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Governing Internal Security in the European Union

Artur Gruszczak[1]

Introduction

The Maastricht treaty on the European Union (EU) erected a three-pillar edifice of European integration whose third pillar comprised various forms of cooperation in justice and home affairs. Many practices had existed much before 1992 and their inclusion into the new organization was a kind of cosmetic surgery. That face-lifting of cooperation in justice and home affairs had obvious consequences for the nature of the third pillar and the overall balance of EU policies. The third pillar was a strictly intergovernmental area where the EU members kept their sovereign right to decide upon their home affairs and judicial cooperation, as well as regulate migration flows and safeguard their national borders. EC institutions did not have much say on those matters, and any progress of cooperation depended on consensus between the members.

The Maastricht treaty established legal/formal and institutional grounds for EU cooperation in managing internal security through intergovernmental consultations regarding the movement of persons in the EU, and concomitant flanking measures in the fields of police and judicial cooperation. EU politics of internal security was formally strengthened in the Amsterdam Treaty, and practically through incorporation of acquis Schengen into the legal framework of the Union. The gradual widening of the Schengen area, the abolition of controls at internal borders and the reinforcement of flanking measures, especially at external borders, allowed the EU to set up a comprehensive and relatively efficient system of internal security.

Although the Amsterdam treaty, reforming the EU, intended to improve the fluctuation of numerous policy fields, its provisions concerning justice and home affairs were controversial. Firstly, a relatively simple and

[1] Artur Gruszczak is Assistant Professor at the Department of International and Political Studies at Jagiellonian University in Krakow, Poland. He is also a Research Fellow at the European Center Natolin in Warsaw where he coordinates a network "Forum - EU Justice and Home Affairs". He may be reached at: wsisw@natolin.edu.pl.

transparent structure of third-pillar cooperation was replaced by a multi-level asymmetrical and entangled cross-pillar construction in an "area of freedom, security and justice." Provisions relating to immigration, visas, asylum and other policies related to free movement of persons were transferred to the Community pillar. The third pillar was reduced to police and criminal justice cooperation. The Schengen acquis was inserted into the framework of the EU although its provisions were granted a special autonomy.

Discussions about the reform of the EU have dominated a general political and theoretical discourse on European integration at the threshold of the 21st century. A host of supranational institutions and intergovernmental bodies along with politicians and government officials from the EU members have perseveringly deliberated upon the most suitable and desirable shape of a future EU. The 2007 Lisbon treaty ended the long and tortuous trip to a new arrangement for European integration although its fate is still undecided. Moreover, the formal abolition of the pillar structure was partially undermined by special provisions concerning, first of all, internal security matters, especially police cooperation and criminal justice.[2]

The process of constitutionalisation of the EU came amidst a great global security debate. The symbolic and political impact of the 9/11 terrorist attacks on the US, when Western civilization lost the feeling of stability and entered a new stage: a 'war on terror,' brought about new challenges for the EU in the area of security. Transnational processes, in which the EU and its Communities have, for decades, assumed a leading and creative role, changed the traditional perception and understanding of security.

One of the objectives of European integration has been to make inhabitants of the continent feel safer and more confident in the institutions of public life. The challenge of transnational threats such as terrorism, cross-border organized crime, large-scale migrations, asymmetrical conflicts or WMD proliferation had also to be met by the European states. Confronted for decades with such disquieting events and phenomena, the Europeans managed to work out, within the framework of European integration processes, certain arrangements allowing for more effective and long-term cooperation in preventing and combating the major threats to European security.

This paper is intended to reflect upon the problems and challenges to the EU's internal security governance from three different angles: theoretical, political and virtual.

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[2]   See Jörg Monar, "Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the 'Area of Freedom, Security and Justice'?" *European Constitutional Law Review*, 2005, 1 (2): 226.

Governance as an Analytical Framework for EU Internal Security

Cooperation in the area of the EU's internal security covers a vast terrain where multiple actors on transnational, national and sub-national levels enter in complex interactions mapping out, or bringing about diverse models of security and agendas for public order. Polycentric and differentiated structures of EU security governance predetermines a variety of approaches to efficient and legitimate policy-making, and allows for identifying several modes of governance in the area of internal security of the EU.

Governance is a multifaceted concept which, being in vogue over the past decade, poses numerous cognitive, analytical and definitional problems and difficulties. Regardless of the enormous scholarship in this field[3], one should keep in mind three basic presumptions:

- the EU is a special kind of (epistemic / security / organizational / regulatory) community "cursed" by her hybrid nature "contaminating" the structures of power, authority, accountability, territoriality;
- security governance should be taken as a policy issue where public institutions predominate societal self-organization;
- governance should be seen in an organizational/procedural perspective rather than in participatory/distributive one.

The EU's internal security policy was predetermined by some hybrid features of the Union and thus sought to interlink activities undertaken by its members on the basis of prerogatives in the areas of law enforcement, public security and public order, with cross-border cooperation within and outside the EU's normative and institutional framework, as well as activities of EU

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[3] James N. Rosenau, "Governance, Order and Change in World Politics" in *Governance Without Government: Order and Change in World Politics,* ed. by J.N. Rosenau, E.-O. Czempiel (Cambridge: Cambridge University Press, 1992); *Modern Governance: New Government-Society Interactions*, ed. by Jan Kooiman (London - Thousand Oaks – New Delhi: Sage Publications, 1993; James G. March and Johan P. Olsen, *Democratic Governance* (New York: The Free Press, 1995); R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Buckingham: Open University Press, 1997); *Debating Governance. Authority, Steering, and Democracy*, ed. by Jon Pierre (Oxford-New York: Oxford University Press, 2000); Artur Gruszczak, "Democratic Governability in East-Central Europe – A Comparative Performance Account" in *Perspectives on Democratic Consolidation in Central and Eastern Europe*, ed. by Dirk Berg-Schlosser and Raivo Vetik (Boulder: East European Monographs, 2001); Kees van Kersbergen and Frans van Waarden, "Governance" as a bridge between disciplines: cross-disciplinary inspiration regarding shifts in governance and problems of governability, accountability and legitimacy," *European Journal of Political Research* 2004, 43 (2): 143–71; Renate Mayntz, "From government to governance: Political steering in modern societies" in *Governance of Integrated Product Policy,* ed. by D. Scheer and F. Rubik (Sheffield: Greenleaf Publishing, 2006); Oliver Treib, Holger Bähr and Gerda Falkner, "Modes of governance: towards a conceptual clarification," *Journal of European Public Policy* 2007, 14 (1): 1–20.

agencies and bodies in the area of freedom, security and justice (e.g. Europol, Eurojust, Frontex), inserting all that in an overall security strategy of the Union.

EU security governance is a complex set of political activities undertaken by the members, assisted by EU institutions, bodies and agencies, to secure a high level of safety for EU citizens, and legal aliens, as well as to respect civil liberties and fundamental rights. Security governance embodies active public and private involvement in creating conditions necessary for the government to fulfill its functions with legitimacy, efficacy and stability. The EU's identity is built on a common perception of threats and risks. Moreover, EU security governance is being realized in a single territorial entity consisting of complex, multitiered, geographically overlapping structures embedded into multilayered security regimes. In this context, EU security governance has been strongly influenced by "schengenization" of normative framework for internal security cooperation.

EU security as a political issue involving rational decision-making, enforcement, and follow-up, has to be taken at the same time as a societal phenomenon allowing for greater human mobility, large-scale cross-border flows and high-tech tools of interpersonal communication. Free movement of people, empowerment of EU citizens and legal residents to move and reside freely within the territory of the EU members (under certain conditions), gave rise to a growing need for safeguarding those achievements and at the same time enhancing efficiency and viability of law enforcement institutions. Balancing freedom with security in a common area became an entangled and challenging issue politically and practically. Securitization over the freedom to move, reside and communicate in the EU turned out to be a functional requirement and condition of further development of the EU as an area of freedom, security and justice.

Given the aforementioned remarks, one can distinguish the following modes of governance of EU internal security[4]:

Liberal externalization – security policy is still a domain of governmental actions and undertakings and, as such, is intrinsically inserted into diplomacy and international agreements. Local indigenous factors of instability and insecurity are closely interlinked with external sources of risks and threats originating in religious, cultural or ethnic dissent. State institutions in their responsibilities for safeguarding state sovereignty, territorial integrity but also public order and safety for the inhabitants, take security as a "dual-use" issue, both internal and external, combining thus domestic efforts with activities abroad. The basic assumption of security policy is that in the global context of political, economic, social and cultural processes the state has to reinforce the capacities to deliver basic values and norms underpinning national identity,

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4   For more details see Artur Gruszczak, "Governance of EU Internal Security: Does a Multitude of Methods Make a Method?" in *The Modes and Methods of European Union Activity*, ed. by Leszek Jesień (Kraków: Tischner European University, 2008), 156–65.

legitimacy and authority. Stepping up to the level of EU cooperation, security seems to be a matter of intergovernmental bargain and collective choices resulting from a common perception of fears.

Intensive transgovernmentalism – EU members are committed to advanced forms of extensive cooperation and engagement but consider the EU legal and institutional framework insufficient, inadequate or unacceptable.[5] Bifurcating paths of securitization of the EU led to multiple policy venues where security is a major objective. The complex EU legal and institutional framework is still insufficient to pledge solid support to efforts undertaken by the members individually or in a coalition. While the development of security cooperation within the EU could be evaluated positively in terms of strategies, action plans, green papers, and evidently, legal instruments, the members still keep quite a wide area of exclusive competences and resist further "unionization" of internal security policy.

Open coordination (strategy maps) – Open coordination as an EU policy tool was established by the 2000 Lisbon European Council to improve governance and decision-making in "soft areas" of the Union's competence. As Radaelli writes, "open coordination enables policy-makers to deal with new tasks in policy areas that are either politically sensitive or in any case not amenable to the classic Community method."[6] Application of the open method of coordination in the area of freedom, security and justice means combining instruments of open coordination within weakly constitutionalised areas of Community competence (immigration and asylum, border control) and intergovernmental third-pillar patterns of cooperation (threat reduction and assessment, intelligence-led policing, information sharing). Tools of open coordination used in the third-pillar cooperation included strategic guidelines elaborated and adopted by the European Council or the Council, regular policy evaluation and the use of scoreboards, sharing best practices (fundamental for EU cooperation in the fight against terrorism, organized crime, illegal migration).

Multi-level governance – heterogeneity of justice and home affairs in the EU requires an extensive use of multidimensional methods and policy-oriented agenda-settings.[7] Even some government-centric fields of JHA, like police cooperation, could not work properly when reduced exclusively to the state level. Within the area of internal security, there are various ventures undertaken in different dimensions by different political actors with overlapping competencies. Representatives of national law enforcement bodies constitute only

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[5] Helen Wallace, "The Institutional Setting" in *Policy-Making in the European Union* ed. by Helen Wallace and William Wallace (Oxford: Oxford University Press, 2000), 33.

[6] Claudio M. Radaelli, *The Open Method of Coordination: A New Governance Architecture for the European Union?* (Stockholm: Swedish Institute for European Policy Studies, 2003), 7.

[7] Jörg Monar, "Specific factors, typology and development trends of modes of governance in the EU Justice and Home Affairs domain", available at http://www.eu-newgov.org/database/DELIV/D01D17_Emergence_NMG_in_JHA.pdf, accessed on 12 September 2007.

one set among a variety of participants in EU politics.[8] The movement from the intergovernmental to supranational realm in terms of security integration is not a result of non-purposeful spill-over, but of the strong role played by particular epistemic communities in the EU. Multi-level governance appears to be a method of integration through bargain between strategy-oriented transnational epistemic communities and EU Members dedicated to pursue their own goals. Multi-level governance in internal security area is a vertically-oriented set of patterns of decision-making and enforcement embedded in interlocked structures permeating heterarchical architecture of horizontal layers wherein competencies and jurisdictions are diffused and locally-oriented actors focus on individual properties.[9] Diffusion of responsibilities for EU internal security and overlapping competencies and jurisdictions on national and EU levels increase a chance for successful implementation of multi-level governance as the predominant mode of internal security governance.

Networked governance – Policy networks imply a cooperative mode of governance based on stable patterns of exchange and reciprocity. Multiple actors with overlapping competencies engage in cooperation and equivalent exchange. Internal security governance networks constitute both loose institutional arrangements[10] and non-hierarchical structures of information exchange. Emergence of various networks was largely facilitated by technological breakdown and revolution in global communication. Technology and modernization contributed to a new perspective on the interaction between human existence and transformation of state politics. As Castells wrote, "the European member states have been forced to innovate, producing, at national, regional, and local levels, new forms and institutions of governance, including the Union itself as a 'new form of state', i.e., 'the network state'."[11] Information networking is probably the most spectacular form of EU internal security governance. Collection, storage, analysis and exchange of information is the dominant mode of activities of EU bodies like Europol, Eurojust, European Justice Network (in criminal and in civil matters as well), Eurodac. Network systems, like the Schengen Information System and a would-be Visa Information System are the basis and crucial element of EU policy in the area of movement of persons. EU security policies prove that the dense network of interconnected entities bound by nodal links could function not only as a useful tool to maintain top-down

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8   Monica den Boer, "9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment", Groupement d'Études et de Recherches 'Notre Europe', Policy Papers N°6, September 2003, 23.

9   Magnus Ekengren, "New Security Challenges and the Need for New Forms of EU Cooperation: The Solidarity Declaration against Terrorism and the Open Method of Coordination," *European Security* 2006, 15 (1): 91.

10 Monica den Boer, "From Networks to Institutions ... or Vice Versa? Opportunities for "Good Governance" in EU Police Cooperation," *Collegium* 2001, 22: 36–43.

11 Manuel Castells, *End of Millenium*, Vol. III, *The Information Age: Economy, Society and Culture* (Oxford and Malden: Blackwell, 2001), 362–63.

securitization of the public arena but also as a pattern of politics focusing on cross-border organizational undertakings and operations bringing about practical results in terms of security strategy.

A conceptual approach to governance of EU internal security is based on a flexible architecture of cooperation and mutual support, horizontal intertwining of cooperation fields and policy dimensions, multiple roles and diverse tasks for policy actors involved in security governance. Such a configuration, however, is dyadic in its essence. In the legal-institutional context, it is centered on EC institutions and third-pillar agencies (Europol and Eurojust). But there are still many policy areas where supranational institutions and bodies are excluded or simply ineffective in their activities. This is the reason why members were so keen on launching and reinforcing various forms of transgovernmental cooperation. While Europol has been lacking operational competences and it works as an information clearinghouse, many cross-border police cooperation agreements between EU members were concluded (e.g. the Mondorf agreement between Germany and France of 1997 or the Benelux treaty on cross-border police interventions of 2004) providing for advanced common operational activities in the fight against serious crime. For the Council of the EU was grappling with the free-riding syndrome and lack of consensus indispensable to adopt new legal measures in the third-pillar cooperation, a group of EU members launched such extra-EU initiatives as the G6 group[12] or the Prüm Treaty of 2005.[13]

That apparently fragmented structure of security cooperation shows nevertheless clear evidences of interlocking capacities and multifunctional design. It is interesting to see that some cooperation forms with centrifugal effect (like the Prüm cooperation) were quite quickly, though only partially, transformed into centripetal action (Council decision of June 2007 integrating major parts of the Treaty into EU law). This example shows that intensive transgovernmentalism is still a viable and relatively efficient mode of cooperation in such entangled and complex structure of EU internal security cooperation.

The Politics of EU Internal Security

EU security governance, in its "classic" meaning of the 1990s, was a complex set of political activities undertaken by the members, assisted by EU

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[12] An informal group of intergovernmental cooperation on security matters (chiefly terrorism, illegal migration, transnational organized crime) established in 2003 on French initiative, comprising France, Germany, the United Kingdom, Italy, Spain and – from 2006 – Poland.

[13] "Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration", signed in the German village of Prüm on 27 May 2005. See Prüm Convention, Council of the European Union, doc. 10900/05, Brussels, 7 July 2005.

institutions, bodies and agencies, to secure high level of safety to EU citizens and legal aliens as well as to respect civil liberties and fundamental rights. Security governance embodied active public and private involvement in creating conditions necessary for the government to fulfil its functions with legitimacy, efficacy and stability. Moreover, EU security governance was being realized in a single territorial entity consisting of complex, multitiered, geographically overlapping structures embedded into multilayered security regimes. In this context, EU internal security governance was strongly influenced by "schengenization" of normative framework for internal security cooperation.[14]

Such an approach is close to Kirchner who perceived EU security policy as a combination of institutional roles and policy fields in a wide area of the European integration. Kirchner focused his analysis on how the EU "has co-ordinated, managed and regulated key security functions as conflict prevention, peace-enforcement/peace-keeping and peace-building".[15] Such a wide approach to the issue of security of the EU entails drawing a multi-level, pluri-conceptual study area interlinking various elements and dimensions of security of the EU. In a similar vein, Rhinard, Ekengren and Boin perceive the issue of EU security through various lenses of EU activities in the field of security. They point out that the Union moved recently towards an active role as an external security provider – as Kirchner wrote – but extended this role to internal security matters in the context of protection and a "safer Europe". They use the term "protection space" for description of a new security area built up by sets of actors, rules and practices seeking to protect citizens against direct and indirect threats.[16]

Given that observation, one can notice a significant and important in terms of security policy shift from consequent criminal justice to proactive law enforcement. This was due to the fact that implementation of the most relevant legal instruments adopted on the level of EC institutions, especially the 2002 framework decisions on the European Arrest Warrant and Joint Investigation Teams, were at the beginning sluggishly and in some cases reluctantly transposed into national legal orders, regardless of consequences of 9/11. Further instruments, like European Evidence Warrant or framework decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Members of the EU either await complete implementation in all Members or are subject to numerous limitations. For example, on the grounds of evidence warrant, competent authorities of EU Members could only exchange already existing and clearly available objects,

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[14] Artur Gruszczak, "Networked Security Governance: Reflections on the E.U.'s Counterterrorism Approach," *Journal of Global Change and Governance* 2008, 1 (3): 4–5.

[15] Emil J. Kirchner, "The Challenge of European Union Security Governance," *Journal of Common Market Studies* 2006, 44 (5): 948.

[16] Mark Rhinard, Magnus Ekengren and Arjen Boin, "The European Union's Emerging Protection Space: Next Steps for Research and Practice," European Integration 2006, 28 (5): 514–17.

documents or data obtained under production, seizure orders, including criminal records. Only judges, investigating magistrates and public prosecutors are entitled to issue evidence warrants. If the framework decision on evidence warrant is restrictive as to national authorities involved in cooperation, decision on exchange of information and intelligence seems to be little specific on national users. Defining them as "a national police, customs or other authority", it opens room for multitude of actors being involved in sensitive arrangements. Exchange of intelligence, a critical element in attempts at establishing an EU intelligence-led police cooperation, also hardly passes the proportionality test. Availability of police data and intelligence, notwithstanding such a principle proclaimed in the 2004 Hague Programme, is subject to numerous regulations, rules and working arrangements established on EU level as well as within national legal and political frameworks. Given constant deficit of trust among law enforcement agencies and EU bodies, like Europol and Eurojust, rapid, straightforward, full and efficient transfer of information and intelligence data is hardly possible exclusively on the grounds of the Council framework decision, rather it would follow intergovernmental channels and arrangements, both formal and informal.

The need to establish stronger and more politically-oriented bases for internal security policies as well as the pressure to set them into motion as quick as possible contributed to the employment of strategic thinking into conceptual works and policy-making. In the aftermaths of the 2004 Madrid terrorist attack, unlike post-9/11 developments, the need for concerted action was evident on the level of the EU. Moreover, given political and operational reasons as well as domestic circumstances in certain Members, EU cooperation had to take into account common actions and strategies worked out by the institutions and bodies of the Union in its legal and institutional framework. In the European Security Strategy a scenario for joint action on the EU level was clear: "Europe is both a target and a base for such terrorism: European countries are targets and have been attacked […]. No single country is able to tackle today's complex problems on its own […]. Concerted European action is indispensable".[17]

The whole package of interlocking strategies of internal security management was based on the principles of diminishing threats (both internal and external) and reducing vulnerability. Some of those strategies have been outlined in general terms (the 2003 European Security Strategy); others were designed specifically to tackle the challenges of cooperation in the area of freedom, security and justice (the 2005 Strategy for the External Dimension of Justice and Home Affairs; the 2004 EU Drugs Strategy 2005–2012; the 2005 strategy for combating radicalization and recruitment into terrorism); still others kept a horizontal position (the 2005 Counter-Terrorism Strategy).

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[17]   A Secure Europe in a Better World, 1 and 3.

An evident feature of EU security policy after 2004 is the stress on prevention, an early warning activity relying on a proper identification of root causes of delegitimisation of public order in the EU.[18] The EU Counter-Terrorism Strategy approved by the Council on 1 December 2005 set out a strategic commitment to "protective security" and was founded on four types of activities: prevention, protection, pursuance and response.[19] The Counter-Terrorism Strategy puts emphasis on countering radicalization and terrorist recruitment. This aim was made clearer in the strategy for combating radicalization and recruitment into terrorism adopted by the Council in 2005.[20]

Nearly all of the above-mentioned strategies stemmed from an optimistic supposition that societal sphere of the EU is sufficiently strong to neutralize and absorb dysfunctional undertakings planned or committed by enemies of freedom and democracy through mechanisms of inclusiveness inherent in EU politics, deep-rooted in democratic and liberal tradition of an EU supranational community.[21] However, it is often stressed that indigenous factors of instability and jeopardy are closely interlinked with external sources of threats and menaces, often strongly motivated by religious or cultural reasons. This is particularly important in the present era of asymmetric threats and conflicts where danger may come suddenly and provoke an immediate outburst of panic and destabilization. In such circumstances one of the arguments in the European Security Strategy should be taken for granted: "With the new threats, the first line of defence will often be abroad".

The 2005 Strategy for the External Dimension of Justice and Home Affairs stemmed from a thesis that the emergence and reinforcement of an area of freedom, security and justice in the EU can by successful only when the external political and social environment, particularly in adjacent and neighbouring areas and regions, will offer favourable conditions in terms of partnership, cooperation and threat reduction. This would mean that the EU should launch an intensive multi-level conceptual and organizational labour driving at re-shaping the outer world into an area of freedom, prosperity, rule of law and accountability. In terms of security needs, the strategy makes it pretty clear: "it is no longer useful to distinguish between the security of citizens inside the EU and those outside".[22]

Since, after 9/11, EU internal security became evidently a cross-pillar issue, involving a series of divergent Community and Union legal measures,

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[18] See Marieke de Goede, "The Politics of Preemption and the War on Terror in Europe" *European Journal of International Relations* 2008, 14 (1): 161–85.

[19] Council of the European Union, doc. 14469/05 LIMITE, Brussels, 15 November 2005.

[20] Council of the European Union, doc. 14781/1/05 REV 1 LIMITE, Brussels, 24 November 2005.

[21] See Cornelia Beyer, "The European Union as a Security Policy Actor: The Case of Counterterrorism," *European Foreign Affairs Review* 2008, 13 (3): 302–03.

[22] Council of the European Union, doc. 14366/05 LIMITE, Brussels, 11 November 2005, 3.

common actions, joint endeavours and practical instruments, efforts at improving effectiveness of EU legal and institutional framework, particularly through abolishing the pillar structure of the Union and replacing them with a single "communautarized" framework, were culminated in 2007 when the Lisbon treaty was signed. The reform treaty, however, in a sense is a step back since it acknowledges numerous sovereign competencies that the Members retain in their internal security policies and gives them a wider room for manoeuvre in the field of internal security outside the legal and institutional framework of the EU. CEPS experts Carrera and Geyer pose a slightly rhetoric question: "did we scrap the pillars only to construct a 'mosaic' (a 'patchwork') in the Areas of Freedoms, Securities and Justices?"[23]. Monica den Boer, referring herself yet to the constitutional treaty, considered it the "proof of the lack of vision about the long-term objectives."[24]

Indeed, the complex and entangled EU area of freedom, security and justice as erected in Amsterdam, would after the present reform of the treaties still be as complicated as before, with new provisions having in some cases a retrogressive effect. For instance, widened parliamentary scrutiny may discourage Members from sensitive undertakings in the field of internal security, border management and migration. Introduction of a specific 'emergency brake' in some areas of judicial cooperation in criminal matters makes any progress in this area hostage of Members.

Another evidence of the lack of progress in the third pillar area, or even false meaning of advancement in this field, is the arrangement of prerogatives and power of Europol and Eurojust. The role of both major EU bodies involved in internal security cooperation, was kept limited to being an information clearinghouse and a coordinator of national activities in a support capacity. The question of assignment of operational powers to Europol indicates unsurmountable barriers to a qualitative advancement in EU internal security cooperation. A commitment to endow Europol with operational powers was already present in the Amsterdam treaty. The reform treaty does nothing else than repeating this promise. Instead, national parliaments were tasked with the political monitoring of activities of Europol. Although some experts see this proposal as an example of exception clauses advocated by the proponents of intergovernmentalism, we would rather consider it another brake restraining in the name of national sovereign interests further practical collaboration unfolding on transnational level.[25]

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[23] Sergio Carrera, Florian Geyer, "The Reform Treaty & Justice and Home Affairs: Implications for the Common Area of Freedom, Security & Justice" *CEPS Policy Brief*, no. 141, August 2007, 2.

[24] Monica den Boer, "Crime and Constitution: a Brief Chronology of Choices and Circumventions," *Maastricht Journal of European and Comparative Law* 2004, 11 (2): 143.

[25] Wolfgang Wagner, "Guarding the guards. The European Convention and the communitization of police co-operation," *Journal of European Public Policy* 2006, 13 (8): 1230–1246.

Hence the logic of the reform in the area of freedom, security and justice is quite perverse. It seems that it could reinforce the tendency to develop novel forms of justice and home affairs cooperation outside the EU. The reform treaty explicitly acknowledges the opportunity to launch and develop certain forms of cooperation outside the Union. "It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security."[26] Variable geometry of internal security cooperation between the EU Members is thereby sanctioned. The gap between intergovernmentalism and communitarism cannot be closed overnight.

Virtual Security Governance

Governance of EU security stems from the growing need of establishing intrinsic linkages between modern security governance and post-modern forms of securitization. Strong belief in modern technologies of surveillance and control motivates proliferation of high-tech security tools at the Union level. The Members, convinced of efficiency and rationality of those new generation instruments, make binding agreements, through community measures or EU law, on application of high-tech security tools to cooperation in the area of freedom, security and justice. The Union therefore seeks to attain classical objectives by the use of post-modern means and instruments whose substance is information. That is why EU agencies and bodies in charge of securing stability and safety in the whole Union focus their activities on information gathering, processing and storage yet scarcely on operational activities. The collection, storage, analysis and exchange of information (Europol), technical support and expertise, risk analyses and research (Frontex) comparison and storage of data (SIS, Eurodac, VIS) are forms of activities predominant in the context of EU internal security governance. That is why the Union and its members put so much emphasis on the principle of availability, i.e. the right of equal access by an appropriate authority in a member state to information held by authorities in other member state. That is the reason – along with the post-modern perception of territoriality and sovereignty – why cooperation in justice and home affairs among the EU members has been recently following bifurcating paths. A relatively new context of cooperation should be referring to various projects drawn up by the members outside the EU's formal structures bringing about fragmentation or multi-levelling of EU internal security governance. The Prüm treaty (2005) as well as the Council decision implementing main provisions of that treaty into the EU law evidence strong emphasis put on establishment and availability of national DNA analysis files, fingerprint data bases, automated searching and

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[26] Article 73, "Treaty on the functioning of the European Union, Consolidated Version", *Official Journal of the European Union* C 115, 9.05.2008, 74.

comparison of biometric data as well as supply of other sensitive personal data. Adding some of the recent proposals from the European Commission (like entry/exit system at the external borders, EU PNR or body scanners at border crossing points) the stress on virtual security measures should be seen as unprecedented and comparable only to some tentative proposals put forward by certain members.

Faith in high-tech sophisticated methods and tools results from a specific "Copernican turn" in thinking about public security and personal safety in the Western cultural area. Advances in technology, innovation and modernization contributed to a new perspective on the interaction between human existence and transformation of state politics. Reflection on security had to be reoriented toward post-modern new technological paradigm centred on sophisticated means of microelectronic information and communication technologies, widespread global networking, virtual reality processes in cyberspace, "stealth" surveillance and management of identity of individuals. A move of security agencies beyond their national territories and the progress in European policing made internal security subject to a special spill-over where decisions and moves facilitating transnational cooperation, economic integration and free movement prompted the emergence of new policies and measures seeking to strengthen liberties and reduce threats. In Badie's words, identity-based commitments and transnational involvements challenged the state's capacity to use its ultimate power and thus to display sovereignty.[27] As a result, the fading away of sovereignty, or reduction of sovereignty to a spacial practice, brought about the blurring of classical distinctions and the emergence of new identities.[28] Modern attributes of sovereignty and order, like self-sustainable nation-state, boundary-closed territory; sovereign, internally legitimate state authority; macro-political strategies of national development, primacy of public law in international arena, seemed more and more obsolete.

Structural transformation undergoing rapidly in the realms of technology, communication and culture contributed to a new perspective on governance highlighting the interaction between human existence and reconstruction of state. Zwahr and Finger saw it in the following way: "System we call State is more *virtual* than *physically* existent. There is no tangible object we can identify to be the 'State', rather it is the system of functions, mechanisms and objects as a whole. That is why we call the system 'State' a *virtual governance architecture*."[29]

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[27] Bertrand Badie, "Realism under Praise, or a Requiem? The Paradigmatic Debate in International Relations," *International Political Science Review* 2001, 22 (3): 255.

[28] R. B. J. Walker, "Europe is not where it is supposed to be," in *International Relations Theory and the Politics of European Integration*, ed. by Morten Kelstrup and Michael Charles Williams (London – New York: Routledge, 2000), 21.

[29] Thomas Zwahr and Matthias Finger, "Towards Virtual Governance Architecture – A Perspective on Information Technology as a Transformer of Public Institutions and Governments" available at http://infoscience.epfl.ch/record/55884 accessed on 11 September 2007.

What has been interesting and significant in the development of EU justice and home affairs cooperation, especially in the aftermath of 9/11, was the emergence of new forms of EU internal security governance contributing to a progressing shift towards virtual governance.[30] Obviously enough, "virtual" should not be identified with a computer-generated "space" which is viewed through "goggles" and is responding to stimuli sent from the participant.[31] The virtual should be conceived as a developing form of existence that is fully real, that has its own ontological status, but has not yet been fully actualized.[32] The Deleuzian approach to differentiation and divergence makes an interesting contribution to the meaning of virtuality in the structural context of technological shifts and their impact on the tense relationship between security and liberty.[33] Difference may be taken as a regulatory norm enabling individual and collective identification, which is a key method for the early detection of threats to public order. Security then is an issue of managing difference and this feature may be best revealed when appropriate means and tools are applied.[34] This explains why the politics of security experienced post-modern turn to a new technological paradigm centred on sophisticated means of microelectronic information and communication technologies, widespread global networking, virtual reality processes in cyberspace, surveillance and management of identity of individuals.

Networking, digitalization and information governance in EU security area did not mean breaking with the classic meaning of 'territorial sovereignty' but rather shifting towards a qualitatively new dimension of cooperation without encroaching sovereignty. Therefore, post-classic approaches focusing on sovereign rights and territorial boundaries should also be taken into account although not in a "pure" form but "virtualized" by massive information flows, technologies of managing difference and digital identification. Sharing intelligence and transferring sensitive data, including personal data and biometric identifiers, have been postulated since the trauma of 9/11. Virtual governance of EU internal security took shape of a multidimensional networked structure consisting of communication channels and nodes of data bases and analytical centres.

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[30] Kirchner, "The Challenge of European Union Security Governance", 948.

[31] Mark Poster, *The Second Media Age* (London: Blackwell, 1995), 12.

[32] Barbara Hooper, "Ontologizing the borders of Europe" in *Cross-Border Governance in the European Union*, ed. by Olivier Kramsch and Barbara Hooper (London and New York: Routledge, 2004), 211.

[33] Gilles Deleuze, *Difference and Repetition* (New York: Columbia University Press, 1994).

[34] Didier Bigo and Sergio Carrera, "From New York to Madrid: Technology as the Ultra-Solution to the Permanent State of Fear and Emergency in the EU", CEPS, Brussels, April 2004, available at http://www.ceps.be/Article.php?article_id=314, accessed on 4 September 2004.

EU projects that have been unfolding recently (SIS II, VIS, Eurodac, entry/exit) are based on highly advanced communication and control technologies and resolutely introduced biometrics. This relatively new technique of personal identification and authentication is particularly important in the context of security management, allowing for advanced personalization of administrative measures concerning both EU citizens (ID cards, passports, mobile telephony) and aliens (visa, asylum application, border control). This is an effective tool against illegal migration (like Eurodac fingerprint data system), but also an instrument facilitating certain procedures related to freedom of movement (like IRIS system of control on selected British airports).[35] This is, at the same time, a powerful tool allowing for construction of a sophisticated system of individual control and surveillance in order to prevent and counter major threats to internal security like terrorism or WMD proliferation. Hitherto projects carried out by EU countries are concentrated on external border security measures, involving a specific "biopolitical technology"[36] (biometric or machine-readable passports, biometric visas, fingerprint and body scanners) as well as high-tech means of border control (satellite surveillance, infrared monitoring, electronic fences and even spy planes[37]).

Evidently, virtualization of EU security policy is a nonlinear process reinforcing thereby multi-levelling of internal security governance. In terms of politics it may even breed frustration since some leading members, supported by the European Commission, are eager to proceed with further digitalization and technological securitization of the Union while the majority of middle and small nations, backed by the European Parliament, are afraid of economic, political and societal consequences of that process. Rapidly growing technological gap between means of policing, surveillance and data exchange applied by the most advanced EU Members, like Germany, France, the UK or the Netherlands and traditional methods and techniques employed by law enforcement agencies in the "new Europe" (former Communist states) hinders prospects for establishing an Union-wide virtual security community.

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[35] See Iris Recognition Immigration System, http://www.iris.org.uk and e-Borders Programme, http://www.homeoffice.gov.uk.

[36] Jef Huysmans, "A Foucaultian View on Spill-Over: Freedom and Security in the EU," *Journal of International Relations and Development* 2004, 7 (3): 308.

[37] According to a report published by Transnational Institute and Statewatch (Ben Hayes, *Arming Big Brother. The EU's security research programme*, Amsterdam, April 2006), a research programme financed by the European Commission seeks to establish a system of border surveillance by Unmanned Aerial Vehicles (UAVs). British Independent on Sunday (4 June 2006) informed: "Fleets of unmanned drone aircraft fitted with powerful cameras are to be used to patrol Europe's borders in a dramatic move to combat people-smuggling, illegal immigration and terrorism", available at http://news.independent.co.uk/europe/article624667.ece, accessed on 4 June 2006.

Conclusions

Internal security governance and – in a wider perspective – the governance of the areas of freedom, security and justice appear as a complex multi-level differentiated set of organizational, institutional and normative patterns and modes of "arranging things". The modes mentioned in the text are, in a sense, intermingled and generally formatted by the legal and institutional architecture of the EU. They never work alone, they have to be interlocked and stimulated by others. Horizontal and vertical dimensions of governance shift actors' preferences toward predictable outcomes and strategic blueprints. This is legitimate in case of "classical" modes as externalization and intensive transgovernmentalism, and even in some aspects of multi-level governing. However, post-modern methods and instruments of securitization make them more and more obsolete. In the post-9/11 world information became the major instrument of cooperation between EU members in their efforts to improve governance of internal security but its utility depends much on citizens.[38] Civic response to government policies is decisive for a successful and effective implementation of information-led model of network governance. The application of new technologies, means, methods and techniques to information gathering, processing and transferring has to be verified because it is the average citizen who is impacted from these advanced tools, and methods, of securitization. Governments and public agencies must seek a balanced approach to a subtle relationship between security and liberty. Information governance and public networking seem to be suitable means of legitimization of EU security policy. However, they would not minimize the side effects of large-scale information processing and circulation among security agencies on both the EU level, and within the transatlantic security community.

Freedom, security and justice are really laudable goals and all the efforts undertaken by the EU institutions and members towards the construction of a genuine security policy arena are the bright side of justice and home affairs cooperation. Unfortunately, it turns out more and more frequently that the measures leading to that objective cause harmful effects on liberty, transparency and senses of freedom among EU citizens. More accountability means greater influence of European Community institutions, like the European Parliament and Court of Justice, but at the same time this could slow decision making, subjecting it to political and legal debates, not only on the member level, but also, or mainly, on the EU level.

If the members want to energetically push their cooperation forward, they must work out a common approach regardless of various local, national, political, ideological, societal, cultural determinants. Yet Monar stresses that

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[38] Juliet Lodge, "EU Homeland Security: Citizens or Suspects?" *Journal of European Integration*, 2004, 26 (3): 253–79.

the "least common denominator, however, has in most cases meant 'negative' action in the sense of restrictive measures".[39] Therefore, progress achieved in reaching a single uniform approach may be illusionary and have negative outcomes over the long run.

Last, but not least, one should be fully aware that "the penalty for delay in building the area of freedom, security and justice could be an increase in crime, a lessening of confidence in the courts and an increase in insecurity on the part of European citizens".[40] The EU must reinvent internal security governance inasmuch as the reform treaty seems to be the lowest common denominator worked out in the long, dramatic and tortuous process of negotiations. Variable geometry of modes of EU internal security governance is the best available way out of the labyrinth of the EU's justice and home affairs.

European security is spilling over the external frontiers of the Union. In the era of the "war on terror", the challenge of global threats such as terrorism, transnational organized crime, large-scale migrations, cybercrime or money laundering cannot be met by the EU alone. Transnational processes, in which the EU has played for decades a leading and creative role, changed traditional perception and understanding of security. The breaking of nations allowed for not only circulation of ideas, international economic exchange, human mobility and development of interpersonal relations in the global scale, but also made room for proliferation of trans-border threats, pathologies and various forms of criminal activities.[41] The globalization of the structure of the international system is a dual process: positive stimulation of cooperation, exchange and mutually profitable economic and technological advancement was accompanied by emergence of new channels and opportunities for individuals, groups and organizations involved in illegal and criminal activities harmful and dysfunctional in the context of global stability and openness. As a result of these transnational processes, the move of security agencies beyond their national territories and the progress in international cooperation, at least in Europe, internal security became subject to a special kind of spill-over where decisions and moves facilitating transnational cooperation, economic integration and free movement prompted the emergence of new policies and measures seeking to strengthen liberties and reduce threats. In a wider Europe, there is a room for further measures and initiatives, and new members should perform a more active role in securing Europe against transnational threats.

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[39] Monar, "Specific factors, typology and development trends of modes of governance in the EU Justice and Home Affairs domain," 5.

[40] Adam Townsend, "Can the EU achieve an area of freedom, security and justice?", Centre for European Reform, London, October 2003, 9, available at http://www.cer.org.uk, accessed on 6 June 2004.

[41] See Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (London: Atlantic Books, 2003).

The politics of the EU is full of dichotomies. The hybrid nature of the EU seems to justify that feature of the European integration. Nonetheless, it does not absolutely mean that one should comprehend that complicated process through paradoxes and contradictions. The transnational aspect of the EU politics requires clear explanations to various queries and doubts concerning ways and means the EU adopts in its everyday activities. Perhaps the EU cooperation in justice and home affairs is an area where ambivalent approach is a must in order to grasp mentally all the peculiarities of the EU's overall governance of internal security matters.