Interparliamentary Co-operation in EU Justice and Home Affairs

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1. Introduction

EU Justice and Home Affairs has been one of the fastest- if not the fastest- growing area of EU law and policy in recent years. The fields that it covers raise important questions related to both sovereignty and power transfer from the national to the EU level, as well as of course to the protection of fundamental rights and the re-negotiation of the relationship between the individual and the State within the EU framework. The growth of EU action in Justice and Home Affairs has therefore the potential of being a catalyst in the transformation of the Union from a market to a demos. The very nature of EU Justice and Home Affairs law and policy- and the institutional limits at EU level- has led to calls for enhanced parliamentary scrutiny, by both the European Parliament and national parliaments. Such calls- especially with regard to an enhanced role by national parliaments- have been prominent in the EU constitutional debate in recent years, with national parliaments increasingly being viewed as able to address the perceived indifference of EU citizens towards the European Union and to bring 'Europe closer to its citizens'. Along with strengthening mechanisms of scrutiny of EU law and policy at national level, closer co-operation between national parliaments (and to some extent between national parliaments and the European Parliament) may play an important role in strengthening the input of national parliamentary scrutiny to the shaping of EU law and policy on Justice and Home Affairs. This chapter will attempt to cast light on significant challenges facing inter-parliamentary co-operation with regard to action in the field of Justice and Home Affairs. While a number of the issues mentioned are EU JHA-specific, broader questions concerning the reach and extent of inter-parliamentary co-operation in the making of EU law will inevitably be taken into account.

2. Justice and Home Affairs law as emergency legislation

Although not the rule, the possibility of the adoption of EU Justice and Home Affairs legislation as a matter of urgency cannot be excluded. A prime example of such emergency framing has been the introduction and adoption of the European Arrest

Warrant.[1] Tabled shortly after 9/11, this far-reaching and unprecedented text was 'agreed' by JHA Ministers in less than three months (at the end of the 2001 Belgian Presidency). The tight timing- linked with the political aim of having agreement as soon as possible- meant that national parliaments were given extremely limited time to scrutinise meaningfully the various drafts emanating from the Council Working Groups- following a moving target has proven to be quite a challenging task.[2] This has led to the adoption – with limited scrutiny- of a measure which introduced the method of mutual recognition in criminal matters in the EU and had significant implications for the protection of fundamental rights across the EU, but also for the broader issue of legitimacy of EU action on the basis of mutual recognition, the compatibility of such action for the rule of law, and its impact on the reconfiguration of the relationship between the individual and the State at national, but also at EU level.[3] Along with the European Arrest Warrant (and the Framework Decision on combating terrorism which was negotiated in parallel)[4], it must be reminded that negotiations on long-standing pending proposals at the time (such as the Decision establishing Eurojust and the Second Money Laundering Directive) were similarly accelerated and significantly different texts were agreed to at the same Council. Like the European Arrest Warrant, these proposals were not devoid of controversy: the 2nd money laundering Directive introduced highly contested obligations for the legal profession to co-operate with the State in combating money laundering, which have been deemed as challenging lawyer-client confidentiality, the right to fair trial and the very administration of justice in Member States; and the Eurojust Decision dealt with inter alia the extent to which Member States would transfer powers to the EU with regard the initiation of investigations and prosecutions.[5] Such emergency framing has resurfaced post-9/11 on measures framed as counter-terrorism measures and it is not

[1] Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, OJ L190, 18 July 2002, p.1.
[2] See in this context the Reports by the UK House of Lords European Union Committee demonstrating the attempts to scrutinise at a short notice and within a limited timeframe the drafts of the European Arrest Warrant: *Counter Terrorism: The European Arrest Warrant*, 6th Report, session 2001-02, HL Paper 34; and *The European Arrest Warrant*, 16th Report, session 2001-02, HL Paper 89.
[3] For details see inter alia V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', in *Common Market Law Review*, vol.43, 2006, pp. 1277-1311.
[4] Framework Decision on the definition of terrorism, OJ L164, 22 June 2002, p.3.
[5] For details, see V. Mitsilegas, J. Monar and W. Rees, *The European Union and Internal Security*, Palgrave, 2003.

unlikely that similar emergency discourses could arise in the future.[6] The challenges for inter-parliamentary co-operation in this context are evident, notably the need to provide a speedy, co-ordinated response flagging up in particular national parliaments' points and objections with regard to the compatibility of proposed measures with fundamental rights – a pre-requisite for such response reflexes would be to establish mechanisms ensuring the speedy transmission of Council document drafts to national parliaments.

3. The EU external action on Justice and Home Affairs

The emergence of the European Union as an international actor in JHA has raised a number of questions regarding the coherence and consistency between its internal and external action, in particular the compatibility of EU action in the international field with fundamental rights and the standards and values upon which the Union is claiming to be based.[7] Action plans and agreements with third countries on the fate of asylum seekers and refugees, on readmission, on extradition and the transfer of passenger data (PNR) all constitute examples of contested EU external action in Justice and Home Affairs. Parliamentary scrutiny in this context is extremely limited. In the third pillar in particular, the European Parliament has no say, and in practice the role of national parliaments has been very limited (examples of the scrutiny of international third pillar agreements by the UK Parliament demonstrate that these agreements were almost presented as a fait accompli, with signature dates set up a priori and signature deemed as a matter of urgency).[8] Similar limits to national parliamentary scrutiny of first pillar agreements (such as the original EC-US PNR agreement) were presented, caused in part by institutional factors.[9] In the light of the

[6] For example the (first pillar) data retention Directive was adopted after negotiations were accelerated on the grounds that the measure was essential for counter-terrorism purposes (OJ L105, 13 April 2004, p.54). After the Madrid attacks, the EU focus has been largely on measures enabling the collection, retention and exchange of personal data.

[7] See in this context, V. Mitsilegas, 'The New EU-US Co-operation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' in *European Foreign Affairs Review*, vol.8, 2003, pp.515-536.

[8] See House of Lords European Union Committee, *EU-US Agreements on Extradition and Mutual Legal Assistance*, 38th Report, session 2002-03, HL Paper 153.

[9] For instance, the 'adequacy' Decision accompanying the EC-US PNR Agreement was a comitology Decision, and the extent of national parliamentary scrutiny of such a measure remains varied across Member States. See V. Mitsilegas, 'Contrôle des étrangers, des passagers, des citoyens: Surveillance et anti-terrorisme' in *Cultures et Conflits*, vol. 58, 2005, pp.155-182.

significant repercussions of EU external action in Justice and Home Affairs for the protection of fundamental rights, but also for the credibility and legitimacy of EU external action and its consistency with the proclaimed 'internal' Union values and standards, close and timely monitoring by national parliaments and strong inter-parliamentary co-operation may prove central in highlighting the issues involved at national level. National parliaments in this context are faced with the challenging task of exerting influence towards the early scrutiny of texts (such as draft international agreements) which remain in secret until very late stages in the negotiations. This challenge is further compounded by the need of a co-ordinated, inter-parliamentary approach on such matters. Moreover, an open question remains the involvement of national parliaments in cases monitoring human rights in the context of external Justice and Home Affairs law and policy, but also more broadly in the context of action which may not involve legislation- the case of scrutiny of Member States' involvement in rendition flights is a prime example.

4. Agencies, databases and operational co-operation

A dominant trend in the development of EU Justice and Home Affairs – with great visibility in the Hague Programme- has been the focus on operational co-operation and the collection and exchange of personal data. A number of EU databases are being established and/or developed (the second generation Schengen Information System and the Visa Information System being prime examples) and their potential 'interoperability' is being examined.[10] While these developments may have a very substantial impact on fundamental rights, their design and implementation may receive very little scrutiny. National parliaments examine only the 'parent' EU legislation establishing these systems/databases. However, such legislation leaves a number of aspects to be decided under the 'comitology' procedure, the move justified on the basis that a lot of these issues are 'technical'. This view is backed up by the Commission's Communication on interoperability which treats the latter concept as a

[10] For an overview, see V. Mitsilegas, 'Databases in the Area of Freedom, Security and Justice' in H. Xanthaki (ed)., *Towards a European Criminal Record*, Cambridge University Press, 2008.

'technical issue'.[11] A similar approach can also be discerned in other Justice and Home Affairs measures, such as the Third money laundering Directive, which leaves crucial definitions determining its scope to 'comitology'.[12] This view may lead to a de facto 'depoliticisation' of these issues, shielding choices regarding the collection and exchange of sensitive personal data- as well as the very scope of Justice and Home Affairs instruments - from an open, democratic debate. Similar gaps may exist as regards the examination of the operation of these systems/databases, their interlinking and rules on access. The examination of such issues by national parliaments- let alone the establishment of stronger interparliamentary co-operation- poses significant challenges in the light of the admittedly limited expertise of national parliaments in dealing with comitology.[13]

Another example of potential 'depoliticisation' which may lead to gaps in democratic scrutiny is the proliferation of EU Justice and Home Affairs bodies and agencies.[14] Europol has been the leading example in this context, but is now accompanied by bodies and agencies such as Eurojust and Frontex (with Europol and Eurojust being third pillar bodies, while Frontex being a first pillar agency). In the development of all these bodies, two interlinked issues have been central: the relationship between the EU and the national level (and the degree of transfer of powers to an EU centralised agency); and the exact role and powers of EU bodies- in particular whether, and to what extent these are 'operational'.[15] There are currently significant gaps in the scrutiny and accountability of the operations/work of these bodies. As with databases, the involvement of national parliaments is mostly limited to the examination of the

[11] European Commission, *Communication on Improved Effectiveness, Enhanced Interoperability and Synergies among European Databases in the Area of Justice and Home Affairs*, COM (2005) 597 final, Brussels, 24 November 2005 (in particular p.3).

[12] Such as the definition of a 'politically exposed person- for this and other aspects, see V. Mitsilegas and B. Gilmore, 'The EU legislative framework against money laundering and terrorist finance: A critical analysis in the light of evolving global standards' in *International and Comparative Law Quarterly*, vol. 56, 2007, pp.119-141.

[13] See the COSAC Sixth Biannual Report (November 2006), where it was stated that 'the comitology procedure seems to be a relatively new and unknown subject area for many national parliaments' (p.28).

[14] On both aspects of depoliticisation, see V. Mitsilegas, 'Border Security in the European Union. Towards Centralised Controls and Maximum Surveillance' in E. Guild, H. Toner and A. Baldaccini, *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing, 2007, pp.359-394.

[15] Mitsilegas et al., op.cit.; Mitsilegas, op. cit. (Border Security); see also the Reports by the House of Lords European Union Committee: *Judicial Co-operation in the EU: the Role of Eurojust*, 23rd Report, session 2003-04, HL Paper 138; and *Proposals for a European Border Guard*, 29th Report, session 2002-03, HL paper 133.

draft legislation establishing such bodies/agencies- with more detailed ex post scrutiny being largely ad hoc by specific national parliaments- and with varying content and reach.[16] Enhanced scrutiny and inter-parliamentary co-operation is essential given the potentially far-reaching consequences action in the fields covered by these bodies may entail and the considerable potential gap in the examination of operational and management action by these bodies. Establishing co-operative scrutiny mechanisms becomes all the more relevant given the increasing difficulties to precisely 'pin down' what exactly these EU bodies do in practice- the uncertainty surrounding the precise nature of FRONTEX operations in guarding EU maritime borders is a prime example.

5. The subsidiarity debate

The general questions with regard the evolution of the principle of subsidiarity and the role of national parliaments in monitoring its use apply in the field of Justice and Home Affairs as well. Issues of co-ordination between national parliaments and justification of their Opinions on subsidiarity within the framework of various forms of the 'early warning system' exercise are particularly relevant, especially in the light of the fact that EU Justice and Home Affairs is currently one of the areas with one of the heaviest production of legislative and policy texts at EU level. In this context, issues with which national parliaments are currently grappling- such as the link and the (im)possibility to distinguish between subsidiarity and proportionality, or subsidiarity and competence- remain relevant both in the context of national parliamentary scrutiny, and in the context of interparliamentary co-operation given the need for national parliaments to develop common positions regarding the compatibility of EU law proposals with the subsidiarity principle.[17] The need for timely examination and good co-ordination between national parliaments in this context is evident. Another issue that is in need of attention is the timing of the subsidiarity check. Having one check only at the level of the Commission's initial proposal is far from adequate, as the subsidiarity check is linked with the content of the proposal. The content of legislative proposals – especially in controversial cases-

[16] For examples of ex post national parliamentary scrutiny, see in particular the House of Lords EU Committee Report on the work of Eurojust (note 15 supra).
[17] For cocnetual issues arising in the examination of subsidiarity issues by national parliaments and their co-operation, see the COSAC Seventh Biannual Report (May 2007).

may change considerably in negotiations in the Council. A good example is the Commission's proposal for a third pillar Framework Decision on defence rights, which has been substantially watered down in negotiations.[18] Limiting the subsidiarity test to the Commission draft only would not be a representative or accurate test for subsequent drafts and potentially the adopted legislation.[19] National scrutiny of subsidiarity and the relevant interparliamentary co-operation should strive to cover as many stages of the legislative cycle as possible.

6. The legislative cycle of EU Justice and Home Affairs proposals- from impact assessments to the monitoring /evaluation of implementation

Along with the scrutiny of draft proposals for EU Justice and Home Affairs, action and co-operation between national parliaments could extend to the other stages of the legislative cycle. Prior to – or at the stage of- the very submission of a draft proposal by the European Commission (or Member States), a key scrutiny role for national parliaments may involve the impact assessments put forward by the Commission. At present, national parliaments examine such impact assessments in a varying degree of intensity.[20] Examination could focus on the impact assessment submitted by the Commission, but it could also extend to the stage prior to the publication of such impact assessment, by feeding national views into the Commission's consultation process. Such early action would tie in well with the view that involvement by national parliaments could extend also to the policy cycle of EU institutions (such as the Commission's Annual Work Programme) and influence at an early stage policy

[18] For details on the content, rationale and evolution of this proposal, see House of Lords European Union Committee, *Procedural Rights in Criminal Proceedings*, 1st Report, session 2004-05, HL Paper 28; and subsequently, *Breaking the Deadlock: What Future for EU Procedural Rights?*, 2nd Report, session 2006-07, HL Paper 20.

[19] The procedural rights proposal is a good example where the examination of subsidiarity may be de facto combined/merged with the examination of the existence and extent of EU competence in the adoption of the measure. In fact, a number of objections by Member States in the Council (which have contributed to the blocking thus far of the adoption of the proposal) have been centered on the issue of competence. On the competence issue regarding this proposal, see V. Mitsilegas, 'Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance' in S. Carrera and T. Balzacq, *Security versus Freedom? A Challenge for Europe's Future*, Ashgate, Aldershot, Hampshire and Burlington, VT, 2006, pp. 279-289.

[20] For examples, see the COSAC Fourth Biannual Report (October 2005).

decisions on whether to table legislation in the first place.[21] Involvement of national parliaments in impact assessments may add particular value in the field of Justice and Home Affairs, where submitting impact assessments has not always been forthcoming (also due to the fact that Member States may still table their own legislative proposals). National parliaments may also require further information from their Governments at the stage of submission of EU proposals for legislative scrutiny. A recent example of a development that could contribute towards meaningful scrutiny of Justice and Home Affairs proposals at an early stage has been the acceptance by the UK Government to include in the Explanatory Memorandum accompanying EU proposals sent for scrutiny to Westminster with enhanced information on the implications of the proposals for human rights.[22] This practice- which would follow the proposal in all stages of the legislative cycle up to its adoption- could be emulated by other national parliaments and add value to inter-parliamentary co-operation on Justice and Home Affairs matters.

Interparliamentary co-operation could potentially focus more at the various stages of negotiations leading to the adoption of Justice and Home Affairs legislation. Along with the continuous scrutiny of subsidiarity mentioned above, national parliaments could strive to keep if not abreast, at least updated on developments in the Council Working Groups and the elaboration of compromise texts which could be submitted for agreement without any substantive scrutiny by national parliaments. The recent practice of adoption of immigration legislation at EU level may leave much to be desired in terms of national parliamentary scrutiny. The move in 2005 to co-decision between the Council and the European Parliament on Title IV measures (excluding economic migration)[23] has led on a number of occasions (such as the adoption of the Schengen Borders Code or the Regulation on Rapid Border Intervention Teams) to a first reading agreement between the Council and the Parliament- with the Parliament perceived to be acting effectively as the '26th' or '28th' Member State in the Council

[21] An example of a shift to more 'strategic' scrutiny in addition to the scrutiny of Union legislative proposals can be discerned in the work of the House of Lords European Union Committee. For its rationale see *Review of Scrutiny of European Legislation*, 1st Report, session 2002-03, HL Paper 15.
[22] See House of Lords European Union Committee, *Annual Report 2006*, 46th Report, session 2005-06, HL Paper 261 (para. 125).
[23] Council Decision of 22 December 2004 providing for certain areas covered by Title IV of part III of the EC Treaty to be governed by the procedure laid down in Article 251 of the Treaty, OJ L396, 31 December 2004, p.45.

and putting forward its own amendments and requirements (at times in conjunction with other, parallel negotiations including on third pillar measures) in order to reach a compromise. While such practice falls within the institutional prerogatives of the Parliament, the impact for national parliaments might be to be presented with a text that is in reality a *fait accompli*. National parliaments may have to look at whether co-operation with their Government (acting within the Council) or with the European Parliament directly might be the optimal way of ensuring they have a say in the late stages of negotiations.[24]

While effective interparliamentary co-operation on the ex ante scrutiny of EU draft legislation is crucial, another important issue concerns the role of national parliaments in the implementation of adopted EU JHA legislation at the national level. For the majority of these measures, national parliaments have the challenging task of adopting legislation which would achieve the objectives of the EU measure involved, while adjusting it to the domestic legal system and culture. While a number of the issues involved may be highly political, consultation and exchange of best practice between national parliaments might be desirable. Such exchange of views may be limited to drafting issues, but could also extend to more 'political' choices (such as the implementation of optional grounds for refusal in measures on mutual recognition in criminal matters- an issue that has arisen in the debate over the German implementation of the European Arrest Warrant). At the domestic level, consultation is essential between national and regional parliaments, but also between different parliamentary sectoral committees (in Justice and Home Affairs, these could be committees on European affairs and committees on internal /home affairs or labour matters).[25] Establishing mechanisms of interparliamentary co-operation is also of importance in this context, especially in the light of the emphasis of the Hague Programme on the evaluation of the implementation of EU Justice and Home Affairs law, and the provision by the Constitutional and Reform Treaties for a special role for

[24] Engagement with Governments is also essential where the Council reaches a so-called 'general approach' on a proposal (formerly a 'provisional agreement'). This is not a formal agreement, but may have the effect that large parts of the text (if not the text as a whole) is effectively 'locked'. This may have an impact of de facto overriding parliamentary scrutiny reserves. On the UK context, see House of Lords European Union Committee, *The Scrutiny of European Union Business- Provisional Agreement in the Council of Ministers*, 23rd Report, session 2001-02, HL Paper 135.

[25] For proposals to 'mainstream' scrutiny of EU matters to sectoral committees in the UK context, see House of Commons Home Affairs Committee, *Justice and Home Affairs at European Union Level*, 3rd Report, session 2006-07, HC 76.

national parliaments regarding the evaluation of the implementation of Justice and Home Affairs measures.[26] Such interparliamentary co-operation could also extend to the monitoring of action by EU Justice and Home Affairs bodies, such as Europol and Eurojust. The Reform Treaty also calls – taking into account the more 'intergovernmental' character of these bodies – for their scrutiny by the European Parliament and national parliaments. The precise depth of such scrutiny and the respective role of national parliaments and the European Parliament in this context remain to be defined [27]

7. Co-operation with the European Parliament

In a number of the issues mentioned above (in particular scrutiny of EU agencies and the evaluation of Justice and Home Affairs legislation), the establishment of forms of co-operation between the European Parliament and national parliaments has been hailed as the way forward. While the constitutional issues arising from such co-operation may have been underestimated and the prospect of an antagonistic relationship between national and European parliamentarians cannot always be excluded, co-operation may be essential to ensure a high level of transparency and scrutiny of EU Justice and Home Affairs. For national parliaments, good relations with the European Parliament are essential in order to ensure their meaningful involvement in the EU policy and legal process- especially in the light of the strengthened role of the European Parliament as a co-legislator in aspects of Justice and Home Affairs, which will become the norm if the Reform Treaty is ratified. On the other hand, a co-operative European Parliament may also benefit by enhanced visibility at national level and by using the weight of national parliaments to conduct scrutiny of Member States' implementation and application of Justice and Home

[26] The latest draft of the Reform Treaty (doc. CIG 1/07, Brussels 23 July 2007) introduces Article 8c enabling national parliaments to take part in the evaluation mechanisms in accordance with the relevant provision in the AFSJ chapter. This provision (revised Article 64) calls however for national parliaments and the European Parliament merely 'to be informed of the content and results of the evaluation'.

[27] According to the latest draft of the Reform Treaty: national parliaments are to be involved in the political monitoring of Europol and the evaluation of Eurojust's activities (Article 8c). Article 69h calls for the adoption of future legislation determining arrangements 'for involving the European Parliament and national parliaments in the evaluation of Eurojust's activities'; Article 69k calls for the future adoption of 'procedures for scrutiny of Europol's activities by the European Parliament, together with national parliaments'.

Affairs matters. While forms of co-operation have already been established,[28] co-operation could be further streamlined and strengthened. The key in this context is for the respective roles of national parliaments and the European Parliament in the EU legislative and constitutional framework to become clear to those involved and issues related to the fact that national parliaments are increasingly called to be involved in the EU law-making process without them actually being an EU institution to be addressed.

8. Conclusion

The above examples demonstrate that there is still considerable scope for the expansion and strengthening of both national parliamentary scrutiny and inter-parliamentary co-operation (between national parliaments as well as between them and the European Parliament) in the area of Justice and Home Affairs. Given the constant growth of EU Justice and Home Affairs legislation, and the changing institutional roles of the European Parliament (and to some extent national parliaments) in the field, establishing mechanisms ensuring the timely and in depth scrutiny and co-operation regarding legislative proposals in the field are needed as a matter of urgency. Co-operation should follow closely the legislative cycle of proposals, and could also focus on the early stages of examining impact assessments. Examination of such assessments, along with the subsidiarity test, should to the extent possible follow the evolution of legislation, instead of being limited to the original Commission proposal. Along with such ex ante scrutiny, the importance of interparliamentary co-operation ex post, at the stage of implementation of Justice and Home Affairs legislation, but also regarding the scrutiny of agencies and EU bodies and operational co-operation at EU level, should not be underestimated. Interparliamentary co-operation in this context may prove crucial in bringing into the fore concerns and views of citizens across the Union regarding the operation of EU mechanisms of Justice and Home Affairs co-operation (such as the European Arrest Warrant), while at the same time providing effective avenues for scrutiny and accountability of EU structures (such as databases and agencies) whose operations are

[28] These have largely taken the form of Joint parliamentary meetings (on broad topics, which have included Justice and Home Affairs), and Joint committee meetings – see COSAC Sixth Biannual Report (November 2006).

potentially shielded from public scrutiny and debate. Admittedly, such an expansion of interparliamentary co-operation in the field of Justice and Home Affairs may test both the resources and the perception of the role of national parliaments in the scrutiny of EU law and policy. It may also test the psychological and institutional capacity of co-operation between national parliaments and the European Parliament, each defending their prerogatives within the scrutiny of EU law. However, enhanced co-operation will mean enhanced scrutiny and transparency in this highly contested field of EU action. The more an open and extensive debate regarding the direction of Justice and Home Affairs law and policy- and the Union as such- is deemed necessary at this stage of European integration, the more enhanced interparliamentary co-operation appears as a one-way street.