

Challenges and Critiques of the EU Internal Security Strategy

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Rights, Power and Security

Edited by

Maria O'Neill and Ken Swinton

Cambridge
Scholars
Publishing



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This book first published 2017

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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ISBN (10): 1-4438-9165-7

ISBN (13): 978-1-4438-9165-3

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LIST OF ACRONYMS

AFSJ	Area of Freedom Security and Justice
AG	Advocate General
AS	aerial surveillance
AWFs	Analysis Work Files
CERTs	computer emergency response teams
CFCs	chlorofluorocarbons
CFSP	Common Foreign and Security Policy
CIIP	Critical Information Infrastructure Protection
CIP	Critical Infrastructure Protection
CIPS	financial instrument for “the protection of citizens and critical infrastructures against terrorist attacks and other security-related incidents”
CIWIN	Critical Infrastructure Warning and Information Network
CJEU	Court of Justice of the EU
CLC	Civil Liabilities Convention 1992
CoE	Council of Europe
CT	Counter-terrorism
DDoS	distributed denial of service
DGs	Directorate Generals (European Commission)
DNA	Deoxyribonucleic acid
DPAs	(national) Data protection authorities
DPO	Data Protection Office (Europol)
DPWP	Data Protection Working Party
EAS	External Action Service
ECD	Europol Council Decision
ECHR	European Convention on Human Rights
ECI	European Critical Infrastructures
ECIM	European Criminal Intelligence Model
ECIP-POC	network of national points of contact on European Critical Infrastructure Protection
ECJ	European Court of Justice
ECD	Europol Council Decision
ECtHR	European Court of Human Rights
EC3	European Cybercrime centre
EDA	European Defence Agency

EDPS	European Data Protection Supervisor
EEA	European Economic Area
EEAS	European External Action Service
EED	Energy Efficient Design Index
EIS	Europol Information System
EMSA	European Maritime Safety Agency
ENISA	European Network and Information Security Agency
ENP	European Neighbourhood Policy
ENTSOE	European energy providers and regulators
ENU	Europol National Units
EP	European Parliament
EPCIP	European Programme for Critical Infrastructure Protection
ERN-CIP	European Reference Network – Critical Infrastructure Protection
EU	European Union
EUCFR	EU Charter of Fundamental Rights
Euro-Med	Euro-Mediterranean
ESS	European Security Strategy
E3PR	European Public + Private Partnership for Resilience
FIU	Financial Intelligence Unit
FP	Focal Point (Europol)
GESAMP	Group of Experts on the Scientific Aspects of Marine Environmental Protection
GHGs	greenhouse gas emissions
HRW	Human Rights Watch
HMICS	HM Inspectorate of Constabulary for Scotland
HNS convention	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996
IT	Information Technology
IGO	Inter-Governmental Organisation
ICT	Information and Communication Technology
IPS	Inspectorate of Prosecution in Scotland
IMDG Code	International Maritime Dangerous Goods Code
IMO	International Maritime Organisation
ISS	Internal Security Strategy
JHA	Justice and Home Affairs
JRC	Joint Research Centre (European Commission)
JITs	Joint Investigation Teams
JSB	(Europol) Joint Supervisory Body

MARPOL	International Convention for the Prevention of Pollution from Ships 1973
MEPC	Marine Environmental Protection Committee (of the IMO)
NATO	North Atlantic Treaty Organisation
NGO	Non Governmental Organisations
NIM	National Intelligence Model
NIS	Network and Information Security
NLSs	Noxious Liquid Substances
NOx	nitrogen oxides
NSA	U.S.'s National Security Agency
OECD	Organisation for Economic Cooperation and Development
OLAF	European Anti-Fraud Office
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic 1992
PRFs	Port Reception Facilities
PJCCM	Police and Judicial Co-operation in Criminal Matters
RoI	Republic of Ireland
SAs	Special Areas
SCEDA	Scottish Crime and Drug Enforcement Agency (since merged into Police Scotland)
SECAs	Sulphur Emission Control Areas
SEEMP	Ship Energy Efficiency Management Plan
SID	Scottish Intelligence Database
SIENA	Secure Information Exchange Network Application
SIS	Schengen Information System
SOC	Serious and Organised Crime
SOx	sulphur oxides
SS	satellite imager
SYRIZA	Coalition of the Radical Left, Greece
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNCEIP	Thematic Network on Critical Energy Infrastructure Protection
UN	United Nations
UNCTAD	UN Conference on Trade and Development
UNHCR	United Nations High Commissioner for Refugees
US(A)	United States of America
USE	Unified Search Engine (Europol)
VIS	Visa Information System
VOCs	volatile organic compounds
WTO	World Trade Organisation

CHAPTER ONE

INTRODUCTION AND OVERVIEW

MARIA O'NEILL

The European Union's (EU's) Area of Freedom, Security and Justice (AFSJ) has entered a new period of development. Since the publication of *New Challenges for the EU Internal Security Strategy* with Cambridge Scholars in 2013,¹ the original implementation period of the Stockholm Programme – an open and secure Europe serving and protecting citizens² has come to an end, with some of its issues still having to be properly addressed. The new security programme for the EU, the European Agenda on Security,³ has since been written. The external relations of the EU, a subject covered in the 2013 book, have now come centre stage. Human trafficking, another subject explored in the 2013 book, is now gaining attention at both the legislative and operational law enforcement level in many EU member states. The other 2013 themes, the business of crime and the policing of ports are still receiving day to day law enforcement attention across the EU.

The post Lisbon EU Internal Security Strategy of 2010 has been in place for a number of years, and many of the provisions of the Stockholm Programme have been legislated for. The European Agenda on Security states that the EU Internal Security Strategy strategic objectives “remain valid and should continue to be pursued”.⁴ It is now necessary, however, to empirically analyse the exact levels of policy and practice developments

¹ O'Neill, Swinton and Winter, *New Challenges for the EU Internal Security Strategy* (Newcastle-upon-Tyne: Cambridge Scholars 2013).

² Stockholm Programme – an open and secure Europe serving and protecting citizens OJ 2010 C115/1.

³ Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions - *The European Agenda on Security*, COM(2015) 185 final.

⁴ *Ibid.*, 2.

of the various provisions of the internal security strategy, in order to ensure that no gaps remain where laws and practices are supposed, under the Stockholm Programme, to be in place, so that the implementation of the EU Internal Security Strategy does not end up being merely a paper based exercise. What works well, and is of considerable added value for some EU member states, may prove to be a mis-fit for others, leading to the argument that the provisions on enhanced cooperation⁵ should be used more frequently in this area. In addition the specific “accelerator”⁶ and “emergency brake”⁷ provisions for the AFSJ could be utilised more often to deliver an EU legal and practice framework that adds value to cross border justice and law enforcement provisions without adding new stumbling blocks and obstacles at the level of national implementation or operationalisation of what are otherwise well intentioned EU measures. This will require greater consultation in the design of proposals, and willingness to engage in greater levels of complexity at the development stage, by both EU officials and their counterparts within member states. It is also arguable that those provisions currently in place should be evaluated for their level of effectiveness, and fitness for purpose, for all and each of the EU member states, with any appropriate modifications being made at either the policy, legislative, implementation or practice level, as appropriate. However this is a matter for further research by other colleagues, both in law enforcement practice and academia.

Further challenges, with respect to the UK (subject to any post-Brexit agreement) and the Republic of Ireland (RoI), will be the impact of Protocol No 21 to both countries, and the impact of Protocol No 36 (Article 10.4) to the UK. Protocol No 21 looks forward from the date of the Lisbon Treaty, basically stating that any new measures under the AFSJ, (for which there were already similar, but differing UK and RoI opt outs for measures building on the Schengen *acquis*, predominantly in the area of “visas, asylum and immigration and other matters dealing with the free movement of [third country nationals]”,) are not to apply to them, unless that particular country opts back into the provision “within three

⁵ TEU, Article 20 and Articles 326 and 327 TFEU. Also relevant are Articles 329 to 334 TFEU.

⁶ Specific enhanced cooperation provisions for EU policing being provided for in TFEU Article 87.3, second paragraph. Article 83.3 second paragraph for Judicial Co-operation in Criminal Matters, and Article 86.1 second paragraph *et seq.* TFEU for the European Public Prosecutor.

⁷ TFEU Article 82.3 and Article 83.3 first paragraph for Judicial Co-operation in Criminal Matters.

months after a proposal or initiative has been presented to the Council.”⁸ It is unclear what exact impact this will have as the UK (subject to any post-Brexit agreement) and RoI have already opted back into many, but perhaps not all, of the post Lisbon measures. A full audit of the impact of this provision still has to be conducted. Under Protocol No 36, Article 10.4 the UK additionally had the option to opt out of all of the pre-Lisbon AFSJ measures that it was originally party to, with the option to “at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it” under the above provisions.⁹ The UK notified the EU of its intention to exercise its rights under Protocol no 36, Article 10.4 and issued a 158 page Command Paper on the UK’s view of the matter,¹⁰ leading to a block opt out, and the UK opting back into what it considered to be the 35 most important pre-Lisbon EU AFSJ measures.¹¹ It is to be remembered that the UK (subject to any post-Brexit agreement) can seek to re-join measures “at any time.” At the time of writing negotiations are ongoing with the EU as to how matters are to proceed. A challenge for both the UK (subject to any post-Brexit agreement) and the RoI will be to negotiate these changing relationships with the EU in this area. It will also pose a challenge for other member states of the EU in dealing with both these countries. However, despite the rhetoric in public, it is hoped that the level of UK and RoI disengagement with the AFSJ, outwith matters pertaining to their original Schengen opt outs, to include post-Brexit, may not be as great as originally feared.

Ensuring that no gaps remain in the EU legal and policy framework, while respecting national sovereignty, and the EU’s principle of subsidiarity,¹² where this applies, such as in the EU’s AFSJ,¹³ is one of the EU’s key challenges, an issue taken up by Bossong. In his chapter on the EU’s Critical Infrastructure Protection (CIP) and Critical Information Infrastructure Protection (CIIP) he starts the empirical analysis that he says is required to establish the exact level of development of the EU’s security profile given the considerable obstacles that the EU has faced to “translate its ambitions” into practice. The same argument could be made for all

⁸ Protocol No 21, Article 3.1.

⁹ Protocol No 36, Article 10.5.

¹⁰ HM Government, *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union*, July 2013, Cm 8671.

¹¹ Miller, V., In brief: the 2014 block opt-out and selective opt-back-ins, Standard Note: SN/IA/6684.

¹² TEU, Article 5.1.

¹³ TFEU, Article 4.2.j.

aspects of the EU internal security strategy. Separately the issue of CIIP is taken up later by Dewar, in his analysis of the EU's Cybersecurity provisions. Dewar talks about the lack of cohesion which has been seen at various stages of the development of the EU's Cybersecurity strategy, covering both the civilian and military response to this threat in Europe. Dewar concludes that the EU has maintained "consistent priorities but shifting approaches" during the course of the evolution of the strategy. In the context of Bossong's chapter this writer would argue that it is possible that the European Network and Information Security Agency (ENISA) could network capacities between more advanced member states in the context of cyber-security, while providing coverage, and protection, for those EU member states which are less developed in this area, particularly given that the EU is supposed to be providing additionality in this area.

As alluded to in the European Agenda on Security,¹⁴ it cannot be assumed that all issues raised in Stockholm Programme have in fact been adequately addressed, or that those which have been addressed are in fact effective in practice. A number of further provisions in the Stockholm Programme are now only beginning to see the light of day. Equally new internal security threats continue to emerge. Two non-traditional security threats are getting particular attention in this publication, environmental crime, often associated with organised crime, and a security issue of the 21st Century, cyber-security, which needs to be distinguished from cyber-crime. A further example of emerging security issues is the Joint Communication from the High Representative for the Common Foreign and Security Policy (CFSP) and the Commission on the need for a maritime security strategy.¹⁵ With external agencies expressly referred to in the communication, Carpenter's examination of the provisions for monitoring and controlling ship source pollution as an environmental crime is highly relevant.

As international maritime environmental provisions are a well-developed area of international law and practice, Carpenter's analysis of the state of play and operation of the ship source pollution provisions, in the various seas which surround the EU, and of interest to the UK post Brexit. The method of surveillance used when combating ship source pollution,

¹⁴ Communication from the Commission, *The European Agenda on Security*, 2.

¹⁵ High Representative of the European Union for foreign Affairs and Security Policy and European Commission: Joint Communication to the European Parliament and the Council; *For an open and secure global maritime domain: elements for a European Union maritime security strategy*, JOIN(2014) 9 final.

through satellite tracking, is a method which could be adapted for other law enforcement and public safety functions, and has been recommended for the tracking of commercial aircraft. It is worth noting in this context that the EU does have a (civilian) space programme, the European Space Agency (also referred to in the Joint Communication on maritime security), Ariane rockets, which take off from the EU's space port in French Guyana, and is developing the Galileo navigation system, which, when completed, will have 30 satellites in near earth orbit, with a number already deployed. The EU is also operating other systems, such as the Sentinel system, as well as the various commercial operations based within the EU, such as Inmarsat, which is already involved with maritime and aviation work. The issue of how existing maritime pollution reporting systems will interact with Europol, and law enforcement generally, an issue introduced by Blasi Casagran in her chapter on reform of Europol through the Europol regulation, is not addressed by Carpenter. No doubt this will be the subject matter of further academic research.

The 2009 Stockholm Programme, and the 2010 Internal Security Strategy had an ambitious vision. Each of their provisions must be implemented adequately in order to ensure a secure Europe for all of its citizens, while also reflecting the vision for a free and just Europe. Once the legal and policy frameworks have been properly designed, they then need to be implemented effectively. This implementation needs to be done by the relevant security, investigatory or judicial staff. The approach of the law enforcement community to the operationalization of EU policies, and their own impact on those policies, is an issue which attracts the attention of two contributors to this book, Skleparis and Egan, building on case studies in Greece and Scotland, UK, respectively, for their work. Of particular interest in the context of both of these chapters is Egan's examination of the development of police knowledge and whether the police can be considered to be an epistemic community. If this type of analysis is transferred to the subject matter of Skleparis' chapter, some interesting analysis could develop, particularly in the broader (than the subject matter of both chapters) context of EU cross border policing and counter-terrorism. A further challenge for the future effective development of the AFSJ, is that the approach taken in these two cases studies which would need to be adopted in each of the EU member states, in each of the key security threat areas, in order to develop an accurate picture of the effect and implementation of EU policies going forward.

At the power/security/rights nexus is an issue which gained prominence during 2013-2014, and still highly relevant today, the use of data by law enforcement agencies (and, outside the EU legal framework, the intelligence services,) also gets prominent attention in this 2014 Cambridge Scholars collection. Data can be collected by private parties for commercial purposes. This can then be transferred to law enforcement authorities for law enforcement purposes. Equally data can be collected by law enforcement authorities for intra-EU law enforcement purposes, but then be exported outside the EU, to countries which may or may not recognise the EU's data protection regime and associated rights. The number of countries to which this data can be exported is currently limited, although not unproblematic, particularly in the context of data transfer to the USA. With the external dimension of EU cross-border law enforcement anticipated to be developed in the future, to include with the UK post Brexit, but also in the ongoing relationships under the European Neighbourhood Policy and Euro-Mediterranean Policy, further, highly complex, challenges are expected to arise. Negotiations on cross-border law enforcement with Russia have floundered on the issue of effective data protection regulation (and practice) in Russia.¹⁶

Equally the issue now arising is where private parties are being tasked with collecting data for law enforcement purposes, and then storing that data until it is required, that data being stored either inside or outside the EU, with the possibility of leaks or non-authorised use of that data to third parties. The issues which surround data protection and data security are multiplying as the EU, and the world, becomes increasingly digitally interconnected. Furthermore, the issue of the collection of data following intelligence led policing,¹⁷ when suspected individuals are targeted, following the issuing of warrants, mediated by independent parties such as the judiciary, has to be juxtaposed with the increasing creep of mass surveillance through the storage of data which may or may not relate to a suspected individual, may or may not be connected to a particular crime, with that data being used by way of massive data processing methods, known in the law enforcement world as profiling, an issue which itself raises very serious issues with regard to the presumption of innocence, human and fundamental rights. It also raises the issue of wasting limited

¹⁶ Commission staff working document accompanying the communication from the Commission to the Council - *Review of EU-Russia relations pursuant to conclusions of the Extraordinary European Council of September 1, 2008*, COM(2008) 740 final, paragraph 40.

¹⁷ Radcliffe, J., *Intelligence Led Policing* (Cullompton: Willan Publishing, 2008).

law enforcement resources in building large data handling centres, when funds are still restricted for protecting society from known or legitimately suspected offenders or terrorists.

As the greatest bulk of EU cross-border law enforcement activities involve the transfer and analysis of personal data, this issue has attracted the attention of three contributors to this book, analysing this issue from three different perspectives. Gaps and conflicts have clearly emerged between the different legal tools, both planned, and in force, in this area. The attitudes of individual law enforcement officers, or their organisations, when processing such data, also needs to be examined, as officers, as either individuals or through a community of practitioners, can often bring their own prejudices to an activity, giving it an effect in practice which was not intended by either the policy makers or the legislatures, or which would find favour with relevant judiciary.

The underpinning legal framework for the EU AFSJ is also undergoing rapid change, with the five year phase in period of the Lisbon Treaty now over. The new legal and institutional framework began working in earnest from December 2014. The Court of Justice of the EU (CJEU) has now obtained its full powers,¹⁸ bringing with it the full impact of the upgrade in legal status of the EU Charter of Fundamental Rights (EUCFR). (This was one of the key points of contention with the UK in the AFSJ). The proposed accession of the EU to the Council of Europe's European Convention on Human Rights (ECHR) still has to be completed. There is a changing institutional balance within the EU, and a rebalance between the AFSJ's three themes. The widely accepted imbalance in favour of the more developed EU transnational security provisions is expected to be addressed by an improvement of the provisions of the EU transnational freedom and justice provisions. This is echoed in the European Agenda on Security.¹⁹ Equally there will be an increase in involvement of the Commission and European Parliament in law making for the AFSJ. However, even with the increased balance and robustness of the post Lisbon AFSJ legal framework, part of the EU, the CFSP, remains intergovernmental, outside the scope of review of the CJEU, and lacking a rights based legal system. This lack of judicial oversight for CFSP activities is an issue raised by Grant in her chapter on data protection. If a legal system has been developed, it needs to operate in all relevant areas. It is clear from Grant's

¹⁸ Protocol No 36 on Transitional Provisions attached to the TEU and the TFEU post Lisbon.

¹⁹ Communication from the Commission, *The European Agenda on Security*, 3.

chapter that a serious gap has emerged in the outward facing external activities of EU, as exemplified in her analysis of the activities of the External Action Service (EAS) as it handles personal data.

Independent of overarching EU legal and policy developments, details in the EU's legal and institutional provisions in the AFSJ are also developing. The Europol regulation has changed Europol's internal competences and operations, and adding a couple of new crime areas, as with ship source pollution, discussed above. The issue of rights, to offset the power which individual EU member states can maintain over individuals, in the context of EU law enforcement agencies activities, however, needs to be addressed. Both old and new provisions in the AFSJ now have to be fully EUCFR and ECHR compliant, and have been subject to adjudication to that effect since December 2014.

These significant developments will further involve policy makers, lawyers, criminologists and the law enforcement professionals across the EU. Each stage of the policy and practice development process needs to be examined, together with the sites or locations where security, and its counterpoints, freedom and justice, become an issue. The challenges for, and the critiques of the EU Internal Security strategy, from the perspective of rights, power and security, continue to multiply. This publication will address a number of these issues.

This collection, building on original research by its contributors, comprises work by authors from a wide variety of academic and professional areas and perspectives, as well as from different countries, on a variety of areas and issues related to or raised by the EU's Internal Security Strategy, from critical infrastructure protection to the data handling systems at Europol, from the implementation by the border police in Greece of EU external border policies, to the impact of the change of legal status of former Police and Judicial Co-operation in Criminal Matters (PJCCM) provisions, post Lisbon, the upgrade in legal status of the EUCFR, and the changing role of the CJEU in this area. This book examines, from a wide variety of discipline perspectives, to include law, geography and politics, both the changing legal landscape of the EU, and its response to new security threats, such as cyber security and the new role of Europol, under the Europol regulation, of the enforcement of ship source pollution.

The collection is divided into four parts. After this initial introduction, the second part examines some of the paradigm shifts which will be necessary

for the further development and deepening of the EU Internal Security Strategy. Both the changing legal system at the EU, and the need to empirically analyse the implementation of varying aspects of the EU security policy are covered here. The third part provides an analysis of the EU's data processing provisions from a law enforcement perspective, with three chapters taking differing approaches to this issue. The fourth part of this publication analyses the new security threat of environmental crime. Within each part the contributors examine different, but overlapping, legal, political, practical and analytical cases, themes and issues.

The second part of this book focuses on some of the paradigm shifts which will be necessary for the further development of security within the EU. While the initial policy and legal framework was set out in 2010, as the strategy develops, and is implemented, against a changing legal and security threat landscape, new approaches will be required to ensure that all aspects of its effective implementation and further development are addressed. The initial provisions of the law enforcement aspects of the AFSJ were designed, from the bottom up, by law enforcement personnel, using a constructivist approach. This has served the security aspect of the AFSJ well. However, as there is now an emphasis on the development of the "freedom" and "justice" aspects of the AFSJ, a new approach is required. This is a theme echoed by Grant in her later data protection chapter. While there is no intention to cross the treaty based red lines of EU competence, such as member state internal security or national security, and while recognising that the AFSJ is an area of shared competence subject to the principle of subsidiarity, an argument can still be made for a constitutionalist approach to the further development of the AFSJ, in light of the upgrade in legal status of PJCCM provisions, and the improved legal status of both the CJEU and the EUCFR post Lisbon. In addition, Bossong argues that for a proper further development of the security aspect of the AFSJ there is a need for a "cross-cutting empirical survey from a governance perspective", in order to establish where exactly we are in the development of the EU's internal security provisions, and in establishing what are the best approaches in closing off any gaps which may have developed.

O'Neill analyses the changing legal landscape of the AFSJ, which includes the post-Lisbon upgrade in status of the Court of Justice, which gained its full capacity in December 2014, the upgrade in legal status of the EUCFR 2000, and the anticipated accession of the EU to the Council of Europe's ECHR. Also covered is the much delayed EU road map on procedural

rights, now in the course of implementation. All of these developments will have a considerable impact on how cross-border law enforcement operations and prosecutions will be conducted, with one eye being kept at all times on the preparation of cases, and the collection of supporting evidence, for hearing in a court of at least one EU member state.

Bossong's chapter focuses on CIP. He addresses the "empirical complexity" of this area of governance at an EU level, which includes policy instruments, legislative provisions, and "financial incentives and involves a wide variety of actors, institutions and networks." He covers the separate tracks of development of "energy and transport networks," and "critical information infrastructures, which can mean any major IT-based communication and control system." He sheds light on this complex and rapidly evolving area, concluding that "sector-specific binding regulation and considerable institutional capacity-building at the EU level," rather than the much vaunted "public-private partnerships and networking across policy fields," appear to be the most effective approach to security governance in the area of CIP.

The third part of this book focuses on new security challenges for the EU Internal Security Strategy. While the EU and its member states may have thought that they had written a definitive strategy document, such as the EU Internal Security Strategy in 2010, new security threats continue to emerge, as reflected in the European Agenda on Security. As existing strategies are put into operation, new issues arise, such as how exactly Greek security professionals implement the EU's immigration regime, as analysed in Skleparis' chapter, and new or emerging security threats, such as cyber-security, as analysed by Dewar. With the ever changing security landscape, both at an international relations and internal crime level, the EU and its member states need to be constantly alert, and ready to respond with appropriate measures, in order to ensure that the EU really does provide security within the EU, and that either all or parts of the AFSJ do not just end up as very impressive, but ineffective, paper based exercises.

Skleparis' chapter can be seen as a case study of one of the user groups of the intelligence analysed by O'Neill, Blasi Casagran and Grant in their chapters. Equally a link between Egan's epistemic communities and Skleparis' work should be made. Skleparis' work focuses on the attitudes of Greek security professionals, whether they be the Hellenic Police or Coast Guard, in implementing the EU's border security provisions. He examines some "deeply embedded negative attitudes" to "various key

issues related to migration,” in a country located at a “busy land and sea crossing route for illegal migrants.” The chapter provides the Greek security professional’s view of the “migration-security nexus,” and their conceptualisation of the migrant as the “other” in the context of globalisation and multiculturalism. This is done through using data obtained from 20 face to face semi-structured interviews, and applying discourse analysis to 11 master’s dissertations produced by high-ranking officers in the Hellenic Police and Coast Guard. The chapter goes on to examine the impact of Frontex and their training products on this situation.

Dewar’s chapter examines the EU’s civilian response to cyber-security, acknowledging that the North Atlantic Treaty Organisation (NATO) is the key player in the military approach to cyber-security in most EU member states. His chapter starts with an historical analysis of EU cybersecurity policy. The chapter brings the reader through three distinct phases of this development, from the “first attempts to codify the field in the EU in 2001,” the impact of the change in EU focus after the failure of the draft EU Constitutional Treaty, and “subsequent attempts to revitalise interest in cybersecurity in 2006.” Dewar analyses the publication of the EU’s Cybersecurity Strategy, published in February 2013, and its supporting directive, examining what was the “first consolidated strategic response of the Union to cybersecurity issues.”

The fourth part of this book covers the highly contentious issue of data in a law enforcement context. Three chapters in this part tackle this issue, all written from quite distinct perspectives. In the absence of direct law enforcement powers and law enforcement agencies at EU level, the principal way in which the EU adds value to member states security in the context of transnational crime and counter-terrorism operations is in the sharing, and further analysis of data. Data processing brings with it the traditional issues of data protection, from a data subject perspective, and data security, from a law-enforcement perspective. Additionally the issue of massive data capture by law enforcement authorities, and private bodies acting on behalf of law enforcement authorities, has come to the fore, with many, including this writer, arguing that intelligence led policing should be maintained as the EU preferred method for transnational law enforcement, rather than mass data surveillance, which could lead to the highly problematic issue of reliance on profiling. A number of the relevant issues are addressed by contributors to this publication, with Blasi Casagran, writing with the benefit of the experience of a posting to Europol, on the Europol legal framework, and its impact on data

processing at Europol. Grant takes a rights and personal data approach to the issue of the free movement of data for security purposes, and also tackles the issue of internal EU law enforcement data being “exported” to third countries via the EU’s CFSP actors and mechanisms. Egan addresses the issue of police practitioners as an “epistemic community” and the approach of police professionals, in a Scottish financial investigation context to the issue of data in the context of law enforcement.

Blasi Casagran approaches the issue of EU law enforcement data processing from the perspective of Europol, both under the former provisions and under the Europol regulation. The main purpose of her study is to identify and analyse the new rules that will impact on the processing of personal data at Europol. She examines the many criticisms of the Europol regulation, from diverse pro-privacy interest groups, which argue that the regulation will make the former Europol data protection and data security schemes less restrictive, with less protection for the individual than was previously the case. She goes on to demonstrate that Europol can and will maintain and improve the robust data protection regime that the agency had already created.

Grant develops this theme of law enforcement data processing, taking a wider view than Blasi Casagran’s focus on Europol, and arguing her points from a data protection perspective. Building on both EU policy documents and case law of both the European Court of Human Rights (ECtHR) and the CJEU, she analyses proposals for reform, and the subsequent enactment, of the EU wide data protection within the now unified supranational legal framework of mainstream EU law. Grant also takes on the challenge of analysing the activities of the remaining intergovernmental activities of the EU, under the CFSP, in particular through the EU’s EAS. She examines the exact legal status of data protection in this intergovernmental area, and the gaps in data protection for data which is otherwise legally transferred from internal EU law enforcement bodies to, for example, the European Economic Area, for onward transmission to third countries for extra-EU law enforcement activities.

Egan’s chapter is based on earlier doctoral research with territorial Scottish police forces, focusing on the financial investigation community’s expertise. While the Scottish police structure has now changed, her work remains relevant to ongoing financial investigations, and its implications are transferrable to the wider policing community across the EU.

Specifically, she examines how the work of the Financial Intelligence Unit (FIU) contributes to the creation of police knowledge and its subsequent dissemination. She points out that the creation and dissemination of police knowledge is of concern because claims to knowledge can be exercised to influence the policy and law.²⁰ Boswell argues exercising these claims to knowledge can serve a legitimising and substantiating function.²¹ This means the knowledge can be drawn upon by an organisation to “bolster claims to resources or jurisdiction” or to justify policy preferences and marginalise competing interests.²² It has been argued by Ericson that police officers produce and distribute knowledge for the management of risk.²³ However, Ericson claims that police officers offer distinctive knowledge about such risks, and it is this distinctive contribution to the “security quilt” that provides their legitimacy as an aspect of government.²⁴ This author would argue, that in some areas of policing, and perhaps not those covered by Egan, the subjective nature of this police knowledge can be quite worrying, needing a stronger fundamental, human and due process legal framework.

Similarly challenging, Egan goes on to discuss the fact that the developing AFSJ places continued pressure on EU agencies to shore up the available evidence base for policy development.²⁵ The implementation of the EU Internal Security Strategy constructively demonstrates how such evidence is incorporated within policy development at the EU level. However, as acknowledged by Parkin, many of these EU agencies derive such evidence from member states’ various data repositories. Consequently, domestic organisations/agencies responsible for such data collection can influence EU level policy. Against this background, this chapter examines the interaction of national police practitioners as “experts in their field,” assessing the validity of their knowledge as a foundation for such policy and increasingly, law making.

²⁰ Boswell, C., *The Political Uses of Expert Knowledge: Immigration policy and Social Research* (Cambridge: Cambridge University Press, 2013), 7.

²¹ *Ibid.*

²² *Ibid.*

²³ Ericson, R., “The division of expert knowledge in policing and security”, *BJS* 45(2) (1994): 149-175. 151.

²⁴ *Ibid.* 153.

²⁵ Parkin, J., *EU Home Affairs Agencies and the Construction of EU Internal Security Strategy*, (Brussels: CEPS Paper in Liberty and Security in Europe No 53, December 2012).

The final part of this book focuses on the emerging area in the context of cross-border law enforcement, environmental crime. Often connected with the activities of organised crime groups, environmental crime, both terrestrial and maritime, is gaining an increasing profile at an EU level. Environmental crime generally is seen as “being a serious and growing problem that needs to be tackled at European level”.²⁶ With the Europol regulation expressly granting Europol competence to address ship source pollution, the issue arises as to how Europol is to operate in this area. In particular, Europol’s interaction with not only national law enforcement in the context of environmental crime, but also the EU’s Environment Agency and national environmental agencies need to be examined. In addition, as many of the laws in force in this area are international treaties, with both EU and non-EU contracting parties, Europol needs to develop operational relationships with these non-EU countries in the context of ship source pollution law enforcement. As Eurojust is competent to act in all crimes in which Europol is competent to act, transnational (EU and non-EU) prosecutions in the context of ship-source pollution also merit further academic, policy and practitioner examination. Separate from the above challenging issues, is where Carpenter’s analysis fits into the more broadly focused EU maritime security strategy.

Carpenter, in her chapter, examines the provisions on ship-source pollution as an environmental crime on the basis of EU and International law, leaving it to future researchers to examine how exactly both Europol and Eurojust will interact with the other key stakeholders in implementing its law enforcement and prosecution capacity in this area. Arguing that the ship-source pollution regime could provide a model for further developments for both territorially based environmental crime and transnational surveillance frameworks more generally, Carpenter’s chapter examines the MARPOL Convention,²⁷ which aims to prevent pollution by oil, noxious liquids and garbage, for example, through the use of standards for ships and also zones where the discharge of wastes is prohibited into the sea. The chapter also examines the EU Directive on Port Reception Facilities for ship-generated waste and cargo residues²⁸ and the role of the

²⁶ <http://ec.europa.eu/environment/legal/crime/index.htm> (last accessed: 21/7/17).

²⁷ International Convention for the Prevention of Pollution from Ships 1973, as amended by its Protocol of 1978.

²⁸ Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues, OJ 2000 L332/81.

EU's European Maritime Safety Agency (EMSA).²⁹ The chapter then goes on to examine three specific regimes, those covering the Baltic Sea, Mediterranean Sea and the North Sea, (adjacent to the post-Brexit UK), and the use of aerial surveillance is used to detect oil pollution and, through the use of satellites and in co-operation with the EMSA, to hindcast (back-track) oil pollution to a specific ship at sea. The chapter focuses, in particular on the regime covering the North Sea, together with the expansion of its regime into the North-East Atlantic.

Increasing complexity is emerging as the EU Internal Security Strategy develops over time, and moves from a paper based exercise to one that has to be implemented in practice, and deliver results, and against the background of a continuing diversity in legal and law enforcement systems across EU member states. These challenges are multiplied as new EU systems need to be integrated with existing communities of practices, with law enforcement agencies, and individual agents putting their own interpretation on what has been designed "in Brussels." In addition the imbalance between the rights, power and security elements of the AFSJ has been recognised, and needs to be rebalanced. It is clear that the Internal Security Strategy is, and will continue to be for a long time, a work in progress, as reflected in the European Agenda on Security,³⁰ not only addressing traditional transnational security threats, but in reacting to emerging issues which appear over time, either as new crime areas, or issues which arise during the implementation of earlier phases of the strategy. This will be a subject matter for academic discourse for many discipline areas for some time to come.

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²⁹ Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (Text with EEA relevance), OJ 2002 L208/1.

³⁰ Communication from the Commission, *European Agenda on Security*, 2.

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PARADIGM SHIFTS FOR THE EU

CHAPTER TWO

A FIRST MAPPING OF THE POTENTIAL IMPACT OF THE JUSTICE DEVELOPMENTS ON THE AREA OF FREEDOM SECURITY AND JUSTICE

MARIA O'NEILL

Introduction

We are entering into a new phase in the construction of what is now known as the Area of Freedom, Security and Justice (AFSJ). Early developments on the security side, led predominantly by law enforcement professionals, following an Onuf¹ style constructivist methodology, are now nearing completion. While a few specific crime areas still need to be addressed, the current areas of rapid development are in the freedom and justice aspects of the AFSJ. A new prism needs to be adopted, namely one of European Union (EU) constitutionalism, further refining what it means to be an EU citizen. The Lisbon Treaty gave a massive impetus to these new areas of development, giving a substantial upgrading in the legal framework for ex. Police and Judicial Co-operation in Criminal Matters (PJCCM) matters. These provisions also become subject to adjudication by the Court of Justice (CJEU), formerly the European Court of Justice (ECJ), and benefit from the Lisbon Treaty upgrade of the EU Charter of Fundamental Rights (EUCFR), and the anticipated accession of the EU to the European Convention on Human Rights (ECHR). This area of law “is still in its infancy.”² These changes should equally affect the UK (subject to any post-Brexit agreement) and Poland, despite their opt-out positions

¹ Onuf, N., “Constructivism: A User’s Manual”, in *International Relations in a Constructed world*, eds. V. Kubáľková, N. Onuf and P. Kowert. (New York: M.E. Sharpe, 1998), 58.

² Luchtman, M. “Principles of European Criminal Law: Jurisdiction, Choice of Forum, and the Legality Principle in the Area of Freedom, Security, and Justice,” *European Review of Private Law* 2012, 347-380, 347.

pursuant to Protocol No. 30 post-Lisbon, with regard to the EUCFR. The imbalance between security and freedom and justice in the AFSJ is causing problems. Guild talks about “unleashing the power of the Member States to exercise punishment at the edges of their own constitutional settlements.”³ Equally, problems arise when only the “enforcement mechanisms of criminal law” is given equal status across borders.⁴ However, constitutional problems arise, as while the AFSJ is clearly a matter for the EU, “criminal law in general” is not.⁵ The development of powers at an EU level “as a means to cope with the increasing transnational crimes as a result of European integration” needs therefore, to be matched “by appropriate protection of fundamental rights at that level.”⁶

The member states of the EU, however, come from three main legal traditions, “the inquisitorial, adversarial, and post-state socialist.”⁷ In addition, “criminal procedures vary enormously,” as do “the level of legal protection offered to suspects in criminal proceedings,”⁸ with court procedures and decisions reflecting “the very different constitutional traditions of each country.”⁹ These fundamental differences, in areas outside the EU’s competence, allied with the increase in numbers of people in transnational criminal investigations and decisions, involving possibly more than two EU member states,¹⁰ are leading to some very complex problems.

In addition to examining the very real instrumentalist issues which arise, questions as to the constitutional impact of these developments also need

³ Guild, E., “Crime and the EU’s Constitutional future in the Area of Freedom Security and Justice,” *European Law Journal*, 10(2): 220.

⁴ *Ibid.* 219.

⁵ Luchtman, “Principles of European Criminal Law,” 358.

⁶ *Ibid.* 366.

⁷ Vocht, D.L.F. de & Spronken, T.N.B.M., “EU Policy to Guarantee Procedural Rights in Criminal Proceedings: ‘Step by Step’”, *North Carolina Journal of International Law and Commercial Regulation*, 37 (2011): 436-488, 238.

⁸ *Ibid.*, 237.

⁹ Ziamou, T., “New process rights for citizens? The American tradition and the German legal perspective in procedural review of rulemaking”, *Public Law* (1999), Win.: 726-742, 726.

¹⁰ De Bondt W. and Vermeulen, G., “The Procedural Rights Debate A Bridge Too Far or Still Not Far Enough?” *EUCRIM (FREIBURG)*, 4 (2010): 163-167, 163.