

EU Policy on Internal Security and the Subsidiarity Principle

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HARTMUT ADEN, APR 5 2021

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The principle of subsidiarity is of particular relevance when the role of the EU in policy and law-making is contested. This chapter builds upon the hypothesis that the situation is ambiguous for internal security: on the one hand, national sovereignty still plays an important role in this field, at least in the official discourse of certain actors in the member states. On the other hand, policy makers and security agencies more frequently recognise the necessity of effective coordination and cooperation in dealing with transnational threats; especially those related to international terrorism. Article 5 (3) of the Treaty on European Union (TEU) defines the requirements as follows: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

As internal security was considered by most European politicians as a core element of national sovereignty for many years, the institutions of the European Communities that were the predecessors of the current European Union only played a minor role in this field. With the Treaty of Maastricht, internal security shifted into the realm of official EU policy, albeit in the intergovernmental third pillar. Only since 2009, with the Treaty of Lisbon, have major parts of internal security become full EU policies. Nevertheless, some member states are still hesitant to get involved in more intensive cooperation (Aden 2015 and 2018).

Today, the application of the subsidiarity principle to internal security under the Treaty of Lisbon is rather clear. The Treaty on the Functioning of the EU (TFEU) explicitly defines that the EU and the member states share legislative power over the Area of Freedom, Security and Justice (AFSJ) (Article 4 (2j) TFEU). For internal security, as far as it falls under the AFSJ, this means that the EU has the authority to legislate where security can be improved through coordination and cooperation among the member states' security agencies – but not for security issues that are of an entirely regional or local nature. Nevertheless, concerns persist that the EU initiatives might go further than necessary. The TFEU therefore attributes the role of watchdog to national parliaments in order to make sure that the EU only regulates AFSJ issues that member states cannot sufficiently address or provide security for on their own (Monar 2014, 201).

National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality. (Article 69 TFEU)

The AFSJ includes major, though not all, elements of internal security. While the EU now has legislative powers for trans-border aspects of policing and criminal justice, cooperation between secret services does not fall under the EU's authority completely. Thus far, the initiatives for secret service coordination are not part of the AFSJ, rather of foreign policy. Consequently, the EU Intelligence Analysis Centre (INTCEN) that was first established in 1999 as

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Joint Situation Centre (SitCen/JSC), became part of the EU's External Action Service in 2012.

This chapter asks from a trans-disciplinary legal and political science perspective: What is the relevance of subsidiarity for EU internal security policy? What is the relationship between subsidiarity, sovereignty and the logics of a policy area that is, for a major part, characterised by reactions to security incidents such as natural disasters or terrorist attacks? And finally: Is subsidiarity only a political and legal concept, or is it also a relevant issue for the administrative practice of cooperation among security agencies in Europe?

Sovereignty and the Monopoly of Legitimate Force

Analysing the role of subsidiarity for the EU's internal security policy must take specific tensions between claims for sovereignty and subsidiarity into account. These theoretical and empirical concepts sometimes conflict and sometimes converge. Both may be mobilised in order to support the position of policy makers who fear loss of political influence and power. While the appeal to sovereignty is mostly motivated by the wish to maintain power within nation states, the subsidiarity principle may result in either political decisions being made at the European level, or, at national or sub-national levels (van Kersbergen and Verbeek 2004, 144–5).

Even if privatisation has become an issue of internal security over the past decades, this policy area is still very closely connected to the nation state. In EU member states, police forces and secret services are public administrations often belonging to states or sub-national public authorities such as regions or cities. For policing, an important aspect of the public authorities' power is related to the state's monopoly to exert legitimate force. In the early 20th century, Max Weber (1980, 30) underlined the value of this state function, arguing that this is a key factor in discerning the modern states from feudalism where public security tasks were sold to private actors who bought the right to take money for providing protection or simply controlling the passage of travellers and goods. By contrast, modern rule of law style nation states with institutions that are bound to human rights and have to respect legal rules are much better positioned to provide security impartially.

Most political systems are multi-layered and have a well-established distribution of security tasks between different polity levels, such as local authorities, regions, and the central state. Therefore, most states have several police forces and secret services. States where police forces are primarily organised at the local level have a higher number of police forces, for example the United States of America.

If EU member states are still hesitant to transfer internal security tasks to the EU, this is often related to the questions if and to which extent the EU is evolving towards a state-like polity. Empirically, EU authority covers a broad range of policy areas, and the EU's institutions fulfil similar functions as national governments, parliaments, and courts. Therefore, over the past decades, the EU has made clear steps towards becoming a state-like polity, empirically rather than in a normative perspective. Defenders of the nation state have sustained political pressure in order to avoid the EU becoming a state. In this respect, the transfer of internal security powers to the EU is highly symbolic, as centralised police forces with executive rights would make the EU even more similar to a state. Therefore, using subsidiarity arguments to avoid internal security powers to be transferred to the EU is closely linked to the protection of national sovereignty and to euro-scepticism: both arguments are often used in the political discourse to prevent the EU from becoming more state-like. In this respect, the British opt-out from major parts of EU internal security policy (Tekin 2012, 186–95), that may now be interpreted as a kind of anticipated 'mini-Brexit', is highly symptomatic.

Europeanisation of Policing and the Perception of Threats

The practical implementation of the subsidiarity principle for internal security is closely linked to the Europeanisation of this policy area. The analytical usefulness of the term Europeanisation has been intensively debated over the past two decades (see Goetz and Meyer-Sahling 2008). In this chapter, it is used as an analytical framework, including the perspectives that member states' policies are influenced by decisions taken at EU level and that decision-making processes and responsibilities have been transferred to centralised institutions in the EU. The perspective of subsidiarity, applied to police agencies and secret services as to other branches of public administration (see van Kersbergen and Verbeek 2004, 151; Craig 2012), is closely related to the question of how centralised or

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decentralised internal security institutions are and should be. How far should their work be bound to harmonised European standards?

Centralisation processes of internal security institutions have already been going on for a long time. However, centralisation is no continuous process. Sometimes centralisation and de-centralisation even take place in parallel (Aden 1998, 41-121). While the growing importance of transnational and global interconnections in business and everyday life have triggered centralisation of security structures, shortcomings in local security have sometimes led to re-decentralisation of policing. For example, a specific cybercrime unit associated to Europol was recently established, whilst the deployment of patrol officers whom are known by citizens has been a relevant issue in many local communities for a number of years. This form of (re-) decentralisation is in response to studies which have demonstrated that citizens feel safer if they regularly see police officers in the streets – ideally patrol officers whom the citizens know personally. These empirical examples demonstrate that the ideas behind the principle of subsidiarity may be helpful to answer the normative question of what role the European Union should play in internal security and how far Europeanisation should go. Security problems that are rather local or regional can be better solved at decentralised levels, while security problems with trans-border or even global implications require some degree of centralised coordination and cooperation.

De facto, despite the persisting importance of state sovereignty over internal security in the official discourse, this policy area is already considerably Europeanised. The institutional setting that has been established at EU level for facilitating trans-border policing is closely related to threats of internal security perceived in the relevant period of time (Bigo 1996, 258-66). A core element of Europeanised policing in the sense of centralised coordination is Europol, the EU agency for cooperation in criminal investigation, based at The Hague in the Netherlands. In the 1990s, Europol was established for combating international drug trafficking and organised crime, both perceived at that time as major threats for internal security. The international dimensions of these kinds of crime establish – in the perspective of subsidiarity – the relevance of coordination at EU level and beyond. However, combating international drug trafficking and other forms of organised crime by international coordination has not been very effective thus far. Illegal markets that allow criminals to make money will attract new criminals when others have been stopped and arrested by the police. Alternative policy measures avoiding illegal markets would therefore probably be more effective. Thus, these examples show that the subsidiarity principle does not prevent policy makers and security agencies from following strategies that are ineffective.

Over time, EU coordination in the field of internal security has been extended to a number of other threats, from counterfeiting the Euro to international terrorism and cybercrime. As these threats could hardly be dealt with effectively solely at a member state's level, the subsidiarity principle clearly supports the establishment of a European coordination infrastructure. In recent years, EU policy makers have opted for harmonising this coordination infrastructure by transferring them into EU agencies. Europol was attributed the status of an official EU agency in 2009. Since its establishment, this agency has been part of the broader EU system, but it enjoys a relevant degree of autonomy. EU Regulation 2016/794 highlights Europol's support function:

Europol shall support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy ... (Article 3 (1)).

Even under the binding Europol Regulation that has replaced the former 'third pillar' legal instruments, the member states make use of Europol's support on a mostly voluntary basis. In this respect, subsidiarity and national sovereignty still play an important role.

Horizontal coordination among the member states' police agencies is another interesting pattern that is related to subsidiarity: the liaison officers that police agencies of member states send to Europol are a core element of this function. One of their tasks is to organise information-sharing between Europol and the police agencies from their home countries. This is an element of vertical, but mostly non-hierarchical cooperation (Aden 2015). Beyond this task, they also exchange information related to investigation cases directly with the liaison officers from other member states. Therefore, liaison officers play an important role in horizontal cooperation among the member states'

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police agencies. In the perspective of the subsidiarity principle, the relevant internal security tasks remain within the member states' responsibility. The EU provides a platform for coordination among them.

Similarly, other elements of a support infrastructure have been established at EU level, leaving discretion to the member states as to how to use them. The centralised databases introduced for internal security cooperation over the past decades (Boehm 2012, 259-319 and Aden 2018, 986-8) can be classified as centralised administrative structures delivering services for the member states' administrations. The member states are obliged to establish a central unit that filters data relevant for trans-border cooperation and enters it into the databases. The most important database of this type is the Schengen Information System (SIS) established in the 1990s. The member states' law enforcement and immigration authorities enter data into this database, especially information related to wanted criminals or stolen goods. The SIS information may also be related to the refusal of entry for individuals – mostly in connection with the implementation of a restrictive immigration policy. The SIS is linked to national police information systems. This means that police checks in any Schengen country can lead to a 'hit', indicating that a person or good is sought by a police agency somewhere in Europe, or that immigration authorities have decided to refuse entry to said person. Further proceedings, i.e. extradition, will then have to be managed on a bilateral basis by the police agencies and the judicial authorities of both countries.

In 2012, the management of the 'second generation' SIS and other AFSJ databases was attributed to a then newly created separate EU agency: eu-LISA, the EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice, located in Tallinn (Estonia – headquarters), Strasbourg (France – IT infrastructure) und Sankt Johann (Austria). So far, beyond the SIS, eu-LISA manages the fingerprint database Eurodac and the Visa Information System (VIS) (Balzacq and Léonard 2013, 133; Aden 2015). With the newly established Entry-/Exit-System and the European Travel Information and Authorisation System (ETIAS), EU databases will in the future cover additional data on people travelling to Europe. Here again, in the perspective of subsidiarity and national sovereignty, no essential power has been transferred to the EU, yet a centralised support infrastructure for the member states' law enforcement agencies has been established at EU level.

However, the establishment of EU agencies means that Brussels is expanding its administrative capacities and therefore opens opportunities to later transfer additional tasks to the EU level. With numerous proposals for additional coordination instruments, the European Commission is seeking to gain influence and power in a policy area still dominated by the member states. One example is the interoperability proposal presented by the Commission in 2017. In the past, each policing and migration database was separate and had its specific access rules. The Commission's interoperability proposal includes a common search portal for all databases, which may facilitate the use of EU databases but will also lead to challenging problems in the perspective of privacy, purpose limitation, and data quality management (Aden 2018, 988).

Other EU agencies for internal security follow a similar logic of respecting subsidiarity and national sovereignty. Frontex, the highly contested European Border and Coast Guard Agency, organises joint operations mostly carried out by border and coast guard forces delegated by member states. EU Regulation 2016/1624 which now governs the agency's work, defines Frontex as an institution that shares responsibilities with relevant member states administrations:

The European Border and Coast Guard Agency ... and the national authorities of Member States which are responsible for border management, including coast guards to the extent that they carry out border control tasks, shall constitute the European Border and Coast Guard (Article 3 (1)).

Centralised administrative structures for police cooperation in the EU, as of yet, have only limited vertical-hierarchical top-down power enabling them to force the member states' security agencies to cooperate. The centralised administrative capacities established at EU level rather offer services which member states are principally free to make use of. The limited administrative and operational capabilities at EU level contribute to the result that, de facto, intergovernmental coordination and voluntary cooperation among the member states' security agencies remain the dominant modes of governance in this policy field (Monar 2014, 202). Thus, the member states still have broad discretion in decision-making in the area of trans-border internal security cooperation, and the subsidiarity principle is

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rarely mobilised to prevent the EU from further coordination.

The now circa 40 Police and Customs Cooperation Centres (PCCC) established in the border regions between the Schengen countries since the 1990s (Gruszczak 2016) are another interesting case in the perspective of subsidiarity. They have been established by bi- or multilateral agreements concluded between the neighbouring countries cooperating within these centres. EU institutions are usually not involved. Police and customs administrations from neighbouring countries share an office building within the border region in order to coordinate over trans-border cases. Due to the daily work which occurs in the same building, the PCCCs can be classified as a particularly strong variation of network-based horizontal administrative cooperation. In the perspective of subsidiarity, operational decision-making in the PCCCs is mostly decentralised.

Serious threats such as international terrorism trigger the question if – again in a subsidiarity perspective – the member states should transfer more powers to centralised coordination units for police work and secret services to make coordination more effective. Almost ritually, after major terrorist attacks, the EU ministers of the interior meet and promise to intensify cooperation. However, in the end, only limited policing power has been transferred to the EU so far (Aden 2015 and 2018). Taking the subsidiarity principle seriously would probably require transferring more binding coordination power to the EU in order to react effectively to transnational threats – and even establishing EU internal security institutions with more executive powers.

The European Public Prosecutor's Office

As of now, Eurojust is the most established instrument of criminal justice coordination in the EU. Representatives from the member states' criminal justice systems exchange information and coordinate their work related to criminal investigation. Similar to Europol, the EU has established an infrastructure for coordination without forcing the member states to use it. Therefore, in the perspective of subsidiarity, the establishment of Eurojust has been mostly uncontested.

This changed with the following step. The Treaty of Lisbon made possible the establishment of a European Public Prosecutor's Office (EPPO) derived 'from Eurojust' – an idea which some actors had already been promoting for many years (Giuffrida 2017).

In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament' (Article 86 (1) TFEU).

The EPPO's authority will be, at the beginning, limited to the protection of the Union's financial interests, thus it will mainly cover cases of fraud related to the EU budget. From a subsidiarity perspective, it seems clear that a more uniform treatment of these cases could be better managed and coordinated by a European body for criminal investigation than by a single member states' criminal justice system.

The establishment of the EPPO as a new institution can be conceived of as a transfer of new powers to the EU. The Treaty of Lisbon opened the path to establishing the EPPO via a unanimous decision in the Council – not by a majority vote in the Ordinary Legislative Procedure. This is one example of a case in which the Treaty of Lisbon makes it possible to transfer powers to the EU without a treaty change. Article 86 also establishes the possibility of settling for enhanced cooperation among a number of member states if unanimity is not reached.

In July 2013, the European Commission proposed a regulation in pursuance of the EPPO's establishment. This proposal was intensively debated not only in the Justice and Home Affairs Council and in the European Parliament, but also by a number of member states' parliaments questioning the conformity of the proposal with the principle of subsidiarity. The relationship between the EPPO and national law enforcement authorities was particularly contested in this perspective (Lohse 2015, 177). The Commission proposed that most of the EPPO's investigative work should be done by the national law enforcement institutions – with a quasi-subordination of the member states' criminal

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investigation units under the EPPO:

The designated European Delegated Prosecutor may either undertake the investigation measures on his/her own or instruct the competent law enforcement authorities in the Member State where he/she is located. The authorities shall comply with the instructions of the European Delegated Prosecutor and execute the investigation measures assigned to them (European Commission 2013, 23; Article 18 (1)).

During the discussion in the Council, the member states' governments maintained the idea of opting for a multi-level structure, attributing major investigation tasks to European Delegated Prosecutors who may also exercise as national prosecutors. But they softened the rules concerning the quasi-subordination of national criminal justice institutions to the Delegated Prosecutors. In 2017, Council Regulation 2017/1939 implementing enhanced cooperation in the establishment of the European Public Prosecutor's Office was passed. Twenty member states opted for enhanced cooperation, thus exceeding the minimum of nine member states required by Article 86 (1) TFEU. Whereas the United Kingdom, Ireland and Denmark never intended to join the EPPO due to their broad opt-out for JHA issues (Tekin 2012), other member states hesitated to join the initiative for various political reasons (Giuffrida 2017, 6–7), in some cases related to subsidiarity. The Netherlands and Malta joined in 2018.

The debate on the conformity of the EPPO with the subsidiarity principle shows that this principle is not only relevant to the decision of whether or not to regulate a particular issue at EU level, but also for the way in which the relationship of a new EU body with the relevant authorities at member states' level is shaped.

Secret Service Coordination Beyond Subsidiarity

Compared to police agencies, secret services are even more bound to nation states. While policing, since the Treaty of Lisbon, is one of the many policies for which the EU and its member states share competences, the starting point is different for secret service coordination (Aldrich 2012; Aden 2018). Their coordination is not part of the Area of Freedom, Security and Justice. Again, in the perspective of subsidiarity, the starting point seems clear: The EU does not have any authority, and therefore the subsidiarity principle does not apply. Decision-making should be left to the member states.

However, reality is somewhat more complicated. Secret services have already been cooperating bi- and multilaterally for a long time in order to fulfil their function of informing governments about developments in foreign countries which may be pertinent to foreign policy decisions. This cooperation is even more important for information that might be relevant to external or internal security. Since the 1970s, informal 'clubs' have been established in order to facilitate secret service coordination in Europe and beyond, mostly related to terrorism (Aldrich 2012). After the terrorist attacks of 11 September 2001, the boundaries between external and internal security lost importance, and secret services massively extended their cooperation in order to gather information about terrorist attacks that international networks might plan. This also made secret service work more similar to policing: preventing terrorists from committing attacks means that secret services either have to exert police tasks or that they have to cooperate more closely with police agencies (see Aldrich 2012).

What does this mean for the EU and subsidiarity? Over the past decades, it became clear that more coordination of secret service activities would be useful, even without formal EU legislative authority. The EU Intelligence Analysis Centre (INTCEN) was first established in 1999 as Joint Situation Centre, (SitCen/JSC) in order to coordinate the sharing of secret information needed for governmental decision-making, e.g. in relation to terrorist threats. In 2012 it was integrated into the EU's External Action Service (Boehm 2012, 253–4; Cross 2013). The missing treaty base for this kind of coordination may be considered problematic. By contrast, in the perspective of subsidiarity, strong empirical evidence underlines the need for EU level coordination in activities combating cross-border terrorism. Officialising coordination in the EU framework would also facilitate accountability towards parliaments and the broader public.

Circumventing EU Institutions?

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Police agencies in the EU now widely accept and use standardised 'channels' of EU internal security cooperation such as the Schengen Information System. However, people working for police agencies and secret services sometimes tend to prefer informal coordination to cooperation through formally established institutions such as Europol. This overlaps with the interests of those who wish to keep the EU out of decision-making for internal security in order to protect the member states' national sovereignty.

EU institutions and especially the European Commission have made numerous attempts to convince the member states' security agencies to use the 'channels' established at EU level for their cooperation (Aden 2015; 2018). Nevertheless, informal networks and circles have been maintained. For policing, an 'inherent desire for autonomy in relation to the political-governance level' has been observed (van Buuren 2012, 3). The trust police leaders have in official channels established at EU level has often been limited, especially for sensitive information related to terrorism. Semi-institutionalised, but informal networks as the Police Working Group on Terrorism (PWGT), established in the 1970s, have been maintained and continue to be used. In relation to political decision-making and steering, security agencies enjoy considerable autonomy and discretion when they decide which 'channels' and institutional settings they use for cooperation (Aden 2018).

This demonstrates that, in administrative practice, the selection of an adequate institutional setting for police cooperation is not guided by the subsidiarity principle, rather it is reliant on other aspects, such as the personal and institutional trust in the 'channels' to be used for cooperation and in the officers involved. Trust in their reliability, especially for keeping information secret if necessary, plays an important role in practice (see Aden 2018).

Conclusion

This chapter has shown that for EU internal security policy the subsidiarity principle is often used as an argument to prevent formal power from being transferred to the EU, mostly by actors wishing to preserve a strong nation state and national sovereignty. By contrast, administrative coordination and cooperative practice is rather pragmatic, using the EU's institutional settings for standardised internal security cooperation, though still circumventing them for more sensitive issues such as terrorism. Whether more or less internal security cooperation will take place at EU level in the future therefore depends upon two factors: firstly, on the development of old and new trans-border threats that may trigger intensified cooperation – and secondly, on the weight of euro-scepticism and the wish to maintain national sovereignty. Brexit might open a window of opportunity for more EU integration in the field of internal security among the remaining member states, as a powerful representative of internal security opt-outs will no longer influence EU decision-making.

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