

# The Area of Freedom, Security, and Justice

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## Reader's Guide

This chapter looks at one of the most recent European policies, Justice and Home Affairs (JHA), and its subsequent transformation into the Area of Freedom, Security, and Justice (AFSJ). The AFSJ comprises policy areas such as immigration and asylum, and police and judicial cooperation, some elements of which were found prior to the **Lisbon Treaty** in the EU's third pillar (see Chapters 2 and 3). The chapter focuses first on the early years of cooperation in this policy area and provides an introduction to the **Schengen Agreement**. It then reviews the procedural steps taken first by the **Maastricht Treaty** (1993), then at **Amsterdam** (1999), and subsequent institutional developments culminating in the Lisbon Treaty. The second half of the chapter concentrates on policy output, again looking at steps taken with Maastricht, Amsterdam, and Lisbon, but also in the landmark **Tampere European Council** meeting, the **Hague Programme**, and most recently the **Stockholm Programme**. It argues that, although some progress has already been made towards **Europeanizing** AFSJ policy, this field continues to be laced with **intergovernmentalism**. Moreover, given the inherent tensions in the policy, numerous challenges remain to be resolved.

## Introduction

Cooperation in the Area of Freedom, Security, and Justice (AFSJ) has undergone a remarkable ascent from humble beginnings to a fully fledged and vibrant EU policy. One of the newest additions to the EU mandate, it seeks to engage the European Union in the fields of immigration and asylum policy, and police and judicial cooperation. Because of the sensitive nature of the issues involved, cooperation has been slow and difficult. However, it has resulted in a body of policies that apply across the EU's internal and external borders, and which have locked previously inward-looking national authorities into a multilateral process. This has involved significant political compromise, which led to the introduction of a complicated mix of **Communitarized** and intergovernmental institutional procedures peculiar to this field. The EU is now developing a complex immigration and asylum **regime**, and is also making progress on police and judicial cooperation. Particularly after the conclusion of the **Amsterdam Treaty**, the EU's capacity to reach collectively binding decisions in this field has improved considerably, creating momentum towards further cooperation and increasing concerns about the creation of a **'Fortress Europe'** into which access is increasingly restricted.

## Preludes to cooperation

If, in the late 1960s, government ministers responsible for home affairs and justice had been told that they would soon need to consult with fellow European

ministers while formulating policies on immigration, asylum, judicial, and police matters, they would no doubt have found this a very unlikely and undesirable prospect. Yet, during the 1980s and 1990s, issues falling within their mandate have increasingly become of collective EU concern, provoking efforts to deal with them at the European, rather than exclusively at the national, level. Beginning in the mid-1970s and accelerating in the 1980s, these clusters were increasingly incorporated into the collective political agenda, leading to the creation of new, overlapping forums discussing these issues (see Box 20.1).

There were two broad sets of catalysts that drove this development. The first was the consequence of increased cross-border movements into and across Europe. After the Second World War, Western Europe became an area of immigration. Cross-border movements increased, straining border patrols and causing delays at points of entry. With this came growing concerns about transnational crime because of weak border controls and a lack of effective communication among European national law **enforcement** agencies. The second catalyst was the revitalization of the European integration agenda after the signing of the **Single European Act (SEA)** in 1986 (see Chapter 2). The removal of internal EU border controls was written into the 1957 **Treaty of Rome**, even though this had not been fully realized by the early 1980s. With this goal back on the agenda, attention turned to the need to create external Community borders, and to develop common and coherent rules on access. Early efforts targeted three groups: the citizens of the European Community, and then Union, whose freedom

of movement within long-term EU resident non-EU citizens who held residence and **nationals (TCNs)** refugees seeking to enter EC/EU. Early efforts by the EU, but by membership of which European countries at CoE meetings. In fact, the drawbacks and 'lowest common' were also clear.

Cognizant of the states set up the **T** assembly to deal with **closer cooperation** authorities. Trevi was institution, and the **ing consultations** including drug and several other groups. **Judicial Cooperation** assistance Group, and **and Organized** four JHA policy clubs **ing Europeanized: in** **police cooperation;**

### BOX 20.1 CATALYSTS FOR EARLY COOPERATION IN JUSTICE AND HOME AFFAIRS (JHA) MATTERS

Linked to immigration

- Increase in cross-border movements between Western European countries
- Increase in labour and family unification migration into Western European countries
- Increase in applications for asylum
- Concerns about cross-border organized crime

Linked to the **European integration** project

- Undesirable impacts of delays at borders on economic activities
- Desire to complete the creation of the **single market** by gradually removing controls at the Union's internal borders
- Recognition of the necessity to develop common measures to apply to the external border before doing away with controls at the internal border

### KEY POINTS

- Cooperation in Justice and Home Affairs is provided for in the Treaty of Amsterdam.
- The Council of Europe is the main forum for the work of the Council of Europe, which worked slowly and in a fragmented way.
- The Trevi Group was set up in 1975, which tackled issues at the European level.
- The Trevi Group led to the creation of the Justice and Home Affairs (JHA) policy clubs.

### Schengen

the most significant challenge is to do a

movement within the EC/EU was to be secured; long-term EU residents of third countries—that is, non-EU citizens who had relocated to the EU and who held residence and work permits; and **third-country nationals (TCNs)**, including labour migrants and refugees seeking to enter the collective territory of the EC/EU. Early efforts to cooperate were launched not by the EU, but by the **Council of Europe (CoE)**, the membership of which comprised both East and West European countries. Judicial matters were raised often at CoE meetings. While the CoE's work was significant, the drawbacks of its processes, including slow and 'lowest common denominator' policy output, were also clear.

Cognizant of the shortcomings of the CoE, member states set up the **'Trevi Group'** in 1975 as an informal assembly to deal with cross-border terrorism through **closer cooperation** among EC law enforcement authorities. Trevi was a loose network rather than an institution, and the meetings concluded in non-binding **consultations** on organized international crime, including drug and arms trafficking. Subsequently, several other groups were established, including the Judicial Cooperation Group, the Customs Mutual Assistance Group, and the Ad Hoc Groups on Immigration and Organized Crime. These groups spanned the four JHA policy clusters that were gradually becoming Europeanized: immigration policy; asylum policy; police cooperation; and judicial cooperation.

#### KEY POINTS

- Cooperation in Justice and Home Affairs was not foreseen in the Treaty of Rome.
- The Council of Europe (a non-EC institution) was the main forum for the discussion of JHA issues, but it worked slowly and its output was meagre.
- The Trevi Group was created in 1975 as a loose network within which terrorism might be discussed at the European level.
- The Trevi Group led to the setting up of similar groups in related areas.

### The Schengen experiment

Perhaps the most ambitious project of these early years was Schengen. In 1985, a number of EC member states decided to do away with border controls. This

was formalized in the 1985 Schengen Agreement and later the 1990 Schengen Implementation Convention. Belgium, the Netherlands, and Luxembourg (the 'Benelux' countries), along with Germany, France, and Italy, created a new system that would connect their police forces and customs authorities. They also created the **Schengen Information System (SIS)**, an innovative, shared database that stored important information (such as criminal records and asylum applications), and which was accessible by national law enforcement authorities. Schengen's primary objective was to develop policies for the Community's external borders that would eventually remove the EC's internal borders. This was an ambitious goal of which the UK, Ireland, and Denmark remained extremely sceptical. Despite the fact that Schengen involved only some member states, it became a model for the EC (and later the Union) as a whole.

Within the Schengen framework, significant progress was made in each of the four emergent areas of cooperation. With respect to asylum, Schengen instituted a new system for assigning responsibility to review asylum claims to one state in order to stop multiple asylum applications and reduce the administrative costs of processing duplicate asylum claims. Schengen also provided the groundwork for an EU-wide visa policy through a common list of countries the citizens of which would need an entry visa, introducing also uniform Schengen visas. There was more modest output in judicial cooperation, with the easing of extradition procedures between member states. Finally, Schengen involved cooperation on law enforcement, particularly with regard to drug trafficking. However, since most of this work fell outside the EC decision-making structure, it was conducted away from the scrutiny of the general public and their elected representatives (see Box 20.2).

#### KEY POINTS

- The 1985 Schengen Agreement was a commitment by a subset of EC member states to remove controls at their internal borders.
- Steps were taken by the Schengen members to agree on common rules on their external borders, for example, with regard to visa policy.
- For those countries involved, Schengen allowed national civil servants in these fields to become accustomed to European-level cooperation.
- Significant progress was made in each of the four emergent areas of cooperation within Schengen.

### BOX 20.2 WHAT IS SCHENGEN?

Named after the small Luxembourg border town where a subset of the member states of the then EC resolved to lift border controls, the Schengen system is considered a path-breaking initiative to provide for ease of travel between member states. In 1985, France, Germany, and the Benelux countries signed the first Schengen Agreement and were later joined by nine other EU members, bringing the total number of participating states to 15. The Schengen accords sought to remove controls on persons, including third-country nationals (TCNs), at their internal borders while allowing member states to reintroduce them only under limited circumstances. Member states agreed to develop common entry policies for their collective territory, to issue common entry visas, to designate a responsible state for reviewing asylum claims, and to combat transnational crime jointly. They also created a novel database—the Schengen

Information System (SIS)—to exchange information between the member states on certain categories of individual and property. Because the original SIS was designed to interlink at most 18 countries, a new version, SIS II, is to be launched, made necessary by the enlarged EU. The current 26 Schengen countries are: Austria; Belgium; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; the Netherlands; Norway; Poland; Portugal; Slovakia; Slovenia; Spain; Sweden; and Switzerland. Four of these countries (Iceland, Liechtenstein, Norway, and Switzerland) are not members of the EU. Two EU countries (the UK and Ireland) are not part of the Schengen system, although they have recently chosen to **opt in** on an issue-by-issue basis. Bulgaria, Cyprus, and Romania have opted in, but implementation is still pending.

## Maastricht and the ‘third pillar’

Efforts were intensified in the early 1990s to shift the locus of decision-making towards the European institutions. With the implementation of the Treaty on European Union (TEU) in 1993, Justice and Home Affairs (JHA) was incorporated into the European Union, forming its third pillar. The TEU identified the following areas of ‘common interest’: asylum policy rules applicable to the crossing of the Union’s external borders; immigration policy and the handling of third-country nationals (TCNs); combating drug addiction and drug trafficking; tackling international fraud; judicial cooperation in civil and criminal matters; customs cooperation; police cooperation to combat and prevent terrorism; and police cooperation in tackling international organized crime. The Treaty also created a new institutional home for the groups that had been set up in earlier decades and created a decision-making framework. However, this new JHA pillar was the product of an awkward inter-state compromise. In the run-up to Maastricht, while a majority of member states supported bringing JHA matters into the Union, they remained divided over how this should be done. Some argued that JHA should be handled within the first pillar, as a **supranational** policy; others preferred to keep this sensitive field as a largely intergovernmental dialogue.

Title VI TEU reflected the institutional consequences of this political compromise. With the third

pillar, the Treaty established an intergovernmental negotiating sphere that marginalized the Community institutions, particularly the European Commission, within the JHA decision-making process. This third pillar set-up diverged significantly from standard decision-making in the EC. The key decision-taking body became the JHA Council. The European Commission’s usual function as the initiator of European legislation (see Chapter 9) was diminished by a shared right of initiative in JHA and the role of the European Parliament did not extend beyond consultation, a situation that led to accusations that JHA exemplified the Union’s **democratic deficit** (Geddes, 2000; Uçarer, 2014; Bache et al., 2014; see also Chapter 24). The European Court of Justice (ECJ), the body that might have enhanced the **accountability** and judicial oversight of policy, was excluded from jurisdiction over JHA matters (see Chapter 12).

Although bringing JHA into the EU was an important step, critics of the third pillar abounded. Two interrelated criticisms were advanced. Critics lamented the lack of policy progress in the post-Maastricht period. The problem was that the post-Maastricht institutional arrangements were ill equipped to handle the pressure or indeed the existing, workload falling under JHA. The decision-making framework was cumbersome, often non-binding policy instruments necessary for long-drawn-out (and potentially inconclusive) negotiations. All decisions in the third pillar had to be made unanimously and this led to deadlock. When

was reached, the denominator of negotiations continued to remain at a time when the image vis-à-vis

### KEY POINTS

- The Maastricht Treaty created a third pillar.
- The institutional framework of the third pillar was largely intergovernmental.
- Key institutions of the third pillar were marginalized.
- The JHA framework was established in the mid-1990s.

## Absorbing the Amsterdam

In the run-up to the Amsterdam Treaty, proposals for reform included the following: the European Commission, the European Court of Justice, the elimination of the pillar structure, and the incorporation of the third pillar into the European Union. As with the Amsterdam Treaty, the debate over the

The challenge was to create a new institutional framework by creating a new body, the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP). Within such an arrangement, the High Representative would be responsible for coordinating the external relations of the Union. The Amsterdam Treaty brought significant changes to the third pillar.

Second, the third pillar was integrated with the first pillar. The Schengen system was integrated into the first pillar.

The first pillar was the

reached, the result was often a lowest-common-denominator compromise that pleased few. Negotiations continued to be secretive and the European Parliament remained marginalized, particularly problematic anytime when the Union was trying hard to improve its image vis-à-vis its citizens.

#### KEY POINTS

- The Maastricht Treaty, which came into effect in 1993, created a 'third pillar' for Justice and Home Affairs.
- The institutional framework put in place was intergovernmental and cumbersome.
- Key institutions such as the EP and the Court were marginalized.
- The JHA framework was subject to much criticism in the mid-1990s.

### Absorbing the third pillar: from Amsterdam to Lisbon

In the run-up to the 1999 Amsterdam Treaty, proposals for reforming Justice and Home Affairs (JHA) included the following: enhanced roles for the Commission, European Parliament (EP), and Court of Justice; the elimination of the unanimity rule; and the incorporation of the Schengen system into the European Union. As with Maastricht, there was a fierce political debate over these issues.

The challenge was to make the Union 'more relevant to its citizens and more responsive to their concerns', by creating an 'area of freedom, security and justice' (AFSJ) (Council of the European Union, 1996). Within such an area, barriers to the free movement of people across borders would be minimized without jeopardizing the safety, security, and human rights of EU citizens. The Amsterdam compromise led to three important changes. First, parts of the Maastricht third pillar were transferred to the first pillar, or 'Communitarized'. Second, the institutional framework for issues that remained within the third pillar was streamlined. And third, the Schengen framework was incorporated into the Union's *acquis communautaire*.

#### New first-pillar issues under Amsterdam

The Communitarization of parts of the erstwhile third pillar was the most significant development at

Amsterdam with respect to JHA matters. These provisions called for the EU Council to adopt policies to ensure the free movement of persons within the Union, while concurrently implementing security measures with respect to immigration, asylum, and external border controls. The Treaty also specified new decision-making rules. A transition period of five years was foreseen, during which unanimity was required in the JHA Council following consultations with the EP. After five years, however, the Commission would gain an exclusive right of initiative, member states losing their right to launch policy instruments. While the EP's access to the decision-making procedure would still be limited to consultation in most cases, an automatic shift to the **co-decision** procedure (now the **ordinary legislative procedure**, or OLP), which would give the EP much more of a say, was foreseen in the area of uniform visa rules and the procedures for issuing visas. The Court of Justice would receive a mandate for the first time, allowing it to undertake **preliminary rulings** in policy areas falling within the first pillar in response to requests by national courts (see Chapter 12). Despite these improvements, however, the new Amsterdam architecture turned out to be a formidable maze created through masterful 'legal engineering' for political ends and opaque even for seasoned experts.

#### The left-over third pillar: cooperation in criminal matters

The Amsterdam reforms left criminal matters in the third pillar. The amended Title VI included combating crime, terrorism, trafficking in persons and offences against children, illicit drugs and arms trafficking, corruption, and fraud. The Treaty envisaged closer cooperation between police forces, customs, and judicial authorities, and with **Europol**, the European Police Office (see 'Post-Maastricht developments in policy'), seeking an approximation of the criminal justice systems of the member states as necessary.

While the new Title VI essentially retained the intergovernmental framework created at Maastricht, the Commission obtained a shared right of initiative for the first time—an improvement over its pre-Amsterdam position. The EP gained the right to be consulted, but that was all. The Treaty constrained the Court in a similar fashion in that it recognized its jurisdiction to issue **preliminary rulings** (see Chapter 12) on the instruments adopted under Title VI, but importantly made this dependent on the **assent** of the member

states. While the Commission, Parliament, and Court were to continue to struggle to play an active role in the third pillar, the Council retained its dominant decision-making function and unanimity remained the decision rule used in third pillar legislation.

### Absorbing Schengen

After much debate, Schengen was incorporated into the EU by means of a protocol appended to the Amsterdam Treaty. The Protocol provided for the closer cooperation of the Schengen 13 (that is, the EU15 minus Ireland and the UK) within the EU framework. With this development, cooperation on JHA matters became even more complicated, involving various overlapping groupings. There were those EU members that agreed to be bound by the Amsterdam changes (the EU12); Denmark chose to **opt out** altogether, and the UK and Ireland would remain outside unless they chose to opt in. Moreover, there were actually 15 signatories to the Schengen agreement (the Schengen 15), of which 13 were EU members and two were not (Iceland and Norway). The two members of the EU that remained outside the Schengen system, the UK and Ireland, decided to take part in some elements of Schengen, including police and judicial cooperation. Of the 12 countries that subsequently joined the EU in 2004 and 2007, nine joined the Schengen area fully in 2007. Non-EU Switzerland partially joined Schengen in December 2008. This makes for quite a complex system: of the current 26 members, 22 are EU members and four (Iceland, Liechtenstein, Norway, and Switzerland) are not. As of 2012, three current EU members (Bulgaria, Romania, and Cyprus) are in line to join. Two current EU members (the UK and Ireland) remain outside the Schengen area and three non-EU microstates (Monaco, San Marino, and the Holy See) are de facto Schengen members because they maintain open borders with their neighbours. One could argue that the incorporation of Schengen into the *acquis communautaire* did not result in desired simplification, but rather maintained, if not amplified, the convoluted system of the early 1990s. Not surprisingly, some now regard this particular aspect of AFSJ as the ultimate example of a **multi-speed**, or 'à la carte', Europe.

The Treaty of Nice made few substantial changes to these institutional developments, although it did extend the shared right of initiative for the Commission in the otherwise intergovernmental (residual) third pillar.

### 'Normalizing' AFSJ: the Constitutional Treaty and the Lisbon Treaty

The **Convention on the Future of Europe** and the 2003–04 intergovernmental conference (IGC), culminating in the October 2004 signing of the **Constitutional Treaty** (CT), marked the next, if incomplete, stage in JHA reform. The CT provided for the 'normalization' of JHA by abolishing the pillar structure, greater use of **qualified majority voting** (QMV) except for judicial and police cooperation in criminal matters (JPCCM). It retained the shared right of initiative for the Commission and the member states in judicial cooperation in criminal matters, but foresaw proposals coming from coalitions composed of at least 25 per cent of the membership of the Union. These were all efforts to streamline the decision-making process while preserving a diminished capacity for member states to block decisions. The CT further provided for a role for national parliaments to monitor the implementation of JHA policies and for a **judicial review** of compliance by the ECJ. Finally, the Constitution retained the British and Irish opt-ins, and the Danish opt-out.

However, the CT was stalled when it was rejected in referenda in France and the Netherlands. The AFSJ provisions were later given a new life in the Lisbon Treaty, signed on 13 December 2007. The Lisbon Treaty contains all of the major innovations pertaining to AFSJ that were present in the CT, and underscores its salience by placing it ahead of **economic and monetary union** (EMU) and the **Common Foreign and Security Policy** (CFSP) in the Union's fundamental objectives. The Lisbon Treaty also incorporates the Prüm Convention (sometimes referred to as 'Schengen III') into the *acquis communautaire*. The Lisbon Treaty foresaw jurisdiction for the **Court of Justice of the EU** (CJEU) to enforce all AFSJ decisions apart from provisions adopted under the post-Amsterdam third pillar. As of December 1, 2014, the normal powers of the Commission and the ECJ now extend to all areas of AFSJ. The EP will operate with the ordinary legislative procedure (OLP, formerly co-decision) authority in almost all cases. However, the Lisbon Treaty's transformation provisions were also brought about by compromise. Opt-outs and opt-ins remain for Denmark, the UK, and Ireland (see Table 20.1). These concessions are criticized as moving further towards a multi-speed Europe. Nonetheless, the Lisbon Treaty represents the most significant reform of AFSJ to rectify vexing institutional problems that were created by Maastricht.

Pre-Maastricht JHA	Post-Maastricht third pillar	Post-Amsterdam first pillar (Communicarized areas of former third pillar) Immigration; asylum; Police and Judicial Cooperation in Civil Matters	Post-Amsterdam third pillar Police	Lisbon Treaty
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Table 20.1 JHA/AFSJ cooperation: from Trevi to Lisbon

	Pre-Maastricht JHA	Post-Maastricht third pillar	Post-Amsterdam first pillar (Communitarized areas of former third pillar) Immigration; asylum; Police and Judicial Cooperation in Civil Matters	Post-Amsterdam third pillar Police and judicial cooperation in criminal matters	Lisbon Treaty
	Title VI TEU, Article K	Title IV TEC, Articles 61–69	Title IV TEC, Articles 61–69	Title VI TEU, Articles 29–42	Title IV TEC, Articles 61–69 Consolidated pillars
European Parliament	No role	Limited role, consultation	1999–2004 Consultation	Consultation	Ordinary legislative procedure
European Court of Justice	No jurisdiction	No jurisdiction	Referral for an obligatory first ruling for national last-instance courts	Preliminary rulings for framework decisions and decisions, conventions established under Title VI and measures implementing them	Jurisdiction to enforce all AFSJ decisions after 1 December 2014
Council	No direct role	Dominant actor	Dominant but Commission and EP ascendant	Dominant actor	Shared power position <b>'Enhanced cooperation'</b> possible Exclusive right of initiative
Commission	Consultative Occasional observer at intergovernmental meetings	Shared right of initiative with member states except judicial and police cooperation (no right of initiative)	Shared right of initiative (member states asked the Commission to assume an exclusive right for asylum issues)	Shared right of initiative (previously impossible)	
Decision-making mechanisms	Intergovernmental negotiations Non-binding decisions in the form of resolutions Binding decisions in the form of treaties	Unanimity rule on all issues	Council acts unanimously on proposals from Commission and member states for the first five years Opt-in (UK, Ireland), opt-out (Denmark)	Council acts unanimously on proposals from Commission and member states	QMV for most decisions Opt-out (Denmark on judicial cooperation) Opt-ins (UK and Ireland)

Note: This covers asylum policy, the crossing of the external borders of the EU, immigration policy and the handling of third country nationals, combating drug addiction and trafficking, tackling international fraud, judicial cooperation in civil and criminal matters, customs cooperation, and police cooperation to combat and prevent terrorism and organized international crime.  
Source: adapted and expanded from Ujarek, 2013.

## KEY POINTS

- The Amsterdam Treaty sought to address the shortcomings of the third pillar by bringing immigration and asylum, as well as judicial and police cooperation in civil matters, into the first pillar. The third pillar, cooperation in criminal matters (police and judicial cooperation), remained intergovernmental.
- Schengen was incorporated into the Treaty, but this did not result in simplification given the overlapping memberships involved in this agreement.
- The **Nice Treaty** added few changes to the Amsterdam set-up and extended a right of shared initiative to the Commission in the third pillar.
- The **Lisbon Treaty** is the most significant reform of Justice and Home Affairs to date. It makes important strides in normalizing this policy domain in the aftermath of the failed Constitutional Treaty.

## Policy output: baby steps to bold agendas

There have been several spurts of policy since the beginnings of cooperation on Justice and Home Affairs (JHA), building on the early pre-Maastricht efforts, but gathering momentum after Maastricht and Amsterdam. More recently, in addition to making progress on the four main dossiers (immigration, asylum, police cooperation, and judicial cooperation), the European Union has acknowledged the importance of the external dimension of JHA and has embarked on attempts to export its emergent policies beyond the Union.

### Post-Maastricht developments in policy

After Maastricht, member states first focused on rules to apply to third-country nationals (TCNs) entering the Union territory. The Council formulated common rules in this area for employment and education, and recommended common rules for the expulsion of TCNs. It also recommended a common format for 'bilateral readmission agreements' (which would allow for the deportation of TCNs) between member states and third countries. In 1997, an extradition convention was concluded among the EU member states. Agreement was also reached on the format of a uniform

visa, as well as on a list of countries the nationals of which required a visa to enter EU territory. These relatively unambitious agreements sought to develop comparable procedural steps for the entry, sojourn, and expulsion of TCNs.

The most notable development in asylum was the conclusion of the 1990 Dublin Convention, an instrument of binding regional international law, which designated one member state as responsible for the handling of an asylum claim, resting on the concepts of safe countries of origin and transit into the EU, rejecting applications lodged by the nationals of countries deemed safe or by those who had passed through safe countries en route to EU territory. Refugee rights activists frowned upon these policies as dangerously restrictive and warned that such rules could potentially weaken refugee protection.

Work began on the European Dactyloscopy (EU-RODAC)—that is, fingerprinting—system, which would allow member states to keep track of asylum seekers, as well as on the negotiation of a common framework for the reception of individuals seeking temporary protection status in Union territory. The Maastricht Treaty also embarked on the ambitious agenda to create a European Police Office (Europol) to enhance police cooperation and information exchange in combating terrorism and the trafficking of drugs and human beings. Based in The Hague, Europol became operational in October 1998. Ministers of the member states also signed an agreement to create a Europol Drug Unit to assist in criminal investigations. The Union thus sought to enlist the help of countries considered to be contributing to the supply of drugs, particularly those in the Caribbean and Latin America.

### Amsterdam and Tampere

Following Amsterdam, progress accelerated, aided by a European Council dedicated exclusively to JHA. The goal of this summit, which was convened in Tampere (Finland) in October 1999, was to evaluate the impact of Amsterdam and to discuss the future direction of cooperation. Included in the 'Tampere milestones' were a reiterated commitment to the freedom of movement, development of common rules for the treatment of TCNs, including guidelines for dealing with racism and xenophobia, the convergence of judicial systems, and the fostering of **transparency** and

democratic goals were being migration and beings.

On matters advocated a 'co to the combat political and ec individuals to leave AFSJ policies sh eign policy, incl economic relati eration between address the caus ing countries to flight and speed grants from Uni

EU member ating a Common including standa for asylum appli gee recognition, as the coordinat asylum and soo including on rec a common set of of asylum claims, tion schemes for the creation of th to aid EU recipie fluxes, such as th from Bosnia and Convention had t tem was now fun was in progress.

In matters of j third pillar issues, foreseen in which decisions and cro prosecutions, as w procedural law, w Tampere also c tal Cooperation t nual prosecutors Hamjast would ai other criminal in European Police C about officers from European Police C



control. Among the more far-reaching were better controls on, and management of, migration and the deterrence of trafficking in human

In matters of immigration and asylum, Tampere adopted a 'comprehensive approach', closely linked with the combating of poverty, and the removal of the political and economic conditions that compel individuals to leave their homes. It was argued that JHA/Justice policies should be linked closely to tools of foreign policy, including development cooperation and economic relations. This called for intensified cooperation between countries of origin and transit to address the causes of flight, empowering neighbouring countries to offer adequate protection to those in flight and speeding up the removal of illegal immigrants from Union territory.

EU member states committed themselves to creating a Common European Asylum System (CEAS), including standards for reviewing claims and caring for asylum applicants, and comparable rules for refugee recognition. The Commission was designated as the coordinator of policy proposals dealing with asylum and soon introduced numerous proposals, including on reception conditions for refugees, and a common set of minimum standards for the review of asylum claims, as well as common family reunification schemes for refugees. The Union also approved the creation of the European Refugee Fund, designed to aid EU recipient states during massive refugee influxes, such as those experienced during the fallout from Bosnia and Kosovo. By this point, the Dublin Convention had taken effect, and the EURODAC system was now functioning. The creation of the CEAS was in progress.

In matters of judicial and police cooperation, still third pillar issues, a European Judicial Area (EJA) was foreseen in which the **mutual recognition** of judicial decisions and cross-border information exchange for prosecutions, as well as minimum standards for civil procedural law, would be ensured.

Tampere also created the European Union's Judicial Cooperation Unit (Eurojust). Composed of national prosecutors, magistrates, and police officers, Eurojust would aid national prosecuting authorities in their criminal investigations of organized crime. A European Police College (CEPOL), which would also admit officers from the **candidate countries**, and a European Police Chiefs Task Force (PCTF) were also

planned. Priorities were established for fighting money laundering, corruption, euro counterfeiting, drug trafficking, trafficking in human beings, the exploitation of women, the sexual exploitation of children, and high-tech and environmental crime, designating Europol as the lead agency in these efforts. Importantly, Tampere also established **benchmarks** and set deadlines for the accomplishment of its goals, which enlivened the policy process. Debate on the numerous items on the agenda after Tampere was protracted. Blame for the delays was variously attributed. While the member states (operating through the Council) blamed the Commission, critics noted that the Council was in no particular hurry to press forward with the adoption of these measures. The Commission tabled new and revised initiatives relating to asylum procedures: on reception conditions for asylum seekers; on the definition and status of refugees; and on a first-pillar instrument to replace the Dublin Convention. Nonetheless, the Presidency Conclusions issued at the end of the June 2002 Seville European Council called emphatically for a 'speeding up' of work, suggesting continued frustration with the progress made since Tampere.

### The Hague and Stockholm Programmes and Beyond

The next phase of cooperation would involve creating an integrated border management system and visa policy, complete with a Visa Information System (VIS) database to store the biometric data of visa applicants, a common policy on the management of migration flows to meet economic and demographic needs, and the creation of the EJA. The Hague Programme that was subsequently adopted at the November 2004 Brussels European Council reiterated the call for the abolition of internal border controls soon after the projected launch of SIS II (see Box 20.3). The Hague Programme called for the implementation of the CEAS and the gradual expansion of the European Refugee Fund. The Council Secretariat's Situation Centre (SitCen), which would provide strategic analyses of terrorist threats, was endorsed and Frontex, responsible for securing the external borders of the EU, was created. The Hague Programme invited greater coordination on the integration of existing migrants, and, for the external dimension, stressed partnership with countries of origin and/or transit, and the conclusion

### BOX 20.3 STRAINS ON SCHENGEN AND THE FREEDOM OF MOVEMENT: THE EFFECTS OF DOMESTIC POLITICS

Schengen is arguably the most important multilateral mechanism that jump-started the AFSJ. However, it has recently come under strain as a result of the **Arab Spring** at a time when the EU is facing a significant crisis of the euro, its other most visible achievement. In May 2011, Schengen's provisions were temporarily suspended between Italy and France, and border checks were reinstated. The crisis was precipitated when Italy, not happy with the lackadaisical support that it received from the EU in the face of migrants arriving in Lampedusa and elsewhere to flee the upheaval in North Africa, issued about 22,000 travel documents to arrivals. Given the absence of border controls, these travel documents would allow arriving North Africans to travel onward, including to France. Despite the fact that Schengen is based on mutual recognition of entry and travel permits throughout the Schengen area, France refused to recognize the Italian documents as valid, reinstated border checks, and started sending individuals with these documents back to Italy. Unrelatedly, Denmark, citing a perceived increase in cross-border crime, also briefly reinstated controls at its Schengen borders. This was a concession to the anti-immigration **Danish People's Party**, on the cooperation of which the government relied in the legislative process. Meanwhile, while the initial stand-off de-escalated between France and Italy, President Sarkozy announced in March 2012, from the campaign trail (a month before critical national elections in France), that France might pull out of Schengen unless the EU stemmed illegal migration. As with Denmark, this was in an effort to curry favour with nationalist, anti-immigration, and far-right electorate and political parties. Suddenly, it appeared that domestic politics and electoral cycles in these three EU member states, complicated by international developments, were poised to undermine Schengen and what it represented. Ultimately, no

politician wants to be blamed for the collapse of Schengen and the reinstatement of cumbersome border checks. That being said, this brief episode, which Schengen weathered, nonetheless showed that it is vulnerable.

In November 2014, the UK Prime Minister, David Cameron, sparked additional controversy in an op-ed in the *Financial Times* by arguing that 'Free movement within Europe needs to be less free' and announcing limits to the rights of EU member migrants through quotas and other measures. Adding to the already difficult interactions with the UK brought on by the plans for a UK referendum on membership in the EU, this occasioned sharp critique from the European Commission as well as other EU members such as Germany on the grounds that such a move would be incongruent with the freedom of movement of EU citizens protected by common market provisions. Chancellor Merkel went as far as noting that Germany would be prepared to accept a UK exit from the EU if the UK insisted on curbing EU migration and violating the non-negotiable principle of freedom of movement of labour. Cameron's rhetoric should be placed in the context of the 2014 European Parliament elections during which the anti-EU and populist **UKIP (United Kingdom Independence Party)** received more votes than any other British party, showing once again that domestic politics and posturing has important consequences. During the summer of 2015, when Schengen was marking its 30th anniversary, thousands of asylum seekers, mainly from Syria, entered into the EU. Many EU states temporarily reintroduced border controls, underscoring differences of opinion between member states and further highlighting the strains on collective management of migration flows.

of further readmission agreements as necessary (see 'Extending JHA/AFSJ cooperation outwards'). The Hague Programme arguably gave policy-making a push, resulting in the adoption of hundreds of texts in 2007 alone.

The Hague Programme was followed by the Stockholm Programme to guide AFSJ cooperation for 2010–14, which echoes the political priorities of its predecessors: promoting **European citizenship** and fundamental rights; an internal security strategy to protect against organized crime and terrorism; integrated border management; a comprehensive Union migration policy; completing the CEAS by 2012 (a missed deadline); and integrating these priorities into the external policies of the EU. It foresees an expansion of Europol, as well as several other measures in the police cooperation realm, and further empowers Frontex.

#### KEY POINTS

- Since Maastricht, significant policy progress has been made in the fields of immigration, asylum, police, and judicial cooperation, even though policy output has fallen short of initial expectations.
- Policy-making focused on developing common rules for travel within and entry into the Union, **harmonizing policies**, offering protection to asylum seekers and refugees.
- It also led to the creation of better information exchange and cooperation between law enforcement officials and developing mutual recognition of judicial decisions within the EU.
- The Hague and Stockholm Programmes gave policy-making a push by calling for the implementation of a common asylum system, and stressed **partnership with countries of origin and/or transit**.

## Extending outwards

During the initial years of the EU, the Home Affairs and Justice Ministers pushed for the removal of barriers to the free movement of people within the European Union. The Commission planned **enlargement** of the EU territory outward. The JHA/AFSJ matters were in mind. Member states were looking to solidify EU ties with third countries to tighten borders (Uçarer, 2002). The EU sought **agreements** with third countries. These attempts to adopt close varied management regimes in Central and Eastern Europe and the Mediterranean region of these areas.

EU policies began to focus on enlarging countries, particularly in the Balkans. Schengen agreements with third countries, such as the **Republic, in which** individuals returned to their countries were deemed to be in transit, compelling them to travel through the EU. At the 1993 summit, the future membership of the EU was discussed. Rapid incorporation of new members after Amsterdam, a **accession** part of the enlargement process, some of which involved the removal of border controls. The Commission made for policy-making a push by calling for the implementation of a common asylum system, and stressed **partnership with countries of origin and/or transit**.

## Strengthening JHA/AFSJ cooperation

During the initial phases of cooperation in Justice and Home Affairs, the immediate goal was to lift barriers to the free movement of persons within the European Union. As the 1990s progressed, the rapid enlargements projected the collective territory outwards, making it necessary to discuss JHA/AFSJ matters with the Union's future borders. Member states began to involve certain countries in some of their initiatives, attempting to solidify EU border controls by recruiting other countries to tighten their own controls (Lavenex and Walker, 2002). This involved entering into collective agreements with countries of origin and transit. These attempts to recruit neighbouring countries to adopt close variations of the EU's emergent border management regime were particularly pronounced in Central and Eastern Europe (CEE), the Maghreb, and the Mediterranean basin, because of the proximity of these areas to the EU.

EU policies began to radiate out to neighbouring countries, particularly those applying for membership. Schengen countries collectively signed agreements with Poland, Hungary, and the Czech Republic, in which the latter agreed to readmit individuals returned from EU territory. Most CEE countries were declared safe countries of origin and transit, compelling them to accept asylum seekers who had travelled through their territory to get to the EU. At the 1993 Copenhagen European Council, future membership was made conditional upon the rapid incorporation of the EU's JHA *acquis*, which, after Amsterdam, also included the Schengen *acquis*. The accession partnerships included an aid component, some of which was tied to the improvement of border controls. The EU assumed an advisory role for policy-making in CEE countries, with the aim of helping them to develop policies in line with those of the EU (Grabbe, 2006). Applicant countries began adopting the EU's JHA policies even if that meant implementing, often at the risk of souring relations, restrictive policies vis-à-vis countries the citizens of which had previously enjoyed, for example, visa-free access into their own territories. The 2004, 2007, and 2013 enlargements included the majority of these accession countries (see Chapter 16). JHA's external dimension extends further than would-be member countries, however: the EU expects similar

adjustments of countries that are not part of the enlargement process. These expectations are situated in the broader setting of the Union's external relations (see Chapters 15 and 17), and, more specifically, have become part of its aid and trade policies. Thus North African, Mediterranean, and African, Caribbean, and Pacific (ACP) countries are steered towards adopting some of the EU's deflective immigration and asylum policies to ease migratory pressures into the Union by including sending and transit countries in the screening process. To these ends, in addition to the readmission agreements negotiated by its member states, by 2015, the EU itself implemented readmission agreements with Albania, Bosnia and Herzegovina, Cape Verde, the former Yugoslav Republic (FYR) of Macedonia, Georgia, Hong Kong, Macao, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, Turkey, and Ukraine. The Commission has been negotiating similar agreements with Algeria, Belarus, China, and Morocco. Developments in October 2005 in the Spanish enclaves of Ceuta and Melilla, where hundreds of sub-Saharan Africans attempted to jump razor-wire fences to gain access to Spanish territory and were subsequently expelled to Morocco, intensified calls to cooperate with third countries to secure Europe's borders.

The external dimension of the AFSJ seeks to develop compensatory measures, as the EU seeks to manage its collective borders. Yet the EU's efforts to extend its strict border controls outwards by assisting (and in some cases demanding) the adoption of stricter border control measures elsewhere involves an irony. While the EU attempts to liberalize the freedom of movement within its territory, it does so by applying potentially illiberal policies at its borders and by advocating such policies in its relations with third countries (Uçarer, 2001; see also Box 20.4). Frontex also plays a crucial role by engaging countries that are on EU's land borders in the southeast and the Western Balkans, and on its maritime borders in the Mediterranean. Frontex is capable of engaging perceived security threats through 'rapid border intervention teams' (RABITs), by dispatching aircraft, helicopters, and other patrol boats to hot spots. Such deployments, with operational names such as 'Hermes' and 'Poseidon', frequently occur in the Mediterranean, particularly near Malta and Italy, with their exposure to North Africa.

### BOX 20.4 FIGHTING TERRORISM IN THE EUROPEAN UNION

JHA/AFSJ cooperation owes its genesis partly to the efforts of the Trevi Group, the main goal of which was to establish cross-border cooperation in the fight against organized crime and terrorism. These matters were subsequently incorporated into the Union. Europol was created to facilitate the apprehension and prosecution of transborder criminals, and established jointly accessible databases to enhance police cooperation. The Commission began work in late 1999 to develop an instrument that would outline the Union's position on terrorism, covering terrorist acts directed against member states, the Union itself, and international terrorism.

EU's focus on terrorism was heightened following the 11 September 2001 ('9/11') attacks. EU politicians expressed solidarity with the USA and supported military operations launched in Afghanistan. The events in the USA prompted the EU to move speedily towards adopting anti-terrorist policies already in preparation. Terrorism was defined as 'offences intentionally committed by an individual or a group against one or more countries, their institutions or people, with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country' (European Commission, 2001b). In October 2001, the Council committed the Union to adopting a common definition of terrorist offences, a common decision on the freezing of assets with links to suspected terrorists, and establishing the **European arrest warrant (EAW)** designed to replace the protracted extradition procedures between EU member states with an automatic transfer of suspected persons from one EU country to another. The Council urged better coordination between Europol, Eurojust, intelligence units, police corps, and judicial authorities, and announced work on a list of terrorist organizations, which was adopted in 2001 and later updated. The Union called for increased vigilance for possible biological and chemical attacks, even though such attacks had never previously occurred in the EU. Finally, linking the fight against terrorism to effective border controls, the European Council insisted on the intensification of efforts to combat falsified and forged travel documents and visas (European Council, 2001). The focus on anti-terrorism measures intensified yet further after the 11 March 2004 attacks in Madrid. While no stranger to terrorist attacks from separatist Basque militants, Spain's trauma sharpened the attention to terrorism. The EU and its member states subsequently negotiated a number of cross-border initiatives to enhance their collective capabilities to combat terrorism. Among these was the Prüm Convention of 2005 which enabled signatories to exchange DNA, fingerprint, and vehicle

registration data to combat terrorism. The possibility that violent acts could be perpetrated by ill-integrated migrants—highlighted by the widely publicized murder of Theo van Gogh, a prominent Dutch film director, at the hands of a Muslim who held dual Dutch and Moroccan citizenship—rekindled the integration debate. Fears about 'home-grown' terrorism hit another high with the 7 July 2005 ('7/7') London bombings and later with the attack on the French satirical weekly *Charlie Hebdo* on 7 January 2015.

The Union is now working on improving its information exchange infrastructure to help with its anti-terrorism efforts. Along with a second-generation Schengen Information System (SIS II), a new EU Visa Information System (VIS) rolled out provisionally in 2011 in North African countries. Possessing interactive capabilities, SIS II includes additional information on 'violent troublemakers' (including football hooligans, but potentially also political protesters) and suspected terrorists, and will also store biometric information (digital pictures and fingerprints). In turn, the VIS will collect and store data from all visa applications in all member states, including biometric data such as digital photos and all ten fingerprints—something that is criticized for potentially falling foul of data protection measures. While the attention directed towards anti-terrorist measures is warranted, the EU's efforts in this field have already attracted criticism from civil liberties and migrants' rights advocates (Statewatch, 2011). Activists caution against a possible backlash against migrants of Arab descent and argue against closing the EU's outer doors even more tightly. Anti-Islam and xenophobic rhetoric displayed by various groups, such as **Pegida (Patriotic Europeans against the Islamisation of the West)** in Germany and political parties such as the **Front National** in France, capitalize on violence that can be linked to persons of migrant origin and raise concerns about further securitization of migration and asylum in Europe. As in the post-9/11 USA, European anti-terrorism measures have attracted sharp criticism from civil libertarians in Europe, who also remain sceptical about closer anti-terrorism cooperation between the US and the EU for data protection reasons. The challenge in Europe is similar to that in the US: developing policy instruments that meet security needs while protecting the civil liberties of individuals residing in the EU territory. The events of 11 September 2001, 11 March 2004, 7 July 2005, and 7 January 2015 seem to have brought JHA cooperation full circle to its Trevi origins. It is certain that this dossier will remain very lively, if controversial, in the future, preserving the security narrative that sits uneasily in a multi-religion, multi-ethnic, and multi-origin Europe.

### KEY POINTS

- Cooperation in JHA (AFSJ) has developed significantly, particularly vis-à-vis terrorism.
- The enlargement of the EU (and therefore the number of applicant countries) has led to the development of rules before the EU.

### Conclusion

Cooperation in JHA has come a long way since the 1970s. It currently occupies a prominent position in EU policy. The Commission now has a clear mandate for creation within it. The status of the European Court of Justice in Luxembourg and Lisbon. Member states strain the sovereignty of member states and the political system. However, the EU can achieve its common goals through significant progress in JHA and Justice (AFSJ). As in the USA and the UK, the summer of 2015 saw the signing of transborder cooperation agreements. The EU is still a young organization with established competence in JHA. It remains significant in maintaining consistency in JHA. The EU must continue to work on JHA, and sometimes

### QUESTION

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## POINTS


- Cooperation in the Area of Freedom, Security, and Justice (AFSJ) has developed a significant external dimension, particularly vis-à-vis the EU's neighbours.
- The enlargement of the Union not only pushes its borders (and therefore the AFSJ) eastwards, but also commits applicant countries to adopt Justice and Home Affairs (JHA) rules before their accession.
- AFSJ policy output also has an impact on countries that are not part of the enlargement process.
- Terrorism is a key challenge facing the EU and its member states.

## Conclusion

Cooperation in Justice and Home Affairs (JHA) has come a long way since its obscure beginnings in the 1970s. It currently occupies a prominent and permanent position in EU **governance**. The European Commission now has a more active role, facilitated by the creation within it of two new Directorates-General. The status of the European Parliament and the European Court of Justice has also improved since Amsterdam and Lisbon. Matters discussed in this field continue to strain the sovereign sensibilities of the EU member states and the policy remains intrinsically intergovernmental. However, few believe that the European Union can achieve its **common market** goals without making significant progress in the Area of Freedom, Security, and Justice (AFSJ). As the events of 11 September 2001 in the USA and the attacks in Madrid, London, Paris, and the summer of 2015 clearly demonstrate, the tackling of transborder issues so typical of this dossier demands coordination and cooperation beyond the state. AFSJ is still a young field compared to the other more established **competences** of the EU. And yet, it demonstrates significant institutional change over time while maintaining consistent policy thrusts.

The EU must contend with a number of important, and sometimes conflicting, challenges specific

to AFSJ cooperation. In order to lift internal border controls on people moving within the EU, the Union must articulate and implement policies to manage its *external* borders. These policies should foster the freedom of movement of EU citizens and third-country nationals within the Union. They should also spell out common rules on the entry of TCNs. To demonstrate its commitment to basic human rights and democratic principles, the EU must protect TCNs against arbitrary actions, uphold their civil liberties, encourage inclusiveness, and deter acts of violence against them. To maintain the rule of law, the Union must press forward with judicial and police cooperation, while ensuring the privacy and civil liberties of those living in the EU. To live up to its international obligations, the EU must keep its policies in line with its pre-existing treaty obligations, particularly in the field of refugee protection. To protect its **legitimacy** and to improve its public image, the EU must take pains to address issues of transparency and democratic deficit. Finally, it must undertake these endeavours without raising the spectre of an impenetrable 'Fortress Europe', which some argue already exists. The challenges facing the policy remain substantial.

 QUESTIONS

- What are the catalysts that have led to the Europeanization of Justice and Home Affairs/Area of Freedom, Security, and Justice policy?
- What have been the impediments to effective cooperation in JHA/AFSJ matters?
- If the issues dealt with in JHA/AFSJ can also be addressed through unilateral decisions by individual countries, or by bilateral agreements concluded with interested parties, why is there such an effort to develop multilateral and collective responses in this field?