

The EU and Internal Security: Origins, Progress, Limits and Prospects of a Growing Role (ARI)

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Theme: Since the 1990s the EU has increasingly succeeded in developing a role in the internal security domain. However, this is constrained by the limitations imposed by the Member states in this regard.

Summary: The provision of internal security is a core function of the state; hence, this domain remains a difficult one for EU policy-making. Since the 1990s the EU has increasingly succeeded in developing its role, having now a formal mandate and a record of progress in four main fields: information sharing, convergence of national internal security systems, facilitation of cross-border cooperation and common international action. Yet the Union's role is constrained by the limitations the Member States have imposed on its action possibilities, a prevailing cooperative rather than integrative rationale and serious implementation deficits. The Treaty of Lisbon offers some additional potential for developing the EU's role, but also protects the Member States' national competences in the field, so that much will depend on the actual content of the new 2010-14 Stockholm Programme for the Area of freedom, security and justice.

Analysis:

(1) A Difficult Field for European Integration

The provision of internal security is one of the State's core functions and is consequently highly protected by the principles of national sovereignty and territoriality. Unlike the domain of external security –where international cooperation in the form of alliances and collective security systems has a long tradition and is one of the key instruments to enhance security–, no similar 'culture' of cooperation exists in the internal security field. Different national approaches and perceptions of internal security issues (such as the UK's insistence on maintaining border controls with other EU countries) add to the EU's political difficulties in this domain, as does the fact that 'law and order' issues can make national governments win and lose elections and hence they remain very keen to retain national control.

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(2) The Origins of the EU's Role in the Internal Security Domain

The EU's current role in the internal security domain can be traced back to: (a) the establishment of the TREVI cooperation in the 1970s in response to the terrorist challenges at the time; (b) the need of the Schengen members from 1985 onwards to agree on a broad range of compensatory measures to offset internal security risks resulting from the abolition of internal border controls; (c) the need for the EC/EU members from the end of the 1980s onwards to offset internal security risks resulting from the cross-border liberalisation of economic transactions in the context of the Internal Market and the introduction of the Euro; and (d) the enhanced and new internal-security risk resulting from the higher permeability of borders and the growth of organised crime structures in the wider Europe from the beginning of the 1990s. The post-9/11 increased terrorist threat perception, rather than being at the origin of the EU's role in the internal security domain, has only acted as an accelerator –albeit a major one– of an already growing role of the EU in this domain.

(3) The EU's Internal Security Mandate

Since the entry into force of the Treaty of Amsterdam the EU has –as part of the general Treaty objective of the 'area of freedom, security and justice' (AFSJ)– an explicit mandate to provide EU citizens with a 'high level of security' (Articles 29 TEU and 61(e) TEC), primarily through police and judicial cooperation measures. The EU's internal security mandate is, however, different from that of the states themselves as the EU's role is limited to that of a provider of 'added value' with respect to internal security functions that Member States already fulfil at the national level, with the security competences of the Member States remaining predominant and being explicitly protected in the Treaties. The principle of subsidiarity is very much at the core of the AFSJ *security* concept as action at the EU level can only be justified if internal security issues –because of their cross-border nature– can potentially be more effectively handled through common action at the EU level. In practice this has meant that forms of crime without a cross-border dimension – such as youth crime and burglaries– have so far remained almost totally outside the EU's scope of action, that has primarily focused on serious forms of cross-border crime such as terrorism, transnational organised crime, drug-trafficking and –in an example of the 'securitisation' of other justice and home affairs fields– illegal immigration. Although to some extent original and innovative because of its extension of the notion of 'internal security' to an 'area' encompassing the territories of 27 Member States, the EU's security mandate is therefore limited in its substantive reach. The gradual extension of this substantive reach remains dependent on the political consensus among the Member States, and it will remain so even under the Lisbon Treaty (see below), that explicitly protects the Member States' national internal security functions.

(4) The Progress of the EU's Role in Internal Security

Despite these difficulties and the limitations to its mandate, the Union has been able to develop its role in the internal security domain quite significantly since the 1990s. Four distinct areas of progress can be identified:

- (a) Information sharing and common threat assessment. Whereas in the 1990s information sharing on internal security issues was still sporadic and essentially voluntary, the strengthening of Europol, the implementation of the principle of availability (mainly through the June 2008 'Prüm' Framework Decision on the stepping-up of cross-border cooperation, particularly in combating terrorism and cross-border crime), the strengthening of judicial assistance mechanisms (such as the 2005 Framework Decision on the exchange of criminal record data) and the

use of intelligence-service information (mainly for counter-terrorism purposes) has brought about a major quantitative and qualitative change. The development of information-sharing mechanisms and the strengthening of their institutional context has in turn allowed progress towards common cross-border internal security risk assessments (such as in the form of the Europol OCTA and TESAT reports, Frontex border risks reports) which have an increasing influence on programming and prioritisation at the EU level.

- (b) Convergence of national internal security systems. Despite its minimal level (see below), legislative harmonisation has in some fields (such as the fight against terrorism, organised crime, trafficking in human beings and corruption) forced 'laggard' Member States to bring their national criminal law codes into line with mainstream European principles and concepts. Although less visible (and measurable) than legislation changes, the proliferation of 'soft governance' best practice identification and (through training) transfer, as well as recommendations and guidelines, is having a slow but steady impact on spreading common standards and thereby reducing friction in cross-border cooperation. In the context of the accession process the new Member States have been forced to adapt their systems to AFSJ requirements (such as through the creation of centralised police units for fighting organised crime, the demilitarisation and professionalisation of border guards and the upgrading of legislation and action capabilities in the fight against corruption and money-laundering).
- (c) Facilitation of cross-border cooperation. Europol, Eurojust and Frontex are playing an increasingly important role in facilitating the interaction between the respective national law enforcement and judicial authorities. Both legislation (eg, on Joint Investigation Teams/JITs and Rapid Border Intervention Teams/RABITs) and funding instruments (programmes under the 2007-2013 financial perspective, External Border Fund) are used on a large scale to reduce obstacles to cross-border operational cooperation through non-legislative measures such as training, best practice identification and operational and technical support. Mutual recognition of judicial decisions (eg, on the basis the Framework Decisions of 13 June 2002 on the European Arrest Warrant, of 22 July 2003 on the execution of orders freezing property or evidence and of 24 February 2005 on the confiscation of crime-related proceeds) has opened up significant quasi-automatic pathways for the implementation of decisions of the requesting national system by the authorities of the requested national system, extending *de facto* the 'reach' of national internal security measures to the territories of other EU Member States. The approximation of national law has also helped –although on a more modest scale– to create a common minimum legal platform for cross-border cooperation in fields with major challenges such as terrorism (Framework Decision of 13 June 2002) and trafficking in human beings (Framework Decision of 19 July 2002).
- (d) Common international action. Since the entry into force of the Treaty of Amsterdam there has been a significant expansion of external EU action to reduce internal security risks within the AFSJ. Four main dimensions of this expansion can be identified: (1) the increased 'mainstreaming' of internal security objectives (especially as regards the fight against terrorism, organised crime and illegal immigration) in overall EU external relations, including CFSP and external economic relations; (2) enhanced operational cooperation with some third countries (especially with the US, with whom two agreements on police

cooperation via Europol and two on mutual legal assistance have been signed); (3) the expansion of internal security capacity building assistance to third countries with the aim of strengthening their police, judicial and border control systems, often with a focus on primary EU concerns (especially in the Western Balkans and the ENP countries); and (4) common positions and action in international organisations (eg, cooperation with the UN Counter-terrorism Directorate and UN Convention against Corruption).

(5) The Limits of the EU's Role in Internal Security

At the AFSJ's current stage of development, three main limitations to the EU's role in internal security can be observed:

- (a) Limitations of EU action possibilities. The Member States have so far not transferred any operational law enforcement and judicial powers to the Union, and the much developed agencies Europol, Eurojust and Frontex are still largely limited to information exchange, analysis and coordination functions. As a result, the EU cannot act directly on internal security risks but has to rely on Member State authorities to take appropriate action, which can entail friction and delays and also limit international action possibilities. Even the frameworks created for cross-border operational deployment of multi-national units (such as JITs and RABITs) have still to operate under a range of limitations imposed by the principle of territoriality. The unanimity requirement under Title VI TEU ('third pillar') has kept legislative harmonisation at a minimal(ist) level, exemplified, *inter alia*, by the extensive use of 'minimum maximum penalties' as regards the approximation of criminal sanctions. Even some of the mutual recognition measures have been deprived of much of their substance as a result of satisfying each national delegation, for which the December 2008 Framework Decision on the European Evidence Warrant with its restriction to already available evidence in the form of documents, objects and data (not covering, for instance, DNA samples or the monitoring of bank accounts) is a primary example.
- (b) Cooperation rather than integration as the prevailing rationale. For the reasons referred to above, Member States have tried to avoid any real legal and structural 'integration' in the internal security field, focusing instead on the facilitation of cross-border cooperation between law enforcement and judicial authorities. While this has brought about qualitative progress in addressing transnational internal security risks, it has also led EU action on internal security issues to remain based on 27 cooperating national systems that are largely autonomous and substantially different in terms of structures, procedures and legal frameworks. This not only contributes to major persisting operational friction because of both the absence of effective common command-and-control structures and continuing incompatibilities between the national structures, procedures and rules supposed to interact in the fight against cross-border crime –which inevitably reduces effectiveness–, but also to a permanent need for a huge coordination effort –that takes up much of the time and resources of the Council bodies and the special agencies–.
- (c) Significant implementation deficits. The EU's action in the internal security domain is affected by a double implementation deficit, both at the EU and the national levels. At the EU level, the Heads of State and Government (in the European Council) and often also the Ministers of the Interior and of Justice (in the JHA Council) find it easier to agree on ambitious objectives and strategies rather than on ensuring their subsequent implementation through appropriate legislative acts, which are often greatly delayed

and ‘thinned-out’ in the detailed negotiations at the expert level. This, however, is part of a structural problem of the EU as a whole, as the political cost of not achieving declared objectives is much lower in the EU context than in a national government/parliament/media context. The prevailing unanimity requirement, the extensive use of parliamentary reserves and the complexities of ‘pillar division’ also contribute to the implementation deficit at the EU level, which according to the European Commission’s July 2008 report on the implementation of the current ‘Hague Programme’ has led to an achievement rate of agreed upon objectives of only 38% (COM(2008)373). At the national level, Member States –to some extent helped by the absence of a treaty infringement procedure under Title VI TEU– often take a very long time to transpose major internal-security-related legislation, and sometimes –as in the case of the European Arrest Warrant– also try to ‘soften’ the impact of these measures through specific national application rules partly at variance with the rules defined at the EU level.

(6) The Treaty of Lisbon

The Treaty of Lisbon provides some potential for the strengthening of the EU’s role in the internal security domain, mainly through the *de facto* ‘communitarisation’ of the current ‘third pillar’, the formal abolition of the ‘pillar divide’, the extension of the qualified majority to a range of internal security matters, reinforced EU competences in the fields of criminal and criminal procedural law, the possibility of establishing a European Public Prosecutor and the provision for a legislative text defining the conditions under which police officers can operate in the territory of another Member State. Yet at the same time, the new Treaty also protects the national internal security and law and order competences of the Member States more explicitly than before (amended Article 4(2) TEU and Article 72 TFEU), extends the existing ‘opt-outs’ for the UK, Ireland and Denmark to police and judicial cooperation in criminal matters, introduces an ‘emergency brake’ to protect national criminal justice systems against measures subject to majority voting which a Member State might find undesirable and still provides for a number of unanimity requirements on matters of particular sensitivity (such as the establishment of the European Public Prosecutor’s Office, operational cooperation between police forces and the conditions and limitations under which police authorities may operate in the territory of another Member State). The new Treaty is therefore unlikely in itself to provide a major new breakthrough for the EU’s role in the internal security domain.

Conclusion

The Stockholm Programme and the Future of the Area of Freedom, Security and Justice

At least as important, if not more, as the Lisbon Treaty for the further development of the Union’s role is the Stockholm Programme, to be adopted under the Swedish Presidency of the second half of 2009, as it will define priorities and objectives for the years 2010 to 2014. A substantial Stockholm Programme coinciding with the –still uncertain– entry into force of the Treaty of Lisbon could provide a basis for a new phase of dynamic growth of the Union’s role in the internal security domain, but the lack of consensus on certain issues (such as the establishment of the European Public Prosecutor) could increase the chance/risk of some of this potential being realised only on the basis of an ‘enhanced cooperation’ involving only some of the Member States.

In its proposals for the Stockholm Programme adopted on 10 June 2009 (COM(2009)262/4) the European Commission has only been moderately ambitious in the internal security field, carefully avoiding –while the second Irish referendum is still

pending— any of the potential new action possibilities provided by the Lisbon Treaty. While the Commission Communication contains many proposals which could improve the functioning of existing structures and mechanisms —such as the creation of an ‘Erasmus’-type exchange programme for internal security professionals to build-up cross-border trust and expertise and the introduction of a European Information Model for the sharing of security related information—, the proposals could have been more substantial —at the price of also being more controversial— as regards new initiatives to strengthen cross-border operational police cooperation and the legislative agenda in the field of criminal law. The Commission is certainly also right in advocating the definition of a more long-term ‘Internal Security Strategy’ clarifying responsibilities and priorities —EU measures have so far followed a somewhat piecemeal approach often in response to events or forceful priorities of some Member States— but the Stockholm Programme should be a bit more concrete on the actual content of such a Strategy, including on its external relations and financial solidarity aspects.

Finally, it should also be noted that the June 2009 Commission proposals —partly in response to the increasing criticism about the predominance of security objectives within the AFSJ— place the main emphasis for the future development of the AFSJ on the promotion and protection of citizen’s rights. While an effective balance between security and the rights of the individual is necessary for both the credibility and the legitimacy of the AFSJ as a fundamental political project, the risks posed to fundamental rights by EU measures in this field often tend to be slightly exaggerated as the primary risks in this respect are still to be found at the national level, as all executive powers in the internal security field remain with the Member States which are also at the origin of most of the data processed at EU level for internal security purposes. Some of the energy of the critics of the EU’s role in the internal security domain might actually be focused more effectively on the serious problems at the national level, as shown by the recent issues in several Member States regarding detention without trial, extraordinary renditions and improper use of personal data. Any downgrading of the EU’s internal security dimension in response to partly exaggerated fears about the ‘securitisation’ effects of the AFSJ could substantially reduce the real added value that the EU can provide to Member States that are increasingly struggling to find effective responses to the growing diversity and sophistication of serious cross-border crime. The Stockholm Programme should make internal security and the rights of the individual equal parts of the same fundamental objective of developing the AFSJ rather than downgrading one in favour of the other —all the more so as a good case can be made for internal security also being a right to which the European citizen is entitled to—.

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