The need for compromise under the spectre of enhanced cooperation and national sovereignty concerns have led to the adoption of a complex and at times unwieldy piece of legis-

lation which law generated a very complex legal structure for the EPPO and has left many matters to be regulated by national law.

In this manner, the EPPO Regulation generates a number of concerns regarding legal certainty and the protection of fundamental rights and the rule of law, especially in view of the limited avenues of a legal remedy before the CJEU. But if one wishes to view the glass as half full, it is certain that the very establishment of the EPPO with the participation of a great majority of Member States is an unprecedented and great leap forward for European criminal justice, as for the first time an EU agency with coercive powers and direct powers over national systems has been established. It is for courts, national and European, to address the fundamental rights and rule of law challenges in the future.

The third and fourth elements of constitutionalisation are inextricably linked and involve the application of general principles of EU law and fundamental rights in European criminal law. The CJEU has confirmed in a variety of cases the applicability in this sensitive field of principles including primacy and effectiveness of EU law as well as direct effect, including of Treaty provisions such as Article 325 TFEU. While as demonstrated in the *Taricco* judgement saga these developments are not always readily accepted by national legal orders, the strength in the CJEU pronouncements and their impetus for the effective enforcement of European criminal law cannot be underestimated. A particular enforcement role falls here to national courts, which are called to display national law, which hinders the effectiveness of EU law.

National courts have a key role to play also in upholding fundamental rights in Europe's area of criminal justice. This is in particular after the eventual evolution and maturation of the CJEU approach to mutual recognition where post-*Aranyosi* ruling we have moved to a paradigm of 'earned trust' on the basis of effective protection of fundamental rights on the ground. It is for national courts, under a paradigm of dialogical pluralism, to ensure the effective protection of rights which at the same time will, serve to safeguard the very credibility of the system of mutual recognition.

3. Coming of Age: The Challenge of The Rule of Law in an Era of Globalization

This Chapter has demonstrated that European criminal law in the twenty years since Tampere has really come of age in terms of its content, direction and ambition. Challenges of reconciling integration in this sensitive field with national sovereignty and fundamental rights concerns will always remain but they have started to be addressed in a meaningful way. Being forward-looking, this Chapter would like to address two newer but key interrelated challenges for European criminal justice in the future: the challenge of upholding the rule of law and the challenge of upholding and promoting European values in the emergence of the EU as a global actor in an era of globalisation.

In terms of upholding the rule of law: rule of law challenges have arisen in a number of areas of European criminal justice in recent years. Examples include rule of law concerns in the implementation of the European Arrest Warrant (EAW) - with the very concept of judicial independence being challenged and in the process of redefinition by the CJEU- rule of law concerns in the implementation of the EPPO and rule of law concerns in the emergence of an EU data-driven paradigm of operational cooperation, in particular, via the proliferation and expansion of databases and their interoperability. These developments raise the question of vigilance regarding both *ex ante* and *ex post* rule of law scrutiny urgent - there is a need to ensure and provide an effective remedy and transparency for individuals affected by secret and multi-level state enforcement.

These rule of law challenges are more acute in the face of globalisation and the blurred boundaries data driven surveillance entails. The latter blurs boundaries in four ways: between internal and external action; between the public and the private; between migration and security; and between reactive and preventive justice. There is an urgent need not to let this blurring of boundaries undermine the very values upon which the Union is based,

including fundamental rights and the rule of law. Current embodiments of this blurring of boundaries such as the new EU interoperability framework and the current internal and external negotiations on digital evidence in the shadow of the US Cloud Act render these challenges even more visible and acute. In view of globalisation, the challenge for the EU will not only to uphold but also to promote its values in the global scene, as its constitutional framework requires it to do.

17. EUROPEAN CRIMINAL JUSTICE – FROM MUTUAL RECOGNITION TO COHERENCE

Dominik Brodowski

1. Introduction: European Criminal Justice – Mission Completed?

On the occasion of the 20-year anniversary of the groundbreaking Tampere Programme, can we say that European Criminal Justice¹ is, at least on a legislative level, a mission completed? Yes – and no. Yes, as much has been achieved in the quest for more effective criminal justice in the European Union, but also in the quest for a more just criminal justice.² To highlight just a few aspects: (1) An extensive set of mutual recognition instruments is in operation,³ and in particular the European Arrest Warrant has matured to a

1 On European criminal policy since *Mireille Delmas-Marty* famous query “Quelle politique pénale pour l’Europe?” (Delmas-Marty, 1993), just see Vogel (2002); Vogel (2014), 644 ff.

2 On the *acquis*, just see the treatises on European Criminal Law, such as Klip (2016); Satzger (2018); Ambos (2018); and Mitsilegas (2016).

3 Most relevant are the European Arrest Warrant (Council of European Union, 2002), the mutual recognition of custodial sentences (Council of the European Union, 2008) and of financial penalties (Council of the European Union, 2005), the European Investigation Order (European Parliament and Council of the European Union, 2014), and the – not yet operational – Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders (European Parliament and Council of the European Union, 2018c).

successful tool for prosecutors and courts throughout the Union. (2) A set of Directives on procedural rights of suspected or accused persons,⁴ but also on victim rights,⁵ has been enacted. Once the dust has settled on the national level, the often-proclaimed mutual trust between member states⁶ will finally have a more solid normative basis. (3) Ever more often, the relevance of the Charter on Fundamental Rights is recognised, not only in relation to *ne bis in idem* (most recently, see the ECJ judgments of 20 March 2018 – C-524/15 (Menci), C-537/16 (Garlsson Real Estate) and C-596/16 / C-597/16 (Di Puma)), but also concerning the *proportionality of criminal liability* (most recently, see ECJ, decision of 12 July 2018 – C-707/17 (Pinzaru und Cirstinoiu) and ECJ, decision of 30 January 2019 – C-335/18 and C-336/18 (AK))⁷ and the *equal treatment* of all Union citizens by member states (see fundamentally ECJ, judgment of 6 September 2016 – C-182/15 (Petruhhin) and ECJ, judgment of 13 November 2018 – C-247/17 (Raugevicius)). (4) A framework for coordination of European Criminal Justice, in particular by Eurojust (European Parliament and Council of the European Union, 2018a) and Europol (European Parliament and Council of the European Union, 2016d), has been built. (5) And last but not least, the EPPO (Council of the European Union, 2017)⁸ will soon commence operations.

4 Concerning interpretation and translation (European Parliament and Council of the European Union, 2010), information (European Parliament and Council of the European Union, 2012a), access to a lawyer (European Parliament and Council of the European Union, 2013a), presumption of innocence and right to be present (European Parliament and Council of the European Union, 2016a), procedural safeguards for children (European Parliament and Council of the European Union, 2016c), and legal aid (European Parliament and Council of the European Union, 2016e).

5 Concerning compensation (Council of the European Union, 2004) and rights, support and protection (European Parliament and Council of the European Union, 2012b). See also the European Protection Order (European Parliament and Council of the European Union, 2011) and its civil law complement (European Parliament and Council of the European Union, 2013b).

6 In particular, the topic of mutual trust is more pronounced in the jurisprudence of the ECJ compared to legislative programmes (which often called for a strengthening of trust) or the Commission; just see Burchard (2019), 485 ff.

7 A further interesting preliminary question proceeding was removed from the register twice (ECJ, decision of 12 June 2019 – C-149/19 (R.B.) and ECJ, decision of 24 January 2019 – C-510/17 (ML)).

8 On the EPPO Regulation, see an article-by-article commentary by Herrnfeld, Bro-

Without doubt, these are great steps forward towards a truly European Criminal Justice. Owing to these laudable achievements, Europe is safer and more secure – not only in relation to crime, but also in relation to preserving freedoms of citizens vis-à-vis the state.

Yet, there is no time to rest, as the “mission” is far from completed. Not only regarding details – and one can easily speak hours and write monographs on specific provisions in the various Directives, Regulations and Framework Decisions, their interpretation, and their operation in practice. But also on a general, strategic level, the “mission” is also far from completed. There are clear and present dangers to the rule of law. Nationalism and calls for a re-nationalisation of criminal justice⁹ are on the rise. And the so-called “e-evidence” proposals (European Commission, 2018a, and European Commission, 2018b) unearth fault lines of mutual recognition.¹⁰

2. Aims and Means of European Criminal Justice

Once again, it is therefore necessary to re-think the aims and the means of European Criminal Justice, and to set future priorities in line with them. I am therefore very thankful to the organisers of this conference that they take such a future-looking approach, but still give the praise to the Tampere program it truly deserves.

2.1. Aims of European Criminal Justice

What are the aims of European Criminal Justice?¹¹ From a normative birds-eye point of view, it is to build and to protect an Area of Freedom, Security *and* Justice (Art. 3 TEU; Art. 67 para 1 TFEU). Going beyond this mere headline, three more concrete aims can

dowski and Burchard (2020).

9 Criticism in the UK against “Europe” before the Brexit referendum was pointed, among others, against the ECtHR (*sic!*) interfering with the UK criminal justice system.

10 See *infra* II.3.

11 On the genesis, see *supra* note 1.

be discerned from Union primary law (see fundamentally Sieber, 2009, 2 ff.):

Firstly, and this is central to the concept of mutual recognition (cf. Art. 82 para 1 lit a TFEU), European Criminal Justice seeks to empower *national* criminal justice systems to effectively prevent and address crime (cf. Art. 67 para 2 TFEU),¹² in particular¹³ in cross-border situations:¹⁴ mutual recognition extends the powers and the reach of each national criminal justice system, which would otherwise be normatively limited and practically hindered by having to rely on class means of mutual legal assistance and extradition.

Secondly, European Criminal Justice focuses on cross-border crimes and crimes affecting EU interests (Sieber, 2009, 2 ff.). In particular, the Union extensively defines a minimum level of criminalisation for “areas of particularly serious crime with a cross-border dimension” (Art. 82 para 1 TFEU),¹⁵ to a lesser extent for areas subject to Union harmonisation (Art. 82 para 2 TFEU),¹⁶ and sometimes relies on quasi-criminal or administrative modes of sanctioning.¹⁷ A further milestone will be when the EPPO commences the investigation and prosecution of so-called PIF (protection of the Union’s financial interests) offences.¹⁸

12 Beyond mutual recognition, also Eurojust and Europol can be seen – as facilitators – to empower national criminal justice systems, same as the training mentioned in Art. 82 para 1 lit c TFEU

13 Exceptions apply, such as when EC³ (located at Europol) assists national police forces in the forensic evaluation of digital evidence.

14 Notably, this does not only apply to cross-border *crime*: it suffices if a victim travels abroad (European Protection Order), if evidence is located abroad (European Evidence Order), if a convicted person flees abroad (European Arrest Warrant), or merely has a bank account abroad (European Confiscation Order).

15 Recently, see the Directives on money laundering (European Parliament and Council of the European Union, 2018b) and on fraud and counterfeiting of non-cash means of payment (European Parliament and Council of the European Union, 2019).

16 Recently, see the PIF Directive (European Parliament and Council of the European Union, 2017).

17 See, for instance, the regulatory regime relating to the protection of personal data, in particular Art. 83 GDPR (European Parliament and Council of the European Union, 2016b).

18 On the EPPO, see already *supra* note 8.

Thirdly, suspected and accused persons, victims, but also *bona fide* third parties enjoy – at least¹⁹ – fundamental rights and freedoms. Though oftentimes forgotten, European Criminal Justice also seeks to preserve and protect these freedoms (see again Sieber, 2009, 2 ff.), not only in light of the transnational guarantee of *ne bis in idem* (Art. 50 ChFR). The important aim of “combating” crime does not always justify, or “trump”, the infringement of fundamental rights (see fundamentally the ECJ jurisprudence on data retention, most recently ECJ, judgment of 21 December 2016 – C-203/15 and C-698/15 (Tele2, Watson)).

2.2. Means of European Criminal Justice

On the *means of European Criminal Justice*, merely a short reminder of the theoretical framework (see extensively Sieber, 2009, 16 ff.): European Criminal Justice of today is neither a pure model of cooperation, nor a pure model of supranationalisation. Instead, it combines a strong, but not absolute level of cooperation (in particular mutual recognition with limited grounds for refusal²⁰) with significant supranational elements (in particular the harmonisation of criminal laws and procedural rights, a coordination of criminal justice by European bodies and agencies, and soon the EPPO as a supranational, yet hybrid investigatory and prosecutorial body). Here is not the place to discern the evolvement of this “mixture model”, yet it seems evident that it has evolved mostly for political and practical reasons but not for scientific clarity. And as this “mixture model” is now codified on a constitutional level in Art. 82 ff. TFEU, it is unlikely to change fundamentally in the foreseeable future.²¹

19 It often makes sense, not only in liberal democracies, to provide more “spaces of freedom” and additional rights, and not only the bare minimum of liberties required by the constitution and/or by human and fundamental rights.

20 On the concept of mutual recognition in criminal justice, see originally Sieber (1991), 962 f., and recently as well as extensively Burchard (2019).

21 However, once the EPPO is operational *and* a success story, the proposals to expand its material competence (for instance, also for cross-border cases of international terrorism) will gain more track.

2.3. Challenges of the “mixture”

Yet, this mixture model leads to challenges, most of them well described in literature. To name a few: Mutual recognition is criticised for its focus on nation states instead of the Union as a whole (cf. Klip, 2016, 528). Moreover, it relies too heavily on the issuing criminal justice system and its extensive jurisdiction: it determines what is criminalised, but also what crimes are prosecuted by which means and under what limitations (cf. again Klip, 2016, 531 ff.). Only exceptionally, the executing authorities may make use of grounds for refusal.

In the e-evidence proposal (European Commission, 2018a, and European Commission, 2018b), there is almost no role for them to play at all. It seems doubtful whether sufficient mutual trust exists for such near-automatic mutual recognition, especially as the existing, highly specific procedural-rights related instruments²² do not address the questions at stake relating to e-evidence (such as judicial control or material limitations to investigation measures) and therefore cannot provide for a sufficient normative basis for such trust.

Another common criticism describes mutual trust as “hypothetical” or “presupposed” but non-existent in practice.²³ Indeed, there are worrying, clear and present dangers to the rule of law; and some member states still struggle to evolve to modern European standards, and numerous court decisions can be pointed to as evidence for distrust between the states.

Critics of European Criminal justice furthermore state that supranational elements encroach too heavily into the sovereignty of the member states (just see German Federal Constitutional Court, judgment of 30 June 2009 – 2 BvE 2/08 (“Lisbon Treaty”), paras. 252 f.). The same argument is also brought forward against mutual recognition (just see German Federal Constitutional Court, decision of 15 December 2015 – 2 BvR 2735/14 (“Identity

22 See *supra* note 4.

23 See *supra* note 6 with further references.

Control”), paras. 67 ff.), and nowadays in particular against the quasi-automatic recognition proposed for so-called e-evidence.

In my view, most of this criticism is off the point. Instead, the true challenge of the “mixture” of models of supranational and cooperation approaches lies in achieving *coherence*.²⁴ As the European Criminal Policy Initiative has highlighted, such coherence requirements exist relating to substantive criminal law (European Criminal Policy Initiative, 2009) including sanctioning (just see Satzger, 2019) and to procedural law (European Criminal Policy Initiative, 2013). Coherence is, however, also required with regard to the aims of European Criminal Justice, which is not only about catching the criminal in another member state, but also about protecting and preserving *freedom* and *justice*. Let us think, in particular, about a person who is falsely suspected, or about a *bona fide* third party²⁵: Does European Criminal Justice and in particular the current system of mutual recognition do *them* justice?

3. A More Coherent Approach to Mutual Recognition

From such a perspective, it becomes eminent that the strengthening and extension of national criminal justice systems (by means of mutual recognition) requires, at the same time, a coherent strategy of coordination, checks and constraints:²⁶

By calling for *constraining* criminal justice, I do not wish to interfere with the legislative prerogative to determine the criminal

24 See also the similar call by *Liane Wörner* for a complementary balancing act between effectiveness of Union criminal justice, and – in the absence of specific Union rules on the matter – national human and fundamental rights standards, Wörner (2018).

25 In relation to the e-evidence proposal, such a shift of perspective is of utmost relevance. Most of the existing instruments of mutual recognition focus on the (assumed) perpetrator. Compared to the various forms of evidence available under the European Investigation Order (*supra* note 3), requests for e-evidence far more often relate (also) to *bona fide* third parties, to whom no “genuine link” to the issuing state may exist.

26 See additionally the – still noteworthy – suggestions by Vernimmen-Van Tiggelen and Surano (2008), such as “Approximate conditions for bringing an action”; “Approximate conditions for compensation”; “Facilitating the bringing of actions” (p. 28 f.), and the more recent study by Sellier and Weyembergh (2018); see furthermore European Criminal Bar Association (2018).

laws and the configuration of the criminal justice system. Instead, I want to remind that criminal law cannot solve all conflicts in today's societies. Often, criminal law is not the right or only choice. Going beyond this political perspective, there are eminent but also evolving constitutional constraints to criminal justice which must be taken seriously (for Germany, see, for instance, Jahn and Brodowski, 2016). In this vein, the Union should finally live up to the requirement of Art. 6 TEU and accede to the European Convention on Human Rights (but see ECJ, opinion of 18 December 2014 – 2/13); it is great to see that the Finnish presidency is taking steps in this regard (cf. Council of the European Union, 2019b). Then, the Union and its system of mutual recognition should strive to guarantee that the human rights standards are adhered to in *all* cases (in this sense, see the practical concordance approach by Burchard (2019), 514 ff., 569 ff., 619 ff.), and not only presuppose that they are.

Judicial *checks* should not only be seen as a hindrance to “combat” crime, but as a strength of an area of freedom, security and justice. To be worthy of their name, judicial checks must be easily accessible, thorough, and powerful. That requires not only a strong protection of the rule of law including judicial independence. It also requires us to re-think which forum can best assess the situation, and to consider whether sometimes two checks might be better than only one. Moreover, access to justice in cross-border situations requires enhancement (such as by providing for legal aid in both forums).

Coordination is required not only to avoid inefficient parallel proceedings and to prevent *ne bis in idem* situations. It is also required to set out clear, non-ambiguous standards to citizens on what freedoms they enjoy, what conduct is prohibited, and what punishment in what member state they will face in case of which violation. Resolving or at least reducing conflicts of jurisdiction *ex ante*²⁷ (and not only *ex post* through *ne bis in idem*) can further-

27 Currently, Council of the European Union (2009) provides for a weak coordination mechanism facilitated by Eurojust (on its related casework, see recently Council of the European Union, 2019a). For alternative proposals, see exemplarily Bundesrechtsanwaltskammer (2016), which I co-developed. See also Klip (2016), 531 ff.

more enhance mutual trust: it can guarantee that criminal justice systems do not encroach too broadly into situations more closely linked to another member state.²⁸

In my view, such a coherent strategy of coordination, checks and constraints is required to let European Criminal Justice in general and the system of mutual recognition in particular remain a success story – and for the Union to live up to the expectation to form not only an area of cooperation in criminal matters, but a true Area of Freedom, Security *and* Justice.

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²⁸ Several instruments based on the principle of mutual recognition (such as Art. 4 No. 7 European Arrest Warrant and Art. 11 para 1 lit e European Investigation Order, but not the e-evidence proposal) allow for a priority of the territoriality principle, that is for the state in which the crime occurred.

261, 6.8.2004.

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18. 'SCENES FROM A MARRIAGE': TRUST, DISTRUST AND (RE)ASSURANCES IN THE EXECUTION OF A EUROPEAN ARREST WARRANT

Pedro Caeiro

1. Introduction

In the twentieth anniversary of the famous Conclusions of the Tampere European Council, it might be interesting to revisit the notion of mutual trust as the proclaimed foundations of mutual recognition: back in 1999, was the 'cornerstone' built on solid grounds – or has it been floating, since then, over a romantic plan drawn by some *bona fide* architects? This Chapter will focus on trust and assurances and, especially, on the most recent jurisprudence of the Court of Justice of the European Union (CJEU) on the subject¹.

1 CJEU, Judgment, Case C-220/18 PPU, *ML / Generalstaatsanwaltschaft Bremen*, 25 July 2018, ECLI:EU:C:2018:589 (hereinafter, *ML*), and CJEU, Judgment, Case C-128/18, *Dorobantu*, 15 October 2019, ECLI:EU:C:2019:857 (hereinafter, *Dorobantu*).

2. Context

For the past twenty years, mutual recognition has basically amounted to enhancing the effectiveness of judicial cooperation, or, to be more precise, it has worked as the driving belt of the criminal policy of the issuing Member State(s), extending the reach of domestic decisions in criminal matters across the whole territory of the European Union. The lubricant used on that driving belt was mutual trust, more as a normative assumption than as an empirically ascertained situation.

Up until 2016, several decisions of the CJEU have equated mutual recognition with maximal execution. To that purpose, they have built a system of judicial cooperation hermetically sealed vis-à-vis the protection of human/fundamental rights not reflected in secondary law² and have affirmed – obviously, within the scope of EU law – the prevalence of EU standards of protection over the ones provided for by national constitutions, even where the former were lower than the latter³.

However, the judgment in *Aranyosi / Caldăraru*⁴ has brought an important change of perspective to the law and practice of judicial cooperation in the EU and, in particular, to the configuration of mutual recognition. The Court has made clear that the principle of mutual recognition and the duties arising therefrom do not supersede the positive obligation to prevent inhuman or degrading treatment of the individual sought.

Therefore, ‘where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, (...) that judicial authority is bound to assess the

2 See CJEU, Judgment, Case C-396/11, *Radu*, 29 January 2013, ECLI:EU:C:2013:39, para. 36: ‘the executing judicial authority may make the execution of a European arrest warrant subject solely to the conditions set out in Article 5 of that framework decision’.

3 CJEU, Judgment, Case C-399/11, *Melloni*, 26 February 2013, ECLI:EU:C:2013:107, esp. para. 55 f.

4 CJEU, Judgment, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi / Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198 (hereinafter *Aranyosi*).

existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment⁵.

The judgment in the case *ML* led the Court to develop the second step of the test put forward in *Aranyosi*. The Court stated that, under Article 15 (2) of the Framework Decision on the European Arrest Warrant⁶ and the principle of sincere cooperation, 'the executing judicial authority and the issuing judicial authority may, respectively, request information or give assurances concerning the actual and precise conditions in which the person concerned will be detained in the issuing Member State'⁷.

As far as this author knows, it is the first time that the Court uses the concept of assurances / guarantees in the field of judicial cooperation in criminal matters since the revocation, in 2009, of the former Article 5 (1) of the Framework Decision on the European Arrest Warrant⁸. In that context, the executing authority could ask for an assurance that the individual tried *in absentia* would have the right to request a new trial. Strictly speaking, it was not really an assurance, in the sense of a guarantee of future practice, but rather a request for certified information on the foreign legal system to be provided by a reliable source (the issuing judicial authority). In contrast, the notion of assurances in *ML* seems to correspond broadly to the one used in classic judicial cooperation, because the assurances refer to the way in which the surrendered person will be dealt with, in cases that presuppose, to some extent, a situation of distrust. This raises four questions.

5 *Ibid.*, para. 88.

6 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1 f.

7 *ML*, para. 110; in a similar vein, see *Dorobantu*, para. 67 f.

8 Article 2 (1) of the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, OJ 81, 27.3.2009, p. 24 f.

3. The Questions

First question: should the judgments in *ML* and *Dorobantu* be interpreted in the sense that, in the said cases, the executing authorities are entitled to *request* from the issuing authorities *guarantees* that the detainee's rights will be respected?

Apparently, the answer should be in the negative. In *ML*, the Court said that the executing and the issuing authorities may, '*respectively*, request information or give assurances' (emphasis added).

Nevertheless, in *Dorobantu*, the distinction is not as clear, and a *dictum* in the judgment suggests yet a different approach: 'Last, it should be pointed out that, while it is open to the Member States to make provision in respect of their own prison system for minimum standards in terms of detention conditions that are higher than those resulting from Article 4 of the Charter and Article 3 of the ECHR, as interpreted by the European Court of Human Rights, a Member State may nevertheless, as the executing Member State, *make the surrender to the issuing Member State of the person concerned by a European arrest warrant subject only to compliance with the latter requirements*, and not with those resulting from its own national law' (emphasis added)⁹.

It is unclear whether the Court meant to rule that the executing authorities can make surrender *conditional* on compliance (following guarantees) – a sort of resolute condition that would allow for, eg., the revocation of the decision to surrender should the issuing Member State fail to honour the assurances¹⁰ – or

9 *Dorobantu*, para. 79.

10 This was the stance taken by the Portuguese courts in the notorious case *Abu-Salem*: following a motion filed by the extradited individual after his extradition to India, the High Court of Lisbon found that the Republic of India had failed to fulfil the assurances it had provided regarding, *inter alia*, the respect for the specialty rule, and has thus revoked the decision to extradite (*Acórdão do Tribunal da Relação de Lisboa*, proc. 3880/03-3, 14 September 2011, available at www.dgsi.pt). The decision was upheld by the Portuguese Supreme Court, which found further that the presence of the individual in India is now 'illegal' (*Acórdão do Supremo Tribunal de Justiça*, proc. 111/11.7YFLSB, 11-01-2012, available at www.dgsi.pt). Nevertheless, the Portuguese Government has not (yet) enforced the decision by requesting the return of the individual.

simply meant to restate *Melloni* and stress that the standards with which the guarantees (if provided) must comply is the one set by European law.

Be it as it may, since the Court has also ruled that guarantees of a certain kind *must* be relied upon by the executing authorities, save for exceptional circumstances¹¹, it is likely that providing them in these cases will become common practice. In this context, assurances are intended to restore the shaken confidence – or, borrowing from Günther Jakobs's doctrine, they are used to counterfactually reaffirm the worthiness of trust. This is also in line with the argument according to which trust relates to the practice, to the empirical action of the authorities, not to the legal systems of the Member States¹².

Let us now turn to the second question. In his Opinion, the Advocate General has justified the special relevance of the assurances as follows: 'as the expression of an obligation which has been formally assumed, if that commitment is breached, it may be relied on by the person sought before the judicial authority of the issuing Member State'¹³.

The Court agreed, in essence, with this reasoning, but has nevertheless added a conditional clause that may change the meaning of the said assertion: 'a failure to give effect to such an assurance, in so far as it may bind the entity that has given it, may be relied on as against that entity before the courts of the issuing Member State'¹⁴.

11 See *infra*.

12 P. Caeiro (2018), 'Una nota sobre reconocimiento mutuo y armonización penal sustantiva en la Unión Europea', in L. Arroyo Jiménez and A. Nieto Martín (eds.), *El Reconocimiento Mutuo en el Derecho español y europeo* (Marcial Pons), p. 305–310.

13 Opinion of Advocate General Campos Sánchez-Bordona, Case C-220/18 PPU, 4 July 2018, ECLI:EU:C:2018:547, para. 64. In the original language: 'En cuanto expresión de una obligación asumida de manera formal, si se viera defraudada, podrá hacerse valer ante la autoridad judicial del Estado de emisión por la persona reclamada.'

14 Almost all of the linguistic versions that this author is able to understand concur with the English version: 'la violation d'une telle assurance, en ce qu'elle est susceptible de lier son auteur, pourrait être invoquée à l'encontre de ce dernier devant les juridictions de l'État membre d'émission'; 'könnte ein Verstoß gegen eine solche Zusicherung, soweit sie den Erklärenden bindet, diesem gegenüber vor den Gerichten des Ausstellungsmitgliedstaats geltend gemacht werden'; 'la violazione di una simile garanzia, poiché è ido-

Apparently, the AG has boldly affirmed the right of the individual to avail him or herself of the guarantee before the issuing authorities, whereas the Court has taken a more cautious approach, according to which such right may be exercised *if* the guarantee is binding on the authorities of the issuing State.

Both perspectives seem problematic. Neither of them identifies the source where such right is to be drawn from. Is it implicitly granted by EU law? If that is the case, a much deeper and more precise elaboration would be needed, in order to point out the principles and norms that generate that individual right. In the second place, the approach taken by the Court (*'in so far as it may bind the entity that has given it, may be relied on'*) raises more questions than answers. As guarantees are generally binding in the horizontal relations (between States)¹⁵, the Court seems to refer to their binding effect in the vertical relations (between the State and the individual). However, the Court does not provide criteria in order to determine whether or when are the guarantees binding in the latter sense.

True, the conditional clause might intend to refer the issue to the domestic legal order of the issuing Member State: the right may be exercised... as long as the respective national law provides for it. If that is the purpose of this jurisprudence, it does not really add much to the protection of the individual, since the Court has not made the duty to execute the EAW conditional on the actual ability of the assurance to generate individual rights under the respective domestic law.

nea a vincolare il suo autore, potrebbe essere fatta valere, in caso di sua violazione, dinanzi alle autorità giudiziarie dello Stato membro emittente; 'el incumplimiento de esta garantía, en la medida en que puede vincular a quien la preste, podría invocarse contra este ante los órganos jurisdiccionales del Estado miembro emisor' (emphasis added). The sole exception is the Portuguese version, which does not render the notion of conditionality, but affirms that the commitment is binding on the entity that undertakes it and its breach can actually be relied upon by the sought individual before the courts of the issuing Member State, thereby keeping the exact meaning of the Opinion of the Advocate General: 'a violação desse compromisso, que vincula o seu autor, poderá ser invocada contra ele perante os órgãos jurisdicionais do Estado-Membro de emissão' (emphasis added).

15 On the binding nature of guarantees, as unilateral acts (promises), under international law, see C. Eckart (2012), *Promises of States under International Law*, Hart Publ.

Finally, neither the Opinion nor the decisions establish to which *effects* may the individual avail himself or herself of the violation of the assurance. For instance: if the issuing State breaches its commitment not to incarcerate the individual in overpopulated prisons, may he or she resort to the respective courts with a view to obtain a judicial decision ordering that the competent authority respects the guarantee? Or does the violation (only) give rise to a right to compensation? Or – again – will the consequences be those provided for by the issuing State's law (if any)?

The last two issues contend with the relationship between the CJEU and the European Court of Human Rights (ECtHR). In principle, the latter will refrain from examining issues related to the protection of human rights when they fall within the competence of the EU, pursuant to the principle of equivalent protection¹⁶. Nevertheless, after the 'warning' in *Pirozzi*¹⁷, the ECtHR made clear, in *Castaño*¹⁸, that its jurisdiction over human rights violations is not precluded by the circumstance that such violations occur within the scope of application of EU law, in particular in the execution of a European arrest warrant.

The first question is the *sufficiency* of guarantees provided by *judicial authorities*. Relying on the Opinion of the Advocate-General in *ML*, the CJEU found that 'When that assurance has been given, or at least endorsed, by the issuing judicial authority, (...) the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter'¹⁹. In contrast, as guarantees provided by the Executive or by its members are 'not given by a judicial authority', they 'must be evaluated by carrying out an

16 ECtHR, Judgment, App. no. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, esp. para 156 f. and 165.

17 ECtHR, Judgment, Req. no. 21055/11, *Pirozzi c. Belgique*, 17 April 2018.

18 ECtHR, Judgment, Req. no. 8351/17, *Romeo Castaño c. Belgique*, 9 July 2019.

19 *ML*, cit., para. 112.

overall assessment of all the information available to the executing judicial authority²⁰ – in other words, they are only to be taken into consideration as a piece of relevant information.

The almost absolute obligation to execute an EAW when the assurances are given or endorsed by the issuing judicial authorities is consistent with the paradigm underlying the EAW. However, one may wonder whether such guarantees satisfy the criteria of the ECtHR. The Strasbourg Court has consistently held that the guarantees provided by the office of judicial authorities such as the Public Prosecutor were not binding on the respective States and thus could not be accepted as a means of circumventing the obstacles to extradition arising from the risk of ill-treatment by the requesting State²¹.

Against this background, the case-law of the CJEU seems paradoxical. On the one hand, judicial authorities do not have the competence to bind their states at the international level. On the other hand, the Court does not give particular relevance to the guarantees provided by the bodies which usually have the competence to act in the international sphere and bind their state vis-à-vis other States.

The picture that emerges from this reasoning is that trust within the EU has an *institutional* nature: every judicial act is to be fully trusted, but non-judicial acts are only to be taken into consideration, even when they are issued by authorities who have the competence to take on international obligations.

Nevertheless, it would not be surprising that the Strasbourg Court would apply the *Bosphorus* doctrine in this regard and come to the conclusion that guarantees in the execution of a EAW are an *autonomous* concept of EU law²², forming part of a *sui generis* pro-

20 *ML*, cit., para. 114.

21 ECtHR, Judgment, App. no. 14038/88, *Soering v. The United Kingdom*, 7 July 1989, para. 97 f.; ECtHR, Judgment, App. no. 2440/07, *Soldatenko v. Ukraine*, 23 October 2008, para. 73 f.; ECtHR, Judgment, App. no. 54131/08, *Baysakov and Others v. Ukraine*, 18 May 2010, para. 51.

22 This could well be one of the autonomous concepts ‘underpinning the system of mutual recognition’: see V. Mitsilegas, ‘Autonomous Concepts, Diversity Management and

cedure in a *sui generis* political context²³. As a consequence, they are *not* classic promises under public international law and do not have to bear the same features, as long as the system where they operate affords, as a whole, an equivalent protection to human rights.

Concerning the scope of the duty to ensure the rights of the surrendered person, the Court ruled that the executing authority does not have the obligation to check whether the whole prison system of the issuing Member State complies with fundamental rights, but only to assess the conditions of the prison where the individual will stay immediately after surrender and the facilities where he or she will presumably serve his / her sentence²⁴. The pragmatic reasons underlying this decision are obvious. But – again – is this enough to comply with the criteria set by the ECtHR?

Arguably, the jurisprudence in *ML* and *Dorobantu* is hardly sufficient to provide an effective protection against ill-treatment, especially in cases which presuppose, by definition, systemic or generalised deficiencies of such protection. If the ECtHR faced a case where a non-EU State had provided reliable guarantees that the rights of the detainee would be respected (no torture, no ill-treatment) in *some* prisons, but not necessarily in *other prisons* to which he or she might be transferred in the course of the execution of the sentence, would the decision to extradite comply with the Convention? Arguably it would not, because the guarantees would not have effectively averted the risk of ill-treatment.

Moreover, the compliance with the absolute obligation imposed by Article 4 of the Charter of the Fundamental Rights of the European Union and Article 3 of the European Convention on Human Rights cannot be weighed against the ‘excessive’ amount of work for the authorities involved, or with the ‘risk of impunity’, as sug-

Mutual Trust in Europe's Area of Criminal Justice', forthcoming in *Common Market Law Review* (publication expected in issue 1/2020); manuscript kindly made available by the author.

23 In this sense, the recognition of autonomous concepts of EU law by the ECtHR would be the dogmatic correlate of the institutional approach taken in *Bosphorus*.

24 *ML*, cit., para 77 f.; *Dorobantu*, cit., para 64 f.

gested by the Court. There seems to be no place, in this respect, for the 'EU exception', grounded on the circumstance that the requesting/issuing state is a member of the EU.

The convergence with the criteria set by the ECtHR can only be ensured if the CJEU allows the executing Member State to request from the issuing Member State *comprehensive* assurances that bind the latter to always comply with Article 4 of the Charter while dealing with that particular individual. Apparently, such requests already take place at an informal level, allowing for the execution of European arrest warrants in situations which otherwise could be problematic.

4. Conclusion

At first glance, the provision of guarantees does not bode well with cooperation mechanisms based on mutual trust. However, life changes overtime and this might affect trust. The very nature of the object of trust – the practice of the States – renders it vulnerable to departures more or less serious or frequent from the applicable pattern, even when the legal regulation lives up to irreprehensible levels of protection. In any case, after 20 years of marriage, it is better to renew the vows than to let distrust fester and contaminate the relationship.

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- Opinion of Advocate General Campos Sánchez-Bordona, Case C-220/18 PPU, 4 July 2018, ECLI:EU:C:2018:547.

19. THE DYNAMIC EVOLUTION OF EU CRIMINAL LAW AND JUSTICE

Maria Bergström¹

1. Introduction

This Chapter emphasizes the need for more consistency in the field of EU Criminal Law and Justice. Arguably, this can be achieved by looking at new developments through the lens of past experiences. Thereby, some examples from the wider field of EU Law and Anti-Money Laundering (AML) Regulation are provided, illustrative of the evolution of EU law in general that might help us understand the development of EU criminal law and justice in particular. These examples of the rapid evolution of EU criminal law and justice have implications for the allocation of powers, and might therefore have wider European constitutional law implications posing both opportunities and challenges.

It is argued that EU legislative action entails both challenges and priorities, in particular in relation to the following four themes:

1 This paper was presented at the Conference: “20 Year Anniversary of the Tampere Programme: Progress and Future Priorities of the EU Area of Freedom, Security and Justice,” Part of Finland’s Presidency Calendar and Co-organised by CEPS, the Migration Policy Centre (MPC) and the LAW Department of the European University Institute (EUI), in cooperation with the Finish Permanent Representation to the EU, CEPS, Brussels, 3 and 4 October 2019. The paper builds on previous publications by the author some of which are referred to below.

Firstly, the securitisation of threats to the financial sector, transnational organised crime and terrorism financing, and evolving public and private collaboration. Secondly, challenges concerning the increasingly blurred divide between administrative and criminal law provisions and sanctions, not least when it comes to differences in the protection of fundamental rights. Thirdly, the changing balance between mutual recognition and fundamental rights. Lastly, specific challenges connected to the theme of digitalisation, agency-to-agency cooperation and the free movement of information.

All these specific themes with connected priorities and challenges are to some extent overlapping but can in many instances be discussed using past experiences from the field of EU Law and EU AML Regulation as illustrating examples. As a result, more consistency can be achieved also in other areas of EU Criminal Law and Justice.

2. Securitisation of Threats to the Financial Sector, Transnational Organised Crime and Terrorism Financing, and the Evolving Public and Private Collaboration

Money laundering has been formulated as a chameleon threat that must be fought, since ‘it is perceived to facilitate drug trafficking (in the 1980s), organised crime (in the 1990s) and, post September 11, terrorism.’² Placed in the context of the securitisation of transnational criminality,³ it has been argued that the EU Anti-Money Laundering (AML) framework constitutes a new paradigm of security governance.⁴

2 Mitsilegas, V., *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles*, Kluwer Law International, 2003, p. 186, with further reference to Mitsilegas, V. (2003), *Countering the Chameleon Threat of Dirty Money: “Hard” and “Soft” Law in the Emergence of a Global Regime against Money Laundering and Terrorist Finance*, in Edwards, A., and P. Gill (eds.), *Transnational Organised Crime: Perspectives on Global Security*, Routledge.

3 See e.g. Giraldo, J., and H. Trinkunas (2010), *Transnational Crime*, in Collins, A. (ed.), *Contemporary Security Studies*, 2nd ed., OUP.

4 Mitsilegas, V. (2003), *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles*, Kluwer International Law.

In brief, when an issue is being securitised, it is made critically important thereby requiring emergency actions beyond the state's normal course of action. Within the understanding of the notion of securitisation,⁵ a specific speech act by a securitising actor elevates the issue to a matter of importance and security. In this respect, money laundering became an illustration of securitisation when it was portrayed as a security threat by the administration of George W. Bush, thus requiring (and legitimating) a security-oriented response. Since then, the fight against non-military threats such as drug trafficking, organised crime and terrorism has become a top political priority globally, and not least within the European Union.

It has been argued that the securitisation of transnational organised crime and terrorism financing has been used to increase, or has at least led to an increase in EU competencies.⁶ This is most evident in the area of EU criminal law and police cooperation, where the handling of organised, serious crime and terrorism has been used to securitise single issues such as money laundering, as well as entire policy areas. Most notably, the terrorist attacks of 11 September 2001 accelerated the decision-making process in the European Union. Besides the adoption of the framework decision on the European Arrest Warrant (EAW),⁷ intensified AML regulations are the result of the securitisation of transnational criminality, and more recently, securitisation of terrorism as such. Both these threats demand action at the global, as well as the EU and regional levels. AML and financial freezing measures thereby

5 In the international relations literature, securitisation refers to the classification of certain phenomena, persons or entities as existential threats requiring emergency measures. This process of securitisation was introduced by scholars working at the Conflict and Peace Research Institute (COPRI) in Copenhagen. These scholars, later known as the Copenhagen School, placed primary importance on determining how an issue becomes a security issue. The process of securitisation is explained by in Emmers, R. (2010), *Securitization*, in Collins, A. (ed.), *Contemporary Security Studies*, 2nd ed., OUP. This chapter also notes limitations with the concept.

6 Bergström, M. (2013), *The Place of Sanctions in the EU System for Combating the Financing of Terrorism*, in Cameron, Iain, (red.) *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Intersentia, p. 110.

7 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002, L 190/1.

exemplify the shift towards securitisation of threats to the financial sector in general and transnational organised crime and terrorism financing in particular.

In the legal understanding of the term, national security is often invoked to justify the exercise of state power against individuals, but at the same time national security has implications for the division of powers between the different branches of government. Securitisation is thereby often seen as an attempt to shift policy making to a less accountable forum,⁸ something which has effects also on human rights.⁹

In the European Union, the securitisation process of money laundering has successively increased EU regulatory competence, which has resulted in a rigorous regulatory regime, putting strong demands on both public and private actors. Clearly, this shift with the reframing of money laundering as an existential threat linked to organised crime and terrorism has consequences for the division of power between the different branches of government on different levels, but also between public and private actors in this field that complicate the accountability dilemma even further. Hence, the shift towards securitisation of money laundering implies a shift of policy making to a less accountable forum, thereby not only including state actors on the national level. As a result, we need to talk about a new and mixed model of accountability, where a legal model of accountability is arguably emerging for for-profit actors entrusted with public tasks.¹⁰ Besides, the shift towards security governance challenges fundamental legal principles, such as principles of criminal law and human rights.¹¹

8 Cameron, I. (2011), *The Security Concept in the TEU and TFEU*, unpublished manuscript, Conference on EU Common Foreign and Security Policy, Faculty of Law, University of Uppsala.

9 Vestergaard, J. (2011), *Terror Financing – Asset Freezing, Human Rights and the European Legal Order*, *New Journal of European Criminal Law*, Vol. 2: 175–200.

10 Bergström, M. (2011), *EU Anti-Money Laundering Regulation: Multilevel Cooperation of Public and Private Actors*, in Eckes, C., and Konstadinides, T. (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, CUP.

11 See for a comprehensive analysis of AML in this respect, Mitsilegas, V. (2003a), *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles*, Kluwer Law International: The Hague.

Similar to the process of securitisation framed in the international relations literature, the concept of risk, and risk management, signals that an issue is put high on the business as well as the political agenda. To call something a risk is to call for action, risk assessment and risk management.¹² The risk-based approach introduced by the revised FATF Recommendations¹³ and the now repealed third AML Directive,¹⁴ has been further developed towards a more targeted and focused risk-based approach using evidence-based decision-making, as well as guidance by European supervisory authorities. Most importantly, however, the AML Directives applies to a large number of private players whose participation is no longer voluntary.

As a result, the shift towards securitisation and the risk-based approach within the multi-level system of the European Union, have implications for the division of powers, balancing of interests and fundamental rights protection. To complicate regulatory action even further, within the fields of AML Regulation and EU Criminal Law, there are several challenges concerning the increasingly blurred divide between administrative and criminal law provisions and sanctions, not least when it comes to differences in fundamental rights protection.

3. Blurred Divide Between Administrative and Criminal Law Provisions and Sanctions

When it comes to the so called ‘Euro-crimes’ based on Article 83(1) Treaty on the Functioning of the EU (TFEU), minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension can be adopted. Amongst the most recently adopted, Directive

12 Bergström, M., Svedberg Helgesson, K. and U Mörtz (2011), A New Role for For-profit Actors? The Case of Anti-Money Laundering and Risk Management, *Journal of Common Market Studies*, Vol. 49: 1043–1064.

13 The recommendations of the Financial Action Task Force (FATF) are updated regularly, most recently in June 2019. <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html#UPDATES>

14 Directive 2005/60/EC, OJ 2005, L309/15.

(EU) 2018/1673 on combating money laundering by criminal law needs to be implemented by the member states by 3 December 2020.¹⁵ This directive includes the definitions, scope and sanctions of money laundering offences, and affect cross-border police and judicial cooperation between national authorities as well as the exchange of information.

Far from being the first EU legislative measure on AML, the first criminal law initiative has many predecessors, although mainly regulating the administrative law dimensions of AML. The rationale for introducing the first AML Directive in 1991, was that the emergence of the European Single Market and the elimination of national borders demanded compensatory measures to delimit financial cross-border crimes. Hence, the purpose of the first Directive was to prevent the freedom of capital movement and freedom to provide financial services to be used for money laundering purposes. This first Directive outlined a long list of actions to be considered an offence when committed intentionally, and that objective has since been expanded to also prevent organised crime and terrorist financing.

The Fourth AML Directive adopted in 2015 is, like its predecessors, based mainly on Article 114 TFEU on the internal market. Its predominant purpose is rather to improve the conditions for the establishment and functioning of the internal market, than to define criminal law offences and sanctions. Yet, its main aim is still the prevention of the use of the financial system for the purposes of money laundering and terrorist financing.

In the same year, the European Agenda on Security¹⁶ was published that called for additional measures in the area of terrorist financing and money laundering. Soon thereafter, the 2016 Action Plan to strengthen the fight against terrorist financing¹⁷ highlighted the need to counter money laundering by means of

15 Directive (EU) 2018/1673 on combating money laundering by criminal law, OJ 2018, L 284/22.

16 COM (2015)185 final.

17 COM (2015)185 final.

criminal law and the need to ensure that criminals who fund terrorism are deprived of their assets. Subsequently, on 30 May 2018 the Fifth AML Directive was adopted that needs to be transposed by the member states by 10 January 2020.¹⁸

The Criminal Law Directive implements international obligations in this area including the Warsaw Convention, and Recommendation 3 (R3) of the FATF. Recommendation 1 (R1) in turn calls on countries to criminalise money laundering on the basis of the Vienna Convention of 1988, and the Palermo Convention of 2000. The regulatory field of AML thereby applies to a large number of private players whose participation is no longer voluntary with implications also for the field of criminal law and fundamental rights protection.

Despite all assumptions that the current EU AML framework, i.e. before the EU Criminal Law Directive needs to be implemented, is mainly administrative in character, there is a floating line between administrative and criminal law and sanctions, not least since national laws and EU law are intertwined. This may have detrimental effects concerning procedural safeguards and fundamental rights protection, for example if sanctions are in fact criminal rather than administrative in character, or if the different solutions chosen in different member states lead to variations in fundamental rights protection throughout the European Union.

So far, it is mainly the responsibility of the MS to ensure that the parallel systems of administrative and criminal law sanctions do not breach fundamental rights, the rules on privacy and data protection, and the principle of proportionality.¹⁹ EU Law measures, however, may in themselves infringe fundamental rights. Processing personal data collected for one purpose for another, completely unrelated purpose infringes the data protection principle of purpose limitation and threatens the implementation of

18 Directive (EU) 2018/843, OJ 2018, L 156/43, Article 4.

19 See further Bergström, M. (2018), The Many Uses of Anti-Money Laundering Regulation – Over time and into the future, in Herlin-Karnell, E. and E. De Busser, (eds.), Special Issue: EU Security Governance and Financial Crimes, *German Law Journal*, 19(5): 1149-1167.

the principle of proportionality. Hence, the increasingly blurred divide between administrative and criminal law provisions and sanctions entail a number of challenges, not least when it comes to differences in the protection of fundamental rights. Another context where human rights challenges have been recognised, concern various instruments meant to be based on mutual recognition and mutual thrust.

4. The Changing Balance Between Mutual Recognition and Fundamental Rights

The principle of mutual recognition which requires the enforcement of judicial decisions of one member state in another member state has so far always required the intervention of the competent authorities of the member state where the decision is executed, such as decisions relating to the investigation. Hence, when it comes to mutual recognition and Article 82(1) TFEU, important instruments such as the European Investigation Order, based on Article 82(1)a TFEU, the European Protection Order, based on Articles 82(1)a and d TFEU, and a recent proposal for EU Rules on European Production and Preservation Orders for electronic evidence in criminal matters have been adopted.²⁰ This double-text proposal made by the Commission tries to strike ‘an extremely delicate balance between effective and efficient criminal investigations (for police and judicial authorities), legal certainty (for technology companies) and fundamental rights protection (of suspects

20 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ 2014, L 130/1; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ 2011, L 338/2; Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018)225 final; and, Proposal for a Directive of the European Parliament and of the Council laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018)226 final. The proposed legal basis for the directive is Articles 53 and 62 of the TFEU, which provide for the adoption of measures to coordinate the provisions laid down by law, regulation or administrative action in Member States on establishing and providing services. European Commission, e-evidence, at https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/e-evidence_en.

and other users)²¹

The increasing importance of fundamental rights protection can be traced in the gradual developments of these instruments where the Court of Justice of the EU (CJEU) has also been taking part of the law making process in developing new procedures connected to possible grounds for refusal.

So far, much has been written about the specific challenges that balancing mutual recognition and fundamental rights entails, not least in the context of novel CJEU cases involving mutual recognition and fundamental rights protection in relation to the European Arrest Warrant, such as *Aranyosi* and *Căldăraru*, and more recently *Celmer*.²² For the purposes of this Chapter, it is enough to emphasise the increasing importance of fundamental rights protection both accentuated by the EU legislator when adopting new mutual recognition instruments and by the CJEU interpreting old, many times resulting in more elaborated tasks of national agencies thereby developing the principle of mutual recognition to a more sophisticated legal instrument than was originally anticipated, resulting in a higher level of protection of fundamental rights. Yet, when the level of protection is harmonised by the EU legislator, such as concerning the EAW, the main rule is still the prevalence of EU law over national law irrespective of applying national law would result in a higher level of protection.²³

21 Franssen, V. (2018), The European Commission's E-evidence Proposal: Toward an EU-wide Obligation for Service Providers to Cooperate with Law Enforcement? *European Law Blog*, 12 October 2018, available at: <https://europeanlawblog.eu/2018/10/12/the-european-commissions-e-evidence-proposal-toward-an-eu-wide-obligation-for-service-providers-to-cooperate-with-law-enforcement/>

22 Joined Cases C-404/15 and C-659/15 PPU *Aranyosi* and *Căldăraru*; Case C-216/18 PPU, *Celmer*.

23 Case C399/11 Melloni. See also Lenaerts, K. (2019), Making the EU Charter of Fundamental Rights a Reality for All: 10th Anniversary of the Charter Becoming Legally Binding, Keynote Speech, 12 November 2019, High Level event jointly held by the European Commission, the Finnish Presidency of the Council of the EU and the EU Agency for Fundamental Rights, Concert Noble, Rue d'Arlon 84, Brussels, 12 November 2019, available at https://ec.europa.eu/info/sites/info/files/charter_lenaerts12.11.19.pdf

5. Digitalisation, Agency-to-Agency Cooperation and the Free Movement of Information

Lastly, there are specific problems connected to the theme of digitalisation, agency-to-agency cooperation and the free movement of information that needs further investigation and research. Besides the above-mentioned challenges concerning rules of privacy and data protection, there are a number of specific challenges connected to the increasing reliance of electronic reports, e-evidence, and other themes of digitalisation. Not least can it be difficult to identify who is responsible, where certain information including evidence is located, and which rules should apply at various stages of the different processes foreseen for handling such issues. This may have wider complications for agency-to-agency cooperation, the free movement of information and fundamental rights protection in a wider sense.²⁴

The cooperation between police and judicial authorities and companies providing information and communications services is, however, not new. Besides the involvement of private actors within the financial sector including AML, police and judicial authorities have been collaborating for decades with telecommunications operators and providers. However, there is an increased use of online services and new information and communication technologies (ICTs) typically processed by private companies such as technology companies or service providers. Such data is often processed, transmitted and/or stored by foreign companies or service providers.²⁵ This entails specific challenges for police and judicial authorities collecting electronic evidence in fighting crime committed by means of, or involving the use of such ICTs, since the information that criminals share or store by means of new ICTs thus processed by private companies, is not available

24 See further the European Commission DG Justice funded project: JUD-IT – Judicial Cooperation in Criminal Matters and Electronic IT Data in the EU: Ensuring Efficient Cross-Border Co-operation and Mutual Trust, Centre for European Policy Studies, CEPS.

25 Franssen 2018. Cf the involvement of private parties in the regulatory field of AML Regulation.

to public authorities without the cooperation of those private actors.²⁶ Although involving new types of ICTs, the wide experience in public private cooperation from the field of AML Regulation, can arguably be of great use here where obligations on private actors are moving beyond the sphere of financial regulation and telecommunications law.

6. The Dynamic Evolution of EU Criminal Law and Justice

This Chapter has argued that EU legislative action entails both challenges and priorities, in particular in relation to the following four themes: Firstly, the securitisation of threats to the financial sector, transnational organised crime and terrorism financing, and evolving public and private collaboration. Secondly, challenges concerning the increasingly blurred divide between administrative and criminal law provisions and sanctions, not least when it comes to differences in the protection of fundamental rights. Thirdly, the changing balance between mutual recognition and fundamental rights, and lastly, specific problems connected to the theme of digitalisation, agency-to-agency cooperation and the free movement of information.

All these specific themes are to some extent overlapping but have been discussed using past experiences. Some examples from the field of AML typical for the evolution of EU law in general, have been provided. These examples of the rapid evolution of EU criminal law and justice have implications for the allocation of powers, and might therefore have wider European constitutional law implications posing both opportunities and challenges. They might help us understand the development of EU criminal law and justice, hopefully resulting in more consistency within and between the areas of EU Criminal Law and Justice.

26 See in particular Franssen, 2018.

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PART V
POLICE
COOPERATION

20. INTERNAL SECURITY IN THE EU AND POLICE COOPERATION: OPERATIONAL POLICE COOPERATION

Saskia Hufnagel

1. Introduction

Operational police cooperation in the EU has developed significantly since the Tampere Council Conclusions in 1999. Most importantly, the year coincides with the becoming operational of Europol, which has since then developed into an EU agency (Europol Regulation 2016/794). Furthermore, Joint Investigation Teams (JITs) were established under Article 13 of the 2000 Mutual Legal Assistance Convention and today operate under the 2002 Framework Decision on Joint Investigation Teams. The two strategies shall be assessed here in light of police cooperation mechanisms in their functions to facilitate international police interaction, not because they are as such EU police cooperation measures.

The assessment is conducted from an international perspective. The first question in this regard is whether there is any international comparison to the two instruments (Europol and JITs) in any other part of the world. The second question is how these instruments are perceived internationally by third countries and

practitioners and whether they could even be used as a model for police cooperation in other parts of the world.

The answer to the first question can be easily given. There is no other instrument in the world that resembles Europol. Its set-up is unique and neither modelled from any other international organisation, such as Interpol, or federal organisations, e.g. federal police agencies. It sits between the two as it can on the one hand do more than Interpol in that its information exchange can, for example, include more sensitive data, but less than a federal agency as it does not have enforcement powers and cannot direct national police forces. The major difference to Interpol is that Europol has a legal basis and could therefore be said to have from the outset more legitimacy than Interpol or other regional police cooperation initiatives. The latter is, however, not entirely true as there are other regional cooperation strategies, such as the Benelux and the Nordic Countries cooperation that are based on legal frameworks. Be this as it may, in the international comparison, Europol is unique and while this finding does not include any value judgement it could reflect on the specialisation of the agency to the EU situation which might make it uninteresting for the rest of the world to cooperate with.

Regarding JITs, they are less unique as an instrument. JITs are, for example, proposed as cooperation mechanism in some UN suppression conventions, such as Article 19 of the United Nations Convention on Transnational Organized Crime (UNTOC), the Council of Europe (CoE) MLA Convention, a European Union (EU) Framework Decision and numerous bilateral and multilateral treaties. It could hence be discussed whether they are a valid model for other regions or even globally.

2. Europol

When looking at Europol it was at the time of its inception unthinkable that it would become an EU agency, that it would participate in JITs and that it could one day request the initiation of investi-

gations by member states. Europol had a difficult start, as practitioners took a long time to accept the database (Hufnagel, 2013). Europol was initially established as a common data-exchange mechanism for the entire EU and as a Europol liaison officer network. Unlike the Schengen Convention, the Europol Convention did not only provide a legal framework for certain forms of police cooperation, but set up an EU agency that can participate in, support and coordinate JITs (now Article 4(1)(d) and 4(1)(c)(ii) Europol Regulation). Under Article 6 of the Europol Regulation it can suggest to national police forces the initiation of cross-border investigations. Although the mandate and powers of Europol have historically been subject to debates amongst member states, in particular in relation to possible enforcement powers (Mitsilegas, 2009: 165-166), the agency is by now an integral part of the EU architecture on police and law enforcement cooperation.

Objectives of Europol are the support and strengthening of 'action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest' (Article 3(1) Europol Regulation). To further this aim, Europol's focus is the facilitation of information exchange between the member states. Europol has furthermore developed 'products', such as the European Criminal Intelligence Model (ECIM) and the (Serious and) Organised Crime Threat Assessment ((S)OCTA) and it comprises expert groups focusing on specific types of crime, such as the European Cybercrime Centre (EC3), the European Migrant Smuggling Centre (EMSC) and the European Counter-Terrorism Centre (ECTC). These expert groups in particular are considered major improvements to the situation of information exchange at the time of its establishment.

Although it seems that the importance of Europol as an information channel is still negligible compared to Interpol (with 2,000,000 messages exchanged in 2008) (Interpol, 2009: 3-5, 11), since the introduction of the Secure Information Exchange Net-

work Application (SIENA) in 2009, Europol's exchange of operational messages has increased from 284,000 in 2008 to 732,070 in 2014 and 870,000 messages in 2017 (Europol, 2015: 42; 2018: 7). The number of messages has nearly tripled since 2008, showing a growing use of the Europol channel. These numbers support the conclusion that acceptance of Europol by practitioners is increasing and that the Europol mechanisms add value to EU policing practice.

Europol is open to third country participation and could therefore even be seen as a global cooperation mechanism. It cooperates with a number of international and EU organisations (Europol, n.d.). Third party cooperation with Europol was, until the introduction of the 2016 Europol Regulation, possible through operational and strategic agreements. Decision 2000/C 106/1 28 (replaced by Decision 2009/935) determined that the Director of Europol could enter into agreements with third countries and international organisations. Articles 23 and 25 of Regulation 2016/794 now prescribe that Europol may establish and maintain cooperative relations with third countries and international organisations, and conclude agreements with them which may concern the exchange of all information that may be relevant for the performance of Europol's task, including personal data. Article 71(2) sets out that this shall not affect the legal force of agreements concluded by Europol as established by Decision 2009/371 before 13 June 2016, or of agreements concluded by Europol as established by the Europol Convention before 1 January 2010. This means that the procedure for third party participation has changed with the Europol Regulation. While under the Europol Decision and Convention Europol was not an independent agency, but an EU institution, the EU could conclude agreements through it. Since Europol became an agency it cannot anymore, similar to police agencies, conclude agreements that bind the 28 member states. It can, however, similar to national police agencies, conclude so-called 'working arrangements' with third countries and international organisations. The new working arrangements are not divided up into 'operational' and 'strategic' but specify in their individual texts how far the working relationship will go (Europol, n.d.).

Operational agreements have been established with non-EU member states with which there were long established working relationships. They have been established with Albania, Australia, Bosnia and Herzegovina, Canada, Colombia, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, North Macedonia, Norway, Serbia, Switzerland, Ukraine, United States, Eurojust, Frontex and Interpol (Ibid). As can be seen from this list, countries and organisations party to Europol operational agreements are closely linked to Europol due to their competences (Eurojust, Frontex and Interpol) or there is a need to exchange information due to high cross-border activity (trade) and a related crime threat. Other than strategic agreements operational agreements include the sharing of personal data, which could either be a sign of trust or a specific need for closer cooperation. Strategic agreements do not include the exchange of personal data. They have so far been established with China, Russia, Turkey, UAE, OLAF, the European Central Bank, the European Commission, ECDC, EMCDDA, CEPOL, ENISA, EUIPO, UNODC and the WCO (Ibid). Countries and organizations included in strategic agreements have a working relationship with Europol. With all of them there is a need to exchange information due to high cross-border activity (trade, immigration) and a connected crime threat, but the cooperation is not so frequent that the exchange of personal data is perceived as needed or the criminal justice system in the country is not considered compatible for the exchange of personal data for other reasons. It is in this context interesting to note that the two 'new' working arrangements with Israel and Japan potentially include the exchange of personal data (Ibid).

It can be concluded that Europol today is a global police cooperation strategy. While it is not open to all states in the same way, there are possibilities to exchange information with possibly all countries with which the EU has a vested immigration or trade relationship leading to heightened cross-border movements of persons and goods and potentially increased possibilities for transnational crime. It might hence not be an international police cooperation mechanism, but certainly a resource for international

policing that could be more widely used. Furthermore, despite being widely criticised for its lack of accountability, Europol does operate under a legal framework and is subject to the jurisdiction of the EU Court of Justice. Needless to say, cooperation through Europol is subject to the European human rights frameworks and in particular its data protection regime. Cooperation through Europol could hence be considered 'safer' than Interpol, warranting the different levels of sensitivity of information that can (or should) be exchanged through them.

3. JITs

According to Article 13 of the 2000 Convention and Article 1 of the 2002 Framework Decision on JITs, a JIT is an 'operational investigative team consisting of representatives of law enforcement and other authorities from different member states and possibly from other organisations like Europol and Eurojust'. The purpose of a JIT is jointly to investigate a criminal case; the teams are bi- or multi-national, likely operating from one location, possibly multi-disciplinary and are set up for a single investigation within an agreed timeframe. It also needs to be noted here that, similar to Europol, the strategy was initially not extensively applied in the EU. Between 2004 and 2009 approximately only 40 JITs have been operational (Block, 2011: 158). However, the numbers have skyrocketed since then. Already in 2010 Eurojust member desks participated in 20 JITs and Eurojust funded 10 JITs (Eurojust, 2011: 49-50). Numbers furthermore increased to 102 JITs supported by Eurojust in 2013 (Eurojust, 2014: 10), 120 in 2015 (Eurojust, 2016: 12) to the dizzying number of 235 in 2018 (Eurojust, 2019: 16). It is clear that the measure is by now accepted as a useful tool for international police cooperation by practitioners and that the inclusion of Eurojust has led to a professionalisation of the measure. It also needs to be noted here that the numbers above only refer to JITs supported by Eurojust. The current numbers for all JITs conducted under the 2002 Framework Decision would be even higher.

An important aspect of the introduction of JITs was their advantage compared to 'traditional' cross-border investigations, the so-called 'parallel investigations'. Parallel investigations focus on cooperation through exchange of international letters of request (ILOR) in cross-border investigations, commonly based on the 1959 Council of Europe Convention, but specified in bilateral and multilateral agreements (Articles 39 and 40 of the Schengen Convention). When a parallel investigation is set up between two or more member states, investigation teams can work on the same case within their respective jurisdiction simultaneously. Information exchange and the coordination of the investigation are conducted through ILOR exchanges between the participating countries (Block, 2011: 152). In the best-case scenario, ILORs establish a legal basis for the direct and immediate exchange of intelligence and determine the preliminary measures necessary in the course of the investigation that can be taken. If particular investigative measures become necessary in one jurisdiction, such as communication interception, searches, interrogations or confiscation, additional ILORs can be issued (Ibid).

What needs to be considered here is that cooperation in the form of JITs is not only possible under the 2002 Framework Decision, but in the context of the Brexit debate it has been confirmed that JITs between the UK and EU member states would also be possible under Article 20 of the Second Additional Protocol to the 1959 MLA Convention (Carrera et al, 2018: ix). While the required legal basis for cooperation in the form of JITs is generally debated, the investigation into the downing of flight MH17 by a JIT formed of law enforcement agencies from the Netherlands, Belgium, Malaysia, Australia and Ukraine as well as Eurojust shows the numerous possibilities for non-EU member states to participate in the 2002 Framework Decision instrument.

Flight MH17, on its way from the Netherlands to Malaysia, was shot down over eastern Ukraine on July 17th, 2014 and all 283 people on board, including 193 Dutch nationals, 43 Malaysians, 27 Australians, 12 Indonesians, 10 Britons, four Belgians, four

Germans, three Philippine nationals, one New Zealander and one Canadian, were killed (BBC, 2019). The interests of the parties investigating this case are clear. The Netherlands (who also coordinated the team), Belgium, Malaysia and Australia had nationals on the plane, the airline was Malaysian and the flight was shot down over Ukraine. However, the ways in which the countries could join the team legally were uniquely different, with the exception of the EU member states (which are party to the 2002 Framework Decision).

Including Ukraine as a team member was rather straightforward as it is a party to the Second Additional Protocol to the 1959 CoE MLA Convention, which has the same wording as the Framework Decision. Australia could become a party to the JIT as it is a party to the UN Convention on Transnational Organized Crime. Article 19 of the Convention details that ‘the competent authorities concerned may establish joint investigative bodies’ and that ‘[i]n the absence of [...] agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis.’ Australia consequently had to conclude an agreement with the other members to join the investigation team. However, as the requirements under UNTOC are different to both the 2002 Framework Decision and the 1959 CoE Convention, Australia could not conclude an Agreement, but only a non-binding ‘arrangement’. This manifested itself in the resulting treaty in the form that the term ‘Agreement’ contains a footnote stating that ‘[i]n what concerns Australia, the term agreement is to be construed as meaning “Arrangement” throughout the whole text’. Australia could therefore not become a ‘member’ of the team, but only a ‘participant’. The difference being that ‘members’ are automatically privy to all information included in the JIT, whereas ‘participants’ can only get access to files if there is agreement. The term ‘party’ therefore contains the footnote ‘in what concerns Australia, the term “Party to the Agreement” is to be construed as meaning “partner to the Arrangement” throughout the whole text’. Malaysian participation was more difficult as, before it could join the team, assurances had to be sought as to the non-application of the death penalty. The assurances were given and Malaysia could belatedly join the team.

Eurojust was also involved to supply legal support and provide funding for the JIT.

In the MH17 case a JIT was established mainly under the 2002 Framework Decision (EU) on JITs as three of the participating members were EU member states. However, even non-EU countries, when no EU member state is at all involved, have the possibility to establish JITs. As outlined above under the UN Conventions section of the chapter, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances sets out the possibility to establish JITs.

Furthermore, the United Nations 2000 Convention against Transnational Organized Crime (UNTOC) and the United Nations 2003 Convention against Corruption (UNCAC) provide the possibility to form JITs and also make it possible for parties to join the 2002 Framework Decision and the Second Additional Protocol to the 1959 CoE MLA Convention agreements on JITs. The latter two UN conventions were ratified by all 28 EU Member States and by a large number of States both inside and outside of Europe. In 2003 the European Union signed agreements on mutual legal assistance with the United States of America, Norway and Iceland. When Article 13 of the 2000 EU MLA Convention was transposed in Article 20 of the 2001 Council of Europe Second Additional Protocol to the European Mutual Assistance Convention it was ratified by 31 States, 20 of which are EU Member States. So far, the Second Protocol has also been ratified by two States that are not members of the Council of Europe; Chile and Israel (Rijken and Vermeulen, 2006: 10-11). Furthermore, Article 27 of the 2006 Police Cooperation Convention for South East Europe (PCC-SEE) is similar in wording to the 2002 Framework Decision (Article 1). The PCC-SEE Convention finds application in several Member States, like Austria, Bulgaria, Hungary, Romania and Slovenia, and in Balkan countries like Albania, Bosnia and Herzegovina, FYROM, Moldova, Montenegro and Serbia (Rebecchi, 2016: 105).¹

1 Maria Cecilia Rebecchi, 'Joint Investigation Teams: A Reachable Solution to Catch Unreachable Criminals' (2016) 7 *Queen Mary Law Review* 105.

While numerous instruments exist, the harmonisation of JITs is currently discussed at UN level (and has been for more than a decade) according to the 2002 Framework Decision model. The other JIT framework debated is bilateral US-Canada engagement, but as it lacks formality and does not apply between distinctly different jurisdictions, preference so far is given to the European model. It clearly follows that the EU has not only evolved significantly since Tampere with a view to JITs, but that they could be termed best (legal and actual) practice internationally.

4. Conclusion

This Chapter has provided a brief overview on two rather complex strategies of police cooperation. It is clear that the development since Tampere has been significant. This is important to stress in light of Brexit and other separatist movements in the EU. With a view to police cooperation, numerous EU strategies are global best practice, which is particularly remarkable considering the diversity of jurisdictions involved. Many regions around the world look to the EU today to establish or improve their police cooperation.

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21. FROM TAMPERE OVER STOCKHOLM TO LUXEMBOURG AND BRUSSELS: WHERE ARE WE NOW? THE EVOLUTION OF AFSJ DATABASES – MEANDERING BETWEEN SECURITY AND DATA PROTECTION

Teresa Quintel

1. Introduction: General Concerns Related to the Interoperability of EU Databases

At times, the different objectives that the European Union's (EU) Area of Freedom, Security and Justice (AFSJ)¹ should achieve are difficult to reconcile. The removal of the EU internal borders certainly brought more freedom and propelled the cooperation between Member States in both security and justice affairs. Nevertheless, the views on how to achieve security while offering the highest standards of justice diverge. Consequently, the means of cooperation between competent authorities in the EU Member States differ as well, both in the area of border control, migration and asylum, but also in the field of police and judicial cooperation.

1 The objectives for the AFSJ are laid down in Article 67 TFEU.

To compensate for the abolition of internal border controls in the Schengen Area, large-scale databases were set up at EU level to facilitate the information exchange between law enforcement authorities on the one hand and to improve the administration of visas, facilitate border checks and to better manage asylum applications on the other. Over time, the founding acts of those databases, initially established for specific purposes and with strict access requirements, were revised in order to serve more purposes, retain additional categories of data and provide broader access to more authorities.

A number of immigration databases allow law enforcement authorities access for the purposes of the prevention, detection, and investigation of crime. This type of access is often met with critical acclaim, as such access risks to associate two undoubtedly different objectives - managing migration and combating crime (Vavoula, 2020). Particularly during recent years, migration has become a fiercely debated element in the internal security discourse within the EU. In many EU Member States, the security-versus-privacy debate reached new dimensions during the aftermath of the arrival of great numbers of individuals seeking asylum in the EU in 2015.

In order to close the remaining information gap between EU databases, the EU Commission proposed, in December 2017², the Interoperability of EU large-scale IT-systems, which was adopted in April 2019.³ The Interoperability framework is supposed to connect six EU databases, half of which are currently operational,

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- 2 Proposal for a Regulation on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration) and Proposal for a Regulation on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226, COM(2017)793 and 794.
 - 3 Regulation (EU) 2019/817 of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 and Council Decisions 2004/512/EC and 2008/633/JHA [2019] OJ L 135/27 and Regulation (EU) 2019/818 of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 [2019] OJ L 135/85 (hereafter 'Interoperability Regulations').

the other half foreseen to be established by 2023 (Luyten and Voronova, 2019).⁴

Three general concerns may arise with the Interoperability regime: Firstly, the complexity of the anticipated system makes it increasingly difficult for individuals to grasp the processing operations, which may prevent them from exercising their data subject rights: understanding the interoperable system requires understanding the underlying databases as well as the different actors that are responsible for replying to access and rectification requests.

Secondly, beyond their primary purposes of border control, asylum, migration and the management of short-term visas, all underlying databases, including the Interoperability components, are supposed to contribute to the fight against serious crime, the detection of identity fraud and the identification of (unknown) suspects.⁵ In that vein, the Interoperability Regulations shall streamline law enforcement access to non-law enforcement databases that hold information concerning third country nationals (TCNs). This means that not only the initial purpose of the underlying databases was changed from an immigration-related to a law enforcement purpose. That change of purpose also has an impact on the data protection regime that applies to the processing of personal data retrieved from the systems.

Thirdly, besides broadened access rights for national competent authorities, EU Agencies that play an increasingly prominent role in the area of border control and migration management were attributed more access possibilities to the databases. Hence, the number of authorities accessing and further processing the personal data from the different systems multiplied, which might not only affect the willingness of different authorities to share information via the databases, but also impinge on the trust among those authorities.

4 As stated in the proposals, the Commission aims to achieve interoperability by the end of 2023.

5 See Article 2 of the Interoperability Regulations.

Furthermore, the new processing operations and the additional actors that will process the data in the complex systems will render supervision more difficult and require close cooperation between supervisory authorities. The work of national data protection authorities (DPAs) and the European Data Protection Supervisor (EDPS) will be decisive not only for scrutinizing and, where necessary, sanctioning data controllers, but also to ensure that individuals will be able to enjoy their right to effective administrative and judicial review.

2. From Immigration to Law Enforcement Databases and Interoperability

The operational databases - Eurodac⁶, the Schengen Information System (SIS)⁷ and the Visa Information System (VIS)⁸, were established at different times, for different purposes and to be used by different actors. Whereas the Eurodac shall facilitate the determination of the first country of entry of asylum seekers, the VIS is supposed to support the issuance of short-term visas and

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- 6 Regulation (EU) No 603/2013 of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L 180/1.
 - 7 Regulation (EU) 2018/1860 of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals [2018] OJ L 312/1; Regulation (EU) 2018/1861 of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006 [2018] OJ L 312/14 and Regulation (EU) 2018/1862 of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 and Commission Decision 2010/261/EU [2018] OJ L 312/56.
 - 8 Regulation (EC) No 767/2008 of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) [2008] OJ L 218/60.

the SIS is a law enforcement database, which enables competent authorities to communicate and exchange information via secure channels. However, during the past years, all three databases have been revised, with the latest changes to the Eurodac⁹ and the VIS¹⁰ currently pending, and three new SIS Regulations having been adopted in November 2018. All revisions are based on additional legal bases, adding new purposes to the existing ones. Beyond those new purposes, further categories of data shall be added, and the systems shall be rendered interoperable, together with three new databases for which legislation has recently been adopted.¹¹ In total, five (primarily) immigration systems and the SIS shall form the underlying databases that will build the Interoperability framework.

In a nutshell, Interoperability will connect the underlying systems by creating three new centralized databases¹² and a search tool that will enable simultaneous queries in all databases. This will create new layers of complexity and thus, make it more difficult for individuals to understand who is processing their personal data and whom to contact to exercise their rights. Interoperability will also create new access possibilities for competent authorities and will obscure the steps in which data that were connected led to a final result.

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- 9 Proposal for a Regulation on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) [2016] COM(2016) 272 final.
- 10 Proposal for a Regulation amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JHA [2018] COM(2018) 302 final.
- 11 The Entry-Exit System (EES), The European Travel Information and Authorization System (ETIAS) and the European Criminal Records Information System (ECRIS-TCN).
- 12 A Common Identity Repository (CIR), a Biometric Matching Service (BMS) and a Multiple Identity Detector (MID) will store biometric and biographical data centrally. A European Search Portal (ESP) will enable competent authorities to search all systems simultaneously and to be granted access in accordance with the access rights under each individual system.

What is remarkable is that, while the original setup of the operational databases did not grant access to law enforcement authorities, such access was added during the early revisions of their founding acts. Later on, law enforcement access became a default function for the recently adopted systems and the Interoperability components. Hence, the databases were transformed from serving exclusively immigration-related purposes to systems that may all be accessed by competent law enforcement authorities for the prevention, detection and investigation of serious crime. Interoperability pushes such repurposing of personal data even further, by abolishing the cascading system of prior checks in national databases.

The consequences of such transformation are manifold and will not only lead to unnecessary processing operations but might encourage false suspicions against persons whose data are stored in the databases, to the detriment of data subject rights and an increased workload for competent authorities.

On the one hand, the abolition of mandatory checks in national databases prior to accessing the EU systems seems illogical with respect to criminal investigations: the question here would be why a national law enforcement authority should check an EU database such as Eurodac *before* checking a national police database for fingerprints of a potential suspect or perpetrator? It seems likely that this *reverse* procedure would simply lead to additional processing operations, where competent authorities would have to search national databases after an unsuccessful query in the EU systems.

What is more, a hit during a search in the EU databases could lead to an inference that could have been clarified with a prior check in the national systems. Such inference may lead to an unnecessary suspicion against a person and could motivate a police officer to process personal data of that person within a data protection regime that would make it easier to limit the person's rights.

On the other hand, the checking of immigration databases for purposes of criminal investigations might be futile and lead to

additional work for competent authorities. Comparing the access requests by law enforcement authorities to the SIS and Eurodac, the different ratio is striking. While the SIS was accessed a total of 6.185.199.597 times by the sum of all Member States in 2018,¹³ searches in Eurodac carried out by law enforcement authorities amounted to 296 by 10 Member States.¹⁴ Certainly, it should be taken into account that while Eurodac's main purpose is related to asylum, the SIS is a law enforcement database that, obviously, is mainly searched by competent authorities. However, the above numbers demonstrate that law enforcement authorities do not make use of the access possibilities granted to them regarding Eurodac. Consequently, necessity and proportionality of such access rights are not attained.

Beyond standardizing law enforcement access to the underlying databases and streamlining it for the new interoperable system, the Interoperability Regulations shall authorize national police authorities to access one of the interoperability components, the Common Identity Repository (CIR), for the purpose of identifying a person.

Under Article 20 of the Interoperability Regulations, national police authorities may search the CIR during identity checks with biometric data of TCNs. For each person whose data are stored in the CIR, the system shall create an individual file that separates the data according to the information system from which they originated.¹⁵ Moreover, the individual files shall include a reference to the actual record in the underlying databases to which the data belong¹⁶ and retain links that were generated during a so-called

13 SIS II – 2018 annual statistics, 5; <https://www.eulisa.europa.eu/Publications/Reports/SIS%202018%20statistics.pdf> (accessed on 30 October 2019).

14 Europol performed 10 category 5 searches, see: Eurodac – 2018 annual report, 14; <https://www.eulisa.europa.eu/Publications/Reports/2018%20Eurodac%20Annual%20Report.pdf>. (accessed on 30 October 2019).

15 Article 18(1) of the Interoperability Regulations.

16 Article 18(4) of the Interoperability Regulations. Moreover, links from the multiple identity detection, to be carried out in another interoperability component, will be included in each individual file in the CIR.

multiple identity detection.¹⁷ Theoretically, a police officer could stop a person on the street to carry out a random identity check, querying the component with biometric data of that person. While the data stored in the CIR are essentially the same as on a conventional passport and hence, do not reveal more information than a travel or ID document, the reference to the underlying databases and the links on multiple identities could prompt the querying officer to draw certain conclusions about a person.

In addition, a police officer (and Europol staff) may, under Article 22 of the Interoperability Regulations, access the CIR for the prevention, detection and investigation of serious criminal offences, where there are reasonable grounds to believe that consultation of the databases would sustain a suspicion that personal data of a suspect or perpetrator are stored in the underlying systems.¹⁸

While random police checks in the Schengen Area are in line with the case law of both the Court of Justice of the European Union (CJEU) and the European Court on Human Rights (Quintel, 2018), Article 20 identity checks are by far more intrusive from a privacy point of view and may lead to unjustified suspicions against individuals.

3. Access to EU Databases by EU Agencies

Beyond the broadened access to the databases by national (law enforcement) authorities, access has also been widened for those EU Agencies that are involved in the management of migration at the external Schengen Borders, for instance during secondary security checks in the so-called hotspots.¹⁹

Europol, an EU Agency originally responsible to support

17 Article 19(2) of the Interoperability Regulations. One of the interoperability components, the Multiple Identity Detector, will store links that indicate whether a person used fraudulent identities to enter the Schengen Area.

18 Article 22(1) of the interoperability Regulations.

19 European Commission, Hotspot Approach, https://ec.europa.eu/home-affairs/content/hotspot-approach_en. (accessed 19 October 2019).

national law enforcement authorities in the fight against organized crime and terrorism, became increasingly involved in migration related investigations such as migrant smuggling or document fraud. All EU databases feature provisions granting Europol access to retained data for the purposes of fighting serious crime and terrorism. Requirements for access by Europol staff are, inter alia, the existence of reasonable grounds to consider that the consultation of data in the systems may substantially contribute to the prevention, detection or investigation of criminal offences, or, if consultation is necessary to support and strengthen action by Member States within the mandate of Europol (Quintel, 2019). Similar conditions for Europol access apply regarding the Interoperability components.²⁰ In addition, Europol data will be searchable via the European Search Portal²¹ and will be entered into a watch-list that will be included in one of the underlying databases.²²

The European Border and Coast Guard Agency (EBCGA), initially established as supranational Agency tasked to assist the EU Member States with migration management and border control functions, developed into a powerful coordination hub between the Member States and other EU Agencies as well as third countries, progressively gaining operational competences in further areas related to migration. Under the new EBCGA Regulation²³, the Agency's activities will be significantly broadened by strengthening the EBCGA with a new mandate to protect the EU's external

20 Article 22 of the Interoperability Regulations.

21 Chapter II of the Interoperability Regulations.

22 The European Travel Information and Authorization System (ETIAS) will contain a watchlist to which Europol shall add information on the basis of information related to terrorist offences or other serious criminal offences, see Article 34 (2) and (3) of Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 [2017] OJ L 236/1.

23 Council of the European Union Press Release, 'European Border and Coast Guard: Council confirms agreement on stronger mandate' (April 2019), https://www.consilium.europa.eu/en/press/press-releases/2019/04/01/european-border-and-coast-guard-council-confirms-agreement-on-stronger-mandate/?utm_source=dsmsauto&utm_medium=email&utm_campaign=European+Border+and+Coast+Guard%3a+Council+adopts+revised+regulation. (accessed 10 November 2019).

borders, carry out returns more effectively, and to cooperate with third countries. In addition, the Regulation builds upon the increasing number of tasks and responsibilities of the EBCGA regarding irregular secondary movements and the Agency's role in (forced) returns of TCNs.²⁴

Both Agencies will play a central role with regard to the development and operation of EU databases and Interoperability. While Europol's databases will be connected to the interoperable system, the EBCGA will be responsible for the management of essential parts of the Interoperability regime.²⁵ Evidently, both Agencies will feed the databases with information gathered during their deployment and will be granted access to the systems for the performance of their tasks. While the growing synergy between the tasks of the two Agencies may be seen as progress towards a more harmonized and integrated EU border management approach, the overlapping purposes for which they may exchange personal data may lead to concerns, as different data protection regimes apply, not only to the two Agencies, but also on national level.

4. Data Protection Concerns

4.1 Data Protection Concerns related to Law Enforcement Access

As mentioned above, a police officer checking data for identification purposes in the CIR could discover links to a person in law enforcement databases and draw inferences that might lead to an unjustified suspicion against a person. While for data processing operations relating to immigration and asylum the General Data Protection Regulation (GDPR)²⁶ would be applicable, data pro-

24 Cf.: FRA Opinion 5/2018, *The revised European Border and Coast Guard Regulation and its fundamental rights implications Opinion of the European Union Agency for Fundamental Rights*, 17 (November 2018).

25 In relation to the processing of data in the Multiple Identity Detector, the European Border and Coast Guard Agency shall be a data controller within the meaning of point (8) of Article 3 of Regulation (EU) 2018/1725, see Article 40(3)(a) of the Interoperability Regulations.

26 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with

cessed for law enforcement purposes falls within the scope of Directive (EU)2016/680²⁷, which is applicable for processing carried out in the area of police and criminal justice (Sajfert and Quintel, 2019). Evidently, in that area, data subject rights may be restricted more flexibly and transparency requirements are considerably lower than under the GDPR, in order not to obstruct the work of law enforcement authorities. However, where migration is associated with security concerns, the unclear delineation between the Regulation and the Directive could easily lead to the application of the wrong instrument and a lowering of data protection rights for individuals where a police officer applies the rules under the Directive instead of the Regulation (Quintel, 2018). Hence, that officer, basing a search in the CIR on a suspicion that a person could be a perpetrator or suspect, would be able to apply the rules under the Directive and restrict data subject rights more flexibly than if he would apply the GDPR to his processing activities.

4.2. Different Data Protection Regimes Applicable to different Data Controllers

Interoperability will multiply the access points to the different systems in the Member States. While the intention to improve cooperation between the national authorities is certainly commendable, it is doubtful whether those authorities would be willing to share certain data in the systems if they cannot be sure who will have access. Consequently, instead of improving the work of competent authorities, Interoperability could lead to mistrust and negatively impact the information exchanges between those authorities.

The increased involvement of EU Agencies poses yet other data protection concerns, as discrepancies may arise in the con-

regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

27 Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/89.

text of interoperability where systematic data exchanges take place between actors that apply different data protection regimes. Against that background, concerns may arise where Europol staff is granted access to biometric data stored in EU databases and the interoperability components: Under the Europol Regulation, biometric data are not defined as special categories of data and may, therefore, be treated without the provision of additional safeguards.

In addition, the new EBCGA Regulation suggests strengthening the Agency with a new mandate and increased powers to protect the EU's external borders, to carry out returns more effectively, and to cooperate with third countries in the area of border protection. Moreover, the European Border Surveillance System (Eurosur), which will be integrated into the EBCGA under the new EBCGA Regulation, is mainly operated by national authorities that apply either the GDPR or the Directive (EU)2016/680 to their processing activities, while processing by the EBCGA falls within the scope of Regulation (EU)2018/1725.²⁸

With Interoperability, the number and levels of authorities required to input information into the underlying systems multiply and the possibilities for a straightforward identification of the initial source will be obscured. This will make it more difficult to determine the authorities responsible for inputting the data that led to an incorrect result. Not only would this negatively affect the individual who might be wrongfully accused, but also obstruct his or her possibilities to complain against a decision that was based on inaccurate data (Demkova and Quintel, 2020).

4.3. Supervision and Effective Review of Processing Operations

Data processing activities within the AFSJ are rather opaque, which makes it difficult for data subjects to ascertain who is processing their personal data. Therefore, compliance with data pro-

28 Regulation (EU) 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance) [2018] OJ L 295/39.

tection principles, clearly defined processing purposes and strict supervision are of utmost importance to ensure fundamental rights standards. However, with the blurred lines between migration and security and the dilution of responsibilities between different data controllers, it will be challenging for DPAs to obtain a concrete picture of processing activities and the risks involved for data subjects.

The new layers that Interoperability adds to the already complex system of AFSJ databases make it extremely difficult to scrutinize the way in which data are collected, accessed and shared, and the new means to connect and link data within the Interoperability regime raise concerns regarding the review of processing operations.²⁹

Supervisory authorities should be able to follow data flows across the different networks instead of looking at each specific controller separately. In order to achieve an effective supervision of the complex network of different processors, closer cooperation between national DPAs and the EDPS to better understand the steps behind certain decision-making processes and to handle complaints effectively is, therefore, essential, since any unfair processing can entail severe consequences for individuals.³⁰

While on national level, access logs are to be kept for review by the national DPAs³¹, on EU level, the processing of personal data by EU Agencies is supervised by the EDPS. In order to achieve full supervision, cooperation should be reinforced between the DPAs on different levels. Such coordinated supervision has been codified in the legal instruments of some of the underlying databases. Additionally, Article 62(1) of Regulation (EU)2018/1725 puts forward a harmonized model of coordinated supervision between the EDPS and the national DPAs to ensure an effective supervision of large-scale IT systems.³²

29 Cf.: Ibid.

30 Ibid.

31 See: Article 25 of Directive (EU)2016/680.

32 See: EDPS, 'Supervision Coordination'; https://edps.europa.eu/data-protection/supervision-coordination_en. (accessed on 20 October 2019).

5. Conclusion

While the proponents of Interoperability portrayed it as some type of panacea for the existing shortcomings of information sharing in the AFSJ, several caveats in the anticipated regime simply cannot be ignored. One of the most pressing questions should be whether the interoperable system is necessary and proportionate, and whether Interoperability will lead to an improved exchange of information. Where additional actors will be authorized to access the system, this might have an impact on the trust among authorities, which might be reluctant to share information.

Moreover, there is no tangible proof that the broadened law enforcement access, which has been included in the amendments of the underlying databases during the past years and became a default feature for the CIR, will actually improve the work of competent authorities. While recent terrorist attacks are often used as an arguments to extend law enforcement access to EU databases and to support Interoperability, the failure to prevent such attacks derived mainly from the lack of coordination on national level and the absence of data sharing between Member States.

With Interoperability, designated police officers may access the underlying immigration databases via the CIR without checking their national databases beforehand. Moreover, the CIR search shall include a reference to all EU information systems to which the data belong. Hence, during an identity check, a police officer could, by inference, make erroneous conclusions about a person, simply because his or her personal data are stored in one of the underlying databases. Consequently, Articles 20 and 22 of the Interoperability Regulations increase the risk of situations where TCNs as well as EU citizens could become subject to unfair or discriminatory processing.

Ultimately, it remains to be seen whether Interoperability, once established, will indeed improve the scale of information sharing while ensuring effective oversight and safeguarding individuals' rights.

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22. TARGETED SURVEILLANCE: CAN PRIVACY AND SURVEILLANCE BE RECONCILED?

Edoardo Celeste & Federico Fabbrini

1. Introduction

Striking the balance between the protection of fundamental rights and the need to protect national security has been a challenge for all liberal democracies in times of emergency. The same is true also for the European Union (EU). In fact, since the launch 20 years ago of the 1999 Tampere programme, implementing the 1997 Treaty of Amsterdam, the EU has developed a common policy in the area of Freedom, Security and Justice (AFSJ), which led to the adoption of important pieces of legislation also concerning the fight against crime and international terrorism. At the same time, however, since 2000, the EU has been endowed with an advanced and comprehensive Charter of Fundamental Rights, which was given full primary law status by the 2009 Treaty of Lisbon.

As a result, in the last decade, the European Court of Justice has been faced repeatedly with the question of how to reconcile security and justice, contributing to the constitutionalisation of

the AFSJ.¹ This is particularly true in the field of privacy and data protection, where the ECJ has taken a leading role in reviewing EU and national legislation empowering law enforcement agencies to undertake surveillance. In fact, in comparative perspective, the ECJ has become the most important jurisdiction world-wide in limiting security overreach in the field of mass surveillance to adequately protect human rights. Hence, it is not an overstatement to claim that in this field the ECJ has progressively become a “human rights court.”²

This Chapter summarizes the ECJ case law prohibiting mass data collection and retention and discusses its legacy for the future. The contribution is structured as follows. Section 2 contextualises the emergence of mass surveillance in Europe in the early 2000s and maps the relevant legislation adopted by the EU. Section 3 examines the ECJ’s decisions in *Digital Rights Ireland* and *Schrems*, explaining why the ECJ deemed EU surveillance measures to be incompatible with EU fundamental rights. Section 4 examines instead the ECJ’s decision in *Tele2 Sverige & Watson*, and explains how the case law of the ECJ reverberated on surveillance measures adopted at the national level. Finally, section 5 concludes by reflecting on the potential consequences of the ECJ jurisprudence on future cases.

2. The Emergence of Mass Surveillance in Europe

The first years of the twenty-first century were characterised by a radical revolution in terms of intelligence and law enforcement authorities’ practices. In the aftermath of the 9/11 terrorist attacks, the urgent need to contrast international terrorism led to a transition to a system of pre-emptive security and mass surveillance.³

1 See K. Lenaerts (2010), ‘The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice’ 59 *International and Comparative Law Quarterly* 255.

2 F. Fabbrini (2015), ‘The EU Charter of Fundamental Rights and the Rights to Data Privacy: The EU Court of Justice as a Human Rights Court’ in S. de Vries, U. Bernitz and S. Weatherill (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument* (Hart).

3 See V. Mitsilegas (2014), ‘Transatlantic Counterterrorism Cooperation and European

Significant advancements in the technological sector offered for the first time the possibility to collect and process huge amount of data for speculative purposes.⁴

In Europe, several member states enacted legislation requiring internet and telephone service providers to retain and further make accessible to national law enforcement authorities electronic communications' meta-data, i.e. information about the time, location, source and addressees of phone calls, texts or emails.⁵ These statutes were adopted as derogations to EU data protection law, which allowed member states to introduce exceptions to data protection rules in, *inter alia*, the domains of public security, defence and criminal investigations.⁶

In 2006, however, after the terrorist attacks in Madrid and London, the EU institutions saw a window of opportunity to advance legislation to harmonize member states' action in the field. As a result, the Data Retention Directive, Directive 2006/24/EC, was adopted to harmonise the patchwork of laws emerged in Europe. The Data Retention Directive did not require internet and service providers to retain the content of electronic communication, but allowed for the retention of all types of meta-data for a fixed period of time.⁷

In 2013, the entire world was shocked by the revelations of a former contractor of the US Central Intelligence Agency, Edward Snowden. In a series of interviews, Snowden disclosed the existence of various intelligence programmes pre-emptively collecting in bulk communications content and meta-data from major

Values' in D. Curtin and E. Fahey (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge University Press).

4 See Marieke de Goede, *Speculative Security* (Minnesota University Press 2012).

5 See F. Fabbrini (2015), 'Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States' *Harvard Human Rights Journal*, Vol. 28: 65-95.

6 Directive 2002/58/EC, Article 15; Directive 95/46/EC, Article 13.

7 See Fabbrini (2015).

US telecommunications operators and internet companies.⁸ In Europe, this news received unprecedented attention both at institutional and civil society level. Data of millions of Europeans using US internet services providers had been affected. UK intelligence agencies were discovered to have been involved too.⁹ In March 2014, a resolution of the European Parliament strongly condemned the systematic and indiscriminate collection of personal data carried out by the intelligence programmes of the US National Security Agency.¹⁰ However, less than a month later, in the case *Digital Rights Ireland*, the ECJ invalidated the EU Data Retention Directive for failing to limit the width of data collection involved.¹¹ The EU, too, started removing the beam out of its own eye.

3. EU Legislation and Fundamental Rights

The legal regime introduced by the Data Retention Directive had already been subject to judicial scrutiny at domestic level before *Digital Rights Ireland*. The constitutional courts of Romania, Czech Republic and Germany found the national statutes implementing the Directive in their respective countries to be incompatible with the respect of the right to privacy and data protection of individuals.¹² However, it was only in *Digital Rights Ireland* that the validity of the Directive itself was called into question.

In this case, the ECJ recognised that both the blanket collec-

8 D. Cole, F. Fabbrini and S.J. Schulhofer (eds.) (2017), *Surveillance, Privacy, and Transatlantic Relations*, Hart Publishing.

9 See S. Schulhofer (2017), 'A Transatlantic Privacy Pact? A Sceptical View', in D. Cole, F. Fabbrini and S.J. Schulhofer (eds.), *Surveillance, Privacy, and Transatlantic Relations*, Hart Publishing.

10 European Parliament, Resolution on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, 12 March 2014, P7_TA(2014)0230.

11 *Digital Rights Ireland* [2014] ECJ Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

12 Curtea Constitutională [Constitutional Court of Romania], decision No. 1258, 8 October 2009; Nález Ústavního soudu ze dne 22.5.2011 [Decision of the Constitutional Court of the Czech Republic of 22 March 2011], Pl.U S24/10; Bundesverfassungsgericht [German Constitutional Court, 2 March 2010, 125 BVerfGE 261.

tion of meta-data by internet and telephone service providers and the further access to those data operated by national law enforcement authorities represented a “broad ranging” and “particularly serious” interference with the rights to privacy and to data protection, enshrined in Article 7 and 8 of the EU Charter of Fundamental Rights,¹³ since a similar system of data retention would enhance people’s feeling to be constantly under surveillance.¹⁴ While the ECJ ruled that the Directive did not violate the essence of Articles 7 and 8, and that the regime put in place by the Directive met the first tier of the proportionality test, being suitable to pursue an objective of general interest, such as the fight against crime, the ECJ concluded that the Directive could not pass scrutiny under the necessity test.

In fact, according to the ECJ, the interference with the rights to privacy and data protection went beyond “what is strictly necessary”.¹⁵ The ECJ identified five main faults in the Directive, and in particular observed with concern that the Data Retention Directive “entail[ed] an interference with the fundamental rights of practically the entire European population”.¹⁶ The Directive did not require to retain exclusively meta-data of individuals who might have a link with a crime, but essentially affected “all persons using electronic communications services”.¹⁷ Moreover, the Directive did not set objective criteria to regulate the subsequent access and use of personal data by national authorities as well as did not foresee any prior mechanisms of judicial authorisation.¹⁸

In 2015, in the *Schrems* case, the ECJ reiterated its condemnation of the model of blanket surveillance.¹⁹ In the aftermath of the Snowden revelations about the existence of US mass surveillance programmes, an Austrian activist, Max Schrems, filed a complaint

13 *Digital Rights Ireland* (n 11) para 37.

14 *Digital Rights Ireland* (n 11) para 37.

15 *Digital Rights Ireland* (n 11) para 51 ff.

16 *Digital Rights Ireland* (n 11) para 56.

17 *Digital Rights Ireland* (n 11) para 58.

18 *Digital Rights Ireland* (n 11) para 62.

19 *Schrems* [2015] ECJ C-362/14, ECLI:EU:C:2015:650.

to the Irish Data Protection Commission. As a Facebook's user, he was concerned about the possibility of his personal data being transferred from Ireland to the US, and potentially being accessed by US national security authorities with no form of scrutiny or remedy offered to European citizens. Article 25 of the Data Protection Directive allowed EU member states to transfer personal data only to third countries ensuring an "adequate level of protection", which, as the ECJ explained, means a level that is "essentially equivalent to that guaranteed within the European Union".²⁰

Following a request for a preliminary ruling made by the Irish High Court, the ECJ analysed the compatibility with EU law of the so-called Safe Harbour regime, which allowed for the transfer of personal data from the EU to US corporations. Eventually, the ECJ ruled that the Commission adequacy Decision 2000/520/EC, which, pursuant to the Data Protection Directive, certified the adequacy of the level of safeguards offered by the Safe Harbour agreement, was invalid and struck it down.

The ECJ did not directly examine US surveillance law nor did it explicitly affirm that the US do not offer an "adequate level of protection". However, it pointed out that nothing in the Safe Harbour agreement prevented US national security agencies to access and use all EU personal data on a generalised basis, without establishing preliminarily and clearly the categories of data susceptible to be involved. The ECJ reiterated that a similar derogation to the protection of personal data is not limited to "what is strictly necessary".²¹ Moreover, the ECJ went further by affirming that such a model of bulk surveillance, which, in contrast to the case of Data Retention Directive, did not only involve meta-data, but all kinds of personal data, "must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter".²² The ruling of the ECJ therefore forced

20 *Schrems* (n 19) para 73.

21 *Schrems* (n 19) para 93.

22 *Schrems* (n 19) para 94; on the point, see T. Ojanen (2017), 'Rights-Based Review of Electronic Surveillance after Digital Rights Ireland and Schrems in the European Union', in D. Cole, F. Fabbrini and S.J. Schulhofer (eds.), *Surveillance, Privacy, and Transatlantic Relations*, Hart Publishing.

the EU to renegotiate an agreement with the US to allow transatlantic data transfer.

4. National Legislation and EU Fundamental Rights

Digital Rights Ireland and *Schrems* focused on two specific regimes, the Data Retention Directive and the Safe Harbour Agreement, both of which were adopted at EU level. Yet, the judgments had a lasting effect also on national legislation. In fact, as the ECJ had the chance to show in *Tele2 Sverige & Watson*, these judgments *de facto* established a series of general criteria to ensure the compatibility of surveillance programmes with EU fundamental rights.²³

In *Tele2 Sverige & Watson*, the ECJ examined the Swedish and British statutes implementing the Data Retention Directive. Such statutes had formally remained in place even after the invalidation of the Directive. At that time, national legislators and courts were reluctant to interpret *Digital Rights Ireland* as if the ECJ had definitively banned the model of mass data retention and surveillance.²⁴ In *Tele2 Sverige & Watson*, however, the ECJ ruled that the Swedish and British statutes were implementing Article 15(1) of Directive 2002/58/EC, the so-called e-Privacy Directive, which allows member states to derogate from the obligation of confidentiality of electronic communications if necessary to protect a series of interests, including public and national security.

The ECJ found that, in terms of scope, the domestic data retention statutes under consideration, by requiring a blanket retention of meta-data, essentially mirrored the EU Data Retention Directive.²⁵ The ECJ observed that similar data retention systems not only represent an interference with Article 7 and 8 of the Charter

23 *Tele2 Sverige* [2016] ECJ Joined Cases C-203/15 and C-698/15, ECLI:EU:C:2016:970; see E. Celeste (2019), 'The Court of Justice and the Ban on Bulk Data Retention: Expansive Potential and Future Scenarios' (European Constitutional Law Review, Vol. 15: 134).

24 See *Secretary of State for the Home Department v Davis MP & Ors* [2015] EWCA Civ 1185.

25 *Tele2 Sverige* (n 23) para 97.

of Fundamental Rights, enshrining the rights to privacy and to data protection, but also with Article 11, protecting the right to freedom of expression, due to the potential chilling effects that a feeling of constant surveillance may generate on individual free speech.²⁶

Following *Digital Rights Ireland*, the ECJ then reiterated that a data retention model requiring the collection of personal data in a generalised way, involving all users and any methods of communication, with no differentiation, goes beyond the limits of what can be considered as a necessary and justified interference with the fundamental rights of individuals.²⁷

However, in *Tele2 Sverige & Watson*, the ECJ did not limit itself to certify the incompatibility of the bulk data retention models incorporated in the Swedish and British legislation with EU fundamental rights. The ECJ also offered national legislators a pragmatic solution to the issue of data retention. A bulk system of data retention could never be tolerable, even if paired with a set of stringent criteria regulating access by national authorities.²⁸ However, the ECJ clearly pointed out that a *targeted* system of data retention and subsequent use of data by national authorities would represent an admissible compression of individual rights justified by the legitimate interest of combating serious crimes and terrorism.²⁹

The ECJ explained that surveillance should be “the exception”, and not “the rule”.³⁰ For this reason, member states should limit the categories of data, means of communications and persons concerned by data retention measures to “what is strictly necessary”.³¹ The ECJ then stressed that national legislation should circumscribe the number of individuals affected by data retention programmes by requiring the presence of an objective link between the public

26 *Tele2 Sverige* (n 23) paras 92–93.

27 *Tele2 Sverige* (n 23) para 105 ff.

28 Cf. *Secretary of State for the Home Department v Davis MP & Ors* (n 24) paras 48 and 65.

29 *Tele2 Sverige* (n 23) para 108.

30 *Tele2 Sverige* (n 23) para 104.

31 *Tele2 Sverige* (n 23) para 108.

concerned and the crime or risk to be prevented.³² Lastly, with high sense of pragmatism, the ECJ suggested that this condition could be fulfilled by a domestic legislation restricting data retention practices to one or more geographical areas with a significant level of risk.³³

5. Conclusion

The case law in *Digital Rights Ireland*, *Schrems*, and *Tele2 Sverige & Watson* shows that the ECJ has increasingly struck the balance between privacy and security in favour of data protection. Despite the efforts by EU and national authorities to adopt surveillance measures in the aftermath of the terrorist attacks of 9/11, the ECJ has step by step invalidated measures such as the Data Retention Directive or national laws implementing it, which created a system of mass surveillance to the detriment of the protection of fundamental rights. Moreover, the ECJ has annulled the Safe Harbour Agreement since it allowed the transfer of data to the US in the absence of adequate privacy protection, and thus with no limits to the ability of US law enforcement authorities to access EU citizens' data. As such, the ECJ has embraced a standard of human rights protection in the field of national security which is arguably the most advanced in comparative perspective, by holding that human rights cannot be sacrificed on the altar of national security.

On the one hand, this has relevance in the short term. A number of cases are in fact currently pending before the ECJ. In October 2017, in the case *Privacy International*, the UK Investigatory Powers Tribunal, which is the British jurisdiction with competence on cases of alleged human rights violations perpetrated by national law enforcement and intelligence agencies, has asked the ECJ to ascertain whether UK's domestic legislation establishing a blanket system of data retention for national security purposes is compatible with the obligation of confidentiality of electronic

32 *Tele2 Sverige* (n 23) para 110.

33 *Tele2 Sverige* (n 23) para 111.

communications provided by the e-Privacy Directive.³⁴ The preliminary conclusion of the British Tribunal is that bulk collection and processing of data are an “essential necessity [...] to protect national security”; and that the principles established in *Tele 2 Sverige & Watson* would not be applicable.³⁵ However, there seems to be no reason why the ECJ should depart from its approach and admit the compatibility of a bulk data retention regime with EU fundamental rights.

Moreover, in May 2018, in the so-called *Schrems II* case, the Irish High Court has referred to the ECJ a further question related to the data transfer between EU and US corporations.³⁶ The original complaint to the Irish Data Protection Commissioner was filed again by Mr Schrems, this time contesting Facebook Ireland’s practice of relying on standard contractual clauses to transfer personal data to its mother company in the US. Standard contractual clauses are one of the mechanisms for transferring EU personal data outside the EU, and consist of model contracts approved by the European Commission. In *Schrems II*, the ECJ will be asked to clarify if the use of these clauses to transfer data to the US is permitted in light of US surveillance laws and practices. After the first *Schrems* case, in US law there have been limited improvements allowing for more transparency and accountability of intelligence and law enforcement authorities, in particular vis-à-vis foreign citizens. Some critical points, however, still persist, making *de facto* very hard to ensure that EU personal data transferred to the US enjoy “essentially equivalent” safeguards.

34 Reference for a preliminary ruling from the Investigatory Powers Tribunal - London (United Kingdom) made on 31 October 2017 – *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* (ECJ, Case C-623/17); see *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* [2017] UK IPT IPT/15/110/CH; *Privacy International v Secretary of State for Foreign and Commonwealth Affairs & Ors* [2016] IPT/15/110/CH (UK IPT); see *Celeste* (n 23).

35 Reference for a preliminary ruling from the Investigatory Powers Tribunal - London (United Kingdom) made on 31 October 2017 – *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* (n 34).

36 Reference for a preliminary ruling from the High Court (Ireland) made on 9 May 2018 – *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems* (ECJ, Case C-311/18).

On the other hand, the case law of the ECJ also has longer term implications. Twenty years ago, in Tampere, member states laid down the strategic objectives of a European area of freedom, security and justice, where police and judicial authorities of different nations could cooperate in order to enhance the protection of individual rights. Achieving that objective required maintaining a high and even level of human rights protection across the EU.

While many challenges in this area remain – including the threatening dynamics of rule of law backsliding in several member states, and not to mention the risks connected to Brexit (the UK decision to leave the EU) in this field – the ECJ has confirmed through its case law on mass surveillance and privacy that it will carefully police this space, to make sure that integration in the field of AFSJ does not result in a limitation of human rights.

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