Erasmus Academic Network
LISBOAN
Teaching & Researching the Lisbon Treaty

Education and Culture
Lifelong Learning Programme

With the support of the Lifelong Learning Programme of the European Union

Project no. 177316-LLP-1-2010-DE-ERASMUS-ENWA

LISBOAN

Linking Interdisciplinary Integration Studies by Broadening the European Academic Network

Report from the Workshop "Governance changes in the Area of Freedom, Security, and Justice after the Lisbon Treaty: Internalization within the EU and the member states and externalization in foreign policy"

Ronald Holzhacker, University of Groningen, Netherlands
Paul Luif, Austrian Institute for International Affairs, Vienna

Deliverable No. D 65

October 2011, Project month 13

Dissemination level: Public

Funding Disclaimer: This project has been funded with support from the European Commission. This publication reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Report

European integration is moving forward and entering areas traditionally viewed as being at the very heart of the state. Many of the developments in the area of AFSJ have been driven by heads of state coming together in European Council meetings: the Hague Programme and the Stockholm Programme have been important to establishing the priorities in this area. Justice issues are also an area where national parliaments have at times played a strong role in scrutinizing developments. With the Lisbon Treaty, the European Commission and in particular the European Parliament play an increasingly important role in setting priorities and overseeing implementation. While we are interested in developments at the EU level, we believe that more research needs to look at the impact which the EU developments in this area have on policy and governance in the member states as part of the implementation process. These challenges involve also the accession countries and the neighbours of the EU. Thus, the external effects of the changes in EU rules are also analyzed.

The Workshop was organized in two parts: The first part dealt with institutional and decision-making matters. The session was held at the Dutch Ministry of the Interior and Kingdom Relations in the afternoon on October 20, 2011. *Ron Holzhacker* and *Paul Luif* introduced the session of the Workshop and thanked the Ministry officials for providing the location. Luif gave an overview on the development of EU policy area Justice and Home Affairs (JHA), beginning with the TREVI cooperation in 1975, the proliferation of groups dealing with these issues and JHA finally being incorporated into the "Third Pillar" of the Maastricht Treaty in 1993. The Lisbon Treaty abolished the pillar structure; Justice and Home Affairs is now decided by the ordinary legal procedures; some peculiarities remain.

Stine Andersen discussed in her paper the effectiveness of peer evaluation as a means of enforcement, introduced by Article 70 of the Treaty on the Functioning of the European Union (TFEU). She compared it to the infringement procedure under Article 258 TFEU and maintained that peer evaluation have the potential to be an efficient and inclusive method engaging states in *ad hoc* as well as more permanent processes of tracing compliance problems in the EU.

A legal analysis of migrants' interception operations in the Mediterranean Sea and the fundamental human rights issues connected with these operations were the topic of *Luisa Marin's* presentation. She argued for more transparency in FRONTEX policing operations and stressed the importance of the legal reference in the Lisbon Treaty to the Charter of Fundamental Rights.

Jeanne Pia *Mifsud Bonnici* discussed in her paper the operational experiences of the EU's Data Retention Directive in the past five years since its coming into force. According to her, it is time to redefine the relationship between security needs and fundamental rights in data retention. A "coexistence" between the laws and tools for the investigation of crime and the right to private life, although a delicate balance, can be achieved.

Each of the presentations was commented by a Dutch official, which lead to intensive debates on the practice of Justice and Home Affairs.

The second session in the morning of October 20, 2011, met in the Dutch Parliament (in the premises of the Tweede Kamer); the location was a symbol for stressing the importance of (national) parliaments in JHA after the Lisbon Treaty came into force.

Sarah *Wolff* presented a paper she had written together with Grégory Mounier, analyzing the external dimension of JHA and looking at the dynamics of its expansion and diversification. She posited three dimensions in this context: further institutionalization, politicization and operationalization. These complex developments can give third countries a "kaleidoscopic" image of the EU, showing that for them it is not so straightforward to know how to cooperate with the Union in this field.

In examining the adoption of restrictive sanctions against individuals or non-State actors Peter *Van Elsuwege* illustrated the constitutional complexities of the EU. The objective of increased foreign policy coherence does face significant legal obstacles. In particular, the European Parliament lacks formal role in the area of Common Foreign and Security Policy whereas in JHA it acts as a co-legislator after Lisbon; this increases the potential for inter-institutional litigation.

Claudia *Engelman* and Maarten Peter *Vink* showed that the country of origin information has been crucial for determining the validity of asylum claims in the EU. They analyzed why national authorities are interested in "practical cooperation" with authorities in other countries. Asylum governance in Europe is in their view to a large extent determined by informality and driven by only a few European countries.

Finally, Theodore *Baird* introduced the topic of his PhD thesis on the formation of markets for the smuggling of migrants in Turkey.

Among the topics of the final discussion were again the complexity of the EU's decision-making procedures in JHA as well as the potential conflicts between the rule of law, the need for privacy and the requirements of preventing or tracking down criminal offenses. Participants agreed that in view of the quality of the contributions, the organizers of the Workshop should try to look at the possibility for publishing the papers in special edition of a peer reviewed journal.

Programme:

Conference Schedule
Day 1: Ministry of the Interior and Kingdom Relations
'Academics meet policy-makers' programme

October 20, 2011

13.45 Welcome with coffee and tea

14.00-14.15 **Opening Remarks** by **Melchior Bus**, Head of Unit, International Affairs, Ministry of the Interior of the Netherlands.

14.15-15.00 **Ron Holzhacker** and **Paul Luif**: **Introduction**: AFSJ after Lisbon: Internalization and Externalization

15:00-15:45 **Paper 1/ Stine Andersen**: Non-binding peer Review within AFSJ
Comment: Pim Albers, Ministry of Security & Justice

15:45-16:00 Coffee break

16:00-16:45 **Paper 2/ Luisa Marin**: The externalization of undocumented migration controls as a threat for the EU's constitutional commitment to fundamental human rights? Legal analysis of migrants' interception operations in the Mediterranean Sea.
Comment: Sander Luijsterburg, Dutch Permanent Representation to the EU; First Secretary Home Affairs.

16:45-17:30 **Paper 3/ Jeanne Pia Mifsud Bonnici**: Redefining the relationship between security, data retention and human rights
Comment: John Morijn, Ministry of the Interior, Dept. of Constitutional Affairs and Legislation; Dutch National Liaison Officer, EU Fundamental Rights Agency

17:30-18:00 Drinks

Day 2: Dutch National Parliament
October 21, 2011

9.00	Welcome to the Dutch Parliament by **Lisa Vermeer**, Deputy clerk of the Standing Committee on European Affairs, EU-advisor of the standing committees on Security & Justice and Home Affairs
9.30-10.15	**Paper 4 / Sarah Wolff:** National Executive-led Agenda – Shaping and Implementing the External Dimension of JHA
10.15-11.00	**Paper 5/ Peter Van Elsuwege:** Interface between AFSJ and CFSP: Legal Constraints to Political Objectives
11.00	Coffee Break
11.15-12.00	**Paper 6/ Claudia Engelman and Maarten Peter Vink**: Asylum – Intergovernmental Exchange of Origin Information
12-12.15	**Introduction of PhD research, Theodore Baird**: Danish Institute for International Studies and Roskilde University
12.15-12.45	Final Discussion and Closure
12.45 -13.45	Lunch at the Parliament

Annex: Proposal for Special Issue

Freedom, Security, and Justice:

Intern- and Externalization
In the EU and the Member States
after the Lisbon Treaty

Editors: Ronald Holzhacker and Paul Luif
November 15, 2011

As the EU has evolved, it has also begun to address policy questions which are closer to the very heart of the state. From cooperation in Justice and Home Affairs, originally conceived as the third pillar of European cooperation, has emerged the Area of Freedom, Security, and Justice (AFSJ). A unique aspect of policy in this area is the desire to integrate the internal and external dimensions of this policy area. One of the tensions in this policy area has been balancing the protection of fundamental rights and increasing security.
Many of the developments in the area of AFSJ have been driven by heads of state coming together in European Council meetings: The Hague Programme and the Stockholm Programme have been important to establishing the priorities in this area. Justice issues are also an area where national parliaments have at times played a strong role in scrutinizing developments. With the Lisbon Treaty, the European Commission and in particular the European Parliament play an increasingly important role in setting priorities and overseeing implementation. While we are interested in developments at the EU level, we believe that more research needs to look at the impact which the EU developments in this area have on policy and governance in the member states as part of the implementation process. These challenges involve also the accession countries and the neighbors of the EU. Thus, the external effects of the changes in EU rules will also be analyzed.

This special issue emerged from a call for papers to the LISBOAN network of 67 European universities, a network funded by the EU's Erasmus program. What made the conference in The Hague different than most purely academic conferences, was our desire to reach out and also have a dialogue with civil servants in the government on the topics addressed. This was especially fruitful because our focus on AFSJ is at the national level, so having an exchange of ideas with government policy makers had the potential to bring in current controversies in this young field of policy making, and to gain insights typically shielded from academic scrutiny. Certainly the insights shared triggered theoretical concepts from political science, such as spill-over processes from one policy area to another, internal bureaucratic competition between ministries and political sensitivities in the member states to justice and home affairs issues. Our discussions took place the first day at the Dutch Ministry of the Interior and Kingdom Relations, and the second day at the Dutch national parliament (Tweede Kamer).

The first part of this special issue focuses on the institutional relations of policymaking in AFSJ, both within member states and between member states. Thus, here we are interested in national executive control, national parliamentary scrutiny and peer review across the member states with regard to AFSJ. The second part focuses on specific policy areas which are part of AFSJ. Here we begin with two papers which highlight the tension found in this policy area between security and human or fundamental rights, the first related to data retention and the second policing external borders. The final two papers are concerned with data exchange between European countries (under the Pruem Treaty) and transatlantically with the US, and the interface between AFSJ and the Common Foreign and Security Policy (CFSP).

The first contribution to this special issue, by Mendeltje van Keulen, focuses on the member states and their role in both shaping and implementing policy with regards to Justice and Home Affairs, designed to create an Area of Freedom, Security, and Justice in the EU. Here she first discusses executive decision making, and then focuses on national parliamentary scrutiny of this policy area. Policy in this area, ranging from street-level policing to anti-terrorism, forms an institutionally dense and highly political sensitive area. She notes that national parliaments have been active since an early stage in attempting to control the EU-activities of their governments in justice and home affairs in the Council of Ministers. Her article focuses on the parliamentary practices for government oversight of Justice and Home Affairs policies in the Dutch parliament and discusses the implications of this for institutional empowerment.
The second article, by Stine Andersen, examines the peer review process, in which member states, in collaboration with the European Commission, conduct evaluations of member state implementation of AFSJ. She compares the advantages of such peer review based on Article 70 of the TFEU, compared to the general infringement procedure established in Article 258 TFEU. She notes that peer review involves all member states instead of just one, and has the potential to bring about clarification of EU law and an exchange of implementation practices which may general behavioral change. She provides examples from both the Dutch and Danish experiences.
Now turning from these institutional perspectives to particular policy areas, we turn to the contribution of Jeanne MIfsud Bonnici. She is interested in the relationship between security and human rights, and focuses on the Data Retention Directive. She calls for a critical reflection of this directive which was passed in the political climate after September 11 and bombings in London and Madrid, when an anti-terrorism agenda rose quickly to the fore. Next, Luisa Marin investigates the policy related to the externalization of undocumented migration controls as a potential threat to fundamental human rights. Her focus is on a legal analysis of current inception operations in the Mediterranean Sea.

Next Paul Luif and Florian Trauner focus on the EU-US relations and agreements on the exchange of information related to organized crime. The Pruem Treaty, confined to the EU's territory, became the basis for a much wider transatlantic data exchange program. Finally, Peter van Elsuwege turns our attention to the interface between the Area of Freedom, Security and Justice and the Common Foreign and Security Policy of the EU. He notes that although the distinction between the internal and external aspects of security is highly superficial, the division remains crucial for the determination of the legal basis and decision-making procedures. He illustrates this tension by investigating the practice of adopting restrictive sanctions against individuals and non-state entities.

Table of Contents

Abstracts

Stine Andersen
Non-Binding Peer Evaluation within an Area of Freedom, Security, and Justice

This paper examines Article 70 TFEU, which provides a legal basis for objective and impartial evaluation of member state implementation within an Area of Freedom, Security and Justice (AFSJ). Several points pertaining to the effectiveness of peer evaluation as a means of enforcement are discussed. Specifically, it is explored how non-binding arrangements display potential to bring about clarification of EU law and the correct implementation thereof as well as to generate behavioural change. The analysis is in part theoretical and in part based on practical experiences gained by Dutch and Danish officials engaged with peer review. Furthermore, it is argued, peer review arrangements based on Article 70 TFEU may also bring about an incremental adaptation of national practices and implementing measures. Finally, the role of the European Parliament according to Article 70 TFEU is appraised.

Mendeltje van Keulen
New Parliamentary Practices in Justice and Home Affairs: Some Observations

The policy field of Justice and Home Affairs aims to realise a EU-wide Area of Freedom, security and justice. The topics at stake range from street-level policing to anti-drugs policy and from customs cooperation to data protection and anti-terrorism, on the shaping sides. 'JHA', as it is known in Brussels jargon, forms a particularly complex, institutionally dense and politically sensitive area. The field also stands out from other policy domains as also the national parliaments, the traditional 'losers' of European

integration, have from a relatively early stage been active in controlling the EU-activities of their governments in the Council of Ministers. Thereby, the national legislatives' activity in the field of JHA has preceded the more recent trend of parliamentary involvement in EU affairs. This paper describes the parliamentary practices on Justice and Home affairs policies in the Dutch parliament and discusses a number of implications of institutional empowerment.

Jeanne Pia Mifsud Bonnici

Redefining the relationship between security, data retention and human rights

Post September 11 and the Madrid and London bombings, the EU security and anti-terrorism agenda pushed through a number of, what seemed to be at the time, necessary but controversial policies and legislation aimed at intelligence gathering and preventive action. On the one hand a pro-security lobby developed arguing that unless citizens are safe no other rights can be protected by states. On the other hand the necessity and proportionality lobby argue that there is no legal basis for unlimited and unrestrained invasion of fundamental rights of citizens in the name of security. One such controversial legislation was the Data Retention Directive (Directive 2006/24/EC): the aim is to allow the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. Its passage into law was not easy. Its legal basis was even questioned before the European Court of Justice.[1] The unease about its legality did not stop there: three national constitutional courts – the Romanian Constitutional Court in October 2009[2], the German Federal Constitutional Court in March 2010[3] and the Czech Constitutional Court in March 2011[4] – annulled the laws transposing the Directive in the respective jurisdictions on the basis that they were unconstitutional.
This paper reflects on what is actually going on, now between 5-10 years after the enactment of the controversial laws. Particularly since the introduction of the Data Retention Directive, the general EU legal context relevant to the Directive has changed. With the coming into force of the Lisbon Treaty, the pillar structure is no more. The abolition of the pillar structure reopens the discussion on the legal basis of the Directive, and whether now that the pillar strictures are no more the legal basis of the Directive should be rethought. A second important change is the confirmation of the legal effect of the Charter of Fundamental Rights of the EU having the same legal value as the Treaties and the subsequent debates (particularly in communications between the Commission and Council and debates of the European Parliament) on a proper human rights and rule of law approach to areas of freedom, security and justice.
The author argues that taking the changes in the wider European Union legal framework together with the changed political reality, empirical evidence of the results obtained from the national implementation of the Data Retention Directive, the guidance offered in the various national court decisions, and the current exercise of evaluation by the Commission, we are now able to rethink and redefine the relationship between security, the need for intelligence gathering and protection of fundamental rights. Yet while arguing for this redefinition, the paper also reflects on the chances that this process of redefinition actually takes place: is this yet another case of opportunistic pragmatism?

Paul Luif and Florian Trauner

The Prüm Treaty and EU-US relations: the dynamics of exporting/importing a data exchange regime

The Prüm Treaty is an agreement to exchange data on organized crime. Launched as an intergovernmental initiative among some member states in May 2005, the Prüm Treaty become part of the EU's legal

1 ECJ, C-301/6 Ireland v Parliament and Council, ECR [2009] I-00593

2 Decision no 1258 from 8 October 2009 of the Romanian Constitutional Court

3 Budesverfassungsgericht, 1 BvR 256/08

4 Judgment of the Czech Constitutional Court of 22 March on Act No. 127/2005 and Decree No 485/2005

framework in June 2007. Relatively quickly, this data exchange regime did not remain confined to the EU's territory. In particular the US displayed a strong interest to sign comparable data exchange agreements with individual EU member states. Rather than cooperating with the EU as a whole, however, the US approached EU member states on a case-by-case approach, threatening to introduce a restrictive visa regime, should the target European states refrain from accepting the agreement. This article investigates the process and the EU-US relations in this particular field of cooperation, elaborating on the underlying dynamics and actors' interests in establishing a new regime on transatlantic data exchange.

Peter Van Elsuwege

The Interface between the Area of Freedom, Security and Justice and the Common Foreign and Security Policy of the European Union: Legal Constraints to Political Objectives

The Treaty of Lisbon formally abolished the pillar structure and introduced a separate Title on the establishment of an "Area of Freedom Security and Justice" (AFSJ) in the Treaty on the Functioning of the European Union (TFEU). Shortly after the entry into force of this new legal framework, the European Council adopted the Stockholm programme laying down the EU's political priorities for the development of the AFSJ. One of the identified objectives is to ensure the integration of the EU's policies in the AFSJ into the external policies of the Union, including the Common Foreign and Security Policy (CFSP) of the Union. This requires increased coherence between traditional external security instruments and internal policy instruments with a significant external dimension, such as the instruments adopted in the context of the AFSP.
In this paper it is argued that the political objective of increased foreign policy coherence faces significant legal obstacles, mainly because the CFSP remains subject to specific rules and procedures. Despite the growing recognition that a distinction between the internal and external aspects of security is highly superficial, this division remains crucial for the determination of the appropriate legal bases and decision-making procedures. The "mutual non-affectation clause" of Article 40 of the Treaty on European Union (TEU) confirms the importance of the interface between the CFSP and the other policies of the Union.
The difficulties in defining the exact boundaries between the AFSJ and the CFSP are illustrated with the practice of adopting restrictive sanctions against individuals and non-State entities. Such measures can be adopted on the basis Article 75 TFEU in the context of the AFSJ and with regard to the implementation of the CFSP on the basis of Article 215 TFEU. Significantly, both provisions require different decision-making procedures. It is argued that this increases the potential for inter-institutional litigation as is illustrated with a pending Court case between the European Parliament and the Council on the adoption of Regulation 881/2001 imposing restrictive measures directed against persons associated with Usama bin Laden, Al Qaida and the Taliban.

Luisa Marin

The externalization of undocumented migration controls as a threaten for the European Union's constitutional commitment to fundamental human rights? A legal analysis of migrants' interception operations in the Mediterranean Sea.

This paper deals with policing the external borders of the European Union, an issue that recently has witnessed significant developments in connection with the externalization of the fight against undocumented migration. After a presentation of the theoretical framework conceptual elements underpinning the research (1), the paper will present diversion or interception operations of

undocumented migrants in the Mediterranean Sea. These operations are carried out by some EU's member states in occasion or alongside Frontex-coordinated operations of control of southern maritime borders (2). The paper will then qualify those operations in legal terms (3), and present the problems arising from these recent forms of operational cooperation among Member States (MS) and coordinated by the agency Frontex. A last section (4) will discuss the impact of those operations as examples of externalization of migration controls on fundamental human rights obligations of the MS, with specific attention to the EU Charter of Fundamental Rights and the European Convention of Human Rights. The latter instrument in particular offers an interesting prism for analysis, thanks to the recent judgment in the case of M.S.S. v. Belgium and Greece (Application no. 30696/09, judgment of 21 January 2011, Grand Chamber) and also to the case of *Hirsi et al. v. Italy* (Application no. 27765/09, pending). The first case, though concerning asylum cooperation within the framework of the Common European Asylum System (CEAS), clarifies, *mutatis mutandis*, the role and the legal liability within the Conventional system of MS while cooperating within European legal framework, such as the CEAS; the second case, currently pending, will possibly clarify the role of Frontex while coordinating joint operations, carried out alongside diversion operations taken under the responsibility of a single member state, on the basis of bilateral agreements with third countries.