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WORKING DOCUMENT

on the European Union's internal security strategy

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Interaction between the European Union's 'external' and 'internal' security

The first grey area concerns the relationship between the EU's terms of reference in the field of security and defence (ESDP) and its remit regarding internal security. Under the Lisbon Treaty, ESDP continues to be governed by special provisions which more or less correspond to the 'second pillar' arrangements under previous treaties, precluding in this area the adoption of legislation or the conclusion of international agreements that are binding on their signatories to the same extent as those concluded under the EU's 'ordinary' powers in the field of police cooperation or judicial cooperation in criminal matters.

The difference is far from negligible, since the Treaty bestows joint responsibility on Parliament within the scope of its 'ordinary' powers, entitling it to be fully and promptly updated throughout the negotiations and, above all, to approve or reject an agreement (as recently evidenced by the EU-USA TFTP and PNR agreements or the readmission agreements negotiated with a number of third countries). In such cases, international agreements are considered an outside 'extension' of internal EU policies and must be negotiated and concluded under ordinary procedures and in compliance with the principles governing European policy in the relevant sector (immigration, data protection, terrorism). In other words, external powers are determined by internal powers and not the reverse (as stated in certain Council documents).

This means that cooperation between Parliament (the LIBE committee in particular) and the entity (High Representative or Commission) negotiating the agreement on behalf of the Council is essential. The handling of 'classified' information and access thereto where necessary for the conclusion of international agreements or the adoption of legislation relating to AFSG is a crucial issue which will inevitably arise.

Interaction between the internal security of the Member States and that of the Union

The second grey area concerns interaction between the internal security of the Member States and that of the Union. Suffice it to say that, following the adoption of the Lisbon Treaty, internal security has acquired fully-fledged EU policy status and is hence governed by the principles upheld for decades by the Court of Justice, which include:

- the primacy of European law over national law and

- the direct applicability of regulations (and directives where the provisions thereof are clear and unconditional).

Measures in the field of public security, more so than in other policy areas, must comply with the binding principles set out in the Charter of Fundamental Rights.

Here, to a greater extent than in other traditional policy areas, it is vital for European legislators to respect the criteria of subsidiarity and proportionality (if only to avoid legal action by any of the Member State parliaments).

In setting out the Stockholm Programme[1] the European Council itself accordingly took the

[1] OJ C 115, 11.5.2010, p. 1.

view that it was necessary to define a security strategy inspired by '*clarity on the division of tasks between the Union and the Member States, reflecting a shared vision of today's challenges*'. Paradoxically, however, the Stockholm Programme itself sets out a very broad range of objectives to be achieved in the five-year period between 2010 and 2014, showing little concern to establish the respective terms of reference of the EU, its agencies and the Member States.

A similarly Impressionistic approach has blurred the outlines of the measures adopted over the last 20 years in the field of police cooperation and judicial cooperation in criminal matters, which will apply until 1 December 2014 at the latest (Article 10 of Protocol No 36). Despite repeated requests from Parliament, the Commission has not yet commenced the 'Lisbonisation' of existing legislation, preferring to proceed on a case-by-case basis. While this approach facilitates progress in certain specific areas (for example, in connection with proposals regarding the procedural rights of those involved in criminal cases, data protection or measures to prevent human trafficking, as well as the recent proposal concerning assessment of cooperation in the Schengen framework), it is effectively delaying until the next parliamentary term the resolution of matters which are considered urgent by the European Parliament and the national parliaments, such as the 'Lisbonisation' of Europol and Eurojust and initial assessment of AFSG policies (Articles 88, 85 and 70 TFEU respectively).

In the absence of any clear framework, the methodological approach adopted by the Council following the entry into force of the Lisbon Treaty seems reasonable. This is set out in a number of strategic documents including:

- the Council conclusions on the architecture of internal security adopted in 2006 which provide for a four-phase EU internal security reference framework[1] and

- the internal security strategy set out by the JHA Council in Toledo and confirmed by the European Council in March 2010[2].

These documents basically seek to identify and compare the threats to EU internal security by means of a 'circular' decision-making process regularly involving the EU institutions and Member States with the support of the European agencies concerned (Europol, Eurojust, Frontex). This process, coordinated at European level by the Internal Security Committee in accordance with Article 71 TFEU, should progressively reveal exactly what measures are necessary at EU level to ensure more nimble cooperation between the national authorities and facilitate specific initiatives at EU level.

The Commission for its part has recently issued (albeit outside the framework established by the Council) a communication on strategic priorities and initiatives in the field of EU internal security[3].

Leaving aside for now consideration of the recommended priorities to be analysed in Working

[1] Council document No 7039/2/06 JAI 86 CATS 34 (not forwarded to Parliament).
[2] See official document: http://register.consilium.europa.eu/pdf/en/10/st07/st07120.en.10.pdf and the handbook entitled 'Towards a European Security Model' http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QC3010313ENC.pdf
[3] COM(2010) 0673.

Document No 3, the Commission and Council have to date clearly been willing to proceed on a fresh footing, following the adoption of the Lisbon Treaty, with European integration in the field of freedom, security and justice.

Interaction between European institutions, in particular between the European Parliament and the Council

The disregard shown to date by the Commission and Council for the role of the European Parliament and national parliaments in drawing up this strategy is unquestionably a cause for concern. Incredible as it may appear, the principal strategic documents adopted to date by the European Council, the Council and the Commission seem to ignore the existence of the European Parliament altogether. While such a thing would, to say the least, have been surprising prior to the entry into force of the Lisbon Treaty, it is nothing less than inexplicable one year afterwards.

A case in point is the European anti-terrorist strategy already launched at the end of 2001 and reviewed in 2005[1]. This strategy, instigated by the Counter-Terrorism Coordinator and assessed on a six-monthly basis by the Council, the European Council and the Member States[2], sets out a structured set of objectives, programmes and agreements established over the years but without ever officially involving Parliament. How then can Parliament be expected to process all this material and fashion it into legislation, having previously been forced to content itself with the merest scraps of information gleaned from the press and from occasional meetings with the European Coordinator? *(See own-initiative report by Sophie In'T Veld.)*

The same largely applies to measures to combat organised crime. On 8 and 9 November 2010, the Council drew up a 'policy cycle' for 2011-2013 establishing channels for dialogue between the Member States and the European institutions and agencies, while disregarding Parliament, notwithstanding its role as co-legislator and budgetary authority. *(See own-initiative report by Sonia Alfano.)*

Given their propensity to turn a blind eye, the other institutions should not be surprised at Parliament's response to matters such as the EU-USA agreement concerning the transfer of banking data (TFTP-SWIFT) or the agreement concerning the personal data of air travellers (PNR), not to mention the internal security measures adopted by a number of Member States but considered by Parliament (and the Commission itself) as posing a risk to the free movement of persons and encouraging to discrimination (against the Roma minority, for example).

After years of inter-institutional tension, resulting in proceedings before the Court of Justice, it is surprising that the European Parliament (and the Council of the European Union itself) still has no objective yardstick by which to assess the impact of legislation, such as that on the use of data regarding air travellers. A similarly cavalier attitude was adopted regarding the

[1] http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf

[2] National anti-terrorist measures (like those concerning cooperation in the Schengen area) are subject to evaluation by the Member States themselves. The most recent report is contained in Council document: http://register.consilium.europa.eu/pdf/en/10/st08/st08568.en10.pdf

proposed use of body scanners, concerning which impact assessments were made available only after the proposal had been rejected in plenary.

Parliament is not, as has been suggested, simply 'flexing its muscles' in order to impress the other institutions but is, on the contrary, seeking to adopt a considered approach to its responsibilities under the Treaty in these sensitive areas, not least because sooner or later it may well be called upon to defend itself before the Court of Justice for infringement of the principle of subsidiarity or proportionality (possibly in response to proceedings initiated by a national parliament or a request from an ordinary court for a preliminary ruling).

In order to meet its responsibilities in this respect, it is essential for Parliament to have all the information necessary for it to fulfil its role as co-legislator whethers that information is in the hands of the other institutions or the Member States themselves, especially in cases where the latter are seeking EU intervention in sensitive areas related to common security. Simply to ignore the issue or to refuse or hamper access to such information is, in your rapporteur's opinion, an infringement of Article 13(2) TEU, which states that the institutions shall practise mutual sincere cooperation.