An Appraisal of the European Commission of Crisis

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CEPS

Sergio Carrera

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CENTRE FOR EUROPEAN POLICY STUDIES (CEPS)
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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
CAMM	Common Agendas on Migration and Mobility
CEAS	Common European Asylum System
CIR	Common Identity Repository
CJEU	Court of Justice of the European Union
COM	European Commission
CSDP	Common Security and Defence Policy
DG	Directorate General
DRF	Democracy, Rule of Law and Fundamental Rights Mechanism
EASO	European Asylum Support Office
EAW	European Arrest Warrant
EBCG	European Border and Coast Guard
ECA	European Court of Auditors
EUCFR	EU Charter of Fundamental Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECTC	European Counter Terrorism Centre (see Europol)
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
EEAS	European External Action Service
EIO	European Investigation Order
EMSC	European Migrant Smuggling Centre (see Europol)
EPO	European Production and Preservation Order
EPPO	European Public Prosecutor's Office
ESIFs	European Structural and Investment Funds
ESO	European Supervision Order
ETIAS	European travel information and authorisation system
eu-LISA	European Agency for the Operational Management of large-scale IT systems in the Area of Freedom, Security and Justice
EUBAM	EU Border Assistance Mission
EUNAVFOR-MED	Operation Sophia
EURAs	EU Readmission Agreements
Eurodac	European Automated Fingerprint Identification System

Eurojust	EU Judicial Cooperation Agency
Europol	EU Police Cooperation Agency
EUTF	EU Trust Funds
FRA	European Union Agency for Fundamental Rights
FRO	Frontex Fundamental Rights Officer
Frontex	EU External Borders Agency (see also EBCG)
GDPR	General Data Protection Regulation ((EU) 2016/679)
HOME	Home Affairs DG
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of European Commission
ILO	International Labour Organisation
JHA	Justice and home affairs
JIT	Joint investigation team
JPSG	Joint Parliamentary Scrutiny Group (European Parliament)
JUST	Justice DG
JWF	Joint Way Forward
LEA	Law enforcement authority
LIBE	Civil Liberties, Justice and Home Affairs Committee, European Parliament
MID	Multiple Identity Detector
MLATs	Mutual Legal Assistance Treaties
MFF	EU Multiannual Financial Framework
MRCC	Maritime Rescue Coordination Centre
OLAF	European Anti-Fraud Office
PNR	Passenger name record
REFIT	Regulatory Fitness and Performance Programme
SAR	Search and Rescue at Sea
sBMS	Shared biometric matching system
SBC	Schengen Borders Code
SEM	Schengen Evaluation Mechanism
SIS	Schengen Information System
SSI	Single search interface
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

EXECUTIVE SUMMARY

Has the Juncker Commission delivered a "new start" for EU Justice and Home Affairs (JHA) policies? This book examines the question in relation to the performance of the European Commission's intra-institutional setting while taking stock of the most relevant legislative developments in JHA or the Area of Freedom, Security and Justice (AFSJ) from 2014 to 2018.

The Juncker Commission has been dubbed a 'Commission of crisis'. The set of policy priorities laid down in "A New Start for Europe", the President's 2014 political guidelines, have been subject to various events framed as 'crises', which have sent political waves over the legitimacy and fundamentals of European integration in JHA. These have included the 2015 'European refugee humanitarian crisis', the reintroduction of internal border controls in the Schengen area by a few member states, acts of terrorism in several European cities and some EU governments actively backsliding in terms of rule of law.

Following the Introduction, **Section 2** of the book examines the Commission's new structure for JHA, and its intra-institutional configurations. For the first time this Commission included a First Vice-President responsible for Better Regulation, Inter-Institutional Relations, Rule of Law and the EU Charter of Fundamental Rights, Frans Timmermans. He was entrusted with two main roles: first, as a 'watchdog' upholding the EU Charter of Fundamental Rights and the rule of law principles envisaged in the Treaties and monitoring Better Regulation guidelines, across all the Commission's activities; and second, coordinating the work of the three JHA-related Commissioners:

- The Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, Directorate General for Justice and Consumers (DG JUST);
- The Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, Directorate General Migration and Home Affairs (DG HOME);
- The Commissioner for the Security Union, Julian King, also at DG HOME.

The structuring of this Commission's work on JHA into two DGs dealing with separately issues of 'Justice' and 'Home Affairs' has continued to prove a welcome division of responsibilities. However, the exact division of portfolios between all the relevant Commissioners has not always been clear or remained consistent.

Since the emergence of the 'European refugee humanitarian crisis' in 2015, the highest political instances inside the Commission took over most of the themes under the responsibility of each of the Commissioners for 'Home Affairs and Migration'. This has meant the implementation of a 'top-down approach' in decision-shaping and making. The Commission President's cabinet, and chiefly, First Vice-President Timmermans and the Vice-President of the Commission and High Representative of the Union for Foreign Affairs and Security Policy (HR/VP), Federica Mogherini (European External Action Service, EEAS) have been in the driving seat in the Commission's responses to the various 'crises'.

In practice this has meant that there has been not one, but *many* 'Home Affairs' Commissioners. The blurring of Commissioners/Vice-Presidents portfolios has generally played in favour of a *home affairs and security approach* prevailing among all relevant Commissioners and Vice-Presidents in areas such as migration, asylum and judicial cooperation in criminal matters. This has not always allowed for the prioritisation and development of other equally crucial policy approaches in sectors such as foreign affairs, development cooperation, humanitarian aid, trade, justice, employment and social affairs.

The 'Commission of crisis' has put too much focus on border controls and prevention of entry, returns and readmission in cooperation with third countries on migration, countering migrant smuggling, building third country capacity for interception at sea and safeguarding internal security in its overall policy agenda. This has not always allowed the First Vice-President to rigorously fulfil its watchdog mandate in the setting and implementation of Commission policy priorities in view of their compatibility with and impact on the rule of law and fundamental rights, nor in respect of their added value, proportionality and necessity in view of EU Better Regulation guidelines.

Section 3 of the book conducts a detailed examination of the most relevant legal and policy developments by the European Commission from mid-2014 to the end of 2018 in the following AFSJ fields: Schengen and securing borders; asylum and refugees; legal immigration; irregular entry and third-country cooperation on expulsions; criminal justice and police cooperation; and the rule of law and fundamental rights. Special attention is given to the Commission's enactment of legal acts. These developments are critically assessed in view of rule of law, fundamental rights and Better Regulation guidelines, all corresponding to the First Vice-President of the Commission's tasks and lying at the constitutive basis of the EU legal system.

There are three main 'policymaking logics' at stake which summarise and describe the overall performance of the European Commission from mid-2014 to the end of 2018 in relation to the AFSJ: Europeanisation; intergovernmentalism and rule of law backsliding; and informalisation and exceptionalism.

Europeanisation

'Crises' have served as catalysts for the adoption of previously controversial and already existing, as well as some new, EU policy, legislative and institutional ideas by the Juncker Commission. They have provided the ground for the re-design or creation of new Community bodies and EU agencies responsible for coordinating and supporting EU member states and with increasing operational tasks in JHA-related fields. The proposed and adopted reform of the Frontex Agency into a European Border and Coast Guard (EBCG), the creation – through enhanced cooperation – of a European Public Prosecutor's Office (EPPO), a new mandate and a counter-terrorism centre at Europol, and an expanded role for the eu-LISA agency, constitute some cases in point. A key outstanding issue for these community bodies and agencies is that of democratic accountability and judicial control, and effective access to justice and independent complaint mechanisms when their activities impact on fundamental rights.

The Commission has also actively contributed to the initiation and setting up of new EU harmonised legal standards. A key and most visible achievement of this Commission was the formal adoption and entry into force of the new EU data protection framework including the General Data Protection Regulation (GDPR), which is now a world-wide benchmark on privacy protection.

In other areas, the Commission has presented some security or law enforcement-related initiatives in the fight against crime and terrorism whose EU value added, necessity, proportionality and fundamental rights compliance – according to the EU Better Regulation Guidelines – have not been sufficiently proven and independently assessed. These have included policy initiatives such as the 'interoperability' of EU databases, and the related new role attributed to the European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), as well as the presentation of European Production and Preservation Orders (EPO) and a proposal aimed at preventing the dissemination of terrorist content online.

The area of asylum has been negatively affected by a home affairs and 'securitarian' rationale. Some Commission proposals have aimed at reframing some already existing EU asylum instruments falling under the Common European Asylum System (CEAS) as migration and border management instruments. This has been the case for example with the idea to oblige all member states to use 'safe third country' notions that would require them to expel legitimate asylum seekers to countries outside the EU where their safety is not always guaranteed.

This security rationale has also materialised in an increasing focus on conditionality in exchange of resettlement, or the increasing penalisation of asylum seekers who move to a second member state different from the one of

first irregular entry (so-called 'secondary movements'), irrespective of the possibility of having legitimate reasons to do so such as degrading or inhuman reception conditions.

Informalisation and Exceptionalism

The refugee humanitarian crisis in EU countries such as Greece and Italy showed the limits and inherent flaws characterising the current distribution model envisaged in the 1990 EU Dublin system for assessing asylum applications, and on-the-ground weaknesses in reception conditions and judicial/administrative asylum structural capacities.

As an 'immediate policy response' in 2015, based on the European Agenda on Migration, the Commission proposed an emergency temporary relocation mechanism establishing a distribution key model for relocating some asylum-seekers (only those belonging to one of the eligible nationalities, mainly Syrians and Iraqis) from Italy and Greece to other EU member states, which has been the object of legal challenges before the Luxembourg Court and subject to serious implementation obstacles by some member states.

This came alongside a 'hotspot' approach to assist authorities in Italy and Greece with the support of EU agencies like Frontex, the European Asylum Support Office (EASO), the EU Police Cooperation Agency (Europol) and the EU Judicial Cooperation Agency (Eurojust) in the registration of asylum seekers, the identification and fingerprinting of potential beneficiaries for the temporary relocation scheme and countering migrant smuggling. The 'hotspot model' has been subject to criticism because the hotspots were developed and implemented entirely outside any EU legal framework, including EASO's involvement in admissibility of asylum applications in Greece. They have raised concerns about their compatibility with fundamental rights challenges, specifically in relation to the forced fingerprinting of individuals, quasi-detention practices and degrading reception conditions, expedited admissibility interviews and their focus on 'security' instead of access to international protection.

Another example of informalisation was the so-called 'EU-Turkey Statement' adopted in March 2016. Despite being politically portrayed as an 'EU-product', the Luxembourg Court confirmed that the Statement's authorship belonged to the Heads of Government and State of EU member states, not to any EU actor whatsoever. When negotiating the deal with Turkish Government, EU member states made the strategic choice to avoid the EU Treaties and European law all together in an area of shared and exclusive EU competence.

This meant that they side-lined the EU democratic rule of law guarantees envisaged in the Treaties, i.e. the role of the European Commission, democratic scrutiny by the European Parliament and judicial control by the Luxembourg

Court, as well as domestic checks and balances. Here in addition, the fundamental rights impacts and violations during the implementation of the EU-Turkey Statement have been amply documented, yet any legal responsibilities for these remain to be determined.

The Commission has also made 'strategic use' of EU policy instruments not constituting formal legal acts or international agreements envisaged in the EU Treaties, and falling outside the EU budget ('emergency funding'). This is the case of 'readmission arrangements', which do not correspond with EU Readmission Agreements, and aim at cooperating with African governments (e.g. Niger, Nigeria, Senegal, Mali and Ethiopia) and some in the Middle East (Afghanistan) in the readmission of irregular third country nationals and their own nationals. Their implementation has been tied to the use of extra-budget and emergency-led EU funding instruments, chiefly the so-called 'EU Trust Funds' (EUTF).

The use of EUTF has also been involved in the implementation of EU anti-human smuggling policies in Libya, including some activities of the EUNAVFOR-MED Operation (Operation Sophia). Despite its limited success in dismantling the 'business model' of smugglers in the Central Mediterranean, Operation Sophia's mandate has been extended on several occasions, to pursue activities such as those included in the scope of an EUTF project with Italy aimed at "strengthening the operational capacities of Libyan coast guards". The risk here is in indirectly financing trainings and 'capacity building' resulting in asylum seekers being increasingly prevented from leaving Libya and violating the *non-refoulement* principle in a country that remains in conflict.

Intergovernmentalism and Rule of Law Backsliding

The politics of crisis have also come with very high costs for the Juncker Commission. 'In the name of' the refugee crisis and its exceptionality, several member state governments and Ministries of Interior have started to act outside, or in direct contravention to, EU Treaty and existing legal frameworks and their commitments in the scope of key Union policies. They have also attempted to regain lost territory and 'reverse Europeanisation' in some of these JHA domains.

This has been the case of the Schengen Area. Since 2016, and giving the refugee crisis as justification, Austria, Germany, Denmark, Sweden and Norway introduced internal border controls and have since then unlawfully prolonged them beyond the foreseen deadline. Nationalism has also prevailed in relation to EU asylum policy and the Commission's proposed reform of the EU Dublin Regulation, which is currently stalled inside the Council. This has meant that other asylum-related proposals such as the transformation of the European Asylum Support Office (EASO) into an EU Asylum Agency are equally stalled.

However, not enough attention has been paid to more rigorous enforcement of the implementation of already existing CEAS standards, including reception conditions, by all these same member states.

The area of legal immigration has also showed persistent nationalistic dynamics preventing further Europeanisation. Despite Juncker's priority to promote a new European policy on legal migration and revise the EU Blue Card scheme for attracting highly qualified third country workers, the Commission proposal to achieve that goal is currently frozen as it has met resistance from some EU member states inside the Council regarding the abolition of parallel national schemes for highly skilled foreign workers.

This Commission has also faced a situation where some EU governments have actively engaged in the dismantling of domestic rule of law checks and balances and constitutional (separation of powers) guarantees. For the first time, the Commission has made use of the EU Rule of Law Framework and the Art. 7 of the Treaty on the European Union (TEU) procedure against Poland. However, use of both tools has revealed fundamental procedural barriers: they are highly politicised and dependent on member state governments, they do not ensure equal treatment among all EU member states, with little potential for effectively preventing a risk or a threat to the rule of law from becoming systematic and thereby undermining the basis for mutual trust in the EU's AFSJ.

Based on the research findings, **Section 4** of the book concludes and outlines a set of policy priorities for the next European Commission. The second half of 2019 will constitute a milestone in EU cooperation on EU AFSJ policies. Mid-October will be the twenty-year anniversary of the adoption of the 1999 'Tampere Programme', which laid down for the first time the main JHA policy orientations and priorities for the years to come. December 2019 will also be the ten-year anniversary of the Lisbon Treaty that brought a majority of EU JHA domains under the Community method of cooperation and, by doing so, placed EU democratic rule of law and fundamental rights at the centre of AFSJ cooperation. The Lisbon Treaty liberalised the ownership of the EU AFSJ policy agenda beyond the European Council, the JHA Council and member state Ministries of Interior, by recognising an equally central role in priority setting by the Commission and the European Parliament. The set of intra-institutional and substantive policy priorities presented in Section 4 take into account the milestones as laid out in the Tampere Programme and the Lisbon Treaty.

1. INTRODUCTION

In September 2014, the current President of the European Commission, Jean-Claude Juncker, presented his new team of Commissioners and their corresponding portfolios. The increasing political salience of Justice and Home Affairs policies was reflected in the appointment for the first time of a First Vice-President, Frans Timmermans, responsible for the rule of law, the EU Charter of Fundamental Rights and 'Better Regulation', and with the task of coordinating the Directorate Generals for Justice – DG JUST, and that of Home Affairs and Migration – DG HOME.

A 2014 CEPS publication provided a preliminary analysis of the main structural and thematic innovations introduced by the new Commission's architecture.[1] It raised the following question: Does the new Juncker Commission herald a new start for EU Justice and Home Affairs or Area of Freedom, Security and Justice policies?[2]

This book aims at revisiting this question in light of the Commission's intra-institutional situation, and a selection of the most relevant policy and legislative outputs during the 8th legislature from mid-2014 to end of 2018. The original priority given by this Commission to the rule of law, fundamental rights and better regulation was expected to facilitate policy optimisation through 'better law making' and mainstreaming EU rule of law and fundamental rights standards in all Commission work covering JHA cooperation. Has this been accomplished?

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[1] Sergio Carrera and Elspeth Guild (2014), "The Juncker Commission: A New Start for EU Justice and Home Affairs Policy?", CEPS Essay, Brussels, No. 15, 18 September (https://www.ceps.eu/publications/juncker-commission-new-start-eu-justice-and-home-affairs-policy).

[2] These include policy domains falling under the rubric of Title V of the Treaty on the Functioning of the European Union (TFEU) entitled 'Area of Freedom, Security and Justice', and comprising Chapter 1 (General Provisions, Arts. 67-76), Chapter 2 (Policies on Border Checks, Asylum and Immigration, Arts. 77-80); Chapter 4 (Judicial Cooperation in Criminal Matters, Arts. 82-86), and Chapter 5 (Police Cooperation, Art. 87-89). The examination does not cover EU policies on judicial cooperation in civil matters laid down in Chapter 3 of Title V TFEU. According to Article 4.2.f TFEU, the Union counts with shared legal competence with Member States. The analysis also covers selected developments falling under the scope of Part II TFEU (Non-Discrimination and Citizenship of the Union).

The Juncker Commission has been dubbed the 'Commission of crisis'. In several of its annual State of the Union addresses Juncker emphasised that 'the EU is in an existential crisis'.[3] He also posed a key question: "Will Europe still be a world leader when it comes to the fight for human rights and fundamental values?" The set of political guidelines under the title "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change" outlined in his Opening Speech before the European Parliament in July 2014 have been subject to various national events framed as 'crises', which have sent political waves over the legitimacy and fundamentals of European integration.[4]

The 'European refugee humanitarian crisis' emerging in 2015 brought to light the unfinished components and structural gaps characterising EU asylum and borders policies.[5] A few member states reacted by reintroducing internal border checks on persons and derogating the border-free Schengen area.[6] The period from 2014 to 2018 has seen some acts of terrorism in several European cities, which have also put the EU's role and value added on cross-border criminal justice and police cooperation under the spotlight.[7] This has come alongside the rise of the radical right and Euroscepticism in some EU governments, with some member states backsliding in their rule of law systems

[3] Jean-Claude Juncker (2016), "State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends", European Commission Press Release Database, Strasbourg, 14 September (http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm).

[4] Jean-Claude Juncker (2014), "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change - Political Guidelines for the next European Commission Opening Statement in the European Parliament Plenary Session", Strasbourg, 15 July (https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf).

[5] Sergio Carrera, Steven Blockmans, Daniel Gros and Elspeth Guild (2015), "The EU's Response to the Refugee Crisis Taking Stock and Setting Policy Priorities", CEPS Essay, Brussels, No. 20, 16 December (https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis_0.pdf).

[6] Sergio Carrera, Marco Stefan, Ngo Chun Luk, Lina Vosyliūtė (2018), "The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016", under request of the European Parliament's LIBE Committee, published by the Policy Department for Citizen's Rights and Constitutional Affairs, February (https://www.ceps.eu/publications/future-schengen-area-latest-developments-and-challenges-schengen-governance-framework).

[7] Sergio Carrera, Elspeth Guild and Valsamis Mitsilegas (2017), "Reflections on the Terrorist Attacks in Barcelona Constructing a principled and trust-based EU approach to countering terrorism", Policy Insights, CEPS, Brussels, No 2017-32, August (https://www.ceps.eu/system/files/PI2017-32%20JHA%20Terrorism%20and%20Barcelona.pdf).

and dismantling constitutional checks and balances and domestic fundamental rights protections.[8]

'Crises' have served as catalysts or 'political opportunities' for the adoption of previously controversial and already existing, as well as some new, EU policy, legislative and institutional ideas. Some of these have taken *Europeanisation* forward by: first, setting up new EU harmonised legal standards and rules; and second, re-designing existing or setting up new Community bodies and EU agencies responsible for coordinating and supporting EU member states with increasing operational and policy tasks in these policy areas.

That notwithstanding, 'the politics of crisis' have not benefited this Commission overall. Policies have often developed in contradiction to EU Treaty principles (rule of law and fundamental rights) and lack compliance with better regulation guidelines. In addition, they have taken 'less EU' and a 'new start' for:

First, *informalisation and exceptionalism*, with increasing 'strategic use or choice' of EU policy instruments not constituting formal legal acts or international agreements as envisaged in the EU Treaties, or falling outside the EU budget. These instruments constitute flexible political tools in the scope of EU cooperation with third countries, but they also come with a low degree of enforceability and high dependency on third-country governments or authorities, side-lining EU rule of law and democratic checks and balances, and an uneasy relationship with fundamental rights.

Second, *intergovernmentalism and rule of law backsliding* in areas of shared or even exclusive Union competence, with member states acting outside or in direct contravention with EU Treaty and legal frameworks and binding commitments in key Union policies, or attempting to regain lost territory and 'reverse Europeanisation' in some of these domains.

Section 2 of this book focuses on the ways in which the new intra-institutional configurations brought by the Juncker Commission to JHA-related dossiers have worked out and developed in practice. Section 3 takes stock of selected main and most relevant legislative AFSJ developments during the 8th legislature, which is complemented by a detailed overview of the key legal acts presented, adopted or under negotiation during the Juncker Commission in Annex I of this book. Based on this, Section 4 concludes by outlining a set of priorities for the next European Commission.

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[8] Sergio Carrera and Petra Bárd (2018), "The European Parliament vote on Article 7 TEU against the Hungarian government: Too late, too little, too political?", CEPS, Brussels, 14 September (https://www.ceps.eu/publications/european-parliament-vote-article-7-teu-against-hungarian-government-too-late-too-little).

The second half of 2019 will also constitute a milestone in EU cooperation on JHA or Area of Freedom, Security and Justice policies. Mid-October sees the twenty-year anniversary of the adoption of the so-called 'Tampere Programme' (European Council Presidency Conclusions, 15 and 16 October 1999). Based on the mandate given by the entry into force of the Amsterdam Treaty in 1999, the Tampere Programme laid down for the first time the main policy orientations and priorities to guide the progressive building of an EU AFSJ.[9]

December 2019 will also correspond with ten years since the entry into force of the Lisbon Treaty,[10] which brought a majority of EU JHA domains under the Community method of cooperation. It also conferred a legally binding nature to the EU Charter of Fundamental Rights (EUCFR) and called on the Union to accede the European Convention of Human Rights (ECHR).[11] The 'Lisbonisation' of JHA policies represented a decisive step forward in placing EU democratic rule of law and fundamental rights at the centre of AFSJ cooperation. The policy priorities for the next European Commission presented in Section 4 take into account both the priorities and actions included in the Tampere Programme and those in the Lisbon Treaty.

[9] Elspeth Guild, Sergio Carrera and Alejandro Eggenschwiller (2010), The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges under the Stockholm Programme, CEPS Paperback, Brussels (https://www.ceps.eu/publications/area-freedom-security-and-justice-ten-years-successes-and-future-challenges-under).

[10] Sergio Carrera and Elspeth Guild (2015), Implementing the Lisbon Treaty: Improving the Functioning of the EU in Justice and Home Affairs, European Parliament Study, AFCO Committee, Brussels (https://www.ceps.eu/publications/implementing-lisbon-treaty-improving-functioning-eu-justice-and-home-affairs).

[11] Art. 6.2 of the Treaty on the European Union (TEU) declared that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

2. THE COMMISSION'S NEW STRUCTURE: ONE HAT TOO MANY?

The initial appointment of three Commissioners with JHA portfolios was one of the main innovations introduced by the Juncker Commission. This included the First Vice-President and Commissioner for Better Regulation, Inter-Institutional Relations, Rule of Law and the EU Charter of Fundamental Rights, Frans Timmermans, the Commissioner for Justice, Consumers and Gender Equality (Věra Jourová) and third, the Commissioner for Migration, Home Affairs and Citizenship (Dimitris Avramopoulos).[12] Right from the start, Timmermans was given a clear mandate to guide, coordinate and scrutinise the work of the other two JHA Commissioners and "act as a watchdog, upholding the Charter of Fundamental Rights and the Rule of Law, in all the Commission's activities".[13] For the first time, a European Commission included a Commissioner in charge of the rule of law.

In August 2016, Juncker added a fourth Commissioner to this institutional triangle: Julian King as Commissioner for the Security Union, also working under the guidance of the First Vice-President, and supporting the work of the Commissioner for Migration, Home Affairs and Citizenship at DG HOME.[14] As outlined in the Mission Letter issued by President Juncker, the idea behind a Commissioner for the Security Union was to implement a "new way of working" inside the Commission and to steer and coordinate work across

[12] Under the original set of portfolios 'citizenship' was under the mandate of Tibor Navracsics, Commissioner for Education, Culture and Youth, and it was only later on transferred to Avramopoulous' responsibilities.

[13] European Commission (2014), "The Juncker Commission: A strong and experienced team standing for change", European Commission Press Release Database, Brussels, 10 September (http://europa.eu/rapid/press-release_IP-14-984_en.htm).

[14] European Commission (2016), "President Juncker consults the European Parliament on Sir Julian King as Commissioner for the Security Union", European Commission Press Release Database, Brussels, 2 August (http://europa.eu/rapid/press-release_IP-16-2707_en.htm).

relevant Commission DGs and services in the area of security.[15] This materialised in the so-called 'Security Union Task Force'.[16]

The fact that the Juncker Commission has included four different Commissioners dealing with JHA or AFSJ-related issues constitutes the best illustration of how these policies moved to the top of EU's political agenda. The structuring of the European Commission's work on JHA or AFSJ into two main DGs dealing separately with issues of 'Justice' and 'Home Affairs' has continued to prove a welcome division of responsibilities.[17] It corresponded with previous recommendations put forward by CEPS research.[18] The additional appointment of a First Vice-President responsible for closer internal scrutiny of the Commission's own work in view of EU Treaty values and 'better regulation'

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[15] Jean-Claude Juncker (2016), "Mission Letter to Julian King Commissioner for the Security Union", European Commission, Brussels, 2 August (https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner_mission_letters/mission-letter-julian-king_en.pdf).

[16] Sergio Carrera and Valsamis Mitsilegas (2017), "Constitutionalising the Security Union: Effectiveness, Rule of Law and Rights on Countering Terrorism and Crime", CEPS, Brussels, 21 November (https://www.ceps.eu/publications/constitutionalising-security-union-effectiveness-rule-law-and-rights-countering).

[17] The Barroso II Commission, which ran from February 2010, started to work with only one DG Justice, Freedom and Security (JLS) under the responsibility of two different Commissioners: Viviane Reding (as Commissioner for Justice, Fundamental Rights and Citizenship), and Cecilia Malmström (as Commissioner for Home Affairs). Reportedly, following some 'turf wars' between them, Barroso decided to split the DG into two, one dealing with 'Justice', and another with 'Home Affairs'. A press article stated that "They clashed over proposals to combat child pornography on the internet and over negotiations on sharing information about bank transfers. The claim that the two commissioners and their teams could work together in one department looked threadbare." It added that "Officials familiar with the decision point out that the Commission's organisation will match the set-up in most national governments, where one minister deals with home affairs issues and one with justice matters." Refer to Politico (2010), A Departmental Split to end turf wars? Reding gets her way and her own department; decision follows change of heart by Barroso, 6.9.2010 (https://www.politico.eu/article/a-departmental-split-to-end-turf-wars/) See Sergio Carrera (2012), The Impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders: The Struggles over the Ownership of the Stockholm Programme, in E. Guild and P. Minderhoud (eds), The First Decade of EU Migration and Asylum Law, Martinus Nijhoff Publishers, Leiden, pp. 229-254.

[18] Sergio Carrera, Didier Bigo, Elspeth Guild (2009), "The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security", CEPS, Brussels, 9 September (https://www.ceps.eu/publications/challenge-project-final-policy-recommendations-changing-landscape-european-liberty-and).

principles was an equally promising feature.[19] The *Task Force approach* implemented in the field of security also promised a better guarantee of joined-up intra-institutional strength between several DGs with direct and indirect linkages to a specific policy area.

However, the exact division of responsibilities and portfolios among all relevant Commissioners has not been always the clearest. The most visible examples have included the portfolios on migration and security, which have by and large predominated in this Commission. Past CEPS research suggestions called for a clearer distinction of responsibilities between JHA Commissioners and relevant DGs, particularly between migration and security portfolios.[20] Instead, the Commissioner for Home Affairs and Migration, and DG HOME, has remained officially responsible for EU security policies, including the fight against crime and terrorism and police cooperation. This became even more reinforced with the additional appointment of a Commissioner for 'the Security Union' at DG HOME.

Since the emergence of the 'European refugee humanitarian crisis', the highest political instances of the Commission (President and First Vice-President's offices) took over most of the themes under the responsibility of the Commissioner for 'Home Affairs and Migration', and that of 'Security'. In contrast to the previous Commission, this has meant a 'top-down approach' of decision-shaping whereby political decisions have most often emerged from these 'higher instances' instead of the thematic Commissioners and specific DGs with the technical knowledge on these matters.

During the last three years, First Vice-President Timmermans has been in the main driving seat in the Commission's Reponses to this crisis.[21] The political salience of migration in this Commission materialised in more than 10 different Commission DGs working on issues related to 'the refugee crisis'. Timmermans also played a key role in the Commission's Security agenda, particularly as regards the Union's responses following terrorist attacks in Europe.[22] The High

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[19] Sergio Carrera and Elspeth Guild (2014), "A New Start for the EU's Area of Freedom, Security and Justice? Setting of Priorities for the New European Commission", CEPS Commentary, Brussels, 23 September (https://www.files.ethz.ch/isn/183842/SC%20and%20EG%20New%20Start%20for%20EU%20JHA.pdf).

[20] Carrera et al. (2009), op.cit.

[21] European Commission (2016), "Refugee crisis: Commission reviews 2015 actions and sets 2016 priorities", European Commission, Press release, Brussels, 13 January (http://europa.eu/rapid/press-release_IP-16-65_en.htm).

[22] Sergio Carrera, Elspeth Guild, Valsamis Mitsilegas (2017), "Reflections on the Terrorist Attacks in Barcelona: Constructing a principled and trust-based EU approach to countering

Representative (HR/VP) Federica Mogherini (European External Action Service, EEAS)[23], also Vice-President of the Commission, has been equally 'active' on the migration and security dossiers, particularly regarding third-country cooperation, defence[24] and external financial assistance.[25]

The blurring of intra-institutional responsibilities and Commissioner / Vice-President portfolios has played in favour of a *home affairs and security approach* prevailing among all relevant Commissioners and Vice-Presidents. This has not always allowed for the necessary checks and balances in the setting and implementation of the various Commission policy priorities, particularly between home affairs agendas and those related to wider or equally important policy approaches such as foreign affairs, development cooperation, humanitarian aid, trade, human rights and employment and social affairs. In practice there has been not one, but *many* 'Home Affairs' Commissioners, which – as the next Section and Annex I demonstrate – has in turn affected the setting of priority areas and the policy and legal outputs that have emerged from 2014 up until December 2018.

terrorism", CEPS, Brussels, 29 August (https://www.ceps.eu/publications/reflections-terrorist-attacks-barcelona-constructing-principled-and-trust-based-eu).

[23]European Commission (2018), "European Agenda on Migration: Continuous efforts needed to sustain progress" European Commission Press release, Brussels, 14 March (http://europa.eu/rapid/press-release_IP-18-1763_en.htm).

[24] EUNAVFOR MED Operation Sophia (https://www.operationsophia.eu/).

[25] European Commission (2015), "Syrian refugee crisis: EU Trust Fund launches single biggest EU response package ever for €350 million, helping up to 1.5 million refugees and their host communities in Lebanon, Turkey, Jordan and Iraq", European Commission Press Release, Brussels, 1 December. (http://europa.eu/rapid/press-release_IP-15-6212_en.htm).

3. LEGAL AND POLICY DEVELOPMENTS: PROMISES MADE, PROMISES KEPT?

What have been the most relevant JHA-related outputs during the Juncker Commission? This Section takes stock of some of the most relevant legal and policy developments by the European Commission from mid-2014 to the end of 2018. Annex I of this book provides a detailed overview of all the key JHA legal acts which have been proposed or adopted during the Juncker Commission, and those which remain under inter-institutional negotiation. These have included developments covering the following AFSJ-related areas: Schengen and securing external borders (*Section 3.1*); asylum and refugees (*Section 3.2*); legal immigration (*Section 3.3*); irregular entry and third-country cooperation on expulsions (*Section 3.4*); criminal justice and police cooperation (*Section 3.5*), and the rule of law and fundamental rights (*Section 3.6*).[26]

Special attention is given to the enactment of legal acts as envisaged in the EU Treaties, and the extent to which they have been formally adopted, or remain in inter-institutional negotiation, as well as the adoption and use other policy instruments which have been adopted *instead of* EU legal acts. These developments are compared to Juncker's 2014 Political Guidelines and the promises made by the relevant Commissioners in their hearings during September and October 2014 before the Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament.

The assessment also takes into account the delivery of the key actions and priorities, especially the most important legislative priorities, envisaged in the Commission's 2015 European Agenda on Migration[27] and European Agenda on Security, which set out the Commission's policy roadmap between 2014 and

[26] This Section covers all AFSJ-topic areas with the exception of those falling under the scope of judicial cooperation in civil matters.

[27] European Commission (2015), Communication a European agenda on migration COM(2015) 240 final, Brussels 13 May (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf).

2019.[28] Despite their official titles, the thematic division between 'migration' and 'security' has not been consistently framed and implemented in either of these Agendas. *A 'security' rationale* has also been very much present in the European Agenda on Migration. According to the Communication on the European Agenda on Security "This Agenda has to be seen in conjunction with the forthcoming European Agenda on Migration, [which addresses] issues directly relevant to security, such as smuggling of migrants, trafficking in human beings, social cohesion and border management".[29] Moreover, the European Agenda on Security also covered items closely related to judicial cooperation in criminal matters under a 'police cooperation or law enforcement approach'.[30]

The main legal developments are critically assessed in view of rule of law, fundamental rights and Better Regulation guidelines, all of which correspond to the First-Vice President of the Commission's portfolio, and stand at the constitutive basis of the EU legal system,[31] and are pivotal ingredients for the *legitimation of* EU AFSJ cooperation laid down in the Treaties. The appraisal examines these Commission developments in light of the positions and assessments put forward by the European Parliament, the European Court of Auditors, the European Ombudsman, the European Data Protection Supervisor and the EU Fundamental Rights Agency, as well as key findings from relevant international and regional human rights organisations (e.g. UN and Council of Europe), civil society actors and academic research.

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[28] European Commission (2015), Communication a European agenda on security, COM(2015) 185 final, Brussels 28 April 2015 (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf)

[29] Ibid., page 4. See also the reference made to the priority on cooperation against the smuggling of migrants inside the EU and in third country cooperation on page 18 of the European Agenda on Security.

[30] The Commission did not accompany its migration and security agendas with an European Agenda on Justice, leaving an important gap in respect of judicial cooperation in criminal matters. See for instance references to judicial cooperation in criminal matters on pages 10 and 19/20 of the Communication on the European Agenda on Security.

[31] Special attention is given to their impact and compliance with the EU Charter of Fundamental Rights, which has legally binding force, as well as Art. 2 of the Treaty on European Union according to which "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" and Art. 6 TEU.

3.1 Schengen and securing external borders

3.1.1 The European Border and Coast Guard

Securing the EU's external borders has constituted a key policy priority for this Commission. One of the most politically visible Commission initiatives in response to the crisis was the presentation of a new European Border and Coast Guard (EBCG), a reform of the older Frontex (EU External Borders) Agency set in Warsaw (Poland). The reinforcement of Frontex had been already presented as one of the key priorities in the political guidelines put forward by the President Juncker in his Inaugural Speech "A New Start for Europe".[32]

The idea of establishing a European border guard was not new.[33] The peak of the refugee crisis provided the necessary political momentum for the Commission to move forward quickly with a legislative proposal in December 2015, which arrived without any impact assessment.[34] The Regulation 2016/1624 on the EBCG was adopted in record time and published in the Official Journal on September 2016.[35] It increased human and financial resources for the Frontex agency, and granted it a reinforced coordination role over both national border and coast guard authorities.

The new mandate also extended the agency's operational mandate to include the fields of returns and readmission, and third-country cooperation. In the field of expulsions, the agency has been given a reinforced competence to

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[32] Jean-Claude Juncker (2014), "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change - Political Guidelines for the next European Commission Opening Statement in the European Parliament Plenary Session", Strasbourg, 15 July (https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf).

[33] Sergio Carrera (2010), "Towards a Common European Border Service?", CEPS, Brussels, 15 June (https://www.ceps.eu/publications/towards-common-european-border-service).

[34] European Commission (2015), Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 005/267/EC, COM(2015) 671 final 2015/0310 (COD), Strasbourg, 15 December (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/legal-documents/docs/regulation_on_the_european_border_and_coast_guard_en.pdf)

[35] European Parliament and Council (2016), Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, L251/1, 16.9.2016 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1624&from=EN).

implement joint return flights, and to be involved in national return procedures, which turns it into an 'EU Returns Agency'.[36] Still, the EBCG remains 'just a name' which does not fully reflect its actual competences. The new (Frontex+) Agency is still dependent on EU member state contributions, political willingness to cooperate and domestic capacities and law enforcement specificities.[37] It does not have its own personnel, nor the power of command over national authorities.

In his last State of the Union Speech delivered on September 2018, Juncker presented "the last elements needed for compromise on migration and border reform"[38], which included an additional proposal for a Regulation further fine tuning and reinforcing the EBCG.[39] The main idea behind it is to further strengthen Frontex operational capabilities by setting the agency up with 10,000 operational staff by 2020 and its own vessels, planes and vehicles, together with a budget increase of €1.3 billion. The new EBCG would have new executive powers to carry out identity checks, and authorise or refuse entry.

The European Union Agency for Fundamental Rights (FRA) issued an Opinion on 27 November 2018[40] about the newest EBCG proposal where it highlighted the need for strengthening the overall fundamental rights protection framework of the proposed Agency's mandate. The FRA recommended the EU

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[36] Sergio Carrera, Steven Blockmans, Daniel Gros and Elspeth Guild (2015), "The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities", CEPS, Brussels, No.20, 16 December (https://www.ceps.eu/publications/eu%E2%80%99s-response-refugee-crisis-taking-stock-and-setting-policy-priorities).

[37]Sergio Carrera and Leonhard den Hertog (2016), "A European Border and Coast Guard: What's in a name?", CEPS, Brussels, 8 March (https://www.ceps.eu/publications/european-border-and-coast-guard-what%E2%80%99s-name).

[38] European Commission (2018), "State of the Union 2018 – Commission proposes last elements needed for compromise on migration and border reform, European Commission Press Release Database, Strasbourg, 12 September (http://europa.eu/rapid/press-release_IP-18-5712_en.htm).

[39] European Commission (2018), Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council – A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/631 final, Brussels, 12 September (https://eur-lex.europa.eu/resource.html?uri=cellar:3550f179-b661-11e8-99ee-01aa75ed71a1.0001.02/DOC_1&format=PDF).

[40] European Union Agency for Fundamental Rights, Opinion, The revised European Border and Coast Guard Regulation and its fundamental rights implications, FRA Opinion – 5/2018 [EBCG] Vienna, 27 November 2018 (https://fra.europa.eu/en/opinion/2018/eu-border-agency).

legislator reinforce the envisaged complaint mechanism in cases of fundamental rights violations, enhancing the role, capacity and independence of the fundamental rights officer and better operationalising fundamental rights protections in all newly envisaged operational activities.

The need for these proposals corresponds with CEPS research which has revealed:[41] first, the limited powers and independence of complaint bodies and human rights institutions in several EU member states, which prevent an effective follow-up of complaints in the context of border controls and surveillance; and second, the lack of human resources, autonomy and the power to conduct thorough and systematic follow-up monitoring of national complaints by by the Frontex Fundamental Rights Officer (FRO).

The revised EBCG mandate has also incurred criticism from the United Nations. A Joint Communication issued by UN Special Procedures (five UN Special Rapporteurs and two Working Groups) to the Presidents of the European Commission, the European Parliament and the European Council on 18 September 2018.[42] The Joint Communication raised serious concerns about the more recent proposal on the further reinforcement of the EBCG ahead of the Austrian presidency meeting in Salzburg on 19 and 20 September 2018, and concluded that:

> We are concerned that these measures are being proposed as a means to leverage political gain in response to the worrying rise of anti-immigration and xenophobic hate speeches and stances, as reflected by increased acts and discourses of violence and racism against migrants in various EU member States.

3.1.2 The Schengen Area

The Commission has invested efforts in safeguarding the integrity of the Schengen Area in light of some EU member states reintroducing systematic internal border checks on persons. Schengen countries had in the past frequently reintroduced internal border controls in exceptional and casuistic cases.[43] With

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[41] Sergio Carrera and Marco Stefan (2018), Complaint Mechanisms in Border Management and Return Operations in Europe: Effective Remedies for Victims of Human Rights Violations? CEPS Paperback, Brussels (https://www.ceps.eu/system/files/Complaint%20Mechanisms_A4.pdf).

[42] Refer to (https://ohchr.org/Documents/Issues/SRMigrants/Comments/OL_OTH_64_2018.pdf).

[43] The motives included for the purposes of safeguarding international events taking place in their countries, in attempts to restrict irregular immigration, as a response to serious health scares and similar circumstances. See Annex of S. Carrera, E. Guild, M. Merlino and J. Parkin (2011), A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair, CEPS Liberty and Security in Europe Series, Brussels.

the emergence of the 'European refugee humanitarian crisis' in summer 2015, Germany, Austria and Slovenia took immediate action and reintroduced internal border checks in September 2015. This was followed by Denmark, Sweden and Norway, which in November 2015 implemented similar actions. Since 2016 Austria, Germany, Denmark, Sweden and Norway have unlawfully prolonged internal border controls.

All these decisions took place on the basis of Art. 25 SBC. This provision allows Schengen countries to exceptionally re-introduce checks, as a measure of last resort, "when there is a serious threat to public policy or internal security in a member state" at all or specific parts of its internal borders. They can do so subject to specific deadlines: only for up to 30 days or "for the foreseeable duration of the serious threat if its duration exceeds 30 days". Importantly, Art. 25 SBC stipulates that the total time period shall not exceed six months.

In the context of the first round of evaluations under the new Schengen Evaluation Mechanism (SEM), the Commission carried out an unannounced on-site visit to several locations in Greece in the midst of the crisis in November 2015 to evaluate the implementation of the Schengen *acquis*. The evaluation results unsurprisingly concluded that "there are serious deficiencies in the carrying out of external border control". The Commission provided a number of recommendations to Greece in February 2016, which was then adopted by the Council "to remedy serious deficiencies in external border management", chiefly the "identification, registration and fingerprinting" of those irregularly entering the country.

In its March 2016 Communication 'Back to Schengen',[44] the Commission concluded that if "migratory pressures and the serious deficiencies in external border control" were to persist beyond May 2016, it would present a proposal to the Council to operationalise Art. 29 SBC. The Commission did present a proposal to the Council in May 2016[45] recommending the launch of Art. 29 SBC

[44] European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council on Back to Schengen - A Roadmap, COM(2016) 120 final, Brussels, 4 March (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf).

[45] European Commission (2016), Proposal for a Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, COM(2016) 275 final 2016/140 (NLE), Brussels, 4 May (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/schengen_proposal_en.pdf).

"until the structural deficiencies in external border control are mitigated or remedied with Greece", which the Council adopted in a Decision setting out a Recommendation[46] for prolonging temporary internal border control in "exceptional circumstances putting the overall functioning of the Schengen area at risk". The Decision allowed the above-mentioned five EU Schengen members, i.e. Austria, Germany, Denmark, Sweden and Norway, to maintain internal border controls for a period of six months (October 2016).

The same Council Decision provided specific guidelines concerning the exact border points where checks could be reintroduced (a small part of their internal borders corresponding with very specific land border zones and ports), as well as fairly concrete reporting procedures insisting on the necessity and proportionality of these measures as a priority and stating that "Border controls should be targeted and limited in scope, frequency, location and time, to what is strictly necessary to respond to the serious threat and to safeguard public policy and internal security."

Art. 29 SBC was originally designed as a provision that would never be used in practice. History proved this hope to be wrong. Art. 29 provides for a specific procedure to apply in exceptional situations when the overall functioning of the Schengen area is at risk "as a result of persistent serious deficiencies relating to external border control". It allows member countries to introduce internal border controls for an additional period of six months, which can only be renewed three consecutive times with similar six-month periods.

The official deadline for all these Ministries of Interior to 'come back to Schengen' was October/November 2017. However, the same five member states not only exhausted the possibility of extending three times under the Art. 29 SBC procedure. They have also continued carrying out localised internal border checks until the time of writing. Following expiration of the Art. 29 SBC deadline, all relevant Schengen members then continued, again on the basis of Art. 25 SBC, to conduct internal border checks. The six-month period foreseen in Art. 25 SBC has now also been exhausted. More recently, the Ministries of Interior of Austria, Denmark, Germany and Norway have notified a further extension of internal border checks until May 2019, Sweden until February 2019, and France until April 2019.

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[46] European Council (2016), Council Implementing Decision (EU) 2016/894 of 12 May 2016 on setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, L 151/8, 8.6.2016 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D0894 &from=EN).

The main official justifications provided in the notifications issued have mainly related to the so-called "migratory crisis and resulting secondary movement of undocumented and irregular immigrants", and the risks of further secondary movements from those asylum seekers who are still in Greece. However, as the Commission stated in the 2017 Communication Preserving and Strengthening Schengen,[47] and the accompanying Press Release,[48] the use of asylum or migration – and so-called 'secondary movements' – as the basis for justifying the prolongation of internal border checks no longer constitute legitimate grounds for derogating Schengen. The 'secondary movements' argument calls for equally meticulous examination and evidence showing the exact scale and relevance of this issue at the time, and as developed in Section 3.2.2 below, because of possible legitimate reasons for applicants not staying in the first state of irregular entry.

The Commission's strategy has been to 'squeeze' the scope and conditions under which these member states are conducting internal border checks.[49] In addition, the Commission issued a new Proposal for a Regulation amending the rules applicable to the temporary reintroduction of internal border controls.[50] The Regulation would allow reintroduction of internal border checks under Art. 25 SBC for a period of up to one year, which could be extended for a maximum length of two years. In cases where "exceptional circumstances" falling under Art. 29 SBC exist, the total period could be prolonged by a further time of two years. The only obligation for relevant governments would be to justify their decision on a 'risk assessment' explaining how internal border controls contribute to addressing the perceived threat. The proposal is under negotiation.

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[47] European Commission (2017), Communication from the Commission to the European Parliament and the Council on preserving and strengthening Schengen, COM(2017) 570 final, Brussels, 27 September (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927_communication_on_preserving_and_strengthening_schengen_en.pdf).

[48] European Commission (2017), "Questions & Answers: Preserving and strengthening the Schengen area", European Commission's Fact Sheet, Brussels, 27 September (http://europa.eu/rapid/press-release_MEMO-17-3408_en.htm).

[49] Elspeth Guild, Evelien Brouwer, Kees Groenendijk and Sergio Carrera (2015), "What is happening to the Schengen borders?", CEPS, Brussels, 16 December (https://www.ceps.eu/publications/what-happening-schengen-borders).

[50] European Commission (2017), Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders, COM(2017) 571 final, Brussels, 27 September (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927_proposal_for_a_regulation_amending_regulation_eu_2016_399_en.pdf).

The European Parliament[51] has been critical as the proposal came without an impact assessment and it could 'legalise'[52] unlawful practices in member states. Moreover, as evidence by EU Fundamental Rights Agency (FRA) shows,[53] little has been said about the impacts that these internal border checks have had on the fundamental rights of asylum seekers and refugees.

3.2 Asylum and refugees

Another key political priority for this Commission has been asylum policy. This has constituted one of the main 'turf wars' between the Commission and some EU member states governments during this legislature. The refugee humanitarian crisis in EU countries in Greece and Italy clearly showed the fundamental limits and inherent flaws in the distribution model envisaged in the 1990 EU Dublin system. It exposed the lacunae affecting existing EU sharing of responsibility rules where extraordinarily large numbers of people travel by land, rather than by air, to the EU.[54] It also revealed the on-the-ground weaknesses in reception conditions and judicial/administrative asylum capacities of external frontier states.[55]

3.2.1 Relocation and hotspots

As an immediate response, the Commission proposed an emergency temporary relocation mechanism[56] in two separate proposals for a Council Decision

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[51] European Parliament (2018), Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders, (COM(2017)0571 – C8-0326/2017 – 2017/0245(COD)), A8-0356/2018, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur Tanja Fajon, 29 October (http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2018-0356&format=XML&language=EN).

[52] Carrera et al. (2018a), op.cit.

[53] FRA (2018), "Periodic data collection on the migration situation in the EU - November 2018 Highlights" (http://fra.europa.eu/en/publication/2018/migration-overviews-november-2018), November.

[54] Advocate General Sharpston Opinion, C-490/16, *Jafari v. Austria and A.S. v. Slovenia*, 8 June 2017.

[55] Sergio Carrera, Steven Blockmans, Jean-Pierre Cassarino, Daniel Gros and Elspeth Guild (2017), *The European Border and Coast Guard Addressing migration and asylum challenges in the Mediterranean?,* CEPS, Brussels (https://www.ceps.eu/system/files/TFR%20EU%20Border%20and%20Coast%20Guard%20with%20cover_0.pdf).

[56] Sergio Carrera and Elspeth Guild (2015), "Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU", CEPS, Brussels, No. 334, October (https://www.ceps.eu/system/files/PB334%20RefugeeRelocationProgramme.pdf).

published respectively in July[57] and September 2015[58] establishing a distribution key model for relocating an original number of 160,000 asylum-seekers from Italy and Greece to other EU member states and which covered people arriving up until 26 September 2017. Later on, 20,000 applicants from this total figure were moved for resettlement.[59]

This came along a 'hotspot' approach[60] to assist with the support of EU agencies like Frontex, the European Asylum Support Office (EASO), the EU Police Cooperation Agency (Europol) and EU Judicial Cooperation Agency (Eurojust) in the identification and registration of asylum seekers in specific locations (mainly 'centres' in selected ports) in Greece and Italy, and the identification of potential beneficiaries for the temporary relocation scheme. The hotspots main objectives were the implementation of obligatory fingerprinting, identification of protection needs and processing of asylum applications and ensuring expulsion. They sought a '100% identification rate'.

The *temporary relocation + hotspot model* has been subject to criticism. Not least in light of the low level of compliance by EU member states in meeting their originally foreseen 'quotas' and agreed pledges,[61] the complete lack of compliance by countries like Hungary and Poland, which did not relocate one single person.[62] But also because of the fundamental rights challenges inherent

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[57] Council of the European Union (2015), "Resolution of the Representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40 000 persons in clear need of international protection", 11131/15, ASIM 63, Brussels, 22 July (https://data.consilium.europa.eu/doc/document/ST-11131-2015-INIT/en/pdf).

[58] Council of the European Union (2015), Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 12098/15, ASIM 87, Interinstitutional File: 2015/0209 (NLE), Brussels, 22 September (https://data.consilium.europa.eu/doc/document/ST-12098-2015-INIT/en/pdf).

[59] Council of the European (2015), Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection, 11130/15, ASIM 62, RELEX 633, Brussels, 22 July (https://data.consilium.europa.eu/doc/document/ST-11130-2015-INIT/en/pdf).

[60] European Commission, "The Hotspot approach to managing exceptional migratory flows" (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf).

[61] European Commission (2017) "Migration: Record month for relocations from Italy and Greece Brussels, European Commission Press release", 26 July (http://europa.eu/rapid/press-release_IP-17-2104_en.htm).

[62] European Commission (2017), Report from the commission to the European Parliament, the European Council and the Council on the Fifteenth report on relocation and resettlement, COM(2017) 465 final, Brussels, 6 September (https://ec.europa.eu/home-affairs/sites/

to the operability and goals of the hotspot approach which has in some cases led to *de facto* detention of asylum seekers under deficient and degrading reception conditions,[63] the use of coercive practices for fingerprinting asylum seekers and the lack of accountability of EU agencies for their actions on the ground, which have been magnified by the fact that the hotspots were developed and implemented outside any EU legal framework.[64] Despite this, the Juncker Commission has argued for the continuation of the hotspot model and more recently advanced its view for complementing it with the concept of so-called "controlled centres" inside the EU.[65]

The temporary relocation mechanism was adopted through an 'emergency procedure' which turned out to put its entire legality at stake before the Court of Justice. The Hungarian and Slovakian governments asked the Luxembourg Court to annul the Council Decision of September 2015 on relocation,[66] challenging its legally binding nature and alleging, *inter alia*, the infringement of essential procedural requirements and principles foreseen in the Treaties. They argued that that the legal basis of the Decision, i.e. Article 78.3 TFEU, was not correct and its required adoption procedures had not been respected. In their view, the measure constituted a legislative act (Council Decision) and should have been adopted under full democratic scrutiny by European Parliament. While the Council had made "essential changes" to the

homeaffairs/files/what-we-do/policies/european-agenda-migration/20170906_fifteenth_report_on_relocation_and_resettlement_en.pdf).

63 Aspasia Papadopoulou (2016), "The implementation of the hotspots in Italy and Greece A study", European Council for Refugees and Exiles (ECRE) (https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016.pdf).

64 FRA (2015), Processing biometric data for immigration, asylum and border management purposes has become common. This focus paper looks at measures authorities can take to enforce the obligation of newly arrived asylum seekers and migrants in an irregular situation to provide fingerprints for inclusion in Eurodac, October (https://fra.europa.eu/en/publication/2015/fundamental-rights-implications-obligation-provide-fingerprints-eurodac).

65 European Commission, Press Release, Managing Migration: Commission expands on disembarkation and controlled centre concepts, 24 July 2018 (http://europa.eu/rapid/press-release_IP-18-4629_en.htm). Refer also to European Commission (2018), Non Paper on "controlled centres" in the EU – interim framework (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-controlled-centres-eu-member-states_en.pdf).

66 Court of Justice of the European Union (2017), The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers, Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council, Press Release No 91/17 Luxembourg, 6 September 2017 (https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf).

original Commission Proposal, mainly removing Hungary from the recipient countries, they pointed out that the Parliament had not been re-consulted.

Indeed, 'in the name of emergency', the European Parliament was only 'informed'. It only expressed formal consent on the first version of the Decision,[67] not on the final one.[68] Luckily for the European Commission, the Court of Justice considered that the procedures had been respected and that the obligation to consult the Parliament had been complied with. [69] The Court assumed, perhaps too easily, that "in its legislative resolution of 17 September 2015 expressing its support for the Commission's initial proposal, the Parliament must necessarily have taken account of that fundamental change in Hungary's status" purely based on a statement delivered on 16 September 2015 by the President of the Council at an extraordinary plenary sitting of the Parliament.

While Parliament's dilemma was seen as being between insisting on its prerogative or saving the temporary relocation scheme, the adoption of the final version of the temporary relocation scheme without clearly respecting the requirement of formal consultation by Parliament weakened its own position more generally, towards both the Commission and EU member states in a crucial decision affecting EU asylum policy and the Union's response to the crisis.

The Court also reminded the two governments about one of the key contributions of the 'Lisbonisation' of EU asylum policy. It underlined that the Council had acted correctly by putting into effect the general principle of solidarity and fair sharing of responsibility envisaged in Art. 80 TFEU.[70] Based

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[67] European Parliament legislative resolution of 17 September 2015 on the proposal for a Council decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary (COM(2015)0451 – C8-0271/2015 – 2015/0209(NLE)) (Consultation) (http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0324).

[68] European Parliament, Press Release, MEPs give go-ahead to relocate an additional 120,000 asylum seekers in the EU, 16.9.2015 (http://www.europarl.europa.eu/news/en/press-room/20150915IPR93259/meps-give-go-ahead-to-relocate-an-additional-120-000-asylum-seekers-in-the-eu).

[69] Court of Justice of the European Union (2017), The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers, Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council, Press Release No 91/17 Luxembourg, 6 September 2017 (https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf).

[70] The CJEU concluded in paragraphs 252 that "In that regard, the Council, when adopting the contested decision, was in fact required, as is stated in recital 2 of the decision, to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the

on this and the above grounds, it therefore dismissed as unfounded the actions brought by the Hungarian and Slovakian governments.

The Commission launched infringement proceedings against the Czech Republic, Hungary and Poland in July 2017[71] and brought them to the attention of the Court of Justice of the European Union (CJEU) in December 2017.[72] The Juncker Commission also made use of infringement proceedings against Hungary for failure to comply with EU asylum standards dealing with reception conditions and procedures, as well as the criminalisation of humanitarian assistance, in July 2018.[73] Similarly, it launched infringement proceedings against the Bulgarian government for failure to implement the Asylum *acquis*, in particular based on shortcomings in reception conditions and asylum procedures.[74]

3.2.2 Reforming the Common European Asylum System

In May[75] and July[76] 2016 the European Commission presented a package of seven legislative proposals aimed at reforming the Common European Asylum System (CEAS) with the aim of addressing some of the deficiencies identified in

EU common policy on asylum is implemented." It continued by saying in paragraph 253 that "Thus, in the circumstances of this case, there is no ground for complaining that the Council made a manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take –– on the basis of Article 78(3) TFEU, read in the light of Article 80 TFEU and the principle of solidarity between the Member States laid down therein –– provisional measures imposing a binding relocation mechanism, such as that provided for in the contested decision."

[71] European Commission (2017), "Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland", European Commission Press release, Brussels, 14 June (http://europa.eu/rapid/press-release_IP-17-1607_en.htm).

[72]European Commission (2017), "Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice", European Commission Press release, Brussels, 7 December. (http://europa.eu/rapid/press-release_IP-17-5002_en.htm).

[73]European Commission (2018), "Migration and Asylum: Commission takes further steps in infringement procedures against Hungary", European Commission Press release, Brussels, 19 July (http://europa.eu/rapid/press-release_IP-18-4522_EN.htm).

[74]European Commission (2018), "November infringements package: key decisions", European Commission Fact Sheet Brussels, 8 November (http://europa.eu/rapid/press-release_MEMO-18-6247_EN.htm).

[75] European Commission (2016), "Towards a sustainable and fair Common European Asylum System", European Commission Press release, Brussels, 4 May (http://europa.eu/rapid/press-release_IP-16-1620_en.htm).

[76] European Commission (2016), "Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy", European Commission Press release, Brussels, 13 July (http://europa.eu/rapid/press-release_IP-16-2433_en.htm).

light of the crisis. A key controversial issue related the proposed reform of the EU Dublin Regulation,[77] which called for the establishment of a permanent corrective (relocation) mechanism in cases when member states would have to deal with "a disproportionate number of asylum seekers" such as the one experienced during the refugee crisis, and a system of 'financial solidarity' (i.e. penalties) for those EU governments not participating in the scheme.

The Commission's proposed reform did not abolish one of the main underlying causes of the humanitarian crisis, i.e. the general (EU Dublin system) rule according to which the first state of irregular entry would be responsible for assessing asylum claims and the obligation for asylum seekers not to seek international protection in a second member state. The Commission also did not support calls to include a preference-matching system whereby the choices of the individuals involved would be taken into account. A main Commission concern has been to find ways to prevent 'secondary movements' of asylum seekers within the Schengen area and sanctioning those who make them. Little consideration has being given to the existence of possible legitimate grounds for people to seek asylum in a second member state, such as degrading or inhuman reception conditions (including lack of adequate housing provision and destitution) in the first state of irregular arrival.

In a step further and separate from the Commission proposal, the European Parliament called for a compulsory relocation system to become the general rule of the CEAS and retiring the first irregular entry-rule of the EU Dublin system.[78] It also expressed its disagreement[79] with the penalisation of or punitive approach towards asylum seekers present in the re-cast proposal on

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[77] European Commission (2016), Proposal for a Regulation of the European parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) 2016/0133 (COD), COM(2016) 270 final, Brussels 4 May (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf).

[78] European Parliament (2017), Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), A8-0345/2017, 6 November. (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0345+0+DOC+PDF+V0//EN).

[79] European Parliament (2016), Reception of applicants for international protection. Recast 2016/0222(COD) (https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0222(COD)&l=en).

reception conditions.[80] On this basis, the Commission recommended in December 2017 that "a way forward could be to adopt an approach where the component of compulsory relocation would apply to situations of serious crisis, while in less challenging situations, relocation would be based on voluntary commitments from member states".[81]

Among other legislative proposals, the Commission encouraged the use of 'safe third country' notions.[82] The main idea was to incentivise EU member states for them to use this concept more regularly and have a more harmonised approach across the EU. The value added of such a policy can be questioned in light of the already existing safe country notions and practices across EU member states.[83] In addition to the fundamental rights risk of using these notions too liberally without securing an individualised asylum assessment, the very premises of the safe third country paradigm are flawed.[84] It assumes that third countries will accept receiving the label of 'safe' and therefore the heavy responsibility that it carries. It also relies upon the unrealistic idea that these countries, particularly African states, can be supported by the EU in developing

[80] European Commission (2016), Proposal for a Directive of the European Parliament and of the Council on laying down standards for the reception of applicants for international protection (recast) 2016/0222 (COD), COM(2016) 465 final, Brussels, 13 July (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_standards_for_the_reception_of_applicants_for_international_protection_en.pdf).

[81] European Commission (2017), Communication from the Commission to the European Parliament, the European Council and the Council on Commission contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy, COM(2017) 820 final, Brussels, 7 December (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171207_communication_on_commission_contribution_to_the_eu_leaders_thematic_debate_on_way_forward_on_external_and_internal_dimension_migration_policy_en.pdf).

[82] European Commission (2016), Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU 2016/0224 (COD), COM(2016) 467 final, Brussels, 13 July (http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF).

[83]European Commission, "an EU 'safe countries of origin' list", (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_safe_countries_of_origin_en.pdf).

[84] ECRE (2016), Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467, European Council on Refugees and Exiles, November (https://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf).

their domestic asylum systems and ratifying relevant UN refugee protection instruments in a way that would formally allow them to qualify as 'safe'.

Yet, does any African country have that capacity, and would they have any actual appetite 'to build capacity' on asylum and be 'safe' for asylum seekers? Doing so would automatically mean becoming responsible for assessing asylum applications and providing durable solutions for potential beneficiaries of international protection in their countries. The proposed Commission approach has disregarded these fundamental questions and also risks ignoring geopolitical implications. Often little consideration is given to third country perspectives and interests when engaging in wider diplomatic and foreign affairs relations which extend far beyond the EU's 'migration management' priority.

In July 2016, the Commission presented a Proposal for a Regulation establishing a Union Resettlement Framework,[85] which aimed at establishing "a more structured, harmonised, and permanent framework for resettlement across the Union" and reducing current divergences among national resettlement practices by harmonising a "collective EU approach to resettlement". The Commission's proposal provided a common definition of the notion of resettlement,[86] the factors to be considered for including non-EU countries from where resettlement would occur and a set of common eligibility criteria and grounds of exclusion for applicants. If adopted, the Regulation would establish common procedures and annual Union resettlement plans with targeted resettlement schemes through European Commission implementing acts.[87] The proposal also included a *migration management approach* by including among the set of factors to be considered in selecting third countries to benefit from resettlement their willingness and "effective cooperation" on reducing irregular entries and increasing readmission rates, as well as the conclusion of readmission agreements.[88]

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[85] European Commission (2016), Proposal for a regulation establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, Brussels, 13.7.2016 COM(2016) 468 final 2016/0225 (COD) (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/resettlement_system_en.pdf).

[86] Art. 2 of the Proposal defines resettlement as "the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection".

[87] See Arts. 7 and 8, as well as 10 and 11 on procedures.

[88] Art. 4.d.iv of the proposal which states that "In determining the regions or third countries from which resettlement shall occur within the Union Resettlement Framework, in

Several civil society actors that have played an active role in the implementation of current resettlement programmes issued a Joint Comments Paper on 14 November 2016 raising important concerns about the proposed Union Resettlement Framework.[89] They highlighted how "the proposed Framework is overly reactive and focuses unduly on migration control objectives, to the potential detriment of resettlement's function as a lifesaving tool and a durable solution." They also reminded the Commission that resettlement "must be regarded as complementary to, and not a replacement of, spontaneous arrivals and the right to seek asylum in Europe." The Joint Letter also raised concerns about the 'conditionality' of resettlement humanitarian options with priority regions selected on the basis of political cooperation with the EU in other Union security- oriented fields such as expulsions and readmission.

In November 2016, the Office of the United Nations High Commissioner for Refugees (UNHCR) provided comments in light of its internationally recognised mandate and its current central global role in implementing resettlement activities.[90] UNHCR raised additional concerns about the risk of the Union resettlement framework blurring the distinction between resettlement as a tool for protection and family reunification. In its view, the Union framework should avoid duplications with already existing structures and take place under "the existing international resettlement architecture". Importantly, it also pointed out that it "understands States' concerns and desire to deploy various tools to effectively manage migration. Yet, resettlement is, by design, a tool to

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accordance with the implementing acts referred to in Articles 7 and 8, the following factors shall be taken into consideration: "(d) a third country's effective cooperation with the Union in the area of migration and asylum, including: (i) reducing the number of third-country nationals and stateless persons irregularly crossing the border into the territory of the Member States coming from that third country; (iv) increasing the rate of readmission of third-country nationals and stateless persons irregularly staying in the territory of the Member States such as through the conclusion and effective implementation of readmission agreements".

[89] Joint Comments Paper by: Caritas Europa, Churches' Commission for Migrants in Europe (CCME), European Council for Refugees and Exiles (ECRE), International Catholic Migration Commission (ICMC Europe), International Rescue Committee (IRC), Red Cross EU office (2016), on European Commission proposal for a Regulation establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council COM(2016) 468, 13 July 2016, Brussels, 14 November 2016 (https://www.ecre.org/wp-content/uploads/2016/11/NGO-joint-comments-resettlement-141116.pdf).

[90] UNHCR Observations and Considerations (2016), Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, November 2016 (https://www.refworld.org/pdfid/5890b1d74.pdf).

provide protection and a durable solution to refugees rather than a migration management tool".

All in all, the latest EU asylum reform remains frozen at the time of writing, which leaves the key actions (including both those identified as 'immediate actions' and the ones falling under Pillar 3 of the European Agenda on Migration, "Europe's duty to protect: A strong common asylum policy"), by and large unaccomplished. There are no indications that the current deadlock will be fully overcome any time soon. The main reason is lack of consensus among some EU member states in finding new ways or 'models' for distributing responsibilities among member states beyond that established under the EU Dublin Regulation. Because negotiations of the above-mentioned seven CEAS legislative proposals have taken a 'package approach' from the outset, some of the other proposals where inter-institutional decision making progress has been achieved are currently stuck in negotiations.

3.2.3 EASO: Towards an EU Asylum Agency

This has been the case for instance regarding the new mandate of the European Asylum Support Office (EASO) located in Valetta (Malta). The Commission presented an important initiative with a clear potential for making important practical contributions on the ground in the sharing of responsibility and solidarity with EU member states maintaining common Schengen external borders.[91] The Commission proposed reforming EASO into an EU Asylum Agency that would not only support and participate in assessing asylum claims along with member state national authorities, but also contribute to the monitoring of the domestic implementation of EU asylum standards and ensuring higher accountability of ongoing EASO operational activities in countries like Greece.[92]

EASO's involvement in conducting 'admissibility interviews' of asylum seekers in the hotspots on the Greek islands has been subject to complaints highlighting that they have fallen outside its current official mandate and have failed to comply with procedural guarantees and the right to be heard in Art. 41 EUCFR.[93]

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[91] Sergio Carrera and Karel Lannoo (2018), "We're in this boat together: Time for a Migration Union", CEPS, Brussels, 22 June (https://www.ceps.eu/publications/were-boat-together-time-migration-union).

[92] Papadopoulou, op.cit.

[93] While the European Ombudsman concluded that the responsibility for decisions on individual asylum applications lies with the Greek authorities, it did accept that complaints by some civil society actors raised "genuine concerns about the extent of the involvement of

The Commission recommended de-linking negotiations on the EU Asylum Agency with the recast CEAS proposals addressed in Section 3.2.2 above.[94] In the above-mentioned State of Union Speech of 18 September 2018, Juncker advanced a new proposal amending the previous one that aims at converting EASO into an EU Asylum Agency.[95] The new proposal aims at strengthening the financial means of the agency so as to reinforce its technical and operational assistance to member states. Among others, it also envisages that it would have the competence to provide administrative assistance to national asylum authorities in carrying out a full or partial examination of asylum applications,[96] assisting or coordinating the setting up of reception conditions and facilities and member states' operational implementation of the EU Dublin procedure with the domestic deployment of 'asylum support teams'.

EASO personnel…and about the quality of, and procedural fairness in, the conduct of admissibility interviews". European Ombudsman (2018), Decision in case 735/2017/MDC on the European Asylum Support Office's (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in Greek Hotspots, in particular shortcomings in admissibility interviews, 5 July 2018.

[94] European Commission (2017a), op.cit.

[95] Council of the European Union (2018), Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 - A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, ST 12112 2018 INIT, Interinstitutional File: 2016/0131(COD), ASILE 59, CSC 253, CODEC 1459, Brussels, 13 September (https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-eu-agency-asylum-regulation-633_en.pdf).

[96] Refer to the proposed revision of Art. 16.2.d of the Commission proposal which states that "The Agency shall organise and coordinate, for a limited period of time, the appropriate operational and technical assistance which may entail taking one or more of the following operational and technical measures in full respect of fundamental rights: (d) facilitate assist with the examination of applications for international protection that are under examination by the competent national authorities or provide them with other necessary assistance in the procedure for international protection, in particular by; (i) assisting with or carrying out the admissibility interview and the substantive interview, as applicable, and the interview for determining the Member State responsible; (ii) registering the application for international protection in the automated system referred to in Dublin Regulation; (c) provide assistance to competent national authorities responsible for the examination of the application for international protection; (iii) assisting with the provision of information to applicants on the procedure for international protection procedure and with regard to reception conditions as appropriate; (iv) assisting with the provision of information on allocation and providing the necessary assistance to applicants that could be subject to allocation".

3.3 Legal Immigration

President Juncker expressly stated in his "A New Start for Europe" Political Guidelines that:

> I want to promote a new European policy on legal migration. Such a policy could help us to address shortages of specific skills and attract talent to better cope with the demographic challenges of the European Union. I want Europe to become at least as attractive as the favourite migration destinations such as Australia, Canada and the USA. As a first step, I intend to review the 'Blue Card' legislation and its unsatisfactory state of implementation.

Previous CEPS research[97] showed that the current 2009 EU Blue Card regime,[98] aimed at easing the conditions of entry and residence for third country highly qualified workers and their family members in the Union, has at times not been working effectively in practice. Very few EU Blue Cards[99] have been issued by EU member states since the regime came into existence, due to a number of factors.[100] Among others: first, its rather restrictive conditions for admission (including high salary thresholds) and for intra-EU mobility (the right, once having being granted EU blue card status, to move with family members to a second EU member state); second, the option for national governments to continue using their parallel national schemes for entry, residence and work of highly qualified third country nationals.

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97 Katharina Eisele (2013), "Why come here if I can go there? Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified' Immigrants", CEPS Paper in Liberty and Security, CEPS, Brussels, No. 60, October (https://www.ceps.eu/system/files/No%2060%20Eisele%20EU%20Blue%20Card%20Directive_0.pdf).

98 Council of the European Union (2009), Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, L155/1, 18.6.2009 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0050&from=EN).

99 European Commission (2016), "Questions and Answers: An improved EU Blue Card scheme and the Action Plan on Integration", European Commission Fact Sheet, Strasbourg, 7 June (http://europa.eu/rapid/press-release_MEMO-16-2071_en.htm).

100 European Commission (2014), Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment ("EU Blue Card"), COM(2014) 287 final Brussels, 22 May (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0287&from=EN).

This was also highlighted by Commissioner Avramopoulos in his hearing[101] as Commissioner-designate before the European Parliament in September 2014, where he stated that:

> The first years of implementation of the 'Blue Card Directive' has shown several shortcomings, such as the existence of competing, parallel national schemes, which create fragmentation and uncertainty and hold back the potential of the legislation to attract talent. Moreover, highly qualified migrants look at the EU as a whole, just like the US, Canada and Australia: we therefore need to ensure that the intra-EU mobility scheme is an attractive option, facilitating circulation of talents and skills within the EU.

The Commission announced the envisaged reform of the EU Blue Card Directive in June 2016,[102] and presented a new legislative proposal[103] reforming the current outlines of the older EU Blue Card Directive. In contrast to other crisis-related initiatives, the proposal followed EU Better Regulation guidelines and toolbox 'to the letter'. A key 'promise' and welcome contribution by the Commission in this new proposal was the much-needed abolition of parallel national schemes for the highly-skilled in member states and the setting up of a single EU-wide scheme.

The re-cast Directive came with an impressive Impact Assessment,[104] closely following EU Better Regulation guidelines and carefully taking existing

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[101]European Parliament (2014), "Hearing with Dimitris Avramopoulos", organized by the Committee on Civil Liberties, Justice, and Home Affairs, Day 2: 30 September 2014 (http://www.europarl.europa.eu/hearings-2014/en/schedule/30-09-2014/dimitris-avramopoulos/).

[102] European Commission (2016), "Delivering the European Agenda on Migration: Commission presents Action Plan on Integration and reforms 'Blue Card' scheme for highly skilled workers from outside the EU", European Commission Press release, Strasbourg, 7 June. (http://europa.eu/rapid/press-release_IP-16-2041_en.htm).

[103] European Commission (2016), Proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment {SWD(2016) 193 final} {SWD(2016) 194 final}, 2016/0176 (COD), COM(2016) 378 final, Strasbourg, 7 June (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/directive_conditions_entry_residence_third-country_nationals_highly_skilled_employment_en.pdf).

[104] European Commission (2018), Commission staff working document executive summary of the impact assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business and Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments {COM(2018) 113 final} - {COM(2018) 99 final} - {SWD(2018) 56 final}, SWD(2018) 57 final, Brussels, 8 March.

evidence and research into consideration, and justifying preferred policy options for reforming the EU Blue Card model. As recognised by the Commission's September 2018 Communication,[105] Enhancing Legal Pathways to Europe, the inter-institutional negotiations on the proposal are stalled, which, while having support from the European Parliament, have encountered fierce resistance from some EU member states, in particular regarding the abolition of parallel national schemes.

Commissioner Avramopoulos committed himself before the European Parliament to "set European rules so as to clarify legal pathways for all categories of workers that seek to reach the continent."[106] It is by and large unclear exactly how this wider priority has been really implemented in practice.

The Commission has slowly advanced on the revision of common EU rules covering the conditions of entry and residence of third-country nationals for purposes of work and studies in the EU. The revisions bring a clear potential for EU value added, especially in relation to their higher set of common standards of protection, facilitated conditions for entry and residence and provisions facilitating intra-EU mobility.[107] This was for instance the case in relation to a re-cast Directive for students and researchers (on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing) in May 2016.[108]

The European Agenda on Migration also talked about the need for the Union to modernise the common visa policy and referred to the previous Barroso Commission's Proposals for establishing an EU Touring Visa.[109] Despite

(http://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-57-F1-EN-MAIN-PART-1.PDF)

[105] European Commission (2018), Communication from the Commission to the European Parliament and the Council Enhancing legal pathways to Europe: an indispensable part of a balanced and comprehensive migration policy A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM(2018) 635 final, Brussels, 12 September (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0635&from=EN).

[106] Hearing Dimitris Avramopoulos (2014), op.cit.

[107] European Commission (2014), Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment ("EU Blue Card"), COM(2014) 287 final Brussels, 22 May (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0287&from=EN).

[108] Ibid.

[109] European Commission, proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code), COM(2014) 164, 1 April 2014; and proposal

its call for their adoption, and in light of diverging views in the Council, the Commission and the European Parliament, which mainly related to the Council and Commission's opposition to include humanitarian visas in the EU Visa Code, the Commission withdrew the former proposals[110] and published a new one in March 2018,[111] where the previously suggested EU Touring Visa disappeared. In another difference from the previous Commission proposal, the Juncker Commission initiative linked facilitated visa provisions to 'conditionality' on migration management by relevant or selected third countries and as "leverage in EU readmission policy".[112]

Therefore, the promises of the European Agenda on Migration have not been delivered, and neither has the European Parliament call for the Union to legislate on humanitarian visas been fulfilled. On 6 December 2018, the European Parliament adopted a Report on the Commission proposal restating the need for the EU to establish "new safe and legal access arrangements for migrants and refugees seeking to come to Europe" and the development of a common legal framework for humanitarian visas as part of the EU Visa Code.[113] The Parliament recommended reincorporating the concept of a 'Touring Visa'. It also underlined the need to reduce or waive the envisaged time limits required by EU member state consulates abroad for the submission of visa applications in "justified individual cases of urgency, including when it is necessary on

for a regulation of the European Parliament and of the Council establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 562/2006 and (EC) No 767/2008, COM(2014) 163, 1 April 2014.

110 European Commission (2018), Commission Work Programme 2018 An agenda for a more united, stronger and more democratic Europe, Strasbourg, 24.10.2017 COM(2017) 650 final (https://ec.europa.eu/info/sites/info/files/cwp_2018_en.pdf).

111 European Commission (2018), Proposal for a Regulation amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), Brussels, 14.3.2018 COM(2018) 252 final 2018/0061 (COD) (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/201780314_proposal-regulation-establishing-community-code-visas_en.pdf).

112 The Commission Proposal links EU visa policy to "ensure a better balance between migration and security concerns, economic considerations and general external relations." See Recital (2) and Art. 25a of the proposal.

113 European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) (COM(2018)0252 – C8-0114/2018 – 2018/0061(COD)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Juan Fernando López Aguilar, 6.12.2018 (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2018-0434+0+DOC+PDF+V0//EN).

professional grounds, on humanitarian grounds, for reasons of national interest or because of international obligations".[114]

The current EU legal immigration *acquis* is still characterised by systemic fragmentation, legal uncertainty and multi-layered migratory statuses across the Union.[115] CEPS research has showed how these features lead to incoherence, obscurity regarding which rules apply to whom, and discrimination towards certain foreign workers regarding fair working and living conditions in line with those enshrined in international human rights and labour standards such as those adopted under the International Labour Organisation (ILO).[116] The Commission announced it would address and examine these issues in a 'Fitness Check' on the existing legal *acquis* on regular immigration. This is still ongoing and expected to appear sometime during the first half of 2019.[117]

3.4 Irregular entries and third-country cooperation on expulsions

3.4.1 EU-Turkey Statement and the Facility for Refugees

One of the most visible and controversial developments here was the so-called 'EU-Turkey Statement' or deal of March 2016.[118] The Statement came in the form of a political declaration and press release setting up the operative framework under which asylum seekers having entered Greece via Turkey would be returned to the latter. Furthermore, Turkey agreed to take back every irregular migrant intercepted in its waters and step up cooperation to prevent irregular entries into the Schengen territory. The Statement also included the so-called 'one-for-one' deal, according to which for every Syrian returned from Greece to Turkey, another would be resettled from Turkey to the EU.

Despite being often politically portrayed as an 'EU-product' and even as a 'model' for future European cooperation with third countries on migration, we only learned later on that 'the EU' had in fact nothing to do it, neither the European Commission or even the European Council. In response to a direct

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[114] Refer to proposed Parliament amendment of Article 1.1.7 of the proposal.

[115] Sergio Carrera, Andrew Geddes, Elspeth Guild and Marco Stefan (2017), *Pathways towards Legal Migration into the EU: Reappraising concepts, trajectories and policies*, CEPS, Brussels (https://www.ceps.eu/system/files/PathwaysLegalMigration_0.pdf)

[116] Ibid.

[117] European Commission, "Evaluation and fitness check (fc) roadmap" (http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_home_199_fitnesscheck_legal_migration_en.pdf).

[118] Council of EU (2016), EU-Turkey statement, 18 March 2016, Press Release 144/16, 18 March (https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf).

action presented by some asylum seekers who were affected by the implementation of the EU-Turkey Statement, and despite some obvious references to the EU in relevant Press Releases proclaiming the Statement and the Commission participating in the negotiations preceding the 'deal',[119] both the General Court[120] and later on the Court of Justice[121] surprisingly confirmed that the Statement's authorship belonged to the Heads of Government and State of EU member states, not to any EU actor at all. It qualifies as an *'extra-Treaty instrument.'*

Determining the authorship of the Statement was central at times for determining responsibilities for the human rights violations that have been inherent in its operationalisation on the ground, not least on the various Greek islands with 'hotspots' and where a geographical limitation preventing asylum seekers from going to Greece's mainland has been in force as a result of the Statement.[122] EU member states strategically chose to evade the EU Treaties and European law, as well as the European institutions, when negotiating the deal with Turkish Government. This meant that they successfully evaded and side-lined the role of the European Commission envisaged in the Treaties, the democratic scrutiny of the European Parliament and judicial control by the Luxembourg Court in an area of shared and even exclusive EU competence.

As the European Ombudsman concluded in a Joint Inquiry issued on January 2017,[123] irrespective of the actual legal or political nature of the Statement, EU institutions and agencies have been central in its practical

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[119] Sergio Carrera, Leonhard den Hertog and Marco Stefan (2017), "It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", CEPS, Brussels, No 2017-15, April (https://www.ceps.eu/system/files/EU-Turkey%20Deal.pdf).

[120] General Court of the European Union (2017), The General Court declares that it lacks jurisdiction to hear and determine the actions brought by three asylum seekers against the EU-Turkey statement which seeks to resolve the migration crisis, Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council, Press Release No 19/17, Luxembourg, 28 February (https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf).

[121]Court of the European Union (2018), Order of the Court (First Chamber) In Joined Cases C-208/17 P to C-210/17 P, Case-law of the Court of Justice, 12 September 2018 (http://curia.europa.eu/juris/document/document.jsf;jsessionid=FA9EA26D49B93883CC945CB5D377493F?text=&docid=205744&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1837731).

[122]Danish Refugee Council (2017), "Fundamental Rights and the EU Hotspot Approach", October (https://drc.ngo/media/4051855/fundamental-rights_web.pdf).

[123] European Ombudsman (2017), "Ombudsman: EU must continue to assess human rights impact of EU-Turkey deal", Case 506/2016/MHZ, Press release no. 1/2017, 19 January (https://www.ombudsman.europa.eu/en/press-release/en/75136).

implementation,[124] including the European Commission,[125] and the latter should secure robust human rights impact assessments of the Statement.

The Commission was indirectly complicit in the entire affair and conclusion of the Statement and has played a key role in its implementation. It presented the Statement as a 'game changer' in decreasing the number of asylum seeker arrivals and daily crossings to the Greek islands to pre-crisis numbers.[126] Vice-President Timmermans insisted on that point before the European Parliament in 2016 and stated that "the agreement with Turkey in my view is the only way forward to solve that problem. Those who criticise the agreement have never presented an alternative".[127] The progressive decrease in the number of irregular entries since 2016 cannot solely be attributed to the EU-Turkey Statement. A similar extra-Treaty way of decision-making was evident in the Balkans Route Statement, which effectively meant the closure of borders for asylum seekers, and in some cases the erection of new border fences and walls by countries like Macedonia or Hungary.

That notwithstanding, a key challenge characterising the Statement right from the start has been its uneasy relationship with the rule of law and fundamental rights. The political framing by the Commission of Turkey as a 'safe third country' for asylum seekers and refugees, and the high degree of pressure[128] that it has put on the Greek authorities to carry out expedited or

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[124] European Commission, "Operational implementation of the EU-Turkey Statement", European Commission Press Release (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_eu-turkey_en.pdf).

[125]European Commission (2016), "Managing the Refugee Crisis: Commission reports on progress made in the implementation of the EU-Turkey Statement", European Commission Press release, Brussels, 15 June (http://europa.eu/rapid/press-release_IP-16-2181_en.htm).

[126]European Commission (2018), "EU-Turkey Statement: Two years on", Press Release, April (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf).

[127] First Vice-President Timmermans (2016), "Remarks by First Vice-President Timmermans – European Parliament Plenary Debate 28 April 2016 – Council and Commission statements on the legal aspects, democratic control and implementation of the EU-Turkey agreement", European Commission Statement, Council and Commission statements on the legal aspects, democratic control and implementation of the EU-Turkey agreement, Remarks by First Vice-President Timmermans to the European Parliament Plenary Debate, 28 April (https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/remarks-first-vice-president-timmermans-european-parliament-plenary-debate-28-april-2016-council-and_en).

[128] European Commission (2016), Annex 1 to the Communication from the Commission to the European Parliament, the European Council and the Council on the Fourth Report on the Progress made in the implementation of the EU-Turkey Statement, COM(2016) 792 final,

accelerated returns of asylum seekers, including vulnerable groups, to Turkey, have generated a great deal of concern. The Greek asylum appeal bodies have disagreed with Turkey being 'safe' and rejected the sending back of asylum seekers.

The lack of safety of Turkey for refugees is not only based on the irrefutable fact that the country is not bound by the 1967 Protocol to the United Nations Geneva Convention on Refugees[129] and refuses to recognise full refugee status for non-European asylum seekers, and thereby all the rights, security of residence and family life guarantees that the UN definition grants to beneficiaries. The non-practical delivery of human rights in the country has been also widely documented and corroborated.[130]

Furthermore, the Statement came with two tranches of 3 billion Euros for Turkey by the EU under the so-called 'EU Facility for Refugees'.[131] The European Court of Auditors (ECA), which published a Special Report on the Facility for Refugees in Turkey,[132] has provided solid evidence on the lack of clarity of where EU funding – including pre-accession assistance[133] – has really gone to and the extent to which the Facility for Refugee's objectives have been actually met in practice. This has been the case in particular due to factors such as "the Turkish authorities' refusal to grant access to beneficiary data for cash-assistance projects", and not enough investment being given to municipal infrastructures and socio-economic support in the country, which are key for effective access to

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Brussels, 8 December (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20161208/4th_report_on_the_progress_made_in_the_implementation_of_the_eu-turkey_statement_annex_1_en.pdf).

[129]Sergio Carrera and Elspeth Guild (2016), "EU-Turkey plan for handling refugees is fraught with legal and procedural challenges", CEPS, Brussels, 10 March (https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges).

[130] Amnesty International (2017), "A Blueprint for despair Human Rights impact of the EU-Turkey Deal" (https://www.amnesty.org/download/Documents/EUR2556642017ENGLISH.PDF).

[131] European Commission, "Managing the refugee crisis the facility for refugees in Turkey" (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160615/factsheet_the_facility_for_refugees_in_turkey_en.pdf).

[132] European Court of Auditors (2018), "Special Report the Facility for Refugees in Turkey: helpful support, but improvements needed to deliver more value for money", No. 27 (https://www.eca.europa.eu/Lists/ECADocuments/SR18_27/SR_TRF_EN.pdf).

[133] European Court of Auditors (2018), "Special Report EU pre-accession assistance to Turkey: Only limited results so far", No. 07 (https://www.eca.europa.eu/Lists/ECADocuments/SR18_07/SR_TURKEY_EN.pdf).

social assistance, housing, healthcare, work and education, key conditions for any country to be considered 'safe' for refugees, and which Turkey simply does not meet.

The EU-Turkey Statement leaves EU member states and European institutions and agencies in a high level of dependency on Turkish authorities and a regime actively undermining the rule of law and civil liberties.[134] More generally, using money as an incentive for cooperation on readmission of asylum seekers irregularly entering the EU creates expectations for any other third countries – such as in Africa – regarding the price tag that will be attached and who is going to pay the next bill.

3.4.2 Readmission and root causes

The Juncker Commission set as one of its emblematic priorities the 'expulsions dimension' of irregular immigration management, both as regards the call for EU member states to increase expulsion rates, as well as the need for third countries to cooperate in the readmission in addition to their own nationals of irregular third-country nationals entering the EU through their territory, in particular from Africa and the Middle East.

The long-standing difficulties experienced by this and all previous Commissions to persuade non-EU countries to sign EU Readmission Agreements (EURAs), and – once concluded – ensuring their usability and practical implementation has been notoriously difficult. The 'European refugee humanitarian crisis' gave new political impetus to the EU readmission agenda. The role of third-country cooperation in increasing 'return rates' of irregular immigrants was framed as one of the highest EU priorities.

While informal methods of cooperation were already in use before the 2015 humanitarian crisis, the latter functioned as a catalyst for the Commission in justifying the development of their use. Since 2015, the Commission – in cooperation with the External Action Service (EAS) and some member state governments – has developed crisis-driven policy and financial tools with the purpose of facilitating third-country cooperation with the EU on readmission and addressing the so-called "root causes of irregular immigration".

The European Agenda on Migration identified third-country cooperation as a key priority area under its Pillar dealing with "Reducing the incentives for irregular migration". It framed the 'root causes approach' also from a migration management or security angle by arguing that "Migration should be recognised

[134] Council of Europe (2017), "110th PLENARY - Turkey - Proposed constitutional amendments "dangerous step backwards" for democracy", 10 March (https://www.venice.coe.int/webforms/events/?id=2369).

as one of the primary areas [in] an active and engaged EU external policy…civil war, persecution, poverty and climate change all feed directly and immediately into migration, so the prevention and mitigation of these threats is of primary importance for the migration debate".[135]

These policy priorities have materialised in the further development of old and new policy or 'political' instruments or 'practical cooperation arrangements' such as 'Common Agendas on Migration and Mobility' (CAMM), High Level Migration Dialogues, Joint Declarations as well as Joint Way Forward. They all share close ties to the implementation of the political agenda laid down in the 2016 EU Partnership Framework with Third Countries under the European Agenda on Migration, which identified the following 'priority partnership countries': Niger, Nigeria, Senegal, Mali and Ethiopia. Another example is the so-called Joint Way Forward (JWF) on migration issues between Afghanistan and the EU[136], where the EEAS[137] has also participated.

EURAs constitute international agreements where the EU has recognised legal competence in the EU Treaties.[138] They provide common operational procedures and administrative rules for the swift identification (and means of evidence) of 'migrants to be readmitted' and the issuing of travel documents (*laissez-passer*) for their expulsion. In contrast, 'readmission arrangements' are instruments or tools not formally qualifying as EURAs, which are instead officially presented as non-legally binding or practical/operational (presented as 'technical') in nature.

African countries have persistently hesitated and expressed disagreement on the EU's readmission priority.[139] The 'crisis' also provided new political grounds for the EU to persist in and re-visit pre-existing EU prioritisation on

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[135] Page 7 of the Agenda.

[136] European Commission, "Joint Way Forward on migration issues between Afghanistan and the EU" (https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf).

[137] European Union External Action (2016), "Joint Way Forward on migration issues between Afghanistan and the EU", 4 October (https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/11107/Joint%20Way%20Forward%20on%20migration%20issues%20between%20Afghanistan%20and%20the%20EU).

[138]Sergio Carrera (2016), "Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights", CEPS, Brussels, 29 August (https://www.ceps.eu/publications/implementation-eu-readmission-agreements-identity-determination-dilemmas-and-blurring).

[139] Sergio Carrera, Jean-Pierre Cassarino, Nora El Qadim, Mehdi Lahlou and Leonhard den Hertog (2016), "EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?", CEPS paper in Liberty and Security in Europe, Brussels, No. 87 January (https://www.ceps.eu/system/files/EU-Morocco%20Cooperation%20Liberty%20and%20Security%20in%20Europe.pdf).

readmission in external policies with Africa, which was once more not received very warmly by the African governments concerned. This was reflected in the Valletta Summit on Migration held the 11 and 12 November 2015 in Malta. The Summit was chaired by European Council President Donald Tusk, and brought together EU and African Heads of States and Governments as well as representatives from the African Union, ECOWAS and the UN. The Summit, and the Joint Action Plan which followed, gave special salience to re-boosting third-country cooperation in a number of areas including readmission.

The Valletta Summit, and its difficult implementation through the Joint Plan, constitutes a visible example of a failing migration-control policy approach when the European Commission and the EEAS have gone abroad, including the so-called 'EU Migration Compacts'. The North African governments' response to various attempts coming from these and other EU actors calling for readmission and safe third country notions has been of long-standing and persistent lack of support. The Valetta Summit once more made evident how African representatives saw a lack of real dialogue – but rather a 'monologue' – between the EU and its African counterparts, with the EU yet again seeking to impose its own 'more-for-more' conditionality approach and accelerate expulsions at all costs.

This European Commission has promoted and implemented the use of non-legally binding instruments[140] in the domain of EU readmission policy. Their blurred legally binding nature – and the fact that the parties are not legally bound to follow the terms of cooperation set out in these arrangements – increases the uncertainty and predictability of readmission procedures. There are no meaningful ways to ensure the compliance of their provisions by the states party due to their lack of enforceability. Also, the documents laying down or listing the concrete set of actions and projects implemented and funded remain confidential and are not disclosed to the public, which entirely prevents much-needed financial, democratic and legal accountability.

Research has showed that the increasing use of non-legally binding 'readmission arrangements' has not helped in making cooperation easier, nor has it increased the number of enforced returns to the relevant African countries.[141] EU readmission arrangements have on the other hand left the door

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[140] Sergio Carrera, Arie Pieter Leonhard den Hertog, Marion Panizzon and Dora Kostakopoulou (2018), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes,* Immigration and Asylum Law and Policy in Europe, Vo. 44, 10 December (https://brill.com/abstract/title/35752).

[141] Sergio Carrera, On Policy Ghosts: Readmission Arrangements as Intersecting Policy Universes, in Sergio Carrera, Arie Pieter Leonhard den Hertog, Marion Panizzon and Dora Kostakopoulou (2018), *EU External Migration Policies in an Era of Global Mobilities: Intersecting*

open for bilateral interests between member states and specific 'priority countries'. In this way, their use can be expected to re-inject 'bilateralism' and specific national agendas into a policy area falling under EU competence. Moreover, they hijack democratic scrutiny by the European Parliament, which has the power of 'consent' in international agreements in light of the Lisbon Treaty.

The implementation of EU Readmission Arrangements has been closely tied to the use of extra-budget and emergency-led EU funding instruments, chiefly the so-called 'EU Trust Funds' (EUTF).[142] The EUTF with Africa has for instance shown how the linkage between the EUTF and the EU Migration Partnership Framework[143] launched by the Commission in 2016[144] has enabled the 'more-for-more' conditionality approach on migration in the area of readmission with relevant African governments. The case of Ethiopia, for example, illustrates how EU funding aims at functioning as a key 'enabler' in the implementation of the political agenda in the EU Partnership, with somewhat mixed results on its effectiveness.[145] Similarly to the readmission arrangements, the fact that EUTFs are 'extra-budget' severely undermines budgetary control by the European Parliament.[146]

Policy Universes, Immigration and Asylum Law and Policy in Europe, Vo. 44, 10 December, pp. 21-59 (https://brill.com/abstract/title/35752).

[142]Sergio Carrera, Leonhard den Hertog, Jorge Núñez Ferrer, Roberto Musmeci, Marta Pilati, Lina Vosyliute (2018), "Oversight and Management of the EU Trust Funds: Democratic Accountability Challenges and Promising Practices", requested by the European Parliament's Committee on Budgetary Control, April (https://www.ceps.eu/publications/oversight-and-management-eu-trust-funds-democratic-accountability-challenges-and).

[143] European Commission (2016), "Migration Partnership Framework a new approach to better manage migration" (https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf).

[144] European Commission (2016), "Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration", European Commission Press release, Strasbourg, 7 June (http://europa.eu/rapid/press-release_IP-16-2072_en.htm).

[145]European Commission (2017), "Partnership Framework on Migration: Commission reports on results and lessons learnt one year on", European Commission Press Release, Strasbourg, 13 June (http://europa.eu/rapid/press-release_IP-17-1595_en.htm).

[146] Carrera et al. (2018b), op.cit.

3.4.3 Returns

The EU has its own return policy under the umbrella of the EU Return Directive 2008/115.[147] Increasing 'the effectiveness' of EU irregular immigration policies, particularly by increasing the enforcement rate of expulsions of irregular immigrants and asylum seekers has become one of the most visible political priorities of this Commission. On repeated occasions, a gap between 'return orders issued' and the total of enforced expulsions has been highlighted.[148]

The European Agenda on Migration (COM(2015)240)[149] declared that "one of the incentives for irregular migration is the knowledge that the EU's system to return irregular migrants is not sufficiently effective". Similarly, in 2015, the Commission published a Communication on an EU Action Plan on return (COM(2015)453),[150] which underlined that during 2014 "less than 40% of the irregular migrants that were ordered to leave the EU departed effectively" and therefore called for the "systematic return, either voluntary or forced, of those who do not or no longer have the right to remain in Europe". Vice-President Timmermans expressly stated[151] that "Everyone who needs sanctuary should find it in Europe. But those who have no justified claim should be quickly identified and returned to their home country".

The transformation of Frontex into a EBCG has also meant granting the agency with an increased operational role in expulsions, which comes alongside similarly high expectations for its task in increasing expulsions rates. In

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147 European Parliament and Council (2008), Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, L 348/98, 24.12.2008. (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN).

148 Carrera (2009), op.cit.

149 European Commission (2015), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a European agenda on migration, COM(2015) 240 final, Brussels 13 May (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf)

150 European Commission (2015), Communication from the Commission to the European Parliament and to the Council EU Action Plan on return, COM(2015) 453 final, Brussels 9 September (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf).

151 European Commission (2015), "European Commission makes progress on Agenda on Migration", European Commission Press release, Brussels, 27 May (http://europa.eu/rapid/press-release_IP-15-5039_en.htm).

addition, President Juncker announced in his September 2018 State of the Union address before the European Parliament the presentation of revised EU rules on returns of irregular immigrants. The Commission adopted a new proposal recasting the EU Return Directive, which aims at increasing the enforcement of return decisions.[152]

This proposal will not solve current legal, judicial and practical issues which stand in the way of enforcement of removals in the EU.[153] Most of these are inherently constitutive to the obligation to ensure effective remedies and legal protection to the individuals involved, and the specificities of national, regional and local landscapes of the actors involved. The fact that the Commission has proposed it without an Impact Assessment of its value and potential fundamental rights violations constitutes another example of non-compliance with EU Better Regulation guidelines, which require justification of proportionality, subsidiarity and proof of compliance with the EU Charter of Fundamental Rights.

Moreover, the proposal has been subject to profound concerns[154] from 90 civil society organisations issuing a statement[155] highlighting that, if adopted, the proposal will actually create more harm and suffering. If adopted, the Directive would lead to more unlawful detention of migrants and asylum seekers, including vulnerable categories, which defeats the very purpose of 'effective expulsions', and neglects the high risks of fundamental rights violations resulting from accelerated border procedures, which are most worrying in light of the ineffective or inexistent complaint mechanisms at domestic levels across the Union (Refer to Section 3.1.1 on the EBCG above).

3.4.4 Migrant smuggling

The dismantling of the so-called 'business model' of migrant smugglers in the EU has been another key political priority for the Juncker Commission.[156] The

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[152] European Parliament and Council (2008), op.cit.

[153] Carrera (2016), op.cit.

[154] ECRE (2018), "European Commission releases proposal to recast Return Directive", News, 14 September (https://www.ecre.org/european-commission-releases-proposal-to-recast-return-directive/).

[155] PICUM (2017), "New EU Commission plans on returns and detention will create more harm and suffering - 90 civil society organisations address EU Commission in joint statement", Picum News, 3 March (https://picum.org/new-eu-commission-plans-returns-detention-will-create-harm-suffering/).

[156] Sergio Carrera and Elspeth Guild (2016), "Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU", CEPS Paperback, Brussels, 22 February

European Agenda on Migration identified "the targeting of criminal smuggling networks" as an area for 'immediate action'.[157] The refugee crisis gave even further impetus to this political priority and placed it at the top of both the Commission's migration and security agendas.

Before the crisis, the EU already had a legislative framework criminalising the facilitation of irregular entry, transit and residence in the EU in the form of the so-called EU Facilitators Package, a pre-Lisbon Treaty framework adopted in November 2002, and which is composed of Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (the 'Directive') and Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (the 'Framework Decision').[158] The Commission's European Agenda on Migration promised that "the Commission will improve the existing EU legal framework to tackle migrant smuggling and those who profit from it".[159] This policy objective has not been accomplished.

CEPS research[160] underlined the need for the Commission to reform the Facilitators Package due to its embedded legal uncertainty regarding legitimate provision of humanitarian assistance by civil society actors, volunteers and citizens to asylum seekers and irregular immigrants. Specifically, Art. 1.2 of the Facilitation Directive offers member states the option to exempt or not from criminalisation individuals or organisations providing assistance which is humanitarian in nature. On the basis of this ambiguity, academic research has provided evidence of instances where civil society actors have been sanctioned, criminalised or policed in some EU member states, as well as a generalised

(https://www.ceps.eu/publications/irregular-migration-trafficking-and-smuggling-human-beings-policy-dilemmas-eu).

157 European Commission (2015), op.cit.

158 OJ L 328, 5.12.2002.

159 Refer to page 9 of European Agenda on Migration.

160 Sergio Carrera, Elspeth Guild, Ana Aliverti, Jennifer Allsopp, Maria Giovanna Manieri and Michele LeVoy (2015), *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants.* Brussels: European Parliament. Available at: (https://www.ceps.eu/publications/fit-purposethe-facilitation-directive-and-criminalisation-humanitarian-assistance). See also Sergio Carrera and Elspeth Guild (Eds) (2016), Irregular Migration, Trafficking and Smuggling in Human Beings, CESP Paperback, Brussels (https://www.ceps.eu/publications/irregular-migration-trafficking-and-smuggling-human-beings-policy-dilemmas-eu).

chilling or deterrent effect for NGOs working to provide legal aid, access to services and advocacy on fundamental rights to third country nationals.[161]

The Commission carried out a REFIT (Regulatory Fitness and Performance Programme) on the implementation of the EU Facilitators Package which was published in March 2017.[162] Despite the wealth of evidence to the contrary, the Commission surprisingly concluded that "there is no sufficient evidence to draw firm conclusions about the need for a revision of the Facilitators Package at this point in time." It added that "a reinforced exchange of knowledge and good practice between prosecutors, law enforcement and civil society could contribute to improving the current situation and avoid criminalisation of genuine humanitarian assistance."[163]

Furthermore, during the term of office of the Juncker Commission we have witnessed a proliferation of border and non-border management related agencies and actors involved in the design and implementation of EU anti-smuggling policies in the Mediterranean Sea. Anti-smuggling policies have been re-framed as 'migration-management' responses to prevent irregular entries in the EU, with an increasing number of transnational actors and EU funding being deployed in their implementation. In its 2015-2020 EU Action Plan against migrant smuggling (May 2015),[164] the Commission proposed the need to increase EU Agencies competences in supporting EU member states in the investigation and prosecution of migrant smuggling networks and called for a 'multi-agency approach'.

As developed in Section 3.2.1 above (Relocation and hotspots), EU home affairs agencies such as Europol and Eurojust were progressively deployed in the hotspots in Greece and Italy helping to "identify smugglers, investigate

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[161] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp, Lina Vosyliute (2019), "Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society", *Hart Publishing,* January (https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/).

[162] European Commission (2017), Staff Working Document REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), Brussels, 22.3.2017 SWD(2017) 117 final.

[163] Ibid., page 35.

[164] European Commission (2015), "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Action Plan against migrant smuggling (2015 - 2020)", COM(2015) 285 final, Brussels, 27 May (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/general/docs/eu_action_plan_against_migrant_smuggling_en.pdf).

them, prosecute them, freeze and confiscate their assets".[165] In addition, Europol has not only been granted an expanded maritime operational activities focused on information exchange to dismantle 'smuggling networks' from Turkey, Libya and other African countries.[166] It was also given a new 'European Migrant Smuggling Centre' (EMSC) in February 2016, which aims at "proactively supporting EU member states in dismantling criminal networks involved in organised migrant smuggling".[167]

The Commission's Action Plan added that the proposed actions "should be seen in connection with on-going work to establish a Common Security and Defence Policy (CSDP)" so as to address human smuggling. This constituted a direct invitation for defence and military actors to become actively involved in the EU's responses to the refugee humanitarian crisis. The most important development implementing this call was the setting up of EUNAVFOR-MED Operation ('Operation Sophia'[168]) which, under the leadership of the Vice-President of the Commission and High Representative Mogherini (EEAS), started in May 2015.

The operation was originally given an international legal mandate to intercept, inspect, seize and destroy vessels on the high seas off the coast of Libya for a period of one year in cases where there are 'reasonable grounds to believe' that these vessels, inflatable boats, rafts and dinghies are being used for smuggling and human trafficking (UN Resolution 2240 (2015)).[169] In June 2016,[170] Operation Sophia's mandate was extended for another year and two new tasks were added: training Libyan coastguards and contributing to the

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[165] Refer to page 9 of the European Agenda on Migration.

[166] Europol (2015), "Joint operational team launched to combat irregular migration in the Mediterranean", Press Release, 17 March. (https://www.europol.europa.eu/newsroom/news/joint-operational-team-launched-to-combat-irregular-migration-in-mediterranean).

[167] Europol (2016), "Europol launches the European Migrant Smuggling Centre", Press Release, 22 February (https://www.europol.europa.eu/newsroom/news/europol-launches-european-migrant-smuggling-centre).

[168] EUNAVFOR MED Operation Sophia official website (https://www.operationsophia.eu/).

[169] UN Security Council (2015), "Adopting Resolution 2240 (2015), Security Council Authorizes Member States to Intercept Vessels off Libyan Coast Suspected of Migrant Smuggling", SC/12072, 7532ND MEETING (AM), Resolution 2240 (2015), UN Press, 9 October (https://www.un.org/press/en/2015/sc12072.doc.htm).

[170] The Political and Security Committee (2016), Political and Security Committee Decision (CFSP) 2016/1635 of 30 August 2016 on the commencement of the capacity building and training of the Libyan Coast Guard and Navy by the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (EUNAVFOR MED/3/2016), L 243/11, 10.9.2016 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D1635&from=EN).

implementation of the UN arms embargo in the high seas (UN Resolution 2291 (2016)).[171]

In July 2017, the Operation's lifetime was extended until December 2018,[172] which was recommended to be extended for a further 18 months,[173] pursuing the development of the EU Trust Fund (EUTF) project[174] started in July 2017 for "strengthening the operational capacities of the Libyan coast guards" and setting up the Libyan Maritime Rescue Coordination Centre, with the Italian authorities (as one of the key implementers of the project) and Libyan stakeholders. A Joint Communication between the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy of January 2017 laid down in a rather transparent manner the key role played by Operation Sophia and the EU Border Assistance Mission (EUBAM), in 'supporting' Libyan Coast Guard capacity to prevent smugglers from operating and "to have the capacity to better manage maritime border and ensure safe disembarkation on the Libyan coast."[175]

The effectiveness and proportionality of Operation Sophia has been subject to much discussion.[176] Not least in light of its contribution towards the militarisation of EU's border surveillance and irregular immigration policy and the increasing focus on 'information exchange' in countering human

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171 UN Security Council (2016), "Security Council Extends Mandate of United Nations Support Mission in Libya, Unanimously Adopting Resolution 2291 (2016)", SC/12398, 7712TH MEETING (AM), Resolution 2291 (2016), UN Press, 13 June (https://www.un.org/press/en/2016/sc12398.doc.htm).

172 European Union External Action (2017), "EUNAVFOR MED Operation Sophia: mandate extended until 31 December 2018", EU News 160/2017, Brussels, 25 July (https://eeas.europa.eu/delegations/japan_en/30393/EUNAVFOR%20MED%20Operation%20Sophia:%20mandate%20extended%20until%2031%20December%202018).

173 Council of the European Union (2018), Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell, 11471/18, Brussels, 27 July (http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf).

174 European Commission (2017), "EU Trust Fund for Africa adopts €46 million programme to support integrated migration and border management in Libya", European Commission Press release, Brussels, 28 July (http://europa.eu/rapid/press-release_IP-17-2187_en.htm)

175 European Commission (2017), Joint communication to the European Parliament, the European Council and the Council on Migration on the Central Mediterranean route Managing flows, saving lives, JOIN(2017) 4 final, Brussels, 25 January (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125_migration_on_the_central_mediterranean_route_-_managing_flows_saving_lives_en.pdf).

176 Carrera et al. (2015), op.cit.

smuggling.[177] This comes alongside the still unresolved and ongoing conflict in the country, which makes the existence of central government and clearly identifiable border and coast guard authorities illusory. The UK House of Lords (2015) concluded that there remain significant gaps in the operation's understanding of smuggling networks and their *modus operandi* in Libya.[178] The operation's objectives in countering 'crime' have by and large exceeded what could be realistically expected from such a military operation.[179]

It is also noticeable that the main mandate of Operation Sophia has not been search and rescue (SAR) at sea. Its contribution to the SAR gap in the central Mediterranean has been negligible. The role that it has played in confiscating and destroying boats and making sea journeys more dangerous, the training of various Libyan coast guard actors[180] and increasing SAR capacity in Libya have been equally controversial. Preventing asylum seekers and immigrants from leaving Libyan waters violates the *non-refoulement* principle, as a wealth of evidence exists that they can be expected to experience indefinite detention, torture and other ill-treatment in centres that are unsuitable for human habitation.[181]

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[177] European Commission (2017), "Europe – the continent of solidarity: Joint Statement on the occasion of International Migrant Day", European Commission Statement, Brussels, 18 December (http://europa.eu/rapid/press-release_STATEMENT-17-5344_en.htm).

[178] The UK House of Lords (2015), "EU Action Plan against migrant smuggling", 4th Report of Session 2015–16, November (https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/46/46.pdf).

[179] Council of the European Union (2016), EUNAVFOR MED - Operation SOPHIA" - Six Monthly Report: June, 22nd to December, 31st 2015, Brussels, 28 January (https://wikileaks.org/eu-military-refugees/EEAS/page-1.html).

[180] European Union external Action (2016), "EUNAVFOR MED Operation Sophia starts training of Libyan Navy Coast Guard and Libyan Navy", Brussels, 27 October (https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/13195/EUNAVFOR%20MED%20Operation%20Sophia%20starts%20training%20of%20Libyan%20Navy%20Coast%20Guard%20and%20Libyan%20Navy).

[181] According to the United Nations "Migrants and refugees suffer unimaginable horrors during their transit through and stay in Libya. From the moment they step onto Libyan soil, they become vulnerable to unlawful killings, torture and other ill-treatment, arbitrary detention and unlawful deprivation of liberty, rape and other forms of sexual and gender-based violence, slavery and forced labour, extortion and exploitation by both State and non-State actors". Refer to United Nations Support Mission to Libya and Office of the High Commissioner for Human Rights (2018), Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya, United Nations Support Mission in Libya and Office of the High Commissioner for Human Rights, 18 December 2018. Refer also to UNHCR (2018), UNHCR Position on Returns to Libya (Update II), September 2018.

3.5 Criminal justice and police cooperation

EU competence on security and criminal justice cooperation has gone through a widening in reach and scope since the 2009 Lisbon Treaty. The latter brought judicial cooperation in criminal matters and police cooperation under Title V, "Area of Freedom, Security and Justice". For the first time in European integration, these policy domains were transferred to shared legal competence between the Union and the member states.

For a period of four years since the entry into force of the Lisbon Treaty in 2009, however, Protocol 36 of the Treaty on the European Union (TEU) limited the ordinary enforcement powers of the European Commission to scrutinise and follow up member states for timely and correct implementation of EU criminal justice and policing laws.[182] This transitional period came to an end in December 2014 with the new Juncker Commission team. Vice-President Timmermans declared that "*Justice and Home Affairs policies are finally set on an equal footing with other EU policies. This is a step forward in making them more transparent and democratic.*"[183] Since then, the Commission acquired a key role in 'monitoring trust' in the EU criminal justice area.[184]

3.5.1 European Public Prosecutor's Office

A major development during the reporting period has been the setting up of the European Public Prosecutor's Office (EPPO) in October 2017.[185] This was highlighted as a key priority by Commissioner Jourová during her hearing before the LIBE Committee of the Parliament as Commissioner-designate on 1 October 2014, when she declared that "In the area of judicial cooperation in

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[182] Sergio Carrera, Katharina Eisele, Valsamis Mitsilegas (2014), "The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area?", CEPS, Brussels, 8 December (https://www.ceps.eu/publications/end-transitional-period-police-and-criminal-justice-measures-adopted-lisbon-treaty-who).

[183] European Commission (2014), "A new era for EU Justice and Home Affairs policies", European Commission Press Release, Brussels, 1 December (http://europa.eu/rapid/press-release_IP-14-2266_en.htm).

[184]Sergio Carrera and Valsamis Mitsilegas (2018), "Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court's request for a preliminary ruling on the European Arrest Warrant", CEPS, Brussels, 11 April. (https://www.ceps.eu/publications/upholding-rule-law-scrutinising-judicial-independence-irish-courts-request-preliminary).

[185] Valsamis Mitsilegas and Fabio Giuffrida (2017), "Raising the bar? Thoughts on the establishment of the European Public Prosecutor's Office", CEPS, Brussels, 30 November (https://www.ceps.eu/publications/raising-bar-thoughts-establishment-european-public-prosecutor%E2%80%99s-office).

criminal matters, I intend to prioritise the establishment of an independent and efficient European Public Prosecutor's Office by 2016."[186]

The EPPO constitutes an ambitious achievement. It grants the EU the first Union body having the power to investigate and prosecute crimes against the financial interests of the EU (PIF offences).[187] The original Commission initiative presented back in 2013 proposed an innovative and centralised EPPO model. After arduous negotiations among EU member states, it was finally adopted under 'enhanced cooperation' in light of Art. 86.1 TFEU. So far, 22 member states are participating in the EPPO.[188]

The final EPPO configurations were significantly watered down into an intergovernmental body during the negotiations inside the Council.[189] It is expected to start operating by the end of 2020, and it will be set up in Luxembourg. During the last State of the Union address delivered in the European Parliament in September 2018, President Juncker announced a new Commission proposal to extend the EPPO mandate to include the fight against terrorist offences affecting more than one member state.[190]

The EPPO's procedural effectiveness will be a key issue due to its very complex, multi-level organisation and decentralised structure.[191] Despite the fact the EPPO is to be formally independent, similarly to the Frontex (EBCG) Agency as has been highlighted above, its structure, membership and decision powers will be highly dependent on member state domestic criminal justice and prosecutorial legal systems, which are profoundly different and diverse in

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[186] European Parliament (2014), Hearing Věra Jourová, Dat 3: 7 October, organized by the Committee on Civil Liberties, Justice, and Home Affairs (http://www.europarl.europa.eu/hearings-2014/en/schedule/01-10-2014/vera-jourova/).

[187] The European Parliament and the Council (2017) Directive 2017/1731 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L198/29, 28.7.2107 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1371&from=EN).

[188] Until present the following countries do not take part in the EPPO: Denmark, Ireland, the United Kingdom, Sweden, Poland and Hungary.

[189] Fabio Giuffrida (2017), "The European Public Prosecutor's Office: King without kingdom?", CEPS, Brussels, 14 February.

[190] Commission Communication - A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes.

[191] The EPPO will be composed by a 'Central Office' comprising the College, Permanent Chambers, the European Chief Prosecutor (and deputies) and European Prosecutors. This will come alongside a decentralised component comprising 'European Delegated Prosecutors' in each of the participating member states and who will have a 'double hat', being at the same time national prosecutors and representing the EPPO in their respective countries.

nature, and where the independence of prosecutorial authorities also varies depending on each EU member state.

Other outstanding issues include the lack of independent judicial oversight at Union level.[192] The Luxembourg Court has only very limited competences to supervise its activities, so judicial oversight is carried out mainly at national levels. Other related questions concern accountability and remedies in cases where its activities may lead to fundamental rights violations, in particular those of suspected and accused persons in criminal proceedings.

3.5.2 Europol

Following various acts of terrorism in several European capitals and cities, and especially since the Paris attacks of January and November 2015, the internal structure of the EU law enforcement agency, Europol, was expanded and a new mandate adopted (See also Section 3.4.4. above). Europol set up a new European Counter Terrorism Centre (ECTC). The European Agenda on Security underlined the importance of the Union's support in fighting terrorism and facilitating coordination among domestic law enforcement authorities and called for the setting up of the ECTC.[193] This was followed by the Justice and Home Affairs Council adopting Conclusions on Counter-Terrorism on 20 November 2015,[194] which see it playing a role in ensuring "information sharing and operational coordination with regard to the monitoring and investigation of foreign terrorist fighters, the trafficking of illegal firearms and terrorist financing".

The ECTC was officially established on January 2016 with the ambition to become a "central information hub" and increase member state support.[195] It

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[192] Mitsilegas and Giuffrida, op.cit.

[193] European Agenda on Security, page 13.

[194] Refer to www.consilium.europa.eu/en/policies/fight-against-terrorism/foreign-fighters/ and see also the Conclusions of the Council of the EU and of the Member States meeting within the Council on Counter-Terrorism, Press Release, 848/15, 20.11.2015 (www.consilium.europa.eu/press-releases-pdf/2015/11/40802205351_en_635836435200000000.pdf).

[195] See https://www.europol.europa.eu/about-europol/european-counter-terrorism-centre-ectc#fndtn-tabs-0-bottom-1 Europol's ECTC has mainly focused on tackling foreign fighters, sharing intelligence and expertise on terrorism financing (TFTP and support by the FIU.net), online terrorist propaganda and extremism (Internet Referral Unit), illegal arms trafficking and international cooperation to increase effectiveness and prevention. ECTC started with 39 staff members and 5 seconded national experts. The Second Progress report towards an effective and genuine Security Union underlined that "The Commission has delivered on its commitment to reinforce Europol by proposing a further additional 20 staff for the European Counter-Terrorism Centre to increase its capacity to respond on 24/7 basis to Member States in the case of a major terrorist attack. This proposed reinforcement is in addition to the 35 staff

came alongside the subsequent adoption of a renewed mandate for Europol.[196] Thanks to this new Regulation, Europol now has an enhanced degree of democratic control and monitoring of compliance with its mission and the impacts of its activities on fundamental rights and freedoms of natural persons, as well as more concrete procedural rules on access to confidential Europol documents and sensitive non-classified and classified information processed by or through Europol.[197] The new Regulation foresaw the setting up of a new Joint Parliamentary Scrutiny Group (JPSG) composed of representatives of national parliaments and the LIBE Committee in the European Parliament.[198] It also foresees the possibility to nominate a JPSG member to participate as 'non-voting observer' on Europol's management board.

The revised mandate also streamlined Europol's data protection rules with those laid down in EU data protection instruments applicable in police cooperation (see Section 3.6.1 below), and new provisions on communication of data breaches and rights on access, rectification and erasure of information by data subjects.[199] It provides for an enhanced monitoring role by the European Data Protection Supervisor (EDPS), a very welcome step forward in ensuring the protection of fundamental rights regarding personal data processing at Europol, including hearing and investigating individuals' complaints.[200] Of concern there remains the lack of robust safeguards in cases of exchanges of personal data directly from private parties, as well as its subsequent transfer by Europol, as envisaged in Art. 26. Moreover, the rules covering the accuracy of information are equally weak and do not allow for preventing the use of unlawfully gathered data (following the *fruit of the poisonous tree* doctrine), which

granted following the EU amending budget 1/2016 adopted by the budgetary authority on 13 April 2016", page 4. European Commission (2016), Communication, Second Progress report towards an effective and genuine Security Union, Brussels, 16.11.2016 COM(2016) 732 final (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0732&from=EN).

196 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, Article 61.

197 Art. 52 of new Europol Regulation.

198 Refer to Art. 51 of the new Europol Regulation.

199 Recital 40 of Preamble and Chapter VI of the Regulation. See also the role played by the independent Data Protection Officer (Art. 41).

200 Art. 43.

may be used in criminal investigations,[201] or any clear sanctions for member state authorities responsible for that information.

The new mandate also expanded Europol's tasks in Joint Investigation Teams (JITs).[202] Previous CEPS research[203] called for ensuring more clarity regarding the new role attributed to Europol in its new Regulation on the financing (awarding of grants) of JITs, so that any new joint investigation initiatives would fully meet EU legal standards covering prosecutorial investigations, and where Eurojust would play a central role in initiating and coordinating JITs, while making sure that they fully comply with EU evidence gathering legal standards in cross-border judicial cooperation in criminal matters. Also its exact relationship and value added in relation to the EU Counter-Terrorism Coordinator[204] in the area of information sharing remains unclear and calls for justification based on robust evidence.

3.5.3 E-evidence, data retention and terrorist content online

Access to electronic information held and processed by IT companies for law enforcement purposes has represented a central priority for this Commission. The issue can be seen as a 'US-import', with the increasing number of transatlantic demands of direct (non-mediated) access to electronic data by US authorities, which as the case of Microsoft shows, ended up before the relevant judicial instances and remain by and large unresolved.[205]

During his intervention before the LIBE Committee of the European Parliament on 30 September 2014 as Commissioner-designate, Avramopoulos underlined as one of his key priorities the need for the EU to find "a new narrative on the role of law enforcement in the digital age. The availability of electronic communications data is a critical tool for criminal investigations. EU action on law enforcement in the digital age has to provide the necessary tools

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[201] See Art. 29.

[202] Art. 5.

[203] Sergio Carrera, Elspeth Guild and Valsamis Mitsilegas (2017), Reflections on the Terrorist Attacks in Barcelona Constructing a principled and trust-based EU approach to countering terrorism, CEPS Policy Insight, Brussels (https://www.ceps.eu/system/files/PI2017-32%20JHA%20Terrorism%20and%20Barcelona.pdf).

[204] Refer to https://www.consilium.europa.eu/en/policies/fight-against-terrorism/counter-terrorism-coordinator/

[205] Sergio Carrera, Gloria González Fuster, Elspeth Guild, Valsamis Mitsilegas (2015) *Access to Electronic Data by Third-Country Law Enforcement Authorities: Challenges to EU Rule of Law and Fundamental Rights,* CEPS, Brussels (https://www.ceps.eu/system/files/Access%20to%20Electronic%20Data%20%2B%20covers_0.pdf).

to fight terrorism and serious crime, including cybercrime, while fully respecting the right to privacy and the protection of personal data."[206]

Later on, this 'security' or law enforcement priority moved to the 'criminal justice' portfolio under the responsibility of Commissioner Jourová and DG JUST. This move – from 'police cooperation' to 'judicial cooperation in criminal matters' – has however proved to be one of the key weaknesses characterising the Commission's proposals on e-evidence. In fact, the above-mentioned Commission's European *Security* Agenda of April 2015 was the one formally calling for reviewing obstacles in judicial investigations and rules on access to electronic information, which once more shows how a security rationale has often overtaken a traditional judicial cooperation in criminal matters approach, and led to a worrying blurring between security and justice in the work of the Juncker Commission.[207]

In April 2018,[208] after lengthy background preparations[209] and internal legal fine-tuning, the Commission presented two separate legislative proposals: one regulation creating the European Production Order[210] and a European Preservation Order; and one directive harmonising the appointment of legal representatives[211] in companies concerned for the purpose of gathering evidence in criminal proceedings.

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[206] Hearing Dimitris Avramopoulos (2014), op.cit.

[207]European Commission (2015a), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions The European Agenda on Security, COM(2015) 185 final, Strasbourg, 28 April. (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf) See specifically pages 19 and 20 of this Communication.

[208] European Commission (2018), "Security Union: Commission facilitates access to electronic evidence", European Commission Press Release, Brussels, 17 April. (http://europa.eu/rapid/press-release_IP-18-3343_en.htm)

[209] European Commission, "Improving cross-border access to electronic evidence in criminal matters" (https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3896097_en).

[210] European Commission (2018), Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters {SWD(2018) 118 final} - {SWD(2018) 119 final}, COM/2018/225 final - 2018/0108 (COD), Strasbourg, 17 April (https://eur-lex.europa.eu/resource.html?uri=cellar:639c80c9-4322-11e8-a9f4-01aa75ed71a1.0001.02/DOC_1&format=PDF).

[211] European Commission (2018), Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings {SWD(2018) 118 final} - {SWD(2018) 119 final}, COM(2018) 226 final - 2018/0107 (COD), Strasbourg, 17 April

The European Production and Preservation Order would allow law enforcement authorities in the EU (police and prosecutors) a direct access to electronic information (including emails) held by service providers offering services in the Union and established or represented in another member state. The service providers would be under the general obligation to allow access to requested data within 10 days, and 6 hours in cases of 'emergency'. They would be also obliged to 'preserve' this data for the duration of the investigations.

A key challenge characterising these proposals is that they evade the current model of mediated mutual legal assistance, whereby an independent judicial authority and relevant Ministries of Justice play a key role in scrutinising the validity, constitutionality and fundamental rights compliance of data requests for law enforcement purposes. This has certainly been the case in the context of third-country cooperation under the so-called Mutual Legal Assistance Treaties (MLATs) with countries such as the US.[212]

When it comes to intra-EU mutual legal assistance, and despite the Commission proposals coming with a detailed Impact Assessment, there has been no solid evidence regarding the actual value added of the EPO in comparison to the already existing system under the European Investigation Order (EIO). The EIO only entered into force in May 2017, and some EU member states are still in the process of correctly implementing it in their national criminal justice systems. As opposed to the EPO, the EIO does offer high-standards and guarantees – fully compliant with the rights of the defence and fair trial envisaged in the EU Charter of Fundamental Rights – for independent judicial oversight in data request for the purposes of criminal investigations as well as expedited procedures in urgent cases.

The legal basis of the proposal is equally contested. Previous CEPS research has underlined that the EPO is closer to police cooperation or internal security, rather than an instrument falling within the scope of judicial cooperation in criminal matters.[213] By side-lining the role of national judicial authorities in the executing state, the EPO evades the principle of mutual recognition of criminal justice decisions and primarily serves law enforcement

(https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0226&from=EN).

[212] European Union and the United States of America (2003), Mutual Legal Assistance: Agreement Between the United States of America and the European Union, Signed at Washington 25 June 2003 (https://www.state.gov/documents/organization/180815.pdf).

[213] Sergio Carrera and Valsamis Mitsilegas (2017), "Constitutionalising the Security Union: Effectiveness, Rule of Law and Rights on Countering Terrorism and Crime", CEPS, Brussels, 21 November (https://www.ceps.eu/publications/constitutionalising-security-union-effectiveness-rule-law-and-rights-countering).

in the pursuit of crimes. The correct legal basis should therefore not be Art. 82(1)(d) TFEU (judicial cooperation in criminal matters), but rather Art. 87(2) TFEU (police cooperation). This is also the opinion of civil society, which has called on the EU legislator to choose a more convincing legal basis and underlined that "the principle of mutual recognition has been reserved for cooperation between judicial authorities only".[214]

The proposal also positions the private sector in a central role in delivering and monitoring mutual trust in the European criminal justice area, and determining if data requests comply with the fundamental rights of suspects, without relieving IT service providers from potential liabilities before the courts in cases of unlawful access. Its relationship with the still unresolved 'data retention saga',[215] and the ongoing negotiations of the so-called 'e-Privacy Directive',[216] are not clear either. This raises further privacy concerns[217] as to whether the proposal will be court-proof not only in Luxembourg but also before domestic constitutional tribunals.

Despite these concerns, the Council reached a draft general approach on the proposal on 30 November 2018.[218] However, representatives from eight Ministries of Justice of EU member states (Germany, The Netherlands, Czech Republic, Finland, Latvia, Sweden, Hungary and Greece) expressed written concerns about the proposal on 20 November 2018.[219] They stated that the proposals would mean that "mutual recognition would be largely abandoned"

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[214] Meijers Committee, CM1809 Comments on the proposal for a regulation on European Production and Preservation Orders for electronic evidence in criminal matters (https://www.commissie-meijers.nl/sites/all/files/cm1809_e-evidence_note.pdf)

[215] Elspeth Guild and Sergio Carrera (2014), "The Political and Judicial Life of Metadata: Digital Rights Ireland and the Trail of the Data Retention Directive", CEPS, Brussels, No. 65, May (https://www.ceps.eu/system/files/EG%20and%20SC%20Data%20retention.pdf).

[216] European Commission (2017), "Proposal for a Regulation on Privacy and Electronic Communications", Digital Single Market, 10 January (https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-privacy-and-electronic-communications)

[217] Statewatch (2018), ""Renewable retention warrants": a new concept in the data retention debate", *State Watch*, 25 April (http://www.statewatch.org/news/2018/apr/eu-data-retention-renewable.htm).

[218] Council of the European Union (2018), Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters- general approach, Interinstitutional File: 2018/0108(COD), Brussels, 30 November (https://data.consilium.europa.eu/doc/document/ST-15020-2018-INIT/en/pdf).

[219] Ministries of Justice of Germany, The Netherlands, Czech Republic, Finland, Latvia, Sweden, Hungary, Greece (2018), Letter to Mrs Věra Jourová, 20 November (https://cdn.netzpolitik.org/wp-upload/2018/11/2018-11-20_Justizminister-Brief_E-Evidence1.pdf).

and a source of "great concern". The letter called on the Commission to ensure a more robust system of checks and balances, which would make it 'Luxembourg Court-proof', and the need to guarantee a mediated model of cooperation keeping the current role of the requested or notified authority/state to reject or withdraw a European Production Order, as well as effective judicial remedies.

18 civil society actors have recently expressed deep concerns about the compromise agreement reached among EU member states during the Austrian Presidency.[220] In short, they have highlighted as problematic that the proposal reduces the chances for refusing access to data on the basis of fundamental rights violations, wrongly assumes that non-content data is less sensitive than 'content data', allows the issuing of orders without court validation and by-passes the role of executing authorities and mutual-trust based cooperation. Similar concerns have been put forward by the European Data Protection Board (EDPB)[221], the German Association of Judges,[222] Internet industry,[223] Bar Associations,[224] etc.

Tackling illegal content online, particularly 'terrorist content', has also been a priority of the Juncker Commission. On 12 September 2018, the Commission presented a Proposal for a Regulation on preventing the dissemination of terrorist content online,[225] and complementing Directive

[220] European Digital Rights (EDRi) (2018), "Civil society urges Member States to seriously reconsider its draft position on law enforcement access to data or "e-evidence"", 5 December 2018 (https://edri.org/files/20181203_e-evidence_civilsocietyletter.pdf).

[221] European Data Protection Board (2018), "Opinion 23/2018 on Commission proposals on European Production and Preservation Orders for electronic evidence in criminal matters", 8 October (https://edpb.europa.eu/our-work-tools/our-documents/opinion-art-70/opinion-232018-commission-proposals-european-production_en).

[222] Deutcher Richterbund (2018), "Stellungnahme des Deutschen Richterbundes zur Europäischen Verordnung zu elektronischen Beweismitteln in Strafsachen", 4 July (https://www.drb.de/positionen/stellungnahmen/stellungnahme/news/618/).

[223] EurolSPA (2018), "E-Evidence: EuroISPA adopts Position Paper", Brussels, 3 July (http://www.euroispa.org/e-evidence-euroispa-adopts-position-paper/).

[224] Council of Bars and Law Societies of Europe (2018), "CCBE position on the Commission proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters", 19 October (https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Position_papers/EN_SVL_20181019_CCBE-position-on-Commission-proposal-Regulation-on-European-Production-and-Preservation-Orders-for-e-evidence.pdf).

[225] European Commission, Proposal for a Regulation on preventing the dissemination of terrorist content online A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, Brussels, 12.9.2018 COM(2018) 640 final 2018/0331 (COD).

2017/514 on combating terrorism.[226] The role and specific duties of hosting service/content providers and internet platforms to remove unlawful content or disable accessibility is another key issue at stake here. In short, the legislative initiative provides a harmonised definition of terrorist content, and a legal obligation for relevant IT companies to comply with 'removal orders' issued by member state competent authorities requesting deletion or preventing access to them under an accelerated time-line, and the preservation of that data.

Similar to the above-mentioned EPO proposal, key issues of concern are first, the need to ensure independent judicial review of content removal, and second, the central role entrusted to IT companies in an area at the heart of states' sovereignty and their citizens' protection. The UN Special Rapporteur on freedom of expression made clear in April 2018 that online content removals must be subject to "an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy".[227]

These and other issues with the Commission's proposal have been underlined and reiterated by a Joint Letter issued on 7 December 2018 by three United Nations Special Rapporteurs.[228] The Joint Letter raises profound questions regarding the very broad definition of terrorist content (which would include legitimate forms of expression) and the lack of sufficient consideration given to human rights protections, especially freedom of opinion, expression and association, and of the human rights responsibilities of businesses according to existing UN standards.[229]

The same UN Special Rapporteurs emphasised that the legislative proposal lacks sufficient clarity and fails to pass the legality test in light of international human rights obligations. These deficits, they contend, "become particularly problematic when such hosting service providers play a role in

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[226] Directive (EU) 2017/541 on combatting terrorism and replacing Council Framework Decision 2002/475/JHA and amending Decision 2005/671/JHA, 15 March 2017.

[227] United Nations, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018, paragraph 66 (https://undocs.org/A/HRC/38/35).

[228] United Nations, Joint Letter, Mandates of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; the Special Rapporteur on the Right to Privacy and the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, OL OTH 71/2018, Geneva.

[229] Refer to United Nations Office of the High Commissioner for Human Rights, UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

areas traditionally ascribed to States, such as by exercising quasi-regulative, quasi-enforcement and quasi-adjudicative functions in the context of the fight against terrorism".[230] These risks were corroborated in a Statement issued by 31 civil society organisations, which called for a significant amendment of the proposal due to the serious risks of arbitrariness and negative impacts for civil society organisations, investigative journalism and academic research.[231]

3.5.4 EU-US Privacy Shield

Following the invalidation by the CJEU of the Safe Harbour decision[232] in October 2015,[233] which concluded that it did not allow for an adequate level of data protection equivalent to the one guaranteed in the EU legal system (see Section 3.6 below), the European Commission adopted an Implementing Decision (EU) 2016/1250 on the EU-US Privacy Shield to regulate transatlantic transfers of personal data between commercial organisations.[234] The Privacy Shield brought important improvements in comparison to the former Safe Harbour system, such as a clearer set of standards[235] and the previous US administration commitments and assurances.

Unresolved concerns have been raised by the European Parliament about the lack of an 'adequate level of protection' for personal data in relation to its "commercial aspects", as well as unwarranted access by US public authorities on data transferred from the EU – in particular for purposes of national security

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[230] Ibid., page 7.

[231] EDRI, Letter on the Proposal for Regulation preventing the dissemination of terrorism content online, Brussels, 18 December 2018, Brussels (https://edri.org/files/counterterrorism/20181204-CivilSociety_letter_TERREG.pdf).

[232] Sergio Carrera and Elspeth Guild (2015), "Safe Harbour or into the storm? EU-US data transfers after the Schrems judgment", CEPS, Brussels, 12 November (https://www.ceps.eu/publications/safe-harbour-or-storm-eu-us-data-transfers-after-schrems-judgment).

[233] Case C362/14 Maximillian Schrems v. Data Protection Commissioner.

[234] Elspeth Guild, Didier Bigo, Sergio Carrera (2017), "Trump's Travel Bans: Harvesting personal data and requiem for the EU-US Privacy Shield", CEPS, Brussels, 5 April (https://www.ceps.eu/publications/trump%E2%80%99s-travel-bans-harvesting-personal-data-and-requiem-eu-us-privacy-shield).

[235] In short these include in view of the European Parliament "the insertion of key definitions, stricter obligations related to data retention and onward transfers to third countries, the creation of an Ombudsperson to ensure individual redress and independent oversight, checks and balances ensuring the rights of data subjects (PCLOB), external and internal compliance reviews, more regular and rigorous documentation and monitoring, the availability of several ways to pursue legal remedy, prominent role for national DPAs in the investigation of claims", paragraph 2 of European Parliament resolution on the adequacy of the protection afforded by the EUU.S. Privacy Shield 2018/2645(RSP), 11.6.2018.

and law enforcement, with US large-scale surveillance programmes still ongoing, as well as the persistent weakness of fundamental rights protections of data subjects (to prevent cases of automated profiling and processing, and the non-consent based processing of data and inexistence of a right to object to data transfers) and the lack of effective remedies available to EU citizens when their data is transferred to the US.[236]

The Article 29 Working Party,[237] which corresponds now with the EDPB, also highlighted the lack of specific rules and "the need of stricter guarantees on the independence and powers of the Ombudsperson mechanism, or the lack of concrete assurances of not conducting mass and indiscriminate collection of personal data (bulk collection)". The above-mentioned Parliament Resolution on the Privacy Shield recalled that 'privacy' cannot be balanced against "commercial or political interests" and concluded that as it currently stands, it does not provide an adequate level of protection in line with EU law.

The Parliament called the Commission to suspend the Privacy Shield until the US authorities comply with its terms. The Commission has not, as yet, followed up this urgent call for action. This stands in contradiction with Vice-President Timmermans' promise in his appointment hearing before the LIBE Committee of the European Parliament that "it is also of crucial importance that in our dealings with third countries, fundamental rights, including personal data protection, must be fully respected."[238] Similarly, Commissioner Jourová undertook at the same moment before Parliament to conclude an agreement with the US *so long as* EU citizens' right to an effective remedy were duly safeguarded, which is currently not the case.[239] There is a high risk that the EU-US Privacy Shield will not be *CJEU-proof* and would not easily pass judicial scrutiny in light of EU data protection standards.[240]

This coincided with the revelations on misuses of personal data by IT and social media companies such as Facebook, which is signatory to the EU-US

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[236] Resolution of 6 April 2017, the European Parliament.

[237] Article 29 Working Party, Press Release, First annual Joint Review of the Privacy Shield, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610170. Refer to Article 29 Working Party Opinions WP237 and WP238.

[238] European Parliament (2014), "Hearing Frans Timmermans", Day 6: 7 October, organized by the Committee on Civil Liberties, Justice, and Home Affairs (http://www.europarl.europa.eu/hearings-2014/en/schedule/07-10-2014/frans-timmermans/).

[239] Hearing Věra Jourová (2014), op.cit.

[240] There is one pending case before the Luxembourg Court of central relevance for the Privacy Shield, i.e. an action for annulment by *La Quadrature du Net and Others v Commission* (Case T-738/16) of October 2016. Refer also to the CJEU ruling in Case *Facebook Ireland Limited and Maximilian Schrems* (Schrems II case) Case C-498/16, 25 January 2018.

Privacy Shield. Evidence showed that the data of about 2.7 million EU citizens was improperly used by political consultancy Cambridge Analytica.[241] According to the European Parliament, "the revelations clearly show that the Privacy Shield mechanism does not provide an adequate protection of the right to data protection",[242] and expressed "its strong concern that, if not dealt with, such misuses of personal data of people by various entities that aim to manipulate their political will or voting behaviour, can threaten the democratic process and its underlying idea that voters can make informed, fact-based decisions for themselves". The Parliament called for greater algorithmic accountability and transparency and regretted that the deadline of 1 September 2018 for the US to be fully compliant with the Privacy Shield has not been met.[243] On this basis, it reiterated its calls to the Commission to suspend the Privacy Shield until the US complies with its terms.

3.5.5 Interoperability, information systems and eu-LISA

The exchange of information between national law enforcement authorities has been a long-standing priority in EU counter-terrorism policies. This Commission has taken this priority to a new level. In the above-mentioned European Security Agenda, the Commission highlighted 'better information exchange' as one of the key pillars in EU cooperation in addressing crime and terrorism.[244]

Over the last two decades of European integration the EU has developed a range of databases. These include the Schengen Information System (SIS II) and the Visa Information System (VIS) – which as Annex I of this book shows have been also recently reformed, as well as Eurodac (the European Automated Fingerprint Identification System), the Europol Information System or the recently adopted European Travel Information and Authorisation System (ETIAS), which did not come with an impact assessment considering its necessity and fundamental rights impacts.[245]. The Commission, and more

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[241] See for instance The Guardian (2018), Cambridge Analytica Scandal: The Biggest Revelations so Far, 22 March 2018 (https://www.theguardian.com/uk-news/2018/mar/22/cambridge-analytica-scandal-the-biggest-revelations-so-far); and The Guardian's Section 'The Cambridge Analytica Files' (https://www.theguardian.com/news/series/cambridge-analytica-files).

[242] Paragraph 12 of European Parliament resolution on the adequacy of the protection afforded by the EUU.S. Privacy Shield 2018/2645(RSP), 11.6.2018.

[243] Paragraph 29 of European Parliament Motion of Resolution no the use of Facebook users' data by Cambridge Analytica and the impact on data protection, 201/82855(RSP), 10.10.2018.

[244] European Commission (2015a), op.cit.

[245] European Commission (2018), "Security Union: Commission welcomes the European Parliament's adoption of the European Travel Information and Authorisation System (ETIAS)

specifically, the Commissioner for Security Union, have placed particular emphasis on overcoming the 'fragmentation'[246] that these systems appear to create through the 'interoperability'[247] of existing and future EU databases.

Another important output from the Task Force on Security Union led by Commissioner King was a so-called Comprehensive Assessment of EU Security Policy published on July 2017,[248] which sought to review EU internal security policy during the last 15 years of European integration. The assessment was a welcome step but did not follow the EU Better Regulation guidelines. Its findings highlighted a number of key "shortcomings" affecting EU information systems: "(a) sub-optimal functionalities of existing information systems, (b) gaps in the EU's architecture of data management, (c) a complex landscape of differently governed information systems, and (d) a fragmented architecture of data management for border control and security". On the basis of a report issued by the High-Level Expert Group on Information Systems and Interoperability set up by the Commission in May 2017,[249] the Comprehensive Assessment then reconfirmed the need to develop their interoperability.

In December 2017, the Commission adopted two proposals for regulation establishing a framework for interoperability between EU information systems, one dealing with those covering police and judicial cooperation, migration and

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and a stronger eu-LISA Agency", Press Release, Strasbourg, 5 July (http://europa.eu/rapid/press-release_IP-18-4367_en.htm). Susie Alegre, Julien Jeandesboz and Niovi Vavoula (2017), European Travel Information and Authorisation System (ETIAS): Border management, fundamental rights and data protection, European Parliament, DG IPOL.

246 European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union, COM(2016) 230 final, Brussels, 20 March (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/legislative-documents/docs/20160420/communication_eas_progress_since_april_2015_en.pdf).

247 European Commission (2017), "Frequently asked questions - Interoperability of EU information systems for security, border and migration management", European Commission Press Release, Strasbourg, 12 December (http://europa.eu/rapid/press-release_MEMO-17-5241_en.htm).

248 European Commission (2017), "Security: the EU is driving work to share information, combat terrorist financing and protect Europeans online", European Commission Press Release, Brussels, 27 July (http://europa.eu/rapid/press-release_IP-17-2106_en.htm).

249 High-level expert group on information systems and interoperability (2017), Final Report, Ref. Ares(2017)2412067, 11 May (http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=32600&no=1).

asylum,[250] and another on Schengen-related databases on visas and borders.[251] The interoperability proposals came alongside another one aimed at strengthening the mandate of the eu-LISA Agency,[252] which was formally adopted on 14 November 2018. In addition to the above, a key objective behind the proposals is the detection of multiple identities and 'combating identity fraud', as well as "fast, seamless, systematic and controlled access" by law enforcement (police and judicial authorities).

The notion of 'interoperability' would not only entail the creation of a single search interface allowing for one query across all existing EU information systems. It would also allow for the interconnectivity of the data registered and the establishment of a shared biometric matching system and the accessibility of this information. The proposals would create three additional EU databases: a Common Identity Repository (CIR); a shared biometric matching system (sBMS); and a Multiple Identity Detector (MID) – which would lead to the creation of a new EU electronic identity for crime-fighting.

The rule of law and fundamental rights challenges inherent to interoperability have been highlighted by CEPS research.[253] The proposals have not fully taken into account their data protection and privacy implications. In

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[250] European Commission (2017), Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration) {SWD(2017) 473 final} - {SWD(2017) 474 final}, COM(2017) 794 final - 2017/0352 (COD), Brussels, 12 December (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20171212_proposal_regulation_on_establishing_framework_for_interoperability_between_eu_information_systems_police_judicial_cooperation_asylum_migration_en.pdf).

[251] European Commission (2017), Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226 {SWD(2017) 473 final} - {SWD(2017) 474 final}, COM(2017) 793 final - 2017/0351 (COD), Strasbourg 12 December (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20171212_proposal_regulation_on_establishing_framework_for_interoperability_between_eu_information_systems_borders_and_visa_en.pdf).

[252] European Commission (2017), "Security Union: Commission delivers on interoperability of EU information systems" European Commission Press Release, Brussels, 29 June (http://europa.eu/rapid/press-release_IP-17-1788_en.htm).

[253] Sergio Carrera and Valsamis Mitsilegas (2017), "Constitutionalising the Security Union: Effectiveness, Rule of Law and Rights on Countering Terrorism and Crime", CEPS, Brussels, 21 November (https://www.ceps.eu/publications/constitutionalising-security-union-effectiveness-rule-law-and-rights-countering).

particular, the way in which they undermine the principle of 'purpose limitation' of data, as well as the implementation challenges they would entail on the ground in multi-actor domestic settings. They provided little evidence about how the 'gaps' resulting from the existence of compartmentalised EU information systems represent a security threat, and what these gaps actually are.

The EDPS Opinion on the Interoperability Proposals[254] underlined the privacy risks inherent to their design, chiefly in relation to the general trend of granting law enforcement authorities access to systems built for other purposes than law enforcement, such as for example the VIS or Eurodac. It also signalled its incompatibility with the principle of purpose limitation and the negative repercussions on the rights of third-country data subjects, in particular the right of access, rectification and deletion of inaccurate data and information and an effective remedy before an independent judicial authority (Art. 47 EUCFR).

The EDPS underlined discrimination concerns and emphasised that "Taking systematically biometric data of a person during an identity check would create the risk of stigmatising certain people (or groups of people) based on their appearance and create unjustified difference of treatment between EU citizens and third-country nationals." The Article 29 Working Party raised similar concerns as to whether such a new biometric register of third-country nationals is proportionate and whether it constitutes an unjustifiable discrimination of third country nationals.

These risks are particularly worrying, not least when considering the findings of a Report issued by the FRA in 2018 that provided evidence on the lack of quality of the biometric data in existing EU databases and how their interoperability would further increase or multiple the risks of misuses, abuses and errors when base-line quality is low.[255] According to the FRA "Individuals often lack awareness and understanding of what needs to be done in case of mistakes in their personal data processed by the systems". Interoperability would extend that gap even further.

For this reason, the FRA recommended the establishment of an 'EU-wide request handling mechanism' at the eu-LISA agency to manage requests to access, correct and delete data as well as to provide data subjects with the

[254]European Data Protection Supervisor (EDPS) (2018), Opinion 4/2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems, 16 April (https://edps.europa.eu/sites/edp/files/publication/2018-04-16_interoperability_opinion_en.pdf).

[255] FRA (2018), Under watchful eyes – biometrics, EU IT-systems and fundamental rights, March (https://fra.europa.eu/en/publication/2018/biometrics-rights-protection).

information they need.[256] This constitutes a major lacuna in the recently adopted eu-LISA Regulation 2018/1726.[257] Despite the fact that its activities are often dressed up as *only* 'operational management' or 'technical solutions', its new mandate includes far-reaching operational, research and policy tasks such as personal data processing, ensuring 'data quality' (which will be most challenging in light of the 'interoperability' proposals), developing other large-scale IT systems, implementing research projects and testing pilot projects,[258] as well as providing *ad hoc* operational support to member state facing "extraordinary security and migration challenges" in particular areas of their external borders (e.g. hotspots).[259] The Regulation does not envisage any complaint procedure or mechanism before any EU agencies such as the EDPS or the European Ombudsman for individuals affected by fundamental rights violations in the context of any of these new responsibilities.

It is also concerning in light of the newly explicit role given to 'outsourcing' eu-LISA tasks to external private-sector actors and network providers,[260] some of which may entail higher fundamental rights risks in light of the challenges inherent to data processing frameworks such as the one envisaged in the EU-US Privacy Shield (Section 3.5.3 above). The Regulation envisages a weak role for the European Parliament in delivering full democratic scrutiny of all the agency's activities, which stands in sharp contrast with the JPSG model foreseen in the revised Europol mandate (Section 3.5.1 of this book).

3.6 Rule of law and fundamental rights

3.6.1 Fundamental rights

The Juncker Commission has made some progress in the development of common EU fundamental rights standards. A key and highly visible achievement of this Commission was the formal adoption and entry into force of the new EU data protection framework, including the General Data Protection

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[256] FRA (2018), Interoperability and fundamental rights implications Opinion of the European Union Agency for Fundamental Rights, FRA Opinion – 1/2018, Vienna, 11 April 2018 (https://fra.europa.eu/en/opinion/2018/interoperability).

[257] Regulation (EU) 2018/1726 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), OJ L 295/99, 21.11.2018.

[258] See Arts. 12 -15.

[259] Art. 16 (Support to Member States and the Commission).

[260] Art. 11 of the Regulation (Tasks relating to the Communications infrastructure).

Directive (GDPR)[261] and the Police Data Protection Directive.[262] The swift conclusions of the inter-institutional negotiations on common EU data protection rules was signalled as another key priority by Commissioner Jourová in her Commissioner-designate hearing before the European Parliament in October 2014.[263] The GDPR is now a key world-wide benchmark of transnational cooperation on privacy protection.

A tough nut to crack during this legislature has been advancing in negotiations on the EU's accession to the European Convention of Human Rights as stipulated in Art. 6.2 TUE and Protocol No. 8. These negotiations started in 2010 and led to the elaboration of a draft accession agreement in April 2013. In his hearing as Commissioner-designate before the LIBE Committee of the European Parliament, Vice-President Timmermans underlined that "In the area of fundamental rights, my priority will be to complete the accession of the EU to the European Convention on Human Rights (ECHR)".

A key unresolved controversy regarding the Union's accession has been the extent to which the envisaged accession arrangement would affect the Union's competences and the exclusive jurisdiction of the CJEU. In its 2/13 Opinion issued on 18 December 2014,[264] the Luxembourg Court issued a negative view on the Union's accession as it argued that, among other issues,[265] it would affect the specific characteristics and autonomy of the EU legal system and did not include a clear co-respondent mechanism and procedure for prior involvement of the CJEU. As a result, a number of fundamental points of the 'draft Accession Agreement' needed to be renegotiated.

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[261]European Commission, "2018 reform of EU data protection rules" (https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en).

[262] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)1, and to Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

[263] Hearing Věra Jourová (2014), op.cit.

[264]Court of Justice of the European Union (2014), Opinion of the Court - Case Opinion 2/13, 18 December 2014 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CV0002).

[265]Adam Łazowski and Ramses Wessel (2015), "The European Court of Justice blocks the EU's accession to the ECHR", CEPs, Brussels, 8 January (https://www.ceps.eu/publications/european-court-justice-blocks-eu%E2%80%99s-accession-echr).

Since then, the Commission continued to consult the relevant Council Working party on solutions to address the Courts' objections.[266] In its Annual Report on the Application of the EU Charter of Fundamental Rights published in June 2018,[267] the Commission loosely underlined that it is "making good progress". In the 12 October 2018 Council conclusions on the application of the EU Charter of Fundamental Rights in 2017 the Council restated its call for the EU accede the ECHR and asked the Commission to swiftly complete its analysis of legal issues raised by the Luxembourg Court.[268]

The same Annual Report on the Application of the EU Charter highlighted the main Commission work in the implementation of the Union's non-discrimination agenda. A key unaccomplished promise during this legislature has been the non-adoption of the 2008 proposal for a horizontal non-discrimination Directive,[269] which aimed at extending protection from discrimination beyond employment and occupation. If adopted, it would also cover discrimination on the basis of religion or belief, disability, age and sexual orientation to areas outside employment (social protection, education and access to goods and services, including housing). The discussions of the proposal inside the Council have not led to any progress.[270] Some member states have questioned the value added of the proposal and raised concerns about its

[266] European Commission (2017), Commission Staff Working Document on the Application of the EU Charter of Fundamental Rights in 2016 Accompanying the document Communication from the Commission to the European Parlament, the Council, the European Economic and Social Committee and the Committee of the Regions on 2016 Report on the Application of the EU Charter of Fundamental Rights SWD/2017/0162 final, Brussels, 18 May. (https://publications.europa.eu/en/publication-detail/-/publication/d74ebf9e-3bae-11e7-a08e-01aa75ed71a1/language-en/format-PDF)

[267] European Commission (2018), "2017 report on the application of the EU Charter of Fundamental Rights", Justice and Consumers (https://ec.europa.eu/info/sites/info/files/2017_annual_charter_report_en.pdf).

[268] Refer to https://data.consilium.europa.eu/doc/document/ST-13093-2018-INIT/en/pdf

[269] Commission of the European Communities (2008), Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}, COM/2008/0426 final - CNS 2008/0140, Brussels, 2 July (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008PC0426&from=en).

[270] W. van Ballegooij and J. Moxom (2018), "Equality and the Fight against Racism and Xenophobia Cost of Non-Europe Report", European Parliamentary Research Service, European Added Value Unit, March (http://www.europarl.europa.eu/RegData/etudes/STUD/2018/615660/EPRS_STU(2018)615660_EN.pdf).

compliance with the principles of subsidiarity and proportionality, as well as budgetary implications and costs.[271]

This is despite the fact that in President Juncker's Political Guidelines and Commissioner Jorouvá's promise before the European Parliament, both underlined the priority to see it adopted and make 'renewed efforts' to enable the Council to reach an agreement.[272] In 2015 the European Parliament reiterated its call for the Council to adopt its position on the proposal urgently, and called on the Commission to make concrete progress on the anti-discrimination agenda.

Moreover, Commissioner Jourová declared in April 2016 that moving ahead in improving procedural safeguards related to pre-trial detention constituted one of the five key priorities.[273] There has been no progress in this regard, despite the fact that a lack of robust procedural safeguards for pre-trial detention and addressing prison overcrowding and unsatisfactory conditions in a number of EU member states can fundamentally hinder and pose major costs for effective EU judicial cooperation in criminal matters.[274]

3.6.2 Rule of law

In the answers provided in the hearing before the LIBE Committee of the European Parliament as Commission-designate in October 2014, Vice-President Timmermans identified as his first priority in relation to the rule of law "to seek to prevent a systemic threat to the rule of law from emerging in the first place. I strongly believe that prevention is better than cure". He also insisted that "I will pay particular attention to the equal treatment of member states". Timmermans also expressed his readiness to use of the EU Rule of Law Framework, and launch infringement proceedings, and declared that "Clearly, Article 7 TEU should be a last resort. I would hope that we never have a situation which requires its use. But if we do, I would be ready to make the necessary proposals".

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271 Refer to https://www.consilium.europa.eu/media/35974/st10202-en18.pdf

272 Hearing Věra Jourová (2014), op.cit.

273 European Commission, Press Release, EU Criminal Law – key to a Security Union based on fundamental rights and values (http://europa.eu/rapid/press-release_SPEECH-16-1582_en.htm).

274 Wouter van Ballegooij (2017), The Cost of non-European in the Area of Criminal Law, European Parliament Research Service (EPRS) (http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf).

The lack of any other form of regular scrutiny of the rule of law post-accession has been referred to as the Copenhagen Dilemma.[275] Indeed, developments during recent years have shown how the trust-based presumption, according to which membership of the Union guarantees that states comply with Art. 2 TEU values, can no longer always be realistically maintained. Art. 7 TEU is the only Treaty instrument for European institutions to act in cases where a member state poses a "clear risk" of seriously breaching Art. 2 TEU values, or when such a breach already exists. Art. 7 TEU envisages a preventive arm (determining a clear risk of a breach) and a corrective arm (determining a serious and persistent breach).

The previous Commission had adopted the so-called the 'EU rule of law framework' which provided a sort of 'pre-Art. 7 TEU procedure'[276] for the Commission to engage in diplomatic talks with any member state concerned. The EU rule of law framework was launched for the first time during the Juncker Commission against the Polish government. As previous CEPS research has argued, the case of Poland is nonetheless a clear example of the inefficiency affecting this EU tool.[277]

The issuing of one rule of law opinion, four rule of law recommendations and twenty-five letters to the Polish authorities within the context of the EU rule of law framework have not prevented this country from progressively backsliding into a state of 'constitutional capture'.[278] Indeed, several Opinions of the Venice Commission of the Council of Europe indicated that threats to the rule of law in Poland have instead escalated over the past two years.[279] This led the Commission to trigger, for the first time, the Art. 7 TEU procedure against the Polish government, and to launch infringement proceedings against some Polish government measures undermining the independence of the judiciary.

Timmermans' promise of 'equal treatment' has not been respected. The case of Hungary has been emblematic. The rule of law challenges in Hungary and Poland have been very similar, and in many aspects almost mimicking each

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[275] Viviane Reding (2013), "Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism", European Commission Press Release, 22 April. (http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm).

[276] European Commission, "Rule of law framework" (https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en).

[277] Carrera and Mitsilegas (2018), op.cit.

[278] Ibid.

[279] Council of Europe, European Commission for Democracy through Law (Venice Commission) (2017) (https://www.venice.coe.int/webforms/documents/?country=23&year=all), Poland: Opinion CDL-AD(2017)031, Opinion No. 904/2017, 11 December 2017 Strasbourg (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e).

other. The EU Rule of Law Framework was welcomed but equally criticised[280] at the outset in 2015 for treating member states differently and the Commission's inaction in respect of Hungary was questioned in early 2016.[281] Similarly, it is striking that the Commission has not launched Article 7 TEU proceedings against Hungary in light of all the existing evidence of the country actively backsliding on the rule of law and dismantling checks and balances since 2010.[282]

It was the European Parliament that took the step of launching the Art. 7 TEU procedure against the Hungarian government in September 2018,[283] on the basis of a European Parliament Report.[284] Published on 4 July 2018, the Report provided evidence raising serious rule of law concerns about Viktor Orbán's government. CEPS research argued the European Parliament vote was a welcome development, but that it came too late and shows that the Art. 7 TEU procedure remains too political and weak in its current form.[285]

Hungary is not the only EU country on the European Parliament's rule of law radar. By way of illustration, in its Mission Report published in November 2018 following the ad hoc delegation to Slovakia and Malta from 17-20 September 2018,[286] a cross-cutting finding concluded that "highlighted that challenges to rule of law and fundamental rights in various member states should be monitored regularly to be able to act more preventively. To achieve

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280 Sergio Carrera and Elspeth Guild (2015), "Implementing the Lisbon Treaty Improving the EU Functioning of the EU on Justice and home Affairs", study for the AFCO Committee, European Parliament (http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519225/IPOL_STU(2015)519225_EN.pdf).

281 Georgi Gotev (2016), "Tavares: Discussing rule of law in Poland separately from Hungary will lead 'nowhere'", *Euractive*, 13 January (https://www.euractiv.com/section/central-europe/news/tavares-discussing-rule-of-law-in-poland-separately-from-hungary-will-lead-nowhere/).

282 Carrera and Bard (2018), op.cit.

283European Parliament (2018), "Rule of law in Hungary: Parliament calls on the EU to act", European Parliament Press Release, 12 September. (http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act).

284 European Parliament (2018), Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded 2017/2131(INL)), A8-0250/2018, 4 July (http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2018-0250&language=EN).

285 Carrera and Bard (2018), op.cit.

286 European Parliament (2018), Mission Report following the Ad - hoc delegation to Slovakia and Malta 17-20 September 2018, 14.11.2018 (https://europeanjournalists.org/wp-content/uploads/2018/11/1164444EN.pdf)

that, the Commission and the Council could support setting up a permanent mechanism for monitoring democracy, rule of law and fundamental rights, along the lines proposed by the European Parliament in its resolution of 25 October 2016".[287]

The European Commission Work Programme 2019[288] identified "an area of justice and fundamental rights based on mutual trust" as one of the themes where new initiatives would be presented before the European Parliament elections in May 2019. It announced that the Commission intended to "present an initiative with a view to further strengthening the 2014 rule of law framework".[289] This proposal is pending at the time of writing. The call by the European Parliament for the Commission to put forward an initiative on "a comprehensive EU mechanism on democracy, the rule of law and fundamental rights (DRF)", and the adoption of the inter-institutional agreement was reiterated in a Motion for Resolution of 7 November 2018. The Parliament warned the Commission that otherwise it "could take the initiative to launch a pilot DRF report and an inter-parliamentary debate".[290]

The Juncker Commission contributed towards a strengthened EU rule of law setting with a proposal for a Regulation that would make benefiting from EU funding (under the next EU Multiannual Financial Framework, MFF) conditional on rule of law compliance by all Member States.[291] The initiative stated that "respect for fundamental values is an essential precondition for sound financial management and effective EU funding". The Commission already has the power to use 'rule of law budget conditionality' and suspend European Structural and Investment Funds (ESIFs) in cases where a member state violates the rule of law. However, this new proposal would make this explicit and significantly expand the Commission's competence to suspend or reduce EU funds[292] in cases of "generalised deficiency as regards the rule of law"

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[287] See also European Parliament (2016), Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL).

[288] European Commission (2018), Commission Work Programme 2019: Delivering what we promised and preparing for the future, COM(2018) 800 final, 23.10.2018, Strasbourg.

[289] Ibid. Page 7.

[290] European Parliament (2018), Motion for a Resolution, on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, B8-0523/2018, 7.11.2018, paragraph 7.

[291] European Commission (2018), Regulation on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States, COM(2018) 324 final, 2.5.2018, Brussels.

[292] Art. 4 of the Proposal for a Regulation.

affecting or presenting the risk of affecting EU financial interests or principles of sound financial management.[293] It would introduce a qualified majority voting procedure within one month in the Council and only require the European Parliament to be informed.

The Commission proposal has been found to be fully compatible with the EU Treaties and in harmony with other parallel EU rule of law legal and policy instruments.[294] The European Court of Auditors (ECA) issued an Opinion on the budget conditionality proposal highlighting the lack of impact assessment and the wide discretionary powers that it leaves to the European Commission.[295] This is particularly so in respect of the inherent imprecision or legal uncertainty regarding the notion of "generalised deficiency as regards the rule of law" and the exact sources that the Commission would make use of when conducting a qualitative assessment concluding its existence as well as for the adoption or lifting of sanctions.

[293] Art. 2 and Art. 3.2 of the Proposal. According to Art. 3.1 risks would include deficiencies affecting the functioning of Member States' authorities implementing the Union budget, investigation and prosecution services in the prosecution of fraud and corruption, effective judicial review by independent courts, the prevention and sanctioning of fraud and corruption, the recovery of funds unduly paid, as well as cooperation with OLAF (European Anti-Fraud Office) and the EPPO in investigations and prosecutions.

[294] Kim Lane Scheppele, Laurent Pech and Daniel Kelemen (2018), Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-Related Rule of Law Mechanism, 12 November 2018 (https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/).

[295] European Court of Auditors (2018), Opinion No. 1/2018, concerning the proposal of 2 May 2018 for a regulation on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States, 2018/ C 291/01, OJ C 291/1, 17.8.2018.

4. CONCLUSIONS AND PRIORITIES

So has the Juncker Commission meant a new start in EU JHA cooperation? This book has illustrated that there have been several important policy, legal and institutional developments advancing or taking forward 'Europeanisation' of the Union's AFSJ. The period between 2014 and 2018 has meant a further liberalisation of the Community method of cooperation and full operationalisation of the enforcement powers of the European Commission and judicial scrutiny by the CJEU. This has been particularly so in relation to EU policies related to judicial cooperation in criminal matters and police.

The European Commission's response to the 2015 refugee humanitarian crisis was prompt and the adoption of the temporary relocation mechanism demonstrated that the Treaties provide the necessary tools and procedures to respond to urgent needs on the ground. That notwithstanding, EU rule of law, fundamental rights and better regulation have been the main victims of 'the politics of crisis' during the 8th legislature in AFSJ policies.

Fast and emergency-driven policy responses often came at the expense of EU better regulation guidelines[296] and rule of law and fundamental rights standards and Treaty and national constitutional principles. While the critical humanitarian situation on the ground may have called for immediate support and actions, the Commission should have not lost track of its mandate and the longer-term impacts of its policy decisions. The Commission First Vice-President should have first and foremost ensured that his mandate and 'watchdog role' was rigorously implemented.

Some policy, legislative and financial instruments proposed or adopted by the Commission have not always been adopted following the ordinary decision making procedures foreseen in the Lisbon Treaty, nor have they come with impact assessments and an evidence-based examination of their added value in line with EU Better Regulation commitments. Other Commission 'comprehensive assessments', such as the one conducted on anti-terrorism

[296] European Commission, "Better regulation: guidelines and toolbox" (https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en).

policies, have not always been accompanied by in-depth evaluations or 'fitness checks'.[297]

As Section 3 and Annex I of this book show, the most important priorities and developments have related to security or policing-oriented policies over other equally central EU policy approaches – such as foreign affairs, employment and social affairs, development aid, humanitarian assistance, criminal justice or trade, as well as their compliance with fundamental rights envisaged in the EUCFR.

In the name of the crisis and emergency some member state governments have also attempted to regain previously lost ground in some JHA-related fields. Key political decisions have been taken that fall completely outside the EU Treaties in areas already under shared or exclusive Union competence. 'Crisis' however has meant a 'new start' for the intergovernmentalism and nationalism which traditionally used to dominate JHA policies before the entry into force of the Lisbon Treaty in 2009.

The 'Lisbonisation' of the AFSJ aimed at facilitating increasing the EU's legitimacy in JHA-related domains by putting the democratic rule of law and fundamental rights at the core of European integration and EU inter-institutional relations and decision-making.[298] However, European cooperation on AFSJ policies between mid-2014 and end 2018 has been driven by 'short-termism' and 'crisis-mode' policymaking in areas of crucial importance for the EU. Extra-Treaty and extra-budget cooperation have meant 'less EU' in crucial EU policies; preventing the Commission from playing its role as envisaged in the Treaties, side-lining the European Parliament and excluding judicial control by the CJEU.

The entry into force of the Lisbon Treaty meant that the monopoly previously enjoyed by the JHA Council over AFSJ policies came to an end. The AFSJ was considered to be amongst the policy areas where the new Treaties generated a more far reaching overhaul. The expansion of the EU ordinary legislative procedure and the formalisation of its consent in a larger number of areas placed the European Parliament as one of the 'winners' of the Lisbon Treaty. The European Parliament not only acts as co-legislator in all these policy domains, but also becomes co-owner of the EU's AFSJ political agenda.

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[297] European Commission, "Better regulation toolbox" (https://ec.europa.eu/info/better-regulation-toolbox_en).

[298] Sergio Carrera, Nicholas Hernanz and Joanna Parkin (2013), "The 'Lisbonisation' of the European Parliament Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice", CEPS, Brussels, No. 58, September (https://www.ceps.eu/system/files/LSE%20No%2058%20Lisbonisation%20of%20EP.pdf)

There were high expectations that this new Commission would work more closely with the European Parliament, in relation and response to nationalistic demands by some EU member states, during this past legislature.[299] This was also part of the First Vice-President of the Commission's responsibilities. That notwithstanding, some of the most central policy decisions justified on the basis of the refugee crisis have expressly or by-design side-lined, sometimes all together, the European Parliament's role.

The Juncker Commission has often paid too much attention and given too great a leverage to some member state governments, and the European Council in AFSJ policy fields. The 'policy salience' of the migration dossier between 2015 and 2018 translated into the multiplication of European Council meetings dealing with 'migration', with JHA Council bodies – i.e. Ministries of Interior of EU member states – playing a rather influential role in setting political priorities and policies in response to the refugee crisis.

Many of the crisis-led legal and policy developments have raised profound challenges and risks to fundamental rights, particularly in their phases of implementation. This is in stark conflict with Vice-President Timmermans' mandate to safeguard the EU Charter of Fundamental Rights and his promise delivered during his appointment hearing, according to which "We need to guarantee that all our actions comply with the Charter. This is the case whether we are acting in the context of legislation or otherwise. There must be systematic fundamental rights checks and *ex post* impact assessments at different stages of the legislative process".[300]

Similarly, Commissioner Avramopoulos stated in his hearing before the Parliament as Commissioner-designate on 30 September 2014 that "my first priority will be to do everything possible within my mandate to cope in an efficient manner with the migratory pressure at our borders, and fully respecting fundamental rights".[301] As illustrated in Section 3 of this book, this promise has not been delivered. The main 'Achilles heel' of EU responses to the 'European refugee humanitarian crisis' has been that there has been an unbalanced setting and implementation of priorities which have not been *EUCFR and Better Regulation-proof*.

The Commission has been entrusted with the role and responsibility of guarantor of the Treaties, which includes the EU democratic rule of law

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[299] See Sergio Carrera (2012), The Impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders: The Struggles over the Ownership of the Stockholm Programme, in E. Guild and P. Minderhoud (eds), The First Decade of EU Migration and Asylum Law, Martinus Nijhoff Publishers, Leiden, pp. 229-254.

[300] Hearing Frans Timmermans (2014), op.cit.

[301] Hearing Dimitris Avramopoulos (2014), op.cit.

standards and the EU Charter of Fundamental Rights that lie at its foundations. Going 'extra-Treaty' for strategic political short-term purposes has not only posed serious threats to these Treaty standards. It has also contradicted the principle of loyal and sincere cooperation in the EU Treaties enshrined in Article 4.3 TEU, which is a key piece in the EU legal system and inter-institutional balance puzzle. This Treaty principle requires member states to facilitate the achievement of the Union's tasks and to refrain from any measure that could jeopardise the attainment of the Union's objectives. It also requires European institutions not to undermine these same objectives by short-circuiting the role of other institutional actors.

For instance, the indirect support from the Commission for the adoption and implementation of the EU-Turkey Statement, or the increasing use of non-legally binding instruments like 'readmission arrangements' and extra-budget financial instruments, constitutes an express and conscious 'policy choice' to go 'extra-Treaty' and 'extra-budget'. This kind of decision-making is problematic as it effectively means not following the letter of the Treaties and exercising the EU legal competence on AFSJ policies, which since the Lisbon Treaty is formally shared between the EU and its member states and which requires full democratic oversight by the European Parliament and judicial control by the Luxembourg Court.

This book has illustrated how the Juncker Commission has taken Europeanisation forward in a number of important policy areas, by either adopting new EU legal standards in key domains or by re-designing or creating new Community bodies and EU agencies in the JHA arena. However, '*the politics of crisis and emergency*' have also come with very high costs and have not benefited this Commission overall. They have translated into two policy making logics: first, intergovernmentalism and rule of law backsliding, and second, informalisation and exceptionalism, both of which have constituted a serious drawback for this Commission and its outputs. These logics have opened the door to some EU member state governments and their Ministries of Interior attempting to 'reverse Europeanisation' and inject 'less EU' in areas of shared or even exclusive EU competence. Democratic legitimacy, EU rule of law and judicial control and the fundamental rights of individuals have been among the main losers.

4.1 Priorities

4.1.1 Intra-Institutional

The appointment of a new First-Vice President for rule of law, fundamental rights and better regulation was a welcome intra-institutional innovation in the Juncker Commission. The office has served to 'show case' rule of law challenges

arising in several member states. However, a 'Commission of crisis', has translated into a blurring of roles and portfolios with too much emphasis on 'migration' and 'justice' through *a security, home affairs or policing approach*. There has been not one, but many 'Home Affairs' or Security Commissioners, which has in turn had a direct repercussion on *the kind* of legal and policy ouputs. This has been despite President Juncker expressly declaring that migration and asylum should not be mixed with terrorism, and underlying at the G20 Meeting on 15 November 2015 the need to delink terrorism and refugee debates in Europe, and that people seeking international protection are not criminals or potential terrorists.[302]

The next Commission intra-institutional structure should therefore give priority to the following: the role of Vice-President should not be that of 'First Vice-President', as it has exposed this role and made it vulnerable to high-level politics, making it very difficult to maintain the course of action originally envisaged in the mandate. The current setting of having three different Commissioners responsible for 'Justice', 'Home Affairs, Migration and Citizenship' and 'Security Union', under the supervision of a Vice-President on Rule of Law, EU Charter of Fundamental Rights and Better Regulation, has been however a welcome development and should be maintained in the next Commission.

As proposed by previous CEPS research,[303] the portfolios of each of the three Commissioners could be fine-tuned and clarified as follows: first, one Commissioner for Justice, Fundamental Rights and Citizenship, who would be responsible for criminal justice cooperation, European Citizenship and fundamental rights portfolios (Chapter 4 TFEU, Arts. 82-86; Part II TFEU, Arts. 18-25); second, another Commissioner on Schengen, Migration and Asylum (Chapter 2 TFEU, Arts. 77-89); and third, a Commissioner for Security, who would be responsible for the fight against terrorism and criminality, in particular 'police cooperation', i.e. prevention, detection and investigation of crimes (Chapter 5 TFEU, Arts. 87- 89). This division of responsibilities would avoid a mixing of Schengen, migration and asylum with crime and terrorism policies. Each of these Commissioners would ideally have their own DG; otherwise, at a minimum, the current division between DG JUST and DG HOME should be continued.

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302 European Commission (2015), "Transcript of Press Conference - G20 Summit in Antalya", European Commission Press Release, Brussels, 15 November (http://europa.eu/rapid/press-release_SPEECH-15-6091_en.htm).

303 Carrera et al. (2009), op.cit.

4.1.2 Substantive or Thematic

Rule of Law

A first priority should be the setting up a new EU Periodic Review or Mechanism on Democracy, Rule of Law and Fundamental Rights (DRF) covering all EU member states. The EU DRF Periodic Review/Mechanism would be based on a regular and independent examination of all relevant existing international and European sources of evidence on compliance with EU Treaty values.[304] This should go hand-in-hand with establishing a new 'EU Rule of Law Commission or Group'[305] composed of high-level experts and experienced practitioners that would have the competence to impartially assess the qualitative findings by thematic area substantiating the existence of a systemic risk, threats or 'generalised deficiency' of the rule of law, and their wider implications for EU-specific policies and financial instruments in the Union legal system.[306]

The DRF would be part of a wider *'EU Rule of Law Toolbox'* bringing the new mechanism together with all currently existing legal, policy and funding instruments monitoring and assessing member state compliance with Art. 2 TEU principles and the EU Charter of Fundamental Rights. The next Commission should additionally implement 'rule of law infringement procedures', presenting both an accelerated/fast track and freezing component,[307] which would bundle cases against a member state presenting similar basic rule of law issues. The evidence emerging from the DRF mechanism would be central in substantiating the existence of 'systematic' rule of law issues, which could also be directly brought by the DRF Commission or Group before the Luxembourg Court, so as not to leave all room for discretion with the European Commission.

A Migration and Asylum Union

Another priority should be adopting and implementing a *'Migration and Asylum Union'* based on more intra-EU institutional solidarity and supervision.[308] All

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304 Carrera and Bard (2018), op.cit.

305 Petra Bárd, Sergio Carrera, Elspeth Guild and Dimitry Kochenov (2016), "An EU mechanism on Democracy, the Rule of Law and Fundamental Rights", CEPS, Brussels, No. 91, April. (https://www.ceps.eu/system/files/LSE%20No%2091%20EU%20Mechanism%20for%20Democracy.pdf).

306 Carrera et al. (2016), op.cit.

307 P. Bard and A. Śledzińska-Simon (2019), The force of infringement procedures in tackling rule of law backsliding in the Member States, CEPS Policy Insight, forthcoming. See also Carrera, Sergio and Valsamis Mitsilegas (2018), "Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court's request for a preliminary ruling on the European Arrest Warrant", CEPS, Brussels, 11 April (https://www.ceps.eu/publications/upholding-rule-law-scrutinising-judicial-independence-irish-courts-request-preliminary).

308 Carrera and Lannoo (2018), op.cit.

EU member states should fully comply with their current legal obligations under the Schengen regime and immediately suspend unlawful international border controls. The use of border walls and fences at Schengen external borders should be rigorously tested against EU rules and values, and illegal practices by certain member state governments such as 'push backs' and 'hot returns' at external borders should be stopped immediately.

The envisaged proposal for a new mandate of EASO and its transformation into a fully operational EU Asylum Agency should also become a key priority. The new Agency should be entrusted with coordinating and applying a new model for distributing responsibility for processing asylum applications and supervising member states in carrying out that responsibility. The allocation model would follow the distribution key proposed by the European Parliament (see Section 3.2 of this book), in close cooperation with the UNHCR and civil society organisations and under a clear EU and domestic legal framework. This should go hand-in-hand with a more robust legal and judicial accountability framework ensuring effective remedies for asylum applicants interviewed by or receiving negative asylum decisions from the current and new EASO+ Agency.

The new proposal for revising the Frontex (European Border and Coast Guard) mandate presents further potential for institutional solidarity and the development of a 'professional culture of border and coast guards' across the EU. The EBCG could play a more active role in the promotion, evaluation and daily implementation of EU border standards laid down in the Schengen Borders Code (SBC), which already include the practical delivery of key administrative guarantees and fundamental rights protections.

However, it also comes with important gaps and risks. The EBCG should develop its Search and Rescue (SAR) operational functions and ensure a Mediterranean-wide SAR operation. In practice, this would mean that each person disembarking from a Frontex EBCG SAR operation would be taken directly into the scope of application and mandate of the new EU Asylum Agency and a new distribution key model.[309] The new Frontex should also go hand-in-hand with establishing an independent complaints mechanism and an EU border monitor (not dependent on Frontex) so as to further strengthen fundamental rights protection in all its activities and responsibilities. The monitor, which could be part of the European Ombudsman's office, would be responsible for evaluating and handling cases of alleged mistreatment and fundamental rights violation in the context of border control and surveillance operations.

[309] Carrera et al. (2015a), op.cit.

The current EU asylum *acquis* already provides a robust transnational legal framework of Union standards implying clear obligations for all participating EU member states. The next Commission should invest renewed efforts – which should go hand-in-hand with increased EU financial support – in enforcing timely and correct implementation and practical delivery of these common standards on the ground by all EU member states and relevant national authorities. Asylum should be disentangled from security predicaments and agendas. As underlined by the 1999 Tampere Programme,[310] and as now enshrined in Art. 18 EUCFR, a key priority should be to uphold the absolute respect of the right to seek asylum in the Union. Nobody should be sent back to persecution, torture and inhuman or degrading treatment, in violation of the principle of *non-refoulement*.

Moreover, the next Commission should make sure to complement the new mandate of the EU Asylum Agency with a new systematic monitoring or evaluation mechanism in the area of asylum in light of Article 70 TFEU. This should be complemented with further steps in building a *truly Common* European Asylum System, and playing a key role in the faithful implementation of the United Nations (UN) Global Compact on Refugees.[311] The priorities in this policy area identified by the 1999 Tampere Programme – the alignment of rules on mutual recognition of asylum decisions and a uniform status for those granted asylum valid throughout the Union – remain at present incomplete.[312] As highlighted by the 2015 European Agenda on Migration, the next Commission should give particular attention to delivering these objectives, developing common EU legal standards on mutual recognition of positive asylum decisions taken by another member state and "establishing a single asylum decision process so as to guarantee equal treatment of asylum seekers throughout the EU".[313]

As regards 'migration', the next Commission should give priority to developing *a fair EU agenda facilitating legal channels for migration*, and implementing the UN Global Compact on Migration.[314] Such an agenda should

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[310] Refer to Paragraph 13 of the Tampere Programme, which stated that "

[311] United Nations, Global Compact on Refugees, Final Draft, 24 June 2018 (https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/Global-Compact-on-Refugees.pdf).

[312] Refer to paragraph 14 of the 1999 Tampere Programme.

[313] See page 17 of the European Agenda on Migration.

[314] UN Global Compact for Safe, Orderly and Regular Migration, Final Draft, 11 July 2018 (https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf). Refer to Sergio Carrera, Karel Lannoo, Marco Stefan and Lina Vosyliute (2018), Some EU governments leaving the UN Global Compact on Migration: A contradiction in terms?, CEPS Policy Insight,

be firmly rooted in existing international, regional and EU human rights and labour standards and the principles laid down in EU Treaties and national constitutions.

Back in 2010, the European Commission advanced the idea of adopting an 'Immigration Code'.[315] As recommended by CEPS research,[316] the adoption of an EU immigration code – incorporating all existing sectorial EU directives, and providing a uniform level of rights to third-country workers – would be a welcome step forward. This would move towards the implementation of the 1999 Tampere Programme priority calling for the need to align "national legislations on the conditions of admission and residence of third country nationals"[317] and put into practice the Lisbon Treaty goal of developing a common immigration policy which is "fair towards third-country nationals".[318]

The next Commission should also revise the current EU visa waiver regime to include a common EU approach on humanitarian visas that would not be dependent on third-country cooperation on readmission. Such an approach would declassify or suspend EU visa requirements for individuals holding the nationality of top refugee-generating countries according to UNCHR and Eurostat data.[319] The establishment of common EU visa issuing offices in third countries could be revisited, again in line with the call given by the Tampere Programme.[320]

Furthermore, the current EU legal framework on migrant smuggling should be fully 'Lisbonised' and amended so as to ensure full compliance with

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No. 2018/15, November 2018 (https://www.ceps.eu/system/files/PI2018_15_SCKLMSVL_UN%20Global%20Compact_0.pdf).

315 Refer to Commission Communication (2010), Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20 April 2010, which stated on page 52: "Immigration code - Consolidation of legislation in the area of legal immigration taking into account the evaluation of the existing legislation, needs for simplification and where necessary extend the existing provisions to categories of workers currently not covered by EU legislation".

316 Carrera, Sergio, Andrew Geddes, Elspeth Guild and Marco Stefan (2017), Pathways towards Legal Migration into the EU: Reappraising concepts, trajectories and policies, CEPS, Brussels. (https://www.ceps.eu/system/files/PathwaysLegalMigration_0.pdf).

317 Paragraph 20 of Tampere European Council Conclusions.

318 Arts. 67 and 79 TFEU.

319 Wouter van Ballegooij and Cecilia Navarra (2018), Humanitarian Visas, European Added Value Assessment, EPRS, Brussels (http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621823/EPRS_STU(2018)621823_EN.pdf).

320 Paragraph 22 of the Programme stated that "A common active policy on visas…should be further developed, including closer cooperation between EU consulates in third countries and, where necessary, the establishment of common EU visa issuing offices".

international human rights standards and de-criminalise the provision of humanitarian assistance to asylum seekers and irregular immigrants by civil society, volunteers and citizens.

A principled and trust-based Security Union

The EU should construct and progressively develop a *principled and trust-based* policy approach to countering terrorism. This policy approach should start with an evaluation (fitness check) and regular reappraisal of the effectiveness, efficiency and fundamental rights compliance of current and near future EU policies and their priorities, particularly those related to information exchange. In particular, the EU can bring value added by investing more action in furthering EU coordination of traditional policing and criminal justice cooperation in fighting terrorism.[321]

The overall guiding principle in EU security measures should be *less data retention and processing, and better and more accurate use of data* that meets the quality standards of evidence in criminal judicial proceedings.[322] The goal established by the European Agenda on Security calling for "better information exchange" in full compliance with fundamental rights has not been accomplished.[323] The fundamental rights impact of the interoperability proposals – including privacy, non-discrimination and effective remedies – should be independently re-examined and thoroughly addressed. The European Production and Preservation Order (EPO) proposals should be substantially revised and improved so as to: first, duly ensure that electronic data will always meet the standards of 'evidence' in criminal justice procedures; and second, ensure independent judicial scrutiny and effective remedies both in the issuing and executing EU member states.

The EU should set up an EU-wide requests and complaints mechanism, independent from the eu-LISA agency, allowing for data subjects to request access, correct and delete data, as well as lodge complaints against data misuses in the scope of current and future EU databases. Specific attention should be given to strengthening the provision of information to data subjects and guaranteeing effective access to these complaints by affected EU citizens as well as third-country nationals and asylum seekers. A common EU definition of 'competent national authorities' having access to AFSJ databases should be

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321 Carrera et al. (2017a), op.cit.

322 Didier Bigo, Sergio Carrera, Elspeth Guild, Emmanuel-Pierre Guittet, Julien Jeandesboz, Valsamis Mitsilegas, Francesco Ragazzi and Amandine Scherrer (2015), "The EU and its Counter-Terrorism Policies after the Paris Attacks", CEPS, Brussels, 27 November (https://www.ceps.eu/publications/eu-and-its-counter-terrorism-policies-after-paris-attacks).

323 Refer to pages 3 and 5 of the European Agenda on Security.

adopted so as to ensure the principle of purpose limitation is upheld and accessibility is restricted to legitimate domestic actors.

A European agenda on criminal justice and fundamental rights

The next Commission should develop a European agenda on justice and give priority to effective implementation of mutual recognition in criminal matters instruments, starting with the European Arrest Warrant. It could also focus on ensuring the effective domestic transposition and use of the EIO across all relevant member states. It is recommended to let this EU mutual recognition tool grow first before the EPO is adopted. This priority should go hand-in-hand with greater financial investment and resources for ensuring domestic transposition and use of EIOs in light of the needs of national judges, prosecutors and defence lawyers.

This should also be accompanied by a more robust EU framework on suspects' rights in criminal proceedings, starting by filling up current gaps (e.g. pre-trial detentions or witness protections) and then carrying out a 'Fitness Check' on the entire EU *acquis* on suspects' rights in EU criminal justice cooperation. Moreover, the new Commission should develop common EU legal standards preventing the use of unlawful or illegally accessed or processed information in criminal investigations, so that it should not be admissible before any national or Union court throughout the EU.

Any expansion of the areas of competence of the EPPO should be coupled with effective and supranational judicial scrutiny by the CJEU. In line with the Lisbon Treaty, the next Commission should make all efforts to ensure that the EPPO moves from 'enhanced cooperation' to a fully EU body with all relevant EU member states participating in its mandate and activities. Special attention should be also given to bring the EPPO under full judicial control by the Luxembourg Court and developing EU-wide standards for whistle-blower protection with the establishment of a direct complaints mechanism before the EPPO.

The EU's contribution to cross-border operational cooperation in the area of cross-border crime fighting hints at some positive transformative effects. Experiences like those of the Joint Investigation Teams (JITs) of judicial authorities, which were also promoted by the 1999 Tampere Programme,[324] under the joint coordination of EU agencies Europol and Eurojust, call for careful examination and scrutiny, as they have the potential to play a key role in developing mutual trust and cooperation among law enforcement authorities of

[324] Paragraphs 43 and 45 of the Tampere Programme.

EU member states.[325] JITs should facilitate criminal justice investigations rather than focusing on 'intelligence' gathering.

A full implementation of the EU Charter of Fundamental Rights and the Union's accession to the European Convention of Human Rights (ECHR) – following the call envisaged in Art.6.2 TEU – should be at the very top of the new Commission's priorities. The EU is now a regional and international standard-setter regarding fundamental rights such as those related to privacy and data protection. EU standards should be preserved, promoted and rigorously monitored in the adoption and implementation of every legal and policy instrument developing cooperation with third countries. For example, frameworks of cooperation on data transfers with non-EU countries should provide an equivalent level of protection and be fully compliant with Luxembourg Court benchmarks.

EU AFSJ cooperation: legitimation, credibility and trust

The next European Commission should focus on making rigorous use of the legal acts and templates of European cooperation envisaged in the Lisbon Treaty (which comprises both the TEU and the TFEU). The increasing recourse to extra-Treaty and extra-budget instruments during the Juncker Commission has not well served its role as 'guarantor of the Treaties'. It has also posed profound challenges to good administration, democratic accountability and judicial control of the policy developments in areas of huge importance for the Union's legitimation. EU policy responses need to move from a home affairs-centric focus towards a 'multi-sector policy approach' in order to guarantee a balanced setting of priorities across all relevant policy sectors.

The new upcoming period of inter-institutional renewal should shift out of 'crisis mode' and return the 'normal' course of action in European integration to the basis of the mandate provided in the EU Treaties. The next Commission should dedicate all its efforts to designing and implementing a *principled justice, freedom and security agenda* in its strategic policy guidebook. It is by unequivocally placing EU founding principles first – rule of law, fundamental rights and democracy – and systematically enforcing and delivering them in daily practice, that the legitimation and credibility of European integration may be guaranteed in the short and longer term.

[325] Carrera et al. (2017), op.cit.

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ANNEX I.

This table offers an overview of AFSJ developments during the Junker Commission (mid-2014 to December 2018), and legal acts proposed by the Barroso Commission discussed or adopted during this term. Judicial cooperation in civil matters falls outside the scope of the Table.

Legal Act	Proposed	Adopted	Under Inter-Institutional Negotiations
Schengen and Securing External Borders (corresponding with Section 3.1 of this Report)			
ID Cards and Residence Documents	Proposal for a Regulation on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement, COM(2018)212. 17.4.2018.		✓
Simplified Acceptance of Certain Public Documents		Regulation (EU) 2016/1191 of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union. OJ L 200, 26.7.2016.	
Temporary Reintroduction Of Border Control at Internal Borders	Proposal for a Regulation as regards the rules applicable to the temporary reintroduction of border control at internal borders, COM(2017) 571. 27.9.2017.		✓
European Border And Coast Guard (EBCG) – Revision FRONTEX		Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard. OJ L 251, 16.9.2016.	
EBCG	Proposal for a Regulation on EBCG, COM(2018) 631. 12.9.2018.		✓
Schengen Borders Code (Anti-Terrorism Measures)		Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). OJ L 77, 23.3.2016.	

Asylum and Refugees (Section 3.2)			
EASO	Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM/2016/0271 final. 4.5.2016.		✓
EASO	Amended proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010. COM(2018) 633 final. 12.9.2018.		✓
Revision Dublin Regulation	Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). COM(2016) 270 final. 4.5.2016.		✓
Asylum Procedures Directive	Proposal for a Regulation establishing a common procedure for international protection in the Union. COM/2016/0467 final. 13.7.2016.		✓
Qualifications Directive	Proposal for a Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted. COM/2016/0466 final. 13.7.2016.		✓
Reception Conditions Directive	Proposal for a Directive laying down standards for the reception of applicants for international protection (recast). COM(2016) 465 final. 13.7.2016.		✓
Recast Returns Directive	Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast). COM(2018) 634 final. 12.9.2018.		✓
Crisis Relocation Mechanism	Proposal for a Regulation establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013		✓

	of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person. COM(2015) 450 final. 9.9.2015.		
Permanent Relocation Mechanism	Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). COM(2016) 270 final. 4.5.2016.		✓
European List of Safe Countries of Origin	Proposal for a Regulation establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU on common procedures for granting and withdrawing international protection. COM/2015/0452 final. 9.9.2015.		✓
Asylum and Migration Fund	Proposal for a Regulation establishing the Asylum and Migration Fund. COM/2018/471 final. 12.6.2018.		✓
Legal Immigration (Section 3.3)			
Revision Blue Card Directive	Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment. COM/2016/0378 final. 7.6.2016.		✓
Visa Policy Package – Recast Visa Code	Proposal for a Regulation on the Union Code on Visas (Visa Code) (recast). COM/2014/0164 final. 1.4.2014.		**Withdrawn (4.7.2018)**
Visa Policy Package – Touring Visa	Proposal for a Regulation establishing a touring visa. COM/2014/0163 final. 1.4.2014.		**Withdrawn (4.7.2018)**
Revision of the Visa Code	Proposal for a Regulation amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code). COM/2018/0252 final. 14.3.2018.		✓

Directive on Students and Researchers		Directive (EU) 2016/801 of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing. OJ L 132, 21.5.2016.	
Revision of the Uniform Format for Visas		Regulation (EU) 2017/1370 of 4 July 2017 amending Council Regulation (EC) No 1683/95 laying down a uniform format for visas. OJ L 198, 28.7.2017.	
Global Compact for Safe, Orderly and Regular Migration in the area of immigration policy	Proposal for a Council Decision authorising the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the area of immigration policy. COM(2018) 168 final. 21.3.2018.		**Withdrawn**
Irregular Entries and Third Country Cooperation on Expulsions (Section 3.4)			
Revision of the Immigration Liaison Officers Regulation	Proposal for a Regulation on the creation of a European network of immigration liaison officers (recast). COM/2018/303 final. 16.5.2018.		✓
European Travel Document for the Return of Irregular Migrants		Regulation (EU) 2016/1953 of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals. OJ L 311, 17.11.2016.	
Recast of the Return Directive	Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast). COM/2018/634 final. 12.9.2018.		✓
Voluntary Humanitarian Admission scheme with Turkey		Commission Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey. C(2015) 9490.	

Facility for Refugees in Turkey		Commission Decision of 10.11.2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500. 24.11.2015.	
		Commission Decision of 18.4.2017 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015 (2017/C 122/04).	
		Commission Decision of 14.3.2018 on the Facility for Refugees in Turkey amending Commission Decision C(2015)9500 as regards the contribution to the Facility for Refugees in Turkey. C(2018) 1500 final.	
		Commission Decision of 24.7.2018 on the Facility for Refugees in Turkey amending Commission Decision C(2015)9500 as regards the contribution to the Facility for Refugees in Turkey. C(2018) 4959 final.	
Criminal Justice and Police Cooperation (Section 3.5)			
Presumption of Innocence - Procedural Rights in Criminal Proceedings		Directive 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. OJ L 65, 11.3.2016. *Based on the European Commission package of proposals of November 2013.*	
Legal Aid - Procedural Rights of Accused Persons in Criminal Proceedings		Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. OJ L 297, 4.11.2016. *Based on the European Commission package of proposals of November 2013.*	

Review of the Framework Decision on Terrorism		Directive (EU) 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. OJ L 88, 31.3.2017.	
Revision of the Directive on Acquisition and Possession of Weapons		Directive (EU) 2017/853 of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons. OJ L 137, 24.5.2017.	
Anti-Money Laundering Directive (AML) – Countering Terrorist Financing		Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. OJ L 141, 5.6.2015.	
Revision of the Anti-Money Laundering Directive (AML) – Countering Terrorist Financing		Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. OJ L 156, 19.6.2018.	
EU Accession to the Council of Europe Convention on Preventing and Combating Violence Against Women ('Istanbul Convention')	Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence. COM/2016/0111 final. 4.3.2016.		**Withdrawn (11/05/2017)**
	Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence. COM/2016/0109 final. 4.3.2016.		✓
Initiatives to Facilitate Cross-Border Access to and Use of Financial Data by Law Enforcement Authorities	Proposal for a Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences. COM/2018/213 final. 17.4.2018.		✓

Revision of the Regulation on Marketing and Use of Explosive Precursors	Proposal for a Regulation on the marketing and use of explosives precursors. COM/2018/209 final. 17.4.2018.		✓
European Production and Preservation Orders for Electronic Evidence in Criminal Matters	Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters. COM/2018/225 final. 17.4.2018.		✓
Appointment of Legal Representatives for the Purpose of Gathering Evidence in Criminal Proceedings	Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings COM/2018/226 final. 17.4.2018.		✓
Preventing the Dissemination of Terrorist Content Online	Proposal for a Regulation on preventing the dissemination of terrorist content online. COM/2018/640 final. 12.9.2018.		✓
Revision of CEPOL		Regulation (EU) 2015/2219 of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL). OJ L 319, 4.12.2015.	
Procedural Safeguards for Children Suspected or Accused		Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. OJ L 132, 21.5.2016.	
Revision of EUROPOL		Regulation (EU) 2016/794 of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol). OJ L 135, 24.5.2016.	
Insolvency Proceedings		Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings. OJ L 141, 5.6.2015.	

Mutual Recognition of Freezing and Confiscation Orders		Regulation (EU) 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. OJ L 303, 28.11.2018.	
Controls on Cash Entering or Leaving the Union		*Pending publication in EU Official Journal*	
Revision of eu-LISA		Regulation (EU) 2018/1726 of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA). OJ L 295, 21.11.2018.	
Revision of EUROJUST		Regulation (EU) 2018/1727 of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust). OJ L 295, 21.11.2018.	
European Public Prosecutor's Office (EPPO)		Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). OJ L 283, 31.10.2017. *Proposal submitted by the former Commission in 2013.*	
Money laundering		*Pending publication in EU Official Journal*	
Fraud and Counterfeiting of non-Cash Means of Payments	Proposal for a Directive on combating fraud and counterfeiting of non-cash means of payment COM/2017/0489 final. 13.9.2017.		✓
Interoperability and information systems (Section 3.5.4)			
Revision of the Schengen Information System in the Field of Police Cooperation and Judicial Cooperation in Criminal Matters		Regulation (EU) 2018/1862 of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters. OJ L 312, 7.12.2018.	

Revision of the Schengen Information System in the field of Border Checks		Regulation (EU) 2018/1861 of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks. OJ L 312, 7.12.2018.	
Revision of the Schengen Information System for the Return of Illegally Staying Third-Country Nationals		Regulation (EU) 2018/1860 of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals. OJ L 312, 7.12.2018.	
Improvement of the European Criminal Records Information System (ECRIS)	Proposal for a Directive amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS). COM/2016/07 final. 19.1.2016.		✓
New Regulation on the Visa Information System (VIS)	Proposal for a Regulation. COM/2018/302 final. 16.5.2018.		✓
EU Passenger Name Record		Directive (EU) 2016/681 of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. OJ L 119, 4.5.2016.	
Interoperability Between EU Information Systems in the Field of Borders and Visa	Proposal for a regulation on establishing a framework for interoperability between EU information systems (borders and visa). COM/2018/478 final. 13.6.2018.		✓
Interoperability Between EU Information Systems on Police and Judicial Cooperation, Asylum and Migration	Proposal for a regulation on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration). COM/2018/480 final. 13.6.2018.		✓

European Travel Information and Authorisation System (ETIAS)		Regulation (EU) 2018/1240 of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS). OJ L 236, 19.9.2018.	
Entry/Exit System (2013 Smart Borders Package – EES)	Proposal for a Regulation establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union. COM/2013/095 final. 28.2.2013. *Proposed by the former Commission.*		**Withdrawn**
Entry/Exit System (2013 Smart Borders Package – RTP)	Proposal for a Regulation establishing a Registered Traveller Programme, COM/2013/097 final. 28.2.2013. *Proposed by the former Commission.*		**Withdrawn (17.11.2016)**
Entry/Exit System (2016 Smart Borders Package)		Regulation (EU) 2017/2226 of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes. OJ L 327, 9.12.2017	
Recast of the EURODAC	Proposal for a Regulation on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013, for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast). COM/2016/0272 final. 4.5.2016.		✓

Rule of Law and Fundamental Rights (Section 3.6)			
Anti-Discrimination Directive	Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. COM/2008/0426 final. 2.7.2018. *Proposal presented in 2008 by previous Commission.*		✓
EU Accession to the ECHR	Protocol (no 8) relating to article 6(2) of the treaty on European Union on the accession of the Union to the European Convention on the Protection of Human rights and Fundamental Freedoms. OJ C 202, 7.6.2016. *Draft Accession Agreement of 5 April 2013.*		✓
General Data Protection Regulation (GDPR)		Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). OJ L 119, 4.5.2016.	
Verification Procedure Related to Infringements of Personal Data in the Context of the European Parliament Elections	Proposal for a Regulation amending Regulation (EU, Euratom) No 1141/2014 as regards a verification procedure related to infringements of rules on the protection of personal data in the context of elections to the European Parliament. COM(2018) 636 final/2. 12.9.2018.		✓
Whistle-Blower Protection	Proposal for a Directive on the protection of persons reporting on breaches of Union law. COM/2018/218 final. 23.4.2018.		✓
Data Protection – Police Directive		Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data. OJ L 119, 4.5.2016.	

Multiannual Framework for the European Union Agency for Fundamental Rights for 2018-2022		Council Decision (EU) 2017/2269 of 7 December 2017 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018–2022. OJ L 326, 9.12.2017.	
Protection of the Union's Financial Interests (PIF Directive)		Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. OJ L 198, 28.7.2017	
Protection of Individuals with regard to the Processing of Personal Data by the Union Institutions, Bodies, Offices and Agencies and on the Free Movement of such Data		Regulation (EU) 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data. OJ L 295, 21.11.2018.	
Enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament		Commission Recommendation of 14.2.2018 on enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament. C(2018) 900 final.	
Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States	Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. 2.5.2018 COM(2018) 324.		✓

Has the Juncker Commission delivered a "new start" for EU Justice and Home Affairs (JHA) policies? This book examines the question in relation to the performance of the European Commission's intra-institutional setting while taking stock of the most relevant legislative developments and acts in the EU Area of Freedom, Security and Justice (AFSJ) from 2014 up to the end of 2018. These developments are critically assessed in view of the rule of law and fundamental rights standards enshrined in the Treaties and the EU's Better Regulation commitments. The book argues that this has been the *Commission of crisis* and that the 'politics of crisis' have not benefited the Juncker Commission overall. They have allowed for greater intergovernmentalism, rule of law backsliding, informalisation and exceptionalism in EU AFSJ policies. The book puts forward a set of policy priorities for the next Commission term from mid-2019. It recommends unequivocally placing *EU founding principles first* – rule of law, fundamental rights and democracy – as these reinforce each other and work together in safeguarding the constitutional core of the EU and its member states. They are also key ingredients for ensuring the legitimation and credibility of European integration and maintaining social trust.