



EUROPEAN PARLIAMENT

2009 - 2014

Committee on Civil Liberties, Justice and Home Affairs

14.2.2011

WORKING DOCUMENT 1

on the European Union's internal security strategy

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Rita Borsellino

DT\856573EN.doc

PE458.597v01-00

EN

United in diversity

EN

Legal and institutional framework

Background

In the European Union (EU), since the entry into force of the Treaty of Lisbon, the issue of security has been regarded from both an individual perspective, as a condition for the exercise of personal freedoms (Article 6 of the Charter) and from an institutional perspective. The institutions are required to establish within the Union '*an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States*' (Article 67(1) TFEU) and, in its relations with the rest of the world, the Union is to contribute to 'peace' and 'security' by pursuing these objectives '*by appropriate means commensurate with the competences which are conferred upon it in the Treaties*' (Article 3 TEU).

EU action in these areas is a recent development, since in the founding treaties public security was explicitly excluded from Community competence because it was considered a vital, non-delegable expression of state sovereignty. An echo of this reticence can still be found in the Treaties (Article 4(2) TEU and Article 72 TFEU), which recognise the exclusive competence of the Member States in matters relating to national security.

These reservations do not, however, mean that the EU cannot intervene whenever security issues at the supranational level arise, both within the EU and globally.

It is, in fact, precisely the process of globalisation which has recently led both to changes in the nature of security threats and to the strategic response of the Member States in dealing with those threats by progressively transferring the necessary powers to the Community and the Union.

Schengen cooperation – first form of security pooling among Member States

After an initial period of informal cooperation between national administrations (TREVI Group, 1975), in 1985, in Schengen, the Member States launched the most successful example of supranational cooperation, which gradually became incorporated into the framework of the European Community and the EU. The initial aim of this cooperation was to compensate for the abolition of internal borders by increasing controls at external borders. Starting as an ancillary measure to complement the establishment of the single market, Schengen cooperation laid the foundations for European visa and legal immigration control policies and for judicial cooperation in criminal matters.

The revolutionary aspect of Schengen cooperation lies in the fact that the Member States within the area are required to entrust to the states which control external borders the protection of their own internal security too. This calls for absolute faith in other Member States and, over the years, has led to the development of solidarity and interdependence which can now be seen at various levels. The first level is that of the pooling, through the Schengen Information System (SIS), of information relating to internal security which is considered of interest to other states or which might require measures to be taken by those states. The second level is the establishment of European structures and agencies (e.g. Frontex, Europol, Eurojust). The third level is that of the establishment of genuine joint teams for action in a Member State (for example, the multinational teams recently seconded to the Greek-Turkish

border for the control of illegal immigration). The fourth level is that of the mutual recognition of national measures on the territory of other countries and, in exceptional cases, the exercise of enforcement powers on the territory of another state. The fifth level, finally, is that of the harmonisation of national legislation in accordance with a common European model in order to ensure uniform behaviour and high standards (such as in the case of the Borders Code or Visa Code).

The Schengen system also provides for an original formula of mutual control among participating states ('peer evaluation') that strengthens mutual solidarity and complements the traditional control exercised by the Commission under other EU policies.

It is no surprise, therefore, that Schengen cooperation has, since the Treaties of Maastricht (1993) and, above all, Amsterdam, become the real driving force behind the 'area of freedom, security and justice' (AFSJ) which, in turn, since the Treaty of Lisbon, has become the second objective of the Union after the promotion of peace among European peoples (Article 3 TEU).

It is not, however, a simple task to define a 'European model' of security, as common goals and strategies need to be determined and achieved, starting from some very different national cultural, legal and institutional traditions which, in some cases, are rooted in centuries of national history. It is therefore easy to see why the EU is still a 'work in progress' as far as the establishment of a 'European model' of internal security is concerned, when it took more than thirty years to achieve a common market.

In order to address the legal and operational complexities relating to the establishment of a supranational area of security, some quasi-federal agencies were also set up, such as Europol and Eurojust, followed by the Monitoring Centre for Drugs, Frontex and others, the role of which is increasingly to serve as a catalyst for national measures and as an area within which national administrations can share common experiences.

This process of the gradual building of mutual trust and mutual recognition was the key feature of the first phase of the first multiannual programme for the AFSJ (Tampere – 1999-2004) and raised to EU level measures which up to then had been operational only within national borders. However, it also made differences in policies and standards in the various Member States appear even more pronounced, even in sensitive areas such as combating drug trafficking and the fight against corruption and trafficking in human beings.

After 11 September, mutual recognition and integrated EU measures go hand in hand

The common reference to common values, or the fact that all EU states had ratified the European Convention on Human Rights, soon turned out to be a safeguard that was too general, as a result of which some original legislative action was taken at EU level. The breakthrough, however, came after the attacks of 11 September 2001, which made it obvious that alongside the cooperation among Member States an EU security strategy also had to be developed. The strategy had to be complementary to, but also independent of, the strategies of each individual Member State and had to be backed up by the development of strategies, rules and instruments that were specific to the EU.

The first integrated European approach was the first anti-terrorism plan adopted by the European Council on 21 September 2001, underpinned by international obligations (in

particular the 2001 UN Security Council resolutions 1267 and 1373) and framed around EU and national measures, but above all around transatlantic cooperation. It is widely known that it is precisely this cooperation, which grew also in subsequent years, that is the reference framework for the EU. Despite this, there are some substantial differences of opinion in the multilateral approach, regarding, for instance, the scope of the concept of 'war on terror' and other measures taken by the Bush administration, which have subsequently been reviewed by the Supreme Court itself. The EU nevertheless followed with great interest the establishment, between 2002 and 2003 – more than two hundred years after the birth of the United States – of the first US Ministry of the Interior (the US Homeland Security Department) and the development in 2003 of the US Homeland Security Strategy. These measures undoubtedly influenced both the first European security strategy (2003) and the counter-terrorism strategy (2005) and encouraged the adoption of numerous legislative measures such as the Framework Decisions on Terrorism and the European Arrest Warrant, measures to freeze terrorist assets of and, above all, the signing of two major transatlantic agreements on extradition and judicial cooperation in criminal matters, which were ratified by the US Senate and came into force in 2009.

It is interesting to note that in those same years all Member States supported a substantial transfer of powers to the EU in the field of internal security, while in the Constitutional Treaty, followed by the Treaty of Lisbon, resistance against a similar transfer of power to the EU with regard to external security re-emerged, in particular concerning the military and defence sectors. It is patently clear, however, that this difference in treatment by the Member States of internal and external security will probably make it difficult in the current situation to incorporate into a single strategy measures that were developed under very different circumstances and institutional and legal frameworks, even in the face of terrorist threats that could require the use of various instruments.

The establishment of a European internal security model in the wake of the Treaty of Lisbon and the Stockholm Programme

The main innovation of the Lisbon Treaty in matters relating to internal security is that this policy has now been anchored to the specific EU 'rule of law', which is increasingly becoming a legal system that is independent of those of the Member States themselves or of international systems¹.

This legal system is now based on the new Treaties, the Charter of Fundamental Rights and the case-law of the European Court of Justice, even with regard to public security (except for the assessment of the proportionality of measures taken to protect national security).

The EU can therefore now define its own security model, although it will inevitably be different from those developed by individual Member States. This will no doubt lead to resistance, which the Treaty itself already takes into account through its so-called 'emergency brakes' (Articles 82(3), 83(3) and 87(3)) that enable a Member State to suspend the adoption

¹ See, for example, the case-law relating to the 'Kadi' case (Case C 402/05 P), which asserted the primacy of respect for the fundamental right to defence, even where measures had been taken by the UN Security Council to freeze the assets of terrorists, or presumed terrorists.

of an EU measure when it is likely to affect fundamental aspects of its own legal system.¹

Likewise, with a view to achieving greater mutual trust also between national institutions, the Treaties have also strengthened participation and monitoring opportunities for national parliaments. These concern, in particular, the policies of the area of freedom security and justice, in terms of both their evaluation in general (Article 70 TFEU) and operational cooperation between states (Article 71 TFEU), and the activity of the EU public security 'agencies' (Eurojust, Article 85 TFEU and Europol, Article 88 TFEU).

On the same subject of mutual coordination, the Treaty has provided for an internal security committee ((COSI) Article 71 TFEU) and mutual cooperation between departments of different states and between those departments and the EU institutions (Articles 73 and 74 TFEU).

Lastly, the EU institutions will be able to support the implementation of the European security model by using appropriate financial measures and by establishing networks and agencies that operate in the interests of all Member States, largely financed by the Community budget. The financial instrument will thus become a form of expression of mutual solidarity. The principle of solidarity, meanwhile – and not only financial solidarity – will become 'institutionalised' as far as the border control, asylum and immigration policies are concerned (Article 80 TFEU), to support the growing interdependence that has arisen, as stated above, especially among the Schengen cooperation countries.

With regard to these institutional innovations and their incorporation into the programme adopted by the European Council in Stockholm on 10 December 2009, it can now be said that the EU has the necessary powers and instruments to be able to back up the action of the Member States as far as public security is concerned.

This power is expressed through the adoption of legislative strategies and measures *'in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.'* (Article 83, TFEU). The Treaty already identifies as issues of European concern *'terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.'* However, in addition to such crimes the Treaty provides that *'on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph.'*

In the face of such progress, it should, however be pointed out that there are still at least three grey areas concerning these policies – security policy in particular – which could make it difficult to achieve the EU objectives and to determine a common security strategy.

These are: (a) the interaction between external security and internal security; (b) the interaction between internal security at EU level and at the national level, and (c) interaction between EU institutions, in particular the relationship between Parliament and the Council.

¹ It is worth noting that while this can suspend the decision it allows the other Member States to pursue the same objective within the framework of enhanced cooperation.