



An Chomhairle Náisiúnta Eacnamaíoch agus Shóisialta
National Economic & Social Council

BACKGROUND PAPER

7. Ireland's Engagement with EU Policy on Justice, Home Affairs and Foreign Relations

by Barry Vaughan



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Table of Contents

Background Paper 7

Justice, Home Affairs and Foreign Relations

7.1	General Information	1
7.2	EU External Relations	2
7.3	Migration, Border and Asylum Policy – Variety amidst a Common System	14
7.4	Justice and Home Affairs	26
7.5	General Conclusion	31

List of Tables

7.1	Overview of Significant Developments in the EU's Foreign Policy	3
7.2	Major Elements of EU Grand Strategy	9
7.3	Key Developments in EU Migration and Asylum Policy	14
7.4	Chronology of Significant Developments in Justice & Home Affairs	26

Abbreviations

CAP

Common
Agricultural Policy

CEAS

Common European
Asylum System

CEEC

Conseil Européen
des Economistes
de la Construction
[European Council
of construction
Economists]

CFSP

Common Foreign &
Security Policy

EASO

European Asylum
Support Office

ECJ

European Court
of Justice

EDA

European Defence
Agency

EEC

European Economic
Community

ENP

European
Neighbourhood
Policy

EPC

European Political
Co-operation

EPN

European Patrols
Network

ESDP

European Security
and Defence Policy

EU

European Union

EURODAC

European
Dactyloscopy

EUROSUR

European Border
Surveillance System

FRONTEX

Frontières Extérieures
[European Agency
for the Management
of Operational
Co-operation at the
External Borders of
the Member States]

JLS

Justice, Liberté,
Sécurité [Justice,
Freedom and
Security]

NAFTA

North American Free
Trade Agreement

NATO

North Atlantic Treaty
Organisation

PSC

Political and Security
Committee

RABIT

Rapid Border
Intervention Teams

SAA

Stabilisation
and Association
Agreements

7

BACKGROUND PAPER

Ireland's Engagement with EU Policy on Justice, Home Affairs and Foreign Relations

7.1 General Introduction

This chapter analyses developments in two important areas of EU policy-making and governance, namely EU foreign policy and Justice & Home Affairs. Although these subjects would not normally come under NESC's remit, their increasing prominence within the governance of the EU entails that some analysis is necessary in order to understand their significance.

The changing nature of sovereignty within the EU offers an explanation of why Ireland should support these initiatives. NESC has endorsed the view that sovereignty 'no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership of reasonably good standing in the regimes that make up the substance of economic life' (Chayes and Chayes 1995:27). The experience of Ireland within the EU has been a testament to the capacity of the Union to catalyse the development of member-states in concert with others. In so doing, sovereignty, the capacity of a state to fulfil national preferences, has become tied to status, the vindication of a state's existence as a member of an international system.

Thinking afresh about sovereignty in this way offers us reasons why Ireland might support developments in these two policy fields of foreign relations and justice and home affairs. Although they would be considered to be core aspects of a traditional view, the fact that sovereignty has undergone a deep transformation, suggests that Ireland should not be discomfited by greater co-operation in these areas. First because Ireland has interests that could not be achieved apart from its membership of the EU and participation in its operations; and second, even where it may not have a direct interest, it may still cement its reputation and secure its status by being a willing participant and facilitator.

The chapter is divided into three main parts. The first section follows the development of the EU's foreign policy which has been stimulated by enlargement and a more unsettled international environment. Both of these developments have prompted the member-states of the EU to consider greater co-operation in foreign policy. The ends of this common model of foreign policy are many including maintaining the security of the Union; support of human rights; prevention of conflict; eradication of poverty in developing countries; ensuring sustainable development; and the promotion of greater cooperation between countries (Art. 21 TEU). Ambitious goals such as these require some degree of co-operation both between member-states and amongst the various institutions and organization of the EU. How thorough and consistent are these linkages is explored in this section.

The next section analyses developments in migration, border control and asylum policy. It notes how the EU has emphasized a regional and global approach to migration, partly in response to member-states' desire to regulate the numbers of people admitted through their borders. On borders policy, the EU has moved towards a coordinating role through the development of a number of different agencies. And on asylum policy, the EU has moved towards a common system, first based on legally enforceable minimum standards and is now to be achieved by reducing various discrepancies between countries. How much national variety should remain with this increasingly common system remains to be seen.

The issue of national variety amidst an increasingly integrated system re-occurs within the last section of this chapter. The EU has started to develop a significant presence in the area of judicial co-operation in criminal and police matters, largely thanks to the Lisbon Treaty collapsing the distinctions between the first and third pillar. This means that developments are now governed by the Community Method but Ireland has secured the right to opt in on a case by case basis. The outstanding question is the extent to which this selective policy can be maintained amidst pressures for greater integration.

7.2 EU External Relations

7.2.1 Introduction

This section traces the development of foreign policy between EU member-states from its beginnings outside the framework of EU Treaties in the 1970s through to its incorporation in the Treaties of Maastricht (the Treaty on European Union, TEU), Amsterdam (Treaty of Amsterdam Amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts) and Lisbon (Reform Treaty). This section will first trace the origins of a common foreign policy from the Maastricht Treaty and show how it became more prominent thanks to the emergence of the Countries of Central and Eastern Europe from communism and the outbreak of sustained conflict in the Balkans region. In response to the latter, the EU has pioneered a distinctive form of intervention, which sets the aim of peace-keeping as the sustainable cessation of conflict. In the 21st century, the EU has highlighted a number a number of novel threats such as failing states, energy security, climate change and organized crime which are not susceptible to military solutions. This has placed a premium on coherence and consistency between the various policies of the EU so that, for example, trade and development policies support each other.

Table 7.1 Overview of Significant Developments in the EU's Foreign Policy

1972	European Political Cooperation (EPC) – established first framework for foreign policy consultation and cooperation
1992	Maastricht Treaty- established the Common Foreign and Security Policy (CFSP)
1997	Amsterdam Treaty- established the European Security and Defence Policy (ESDP) as a subset of the broader CFSP
1999	European Councils at Cologne and Helsinki - agreed the infrastructure designed to underpin ESDP
2003	ESDP declared operational and European Security Strategy agreed; Council publishes strategy document, <i>A Secure Europe in a Better World</i> (2003), published identifying five major threats
2007	Lisbon Treaty – amendments to provisions on foreign, security and defence policy and re-titles ESDP as the Common Security and Defence Policy (CSDP)
2008	2008 — Council releases a review, <i>Providing Security in a Changing World</i>

7.2.2 The Origins of the EU's Foreign Policy

Prior to the Maastricht Treaty of 1992, foreign policy was largely conducted outside of the legal framework of the then EEC by its member-states. The European Economic Community did have a competence in external trade and negotiated on behalf of its members. In 1970, the then six members of the EEC established a forum known as European Political Cooperation (EPC) which concentrated on the coordination of the foreign policies of its members. Its profile was restricted due to the presence of the North Atlantic Treaty Organization (NATO) and the diversity of viewpoints among its membership. The Single European Act of 1986 brought the EPC under the framework of the European Community and it developed a Secretariat based in Brussels. While its defenders would hail the EPC as a successful model of intergovernmental cooperation without formal integration, its critics noted that it had failed to create an impact on major foreign policy issues such as the Middle East conflict, the invasion of Afghanistan and the support of democratic movements in Poland. The collapse of Communist regimes in 1989 proved to be another challenge.

Within the European Community there were differences about how to react to these events. Some governments favoured the development of a common foreign policy within a Community framework whereas other resisted a move away from the then existing intergovernmental framework and toward a common foreign policy. The ultimate outcome in the Treaty of Maastricht was to locate foreign and security policy within an intergovernmental 'second pillar'. The Treaty declared that 'A Common Foreign and Security Policy [hereafter referred to as CFSP] is hereby established' (Art. J. Title V) and stated that this might entail the 'eventual framing

of a common defence policy, which might in time lead to a common defence' (Art. J 4, Title V).

The use of the term 'common' might give the impression that CFSP was equivalent to the common policies with the EU's first pillar, such as CAP, so that the EU would be sufficiently empowered to achieve a substantial presence in terms of foreign policy. However, the Maastricht Treaty did not provide either for the institutions or budget to achieve such a common policy and the failure of the EU to respond adequately to conflicts in the former Yugoslav republic seemed to underline this incapacity.

By the mid-1990s, the EU's southern members were pressing for a greater focus on the Mediterranean area rather than just the former communist regimes of Central and Eastern Europe. From 1995 on, 6.6 billion and 4.4 billion ecus/euros was committed to Central/Eastern Europe and the Mediterranean respectively. The Conclusion of the EU Presidency in December 1995 also extended the EU's interest beyond Central and Eastern Europe by referring to developments in the Mediterranean, alliances between the EU and US, positions between the EU and Asia, strategies for future relations with Russia and guidelines for cooperation with Latin America.

Some member-states believed that the EU lacked the institutional resources to realize these aspirations and pressed for a permanent post to instill a continuity and presence to EU foreign policy. The Amsterdam Treaty provided for such a post, the High Representative for CFSP supported by a permanent secretariat, whose role was to prepare policy decisions and conduct dialogue with third parties. The Treaty of Amsterdam allowed for the formulation of 'common strategies to be implemented by the Union in areas where the Member States have important interests in common' (Art. J.3.2). It elaborated what the concerns of such strategies might be, namely 'humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking' (Art. J.7.2), the so-called Petersburg Tasks.

7.2.3 Towards Autonomous Action

Protracted conflict in the former Yugoslavia demonstrated the evident lack of an effective common response to this crisis. No individual member-state had the capacity to deal with such a crisis as it demanded a collective response. Member-states became more conciliatory toward the prospect of common action. This sentiment was crystallized in the Franco-British Saint Malo declaration of 1998 which declared that the EU must have 'the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises' (para. 2). Saint-Malo marked a turning point in both French and British attitudes to their involvement in a co-operative European military venture. At the June 1999 European Council in Cologne, member-states pledged their determination that 'the European Union shall play its full role on the international stage' by having the capacity to take decisions on the full range of conflict prevention and crisis management matters known as the Petersberg tasks, as defined in the Amsterdam Treaty.

To achieve this goal, several institutional changes were made. Javier Solana, a former Secretary-General of NATO, was nominated to the post of High Representative for CFSP; a Political and Security Committee (PSC) consisting of ambassadors of each member-state met twice weekly in Brussels; an EU military committee made up of military delegates from each country which is responsible for giving advice to the PSC and European Council; and the creation of an EU military staff that is responsible for early warning and strategic analysis.

In 1999, at a gathering in Helsinki, the European Council announced that in order for member-states to co-operate voluntarily in EU-led operation, they must be able, by 2003 'to deploy within 60 days and sustain for at least 1 year military forces of up to 50,000-60,000 persons capable of the full range of Petersberg tasks' (Presidency Conclusions, 10-11th December 1999, para. 27).

The European Council of Feira (2000) defined four priority areas for the EU to develop civilian capabilities: police, strengthening the rule of law, civil administration and civil protection. By 2003, the EU was committed to having 5000 police officers at its disposal; a pool of judges, prosecutors and civilian administration experts as well as assessment and intervention teams for deployment at short notice. In January 2003, the EU took over from the UN's International Police Task Force in Bosnia-Herzegovina and since then has been involved in a number of humanitarian and peace-keeping tasks (Keatinge and Tonra 2009). In May 2003, the Council agreed that the EU possessed the capability to complete the Petersberg tasks and a mechanism was established to evaluate how commitments were being met.

In 2004, a decision was made to create smaller units in the form of so-called 'battle-groups'. These are forces comprising between 1,500-2,500 troops, with personnel drawn from several different nations. Eighteen battle-groups have been created thus far, and two are always on stand-by in any six-month period ready to be deployed in the event of a crisis. Ireland currently operates with the Nordic battle-group with the other participating countries being Sweden, Norway, Finland and Estonia. Although this move circumvented the constraints upon personnel, the emerging ESDP has been hindered by capacity constraints. A European Defence Agency (EDA) was created in 2004 to encourage the interoperability of the military equipment of the various participating countries.

7.2.4 A Changing Security Environment

In the process of meeting the Helsinki headline goals, the EU also had to contend with a very different security environment introduced by the events of 9/11. The Helsinki Goals were conditioned by the experience of the conflict in the Balkans yet the terrorism displayed by the groups responsible for 9/11 seemed to demand a very different response. After a meeting on 21st September 2001, the Council adopted an action plan against terrorism and pledged that it would 'be a priority objective of the European Union'. In 2002, the Seville European Council affirmed a role for CFSP to contribute in the struggle against terrorism (Presidency Conclusions, 21st-22nd June 2002, para. 11).

A strategy document, *A Secure Europe in a Better World* (2003), developed by the High Representative, identified five major threats: international terrorism, proliferation of weapons of mass destruction, regional conflicts, failed states and organized crime. Identifying such threats led to a revision of security policy and its partial fusion with foreign policy. In fashioning a response to these threats, it was contended that the 'first line will often be abroad' (ibid: 7) and the optimal responses would be only partly based on military means. The strategy considered that 'the best protection for our security is a world of well-governed democratic states' (ibid: 10) which necessitates supporting democratic governance within weak states and strengthening social and political order. Trade and development policies were affirmed as vital instruments to encourage political reform. If the recognition of certain threats such as terrorism and organized crime entailed a blurring of boundaries between the then second and third pillars, reducing these threats meant that the boundaries between the policies of the second and first pillar were merging.

Two key concepts used to meet these threats were identified as 'preventative engagement' and 'effective multilateralism'. The first concept referred to the need for early engagement before countries around the EU deteriorated to avoid more serious problems in the future. Earlier intervention would tilt the emphasis away from military missions and might involve assistance such as 'joint disarmament operations, support for third countries in combating terrorism and security sector reform' (ibid: 12). The security of the EU would be enhanced by promoting a 'ring of well governed countries to the East of the European Union and on the borders of the Mediterranean' (ibid: 8). The second concept reflected the EU's commitment to a rule-based international order through the elevation of international organizations and treaties such as the UN and its charter. The document affirmed that 'strengthening the United Nations...is a European priority' (ibid: 9).

Consequent upon this review, the document stressed that the EU had to be more active in pursuing its strategic objectives in CFSP by developing 'early, rapid, and when necessary, robust intervention' (ibid: 11). Greater capability was also called for in terms of greater information sharing between member-states and the development of a civilian capability to deal with crisis situations. And the last area for action was a call for greater coherence between the various policies of the EU and its member states to ensure that a comprehensive approach to security could be established.

The High Representative (2005) cautioned that a common European Security and Defense Policy had to be based on 'minimum of realism', neither ignoring national differences in the name of an equality of member-states nor magnifying differences in the name of a principle of relative effectiveness (leadership through the larger member-states). Instead, Solana claimed the development of the European Security Strategy had enabled new methods for the construction of a political consensus with Europe which was dominated neither by large states nor by the institutions of the European Union which helped a 'general European interest' to emerge (ibid).

As a result of this consensus, the EU has undertaken 27 missions on three continents since the beginning of 2003. The missions have been weighted toward civilian intervention by a ratio of 2:1 with 19 civilian missions and 8 military ones since 2003 (Keatinge and Tonra 2009). Civilian missions often involve police personnel from EU member states assisting local police forces through monitoring and mentoring rather than directly intervening themselves. Some civilian missions have a broader mandate to restore the rule of law and involve reforming courts, prisons and customs. Numbers involved in these missions can range from a handful as in Georgia to several thousand as occurred in Kosovo.

Military missions tend to be large affairs and take place in situations which are not yet stable enough to receive a mainly civilian intervention. Major operations have taken place in the Balkans and several have taken place on the African continent including the Democratic Republic of Congo and Chad with Irish participation prominent in the latter operation.

7.2.5 Reviewing Progress

A review by the European Council in 2008 — *Providing Security in a Changing World* — documented progress against the threats covered in the 2003 strategy. It also enunciated several others including energy security and climate change. The review predicted that by 2030 the EU would have to import 70 per cent of its oil and gas requirements, much of which would have to come from countries facing instability. The Commission had first raised the issue of energy security in 2000 in a Green Paper, *Towards a European Strategy for the Security of Energy Supply*, and pointed out that the EU did not possess a competence in this area. In 2006, the Commission launched a new Green Paper, *A European Strategy for Sustainable, Competitive and Secure Energy*, which enquired whether 'there is agreement on the need to develop a new common, European strategy for energy (2006: 4). Some weeks later the European Council called for an 'Energy Policy for Europe'. Several priority areas were identified.

The first concerns upgrading and constructing new infrastructure to ensure a secure and reliable supply of energy and avoid undue reliance on any one producer. The Council has recognized that energy policy represents a key part of external relations for the EU and its member-states and therefore it is important that the EU and its member-states 'speak with one voice'. So-called 'energy dialogues' have been established with a number of third countries. The Council has also called for greater attention to the question of renewable energy which is bound up with the EU's commitment to play a leading role in the protection of the environment.

The EU has claimed such a role ever since the climate change convention of 1991. The EU's intervention was decisive in preserving the Kyoto Protocol after the US administration declared its opposition in 2001. In 2003 the European Security Strategy identified how competition for natural resources such as water would be aggravated by climate change and would cause further instability and migratory movements in certain regions. In 2008, the Commission affirmed this analysis labeling climate as a 'threat multiplier' that facilitated disasters, spurred on environmental degradation and induced greater competition for natural resources.

Over the period, the EU has sought to enhance its credibility as a pioneer in this area. In March 2007, EU governments made a commitment for the EU to reduce its greenhouse gas emissions by 20 percent from the 1990 level by 2020. In addition, the European Council agreed to increase the share of renewable energy sources in the EU energy supply to 20 percent and the contribution of bio-fuels in transport to 10 percent in 2020. It also approved the objective of saving 20 percent on the EU's projected energy consumption for 2020.

The EU's role in taking the lead in environmental policy is in keeping with its general conception of its place in the world, namely an entity dedicated to upholding certain values through largely peaceful means. It is likely that 'improvement of the quality of the environment' will continue to operate as an important policy goal as it confirms important facets of the EU's identity. This commitment to environmental goals demonstrates that the foreign policy within the context of the EU encompasses a range of issues, such as energy security, that have not traditionally been inscribed within the compass of foreign policy. Underlying this broad notion of a foreign policy may help to alleviate some of the concerns about an emergent EU foreign policy.

It has been argued that the EU's holistic approach to security matches what Irish governments have tried to practice through the United Nations and EU involvement provides a valuable avenue through which Ireland's peace-keeping tradition can be maintained (Keatinge and Tonra 2009). Ireland has a prominent supporter of EU missions, with perhaps the most prominent example being the operation in Chad, which was under the command of an Irish officer, and where a battalion of 450 personnel was deployed. But Irish personnel have been involved in a number of other missions which have involved monitoring in Georgia, sending weapons-decommissioning experts to Indonesia and training prison officials from Iraq. This emphasis on civilian missions is laudable but it should be borne in mind that EU foreign policy seeks to 'influence or shape sustainable political, legal and socio-economic structures' which can minimize crisis or conflict and (Keukeleire and MacNaughton 2008). Therefore, attention needs to be paid to linkages with trade, development and migration policies, the objective of which is to prevent instability and conflict becoming manifest. This issue is explored in the next section.

7.2.6 Broadening the EU's Foreign Policy into Different Arenas

Foreign policy as conducted by the EU is even broader than this holistic conception of security management. It encompasses physical security, economic prosperity and the projection of democratic values. These principles are enacted as distinctive strategies depending on the arena in which they occur and Smith (2008) suggests there are three: internal, regional and global (see table below).

Table 7.2 Major Elements of EU Grand Strategy

	Internal	Regional	Global
Physical Security	EU as a pluralistic security community Specific confidence-building measures	Enlargement: turning neighbors into members Leading by example (EU as a model for regional cooperation)	Support for efforts against WMD EU as a model for regional cooperation Maintenance of NATO
Economic Prosperity	Trade bloc liberalization in line with European social model	Power of attraction Leading by example Preferential regional trade liberalization	Support for WTO trade regime Special attention to Less Developed Countries
Value	Copenhagen criteria required of all EU member states Charter of Fundamental Rights of the European Union	Political conditionality for cooperation with EU Support for Council of Europe and ECHR	Support for UN human rights policies Opportunistic value projection

Source Smith 2008

When considering internal security, it is clear that EU foreign policy gives more weight to novel threats such as internal terrorism or organized crime than ones based around defense of a sovereign territory. For example, it has encouraged the EU to take an interest in the border arrangements of neighboring countries in an effort to curb illegal immigration. Calming sources of potential conflagration in the regions surrounding the EU has also been a priority and has probably been most successful with the Central and Eastern European Countries and the Balkans. Following the fall of the Berlin Wall, the former group of countries had to fulfill a set of criteria in order to qualify for membership of the EU. These included ensuring the existence of institutions that would safeguard democracy and the rule of law; the existence of a functioning market economy; and take on the obligations of membership. These conditions were not viewed as oppressive since the peoples of these countries were already attuned to the prospect of EU membership. The fulcrum of the EU's structural foreign policy has been a mixture of trade concessions, economic assistance and contractual relationships known as SAAs (Stabilization and Association Agreements). These cover the development of the four freedoms including the establishment of a free trade area; the approximation of legislation to the EU acquis and cooperation in the area of freedom, security and justice. The prospect of accession that gives the EU its leverage and allowed it to impose conditions beyond those imposed upon the CEEC. These include a commitment to good relations with neighbouring countries; compliance with obligations arising from various peace agreements; and a readiness to protect minorities and facilitate the return of displaced people.

Structural ‘foreign’ policy loses some of its potential force when it becomes detached from the prospect of EU membership. In 2004, the EU agreed a European Neighbourhood Policy (ENP) with several countries in Eastern Europe — Ukraine and Moldova — and the Southern Caucasus — Armenia, Azerbaijan and Georgia. Its stated aim is to establish a common area of security, stability and well-being and to prevent the emergence of new dividing lines after the EU enlargement in 2004. ENP Action plans aim to consolidate democracy, the rule of law and good governance. In an evaluation of these action plans, the Commission has highlighted three areas which have proven disappointing: lack of progress in resolving conflicts in these regions; a lack of access to the EU market for products from these countries; and insufficient progress on the movement of citizens from these partner countries to the EU. The EU’s relationship with Russia and its vulnerability in terms of energy security is partly responsible for inhibiting some of its efforts to grant greater concessions.

These policies demonstrate a clear linkage between physical security within the EU and economic prosperity outside of it. Similar linkages are demonstrated in the EU’s adoption of a ‘global approach’ to migration by the ratification of mobility partnership agreements with third countries. Countries involved in such partnerships agree to discourage illegal migration and readmit their own nationals in exchange for short-term visas to enter the EU which is of benefit to both parties.

Agreements such as these often depend on accordance with the EU’s projection of democratic values. Trade deals often depend on what is known as a conditionality clause, linking market concessions with the promotion of democracy and human rights. Linking trade with democratic values is one way of ensuring coherence between the different policies of the EU. This has been an explicit goal since the Maastricht Treaty underlined the importance of consistency of the EU’s external activities ‘as a whole in the context of its external relations, security, economic and development policies’ (Art. C). Despite this goal, it might be the lack of consistency between the actions of the EU and the member-states, and the lack of coherence between policies in different domains, that could pose the greatest risk to the success of the EU’s foreign policy.

7.2.7 Establishing Coherence in the EU’s External Relations

Despite the progress made in the development of ESDP, there is a danger that it can be used not as an instrument of foreign policy but as a substitute for policy itself. If one recalls the distinction between a conventional and structural foreign policy, ESDP may too easily be aligned with the former in a rather reactive mode. If EU foreign policy is to be considered ‘structural’, that is contribute to the sustainable social, political and economic structures, then it needs to extend beyond security and defence considerations to encompass the kinds of issues already alluded to, such as energy security and environmental protection. In fact, the agenda may need to be broadened still further to bring in some of the issues usually associated with the actions of the EU in the first pillar.

For example, the trading activity of the European Union is of such significance – being the world's leading exporter and second largest importer – that it can both support and undermine foreign and development policy objectives. Apart from the overall effects of trade policy, the EU can conclude trade agreements with countries and regions granting preferential access to its markets as well as imposing sanctions such as trade restrictions. In fact, 'pure' trade agreements are rather rare with various development goals often attached. The EU has often used such agreements strategically with trade and cooperation agreements being concluded with Poland and Hungary after the fall of the Berlin Wall to support reforms. Agreements have also been struck as a way of rewarding good behavior such as occurred with South Africa after the fall of apartheid.

The EU can also exercise influence over its external relations through its development policy. The EU and its member-states are the largest donors of humanitarian aid in the world. From this fact, some support the view that the EU should be able to use development co-operation to effect changes within third countries in line with its world view. Accordingly, some have argued that the responsibility for development policy should lie with the newly-constituted post, under the Lisbon Treaty, of the High Representative of the Union for Foreign Affairs and Security Policy. Others have contested that this amounts to a 'politicization' of development policy which might obscure its primary aim, namely the reduction and eradication of poverty as specified in Art. 208 of the Lisbon Treaty. If development policy became more firmly embedded in the EU's external relations, would this mean weakening a commitment to fight poverty where it is unlikely that democracy will flourish? Conversely, can development aid ever be successful in its objective of eradicating poverty without being part of a 'structural' foreign policy? The problem may be in aligning development goals with other interests such as those relating to the EU's agricultural policies.

And the reason for this obstacle might lie in the continuing disjuncture between national interests and the aspirations for an EU common foreign policy. This is not to say that one will prevail over the other. Member-states, especially smaller ones, will often choose to adapt to a more uncertain global environment by aligning themselves with a larger collective voice. It should not be assumed that an emerging EU foreign policy smothers or stifles the voice of smaller nations. In fact, it might give them the space and resources to project traditional concerns afresh or discover new ones. Thus a small state like Portugal was able to draw attention to the situation in East Timor, Spain brought issues relating to NAFTA and Latin America to the EU's attention and large states such as Britain and France have been able to re-engage their former colonies under the auspices of EU-Asian dialogue. Examples like these suggest that member-states do not always approach foreign policy with 'fixed' interests; in addition, whatever concerns member-states have are not necessarily swept away by an emergent EU foreign policy. Instead an interactive explanation, as outlined in Background Paper 1 may be the most valid.

Genestto (2005: 22) comments that the first five years of European defence policy has demonstrated the 'possibility of a third way toward integration, neither totally Community-based nor strictly intergovernmental'. Both the High Representative and the Commission have proven vital in establishing some sort of common defence and security policy and then broadening it to include issues such as energy security. Developments such as these have led analysts to speculate whether the High Representative and the organisations that orbit this post may play an analogous role to that of the Commission in the first pillar, namely identifying and operationalising the common 'European' interest. Keukeleire and MacNaughton (2008) argue that the establishment of such bodies has facilitated a transition of CFSP toward a problem-solving approach rooted in a perception of common interests and away from an intergovernmental approach based on the aggregation of national interests. This is an approach that they designate as 'commonization'; but they distinguish it from the adoption of the Community method (or communitarisation), which entails that these bodies do not have the same primacy in the areas of CFSP as the Commission does in the first pillar. It is important not to overstate either the extent to which such a shift towards a 'commonization of interests' has occurred or the effects it has had.

Reforms to foreign policy contained within the Lisbon Treaty may preserve or even accentuate this tendency towards 'commonization' despite a perception that the 'essential quality of the CFSP in terms of its 'intergovernmentalness'...remains unchanged' (House of Commons Foreign Affairs Committee 2008: 44). The reforms seem to preserve the pre-eminence of member-states within this area as the Commission's role is down-graded – the power of initiative passes to the High Representative - and the ECJ has a very limited jurisdiction. In addition, member-states can invoke an 'emergency brake' clause which would block the taking of a qualified majority vote in the CFSP for reasons for 'vital' national policy.

However, the post of the High Representative is boosted under the Lisbon Treaty. It is appointed by the European Council, by qualified majority vote, with the agreement of the President of the European Commission. The High Representative has responsibilities in both the "Community" areas of EU external action and the CFSP (hence its new title of High Representative of the Union for Foreign Affairs and Security Policy), leading to its description as 'double-hatted'. For the Commission, the individual in question acts as Commissioner for External Relations and European Neighbourhood Policy, which cease to exist as a separate post. The post also encompasses the role of Vice-President of the European Commission and is responsible for "coordinating" all the Commission's activities in the external action field—i.e. those covering, most prominently, trade, development assistance and enlargement. It assumes from the rotating Presidency a number of functions

including ensuring the implementation of CFSP decisions; responsibility for representing the EU externally for CFSP matters and consulting the European Parliament on such matters. The creation of such a post has arisen partly as a desire to achieve greater coherence between “Community” and intergovernmental policy areas. It remains to be seen whether such coherence can be obtained.

In 2010, much attention was devoted to establishing the European External Action Service (EEAS), an organisation dedicated to building an integrated platform that effectively projects the values and interests of the EU around the world (Ashton, 2010). The EEAS gained the approval of the European Parliament and European Council in July 2010. An example of the kind of work that the EEAS will be involved in would be attempting to find sustainable solutions to broad-based security issues, such as piracy off Somalia, which requires bringing ‘operations, diplomacy, economics and development together’ (*ibid.*).

7.2.8 Conclusion

The issue is no longer whether the EU has a foreign policy but of what sort is it. As remarked earlier, some place the distinctiveness of the EU’s foreign policy upon its capacity to mobilize ‘soft power’ or tools of persuasion rather than force. Others (Howorth 2009) cast doubt on this proposition, pointing out that despite its track record in funneling development aid to less developed economies, its reluctance to phase out CAP and open up its agricultural markets to a much greater extent, means that it is still viewed with suspicion. They argue that whatever credibility the EU possesses in the eyes of international actors lies in its capacity to ‘combine, in new and unprecedented ways, military and civilian resources in the delivery of global public goods’ (*ibid.*: 38).

But the capacity to deliver is hampered by the absence of a coherent approach both in terms of reducing inconsistencies between various different policies and aligning the interests of member-states with each other and with a common overall approach. It is possible to view the last decade as something of an interregnum, during which the EU’s attention was captured by the issue of enlargement and its foreign policy ambitions were captured by the issues in its ‘near neighbourhood’. But there are signs that it is willing to take on a more ‘global’ role as demonstrated through Operation Artermis in the Democratic Republic of Congo when forces from Brazil and Canada were deployed in conjunction with EU personnel, independently of NATO.

In light of the various security issues now assuming prominence, the EU will have to extend its global role in terms of setting out various strategic imperatives and fostering agreement about the resources necessary to achieve agreed goals.

7.3 Migration, Border and Asylum Policy – Variety amidst a Common System

7.3.1 Introduction

This section analyses developments in the field of migration, borders and asylum in the decade after the ratification of the Amsterdam Treaty. This Treaty signaled an end to intergovernmental dominance in this area although governments were slow to give up their supremacy. The Council of Ministers meeting in Tampere in 1999 agreed a five-year programme of action which outlined some crucial features for a common EU policy on asylum and migration. This was followed by the Hague programme covering the period between 2005-10 and this has been succeeded by the Stockholm programme. This section will look at developments in migration, borders and asylum policy over the lifetime of both of these programmes and will assess the major issues that feature in the Stockholm programme.

Table 7.3 Key Developments in EU Migration and Asylum Policy

1985	Schengen Agreement was initially an agreement between five states (Benelux countries, France and Germany) to move towards full application of the free movement provisions of the Treaty of Rome (1957). It became a key 'laboratory' for development of measures to underpin free movement with internal security controls.
1986	Single European Act was aimed to create a frontier-free Europe within which people, services, goods and capital could move freely. Compensating immigration and asylum measures were dealt with outside of the formal Treaty framework in informal patterns of inter-governmental co-operation.
1992	Maastricht Treaty created an intergovernmental pillar of the EU dealing with JHA.
1997	Amsterdam Treaty created a new chapter (Title IV) of the main EU Treaty dealing with free movement, migration and asylum.
1999	The Tampere Agreement outlined the framework for common migration and asylum policies with four main elements: <ul style="list-style-type: none"> ◆ Partnership with countries of origin ◆ A common European asylum system ◆ Fair treatment of third country nationals ◆ Management of migration flows
2001	The Nice Treaty developed decision-making rules to give the European Parliament co-decision-making power in key migration policy areas, such as asylum and the return of illegal immigrants and thus sought further development of the framework agreed at Amsterdam.
2004	The Hague Programme mapped a five-year plan for the development of EU migration and asylum policy to cover the period 2005–10.
2008	The Immigration Pact staked out an agenda for EU migration and asylum policy in the areas of legal and illegal immigration, border controls, asylum and relations with third countries.
2009	Stockholm Programme agreed.

7.3.2 The Amsterdam Treaty- Toward a Common Approach

To analyze important developments in the field of migration and asylum policy, the Amsterdam Treaty is a good place to start. The Treaty marked a tentative move away from intergovernmental control of migration and asylum policy by transferring it to a new Title IV along with the issue of free movement within the EU. Article 61 of the Treaty stated that the Council should introduce free movement provisions within five years and adopt 'directly related flanking measures' on external border controls, asylum and immigration. Article 67 provided that the Council would act unanimously for a transitional period of five years following the entry into force of the Treaty.¹ At the end of this period, member-states could agree to move to qualified majority voting but only on a unanimous basis. However, the issue of legal migration was still to be determined unanimously. Three Protocols to the Treaty ensured 'flexible engagement' on Ireland's part. The first ratified Ireland's wish not to be bound by the Schengen acquis. The second recognised Ireland's right to maintain its border controls in order to preserve the Common Travel Area with Britain. And the third exempted the UK and Ireland from participation in measures taken under Title IV although they were and are permitted to opt in. It is important to note with the incorporation of the Schengen acquis into EU law the concept of "free movement" is used in two senses. First, in the traditional sense of free movement for EU citizens, i.e. the right to enter, stay and remain in another Member State; second, in the sense of anyone being able to cross the internal borders without undergoing checks. Since the former is regarded as a fundamental right for EU citizens, it applies to all member-states without exception as demonstrated by the ratification of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. But application of this principle does not prevent Ireland from operating the border controls that it deems necessary.

The Council of Ministers meeting in Tampere, Finland (2001) set the agenda in this area for the next five years. The concluding document articulated a determination to develop the Union as an area of 'freedom, security and justice'. It recognized that the process of European integration would not only reduce the significance of borders within Europe, facilitating the movement of people across the EU, but would also draw people from beyond Europe's borders. This would require some movement toward common policies on immigration and asylum. This involved four distinct issues:

1. Partnership was sought with countries of origin with a comprehensive approach addressing political and development issues;
2. A common European asylum system was to be established with common standards on asylum procedures, common minimum reception conditions, the approximation of rules on the recognition of refugee status and establishing which state is responsible for the examination of asylum claims. In the longer term, the hope was expressed that new Community rules would lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union;

¹ This five-year period, however, did not apply to "conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion" (Art. 63(3)(a)). Nor did it apply to "measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States" (Art. 63(4)).

3. Fair treatment of third-country nationals requiring a more vigorous integration policy aimed at granting them rights and obligations comparable to those of EU citizens; and
4. Management of integration flows through a stronger emphasis on external action in countries from where illegal migration originates.

A high-level working group on asylum and immigration was set up and a 'Scoreboard' was introduced which, biannually, was to review progress made in the implementation of the programme of action. A new Directorate General, Justice and Home Affairs, was created and headed by a Commissioner.

Legal Migration

In the Tampere declaration, the European Council acknowledged the need for 'approximation on the conditions and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union'. It went on to state that the legal status of these nationals should be approximated to that enjoyed by the citizens of member-states. He or she should enjoy the same rights to residence, employment and non-discrimination as possessed as citizens of the state in which he is validly resident.

With that goal in mind, the Commission in November 2000 put forward a proposal for a directive on the conditions of entry and residence of immigrants for economic purposes (2001/C 332 E/080). This initiative was the first, post-Tampere, to delineate the ways in which immigrants could be admitted entry to the member states for economic purposes, together with the respective conditions of residence. It responded to two needs: i) to find human resources quickly for the labour markets of member states with perceived shortages in terms of quantity and quality; and ii) to harmonise the 'rules of entry' and residence throughout Europe. Most member-states were skeptical and saw no added value in developing common rules at the European level and the directive was not adopted.

In the field of regular or legal migration, a number of directives were passed. The Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (2004/38/EC), establishes the conditions and rules for the exercise of the right of free movement and residence (for up to and more than three months) within the EU by Union citizens and their family members of any nationality, including third-country nationals. The enlargement of the EU on 1st May 2004 created a variable geometry in terms of this right. Nationals from the CEEC were entitled to all free movement rights except those pertaining to workers which were then granted by only three of the EU 15 member-states.

Council Directive 2003/86/EC provides the possibility for non-EU nationals residing lawfully in the territory of member states to be reunited with their family members who do not hold the nationality of an EU member state. It aims at creating the circumstances for the integration of third-country nationals, and promoting social and economic cohesion in member states. The right of family reunification depends upon one simple prerequisite: the sponsor should hold a residence permit issued by a member state valid for at least one year or should have a 'reasonable' prospect of obtaining one. Ireland and the UK opted out of transposing this directive.

Free Movement and Borders

The Amsterdam Treaty incorporated the laws relating to the Schengen agreement of 1985, which regulated the free movement of persons between countries that had abolished border controls. Incorporating the Schengen agreement meant that legislation pertaining to this agreement became secondary community law. In a protocol to the Amsterdam Treaty, both Ireland and the UK obtained opt-outs as did Denmark, which was unwilling to participate in the Amsterdam Treaty's provisions on free movement, asylum and immigration. Article 4 of the Protocol allowed the UK and Ireland to opt into measures of which they approved, although this is dependent upon unanimity of the participating countries. Article 8 stated that the Schengen acquis had to be accepted in full by all new member states.

In 2004, the Council formally adopted a Regulation on the creation of an Immigration Liaison Officers Network. Political agreement was reached on a draft Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders. The proposal to set up such a new body was put forward by the European Commission in November 2003. The Council pointed out that since responsibility for the management of the external borders lies primarily with the Member States, it considered the creation of a European Border Management Agency, known as FRONTEX, to be necessary for co-ordination of operational co-operation at the external borders. Other tasks of the Agency include training national border guards; carrying out risk analyses; supporting member states in circumstances wherein they request increased technical and operation assistance at external borders; and supporting member states in organising joint return operations

As this Regulation constitutes a legislative instrument building upon the Schengen acquis, the UK and Ireland, who were interested in taking part in its adoption and application, were prevented from doing so. The UK and Ireland were also prohibited from availing of a regulation establishing standards for security features and biometrics in passports and travel documents issued by Member States. The United Kingdom, supported by Ireland, contested its exclusion from both of these regulations. In its judgement relating to Frontex, the ECJ considered that these states could not simply opt-in to additional measures which built upon the underlying law without themselves subscribing to this acquis. The Courts has been criticized for adopting an 'integrationist' logic which seeks to incentivize the UK and Ireland to participate in the underlying Schengen acquis even though these countries had previously taken a more selective stance. Fletcher (2009: 88) considers that the ECJ has sent

a clear signal disapproving of a 'pick and choose' approach from the United Kingdom (and Ireland) regarding the Schengen acquis. This is likely to have come as a surprise to the UK Government which had thought that the Schengen Protocol afforded them quite a large degree of freedom for opting in or opting out. The judgments suggest a harder line towards those states that hold the position of exceptionality in order to secure the maximum participation possible in the Schengen acquis. And there appears to be a disciplinary intent underpinning the Court's coercion of the United Kingdom to opt-in as much as possible.

Asylum

After the Treaty of Amsterdam was ratified, the Council, at a meeting in Tampere, Finland (2001) committed the EU to the move toward a common EU policy in the matters of migration and asylum. In the years following the entry into force of the Treaty a great number of legislative initiatives were taken, the large majority of them initiated by the European Commission. Since then the EU has adopted a number of importance directives.

The Reception Directive (2003/9) lays down minimum standards for the reception of asylum seekers in areas like accommodation, family unity, medical care. Member-states are obliged to open access to labour markets and vocational training to asylum-seekers 12 months after they have lodged their application.

The 'Qualification' Directive (2004/83) details minimum standards for the qualification of persons as refugees or those in need of subsidiary protection set out three principles that had not been recognized before so that it went beyond refugee rights enshrined in the Geneva convention.

The 'Procedures' Directive (2005/85), which outlines minimum standards on procedures in Member States for granting and withdrawing refugee status, was especially controversial at the time of its passage. It was developed as part of a process of harmonization as the Dublin Regulation (see below) would prevent asylum-seekers from choosing an application country of their choice. Therefore, it would be to their benefit if procedures were harmonized. Standards outlined in the directive related to issues such as access to the asylum process, detention circumstances and the appeals procedure, amongst others. The directive also included controversial concepts such as safe country of origin, which allows applications to be rejected if they emanated from certain countries, and safe third countries, which permits a transfer of responsibility to countries of transit to the EU. Many NGOs were concerned about its alleged lack of compatibility with international legal obligations, although its proponents argue that it represents an advance since, for some countries, it restricts the grounds on which applications can be deemed inadmissible. NGOs countered that this represented a minimal standard, a floor rather than a ceiling, and complained that it would permit other countries to lower their standards but this was considered unlikely. Ireland has transposed the second and third of these directives.

The Common European Asylum System is also of importance for the EU as it opens up the 'communitarisation' of asylum policy, which signifies transfer of national sovereignty to the EU level. Thus, the legal doctrines of the direct effect of EU law and its supremacy will apply to the area for the first. Therefore, individual asylum seekers can take states and individuals to the domestic courts.

The Dublin II Regulation (343/2003) replaced the previous Dublin Convention (1997) determining the state responsible for examining asylum applications lodged in one of the member states of the European Community. Under the Dublin II convention, responsibility for the examination of an asylum application lies with the member state where a link with the asylum seeker was first established. An asylum seeker will have only one chance to make an asylum application. The Dublin convention is supported by a computerized system known as EURODAC, which stands for European Dactyloscopy, which incorporates information about any individual

applying for asylum, any person who is found irregularly crossing the Dublin II borders and data relating to foreigners with an irregular immigration status in a member state. Every member state is under the obligation to fingerprint these three different categories of persons and send the data to the EURODAC Central Unit, (operated by the Directorate General for Freedom, Security and Justice) to ensure that individuals are not making multiple applications for asylum in different jurisdictions.

Tampere – A Balance Sheet

At the end of 2004, the Commission reviewed the progress made towards the Tampere goals and concluded that while the success had been considerable, the original ambition of the Tampere programme had been limited by institutional constraints and by a lack of political consensus. A requirement for unanimity meant that member-states were reluctant to co-operate where their perceived interests were at stake and meant that a 'step-by-step' approach was the only possible way of proceeding. In relation to the matters covered in this section, the Tampere review noted several outstanding issues. These included the development of an integrated border management system and visa policy; the promotion of a common approach to the management of migratory flows; and the development of a common European asylum policy on a fair basis.

7.3.3 The Hague Programme

The successor to the Tampere programme was designated the Hague programme and continued along much the same lines as its predecessor for the period 2004-09. In December 2004, the Council did resolve to operate by qualified majority voting and the co-decision procedure in December 2004 in the fields of visas, asylum and illegal immigration.

The Hague programme declared a desire to establish a second phase of development in the field of borders, asylum and migration policy from 2004-09. This was to be based on a 'fair sharing of responsibility', closer practical co-operation as well as further harmonization of legislation.

The aims of the Common European Asylum System were the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection.

Legal migration, the Hague programme noted, and particularly the determination of the numbers of legal migrants to be admitted into a country remained a competence of member-states. With respect to legally-resident third country nationals, the programme called for their successful integration.

The Hague programme paid particular attention to the 'external' dimension of migration and asylum. It emphasized the importance of co-operating with countries and regions that issued migrants and those through which migrants passed. It underlined the importance of enlisting third countries to assist in migration management, such as those on its Eastern border.

Also highlighted was the importance of a border policy given the abolition of border controls. It welcomed the establishment of FRONTEX and suggested that it should support member-states in the surveillance of long stretches of border.

Borders

FRONTEX is one of the clearest examples of 'intensive trans-governmentalism' that Helen Wallace documented (see Background Paper 1). Although the management of a member-state's borders remains within its own hands, an elaborate set of institutions and procedures, headed by FRONTEX, has been established since 2005. Since then, it has co-ordinated several joint operations on land and sea, to which all member-states have contributed at least once through the allocation of personnel and/or equipment. The agency has also established a European Patrols Network (EPN) which facilitates the surveillance activities of member-states in the Mediterranean area and a more regular exchange of information.

In 2007, FRONTEX established Rapid Border Intervention Teams (RABITs) which represent a 'rapid reaction force' which can be dispatched to any member-states that cannot cope with an influx of third-party nationals at its borders. Approximately 500-600 personnel constitute this pool of personnel and they have yet to be deployed. FRONTEX is examining the prospect of formal co-operation arrangements with border personnel in countries outside of the EU. It has also proposed that it should be at the 'hub' of a new European Border Surveillance System (EUROSUR), based upon satellite coverage.

FRONTEX is part of an effort to create an EU wide area for the free movement of people as the internal market did for goods. But the parameters of the Schengen area are less clearly defined with Ireland and the UK opting out, Denmark selectively choosing to opt in and Bulgaria, Cyprus and Romania only partially applying the Schengen acquis. It remains to be seen whether there will be efforts made to introduce a more uniform approach or alternatively, and how much variety can legitimately exist within this more common system.

Migration

Requested by the Council, the European Commission produced a policy plan on legal migration in 2005. It suggested that labour immigration could contribute to resolving the implications of population decline within the EU and furthering the objective of the Lisbon strategy. Amongst the proposals was for a directive to attract highly-skilled workers who, it was believed, were attracted in disproportionate numbers to the United States,

In May 2009, the Council adopted a directive aimed at facilitating conditions of entry and residence in the EU of third-country citizens for the purpose of highly qualified employment, known as the 'EU blue card' scheme. The scheme will entitle third-country nationals to a series of socio-economic rights and favourable conditions for family reunification and movement across the EU. The directive determines the common criteria to be set by the EU member states for applicants of the Blue Card without prejudice to more advantageous conditions provided for by national laws. The period of validity of the EU Blue Card will be between one and four years, with possibility of renewal. Member-states will have up to two years to transpose the directive into domestic legislation.

The Commission has striven to remind member-states that as a result of the increasing linkages across an area without border controls, the policies and measures adopted by one member-state can have repercussions on other member-states and on the EU as a whole. It has stated its conviction that a more coherent framework for future action by the member-states and the EU itself is necessary.

In December 2005, the Council adopted the position of a Global Approach to Migration. It focused on countries within Africa and the Mediterranean and called for partnership with countries and regional organisations outside the EU on issues such as legal and illegal migration, development, refugee protection and trafficking. It also drew attention to the need to coordinate the different policy areas - external relations, development, employment and justice and home affairs.

Not only is the EU striving to harmonize individual asylum policies but it is also seeking to re-orientate migration policies toward a more comprehensive and holistic response that structures migration flows rather than simply reacts to them. One of the important ways it has done so is through the creation of a 'migration dialogue' which can promote 'channels of communication and discussion on migration between EU and non-EU states. It can also nest migration within broader debates about trade, aid, development and security, which in turn are nested within broader relations' (Geddes 2009: 25). The content of this dialogue has three main elements:

- ◆ Fair treatment of third-country nationals in residence, employment and social and cultural life within the EU.
- ◆ Seek to 'normalise' migration flows through the encouragement of structural and economic reforms in originating countries
- ◆ Continue efforts against illegal immigration through the introduction of return and readmission agreements

Asylum

The Commission had consulted widely and in 2008 produced a policy plan on asylum. It noted that asylum applications were at a relatively low level and that this was an opportune time to improve the systems designed for processing them. One of the most significant issues was the differences between countries in terms of their readiness to accept or reject asylum requests from the same countries. Disparate outcomes were producing a secondary movement of asylum seekers which went against the principles of equal access to protection across the EU. The Commission sought the following changes:

1. Amendments to the Reception conditions directive to limit the amount of discretion allowed to member-states and achieve a higher degree of harmonization;
2. Amendments to the Asylum Procedures Directive which would produce a 'fundamentally higher level of alignment between Member States' asylum procedures'. This included the establishment of a single, common asylum procedure leaving no space for the proliferation of disparate procedural arrangements in Member States;

3. Amendment to the Qualification Directive to ensure a common interpretative between member-states so that, for example, the conditions for subsidiary protection are clarified approach and to achieve the objective of introducing uniform statuses.

The Commission has recognized the inadequacies of existing legislation but this is not to say that they have no effect. For example, on 31st January 2008, the Commission has demonstrated its determination to ensure that these standards are adhered to by referring Greece to the ECJ for failing to put into effect the Returns Directive (guaranteeing a substantive examination of asylum seekers returned from another member-state).

The Irish Government has published the Immigration, Residence and Protection Bill 2008 which, *inter alia*, proposes new legislative provisions to give effect to the Qualification and Procedures directive. The UNHCR (2008b) encouraged Ireland not to use the transposition process as an opportunity to lower standards in areas where it already meets or goes beyond minimum standards specified. It welcomed that the Bill offers the same rights to all applicants entitled to protection whether as refugees or persons eligible for subsidiary protection. However, the UNHCR also expressed its concern that that the transposition of Directives has led to lower standards than what is currently in force and in some instances to wording which contravenes Ireland's international obligations under the 1951 Convention. An earlier UNHCR (2008a) review of the implementation of the Qualification Directive by EU member-states found that some countries persisted with elements of national practice that was incompatible with the Directive with the result that recognition rates exhibited significant variances.

For example, with regard to Iraqi applicants, during the first quarter of 2007, the percentage recognized as refugees in Germany at first instance was 16.3 per cent, and those qualifying for subsidiary protection 1.1 per cent. In Sweden, 73.2 per cent of Iraqi applicants were granted subsidiary protection at first instance in the first quarter of 2007 and 1.7 per cent were recognized as refugees. This contrasts sharply with the recognition rate for Iraqis of 0 per cent in Greece and 0 per cent in the Slovak Republic at first instance (UNHCR 2008a).

As well as calling for a more uniform approach, the Commission also called for a fair sharing of responsibility within the EU, based on the fact that some countries, because of their geographical position, are faced with a particular burden on their asylum systems. Some measures had been already tried. In the wake of refugees fleeing the conflict in the former Yugoslavia, the Council enacted a Directive on Temporary Protection in the Case of Mass Influx (2001/55/EC) which allowed the transfer of applicants away from over-burdened states.

The Commission proposed the following options be explored: joint processing of asylum applications to relieve pressure on 'overburdened' member-states; temporary suspension of the Dublin system to halt the transfer of asylum-seekers who are overburdened; to create asylum expert teams who would assist particular member-states in the processing of applications. The Commission also reaffirmed the need to focus on the external dimension of asylum which would entail fusing it into the 'development agenda in the area of governance, migration and human rights protection' (2008a: 9).

7.3.4 From Hague to Stockholm

In its evaluation of the Hague Programme, the Commission (2009) noted that the directive on the right of citizens of the Union to move and reside freely within the Member States entered into force in April 2006 but overall transposition had been disappointing

On asylum, the Commission noted that the Common European Asylum System had moved from its first phase of elaborating common minimum standards towards a second phase of adopting a policy plan under the Hague programme. Establishing a European Asylum Support Office (EASO) which will attempt to produce more consistent outcomes between countries by organising training at European level and improving access to accurate information on countries of origin is one aspect of this plan.

On the issue of illegal migration, the Commission noted that Mediterranean countries are 'shouldering an increasing share of the burden' (ibid: 6). Expressing the need for sanctions against employers of illegally-staying third country nationals was expected to be adopted in the first semester of 2009, the Commission hoped a directive on this subject would be adopted.

The Commission claimed that it had moved from a security-centred approach to migration to a deeper understanding of the issues. Consequently, the Commission launched the Thematic Programme on Migration and Asylum for the period between 2007-10 with a budget of 205 million euros. The programme sponsors various initiatives which aim to promote well-managed labour migration, prevent illegal immigration and facilitate the return of illegal immigrants.

Despite evidence of some advances, the Commission admitted that progress had been limited. It explained this apparent lack of progress by some of the 'unique challenges' in this areas which it summarised as follows:

a relatively young acquis, an insufficient role of the European Parliament in certain policy areas, a limited jurisdiction of the European Court of Justice and a limited competence of Commission to bring infringement, and the requirement for unanimity for decision-making in several areas. Therefore the ambition of measures was often scaled down in certain areas such as legal migration (13-14)

Failure to ratify the Constitutional Treaty was one significant explanation of reason why the Hague Programme had not been more advanced. But the Commission also contrasted the success in adopting measures with the mixed record in national implementation. Therefore, it suggested the focus of future action should be on consolidation and enforcement. Greater emphasis on implementation would have to be accompanied by greater attentiveness to more systematic monitoring and evaluation of the impact of EU policy.

In 2009, the European Council (2009a) under the Swedish Presidency published the 'Stockholm Programme', a roadmap for the years 2010-14. Like the Review of the Hague programme, it emphasizes the 'full and effective implementation and enforcement of existing instruments' (ibid: 3). Towards that end, it proposes that the Commission undertake 'an objective and impartial evaluation of the implementation of the policies in the area' (ibid), as provided for by the Lisbon Treaty (Art. 61c).

Notable objectives of the Stockholm programme include:

- ◆ The promotion of a 'Europe of Rights' through the incorporation of the European Convention on Human Rights and the Charter of Fundamental Rights into the legal order of the Union
- ◆ Full exercise of the right to free movement throughout the European Union
- ◆ Enhancing respect for vulnerable groups such as ethnic minorities and children
- ◆ Furthering mutual recognition and trust

The document also reaffirms the EU's commitment to the establishment of a Common European Asylum System by 2012 and calls for greater coherence between migration policies and other policy areas such as foreign and development policy and policies for trade and employment. In particular, the Council invited the Commission to explore how migration policy might link with the Lisbon Strategy for growth and employment. Migration policy was also deemed to have an important external aspect, a point that the EU had been stressing since its endorsement of a global approach to migration in 2005. Since then it had elaborated 'mobility partnerships' which are agreements made with countries outside of the EU which enables their citizens to have better access to the EU. The Council considered that these agreements constituted the 'main strategic, comprehensive and long-term cooperation framework for migration management with third countries' (2009: 25). Granting third-country nationals legally resident within the EU a uniform level of rights comparable with EU citizens was restated as an objective a common immigration policy, to be implemented no later than 2014.

On asylum, the EU reiterated its commitment to a common asylum procedure with individual applicants being offered the same level of treatment as regards reception conditions, procedural arrangements and status determination. Significant differences remain in this area which necessitates a higher degree of harmonization. An important role is envisaged for the European Asylum Support Office and the monitoring of the quality of asylum decisions will be crucial. To further this objective, the Council proposes that the Commission should 'consider introducing an evaluation mechanism in order to facilitate the alignment of asylum systems' (pg. 30).

Another significant development occurring in 2010 was the division of justice, freedom and security into two Directorates General, one which deals with home affairs and the other with justice. DG Home Affairs has two main priorities, the first being the maintenance of security within the EU, focusing on problems such as terrorism and organised crime. The second priority concerns migration, and policy will be developed to try to deal with both irregular migration and to ensure that legal migration is adequate for an economic recovery. DG Justice is concerned with civil and criminal justice, fundamental rights and citizenship.

7.3.5 Overview

Developments in relation to borders, migration and asylum policy have often been deemed to be indicative of a new 'fortress Europe'. But as Geddes (2008) indicates, an appropriate analysis of contemporary migration and asylum patterns and official responses to them does not correspond to a notion of the EU as a fortress. It

does not exhibit a uniform pattern; rather its member-states exhibit a differential readiness to permit legal migration, both from fellow EU-member states and from third countries, and asylum-claims from the latter group of countries. Continual discrepancies in the granting of asylum claims underline the second reason why it is inappropriate to think of the EU as a fortress. Uniquely in the world, it demonstrates a pattern of supra-national governance with respect to asylum policy, laying down minimum standards and possessing the legal means to enforce these against member-states that are reluctant or unwilling to abide by them.

Of course, it remains to be seen how far the system of supra-national governance can be extended and whether member-states will resist further restrictions on their room to manoeuvre. Obviously, several member-states such as Ireland and the UK have maintained some autonomy in their decision-making by choosing to opt-in on a case by case basis to the Schengen acquis and Title IV of the Amsterdam Treaty. This level of autonomy in relation to these issues has been confirmed through Protocol 21 of the Lisbon Treaty. However, it may come at an increasing cost as the example of FRONTEX demonstrated. But this may be looking at matters too negatively. It may be more appropriate to ask whether Ireland can contribute to issues such as burden-sharing which can be accomplished in a variety of different ways, perhaps crudely classified as sharing people, policy or money. This is illustrative of how upholding a common approach can entail variety and distinctive national approaches. This issue will surface again in the discussion of criminal matters.

7.4 Justice and Home Affairs

7.4.1 Introduction

The analysis of the EU's growing involvement in criminal matters will be brief, given that this is not part of NESC's normal concerns. Two issues, however, ensure that these issues are worth considering. The first is the case-law emanating from the ECJ which states that the Commission does have the power to lay down criminal sanctions if these are essential for ensuring appropriate observance of EU law. Given that issues of implementation and enforcement of EU directives is being viewed as increasingly crucial, the fact that the Commission has been granted the power to criminalize certain actions is important.

The second important issue for Ireland concerns the consequences of the Lisbon Treaty which collapses the distinction between the first and the third pillar thereby bringing judicial cooperation in criminal matters and police cooperation under the Community method. Ireland has chosen to opt-in on a case by case basis. The Irish government has made a political declaration stating its firm intention to participate, to the maximum extent possible, in proposals concerning judicial cooperation in criminal matters and police cooperation, particularly with respect to the latter area. This is based on the fact that Ireland's common law system differs in some fundamental ways from the criminal justice systems of continental countries. The Government has also given a commitment that it will review the operation of Ireland's freedom, security and justice arrangements after a period of three years (see DFA 2009: 91).

Table 7.4 Chronology of Significant Developments in Justice & Home Affairs

1985	Schengen agreement abolished border control amongst six originating countries to agreement
1992	Maastricht Treaty introduced pillar structure and justice and home affairs was designated as the third pillar to be managed through an intergovernmental process.
1997	Treaty of Amsterdam switched policy on asylum, migration and borders, and judicial co-operation in civil matters to the first pillar, effected by the Amsterdam Treaty. As a consequence, the third pillar has been renamed Police and Judicial Cooperation in Criminal Matters (PJCC) Schengen acquis incorporated into Treaty and Ireland obtained an opt-out in this area.
1999	Tampere Council launched five year program to secure a Union of Freedom, Security and Justice. This program comprised an Area of Freedom involving free movement of persons in accordance with the Schengen acquis, the protection of human rights and suppression of all forms of discrimination; an Area of Security which necessitated a fight against crime especially through police and customs cooperation; and an Area of Justice: improvement of co-operation between national judicial authorities and better access to justice by EU citizens. It was accompanied by score-card approach to facilitate the evaluation of achievements.
2004	European Arrest Warrant comes into operation in Ireland
2005	Hague Programme involved Minimum Standards for procedural rights and access to justice; efficient control of the EU's external borders; continue to contest cross border organised crime and counter the threat of terrorism
2007	Lisbon Treaty proposes to 'communitize' third pillar albeit with exceptions or opt-outs for countries who so wish. European Court would have jurisdiction with regard to commonly agreed policies.

7.4.2 A Slow Start to Co-operation

The Maastricht Treaty of 1992 established the sphere of justice and home affairs as the third pillar of the European Union, to be managed by intergovernmental processes. The Treaty listed several distinct policy areas which were part of this third pillar. These included the issues of asylum, immigration and borders policy that have already been discussed as well as international fraud, judicial co-operation in civil and criminal matters and customs and police co-operation. Despite a declaration of a common interest, member-states found it difficult to adjust to a co-operative agenda, and policy was likened to having 'twelve [the number of member-states in 1992] pairs of hands at the wheel – and twelve feet on the brake' (Tonra 1997: 55). Several proposals were made to break this deadlock including the development of justice and home affairs as a community competence by transferring it to the first pillar. For many member-states, this was a step too far but matters pertaining to

free movement, asylum and immigration were transferred to the first pillar through the Amsterdam Treaty, as documented in section 7.3.2.

Consequently, the concerns of the third pillar were re-designated as 'police and judicial co-operation in criminal matters'. This formed part of the Amsterdam Treaty's aspiration to develop the EU as an area of 'freedom, security and justice'. The Tampere meeting of the Council of Ministers in 1999 produced several objectives to fulfill this goal. The first pertained to harmonisation of laws so that behaviours contrary to common European values, such as human trafficking and money laundering, should be prosecuted and punished in the same way everywhere in the EU. The second objective related to mutual recognition which was recognised as the mainstay of judicial cooperation. Mutual recognition arises when a member state agrees to recognise as valid a decision taken in another jurisdiction even if that decision might have been taken differently or had another outcome in the first jurisdiction. This allows for a greater recognition of the diverse ways through which different jurisdictions can secure justice but does run the risk of inconsistencies arising. Mutual recognition is often deemed more appropriate than a harmonization of laws since it is based on an appreciation of national diversity supported by trust in the legal systems of other member-states. The third objective has been fulfilled by the creation of co-ordination bodies. Perhaps one of the most notable is Eurojust, composed of one judge from each of the 27 member states, whose aim is to improve the co-operation between national personnel investigating and prosecuting serious crime.

7.4.3 Reviewing Progress

A five year review of the Tampere programme was explicit about the reluctance of member states to 'co-operate within this new European framework when their interests are at stake' (European Commission 2004: 4). Moreover, their right of initiative, shared with the Commission, ensured that national concerns were often given priority over the Tampere programme. Despite the misgivings about the level of progress achieved, developments within and outside the European Union demanded a fresh impetus. One of the most important developments within the European Union was the extension of membership to ten new member states in May, 2004. Enlargement required efforts to ground the principle of mutual recognition and establish confidence in the propriety of the workings of individual justice systems. This would be achieved by the certainty that all European citizens have access to a judicial system meeting high standards of quality. To ensure the full implementation of the principle of mutual recognition, a system for evaluating the achievement or otherwise of EU policies in the field of justice was deemed necessary.

Reviews of progress in this area articulated a frustration with the 'recurrent difficulties leading to numerous blockages' in the area of freedom, security and justice (European Commission, 2006: 5). Progress proved difficult on a number of fronts including, the European Evidence Warrant, procedural rights throughout the EU and the definition and criminalization of the offences of racism and xenophobia had been stalled for two years. The Commission compared this tardiness to the progress in the First Pillar where a directive on data retention had been produced within three months. The Commission suggested that further progress could be achieved by the invocation of bridging clauses whereby policy areas can be governed by the community method, subject to a unanimous vote of the Council of Ministers, without an amendment to existing

Treaties. Applying the community method to the Third Pillar would, according to the commission, allow the use of community legislative instruments such as regulations and directives; favour consensus under qualified majority voting; and bring the area of justice, security and freedom under one legal framework would allow more legal certainty and efficiency. During the Finnish Council Presidency of the European Union (July-December 2006), it labeled these problems as ones of deficient efficiency. But it also spoke of deficient implementation whereby national implementation of framework decisions has been slow with the Commission powerless to initiate infringement proceedings against member states for failure to implement Third Pillar decisions.

7.4.4 The Commission taking the Initiative

In fact, the Commission asserted its competence in criminal matters by proposing that it could criminalize matters that fall under the competence of the first pillar. The seminal case related to a case, Environmental Pollution (Case C-176/03), in 2003 when the Commission sought to annul a decision by the Council of Ministers to prescribe criminal penalties against those perpetrating environmental harm. The Council had sought this power under the third pillar of the European Union where the choice of methods is left to individual member states. The Commission sought to establish that the criminalisation of environmental harm should be brought under the first pillar. In its judgement, the Court considered that the traditional custom of reserving criminal powers for the third pillar should not

prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective (Case C-176/03, Judgment of 13 September 2005, at para 48).

In the aftermath of this case, the Commission proposed a directive for a minimum set of serious environmental offences that should be considered criminal throughout the EU. Contrasting its proposals with the reality that criminal sanctions were not in place throughout the EU for all serious environmental offences, it argued that ‘only criminal penalties will have a sufficiently dissuasive effect [upon potential perpetrators of environmental harm]’ (European Commission, 2007: 2). Criminalization would emit a signal of widespread social disapproval and might influence financially powerful actors more than the use of administrative sanctions. The Commission believed that it was necessary to achieve some degree of harmonization otherwise offenders could avail of less stringent penalties elsewhere in the European Union. This decision has been affected by a more recent finding from (Case C-440/05 – Ship-source Pollution) from the European Court of Justice which argued that although the Commission had a legitimate power of initiative to propose criminal penalties in areas that had an environmental impact and to achieve other ‘essential’ Community objectives, it did not have the power to specify the type and level of criminal penalties to be invoked when these objectives are breached. This is a matter for member-states.

This has not prevented the Commission from trying to criminalize those harms that it deems injurious. In 2009, it introduced a Directive on sanctions against employers of illegally staying third country nationals which includes criminalisation provisions (Mitseligas 2009: 535).

7.4.5 Consequences of the Lisbon Treaty for the Third Pillar

The Commission's actions may portend a growing involvement of the European Union within the field of criminal justice policy, especially in light of the powers granted to the EU by the Lisbon Treaty. The Treaty, if ratified, would bring the 'third pillar' of police and judicial co-operation under the decision making procedure of the supra-national European Union, the Community method, albeit with some important exceptions. The Treaty proposes that the EU may establish, to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, minimum rules through directives – binding legislation which leaves it free to member-states as to the means of realising the objective – on the following matters: mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; (c) the rights of victims of crime; and any other aspects of criminal procedure which the Council has identified (Art. 82.2). The Lisbon Treaty also empowers the EU to establish minimum rules in relation to serious crimes with a cross-border dimension such as terrorism or trafficking in human beings and in relation to regulatory areas such as the environment, where the EU has a competence, and the approximation of criminal laws is essential for the effective implementation of EU policy. However two member-states, Ireland and the United Kingdom, have secured an opt-out but can choose to opt in if they so wish. Ireland has declared that it will exercise its opt-in on a case-by-case basis which will require approval by the Oireachtas and will be reviewed in three years.

All member-states can avail of an 'emergency brake' if they believe that proposed directives would threaten a fundamental aspect of its justice system; if disagreement persists even after referral to the Council, then nine member-states can proceed with enhanced co-operation, a so-called 'emergency exit'. This would seem to a measure of last resort and it is reasonable to expect that member-states would strive to find a consensus. It is likely that there will be a greater emphasis on facilitating mutual recognition between member-states, as enlargement has meant that they are more cautious about assenting to it (Mitseligas, 2009). To overcome this problem, an Advisory Group on the Future of European Justice Policy (European Commission 2008b:13) has recommended that the European Union 'enhance mutual trust in the legal systems of other Member States by establishing minimum rights' which would guarantee 'citizens a minimum degree of uniform protection in criminal and investigation proceedings' (ibid: 13-14). The European Council has agreed that there should exist 'European Union standards for the protection of procedural rights' (European Council 2009: 2) for the purpose of enhancing mutual trust and recognition between member-states. In December 2009, the Council reached agreement on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. Provisions included a right to translation, legal aid and communication with family and consular authorities.

The European Council have recently agreed a multi-annual plan for the area of Freedom, Security and Justice, designated as the Stockholm programme (as it was agreed under the Swedish presidency of the Council). The programme entertains a number of goals including the challenge to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe. Also included is the aspiration to consolidate the achievement of a European area of justice so as to 'move beyond the current fragmentation' (2009: 4).

Tools to achieve these and other goals involve building up trust and finding new ways to increase reliance on, and mutual understanding between, the different systems in the Member States (ibid: 5). Attention needs to be paid to the **full and effective implementation, enforcement and evaluation of existing instruments** (emphasis in original). The Council has committed itself to evaluating the effectiveness of the legal instruments adopted at EU level as well as the extent of their implementation. Evaluation is deemed to be necessary to determine any obstacles to the proper functioning of the 'European judicial area', examining first judicial cooperation in criminal matters and then scrutinizing respect for asylum procedures. The Commission has been invited to submit proposals for evaluation in this area based on a system of peer evaluation which would facilitate better understanding of national systems in order to identify best practice and obstacles to cooperation.

More substantive issues include

- ◆ adopting a roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings;
- ◆ establishing minimum rules concerning the definition of criminal offences and sanctions as defined by the Treaty;
- ◆ clarifying the mandate and enhancing the role of FRONTEX;
- ◆ consolidating and implementing the EU global approach to migration by developing relations with countries of origin and transit outside the Union;
- ◆ encouraging the creation of flexible admission systems for immigrants whilst respecting member-states' competence in this area
- ◆ intensifying the efforts to return illegally residing third-country nationals
- ◆ achieving a higher degree of harmonization to bring about the establishment of a Common European Asylum System (CEAS)
- ◆ encouraging greater cooperation between JLS and ESDP to further these shared objectives

7.4.6 Conclusion

Over the course of a decade, the EU's involvement in criminal matters has developed from a 'standing start'. As a result of the Lisbon Treaty, the Commission now possesses a power of initiative and matters will normally be decided by qualified majority voting.² The issue for Ireland will be to what extent it should remain outside of this zone of co-operation or alternatively to what extent it should opt in.

² Except when the Council proposes to lay down minimum rules for specific aspects of criminal procedure not already identified in Art. 82 (2) as this will be decided by unanimity.

7.5 General Conclusion

This chapter has presented an overview of developments in three significant policy fields although the Lisbon Treaty has brought judicial and police co-operation in criminal matters into the same governance framework as asylum and allied issues. In both fields of external relations and the reconstituted justice and home affairs, the EU is becoming a more significant actor, thanks to either introduction of new institutions or new modes of decision-making. Authority is still defused amongst member-states and between them and the institutions of the EU. This makes likely future options difficult to anticipate. What is clear is that the issues that have broached the need for a common approach in both these fields are becoming more prominent.

Ireland faces challenges on a number of different issues which it will be unable to deal successfully in isolation. These include energy security, legal and irregular migration, terrorism and cross-border crime, development, trade and climate change. What President Sarkozy said in relation to migration — ‘do you think we can contain the migratory waves from Central Europe and Africa working against one another or working together?’ — is equally true of all of the above issues. And to further complicate matters, the demarcations between what were once three separate pillars are no longer quite so clear. Migration is as implicated as much with trade and development aid as it is with security and border control.

This places a greater emphasis on coherence between various institutions and policies, and between the interests of the member-states considered singularly and in common. In both respects, the new post of the High Representative of the Union for Foreign Affairs and Security Policy may have a crucial role in forging institutional coherence and common interests.

The policy field known as justice and home affairs has also borne witness to greater involvement by EU institutions. Decisions that would once have been taken by national bodies — such as who is eligible for asylum or what sanction should attend environmental harm — without consideration of other governments or EU institutions or law are increasingly subject to EU scrutiny. The paradox is that the imperative for an increasingly harmonized approach has become ever more necessary because enlargement has introduced greater variety within the practices of member-states but enlargement has made the prospect of a common approach more difficult to achieve. What does this mean for Ireland's involvement in the EU? Might it mean a more concerted involvement on Ireland's behalf when common policies are being mooted and might this help to preserve Ireland's distinctive national concerns as well as helping to achieve the goals we have in common with other member-states?

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