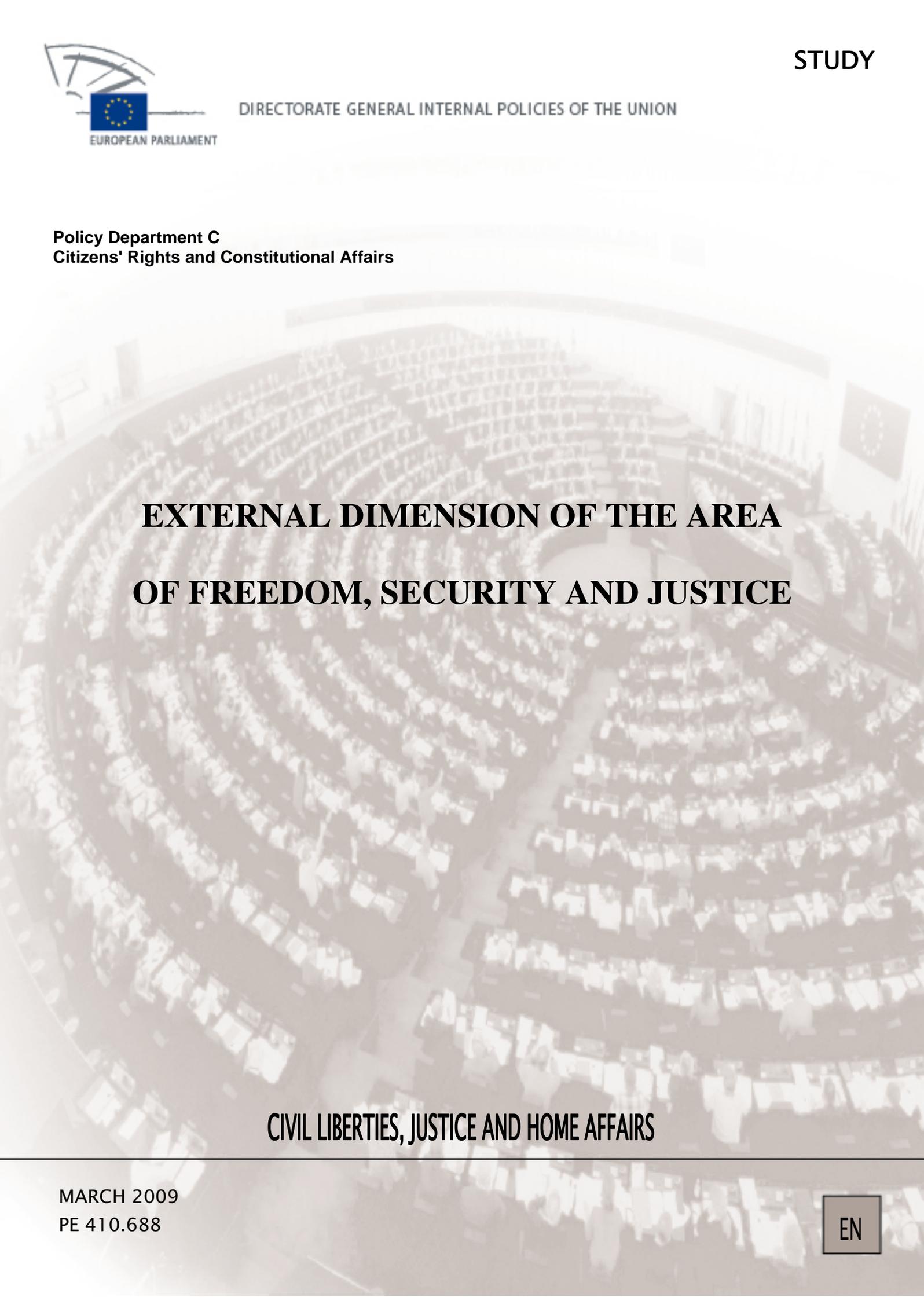


Policy Department C
Citizens' Rights and Constitutional Affairs



**EXTERNAL DIMENSION OF THE AREA
OF FREEDOM, SECURITY AND JUSTICE**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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**Directorate General Internal Policies
Policy Department C
Citizens' Rights and Constitutional Affairs**

EXTERNAL DIMENSION OF THE AREA OF FREEDOM, SECURITY AND JUSTICE STUDY

Abstract:

The "external dimension" of the area of freedom, security and justice (AFSJ) was formalised in the Hague Programme on "strengthening freedom, security and justice in the European Union", approved by the European Council in its meeting of 4 November 2004. In 2005, the European Commission and Council published, at a few weeks' interval, a Communication on "a strategy to the external dimension of the AFSJ" and a "strategy for the external dimension of JHA" in an effort to develop further the guidelines established by the European Council.

The present study provides an overview of the various activities undertaken under the umbrella of this so-called "external dimension" (Section 1). It does so by scrutinising the coherence between the stated objectives of the EU in this domain, and the actual developments that have taken place since the approval of the Hague Programme, paying specific attention in the process to the issue of fundamental rights and freedoms. In the light of this assessment, the study also envisages the future prospects of the "external dimension" (Section 2), which will feature in particular in the next EU multi-annual programme on the AFSJ to be adopted in 2009 (the "Stockholm Programme" in its current denomination). We will, in this perspective, take into consideration what the Lisbon Treaty, should it enter into force, has in stock as regards the legal basis and Parliament competences in the context of the "external dimension", and develop a set of recommendations for the LIBE Committee insofar as this domain is concerned.

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Authors: **Susie Alegre, Didier Bigo, Julien Jeandesboz**

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Copies can be obtained through:

Mr Alessandro DAVOLI
Administrator Policy Department C
Tel: 32 2 2832207
Fax: 32 2 2832365
E-mail: alessandro.davoli@europarl.europa.eu

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The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

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External Dimension of the Area of Freedom, Security and Justice

Susie Alegre, Didier Bigo and Julien Jeandesboz

Executive Summary

The ‘external dimension’ of the area of freedom, security and justice (hereafter ExtDAFSJ) was formalised in the Hague programme on ‘strengthening freedom, security and justice in the European Union’, approved by the European Council in its meeting of 4 November 2004. In 2005, the European Commission and Council published, at a few weeks’ interval, a communication on ‘a strategy to the external dimension of the area of freedom, security and justice’¹ and a ‘strategy for the external dimension of JHA’ in an effort to develop further the guidelines established by the European Council.

Our main argument can be summed up as follows. Firstly, while being identified as a ‘domain’ of EU policy, the ExtDAFSJ features very little coherence. Activities undertaken over the past four years remain piecemeal and emergency-driven, favouring the multiplication of short-term, politically driven actions over the construction of a long-term project. As far as geographical consistence is concerned, secondly, while the external dimension is sometimes deemed ‘global’ by the Commission and the Council, it has mostly focused on the countries participating in the European Neighbourhood Policy (ENP), Russia and the Western Balkans. With these countries, the EU has manifested a tendency to impose its own agenda, while disregarding the interests of its partners beyond governmental circles. As regards cooperation with the United States, which has constituted an area of rapid developments and intense criticism over the past few years, the trend is exactly opposite: too often, the EU has given way to the interests of the US government, security agencies and services, failing in the process to protect its citizens and concerned third-country nationals against some of the most problematic undertakings of the US administration. Overall, finally, **the activities undertaken in the external dimension of the AFSJ have largely favoured security and specific aspects of judicial questions, over freedom.** This trend, although highlighted repeatedly by scholars and analysts of the AFSJ at large does not seem to figure in the current reflection on the successor to the Hague programme.

The note underlines a series of institutional and decision-making issues tied to the implementation of the ExtDAFSJ. It highlights, however, that beyond these questions of coherence, **the fundamental issue is that of the boundaries of law with respect to the externalisation of control, and of the possibilities to control the arbitrary spaces created by this process of externalisation.**

Among the **recommendations** that the note develops, we particularly want to draw attention to the following.

1. As regards the institutional issues tied to the ExtDAFSJ and the general relations between the EU and its partners in this domain:

- The European Parliament should issue **an opinion calling upon the EU’s Fundamental rights agency to establish a programme for 2010 dealing with the human rights/fundamental freedoms aspects of Community cooperation with third countries.**
- If this body cannot undertake such a task, it is important that the European Parliament suggests and backs up the creation of a research group, taking the form of

¹ European Commission (2005), *A strategy on the external dimension of the area of freedom, security and justice*, COM(2005) 491 final, 12 October.

a network of independent experts, on the theme of *Mobility, Security, Ethics, Liberty* (MOSEL). The network would **run an inventory of freedom and ethical issues touching upon transnational mobility in a context of security controls and propose a set of effective remedies** when persons on the move (foreign citizens moving to Europe, or European citizens travelling abroad), are detained at the border, or prevented from starting their journey (through visa refusals or blockages by local police or air companies). This network should follow up on all the activities undertaken under the ExtDAFSJ.

2. As regards JHA cooperation between the EU and the US

- The implications of the closing down of Guantanamo, particularly in light of the EU-US agreement on mutual legal assistance and extradition, need to be assessed. The European Parliament has already debated this issue in a recent plenary debate. **The European Parliament could commission a study or a report to anticipate on this occurrence**, reflecting in particular on the EU's responsibility to protect both its citizens as well as persons who might wish to apply for asylum in one of the Union's member states.
- The abovementioned MOSEL group of independent experts could investigate the fate of European citizens when they are included in various watch lists, following on transnational exchanges of personal data, and when they fall victims to manifest and/or frequent mistakes. MOSEL would be tasked with presenting an **annual report** comprising a survey of third state practices in this field, and their reciprocation by EU authorities, as well as foreseeable improvements, both within the Union itself and in diplomatic relations with third states, in conformity with the principles and values upheld by the EU.

3. As regards the future of the ExtDAFSJ and the Stockholm programme

- The European Parliament, acting under its right of initiative, should **commission a report on the work of the Future Group, to be discussed in plenary session before the end of the current term**. This report should in particular discuss the technological bias which is inherent to the suggestions issued by the Future Group. **Technology alone cannot create 'smart borders', if technology is only used as a means to expand surveillance to the detriment of the upholding and promotion of fundamental freedoms and rights.**
- The European Parliament should organise, starting after the June 2009 elections and resuming after the summer break, a **series of public hearings on the AFSJ, including on the ExtDAFSJ, bringing together experts and practitioners from the various EU agencies and bodies as well as officials from national administrations**. The work of the House of Lords committee on European affairs could provide a useful blueprint in this respect. The outcome of these hearings could serve to consolidate the EP's position in the discussions on the 'Stockholm programme'.

List of Acronyms

AFSJ	Area of freedom, security and justice
CFSP	Common Foreign and Security Policy
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ENP	European Neighbourhood Policy
ESDP	European Security and Defence Policy
EUDPS	European Data Protection Supervisor
ExtDAFSJ	External Dimension of the Area of Freedom, Security and Justice
FRA	EU Fundamental Rights Agency
FRONTEX	EU external borders agency
JHA	Justice and home affairs
PNR	Passenger Name Record
TEC	Treaty of the European Communities
TEU	Treaty on European Union

Introduction²

The ‘external dimension’ of the area of freedom, security and justice (hereafter ExtDAFSJ) was formalised in the Hague programme on ‘strengthening freedom, security and justice in the European Union’³, approved by the European Council in its meeting of 4 November 2004. In 2005, the European Commission and Council published, at a few weeks’ interval, a communication on ‘a strategy to the external dimension of the area of freedom, security and justice’⁴ and a ‘strategy for the external dimension of JHA’⁵ in an effort to develop further the guidelines established by the European Council.

The present briefing note provides an overview of the various activities undertaken under the ExtDAFSJ (Section 1). In the light of this assessment, the note also envisages its future prospects (Section 2), which will feature in particular in the next EU multi-annual programme on the AFSJ to be adopted in 2009 (the ‘Stockholm programme’ in its current denomination). We will, in this perspective, take into consideration what the Lisbon treaty has in stock as regards the legal basis and Parliament competences in the context of the ExtDAFSJ, and develop a set of recommendations for the LIBE committee insofar as this domain is concerned.

Our main argument can be summed up as follows. Firstly, while being identified as a ‘domain’ of EU policy, the ExtDAFSJ features very little coherence. Activities undertaken over the past four years remain piecemeal and emergency-driven, favouring the multiplication of short-term, politically driven actions over the construction of a long-term project. As far as geographical consistence is concerned, secondly, while the external dimension is sometimes deemed ‘global’ by the Commission and the Council, it has mostly focused on the countries participating in the European Neighbourhood Policy (ENP), Russia and the Western Balkans. With these countries, the EU has manifested a tendency to impose its own agenda, while disregarding the interests of its partners beyond governmental circles. As regards cooperation with the United States, which has constituted an area of rapid developments and intense criticism over the past few years, the trend is exactly opposite: too often, the EU has given way to the interests of the US government, security agencies and services, failing in the process to protect its citizens and concerned third-country nationals against some of the most problematic undertakings of the US administration. Overall, finally, the activities undertaken in the external dimension of the AFSJ have largely favoured security and specific aspects of judicial questions, over freedom. This trend, although highlighted repeatedly by scholars and analysts of the AFSJ at large does not seem to figure in the current reflection on the successor to the Hague programme.

1. The external dimension of the AFSJ: Overview

1.1. Overall strategy and policy orientations

The main policy orientations concerning the external dimension of the AFSJ are contained in the Hague programme, and are further specified in the strategy documents of the Commission and of the Council, published at the end of 2005.

² The authors wish to thank Estelle Durand, from the Centre d’études sur les Conflits, for her editing of this note.

³ Council of the European Union (2004), *The Hague Programme: strengthening freedom, security and justice in the European Union*, 16054/04, 13 December. Earlier mentions featured in the ‘European security strategy’ document approved by the European Council in December 2003, but these concerned the EU’s security policies at large, and not specifically the external dimension of the AFSJ.

⁴ European Commission (2005), *A strategy on the external dimension of the area of freedom, security and justice*, COM(2005) 491 final, 12 October.

⁵ Council of the European Union (2005), *A strategy for the external dimension of JHA: Global freedom, security and justice*, 14366/3/05, 30 November.

1.1.1. Background

Initial reference to the ExtDAFSJ can be found in the Presidency conclusions of the Feira European Council of 19-20 June 2000. The European Council concluded on a report submitted to it by the Council Secretariat, on a mandate initially delivered by the Tampere European Council of December 1999. The Feira Presidency conclusions refer in this respect to the ‘European Union’s external priorities in the field of justice and home affairs’ to be ‘incorporated in the Union’s overall external strategy as a contribution to the establishment of the area of freedom, security and justice’. **From the onset, then, the ExtDAFSJ was not intended as an autonomous policy domain, but as a ‘dimension’ of the EU’s AFSJ policies in the first and third pillar, and as a specific aspect of its external policies of the first and second pillar.**

The next step is to be found in the Hague programme, adopted in December 2004, where the European Council outlined a series of policy domains requiring external action to be taken. These encompass the ‘external dimension of asylum and migration’⁶, and comprise the establishment of partnerships with third countries, including countries of origin and of transit, as well as the conclusion of visa facilitation and readmission agreements. The external dimension is also explicitly singled out as regards the possibility to provide technical assistance to third countries in the field of counter-terrorism. More generally, finally, the last pages of the Hague programme highlight that ‘[t]he European Council considers the development of a coherent external dimension of the Union policy of freedom, security and justice as a growing priority’, further stressing that ‘[a]ll powers available to the Union, including external relations, should be used in an integrated and consistent way to establish the area of freedom, security and justice’⁷, and calling upon the Commission and Council Secretariat for the further development of these indications. Following on the Hague Programme and the adoption by the Commission and the Council of the action plan supposed to implement it, Brussels European Council highlighted the need for a strategy document adopted by the Council⁸. In October 2005, the European Commission tabled a communication to this effect, and a strategy document was adopted by the Council in November 2005.

These two documents provide additional details as to some of the objectives, principles, priorities and instruments available to the ExtDAFSJ. They do not, however, specify any further the status and overall orientation of this ‘dimension’, leaving open the question of whether the ExtDAFSJ is an outgrowth of the EU’s policies for setting up the AFSJ itself, or an additional dimension of the EU’s first and second pillar international policies. This lack of guidance has resulted in **a proliferation of initiatives, drawing indiscriminately from all the existing policy frameworks and funding schemes of the EC and EU, thus raising significant questions about coherence, consistency, accountability and transparency in this field.**

1.1.2. Legal bases and repartition of competences

A large part of the abovementioned problems stems from the fact that **there is no formal legal basis and competence for the AFSJ**, and hence no overall ‘external AFSJ objective’⁹.

⁶ Council of the European Union (2004), p.11

⁷ Ibid, p.33.

⁸ Council of the European Union (2005a), *Brussels European Council 16 and 17 June 2005: Presidency Conclusions*, 10255/1/05, 15 July, p.3.

⁹ M. Cremona (2008), ‘EU External Action in the JHA Domain: A Legal Perspective’, *EUI Working Papers*, LAW 2008/24.

The most explicit legal basis regarding the ExtDAFSJ can be found in Title VI (third pillar) TEU Art.38 (with Art.24), which grants the Union treaty-making competence in this area. This legal basis has been used for instance in the conclusion of the EU-US agreement on extradition and mutual legal assistance in criminal matters (see below 1.2.3). Title IV EC, which covers the first pillar dimension of the AFSJ, does not specify anything as regards the ExtDAFSJ: **Community competence in this area has therefore been ‘implied’ from Treaty objectives¹⁰, or founded in other legal bases** from both the EC (for external policies such as development or trade) and EU (for the EU’s CFSP and ESDP) Treaties. Outside of the third pillar, then, and including for treaty-making purposes, the ExtDAFSJ is ‘carried’ by other policy frameworks.

The direct consequence of this lack of explicit legal basis is **the fragmentation of decision-making in the ExtDAFSJ between pillars, institutions and agencies of the EU**. This fragmentation of decision-making **results in a loss of visibility**, which in turn **creates difficulties for evaluation and benchmarking, as well as for accountability and effective coordination of EU activities**.

1.1.3. Objectives

The objectives set out for the ExtDAFSJ in the Commission communication of October 2005 and Council strategy of December 2005 are twofold: firstly, the furtherance of the aims of the internal AFSJ policies, and secondly, the prorogation of the goals of the EU’s other external policies. While this is a particularly vague indication, the Commission and Council documents highlight a set of challenges which the ExtDAFSJ should tackle. For the European Commission, these include terrorism, organised crime, illegal immigration, institutional (state) failure and the limited spread of international legal standards. The Council strategy, on the other hand, largely focuses on the issues of immigration, organised crime and terrorism, *i.e.* on the security aspects of the AFSJ. Human rights, governance and institutional support issues are nonetheless mentioned in the document, but almost as an afterthought.

1.1.4. Principles

The Commission communication on a strategy for the ExtDAFSJ lists a series of guiding principles¹¹, out of which the following are the most important:

- Geographic prioritisation: full-spectrum cooperation in JHA matters should be concentrated on candidate and neighbour countries, while in other third countries, targeted cooperation in specific policy domains should be the rule.
- Differentiation: EU policies in the external dimension of the AFSJ should not be general, but custom-tailored for each third country/region.
- Partnership: activities in the ExtDAFSJ should reflect both the priorities of the EU and of third countries (ownership).

The strategy document adopted by the Council contains similar principles, but puts emphasis on two additional elements:

- Conditionality: the Council strategy notes in this respect that:

¹⁰ Ibid, p.5-6. For instance, the objective of establishing the AFSJ in Art.63(3)(b) TEC.

¹¹ European Commission (2005), p.7. See also S. Alegre (2008), *The EU’s External Cooperation in Criminal Justice and Counter-Terrorism: An Assessment of the Human Rights Implications with a particular focus on Cooperation with Canada*, Brussels: CEPS, *CEPS Special Report*, 11 September, p.4.

The EU should use its significant relationship as an incentive for them [partners] to adopt and implement relevant international standards and obligations on JHA issues. Countries should be aware that the nature of their relationship with the EU will be positively affected by their level of co-operation, given the central importance of these issues for the EU and its Member States¹²

- Complementarity: Member States ‘should mobilise their significant political, financial and operational resources when appropriate alongside the Community and Union to work towards common objectives’¹³.

1.1.5. Priorities

The Commission and Council strategy documents feature two sets of priorities: thematic priorities and geographical priorities. As regards **thematic priorities**, the Commission’s approach comprises five items: human rights, good governance and institution building, migration, asylum and border management, counter-terrorism and organised crime. It can be construed as a full spectrum approach dealing with all AFSJ domains. The logic of the Commission’s document, in this respect, is that the ExtDAFSJ should constitute an opportunity for the EU to project the underpinning values of the AFSJ in addition to targeted technical assistance and cooperation in specific matters. The Council’s approach is more narrowly centred on justice and home affairs *per se*. The listed priorities comprise ‘terrorism, organised crime, corruption and drugs, and [...] the challenge of managing migration flows’¹⁴. As already highlighted, concerns for human rights and good governance are not central, except in relation to capacity building of third country law enforcement agencies.

As regards **geographical priorities**, three broad groupings of third countries and regions are singled out. ‘close partners’ (candidate, Western Balkans and neighbouring countries) and ‘strategic partners’ (Russia and the United States), are to be engaged with on all FSJ policy domains. Beyond these two groupings, other countries are to be engaged with on the basis of issue-specific cooperation.

The geographical prioritisation distinguishes between ‘close’ and ‘strategic’ partners. From the position expressed in particular by the Council, it seems that ‘close’ partners, which stand in a relatively asymmetrical relationship with the EU, are to **be more strongly submitted to mechanisms of conditionality and to pressures of various kinds in order to have them adopt the EU’s priorities** in AFSJ matters, while **dialogue and accommodation are prioritised over strict conditionality for ‘strategic partners’**. This logic, however, seems to contradict the principle of partnership set forth in the Commission’s ExtDAFSJ strategy, and particularly the underpinning notion of ownership.

1.1.6. Instruments

The most exhaustive list of instruments available for ExtDAFSJ activities is comprised in the 2005 Commission communication. All the external relations instruments available to the EU are available to the ExtDAFSJ, including bilateral and multilateral settings, external aid and development programmes, *ad hoc* operational arrangements and so forth. The wealth of instruments available to the ExtDAFSJ is somewhat ambiguous. On the one hand, one cannot object to the mobilisation of existing resources and mechanisms to support the EU’s external activities. On the other, in the absence of a clearly defined overall strategy, and of a strong

¹²Council of the European Union (2005a), p.5.

¹³ *Idem*.

¹⁴ *Ibid*, p.2.

evaluation and accountability structure, **the proliferation of initiatives under different legal and policy frameworks seems to encourage the proliferation of activities to the detriment of coherence and consistence.**

1.2. Survey of activities undertaken in the external dimension of the AFSJ

1.2.1. General overview and assessment

The European Commission so far has issued two progress reports, respectively in November 2006 (reporting period 2005-2006) and May 2008 (reporting period 2007-2008), both conducted under the responsibility of DG JLS¹⁵. While the reports provide a relatively thorough account of the various JHA-related activities undertaken in the EU's external relations during the two reporting periods, it might be argued that they do not satisfy to the usual criteria of evaluation, in two respects:

- Firstly, they do not provide a clear enough impact assessment, as regards both the EU and concerned third countries. Questions related to human rights and fundamental freedoms, in particular, are largely neglected.
- Secondly, they lack a proper assessment of the budgetary impact of the external dimension of the AFSJ.

The Commission's reports firstly highlight that ExtDAFSJ activities over the period 2005-2008 have largely focussed on security matters. The first report suggests that the ExtDAFSJ's main priority is the establishment of 'security partnerships' with relevant third countries or regions, rather than a discussion of the full spectrum of issues comprised under the AFSJ label. The only entries regarding fundamental rights protection concern the establishment of the Fundamental Rights agency (FRA), which in fact mainly focuses on internal issues, and the adoption by the Commission on a communication on children's rights. The second report is similarly succinct, highlighting that 'the Commission continued to promote fundamental rights in the political dialogue with third countries and to use its policy instruments and cooperation programmes to address human rights worldwide'¹⁶ without getting into specifics. The themes of the three Action Oriented Papers (AoP) adopted by the Council during the 2005-2008 period are a giveaway in this respect. Two AoP were adopted in May 2006, the first one dealing with 'Improving Cooperation on Organised Crime, Corruption, Illegal Migration and Counter-terrorism, between the EU, Western Balkans and relevant ENP countries', the other concentrating on 'EU support for combating drug production in and trafficking from Afghanistan'¹⁷. The third one, adopted in May 2006, deals with the Common space of freedom, security and justice with Russia¹⁸.

¹⁵ European Commission (2006), *Progress report on the implementation of the strategy for the External Dimension of JHA: Global Freedom, Security and Justice*, SEC(2006) 1498, 16 November; European Commission (2008), *Second progress report on the implementation of the "Strategy for the External Dimension of JHA: Global Freedom, Security and Justice"*, SEC(2008) 1971, 27 May.

¹⁶ European Commission (2008), p.7.

¹⁷ Council of the European Union (2006a), *Action Oriented Paper on Improving Cooperation on Organised Crime, Corruption, Illegal Migration and Counter-terrorism, between the EU, Western Balkans and relevant ENP countries*, 9272/06, 12 May; Council of the European Union (2006b), *Action Oriented Paper Increasing EU support for combating drug production in and trafficking from Afghanistan, including transit routes*, 9370/1/06, 22 May.

¹⁸ Council of the European Union (2006c), *Action Oriented Paper on Implementing with Russia the Common space of freedom, security and justice*, 15534/1/06, 28 November.

The Commission's reports further demonstrate that ExtDAFSJ activities remain emergency-driven, and dependant upon the fluctuating foreign policy penchants (individual or collective) of Member States, rather than on a consolidated, long-term strategic perspective.

They highlight, finally, that the ExtDAFSJ suffers from a severe case of double standards in its relations to third countries. Some are confronted with tough conditionality and draconian negotiating positions, while others are not. In the case of visa facilitation, for instance, which concerns first and foremost countries whose nationals are at a disadvantage when travelling to the EU, the first report from the Commission recalls that 'readmission is a priority for the EU' and as such, 'that there should be **a link between visa facilitation and readmission agreements**'¹⁹. The report, however, adopts an all-together different language when dealing with EU-US cooperation: 'The strategic nature of our security partnership with the US is based on **a well-established dialogue, built on common values and trust**'²⁰.

1.2.2. EU activities with third countries in justice and home affairs

Despite claims that JHA have gone 'global' (as stated in the Council strategy of 2005), it is fair to say that the 'external dimension' of the AFSJ has been very much centred upon the so-called 'neighbours' of the EU, with the establishment of the European neighbourhood policy (ENP) constituting a turning point in this respect, as well as on candidate and Western Balkans countries. Cooperation with African or Asian countries, as well as with other partners in Latin and North America (e.g. Canada²¹) and the Pacific has remained more elusive and piecemeal.

A key issue in the context of the ENP as well as in relations with Western Balkans has been **the conclusion of readmission agreements**. While readmission of a state's own nationals is an obligation under international law, readmission agreements of the kind negotiated by the EU with several third countries establish provisions for expelling third country nationals who have been found entering or residing illegally on the territory of the EU Member States, not to their country of origin, but rather to countries through which they have been transiting. Exemplifying the kind of 'carrot and stick' approach adopted by the EU with third countries other than its 'Western' partners, readmission agreements with neighbouring and Western Balkans governments have been negotiated 'back to back' with visa facilitation accords, which are a long standing demand of the latter.

Another fast-growing domain of activity, in this regard, has been **border management**. FRONTEX has concluded several working arrangements with neighbouring countries, including Russia, Switzerland and Ukraine, and is in the course of negotiating such an arrangement with Croatia²². One of the main EU initiatives in Eastern Europe has been the deployment of the EU border assistance mission (EUBAM) in 2004 at the border between Moldova and Ukraine, which is now entering its fifth year of activity.

Furthermore, the intense politicisation of migrants' attempts at crossing the fences surrounding Ceuta and Melilla or reaching the coasts of the Canary Islands in the Atlantic and Lampedusa and Malta in the Mediterranean, have led to a number of initiatives. Some of them have been *ad hoc*, others have had a broader, agenda-setting, focus. While the countries of the Maghreb seem to remain the locus of ExtDAFSJ activities on the African continent, the Second EU-Africa summit gathered in Lisbon in December 2007 adopted a 'Joint EU-Africa Strategy', together with an Action Plan covering migration, but also terrorism, drugs trafficking and

¹⁹ European Commission (2006), p.5. Emphasis in original.

²⁰ *Ibid*, p.10.

²¹ On this issue see Alegre (2008).

²² The agency also has a mandate to negotiate with Cape Verde, Egypt, FYROM, Georgia, Mauritania, Moldova, Morocco, Libya, and the United States.

organised crime. While African countries have remained pretty much out of focus for EU ExtDAFSJ activities until then, the Africa-EU partnerships envisaged in the Lisbon Action Plan will have to be closely monitored assessed in years to come.

1.2.3. EU-US cooperation in justice and home affairs

EU-US cooperation in JHA was bolstered after the events of 11 September 2001. This cooperation, however, has been strained by a number of actions undertaken by the Bush administration: the question of extraordinary renditions, the ‘SWIFT case’, and general difficulties in the field of information exchanges (due to diverging legislations and understandings insofar as data protection is concerned, as well as to the extensive resort of US security agencies and services to technological means that are highly intrusive upon privacy, such as datamining)²³ have placed considerable pressure on EU institution and European governments. Whether these difficulties are likely to be attenuated with the advent of the Obama administration remains unclear at this stage (see below the ‘Conclusions and recommendations’ section for further comments).

EU-US cooperation on JHA matters has been ongoing since the mid-1990s, in the context of the ‘New Transatlantic Agenda’, signed together with an EU-US Action Plan at a meeting in Madrid in December 1995. The reaction of both EU and US governments after the events of 11 September 2001, however, led to an acceleration of cooperative ventures. Since 2001, five key EU-US agreements in JHA matters have been signed: a working agreement between Europol and the US on data exchanges, the agreements on mutual legal assistance and extradition, and the infamous PNR and SWIFT agreements. Out of these, the agreements on mutual legal assistance and extradition have yet to enter into force.

Questions of access to, and exchanges of, data, and of the applicable protections regarding human rights and fundamental freedoms lie at the heart of current transatlantic discussions. It is also in this context that problems arising from the trans-pillar layout of both the AFSJ and its external dimension are best illustrated – the PNR and SWIFT agreements being the most striking case²⁴. It seems important to recall that **legal clarity is crucial in such instances**, which touch upon some very fundamental human rights and freedoms issues – **all the more since the fostering of a transparent international legal order is part of the objectives of the ExtDAFSJ**.

The EU-US agreements on mutual legal assistance²⁵ and extradition²⁶ raise another set of problems. These agreements were part of the post September 11th wave of security driven measures taken by the EU. The initiation of negotiations on these two agreements on the basis of Articles 24 and 38 TEU was a novel step for the EU²⁷ as they were the first third pillar international agreements to be concluded and established a role for the EU in the field. The negotiations and the resulting agreements were heavily criticised for their lack of transparency and the minimal opportunity for parliamentary scrutiny, in particular from national parliaments²⁸.

²³ See: P.De Hert, R.Bellanova (2008), *Data Protection from a Transatlantic Perspective: The EU and US Move towards an International Data Protection Agreement?*, Study, DG IPOL, PE 408.320, September.

²⁴ Ibid, p.31-34, for an in-depth analysis.

²⁵ Official Journal of the European Union (2003), *Agreement on mutual legal assistance between the European Union and the United States of America*, L 181, 34-42.

²⁶ Official Journal of the European Union (2003), *Agreement on extradition between the European Union and the United States of America*, L 181, 27-33.

²⁷ For a full assessment of the agreements and the negotiations see: V. Mitsilegas (2007), ‘The External Dimension of EU Action in Criminal Matters’, *European Foreign Affairs Review*, 12: 457–497, p.471-477.

²⁸ Ibid p. 472, see also House of Lords EU Committee (2003), *EU-US Agreements on Extradition and Mutual Legal Assistance*, 38th Report, session 2002-2003, HL Paper 135

Despite the fact that the European Parliament does not have a formal role within the framework of Articles 24 and 38, the European Parliament did make a number of important interventions²⁹ on these agreements, pushing for greater transparency and insisting on key safeguards such as a bar on extradition where the defendant would be sentenced to death in the USA.

The final agreements were signed in June 2003 but have not yet entered into force, notably as they have not been ratified by the USA. The likely practical impact of the agreements on enhanced cooperation and on fundamental rights varies from Member State to Member State. On the one hand, the agreements establish minimum standards of protections below which Member States cannot go in their bilateral agreements with the United States. On the other hand, however, **the guarantees contained in the final texts were not as strong as could have been wished for.** For example, there is no express bar to extradition on human rights grounds³⁰ and the text relating to the death penalty does not prohibit extradition if the death penalty would be imposed, rather it allows extradition on the basis that the death penalty would not be carried out if it were imposed³¹. Given the lack of explicit specialty provisions, the risk of an extradite being subsequently moved to Guantanamo Bay to face trial before Military Commission was not addressed. Article 17(2) of the extradition agreement provides for ‘consultations’ between the parties ‘where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite’. This provision seems to cover decisions by the European Court of Justice or the European Court of Human Rights which are binding on Member States³². **The fact that such rulings along with fundamental constitutional protections should be open to diplomatic negotiation is a worrying development which undermines the principle of the rule of law.** These agreements set a worrying precedent for future agreements between the EU and third countries in this field. It may be, however, that as the agreements have not yet entered into force, almost six years after signature, that they do not demonstrate an effective model for future cooperation.

1.2.4. The ExtDAFSJ and the stakes of human rights and fundamental freedoms³³

While the EU formally recognises that there cannot be security in the absence of freedom and justice guaranteed by the rule of law, **it is far from clear how the EU is guaranteeing that the problems of human rights violations in the countries it cooperates with do not undermine the EU’s avowed commitment to human rights within its own borders.** The EU is obliged to engage with the respect for human rights and the rule of law in the third countries it cooperates with as the implications for human rights of counter-terrorism, migration and criminal justice policy are potentially very serious.

The types of human rights issue which are raised by cooperation with third countries in this field are wide ranging. Examples include **problems of data protection in the exchange of information** as well as the issue of the credibility of information received from third countries which may have been extracted through ill treatment. The continued use of the death penalty in some countries and **the risk of ill treatment in detention of persons who are deported, extradited or arrested on the basis of information coming from EU Member States** raise

²⁹ E.g. EP Recommendation B5-0540/2002 and EP Resolution B5-0813/2001

³⁰ There is a mention to the rights of the individuals in the Preamble of both agreements (recital 3) but the legal force of the preamble is unclear.

³¹ This is a step back from the original position in the negotiating mandate (Council Document 7991/02, p. 13) which provided for guarantees on the non-imposition of capital punishment sentences, reflecting the status quo in a number of Member States.

³² See Mitsilegas, p. 473

³³ For a full assessment of the human rights implications see Alegre, 2008

grave concerns. The safeguards for vulnerable migrants including children and asylum seekers and their treatment in partner countries also gives rise to serious concern.

In addition to the difficulties involved in cooperating with third countries, as the EU expands its competences and presence on the ground through rule of law missions in third countries, the question of accountability for human rights violations by EU personnel and partners in third countries becomes pressing. The amorphous and constantly expanding nature of external cooperation on FSJ issues and the plethora of instruments that can be used makes it difficult to establish a definitive list of the possible implications for human rights and fundamental freedoms.

One of the most stringent illustrations of the human rights and fundamental freedoms stakes involved in the ExtDAFSJ arises from the recent activities of the EU's external border agency. Since its inception, Frontex has coordinated a growing number of joint operations, all of which set up for the purpose of migration control. Some of these operations, especially HERA II, HERA III and HERA 2008, which were based in the Canary islands, have involved the 'diverting' of crafts heading for the high sea or Spanish waters. These interceptions have, for a good part, taken place in the territorial waters of Senegal and Mauritania³⁴. They aimed at bringing the persons on board these crafts back to the coast of these two countries, denying them in the process the possibility of lodging an asylum application. These interceptions have taken place on the basis of bilateral agreements (Memoranda of Understanding) between Spain on the one hand, and Mauritania and Senegal on the other, which, despite repeated requests to Frontex, have remained confidential³⁵. Several problems arise from this situation. Firstly, the interception and 'diversion' of crafts creates a breach as regards the principle of *non-refoulement* of asylum seekers, which is an international obligation of both the Member states and the EU³⁶: depending on the circumstances, persons who might have been eligible in the EU were sent back to Mauritania and/or Senegal without being offered the possibility of filing in an asylum claim. Reports also indicate that persons 'returned' to Mauritania and Senegal in this fashion have faced intolerable conditions of detention³⁷. This situation is further aggravated by the fact that these persons are unlikely to have access to any means of redress, and that the degree to which Frontex can be made accountable for past undertakings, and further potential excesses controlled by the Parliament are very limited³⁸ - particularly given the agency's tendency to escape transparency requests by claiming either a superior public interest as regards public security, or by redirecting claimants to the Member states. **The Schengen border code and its protection needs to apply any time and at any place the Frontex agency is involved directly or coordinates**

³⁴ S.Carrera (2007). *The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands*. Brussels, CEPS Working Documents, n°261, March; J. Jeandesboz (2008), *Reinforcing the Surveillance of EU Borders: the Future Development of FRONTEX and EUROSUR*, Brussels, CEPS Challenge Research Papers, 11; M.Mir (2007). *Managing the EU's External Frontiers: Lessons to be Learned from FRONTEX's Action in the Canary Island*. Brussels, Standard Briefing Note for the European Parliament, April.

³⁵ Such a request was in particular issued by the UK based Immigration Law Practitioners' Association (ILPA). The agency claimed in response that it did not have a copy of the agreements, and that ILPA should address its request to the Spanish government.

³⁶ Art.3 of the European Convention of Human Rights (ECHR) to which all Member States are bound, as well as the EU by means of Art.6(2) TEU, as well as Art.4 of the Charter of Fundamental Rights (CFR). The Community is also bound to the Geneva Convention by means of Art.63(1), while the right to seek refuge is expressly mentioned in Art.18 CFR.

³⁷ See for instance the recent report of Amnesty International on the situation of returned migrants in Mauritania: Amnesty International (2008), *Mauritania: 'Nobody wants to have anything to do with us'. Arrests and collective expulsions of migrants denied entry into Europe*, London: AI International Secretariat, AFR 38/001/2008.

³⁸ See in this respect the evidence submitted by ILPA to the House of Lords Committee on the European Union: <http://www.ilpa.org.uk/submissions/HL%20EU%20Subcttee%20Frontex.doc>.

activities. The policing activities cannot be executed by the navies of Member states with different rules of engagement under the coordination of Frontex acting beyond the legal protection established by the EU institutions. The frontier of policing and control and the frontier of protection and human rights cannot be disconnected. **If so, a zone of indistinction and arbitrariness, contrary to the EU values, is created.**

The activities of Frontex are but one example of the issues raised by the ExtDAFSJ with regard fundamental freedoms and rights. **Such issues stem from the fact that the ExtDAFSJ corresponds to an externalisation of practices and logics of control, while the possibilities for persons to defend their fundamental rights and freedoms remain blocked by the borders where the schengen border code only applies.** Given the seriousness of the human rights issues, it is important that the development of a strategy for the external dimension of the AFSJ puts in place practical efforts to address this issue rather than simply paying lip service to the principles of human rights and fundamental freedoms.

2. Upcoming developments of the external dimension of the AFSJ

The year 2009 will be decisive as regards the future orientations of the ExtDAFSJ, as the European Council is to adopt at the end of the year the successor to the Hague multi-annual programme (hereafter the ‘Stockholm programme’, as it will, according to the current timetable, be adopted at the end of the Swedish presidency). In fact, the process of revising the Hague programme has already started, through the discussions around the work of the ‘Future group’ on JHA matters, as well as (to a lesser extent) through the review of the 2003 European Security Strategy. In the meantime, the roadmap for the implementation of the ExtDAFSJ has been clarified through the adoption of the multi-presidency JHA programme, covering the French, Czech and Swedish presidencies until the end of 2009. The other major outcome for the AFSJ as well as for its external dimension in the year to come is the eventuality of the entry into force of the Lisbon treaty.

2.1. The multi-presidency JHA programme for the ExtDAFSJ.

On 1 July 2008, the Council published a ‘*JHA External Relations Multi-Presidency Work Programme*,³⁹ laying down common priorities for the successive French, Czech and Swedish presidencies as regards the ExtDAFSJ. The initiative is ‘aimed at ensuring continuity in applying the JHA-Relex policy and making citizens more aware of it’⁴⁰, and is the first of its kind in the ExtDAFSJ. The document successively highlights a common **methodology**, common **thematic priorities** and **common geographical** priorities for the three presidencies. The common methodology comprises three elements:

- **Focus:** the work programme mentions the necessity of establishing strategic priorities which are to be translated into operational activities – which is hardly a novelty in terms of policy-making, but in a way constitutes an acknowledgement that so far the ExtDaFSJ has been lacking such an articulation.
- **Differentiation:** the work programme comments on two questions, namely the principle of conditionality and the principle of partnership.
- **Coordination,** between EU external policies, between EU bodies and institutions, as well as between the EU and the Member States.

³⁹ Council of the European Union (2008a), *JHA External Relations Multi-Presidency Work Programme*, 10546/08, 1 July.

⁴⁰ *Ibid*, p.2.

The work programme then proceeds to highlight common **thematic priorities**. Besides existing policy frameworks on terrorism, migration, borders and asylum and police and judicial cooperation, the document places emphasis on **four additional priorities**. Two of these are targeted priorities, on trafficking in human beings on the one hand, and child protection on the other. The other two are broader, and include **judicial cooperation in civil matters** as well as **rule of law, fundamental rights and citizens' interests**:

Finally, the work programme establishes **geographic priorities**, which are similar in scope to those mentioned in previous EU documents: candidate countries, neighbouring countries, 'strategic partnerships' and 'others'.

These observations lead to the following conclusions as regards the multi-presidency work programme in the ExtDAFSJ:

- Overall, the initiative is welcome, **as it injects more transparency** into the EU presidency and Council's activities in this domain. In this respect, it should become a systematic practice for presidency trios.
- The programme is also notable in that it dedicates more attention than most ExtDASFJ documents to fundamental freedoms and rights issues. Attempts to address some of the issues we highlight in this note can therefore draw from the language of the work programme.

2.2. The external dimension of the AFSJ and the 'Stockholm programme'

In the past few months, the Council and European Council have initiated a review process aiming at developing the successor to the Hague programme, to be applicable from January 2010 onwards. This review and proposal dynamic anticipates on the Commission's proposal for the post-Hague programme, which is due in the upcoming months, and has mainly been conducted by the Future Group on European Justice and Home Affairs⁴¹. In the meantime, another review has been initiated on the 2003 European Security Strategy (ESS)⁴², which deals with the EU's external security at large and as such, touches upon issues afferent to the ExtDASFJ.

2.2.1. The work of the Future Group on European Justice and Home Affairs

The establishment of the *Informal High Level Advisory Group on the Future of European Home Affairs Policy* was proposed at a meeting of the EU ministers of Interior and Immigration in Dresden in January 2007, at the initiative of German minister of Interior Wolfgang Schäuble and EU commissioner for Justice and Home Affairs Franco Frattini. It was co-chaired by the latter together with the minister of Interior of the acting presidency, and gathered the Interior ministers of the three presidency trios of the 2007-2011 period, with additional observers (among which the chairperson of the LIBE committee). In this regard, the conclusions of the Group are likely to have an important influence on the upcoming AFSJ multi-annual programme.

⁴¹ Future Group (2008), *Freedom, Security, Privacy – European Home Affairs in an open world. Report of the Informal High Level Advisory Group on the Future of European Home Affairs Policy*, June, available from: <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf>.

⁴² Council of the European Union (2008b), *Report on the Implementation of the European Security Strategy – Providing Security in a Changing World*, 17104/08, 10 December.

The 'Future Group' released its final report in June 2008, entitled *Freedom, Security, Privacy*. This is not the place for a full assessment of its proposals⁴³, but a few words on their general orientations seem necessary. Firstly, while discussing the future of the AFSJ as a whole, the Group almost systematically refers to the notion of 'European justice and home affairs', leaving out in the process explicit reference to the fundamental freedoms aspects of the AFSJ. Secondly, the Group singles out **three 'horizontal challenges'** that the post-Hague programme should address. These include:

- **'Preserving the "European model" in the area of European Home Affairs by balancing mobility, privacy and security'**. The 'mobility-privacy-security' triangle is a relative newcomer in the official documents of the EU. The emergence of this triangle in the Group's report has to be understood in a context where increasing contestation by the community of European scholars and the European Parliament have led to the abandonment of the image of the metaphor of the 'balance' between liberty and security, which was previously a staple of EU official documents on the AFSJ. However, it does not seem that the triangle will operate any better than the balance. In this regard, speaking of mobility and privacy is also a way to avoid mentioning freedom or to confuse freedom with speed of movement and mobility under surveillance.
- **'Coping with the growing interdependence between internal and external security'**. The Group notes that 'external relations [should be] a priority for the future design of European Home Affairs' and 'advocates developing a holistic concept covering e.g. development, migration, security, economic, financial and trade policy aspects'⁴⁴. This amounts to a commitment to further systematise the expansion of ExtDAFSJ concerns to all of the EU's external policy frameworks. Unsurprisingly, however, human rights and fundamental freedoms do not figure in this 'holistic concept'.
- **'Ensuring the best possible flow of data within European information networks'**. The report mainly envisages this issue as a technical challenge. It does not formulate clearly the 'political objectives' at stake, nor does it make explicit reference to data protection and privacy concerns.

The report then proceeds to highlight priority policy areas for the post-Hague programme. Considerations on fundamental freedoms and human rights, however, are not dealt with as a specific chapter, but are spread out across the document.

The report, finally, sports a full chapter on the ExtDAFSJ. The general considerations on this aspect remain along the lines sketched out by the Council strategy of 2005, insisting on flexibility, geographical and political differentiation, as well as on complementarity between EU and Member State activities. Geographical priorities are candidate and neighbouring countries. Thematic priorities include 'migration, the fight against terrorism and organised crime and strengthening fundamental rights'. The latter, however, is limited to the question of data exchanges with third countries and their implication for European data-protection frameworks.

2.2.2. The review of the European security strategy

The initial European Security Strategy document was first submitted by EU High Representative (HR/SG) Javier Solana to the Thessaloniki European Council in June 2003, and

⁴³ For a commentary, see: Statewatch (2008), *The State of Things to Come – EU Future report*, available from: <http://www.statewatch.org/analyses/the-shape-of-things-to-come.pdf>.

⁴⁴ Ibid, p.18.

adopted in December of the same year⁴⁵. As a policy document, the ESS suffered from several biases, including a lack of a consistent long-term perspective. In other words, the ESS can be construed as an important symbolic gesture, but one with little concrete effects. On 8 December 2008, High Representative Solana presented to the General Affairs Council a ‘Report on the Implementation of the European Security Strategy’⁴⁶, which seeks to ‘reinforce’ the ESS. The document concentrates essentially on CFSP/ESDP matters, but proceeds to single out terrorism and organised crime as major sources of international instability. It also highlights migration related questions as a factor of instability and political tension for the EU and its partners. The review of the ESS suffers from the same shortcomings already identified in relation to the ExtDAFSJ, in particular a lack of overall strategic orientation: the main goal highlighted in the review document is the need for the EU ‘to be still more capable, more coherent and more active’⁴⁷. While this is undeniably a laudable position, it does not provide any long-term objective to the EU’s external engagement, nor a driving rationale.

2.2. The Lisbon treaty and its effects on the ExtDaFSJ and the role of the European Parliament

The possible entry into force of the Lisbon treaty in 2009 is the other variable in the future of the AFSJ and its external dimension. The following paragraphs will discuss the changes brought about by the Lisbon treaty insofar as the ExtDAFSJ is concerned (2.2.1) and the role of the European Parliament in this respect (2.2.2).

2.2.1. The Lisbon treaty and the ExtDAFSJ

The Lisbon treaty establishes that:

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.⁴⁸

The Lisbon treaty would have a significant impact on the activities of the EU in the wider world, including in the field of FSJ. Institutionally, perhaps the biggest change would be the establishment of a new High Representative for Foreign Affairs and Security Policy and Vice President of the Commission who would be responsible for ensuring the consistency of the EU’s external actions. The new External Action Service which can draw on the resources of the EU institutions and Member States to assist the activities of the High Representative, should make practical interventions more feasible.

From a legal perspective, in relation to the EU’s ability to make formal international agreements in the field of FSJ, the Lisbon Treaty gives the EU a single legal personality which clarifies the basis on which agreements⁴⁹, such as the EU-US agreements on extradition and

⁴⁵ Council of the European Union (2003), *European Security Strategy*, 15895/03, 8 December.

⁴⁶ Council of the European Union (2008b), *Report on the Implementation of the European Security Strategy – Providing Security in a Changing World*, 17104/08, 8 December.

⁴⁷ *Ibid*, p.4.

⁴⁸ Article 3(5) Consolidated Treaty on the European Union

⁴⁹ Art 217 Consolidated Treaty on the Functioning of the European Union

mutual legal assistance, can be made. This clarifying of the EU ability to act in such circumstances may well see an increase in activities by the EU in this field both through bilateral agreements with third countries and in the international sphere, negotiating and signing multilateral agreements in other fora such as the United Nations and the Council of Europe.

The abolition of the ‘pillar’ structure in the Lisbon Treaty should facilitate coherence between the ways in which different elements of the FSJ agenda are addressed and **will greatly enhance the ability of the European Parliament to take an active role in this area through the co-decision procedure which would apply to all FSJ policy areas.**

Finally, the Lisbon Treaty would mark a major step forward in terms of making rights real in the EU context. The incorporation of the EU Charter on Fundamental Rights and Freedoms into the treaties⁵⁰ making it a legally binding instrument should greatly enhance the ability to challenge developments in the external dimension of the AFSJ on human rights grounds where the human rights implications have not been sufficiently taken into consideration in the drawing up of an agreement or strategy. Likewise, accession of the EU to the European Convention on Human Rights⁵¹ (ECHR) will ensure that the provisions of the ECHR are incorporated into the legal framework of EU decisions and that any inconsistencies with the ECHR are clearly justiciable in the ECJ and ultimately in the European Court of Human Rights. By giving fundamental rights a clearly defined legally binding status in the Treaty, the entry into force of the Lisbon Treaty could mark a significant move towards establishing fundamental rights as a concrete and practical part of the external dimension of the AFSJ.

2.2.2. The European Parliament and the ExtDAFSJ: current situation and future scenarios

The Lisbon Treaty introduces an enhanced role for the European Parliament in relation to scrutiny of agreements in the external dimension of the AFSJ. Although the EP made numerous observations on the EU-US agreements on extradition and mutual legal assistance⁵² it ultimately had no power to prevent the signing of the agreements. The new procedure for concluding such agreements requires, in most cases, the consent of the EP:

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

- (a) after obtaining the consent of the European Parliament in the following cases:
 - (i) association agreements;
 - (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
 - (iii) agreements establishing a specific institutional framework by organising cooperation procedures;
 - (iv) agreements with important budgetary implications for the Union;
 - (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

⁵⁰ Art 6(1) Consolidated Treaty on the European Union

⁵¹ Art 6(2) Consolidated Treaty on the European Union

⁵² Ref footnote above in EU-US cooperation section

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.⁵³

The enhanced role of the EP in this field provides a real opportunity to address the democratic accountability gap that has been identified in the external dimension of the AFSJ. This role, combined with the establishment of fundamental rights as a core part of the Treaty, should allow the EP to develop **its work in this important area by providing a rights based approach to parliamentary scrutiny grounded in the fact that the EP may withhold its consent if it is not satisfied that sufficient protections are in place.**

The work of the EP's temporary committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners⁵⁴ provides an excellent example of the ways in which the EP has used the fundamental rights provisions of the existing Treaty framework to shine a spotlight on the grave problems that can arise in cooperation with third countries in such sensitive areas as counter-terrorism. The fact that the Lisbon Treaty will provide a more detailed and clear legal base for the protection and promotion of human rights in the EU framework should serve to support future work of the EP in this field.

In addition, under the Lisbon Treaty, the High Representative will be responsible for keeping the EP informed of developments in CFSP and of ensuring that the EP's views are duly considered. There is currently an annual debate on the implementation of the CFSP which would be held twice a year under the Lisbon Treaty, improving the possibility for the EP to engage with developments in a timely manner.

3. Conclusions and recommendations

3.1. Conclusions

In the course of this briefing note, we have pointed out issues of two kinds raised by the ExtDAFSJ – institutional issues, and overall strategy issues:

- Institutional issues: these concern in particular the cross-pillar characteristics of the ExtDAFSJ. Decision-making in this aspect of EU activities is fragmented, and has resulted in a proliferation of actions based indiscriminately in the first, second or third pillar, depending on the political opportunities and priorities of the day. **In the process, accountability and responsibility are blurred.** Of particular concern for the European Parliament, in this respect, **is the question of the budgetary implications of the ExtDAFSJ.**
- Strategy issues: the institutional blurriness of the ExtDAFSJ is reflected in its lack of overall strategic guidance. What are the priorities for the EU in FSJ cooperation with third countries? In particular, what room is there for human rights and fundamental freedom issues in the ExtDAFSJ? A serious issue that needs to be addressed, in this regard, is the tendency towards double standards that has crept in relations with so-called 'strategic' partners, on the one hand, and with other third countries, on the other. The ExtDAFSJ, then, is all but balanced, with regard the relationship between the EU and its different partners, but also with regard the various components of the FSJ policies themselves.

⁵³ Article 218 Consolidated Treaty on the Functioning of the European Union

⁵⁴ Established on 18 Jan 2006

This leads, unsurprisingly, to the question of coherence. As highlighted above, concerns with coherence in the EU's ExtDAFSJ activities lie at the heart of current proposals for reviewing the ExtDAFSJ framework and the overall AFSJ strategy for the next five years. One, however, needs to ask what is the coherence which is asked for. Coherence of **objectives to facilitate circulation and freedom** or coherence of **a set of measures which are centred ON the protection of EU citizens against so-called insecurity, risk and threats**? Whose security, freedom and justice is rendered coherent? **What if major contradictions appear between the EU argument for its own security abroad and the rights of the persons under suspicion as dangerous categories of travellers**? The answer remains unclear at this stage. It seems that coherence supposes here **a priority to the security objectives of the EU for its own territory and population, and a diplomatic effort to create links between these priorities and the stability of local governments**. But the relation between stability of local governments and democracy, *i.e.* **freedom of their own population is not integrated into the scope of the coherence of the policy**. The actors are the citizens of the EU which are to be protected, the ministries of interior and justice of the EU Member States and the different EU agencies which are framing FSJ objectives, the diplomatic activities of the external relations of EU Member States and of some EU agencies themselves towards the local governments, and these local governments - **but not their populations which may be put at risk by the overall strategy of collaboration**.

Questions of coherence, however, are only one aspect of the issues afferent to the ExtDAFSJ. Indeed, this domain of EU activities stands out as a 'package' of measures which are structured by the idea of an insecurity continuum against whom the EU has to be protected preventively. This insecurity continuum covers terrorism, organised crime and traffickers, but also includes criminal justice, management of migration flows by associating efforts to assist undocumented migrants to the trafficking of human beings, and by pushing the governments of so-called 'countries of origin' to criminalise emigration, when it is not undertaken legally. **Paradoxically, then, the ExtDAFSJ constitutes a return to the Maastricht definition of the third pillar, a refusal to disconnect asylum, migration and border management from security and crime**. This puts at risk the individuals who have not been recognised as refugees after their application for asylum and do not benefit from secondary protection, as they are returned to their country of origin or transit. Cases concerning the imprisonment of returned 'failed asylum seekers' as 'undocumented migrants' falling under local laws against 'illegal emigration' and which have suffered from ill treatment in jail, have been evoked by different non-governmental organisations⁵⁵. **The fundamental issue, then, is that of the boundaries of law with respect to the externalisation of control, and of the possibilities to control the arbitrary spaces created by this process of externalisation**⁵⁶. In this regard, the ExtDAFSJ is only legitimate if it can be controlled, by the Courts and by the European Parliament.

3.2. Recommendations

3.2.1. Recommendations regarding the institutional aspects of the ExtDAFSJ and EU relations with third countries

In previous pages, we have outlined a series of institutional issues with regard the ExtDAFSJ: lack of clear legal basis and repartition of competence, fragmentation of decision-

⁵⁵ See, again, Amnesty International (2008).

⁵⁶ See, on this issue: D. Bigo and E. Guild, eds (2005), *Controlling Frontiers: Free Movement to and within the European Union*, London: Ashgate; T. Basaran (2008), 'Security, Law, Borders: Spaces of Exclusion', *International Political Sociology*, 2(2), 339-354; see also the special issue of *Cultures & Conflits* 'Confinement des étrangers: entre circulation et enfermement' (n°71), available online: <http://www.conflits.org/index15673.html>.

making, lack of overall strategic guidance and of consistence in terms of the different components of the AFSJ. As regards the question of legal basis, it seems clear that the Lisbon treaty will not bring any major change. However, by abolishing the pillar structure of the EU, the Lisbon treaty, should it be ratified, opens up possibilities for more consistent scrutiny of ExtDAFSJ activities by a broader range of agencies and institutions, including first and foremost the European Parliament, the ECJ, the EUDPS or the FRA. Should the member states fail to ratify the Lisbon treaty, several steps can be envisaged. In any case, the practice of multi-presidency work programmes on the ExtDASFJ should be encouraged, as it enhances the visibility of the activities undertaken in this domain, and provides useful follow-up information for the European Parliament. In addition, we recommend the following:

- As budgetary authority, the European Parliament holds significant leverage over the Community part of the activities undertaken in the context of the ExtDAFSJ. **It should request the Commission to report more precisely on this question, in particular by providing a proper reporting on the financial implications of ExtDAFSJ activities.** This could be important in the long run for the establishment of the 2013-2018 budgetary perspectives, in particular for external policy financial instruments.
- The European Parliament should issue **an opinion calling upon the FRA to establish a programme for 2010 dealing with the human rights/fundamental freedoms aspects of Community cooperation with third countries.** It needs to investigate the risk of double punishment in the EU and in the readmitting country, to investigate the practices of determination of visas, to cover the activities of the different navies of the member states, and especially to have access to the bilateral agreements, to verify their clauses, to check if human rights obligations are respected into the body of the agreements and in practices, to propose solutions for the guarantees of the Schengen Border Code (and hopefully the guaranties of the future visa border code) to be applied at any point of the travel of the person, either at the EU border, during the travel or at the point of departure. This could be done in liaison with the EUDPS. While the FRA's mandate concentrates on matters internal to the Community, the argument that internal and external aspects of the AFSJ are increasingly connected could serve as a justification for such a proposal.
- If these two bodies cannot undertake such a task, it is important that the European Parliament suggests and backs up the creation of a research group, taking the form of a network of independent experts, on the theme of *Mobility, Security, Ethics, Liberty* (MOSEL). The network would **run an inventory of freedom and ethical issues touching upon transnational mobility in a context of security controls and propose a set of effective remedies** when persons on the move (foreign citizens moving to Europe, or European citizens travelling abroad), are detained at the border, or prevented from starting their journey (through visa refusals or blockages by local police or air companies). This network should follow up on all the activities undertaken under the ExtDAFSJ.

In this regard, we believe **placing the promotion of human rights and fundamental freedoms at the heart of EU cooperation with third countries in FSJ matters would constitute a valid long-term perspective, in accordance with the EU's fundamental values.** Such a focus would not only involve the obligations of the Union's partners in this respect, but also **constitute an engagement on the EU's part that fundamental freedoms and rights, and particularly the right to free movement, are placed at the fore of its key interests in its various partnerships.**

3.2.2. Recommendations on EU-US cooperation in JHA matters

At this stage, it is hard to anticipate on the potential changes that the recent US presidential elections will bring about for EU-US cooperation in JHA matters. The recent decision taken by President Obama to close down the Guantanamo detention facility is certainly a sign that the overall attitude of the US government might be changing in upcoming months, but the persistence of certain trends, such as the emphasis on data-collection and the use of data-mining instruments in the conduct of US security policies, or ambiguity as regards the US rendition programme, should not be underestimated.

Potential changes will in any case bring new questions to the fore. The closing down of Guantanamo, in this regard, raises the issue of the status of the persons currently detained there, and particularly of their repatriation, considering the fact that there are still European citizens, or persons likely to be sent back to Europe, among the detainees. In this respect, we recommend the following:

- The implications of the closing down of Guantanamo, particularly in light of the EU-US agreement on mutual legal assistance and extradition, need to be assessed. The European Parliament has already debated this issue in a recent plenary debate. **The European Parliament could commission a study or a report to anticipate on this occurrence**, reflecting in particular on the EU's responsibility to protect both its citizens as well as persons who might wish to apply for asylum in one of the Union's member states.
- The abovementioned MOSEL group of independent experts could investigate the fate of European citizens when they are included in various watch lists, following on transnational exchanges of personal data, and when they fall victims to manifest and/or frequent mistakes. MOSEL would be tasked with presenting an **annual report** comprising a survey of third state practices in this field, and their reciprocation by EU authorities, as well as foreseeable improvements, both within the Union itself and in diplomatic relations with third states, in conformity with the principles and values upheld by the EU. To realise these annual reports, the group would organise a **follow-up on EU and third states practices**, on the **possible improvements regarding both legislation (or international agreements) and practice**, as well as on **the financial costs** induced by technologies of control and their proportionality as regards stated objectives. The group, in this regard, should comprise human rights, European immigration, and privacy legal experts, international relations, diplomacy and security specialists, as well as sociologists and psycho-sociologists dealing with the question of emergency and catastrophe, criminologists dealing with the analysis of police, border guards and their ethical codes, economists specialised in private companies commercialising information and identification technologies, political scientists studying questions of ethics in relation to surveillance, as well as historians and socio-anthropologists specialised in issues of mobility, tourism, immigration and asylum.
- The European Parliament has already commissioned a study on the possible conclusion of an EU-US international agreement on data protection, as recommended by the EU-US High Level Contact Group⁵⁷. It is important that such an agreement does not rely on exchanges of letters for its substantial clauses, as was the case for the 2007 PNR and SWIFT agreements. In this respect, while diplomatically difficult, the use of conditionality with regard in particular the creation of an autonomous data protection office in the US could constitute a proposal worthy of consideration.

⁵⁷ De Hert and Bellanova (2008), op.cit.

3.2.3. Recommendations on the future of the AFSJ and the ‘Stockholm programme’

The current timetable regarding the adoption of the successor to the Hague programme is very tight. European elections in June of this year and the renewal of the European Commission in the fall could further disrupt the process, by creating a lapse of attention at critical moments. The discrepancies that have plagued the drafting and adoption of the Tampere and Hague programmes, which have resulted in particular in the complete marginalisation of the European Parliament, should be avoided. This is important for the ExtDAFSJ, but also arguably for the whole AFSJ policy domain. The report of the Future Group, which states in particular that ‘under the post-Hague Programme, an intensive public debate including a substantial inter-institutional discussion involving the European and national parliaments will have to be launched’, should in this respect be taken quite literally. In this respect, we recommend the following:

- The European Parliament, acting under its right of initiative, should **commission a report on the work of the Future Group, to be discussed in plenary session before the end of the current term.** This report should in particular discuss the technological bias which is inherent to the suggestions issued by the Future Group. **Technology alone cannot create ‘smart borders’, if technology is only used as a means to expand surveillance to the detriment of the upholding and promotion of fundamental freedoms and rights.**
- The proposal from the Commission on the future multi-annual AFSJ programme is expected very soon. The European Parliament **should stand ready to commission another report immediately upon the publication of this proposal, to be discussed before the end of the current term, and allow for the issuance of an opinion on this matter.** The report would in particular study the concrete efforts on human rights and fundamental freedoms that could be made by the EU through the ExtDAFSJ.
- Should a revised ESS document be elaborated, **the EP should insist on the inclusion of a specific section on fundamental freedoms and human rights, making their defence and promotion the overall foreign policy priority of the EU.**
- The European Parliament should organise, starting after the June 2009 elections and resuming after the summer break, a **series of public hearings on the AFSJ, including on the ExtDAFSJ, bringing together experts and practitioners from the various EU agencies and bodies as well as officials from national administrations.** The work of the House of Lords committee on European affairs could provide a useful blueprint in this respect. The outcome of these hearings could serve to consolidate the EP’s position in the discussions on the ‘Stockholm programme’.