

European Internal Security Policy: Core Principles, Enlargement and its External Dimension

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I. JHA in the EU: History, structure and trends

The cooperation in the domain of Justice and Home Affairs⁽¹⁾ is the most rapidly developing area of the EU cooperation of today. It is estimated that approximately 40% of the workload of the Council of the EU (Council of Ministers) is directly or indirectly linked with the JHA agenda⁽²⁾ and include both the cooperation among the EU states and the cooperation extending the external EU borders.

A popular myth emerges occasionally, that the JHA cooperation policy started as late as in the year of 1993 when the Maastricht Treaty entered into force. In reality, however, the beginning of the cooperation relevant for the internal security started as early as in the 50s/60s as the reaction to enhanced mobility of persons, goods and capital within the gradually emerging internal market. The Maastricht Treaty of 1992 only provided a specific institutional framework for already existing judicial and police cooperation and the road-map and legal umbrella for the future development of the cooperation. At the same time, the Maastricht Treaty institutionally and structurally separated the EU cooperation in the domain of Justice and Home Affairs from the mainstream economic integration processes. The economic cooperation has been concentrated within the I. “supranational” pillar of the European Union while the judicial and police cooperation have been operated within the framework of the III. “international” pillar of the EU. Since the Maastricht Treaty, the JHA cooperation further developed due both to the internal reforms (e.g. finalization of Schengen system,

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Amsterdam Treaty, Tampere and Hague programs) and events both within the European Union (immigration flow from Balkans, Africa and China, terrorist attacks in Madrid and London) continent (9/11 attacks in New York and Washington, the Iraq War).

Frame: Most important event in the JHA cooperation in the European Union

- Naples Convention (1957) – cooperation of custom authorities as reaction to the creation of the custom union among the member states
- “TREVI” group as abbreviation of “Terrorism, Radicalism, Extremism and Violence International” (1975) – regular meetings of senior civil servants responsible for the fight against organized crime
- Schengen Agreement (1985) and Schengen Convention (1990) – two international treaties on gradual removal of police and passport controls from the internal borders of the Schengen states⁽³⁾ and establishment of compensatory security measures on the external borders of the EU. Amsterdam Treaty (1997/1999) incorporated the Schengen system into the EU structures.
- Dublin Convention (1990) – agreement on the jurisdiction over asylum applicants but without establishing the standards of the asylum procedure and standards (later, the Dublin Convention has been replaced by EC regulation, labeled as “Dublin II”)
- Maastricht Treaty (1992/1993) – Justice and Home Affairs Policy formally introduced the “pillar system” of the EU established.
- Amsterdam Treaty (1997/1999) – Visa, asylum and immigration agenda transferred from the III. pillar into the I. pillar of the EU (“communitarization” of visa, asylum and immigration policy).
- Tampere Program (1999) - plan of legislative activity for years 1999-2004 primarily focused on creation of the European standards in visa, asylum and immigration policy.
- European Arrest Warrant mechanism (2001/2002) – framework decision

on the European arrest warrant introducing new extradition mechanism in the EU; a model legal norm for EU cooperation in other areas of criminal procedural law based on “mutual recognition” principle.

- “EU Constitutional Treaty” (2004) – significant reform of the EU system, the “pillar” structure abolished, expansion of the majority voting in the JHA agenda, clear legal status of the EU Charter of Fundamental Freedoms. However, the Treaty has been rejected in referenda in France and Netherlands (2005) and has never entered in force.
- “Hague Program” (2004) – plan of legislative activity for years 2004-2009 primarily focused on the fight against terrorism and cooperation in the domain of criminal law.
- EU Reform Treaty (2007) – less ambitious reform of the EU treaty system after failure of the “EU Constitutional Treaty.” The majority of changes in the JHA policy planned by the “EU Constitutional Treaty” should remain in the Reform Treaty text while stronger safeguard clauses introduced. However, the principle of supremacy of the EU law should not be explicitly guaranteed in the Reform Treaty and the legal position of the EU Charter of Fundamental Rights seems to be less clear.⁽⁴⁾
- Enlargement of Schengen area (2008) – majority of new EU members should fully join the Schengen area; the police controls should be removed from the frontier between majority of “old” and “new” European Union states.

As the result of its historical development, the present JHA cooperation is split between the I. pillar of the EU (visa and asylum, immigration, judicial cooperation in non-criminal law, harmonization of certain offences violating the EC policies) and the III. pillar (judicial and police cooperation in the criminal law) whose boundaries are sometimes blurred.⁽⁵⁾ Hence, the current JHA cooperation in the EU covers heterogeneous catalogue of mechanisms which can be structured into is four categories:

- Coordination of procedural criminal law instruments which does not

harmonize national standards of criminal law. The major principle applied in this area is the “mutual recognition” of decisions of the national judicial and police authorities based on the “mutual trust” among the EU states. This method of the cooperation should guarantee that judicial and police decisions issued by the authorities of one EU state (according to national standards) will be directly enforced by the judicial or police authorities of another EU state. However, even if this method of cooperation is accepted as general rule, it has been implemented by “step by step” approach which gradually introduces the “mutual recognition” principle into separate areas of police and judicial cooperation – e.g. the extradition and/or surrender (the European arrest warrant), the collection of evidence (the European evidence warrant) or the confiscation of property and the enforcement of financial penalties.

- Limited harmonization of the substantive criminal law of member states – usually only minimal harmonization is established and it concentrates on the definition of the crimes in question and not on the penalty imposed (or the penalty is defined in rather vague terms). In the third pillar, limited harmonization emerged regarding the terrorism, computer-related crimes or the corruption in public sphere; in the first pillar, the *acquis communautaire* partially harmonized criminal sanctions for the violation of the EC standards in the area of environmental policy, company and accountancy law or the spending rules for the EU funds.⁽⁶⁾ However, the EU law still does contain neither the substantive definitions nor the sanctions for the most significant and frequent crimes (such as theft, intentional assault, rape or murder) due to significant differences in national legal traditions.
- Harmonization of standards of visa and asylum policy in the EU while their implementation is operated by member states authorities: In comparison with visa and asylum policy the harmonization of the immigration policy is still only very limited and it is considered as one of the major objectives of the future EU development.

- Establishment of special agencies or institutionalized cooperation networks which shall assist member states with their fight against the trans-border crime. Examples: EUROPOL, EUROJUST, FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders), European Judicial Network or CEPOL (European Police College). However, the EU agencies and networks are not intended to replace national law enforcement authorities since their role is strictly supplementary.

Tables II and III: Levels of decision-making and implementation of the European visa policy vs. EU judicial cooperation in criminal law

Table II Visa Policy in the EU (centers of power)

	Adoption of standards	Implementation
EU level	X	
National level		X
Regional level		

Table III: Judicial Cooperation in Criminal Law

	Adoption of standards	Implementation
EU level		
National level	X	X
Regional level		

II. Current shortcomings of the JHA cooperation mechanism

Regardless the recent boom of the JHA integration, the level of necessary cooperation is still far from the completion of the objective to establish the EU as “the area of freedom, security and justice” (Art. 2 TEU). The reason behind this situation are primarily the structural shortcomings of the III. pillar regulation

in comparison with the regulatory regime of the I. pillar of the European Union; The most important structural specifics of the JHA cooperation being as follows:

- Limited role of the European Court of Justice (ECJ) in the control and enforcement of the EU rules in the III. pillar. The European Court of Justice has no power to evaluate the compliance of member states with their obligations under the JHA law – in contrast to the enforcement mechanism within the I. pillar (art. 226-228 TEC). Further, the European Court of Justice has only limited power to answer the preliminary questions concerning the EU law which are referred by national/ domestic courts of the member states – again, in contrast to the I. pillar domain where the preliminary ruling mechanism proved to be very effective tool of the development of the European law by the judicial case-law.⁽⁷⁾ While the I. pillar law requires all member states to enable their national courts and tribunals to refer to the ECJ, in the III. pillar area member states must explicitly permit their courts to refer to the ECJ preliminary questions on the validity or interpretation of the EU law (opt-in scheme).⁽⁸⁾
- The secondary norms in the area of the JHA cooperation (framework decisions, decisions, and common positions) do not possess direct effect. Therefore, they can not directly impose obligations or guarantee rights onto state organs, business companies or individuals in member states. Instead, member states must implement them into domestic legal systems and only afterwards the EU legal norms effectively become part of the domestic criminal law. The lack of direct effect of the EU is not only a technical problem but, in combination with the limited access of individuals to the EU courts, it raises significant questions regarding the democracy and the protection of individual human rights in the EU law.
- Several structural aspects of the EU law, which regulates the situation of conflict among the EU and national law, are still unclear in the JHA domain. In particular, the principle of supremacy, formulated by the European Court of Justice in the I. pillar, seems to be non-existent in the

III. pillar. Therefore, the conflict between an EU norm and, for instance, colliding constitutional guarantees of the human rights in a member state, would trigger a significant legal/constitutional problem.⁽⁹⁾

The structural problems of the JHA cooperation in the III. pillar are open to several potential solutions. The first possible scenario can be provided by the European Court of Justice case-law which would fill the interpretation gaps of the written law of the EU. Indeed, the European Court of Justice recently ruled in several cases about the doctrinal features of the III. pillar law. The most commented one was its decision in “Maria Pupino” case (C-105/03), when the ECJ ruled that even the framework decisions⁽¹⁰⁾ do not have direct effect (because the ext of the TEU explicitly prevents this), courts and governmental agencies of member states must interpret domestic law in the way most compatible with the objective of the correspondent framework decision – in other words, even if a framework decision is not directly applicable in member states, it still can influence the application of domestic law indirectly by setting the standards for the interpretation of domestic law.

The second method of healing the structural problems of the III. pillar regulation is the transfer of certain areas of the JHA regulation from the III. pillar into the I. pillar within the current “pillar” structure of the European Union – so called “communitarization” the JHA policy. The most significant step of this nature was made by the Amsterdam Treaty in the 90s when the whole agenda of the visa, immigration and asylum (i.e. the whole non-criminal la agenda) was transferred under the I. pillar regime. The Amsterdam Treaty change, however, was a standard treaty revision and required time-consuming ratification by all member states. However, the current EU treaty system provided also for a simplified mechanism which enables the inter-pillar shifts (i.e. from III. to I. pillar) by unanimous decision in the European Council without requirement of the national ratifications (so called “passerelle mechanism”). Under Finish presidency in the second half of 2006, a proposal for this step was made by the European Commission for majority of the EU anti-terrorist legislation.

However, majority of member states (including the Czech Republic) rejected the Commission plan and maintained the present situation.⁽¹¹⁾

The third possible solution of the JHA shortcoming would be the complete revision of the EU treaty system, including the structural reform of the EU pillar system. The “EU Constitutional Treaty” (officially named “Treaty establishing the Constitution for Europe”), prepared during the Convention on the Future of Europe in years 2002-2003, abolished the pillar structure of the EU and replaced it by single legal and institutional scheme based on the present I. pillar of the EU. Hence, the EU Constitutional Treaty tackled, in rather elegant manner, vast majority of the structural weaknesses of current framework of the JHA cooperation in the area of criminal law. However, after French and Dutch referenda in 2005, which rejected the ratification of the EU Constitutional Treaty, the future of the reform is unclear. After election of Mr. N.Sarkozy as French President in May 2007 and the European summit in June 2007, the most likely scenario of the future of the “EU Constitutional Treaty” is adoption of a “Reform Treaty” with less radical changes in comparison with the “EU Constitutional Treaty”. The conclusions of the European Council indicate, among other, the abolition of the pillar structure of the EU but much less clear position of the supremacy of the EU law or less predictable legal effects of the EU Charter of Fundamental Rights.⁽¹²⁾

III. Enlargement, the Czech Republic and the JHA cooperation in the EU

The Czech Republic joined the European Union on May 1, 2004. Since its accession, the Czech Republic has been required to apply the law of the European Union and the only exceptions (both permanent and temporal) had to be explicitly contained in the Accession Treaty. The preparation for the adoption of the EU JHA acquis started even before the accession – the Czech Republic was obliged to adapt its visa policy towards non-member states according to the EU uniform rules (e.g. it established visa regime for all ex-Soviet states with the exception of Baltic countries) and put its procedural and technical visa rules in

line with the EU standards.

In 2007, only one significant exception exists from the rule on the full application of the JHA law in the Czech Republic – its participation in the Schengen system. By its accession to the EU, the Czech Republic entered only the first phase of the Schengen system which does not include the abolition of police controls between the Czech Republic and other EU countries. Further, the Czech Republic authorities had no access to the major Schengen information database (Schengen Information System) due to the technical limitations of the software used. This transitional phase is expected to last until 2008 when the Czech Republic should start to fully participate in the Schengen system and the police controls on the internal EU borders should be removed.⁽¹³⁾

Regardless the relative smoothness of Czech participation in the JHA cooperation in the enlarged EU, two specific problems emerged in the Czech Republic. The first one is the growing Euroscepticism of new Czech government since 2006 and the second one is the constitutional constraints to the application of the EU JHA law in the Czech territory.

After elections in 2006, a new central-right coalition government has been formed in the Czech Republic. Regarding the JHA agenda, the leading political player within the coalition government is the Civic Democratic Party (ODS) whose members control both the post of prime minister (M. Topolánek), deputy prime minister for European affairs (A. Vondra) and the ministers of justice (J. Pospíšil) and internal affairs (I. Langer). Further, the president of the country (V. Klaus) is the honorary chairman of the same political party.

The Civic Democratic Party was the strongest opposition party during the accession negotiation talks and at the moment of Czech accession to the EU. While it generally supported Czech accession to the European Union, it strongly criticized the conditions of the Accession Treaty as not sufficiently beneficial for the Czech citizens and business companies. During 2004-2006, the party expressed even more radical criticism against new EU initiatives deepening the European integration, in particular against the project of the EU Constitutional Treaty. When the Civic Democratic Party entered the government,

fears emerged that this Eurosceptic approach would complicate or even paralyze Czech participation in the EU governance system, including the JHA domain. The first steps of the new government could support these concerns (e.g. the Czech Republic voted against the transfer of the anti-terrorist legislation to the I. pillar of the European Union) but later the Czech government seems to adopt more constructive approach.

Another possible significant constrain of Czech cooperation in the domain of the criminal law is rooted in Czech constitutional law. The Constitution of the Czech Republic has been amended in 2002 and so call “European clause” has been inserted. The constitutional amendment has been intended to prevent any constitutional disputes regarding the Czech accession to the European Union. However, the wording of the new constitutional text has left several issues unanswered. In the Czech Republic, the major institutional actor responsible for the protection of the integrity of the constitutional order is the Constitutional Court of the Czech Republic. The Constitutional Court has already ruled in several cases with the European Union relevance and one of its most influential judgments concerned the constitutionality of the European arrest warrant mechanism in the Czech Republic.

The saga of the adoption of the framework decision on the European Arrest Warrant (further referred as “EAW”) and its lengthy implementation in the EU member states is sufficiently known and commented.⁽¹⁴⁾ Adopted in the aftermath of the 9/11 attacks, this new framework decision replaced both the former EU law-based mechanism (two extradition treaties adopted within the III. pillar of the EU) and major international law instruments (in particular, Council of Europe Extradition Treaty) for extradition among the EU states. The EAW framework decision also tackled with traditional limitations to the extradition – specifically, the EAW removed the principle of non-extradition of own citizens and special treatment of extradition for political offences. Further, the EAW partially removed the requirement of double criminality for a relatively long catalogue of criminal offences.

The ambitious scheme of the EAW triggered many political and

constitutional disputes and only a minority of the EU countries implemented the EAW framework decision in due time.⁽¹⁵⁾ The Czech Republic should have implemented the EAW framework decision by the date of its accession to the EU (i.e. by May 1, 2004) but adopted the relevant legislation as late as in the autumn 2004 and the new EAW mechanism started to be applied from January 2005.⁽¹⁶⁾

In the Czech Republic, the implementation of the EAW has been based on the amendment of Czech Criminal Code and Code of Criminal Procedure without specific constitutional amendment.⁽¹⁷⁾ The heart of the problem and the emerging constitutional conflict was the Charter of Fundamental Freedoms,⁽¹⁸⁾ an integral part of Czech constitutional order, which prohibits Czech citizens to be “forced to leave the country” (Art. 14 par. 4). The rationale of this constitutional prohibition was the practice of the Communist police of the former Czechoslovakia to force dissidents to leave the country and to deprive them of their citizenship. The Charter of Fundamental Freedoms, adopted in the early 90s, does not explicitly prohibit the extradition of Czech citizens but the (pre-accession practice) of criminal law adhered to the interpretation that extradition of Czech citizens was unconstitutional and the (pre-accession) code of criminal procedure prevented Czech authorities to extradite Czech citizens.

Czech laws implementing the EAW scheme were vetoed by the President of the Czech Republic, Václav Klaus, but the presidential veto has been overruled by the Parliament. Consequently, a group of deputies (MPs) and senators⁽¹⁹⁾ had challenged the implementing legislation before the Constitutional Court of the Czech Republic which delivered its judgment in May 2006.⁽²⁰⁾

Using the same approach as in several older judgments relevant for the EU affairs,⁽²¹⁾ the Constitutional Court avoided answering majority of structural questions regarding the position of the EU law in the constitutional order Czech Republic. The decision of the Constitutional Court has not explicitly answered either the question of the non(existence) of supremacy of the domain of the III. pillar of the EU or the issue of the limits of the competencies transferred from the Czech Republic to the European Union in the area of judicial cooperation in

criminal matters.

After repeating the traditional “mantra” that the Constitutional Court has no capacity to directly review the constitutionality of the secondary legal norm of the European Union, the Constitutional Court reconfirmed its competence to review the constitutionality of any Czech law, including a law implementing the EU secondary law, such as framework decision.⁽²²⁾ The Constitutional Court also rejected – in rather vague terms – the possibility to refer a preliminary question to the European Court of Justice.

In the review of the Czech laws implementing the EAW, the Constitutional Court focused its argumentation on the first article of the Constitution of the Czech Republic which declares the principle of the respect given to the international obligations of the Czech Republic.⁽²³⁾ The Constitutional Court stressed the fact that the constitutional text does not explicitly ban extradition or surrender of Czech nationals abroad as well as they do not explicitly ban the EU cooperation in criminal matters which may result in the transfer of a Czech citizen to another EU state. Instead, the constitutional clause only prevents Czech citizens to be “forced to leave the country/homeland.” In the Court’s view, this constitutional provision can be interpreted in several ways – from absolute ban to transfer Czech nationals abroad in the course of their criminal prosecution to constitutional ban of permanent involuntary discontinuation of the legal ties between Czech citizen and the Czech state. The constitutional clause on the respect to the international obligations of the Czech Republic (art. 1 par. 2) then requires national authorities to choose the interpretation of the constitution which minimizes the risk that Czech states would not respect its obligations under the international law, including the obligation arising from the membership in the European Union.

In the opinion of the Constitutional Court, the link between the Czech Republic and its citizen is not disconnected by the moment of his/her surrender to another EU state. The Czech Republic shall continue the protection of its citizen by the means of international law, in particular via consular protection. Further, the Czech legislators have used all possible options to minimize

the impact of the EAW mechanism onto the factual links between the Czech Republic and its citizen transferred abroad under the EAW mechanism. In particular, the Czech criminal law permits Czech citizens, who have been surrendered (under the EAW) and then sentenced by foreign court to a custodial sentence, to spend their term of imprisonment back in the Czech Republic.

The Constitutional Court also emphasized that the obligation to surrender its own citizen under the EAW is not unconditional. The cooperation can be rejected in a long catalogue of situations described in the EAW framework decision and in a moment when there would a serious risk that the requesting state would not guarantee a fair trial⁽²⁴⁾ for the individual surrendered. In this case, the person concerned can file a constitutional complaint and the Constitutional Court shall evaluate the constitutionality of his/her surrender in the light of the concrete situation.

Hence, the approach of the Czech judiciary towards the impacts of the EU law on the territory of the Czech Republic is following two (partial contravening) objectives – firstly, to guarantee the efficiency of the JHA cooperation in the EU and consequent high level of the internal security in the enlarged EU and, at the same time, to be an ultimate arbiter of the potential intrusion of the European Union JHA activities in the human rights and constitutional structures in the Czech territory.⁽²⁵⁾

IV. External Dimension of the JHA cooperation

The European cooperation in the domain of JHA is not restricted to the internal dimension of the European Union but frequently extends the EU borders. For some areas, such as visa policy, the external dimension is inherent in the very character of the policy regulation. In other domains of the EU cooperation, the external dimension is present in two forms:

- a) the internal cooperation among the EU states can serve as a model for the cooperation between the EU and non-member states (“mirror mechanism”) or
- b) the internal cooperation mechanism is open for participation of non-EU entities.

From the territorial perspective, present external dimension of the EU JHA policy concentrates either on the EU neighborhood (Mediterranean, Western Balkans, Turkey, post-Soviet space) or its trans-Atlantic dimension (the EU-US relations). The cooperation with Japan is limited, primarily due the relative unproblematic nature of the EU-Japanese relations in the respective field. The JHA agenda is not explicitly mentioned in the Hague Declaration on the EU-Japan Relations from 1991. In contrast, the Action Plan from 2001 contains an extended catalogue of planned activities and objectives (focused primarily against terrorism but including also fight against other forms organized crime, computer crime and illegal migration) but majority of them are formulated in rather vague terms without clear bench-marks and time-table for implementation. The most recent document on the external cooperation in the JHA policy published during the Portuguese Presidency of the EU (July – December 2007) devoted only a single paragraph to the EU-Japanese relations.⁽²⁶⁾

Within the common visa, asylum and immigration policy, the integration activities concentrated on the harmonization on visa and asylum procedures while their implementation remained within the competence of individual members states. The harmonization includes the adoption of an uniform catalogue of non-EU countries whose citizens are required to posses a visa when traveling to any EU country (“negative list”) and a catalogue of countries whose citizens are exempted from the visa obligation on the whole EU territory (“positive list”). Japan has been from the very beginning of the harmonized visa policy on the “visa-free list.” Therefore, all EU states, including the Czech Republic, are required by the *acquis communautaire* to terminate and not to re-establish visa obligations for Japanese citizens, even in a situation of a political tension or bilateral sanction regime. The harmonized system permits, however, certain flexibility. Even in case of states on the negative visa list, the EU member states are allowed, for instance, to lift the visa obligation for certain categories of visitors, such as diplomatic and consular staff, transport or rescue personnel and certain categories of students.⁽²⁷⁾ In contrast, visas may be required even from citizens of “visa-free” states when the individual concerned plans

to pursue a professional/commercial activity within the EU territory. Further, the EU law does not specify details of the consular representation of member states, such as their location, staffing or their technical equipment. Therefore, while the member states cannot individually decide on the very existence of visa requirements towards a non-EU state (i.e. they cannot cancel or introduce the visa obligation), they can influence the visa issuing process by creating more or less accessible and “visa-applicants-friendly” consular network.

The harmonization of the EU visa policy is binding only for the EU member states. Therefore, from the perspective of the international law, non-member states can maintain their own autonomous visa policy towards individual EU members. The EU position towards such differentiation, however, is negative and the EU usually attempts to express a political pressure to reach reciprocity in the visa-free regimes.⁽²⁸⁾

To enhance the JHA cooperation, the European Union has established several agencies which should assist member states with the collection, evaluation and analysis of information, with training of their officials and with the exchange of know-how and best practices. The most famous examples of the JHA-related agencies and/or structures are EUROPOL, EUROJUST and FRONTEX.⁽²⁹⁾ Those agencies primarily operate within the EU territory but they are also authorized to cooperate with other countries and international organizations. However, the catalogue of states and organizations, which the agencies cooperate with, must be authorized by the Council of the European Union. In case of EUROPOL, this authorized catalogue contains over twenty states and organizations,⁽³⁰⁾ the external networks of EUROJUST and FRONTEX are less extensive. Japan has not concluded formal cooperation agreement with any of the EU agencies active in the JHA area and their contacts with Japan are mainly restricted to mutual visits of officials⁽³¹⁾ and the exchange of information of general nature (seminars, conferences etc.).

Not only its agencies, but also the EU/EC itself has capacity to conclude international treaties in the domain of criminal law. At present, the most important treaty network – both politically and strategically – links the EU

system with the criminal law of the United States. In the last years, the EU concluded three agreements the United States (the extradition treaty, the treaty on mutual assistance in criminal matters and the agreement of exchange of personal data of flight passengers)⁽³²⁾ and with several European non-EU members (Switzerland). Those agreements do not replace bilateral treaties between the EU and individual European states; instead they are intended to supplement them. In case of Japan, the analogous agreement does not exist so far and the cooperation is primarily based on the bilateral agreements between individual EU members and Japan or multilateral treaty schemes outside the EU framework.

V. Conclusion

In spite the JHA agenda is usually called the cooperation in domain of the “internal security”, its external aspect plays gradually more significant role. The European Union JHA policy can concern Japan in three major ways:

1. Unilateral activities of the EU with the JHA relevance – the most typical cases being the visa and immigration policy where the autonomous EU decisions can influence the mobility (both temporal and permanent) of persons between the EU and Japan. For Japanese administration and diplomacy, the EU regulatory framework has caused the change in the negotiation mechanism – instead of negotiating with individual EU states, the negotiation shifts to the EU level.
2. International agreements between the EU and Japan. At present, the agreements network in the JHA policy is far from being impressive rather but the EU will play more important role in the future.
3. Japanese participation in the EU agencies and networks. The Japanese involvement, both symmetrical and asymmetrical, in the EU bodies seems to be the most perspective method of the EU-Japanese cooperation in the domain in criminal law. This cooperation can tackle with wide scope of trans-border illegal activities, from terrorism to the illegal trafficking in people and the copyright-related crimes.

Notes

- (1) The term “JHA cooperation” as used in this article corresponds to the EU cooperation in the Area of the Freedom, Security and Justice used by the EU institutions; i.e. the policy which covers the internal security cooperation in the I. and III. pillars of the EU.
- (2) Hayes-Renshaw, F., Wallace, H. *The Council of Ministers* (2.ed), Palgrave Macmillan; London 2006, p. 45.
- (3) Schengen states do not automatically correspond to the EU members. Originally, only five states were members of Schengen (Germany, France, Netherlands, Belgium and Luxembourg). At present, the United Kingdom and the Republic of Ireland are still not fully involved in the Schengen system and Denmark has a specific position. In contrast several non-EU states (Norway, Iceland, and Switzerland) are participating in the functioning of the Schengen system.
- (4) The negotiations on the Reform Treaty started in July 2007 and the final version of the Reform Treaty is planned to be agreed in October 2007; the ratification process should be concluded before the elections to the European Parliament in 2009.
- (5) In its recent judgment (Commission vs. Council, C-176/03), the European Court of Justice (ECJ) declared void a framework decision adopted within the III. pillar of the EU norm which intended to harmonize criminal penalties for the most serious environmental offences. The ECJ argued that the sanction mechanism for violation of the EC environmental law, including the criminal sanctions, is integral part of the environmental policy of the EC. Therefore, the respective harmonizing legislation should be adopted in the framework of the I. pillar, regardless the fact it concerns the criminal law.
- (6) For more detailed analysis, see Peers, S. *EU Justice and Home Affairs Law* (2.ed) Oxford: Oxford University Press 2006, pp. 400-410.
- (7) Comp. Edward, D. *National Courts – the Powerhouse of Community Law*. In Bell, J., Dashwood, A., Spenser, J., Ward, A. (eds.). *Cambridge Yearbook of European Legal Studies*. Vol. Five 2002-2003, Oxford, Hart Publishing 2004, pp. 1-14.
- (8) The permission (opt-in) of a member state is not given regarding the particular case but as a general declaration accepting the ECJ jurisdiction to answer preliminary questions. The Czech Republic made this declaration in its accession treaty but majority of new EU states are still reluctant to accept the ECJ jurisdiction in this matter.
- (9) The European Arrest Warrant can demonstrate this situation. The Federal Constitutional Court in Germany declared void German legislation which implemented the European arrest warrant for violation of German constitutional guarantees of fair trial. Similarly, the Constitutional Tribunal of the Republic of Poland decided that the legislation implementing the European arrest warrant in Poland is unconstitutional since it violated the constitutional ban on the extradition of Polish citizens. In both cases, however, not the European framework decision on the European arrest warrant has been challenged but the domestic legislation. In German case, the problem was solved by the adoption of more “constitutionally sensitive” domestic

legislation. In Polish case, the Constitution has been amended in order not to contravene the requirement of the European Union law.

- (10) Framework decision (defined in Art 34 par. 2 TEU) is a type of the III. pillar secondary legal norm which intends to harmonize the criminal law and of the member states. However, the framework decisions are not directly applicable but must be implemented by member states into their domestic legal systems. Therefore, the framework decisions permit certain level of flexibility and are similar to the directives in the EC law. For details, see Kurcz, B. Lazowski, A. Two Sides of the Same Coin? Framework Decisions and Directives Compared. In Eeckhout, P., Tridimas, T. (eds.) *Yearbook of European Law*, Oxford University Press, Oxford 2007, p. 177-204.
- (11) UK leads on EU veto-system reform block, Euractiv.com (December 6, 2006). Downloadable from <http://www.euractiv.com/en/security/uk-leads-eu-veto-system-reform-block/article-160297>
- (12) Comp. Presidency Conclusions, Brussels European Council, June 21/22, 2007, CONCL 2 11177/07, pp. 15-31.
- (13) The second phase of Schengen system will include the abolition of the police controls on both the land borders with other EU states (since January 1, 2008) and at the flights between the Czech Republic and the airports in Schengen states (since March 31, 2008). Reasons behind different dates for the implementation of the second Schengen phase at land border and at the airports are purely technical. The regular reorganization flight and gate schedules at the airports is usually introduced on semestrial basis (since beginning of April and October) and the accession of new member states to Schengen system will require adjustment at current Schengen airports.
- (14) For instance, Wouters, J., Naert, F.: Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After "11 September". *Common Market Law Review* 41: 909-935, 2004, Mackarel, M.: The European Arrest Warrant – the Early Years, *European Journal of Crime, Criminal Law and Justice* (2007) 37-65, Alegre, S., Leaf, M. Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant, *European Law Journal* 10: 200-217, 2004.
- (15) Compare Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2005) 63, Brussels, February 23, 2005, and subsequent reports.
- (16) Another delay in application has been due to the necessity to notify the partial denouncement of the Council of Europe Extradition Treaty to the Council Secretariat.
- (17) The original governmental legislative plan proposed to amend the potential conflicting constitutional provisions but the lack of sufficient support in the Parliament has changed the governmental original interpretation of the constitutional text and the government declared the EAW mechanism to be in conformity with the constitutional order.

- (18) This Charter is integral part of Czech constitutional order and is different from the EU Charter of Fundamental Rights
- (19) From the Civil Democratic Party, i.e. with the same party affiliation as the President of the Republic.
- (20) Decision Pl. ÚS 66/04 from May 5, 2006. The (unofficial) English translation of the judgment is available at http://test.concourt.cz/angl_verze/doc/pl-66-04.html
- (21) In particular, the judgment of the Constitutional Court (ÚS Pl. 50/04) in case of “sugar quotas” which reviewed the constitutionality of a governmental regulation implementing segment of the European Common Agricultural Policy on the sugar production.
- (22) The argumentation of the Constitutional Court states that the reason for this approach is vested in the existence of the legislative discretion of the Czech authorities during the implementation process. In other words, the major argument for the review is the fact that the EAW framework decision has left certain aspects of its implementation opened (e.g. the catalogue of reasons for the optional rejection of the enforcement of the EAW issued by other EU state). On the other hand, the positions of the Constitutional Court is not clear in cases where the EU norm is (would be) so detailed that it would provide the national authorities no margin of discretion in the implementation process.
- (23) Art. 1 par. 2 of the Constitution of the Czech Republic states: “The Czech Republic shall observe its obligations under international law.”
- (24) In particular in case when the member state requiring the extradition has suspended certain rights contained in the European Convention of Human Rights or there is EU sanction mechanism for serious violations of human rights applied against member state.
- (25) For broader context of the resistance of the national judiciary against the EU law (in particular in the new member states), see Sadurski, W. “Solange, chapter 3”: Constitutional Courts in Central Europe – Democracy – European Union. EUI Working Papers LAW No. 2006/40, European University Institute, Fiesole 2006.
- (26) “Japan: The EU-Japan Summit in Tokyo in June 2006 underlined the intention to contribute substantially to the elaboration of the UN counterterrorism strategy and further enhancing co-operation in the fight against terrorism in South East Asia. On 5 June 2007 the 16th Summit between the EU and Japan took place. The launch of preliminary, informal discussions on co-operation between the EU and Japan in the area of legal assistance in criminal matters was welcomed. JHA External Relations Multi-Presidency Work Programme, Brussels, July 2, 2007, p. 18. Available at www.statewatch.org/news/2007/jul/eu-jha-external-programme.pdf However, Japan is one of six Asian countries (Afghanistan, China, India, Japan, Pakistan and the region of Central Asia) which were specifically analyzed in the document concerned.
- (27) The exception may be applied to students from a “negative visa list” country traveling with school trip from school in the “positive list” country.
- (28) The efficiency of this political pressure is not always high. Recent case on the EU influence, or its absence, on the visa policy of the United States, provides rather chilling picture of the EU-

centered influence. For more details, see Peers, S. *EU Justice and Home Affairs Law* (2.ed) Oxford: Oxford University Press 2006, p. 159-160.

- (29) European Agency for the Management of Operational Cooperation at the External Borders.
- (30) For instance: Turkey, Russia, the USA, Canada, China, Morocco, Bolivia, Peru, Colombia, Albania, Bosnia, Serbia, Croatia, Macedonia, Iceland, Norway, Lichtenstein, Switzerland, Ukraine, Moldova, Israel, Australia, Interpol, World Customs Organization, United Nations Office on Drugs and Crime. However, not all states and organizations in the list have already concluded an agreement with Europol.
- (31) For instance, the Japan ambassador visited the premises of EUROJUST in 2006.
- (32) For more detailed analysis of the EU-EU cooperation agreements, see Mitsilegas, V. *The EU-USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data*. *European Foreign Affairs Review* 8:515-535, 2003.

**European Internal Security Policy:
Core Principles, Enlargement and its External Dimension**

<Summary>

Ivo Šlosarčík

The article “European Internal Security Policy: Core Principles, Enlargement and its External Dimension” analyses the EU cooperation in the domain of the justice and home affairs as the most rapidly developing area of the *acquis* of the European Union. The first section of the text covers the objectives and the major structural features of the JHA cooperation and the potential scenarios for the solution of the structural shortcomings of the current JHA cooperation regime (e.g. the ECJ case-law, “mini-reform”, new EU treaty system). The second section of the text analyses the domestic response to the expansion of the JHA, with particular attention given to the case of the Czech Republic. The final section of the article is devoted to the external dimension of the JHA cooperation and the existing and potential links between the EU and Japan.

