A KALEIDOSCOPIC VIEW ON ED-JHA AFTER LISBON

Draft version submitted to European Foreign Affairs Review

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Abstract:

This paper shows that the dynamics of expansion and diversification of the external dimension of Justice and Home Affairs identified in the editorial of this special issue can be altered by three processes: further institutionalization, politicization and operationalization. Those three dimensions participate to the creation of different patterns for the external dimension of Justice and Home Affairs that can be summarized under the metaphor of a kaleidoscope. Dynamics of expansion and diversification can therefore take different forms, following which kaleidoscopic view prevails and leading to different ways of participation and influencing policy-making.

Institutionalization is identifiable by routinization, structuration of decision-making, the diffusion of values as well as competition for power and resources across the actors. Mechanisms contributing to further institutionalization are to be found EU institutions, through the European External Action Service as well as through the diffusion of the EU’s internal security discourse to the Common Security and Defence Policy police missions. The roles endorsed by the European Parliament and Justice and Home Affairs agencies are symptomatic of a politicization trend, which widens the circle of actors in this area. Finally the External Dimension of Justice and Home Affairs is taking an operational dimension, law enforcement actors looking for ways to pursue cooperation in a pragmatic
way, while avoiding some constraints imposed by the institutionalization and politicization. The dynamics of expansion and diversification after Lisbon and Stockholm can be altered, in the coming years, by further institutionalization, politicization or operationalization.

Introduction

Over the last decade, the external dimension of JHA (ED-JHA) has expanded and diversified quite importantly.¹ A case in point is that the European Union (EU) is using more and more visa liberalization or readmission agreements as bargaining instruments in the negotiations with third countries, in particular with its neighbours. While the ED-JHA is part of the development of a global homeland security agenda, the EU is also importantly affected by the homeland security instruments of other countries. The ‘made in USA’ instruments such as Passenger Name Records (PNR) or Terrorist Financing Tracking Programme (TFTP) are indeed being internalized via several mechanisms within the JHA policy instruments, leading the EU to design similar EU-wide PNR or EU-wide TFTP instruments.² The ED-JHA is therefore a fascinating policy field³ whereby dynamics of internalization and externalization are operating but also dynamics of expansion and diversification are at play, as described in the editorial of this special issue.

It is true that over the years, the transversal nature of JHA issues has impacted upon the whole spectrum of EU external relations through policy expansion, bringing new actors into the field. If European policemen and judges are the operational agents of this ED-JHA, development experts are ensuring that the migration-development nexus is not being taken over by the security-development nexus. Similarly, national data protection authorities and the European Data Protection Supervisor are scrutinizing any international agreement that involves the transfer of personal data for law enforcement purposes. The recent opening of a European Parliament office in Washington testifies of the need to improve staff-to-staff
contacts with US Congress and to monitor the situation on PNR and TFTP on the other side of the Atlantic, turning Members of the European Parliament into key actors of the ED-JHA.

This policy and geographical expansions has been noticeable in particular in the EU’s Mediterranean neighbourhood. The wind of revolutions in the Mediterranean region confirmed the extent to which EU internal security and migration regime mattered more than supporting democratization processes as reiterated in the editorial of this special issue. In the beginnings of 2011, discussions in the Foreign Affairs Council were for too long monopolized by the issue of the influx of migrants on the EU’s southern shores. In fact previous research has shown that JHA has topped the EU agenda towards its Mediterranean partners in the last decade, turning border management and counter-terrorism into two main priorities of cooperation. Those projects have overshadowed the difficult efforts to support democratization and the promotion of the rule of law. Policy expansion of the ED-JHA to the field of EU external action has given rise, in the Mediterranean neighbourhood, to tensions between EU internal security concerns and EU normative objective such as rule of law promotion and democratization.

The dynamics of expansion and diversification introduced in the editorial, can therefore lead to different results, and be altered by three processes: further institutionalization, politicization and operationalization. The metaphor of a kaleidoscope helps us to grasp the interactions between those three processes. A kaleidoscope is made of different mirrors and pieces of couloured glass, which when rotated, provides different patterns. By rotating that kaleidoscope, one creates different patterns of participation and influence within policy-making, with varying impacts for the actors involved and different policy outcomes according to which dimension takes precedence. The dynamics of expansion and diversification that
characterise the ED-JHA can therefore be influenced when one or several of those processes (institutionalization, politicization and operationalization) prevail.\(^7\)

The furthering of institutionalization (section 1) is confirmed by the establishment of a series of new mechanisms that are being developed within EU institutions. The European External Action Service (EEAS) but also efforts to bridge the gap between JHA and Common Security and Defence Policy (CSDP) CSDP missions\(^8\) are some of the examples illustrating that point. Following the entry into force of Lisbon and the increased involvement of the European Parliament (the politicization trend- section 2) one of the patterns that emerge is the tendency for EU member states and law enforcement agencies (national and EU) to bypass the constraints of the new JHA decision-making (co-decision in JHA matters) via more operationalization (section 3).

Our findings show that further institutionalization combined with further politicization presents a more complex picture of JHA decision-making. As a consequence, those two trends lead EU actors and third countries to tend to agree on concrete operational action plans and strategies, rather than than lengthy legislative negotiations. This means that even though we see some supranationalization of JHA governance, the intergovernmental decision-making and ‘intensive transgovernmentalism’\(^9\) are finding new ways to bypass supranational institutions, notably via the operationalization trend.

1) Institutionalization logics of ED-JHA

As outlined in the editorial, institutions play an important role in the evolution of the ED-JHA. Coherence, coordination, cross-pillarisation are key issue that arise from an institution expansion in this field. Taking a new institutionalist approach, this section looks into how institutionalization, that is characteristic of the ED-JHA, is formed. Taking a broad understanding of institutions this paper follows the definition of March and
Olsen which identifies three aspects that are interacting in a process of institutionalization. First, it is about developing a process of ‘routinisation’ and ‘structuration’. There is a routinizing of behaviours and some resistance to those behaviours. Secondly there is a ‘standardization, homogenization and authorization of codes of meaning, ways of reasoning and accounts’ whereby practices are being valued beyond their technical aspects and shared by the actors. The third aspect is linked to power and resource capacity: ‘exploiting the capabilities of staff, budgets, buildings, equipment in order to achieve goals’ in a Weberian understanding of power.\textsuperscript{10}

So far the picture of ED-JHA was quite patchy with policy documents and strategies that remained isolated from one another. Recently though, the ED-JHA has undergone a process of ‘routinization’ and ‘structuration’. The latter started initially in the context of the EU relationship with third countries, it was strengthened with Lisbon and Stockholm, and it is now present within EU institutions. Firstly, with respect to EU neighbours and candidate countries, JHA has been incrementally but steadily incorporated into association agreements and accession negotiations. JHA sub-committees, created under the European Neighbourhood Policy framework, are gathering experts to find bilateral solutions on issues such as migration, border management and visa. A sort of networked governance has been identified whereby the EU uses soft modes of governance to co-opt third country administrators into the harmonization or approximation of their legislation with the EU.\textsuperscript{11} For instance, in the context of the Euro-Mediterranean Partnership, the justice and security sub-committees were mandated to implement joint activities in order to improve and assist the development of counter-terrorism standards and capabilities. This can also help the EU to diffuse modes of governance that include accountability, transparency and participation, as exposed by Tina Freyburg in this special issue.
There has been also a routinization in using EU external aid to support JHA projects in third countries which led to some resilience from the development aid community. The migration-security nexus was contested by the migration-development nexus discourse. For instance, in 2010, a project to support the Libyan authorities to enhance the management of borders and migration flows, for €10M, had the objective to provide the Libyan border control authorities ‘with equipment and training facilitating the detection and the disruption of attempts of irregular migration, as well as the identification and registration of the intercepted irregular migrants’. This is a project that clearly shows how development aid, that should aim at eradicating poverty, is sometimes being instrumentalised for internal security purposes.

Secondly, following Stockholm and Lisbon, new rules and policy priorities reinforce those processes of routinization and structuration of ED-JHA. Compared to the Tampere and The Hague Programme, the Stockholm Programme devotes a large section to the ED-JHA. It insists upon the need to find coherence between internal JHA policies and EU foreign policy: the ’external dimension is crucial to the successful implementation of the objectives of [the Stockholm] programme and should in particular be fully coherent with all other aspects of EU foreign policy’. The ambition is to improve coherence between the policy and operational levels of the ED-JHA.

Thirdly, it is possible to identify a series of mechanisms that contribute to further institutionalization: the development of coordinating mechanisms within the European Commission, and the Council with the creation of the JADEX and of the European External Action Service (EEAS). Over the years, specific coordination mechanisms within the European Commission were developed like the group of Commissioners on External Relations as a correlate of institution expansion. Also, within the then Directorate General (DG) Justice Liberty and Security a specific unit was created to deal with external relations and enlargement (A2). This unit was tasked to establish specific inter-service consultation
mechanisms bringing together officials of DG Relex, DG Enlargement and DG JLS (Mounier, 2011). Following the split of DG Home and DG Justice, this unit remains with DG Home and is attached directly to the Director-General, while in DG Justice international matters are dealt horizontally.

Another mechanism within the Council was established by the French presidency in 2008: the JAIEX ad-hoc working group. Following Lisbon, this Council working group has become permanent and monitors JHA issues dealt with in all working groups dealing with EU external relations. This includes for instance JHA clauses in agreements with third countries, issues of visa and readmission, JHA bilateral subcommittees within the ENP, any ministerial meeting or summit with third countries and migration issues. JAIEX is also consulted on any specific initiative with an external relations dimension, like for instance the Sahel security and development initiative, which gathered the expertise from the EEAS but also from DG JLS and of EU Counter-Terrorism Coordinator Gilles de Kerchove. The problem though is that often JAIEX monitors and provides a general overview of ED-JHA rather than really influencing its strategic orientations. For instance, when the discussions on ‘transfer agreements’ which allowed the CSDP Mission Atlanta fighting privacy in the Gulf of Aden to transfer prisoners to neighbouring countries (Ouganda, Tanzania, etc) to be prosecuted there, member states diplomats did not allow the JAIEX working group to discuss the matter, even though it fell under its remit.

The advent of the EEAS opens up new possibilities for this structuration and routinization to take place. Commissioner Malmström had obtained a clear mandate from the Council to negotiate the new EU-US TFTP agreement and the future EU-US PNR agreement, while Commissioner Reading is in charge of negotiating the future EU-US agreement on data protection. However the external implications are quite obvious, since it can also affect the overall EU-US partnership. This means that close coordination between the EEAS and DGs
Home and Justice is needed. Experts need to be sent to EEAS Delegations. This requires an alignment and coordination of EU internal JHA priorities with EU external relations. As outlined by a UK official the Council structures should be used ‘to give EEAS and the Commission the appropriate mandates to take its work forward, which is one of the reasons why we’ve been supportive of the work of the JHA External Working Group, otherwise known as JAIX, which has been looking at those issues’. Some coordination mechanisms have been put in place between the EEAS and DG Home in the case of disasters and the monitoring of catastrophes for instance.

However, as underlined by David O’Sullivan, more ‘joined-up policy making’ on internal and external security is needed. Some EU delegations like the one in the USA have JHA experts. But some member states like the UK have voiced their willingness to see more JHA expertise in the Pakistan EEAS delegation for instance. The involvement of member states diplomats within the EEAS could therefore well influence the homeland security trends of some EEAS delegations. So far most of the concerns of JHA experts abroad were tight to the ‘Commission-centric’ nature of the delegations. It is now up to the new EEAS Delegations to coordinate the work with the member states as well, taking up the prior role of national rotating presidencies. This will requires an extra effort of coordination with the member states services (interior and national diplomacies) as well as delegations. At the moment this special issue goes to press, though, the role of the EEAS in the ED-JHA is not clear.

The fact that Lady Ashton is also vice-president of the European Commission should certainly help to streamline coordination. In a 2009 contribution feeding in the Stockholm programme the UK Delegation called on some key principles to drive the ED-JHA and improve coordination of JHA with external relations priorities. Those principles include ‘harnessing [EU’s] resources effectively and
exerting maximum influence where it can make the most difference; focus[ing] where the EU can add value through its collective leverage above […]]; ensuring that decisions on priority areas are based on evidence in terms of their contribution to strategic or geographic priorities, deliverable and specific to the needs of third countries; […] improve[ing] internal coherence and co-ordination, both between external and internal elements of JHA work and also the link between JHA external priorities and wider EU external objectives (CFSP; CSDP etc).25

The second dimension of institutionalization is about ‘standardization, homogenization and authorization of codes of meaning, ways of reasoning and accounts’ whereby practices are being valued beyond their technical aspects and shared by the actors. It is possible to identify some signs of diffusion of an EU internal security discourse to CSDP police missions. This is nonetheless not in contradiction with the original objectives of civilian crisis management of strengthening the rule of law, police, civilian administration and civilian protection.26 It only shows that the framing of an ED-JHA by police and law enforcement actors taking the view of fighting organized crime and protecting EU internal security has taken precedence over the humanitarian and development objectives of the diplomat community. As highlighted by Javier Argomaniz in this special issue, translated into practice, this discourse can lead to a ‘proclamation-implementation’ gap. Our point is beyond discourse level, it is possible to identify more and more in practice some influence of the internal security community over the external security experts.

Building upon the existing consensus that civilian crisis management and the ED-JHA shared ‘functional similarities’ (to protect the EU internal security regime),27 the 2009 Swedish Presidency tried to get the external and internal security communities to agree on a common set of principles. These discussions started with a Presidency Report on CSDP leading to Council conclusions. Those documents aimed, among other things, at allowing the exchange
of information, between JHA agencies and CSDP police missions; and this in spite of initial reluctances from the diplomat community, which disliked the fact that internal security actors would instrumentalize EU external policy.

The Swedish Presidency Report on CSDP of June 2009 highlighted the need to ‘explore synergies between CSDP and Justice and Home Affairs, including reinforcing the mutual operational benefit in the fight against organised crime, developing information sharing between CSDP missions and Europol and by strengthening the involvement of JHA ministers and relevant national authorities’. The Swedes organized then a series of ad hoc meetings within traditional working groups in both fields (Committee for Civilian aspects of Crisis Management-Civcom, the Article 36 Committee-CATS, the Police Chief Task Force, the Multi-Disciplinary Group on Organised Crime Informal JHA Council) in order to build a consensus among Member States and draft a list of concrete recommendations. In 2009, they adopted Council conclusions which explicitly recognize the role of CSDP missions in the fight against organized crime, in protecting EU internal security and the need to share further information between CSDP missions and JHA agencies: ‘the Council encouraged enhanced coordination between ESDP and initiatives relating to the external dimension of the JHA, e.g. FRONTEX. Furthermore, the Council encouraged further enhanced cooperation and sharing of information, where appropriate, between relevant ESDP and JHA actors’. In line with these Council conclusions, the concept for CSDP police missions of 2002 was amended in February 2010 and included the following: ‘the focus on organized crime should be specifically reflected in the mandate of the mission, in particular when the organized crime originating from or transiting through that host country affect the EU member states’. This shows that organised crime is now well embedded into CSDP discourse.

This process of standardization was taken forward by the Hungarian Presidency which convened the first joint PSC-COSI meeting in June 2011. It shows that this discourse is now
being translated in practice. The Hungarian presidency highlighted the need for ‘a return in internal security’ of CSDP missions. Analysis capabilities of both CSDP and JHA experts should be shared, possibly via the implementation of an intelligence-led policing process in third countries which host a CSDP mission. The question is then how can member states intelligence services, CSDP missions but also Europol and SITCEN work together. Training is also one of the measures envisaged that could contribute to diffuse those practices and codes of meaning, on a long-term and structural basis.\textsuperscript{31} This should only initiate a series of potential meetings to take place.\textsuperscript{32}

Finally, the third dimension identified by March and Olsen is about ‘binding resources to worldviews’ which means looking at staff and resources: ‘exploiting the capabilities of staff, budgets, buildings, equipment in order to achieve goals’. The more there is institutionalization, the more inter and intra-institutional turf wars are likely to occur over staff, budgets and any other resources between diplomats and police actors. The further standardization and integration of the JHA and CSDP communities contributes to enhance competition for power and resources in this policy field. One of the ways to bind CSDP experts to internal security personal’s worldview was made possible because EU police missions are composed mainly of internal security personnel (police, judges, border guards) who depends on ministries of justice and interior. As of August 2009, thirteen CSDP missions were ongoing, eleven of them being civilian missions. Of those 11 civilian missions, six were exclusively composed, excluding administrative staff, by police officers and border guards (EUPOL COPPS, EUPOL Afghanistan, EUSSR Guinea Bissau, EUPM Bosnia, EUBAM Rafah and EUBAM Ukraine Moldova). Two police missions were composed at 75% by police officers and border guards (EUPOL RDC and EULEX Kosovo). However diplomats remain in charge of deciding upon the objectives of the mission. Even though, as demonstrated above, there is an ongoing process of ‘instrumentalization’ of EU external
relation policies by JHA actors, conflicts between the two communities occur frequently, also on exploiting staff, budget and equipment capabilities. Institutionalization can finally lead to the emergence of new networks that try to influence each other worldviews, to spread routinization and structuration, as illustrated by Pawlak in this special issue.33

2) Increased politicization

Next to further institutionalization related to policy expansion, the ED-JHA is also characterized by increased politicization which can in turn importantly affect the dynamics of expansion and diversification. This is a point highlighted by Ripoll and MacKenzie in this special issue. After providing a definition of what we mean by ‘politicization’, this point is illustrated by the new roles endorsed by the European Parliament and by JHA agencies in ED-JHA.

Politicization has been described in the literature as the moment when ‘regional integration becomes contested amongst a widening circle of political actors’.34 For Hooghe and Mark politicization is tightly linked to the construction of an EU polity. Politicization influences the EU multi-level governance. It structures party politics and debate at EU level since politicization includes ‘setting, interpreting, defending, criticizing, and changing normative standards, and in democracies, self-governing, equal citizens may attend to and give priority to a variety of shifting success criteria over time and across issue areas.’35 Internal security has always been a national matter and debates on immigration are becoming increasingly politicized at EU level as well. Immigration is a ‘high politics issue’ to which voters are quite sensitive. In fact from the mid-nineties voters themselves were in favour of more cooperation at EU level leading governments to Europeanize domestic issues to respond to their constituencies concerns.36 JHA issues have started to be politicized at EU level via the growing involvement of the European Parliament since the communautarisation
of JHA issues in 2004 with the Amsterdam Treaty. Similarly the area of freedom, security and justice is tightly linked to EU citizenship and related citizens’ rights which have traditionally been implemented within a national setting. The return directive, which was negotiated for the first time under co-decision in 2008, was a prime example of politicization at EU level. Many actors were involved in deciding upon common minimal rules on voluntary departure period and maximum custody period for instance.\(^{37}\) In fact, interestingly enough this led to international reaction as well, Chavez and Lula reacting quite strongly against the so-called ‘shameful’ directive that is criminalizing migrants. In fact, President Correa of Ecuador also threatened that the negotiations on trade agreement between the Andean Community and the EU could be put at risk.\(^{38}\)

Politicization is generally understood as a phenomenon which triggers more contestation and conflict on policy issues. This politicization can be visible on the input legitimacy side via the way issues are contested within national parliaments and the European parliament but also on the output legitimacy side where some civil society movements might also contest the output of certain policies. This can give rise to protest and resistance to internationalization institutions via social mobilization.\(^{39}\)

Applied to the study of the ED-JHA we understand politicization as increased political contestation of these issues amongst a wider set of actors. As explained earlier and in the editorial, the circle of actors involved with ED-JHA has widen: national parliaments have a bigger say and two posts of Commissioners, one for Justice and the other one for Home affairs were created. Also, the European Parliament is now a co-legislator on most of JHA issues, and has gained consent on international agreements.

Prior to the entering into force of Lisbon, the European Parliament was much more limited in the means it could use to influence ED-JHA. As a budgetary co-legislator it could of course influence importantly the way development instruments were used for the ED-JHA.
However when it came to disagreeing with the European executives (at the time European Commission and member states governments) on the EU-US PNR agreement for instance, the EP had only legal means such as a recourse in annulment in front of the European Court of Justice.\footnote{40}

Lisbon has beefed up the role of EP on ED-JHA notably on the EU-US PNR and TFTP agreements currently being negotiated. According to art 218 Treaty on the Functioning of the European Union the Council must obtain the consent of the European Parliament on all international agreements falling under the ordinary legislative procedure. This therefore includes most JHA matters. The time when the European executive (Commission and member states/ Council) could lead the negotiations alone is over. They have to take into consideration the views of the Parliament during the negotiations in order to secure its approval at the end of the process. The European Parliament is not anymore confined to the role of co-legislator in the fields of migration, asylum and visa, but takes also part to the decisions regarding the security and the protection of EU citizens’ fundamental rights.

As a newly empowered actor in the field of ED-JHA, the European Parliament has opened an office in Washington in April 2010. According the head of the office, Mr. Nowina- Konopka, a parliamentary diplomacy is being pursued on the other side of the Atlantic; the rejection by the European Parliament in 2010 of the US access to the Swift database, acting as a ‘catalyst for the change in the US capital's mindset’.\footnote{41} This politicization has therefore a direct link abroad, and in particular in the context of the transatlantic homeland security agenda.\footnote{42}

Another aspect of this politicization brings us to the role of JHA agencies and their external relations. Agencies are traditionally perceived as de-politicized instruments of governments, bringing independent expertise to EU governance.\footnote{43} Some have argued for instance that expertise should be de-politicized and take the form of agencies. This way, Radaelli sees politicization as the ‘result of a successful attempt to break the walls of technocratic
discussions’ whereby the conflict over policy problems ‘is all about those who argue that there are technical solutions and those who push for a more political debate’.\textsuperscript{44} Variables such as political salience and uncertainty impact on the politicization or technocratization of policy issues. According to his findings, politicization is high when an issue is politically salient and uncertainty is low.

However recent research has shown that agencies were also subject to politics and can in fact resemble the Commission given that they behave more as managers to handle all sorts of managing tasks,\textsuperscript{45} but also simply because they themselves are subject to inter and intra institutional turf wars over power and resources. Looking more closely at the case of ED-JHA and agencies involved in this field, it is possible to conclude that so far agencies have been ‘hostage of politics’. The ED-JHA creates a ‘capability-expectation’ gap\textsuperscript{46} for JHA agencies to respond to the expectations created by European executive (Commission, member states) vis-à-vis third countries when it comes to police and judicial cooperation. The ENP action plans for instance almost systematically include a reference to strengthening cooperation with Eurojust or Europol.\textsuperscript{47}

As of June 2011, Europol had concluded 9 operational agreements with Australia, Canada, Croatia, Iceland, Norway, Switzerland, the USA, but also Interpol and Eurojust. Strategic agreements have been concluded with Albania, Bosnia and Herzegovina, Colombia, Moldova, the Russian Federation, Turkey, Serbia, Montenegro, Ukraine and the FYROM; as well as with a series of organisations such as European Anti-Fraud Office OLAF, the European Central Bank, the European Commission, the European Monitoring Centre for Drugs and Drugs Addiction, the European Police College (CEPOL), the United Nations Office on Drugs and Crime, the World Customs Organisation, the Sitcen and finally Frontex.\textsuperscript{48} European Commission and now the EEAS, are promoting cooperation with Europol for emerging powers such as India as part of their broader agenda with such governments. Often though
such commitments are taken during high-level political meetings whereby the European Council or the European Commission actually commit the agency to conclude agreements which are crucial politically, but not necessarily operationally. Once the political commitment has been made at the highest levels, it is then to the agencies to ensure that third countries have the capacity and the data protection requirements to match the standards of such an agreement with Europol or other agencies. In other words agencies can be used as bargaining tools within broader foreign policy package proposed by the EU to third countries.

3) Operationalization of the ED-JHA⁴⁹

The expansion and diversification of ED-JHA is also tightly linked to the process of ‘operationalization’. In particular, politicization is inherently linked to the operationalization trend from two perspectives. First, from the JHA agencies perspective, the idea was that such operational entities would be independent from politics and therefore able to provide expert advice. But agencies are not immune to politics as we saw. In the field of ED-JHA, agreements of JHA agencies with third countries are presented as technical and necessary to improve exchange of personal data, or border control. However, because they are embedded in a wider framework of EU external relations, they are also linked to the political dimension. In addition, another interesting aspect of this kaleidoscopic view we are describing is that agencies and other national actors might try to escape this politicization via operationalization. Operational cooperation for member states can be seen as a way to avoid further harmonization and the transfer of more powers at the EU level.⁵⁰ The more there is institutionalization of ED-JHA and parallel politicization, the more there seems to be a tendency for actors to pursue further operational cooperation, therefore avoiding the
constraints of the two first trends. We illustrate this argument below with the European Pact on Drugs.

Operationalization is a phenomenon described originally by the Copenhagen school from the perspective of the rise of security issues in policy-making.\textsuperscript{51} The latter are presented as being exceptional and being ‘beyond normal politics’, that is, ‘beyond public debate’.\textsuperscript{52} According to this perspective the operational aspects of police cooperation, or the interoperability of JHA databases, are instances of ‘de-politicization’ which ‘serves as a means to preclude public debate on the interoperability of databases that process essentially personal data, with social and political ramifications’.\textsuperscript{53} This related to the article of Rocco Bellanova and Denis Duez in this issue who argue that ‘artifacts and technologies are requested, designed and built as cornerstones of European Internal Security and its external dimension’ and ‘is generally assumed as politics-free’.

Agencies are particularly central to these dynamics of politicization and de-politicization, especially since Stockholm and Lisbon also provides new opportunities for more operational activities. Such trends are interacting dynamically and it is very difficult to separate the two. Interoperability is frequently mentioned in the Stockholm programme especially when it comes to databases. In particular in developing the future EUROSUR system, the objective is to increased interoperability by encouraging harmonization of needs and the development of standards.

Beyond the IT meaning of interoperability, this concept also refers to operational coordination between the different levels of JHA governance: national, European and international levels should be more interoperable (Frontex, 2009: 3). In fact Frontex presents a strong ‘operational’ character which is highly dependent on the member states, since it only acts as a coordinator for the joint operations of the member states in the field of border management.\textsuperscript{54} So far, Frontex has been highly dependent of the willingness of the member states to
contribute to the operations in equipment and staff. The recent row over the Guidelines at Sea now pending in front of the European Court of Justice, demonstrates also the sensitivity of EU member states to actually share staff and equipment in operations. It also confirms, as highlighted by Slominski in this special issue that further legalisation does not impede different operational practices.

Following the Stockholm programme and drawing lessons from the past, the Frontex mandate is presently being renegotiated. The analysis of the negotiations reveals that the future revised mandate of Frontex will provide the agency with more operational powers. Relying on regional operational offices, like the pilot office opened in Pireus in Greece, could also be developed externally, with offices in third countries.

This ‘operationalisation’ trend is also a way for member states and national law enforcement authorities to claim expertise and to take ad-hoc initiatives. The establishment of the new COSI working group illustrate this new operational approach. This standing committee gathers for the first time the different law enforcement agents and has the mandate ‘to ensure that operational cooperation on internal security is promoted and strengthened within the Union’ (art. 72TFEU).

Following the establishment of the COSI, new working methods favouring operational cooperation are being devised. Such working methods favour informal agreements, ‘pacts’ or instruments that usually lead member states to work on pilot projects, to become leaders on some operational initiatives. The multiplication of those operational soft modes of governance can help member states to escape the constraints of further institutionalization and politicization, in particular where supranational actors play an important role.

One example is the 2010 French initiative to agree on a European Pact Against International Drug Trafficking which mainly aims at being ‘operational’ and take the ad-hoc form of a ‘European Pact’. Adopted by the Council in June 2010, it is being implemented by the COSI.
The Pact shall be implemented ‘in full coherence and synergy with EU other external policies partnerships with source countries (South and Central America) and transit countries (West Africa) and the main partners of the EU (notably the United States) shall be reinforced and their operational aspect developed (target: 2010-2012)’. It links up, at an operational level, the fight against drugs to the combating of organised crime originating from West Africa. This is the first time that such a ‘European Pact’ is to coordinate operations for disrupting heroin trafficking routes at all levels.

The idea is to bring the different law enforcement authorities, national and at EU level, together in ‘operational networks’ through regional information exchange centres in West Africa (Accra and Senegal), the Maritime Analysis and Operations Centre based in Lisbon (MAOC) the Centre Européen de Coordination de la Lutte Anti-Drogue en méditerranée based in Toulon (CECLAD) and the South-East European Cooperation Initiative (SECI). Sub groups of willing member states have been established to implement the various aspects of this Pact and they report on regular basis to the COSI. In addition, this Pact was not discussed with the European Parliament. It is an ‘operational’ initiative, and as such did not go through any traditional decision-making procedure. The COSI, which is a new institutional creation, in fact enables the favouring of ad-hoc and operational cooperation.

In fact the development of EU mobility partnerships, following the Global Approach to Migration, with Moldova, Cape Verde and Georgia are part of those new ad-hoc developed to improve operational cooperation in the field of ‘circular migration’. Like for the 29 measures of the European Pact on Drugs, it is very flexible and based on the willingness of EU member states to take part into this initiative. While it is true that those partnerships were a way to avoid the constraints of the intergovernmental nature of labour migration, they have proved to be a quite popular mechanism amongst EU member states. The European Commission is thinking about extending those mobility partnership ‘with appropriate conditionality’ to
Mediterranean countries referreeing to ‘a genuine commitment from third-countries concerned to readmit irregular migrants who are not entitled to stay in the territory of a Member State’. Interestingly enough those mobility partnerships which tie the EU, its member states and the partner country to a list of initiative have as a legal basis ‘joint declarations’ that ‘are not designed to create legal rights or obligations under international law’. The European Commission has only a coordinating role and those types of ‘alternative and new mechanism of governance intending to move Europeanisation forward through methods different from those already provided by the Treaties’. This is not atypical of European integration but it is interesting to see that, whether it is in the field of police cooperation or the global approach to migration, member states and law enforcement agents sometimes value more ad-hoc, operational or soft modes of governance that enable them to escape the constraints of integration. It also shows that the Council is strengthened in leading the agenda and implementation of such ad-hoc and operational initiatives. The right of initiative of the European Commission is in a way bypassed and it strengthened the intergovernmental aspects of operational cooperation. Even though the ‘technical’ features of the ED-JHA were already designed through the negotiations on JHA chapters that led to the 2004 and 2007 enlargements, it seems that after Lisbon and Stockholm there is more potential to give it an ‘operational’ touch to ED-JHA, thereby de-politicizing the cooperation with international partners. This, in turn can also feed in back into ‘institutionalization’ since it might create some mechanisms of routinization and structuration, however in an ad-hoc manner and outside of traditional ED-JHA governance. However, our point is that it is difficult to detach this operational and pragmatic cooperation from political considerations. Those two dimensions of the kaleidoscope often merged in the same prism. Indeed ‘it would be [...] incorrect to consider the coordination of operational
cooperation itself as a value-neutral or merely ‘technical’ exercise. The Council itself has noted that intelligence-led law enforcement includes the setting of political priorities.\(^{61}\)

4) Conclusions

The developments undergone by the ED-JHA following Lisbon and Stockholm were identified in this special issue as being rythmed by dynamics of expansion and diversification that affect policies, regions and institutions. This article specifies how those dynamics can be affected by three processes that affect the ED-JHA. Firstly, signs of institutionalization are emerging. The ED-JHA is a more routinized and structured practice of policy-makers. JHA is now clearly embedded in the global policy frameworks negotiated with third countries and has also given rise to new coordination mechanisms within the EU institutions. The setting up of the EEAS, in that respect, can be seen both as an opportunity or a challenge to streamline further the coordination of ED-JHA. While there is a diffusion of the EU internal security discourse to EU foreign policy or CSDP missions’ policy makers community, in practice there is still a risk of further fragmentation and turf wars over resources.\(^{62}\) Secondly, the ED-JHA is also characterized by a widening of the circle of actors, who have different views of the objectives and instruments of ED-JHA. In particular this article has shown that the European Parliament but also JHA agencies were endorsing key roles in the ED-JHA. Thirdly, the ED-JHA, and this is particularly true since the creation of the COSI, is under the influence of an operationalisation trend. This trend, present internally in JHA governance, has the advantage both of sometimes bypassing the constraints imposed by institutionalization and politicization, but also to create more trust across European law enforcement agents. It is indeed in the culture of national law enforcement agents to work with operational networks, rather than with policy-makers. This pragmatism is pursued intensively by the COSI but also by the member states gathered in the Council. The European Pact on Drugs, the 29 measures
on illegal immigration or the Global Approach to Migration illustrate that point and help to bring back the member states at the centre of JHA cooperation by favouring soft governance and ad-hoc initiative which seem ‘operational’; and this is in spite of the abolition of the third pillar.

From a third country perspective, this kaleidoscopic view shows that it is not so straightforward to know how to cooperate with the EU, in the field of the ED-JHA. Not only has the range of actors involved increased, with the European Parliament becoming now a key actor in deciding upon JHA international agreements. At the same time though, ad-hoc cooperation is encouraged by EU member states, rending JHA cooperation like ‘business as usual’, following patterns of previous bilateral cooperation. There is however clearly more scope to work with EU JHA agencies. However at this stage it is difficult to make any predictions. Those three trends will influence both the way ED-JHA is designed and implemented within the EU and with third countries. Dynamics of expansion and diversification will be influenced by those three trends and therefore involve a variety of possibilities, following the kaleidoscopic metaphor we have used in this article.
Endnotes

1 See F. Trauner and H. Carrapico, editorial of this special issue.

2 See in this special issue the article by MacKenzie and Ripoll on the role of the European Parliament in PNR.


6 Wallace, H., & Young, A. (1997), See note 1 above.


8 While the Treaty refers now to the Common Security and Defence Policy, some of the documents quoted in this article still use the old acronym of European Security and Defence Policy (ESDP).

9 Intensive intergovernmentalism refers to interaction about national policy-makers, and in the case of JHA amongst police officers, magistrates, or border guards, without much interaction of EU institutions. See S. Lavenex and W. Wallace (2005). ‘Justice and Home Affairs.


14 Around ten pages.


16 To do so, a series of guiding principles are formulated: to develop an EU single external relations policy; to work in partnership with third countries and especially with neighbors; to actively develop and promote European and international standards; to promote the exchange of information between themselves and within the Union on multilateral and bilateral activities, to act with solidarity, coherence and complementarity; to engage in information,
monitoring and evaluation, inter alia with the European Parliament; and that the Union will work with a proactive approach in its external relations. See note 16 above, p. 74.


22 See hearing of David O’Sullivan, Note 21 above.

Available at http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/ISS/cEUF260111ev7.pdf

In the same House of Lords hearing, the chairman of the House of Lords JHA committee reported that ‘when we were in Brussels before Christmas and had a session with David O’Sullivan, who is the CEO of the External Action Service, I have to say that it was very early days indeed, which is a polite way of saying that they did not really know what they were going to do at all’. See note 24 above, p. 22


Document 10748/09 of Council of the European Union of 15 June 2009, ‘Presidency Report on ESDP’, p. 39. In the past, the Commission and the Council had already tried to find some institutional synergies notably via the concept of Security Sector Reform that allowed
the second and the third pillar to work together. The end of the pillarisation helped to increase this trend towards functional similarities between civilian crisis management and ED-JHA. The Stockholm programme recognizes the complementary between CSDP mission and EU internal security/ JHA in fighting transnational crime and promoting the rule of law. This is quite a breakthrough since it was never mentioned in prior multi-annual JHA programmes.


32 For instance CIVCOM with COSI Support Group (planned for 18 May 2011); COTER with TWG (planned for 28 April 2011), with CTC participation; JAIEX potentially with COMAG/MaMa or COEST or COWEB or COMEM/MOG or COASI or COLAT or COTRA or COAFR, depending on issues of mutual interest


42 See A. Ripoll and A. Mac Kenzie, this special issue


47 See ENP action plans at http://ec.europa.eu/world/enp/documents_en.htm


49 For the sake of clarity we want to precise that operationalization refers to the operational activities of law enforcement agencies in the EU. The concept of ‘routinization’


54 Its official name is The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

55 Council of the European Union (2010e). *Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of*

56 Council of the European Union (2010c). European pact to combat international drug trafficking – Luxembourg, 3 June 2010


58 Council of the EU (2009). Joint Declaration on a Mobility Partnership between the European Union and Georgia. 2979th JHA Council meeting Brussels, 30 November 2009.


60 Carrera, S. and R. Hernández i Sagrera (2009), Note 58 above, p. 30

61 Rijpma, 2010, Note 50 above, p. 10

62 See Pawlak, this special issue.