



New kids on the CFSP block: The JHA agencies

by Florian Trauner

Given the mounting security challenges facing the Union, EU governments have announced their intention to upgrade Europe's justice and home affairs (JHA) agencies, notably the European Police Office, Europol as well as the EU's border management agency, Frontex. Already in December 2015, the member states and the European Parliament expanded Europol's competences so as to allow it to crack down on the flow of terrorist money and arms and fight the recruitment of terrorists on social media and the internet. In January 2016, Europol opened a specialised European Counter Terrorism Centre to provide national law enforcement authorities with a central hub for information exchange.

The Commission has also unveiled proposals to establish a new EU border and coastguard force, which may intervene even without the host member state's consent. Moreover, under these new rules, Frontex would no longer just support member states in their expulsion operations: it would now have also the right to initiate flights to expel irregular migrants and failed asylum seekers. With these new powers, it could even organise flights from countries outside the EU – e.g. from the Western Balkans (back) to Turkey.

This new drive for effectiveness inevitably raises questions about the agencies' role in EU foreign

policy. For some years now, Frontex and Europol have helped integrate internal security matters into EU foreign policy. Europol signed its first external cooperation agreements governing the posting of liaison officers and the exchange of expertise or data in the early 2000s with a range of countries including Canada, Switzerland and Turkey. It cooperated closely with the US after the 9/11 terrorist attacks on developing stronger US-EU intelligence exchange. Frontex's external cooperation activities cover information exchange, risk analysis, training, capacity building, pilot projects and joint operations. And they focus on the border control agencies of third countries in the European neighbourhood.

With their enlarged competences and the altered security context in Europe, these agencies are likely to further upgrade their standing in the EU's foreign policy landscape.

Evolving EU foreign policy actors

Europol and Frontex are probably the best-known agencies in this field of EU affairs. Other agencies include the EU's judicial cooperation unit Eurojust, the European Asylum Support Office, the Fundamental Rights Agency and the European Police College. Their degree of involvement in external action differs. While some agencies such as

the Fundamental Rights Agency have a predominantly inner-European focus, others do cooperate with select non-EU partners. Founded in 2011, for instance, the European agency for the operational management of large-scale IT systems in the Area of Freedom, Security and Justice – EU-LISA – limits its external cooperation to states like Norway or Switzerland which are associated with the Schengen passport-free and Dublin asylum regimes. The European Asylum Support Office (EASO) has assisted in improving asylum and reception capacities in countries such as Jordan, Morocco and Tunisia. However, EASO has focused on EU-internal issues such as helping member states whose asylum and reception regimes are under particular pressure. Its foreign policy activities have been fairly limited for the time being.

Yet the agencies most active in EU foreign policy are indeed Europol and Frontex, and the pair's engagement in external affairs reflects the nature of transnational crime and migration. Organised crime networks tend to exploit the opportunities of new technologies and enhanced mobility channels, both inside and outside Europe. At different times and with varying intensity, therefore, Europol and Frontex (as well as Eurojust) have signed a range of external cooperation and working agreements with third countries and international organisations. Most of Europol's 18 operational and strategic cooperation agreements were concluded in the early 2000s, at a time before Frontex was even established. For Europol to conclude an operational cooperation agreement, the relevant third countries have to comply with certain data protection regulations (though Europol may assist them during that process).

Meanwhile, Frontex's working arrangements are more recent and the agency is still in negotiations with a number of countries including Egypt and Morocco. These cooperation frameworks govern the exchange of information and liaison of officers, for instance, or the involvement of non-EU-actors in EU-led border control and police operations.

These agencies have also sought to improve the functioning of police and rule of law missions launched under the EU's Common Security and Defence Policy (CSDP). A frontrunner in this respect has been Europol's support for the EU's Rule of Law Mission (EULEX) in Kosovo. To use their executive

powers more effectively, EULEX staff have been able to rely on criminal information stored in Europol's database.

The test case for Frontex's involvement in CSDP missions has been the EU Border Assistance Mission (EUBAM) in Libya launched in May 2013. The agency has become involved in issues such as the recruitment of deployed staff and in the training of Libyan border officials. The cooperation between the agencies and CSDP missions has thus become more structured over time, regulated with roadmaps, and the exchange of letters and frameworks of cooperation.

Opportunities for cooperation

The argument for updating the role of EU justice and home affairs agencies in foreign-policymaking is straightforward: it will enhance the efficiency of the overall EU approach. The EU has long urged for a more integrated and comprehensive approach towards European security, in which EU foreign and security policy is informed by the knowledge and capabilities of other European actors.

EU members hit by the refugee and migration crisis want to see the signing of more expulsion agreements and the speedier return of irregular migrants. Several member states have toughened their own rules for asylum seekers from countries not affected by civil wars. In February 2016, Germany announced it was putting Algeria, Morocco and Tunisia on its list of 'safe countries', going beyond the list presented by the

European Commission in September 2015 which declared the Balkan countries and Turkey as safe. Asylum seekers from these countries will undergo accelerated processing with little prospect of a positive outcome – but the system is, of course, only workable if they are sub-

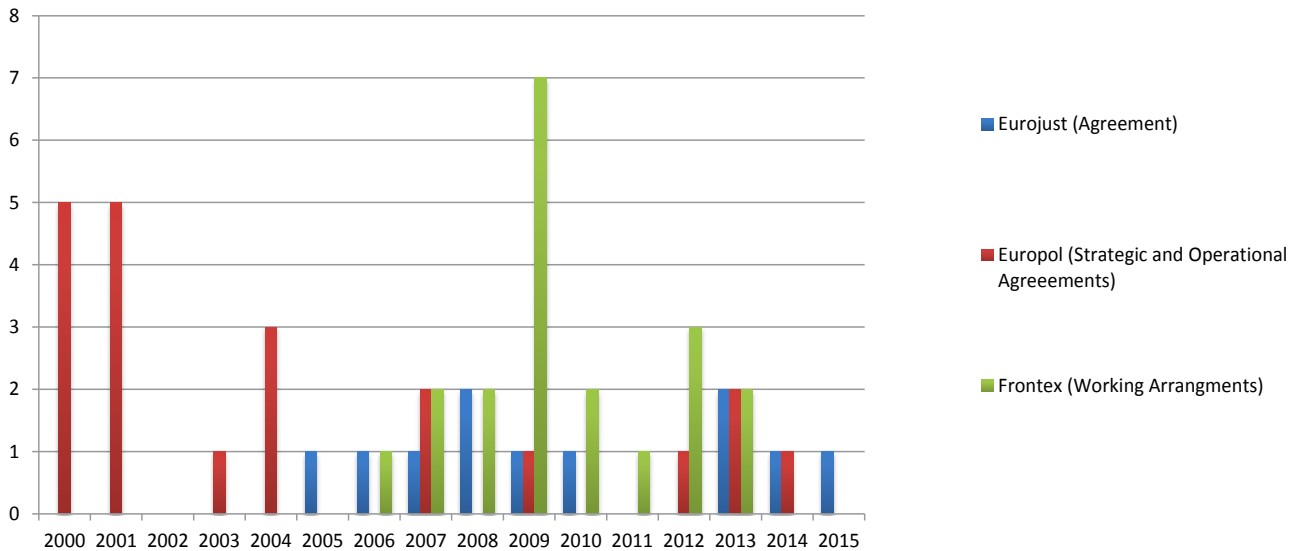
sequently removed from EU territory.

Accordingly, higher expulsion rates are meant to discourage migrants from entering the EU irregularly in the first place. More than €800 million from the Asylum Migration and Integration Fund has been earmarked for use by member states until 2020 for their return operations. In the Council's view, moreover, national authorities should not only draw more heavily on EU finances but also involve more systematically the EU's border agency, including for the acquisition of travel documents, training of staff

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External cooperation agreements of JHA agencies with third countries and international organisations



and the organisation of joint return operations. With the current changes, Frontex may now organise these operations on its own initiative and establish a specialised Return Office within its organisational structure.

There have also been new developments regarding EU inter-institutional cooperation, with Europol no longer collaborating only with civilian CSDP missions. The EU's military operation in the southern central Mediterranean (EUNAVFOR MED) is the first such operation with an explicit reference to Europol in its mandate. On 22 December 2015, Europol and the CSDP mission signed a Memorandum of Understanding on the basis of which Europol assists in the identification and pursuit of criminal groups involved in people smuggling. Europol also intends to feed into the work of EUNAVFOR MED the information gained from its fledgling European Migrant Smuggling Centre (EMSC), which combines Europol's intelligence resources and those of member states.

Europol's involvement in this military operation is something of a test case. Earlier military CSDP missions refrained from cooperating with Europol. A case in point was the EU military mission tackling piracy and armed robbery at sea off the Horn of Africa (EU NAVFOR Somalia). It provided Interpol, the international police office, with information on Somali-based piracy – but not Europol. The current setup is therefore a step towards more inter-institutional cooperation that the CSDP mission in the Mediterranean interacts directly and more systematically with Europol.

It is also worth noting that, in December 2015, Europol and Frontex signed a new cooperation

agreement under which Frontex will be able to send personal data of suspected criminals to Europol. Europol also opened a European Migrant Smuggling Centre in February 2016, which will become a central hub for the exchange of data on migrant smuggling. In doing so, Europol cooperates with Interpol, the world's largest police organisation, to link the information gathered in a European context with available international data.

Challenges and constraints

This said, the EU still faces legal and civil rights constraints in terms of how far it may upgrade the role of justice and home affairs agencies in EU foreign policy. Data held by Europol may reveal information about a person's presumed criminal activities and court convictions. For this reason, Europol's agreements with third countries are carefully graded, and impose data-protection safeguards of different levels of stringency. The format known as 'strategic cooperation agreements' does not provide access to Europol's databases and is signed with countries that have less stringent data protection standards.

By contrast, 'operational agreements' include also the exchange of personal data and allow for the establishment of joint investigative teams. They require a third country to comply with a range of accompanying data protection safeguards.

The main challenge for Europol is to reconcile the pressing security concerns of member states with the EU's stringent data protection requirements. Since the 2015 terrorist attacks in France, Europol has faced higher expectations (and also pressure) to intensify its cooperation with Turkey and North African states. Yet its strict data protection regime

allows for little flexibility. At present, Europol has a mandate to negotiate only with Turkey, Morocco and Israel out of the wider MENA region. With Morocco, the negotiations on a Europol cooperation agreement have been ongoing for years but have not yet borne fruit due to data protection issues.

This is also the reason why the strategic agreement with Turkey signed in 2000, has not been upgraded to an operational one, although this may change in the near future. The Turkish government has recently submitted draft legislation on personal data protection to the parliament in Ankara. According to the European Commission, the draft law is not yet compatible with EU standards with respect to such issues as the independence of the data protection authority. Still, there seems to be momentum for improving Turkey's relation with Europol.

For CSDP missions, another tricky question is how to exchange relevant data with Europol. The transmission of data to and from Europol – as well as its use – must adhere to the agency's data protection principles and information security safeguards. For instance, Europol is obliged to keep a record of who has transmitted a particular piece of information. Put differently, all data sent to Europol has to have an identifiable source. The question for a military CSDP mission therefore is: who is liaising with Europol and who takes the responsibility for transmitting information? Is it the mission as a whole or individual member states? In Europol's cooperation with EULEX Kosovo, for example, Sweden volunteered to undertake the task.

In its external activities Europol, operates under tight judicial and parliamentary control. Since the entry into force of the Lisbon Treaty, Europol's external cooperation agreements are scrutinised by the European Court of Justice. The Council now also cooperates with the European Parliament in steering Europol. Indeed, the European Parliament has often looked critically at whether partner countries are able or willing to ensure the protection of the data sent by Europol. It has challenged different EU-US arrangements on the exchange of personal data, including the most recent one dealing with banking data transfer (the so-called SWIFT agreement). The Parliament initially rejected it in February 2010, and its later acceptance was conditioned on the inclusion of some data-related safeguards.

The question of how to deal with civil liberties and human rights in security-driven external activities is of relevance for other justice and home affairs agencies as well. By taking a lead in migrants' return operations, Frontex is upgrading its role in a highly sensitive human rights field. According to a 2015

report by the EU Ombudsman, Emily O'Reilly, Frontex staff can still improve the handling of fundamental rights issues in the context of their return operations, in particular those by air. Frontex was advised to establish a complaints mechanism and implement a range of other safeguards: including more independent observers during its return operations and ensuring the separation of pregnant women and children from other returnees, for instance.

In addition to these human rights issues, the question is also whether the upgrading of Frontex will be a game changer for the efficiency of the EU's return policy. More EU resources for the EU border agency do not automatically mean that a third country will display more willingness to cooperate on the return of its citizens or transit migrants. In the Council's own words, the EU is now searching for 'a fine balance of incentives and pressures [...] to enhance the cooperation of third-countries on readmission and return.' This approach builds upon tailor-made packages for third countries in combination with a more transactional relationship between, say, development aid and return cooperation. It is, however, still too early to assess whether this will lead to the desired results.

The EU has long sought to conclude readmission agreements with North African states. The Council's mandate to negotiate a readmission agreement dates back to 2000 in the case of Morocco and 2002 for Algeria. There has been little progress since, apart from the signing of Mobility Partnerships with Morocco (2013) and Tunisia (2014), which include a political commitment to future cooperation on readmission. Algeria has not even entered negotiations. The reasons why these states have refrained from accepting EU readmission agreements include high levels of domestic sensitivity to the return issue as well as – thus far – insufficient EU incentives.

The EU has embarked on a strategy of upgrading its JHA agencies in order to enhance the efficiency and effectiveness of its foreign and internal security policies. Yet there is currently the risk of a quintessential 'capabilities-expectations gap' vis-à-vis these agencies. While they can help, they will not be a panacea for solving the manifold security- and migration-related challenges the EU is currently struggling with.

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