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**PARLIAMENTARY OVERSIGHT
OF SECURITY AND
INTELLIGENCE AGENCIES IN
THE EUROPEAN UNION**

EXECUTIVE SUMMARY



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CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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Abstract

This study evaluates the oversight of national security and intelligence agencies by parliaments and specialised non-parliamentary oversight bodies, with a view to identifying good practices that can inform the European Parliament's approach to strengthening the oversight of Europol, Eurojust, Frontex and, to a lesser extent, Sitcen. The study puts forward a series of detailed recommendations (including in the field of access to classified information) that are formulated on the basis of in-depth assessments of: (1) the current functions and powers of these four bodies; (2) existing arrangements for the oversight of these bodies by the European Parliament, the Joint Supervisory Bodies and national parliaments; and (3) the legal and institutional frameworks for parliamentary and specialised oversight of security and intelligence agencies in EU Member States and other major democracies.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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LINGUISTIC VERSIONS

Original: EN
Executive summaries: BG, CS, DA, DE, EL, EN, ES, ET, FI, FR, HU, IT, LT, LV, MT, NL, PL, PT, RO, SK, SL, SV

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Manuscript completed in June 2011.
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EXECUTIVE SUMMARY

The European Parliament's Directorate-General for Internal Policies mandated the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the European Union Institute (EUI) to carry out a study on *'parliamentary oversight of intelligence agencies in relevant EU Member States and other major democracies'*. This study was expected to *'identify democratic standards and best practice as well as a proper balance between the demands of secrecy and the need for scrutiny which can be used by the European Parliament (EP) when it sets up its own oversight body'*. Following consultations with the EP's Directorate General for Internal Policies, it was decided to interpret this mandate against the backdrop of four important trends and developments which have prompted a discussion on how the EP can strengthen oversight of the EU's AFSJ agencies, as well as the European Union's Situation Centre (Sitcen)¹ which plays a role in the Area of Freedom Security and Justice (AFSJ):

(1) The Treaty of Lisbon gives the EP and national parliaments a mandate to strengthen their oversight of two AFSJ bodies: Europol and Eurojust. It explicitly provides for the new regulations on Europol and Eurojust to include provisions on parliamentary 'scrutiny' (in the case of Europol) and 'evaluation' (in the case of Eurojust). Within the next two years, the Commission will put forward proposals for these regulations; the EP will have the opportunity to ensure that this legislation includes appropriate provisions on parliamentary oversight. In addition, the fact that the Area of Freedom, Security and Justice is now subject to the standard legislative procedure means that the EP is now better placed to ensure that new or revised legal frameworks for the AFSJ agencies include provisions on parliamentary oversight. Indeed, it has already done so in a draft regulation on Frontex, which, at the time of writing, was under discussion.

(2) The EP may have some opportunities to address the work of Sitcen, which performs a number of functions pertaining to internal security, because it is now part of the European External Action Service (EEAS). While the EEAS (and thus Sitcen) falls under the Common Foreign and Security Policy (CFSP), which is an intergovernmental policy area, the Treaty of Lisbon gives the EP some new powers in this area.

(3) There have been important developments in the area of access to information, which are intrinsically linked to strengthening oversight of the AFSJ bodies. In 2010, the EP and Commission concluded a new inter-institutional agreement, which significantly improves the EP's access to information from the Commission. In addition, the EP is currently considering the revision of the EU's legislation on access to information, as well as the possibility of a new inter-institutional agreement with the Council, which would include provisions on parliamentary access to classified information. The trajectory of these ongoing discussions will have profound implications for the EP's oversight of AFSJ bodies.

(4) More generally, over the past decade, the EP has developed a growing interest in both national security agencies and AFSJ bodies. This has been evidenced by its strong interest in the development of the new regulation on Frontex, the Europol and Eurojust decisions, as well as two temporary committees that examined the activities of national security agencies and made important recommendations in regard to oversight.

¹ This study uses the term 'AFSJ bodies' to refer to the AFSJ agencies (Europol, Eurojust and Frontex) and the European Union's Situation Centre (Sitcen).

On the basis of this interpretation of the mandate, the primary aim of this study is to provide a comparative assessment of the oversight of intelligence agencies in European Union member states and other democracies, with the aim of identifying good practices that can inform the debate on strengthening oversight of the AFSJ bodies by the European Parliament.

This study focuses on Europol, Frontex and Eurojust as well as Sitcen. Broadly speaking, the role of these AFSJ bodies is to facilitate, coordinate and strengthen cooperation between national authorities with the aim of promoting security and justice within the EU. Arguably the defining feature of the national intelligence agencies² is their power to use what are known as 'special powers' to collect information, such as the powers to intercept communications, conduct covert surveillance, use secret informants, and even enter dwellings surreptitiously. The AFSJ bodies do not possess such powers, and when juxtaposed alongside this description, it is evident that the EU's AFSJ bodies are not intelligence agencies in the way that they are conceptualised at the national level. In view of the fact the EP is interested in strengthening oversight of these bodies, a mandate to study and draw lessons from the oversight of national 'intelligence agencies' may appear to be an unusual choice.

Nevertheless, the AFSJ bodies and national intelligence agencies share a number of characteristics. They perform 'intelligence functions' of national intelligence agencies, albeit not necessarily in the same way or for the same purpose. Notably, they collect (though without recourse to special powers), analyse and disseminate information to a range of decision makers. Another important similarity between the AFSJ bodies and national intelligence agencies is that they too receive, produce and disseminate classified information. This has important implications for oversight because overseers need access to classified information in order to scrutinise the work of agencies whose activities are 'classified' and/or entail the use of classified information, which is an area where the EP can learn much from national systems of oversight. We should, however, remain cautious about the 'portability' of oversight models and practices from the national to the EU level given that national overseers and the EP scrutinise agencies with very different mandates and powers. Oversight has to be understood in the context of the organisations which are being overseen.

This study is comprised of five chapters. The first discusses the aims, mandate and methodology of the study. The second chapter provides an overview of the legal basis, mandate and current powers of Europol, Eurojust, Frontex and Sitcen, and identifies several areas of these bodies' work that might raise concerns from the point of view of oversight. The third chapter analyses the EP's existing role and powers for overseeing the AFSJ bodies, as well as the scope of its access to information from (and pertaining to) these bodies. This chapter also examines the role of national parliaments in overseeing the AFSJ bodies, as well as the role of the Joint Supervisory Bodies (JSBs) of Europol and Eurojust in scrutinising these agencies' use of personal data. Chapter four provides a detailed

² The term 'intelligence agency' generally refers to a state body that collects, analyses and disseminates information—on threats to national security or other national interests—to policy-makers and other executive bodies. Intelligence agencies may perform these 'intelligence functions' exclusively outside of their state's territorial jurisdiction (e.g., the UK's Secret Intelligence Service), exclusively within their state's territory (e.g., Germany's Federal Office for the Protection of the Constitution), or both inside and outside their territory (e.g., the Dutch General Intelligence Service or AIVD). In a few states (e.g., in Sweden and Denmark), these bodies may also possess police powers and are therefore sometimes called 'police security services'. For reasons of consistency, this study uses the term 'intelligence agency' to refer to organisations which are variously labelled as 'security services', 'domestic intelligence agencies' or 'intelligence services'.

comparative assessment of how parliamentary and specialised non-parliamentary oversight is organised and carried out on a national level. This section will pay particular attention to access to information by parliamentary and non-parliamentary oversight bodies. The final chapter of the study outlines a series of options for consolidating and strengthening oversight of Europol, Eurojust, Frontex and Sitcen by the European Parliament. This executive summary will focus on providing an overview of this chapter, including its twenty-two recommendations to the European Parliament.

Recommendations for strengthening the European Parliament's oversight of the AFSJ bodies

This study provides detailed recommendations which might be useful for the forthcoming debate on how the European Parliament's oversight of the AFSJ bodies could be strengthened. Some of these recommendations apply to the EP's oversight of all AFSJ bodies discussed in this study (i.e. Europol, Eurojust, Frontex and Sitcen); however, most focus exclusively on the AFSJ agencies (i.e. Europol, Eurojust, Frontex). This is because the EP has an explicit treaty mandate to oversee Eurojust and Europol, and will be a co-legislator for new regulations on these agencies and Frontex. The development of parliamentary oversight of the Sitcen will have to proceed along a different track because Sitcen falls under the Common Foreign and Security Policy (CFSP), an area in which the EP has fewer powers. The recommendations pertain to the oversight of the AFSJ bodies as they exist in May 2011. It is essential that oversight arrangements are developed in tandem with any changes to the mandates and powers of these bodies, and should remain commensurate with the activities being overseen.

In developing legal and institutional frameworks for parliamentary oversight of the AFSJ bodies the EP and other relevant stakeholders should remain mindful that oversight arrangements should not have the effect of dissuading member states from using these bodies to cooperate in the AFSJ. Most EU member states are now convinced of the added value that agencies such as Europol and Eurojust can have in supporting their own work. Yet, there is a risk that if oversight arrangements place too great a burden on the AFSJ bodies and/or national authorities, some member states may simply revert to bilateral channels of cooperation, which are less heavily regulated and perhaps not subject to the same levels of scrutiny. Any moves in this direction would undermine the capacity of the AFSJ bodies to contribute successfully to promoting freedom, justice and security in the EU.

Recommendation 1: The European Parliament should ensure that any new arrangements for the oversight of the AFSJ bodies do not serve to dissuade member states from using these bodies as platforms for cooperation.

Limitations on the scope of the European Parliament's oversight of the AFSJ bodies

This study highlights several factors which should serve to limit the scope of the EP's oversight of the AFSJ bodies. These primarily relate to oversight of the AFSJ bodies' operational activities. Firstly, the intergovernmental nature of the AFSJ bodies and the relationship between actions of the AFSJ bodies and Member States has important implications for oversight. Member States' police, prosecutorial, border (and to a much lesser extent) intelligence agencies are both the principal suppliers and the main customers

of the AFSJ bodies. The AFSJ bodies function primarily on the basis of information provided by national agencies and their principal output is information and analysis that is sent to these agencies. National agencies may take action, including the use of coercive powers, on the basis of such information, including within the context of operations coordinated by an AFSJ body such as Europol or Frontex. As is discussed in chapter two of the study, such action remains the exclusive responsibility of national authorities. The implication of this is that both the inputs to AFSJ bodies and actions taken on the basis of the outputs of these bodies are regulated by national law and should be overseen by appropriate national authorities. It is generally accepted inside the EP and in Member States that it is not the prerogative of the EP to oversee how national agencies collect information that might be shared with AFSJ bodies and/or action undertaken on the basis of information provided by AFSJ bodies.

Secondly, the AFSJ bodies consist of a mix of personnel seconded by the Member States and EU staff members. National liaison officers at Europol, national border guards that participate in a Frontex-coordinated operation, or seconded intelligence officers at Sitcen are paid by Member States and cooperate with the agencies in accordance with national laws. As such, their cooperation with and contributions to an AFSJ body are more appropriately overseen by national oversight mechanisms. This intergovernmental element of the AFSJ bodies requires that the EP works closely with national parliaments in ensuring that appropriate oversight arrangements are in place.

Thirdly, Europol and Eurojust are authorised to process, store and transfer personal data within the parameters of their mandates. These are activities which interfere with the right to privacy and may serve as the basis for use of coercive or special powers—which have particularly significant human rights implications—by member or third states' authorities. In view of this, these activities clearly need to be subject to oversight by an independent body. Accordingly, the EU has established specialised non-parliamentary oversight bodies—the Joint Supervisory Bodies (JSBs) of Europol and Eurojust—for this purpose. The JSBs have access to all files and premises related to the processing of personal data and are in a strong position to ensure that any practices which violate data protection regulations are corrected. In our view, the JSBs are an appropriate oversight mechanism for scrutinising the use of personal data by the AFSJ agencies. Accordingly, their activities do not need to be duplicated by the EP. Equally, the EP would not need to oversee Frontex's future role in processing personal data because it is envisaged that the European Data Protection Supervisor would perform a similar function to the JSBs.

There are several other arguments against involving the EP in the oversight of the AFSJ bodies' operational activities on an ongoing basis. First, as is noted in chapter four, this is extremely time consuming and requires specialised expertise and resources which many parliaments do not possess. A number of the MEPs and staffers interviewed for this study indicated that the EP would not have the time, resources, or inclination to scrutinise the operational activities of the AFSJ bodies. Oversight can be conducted more effectively by a 'professional' oversight body, such as the JSBs, that focuses exclusively on the oversight of an agency's operational activities. Second, giving the EP a mandate to oversee information processing would require the parliament to have access to personal data in these files, which would raise significant privacy concerns. Finally, parliamentary scrutiny of the operational aspects of the AFSJ bodies' work might adversely impact upon the effectiveness of these bodies. This is because many states are opposed to giving the EP a role in this regard and may reduce information sharing with the AFSJ bodies if the EP was given such a role.

The European Parliament's oversight mandate and functions

There was widespread agreement among our interlocutors at various EU institutions and bodies that the EP should play a role in overseeing the AFSJ bodies. Oversight of the AFSJ bodies by parliament and bodies created by parliament is important for reasons that are outlined in chapters one and four. Perhaps most importantly, the EP is now a co-legislator in the AFSJ and will have a pivotal role in defining the future mandate and powers of the AFSJ agencies in particular. Therefore, it is essential that the EP plays a role in ensuring that these agencies fulfil their mandates effectively and in a manner which complies with relevant legislation. In addition, the AFSJ agencies are funded to a large extent with EU funds that are appropriated to them by the EP. As the budgetary authority, the EP must have a role in ensuring that such money is used both correctly and efficiently.

These rationales for parliamentary oversight of the AFSJ agencies do not, however, imply that the EP should play a role in their management. When discussing the EP's role in the oversight of AFSJ bodies, we should remain mindful of the separation of powers and responsibilities in this regard. This is particularly important in relation to Eurojust because it works with judicial bodies. Oversight of the AFSJ bodies should also not be conflated with controlling or co-managing an agency—this is not the role of a parliament. The AFSJ bodies are meant to serve as repositories of expertise which exist to provide a professional service to the EU and its Member States. It is not the role of parliamentarians to meddle in the management of this work; such functions are primarily the prerogative of the agencies' directors and their management boards. Meanwhile, the Commission and/or Council provide political direction to AFSJ bodies and assume political responsibility for them. For these reasons, the involvement of the EP in matters such as the appointment of management board representatives, or even as part of the management boards of the AFSJ agencies is not recommended. Indeed, the involvement of the EP in these decision-making processes would obfuscate its oversight functions, making it extremely difficult to subsequently review independently the actions of agencies and their management boards.

Recommendation 2: The European Parliament should not be part of the management boards of Europol or Frontex, or of the College of Eurojust.

In chapter four we argue that it is difficult to advocate a 'best' approach or practice in regard to the subject(s) of an oversight body's mandate. Ultimately, what matters is that all dimensions of an intelligence agency's work are overseen by a body which is independent from the agencies and the executive. In the case of the EU, this means independent from the AFSJ bodies, the Council and the Commission. Chapter four of the study illustrates that the 'subject' of oversight can be broadly divided into four areas: operations, policy, administration and finance. In view of the foregoing comments on the role of the JSBs and national authorities in overseeing the operational activities of the AFSJ bodies, it is clear that the EP should focus on overseeing the policies, administration and finance of these bodies. This is, however, without prejudice to the EP's powers of inquiry (discussed in chapter three), under which the EP could, of course, examine allegations that any activities of these agencies violate EU law.

Recommendation 3: The European Parliament's oversight of the AFSJ agencies should focus on their policies, administration and finance.

Oversight of the finances of the AFSJ agencies

The EP can make better use of its budgetary appropriation and discharge powers in its oversight of the AFSJ agencies by ensuring a continued link between the oversight of agencies' policies and administration and the approval and discharge of the agencies' budgets. The entire budget cycle requires close cooperation between the LIBE Committee (or any newly created body with a mandate to oversee the AFSJ agencies), the Committee on Budgets (BUDG) and the Committee on Budgetary Control (CONT). There are four main ways in which the EP can effectively continue and improve the use of its budgetary oversight powers in this regard. First, the EP needs to continue to strengthen the cooperation between CONT, BUDG and the LIBE Committee throughout the budget cycle to ensure that there are links between the oversight of the AFSJ agencies' finances and other areas of their work. Second, some members of the LIBE Committee need to be made more aware of the formidable budgetary and discharge powers at the EP's disposal and how LIBE can work with the BUDG and CONT committees to more effectively use these powers in the fulfilment of its mandate. Third, the powers of the purse (both the reserve procedure and the power to withhold or delay discharge of a budget) can be used as a tool for requesting a change in the policies, procedures or activities of the AFSJ agency concerned. Finally, as we mentioned in chapter three, the reserve procedure may, in some exceptional circumstances, be used as a tool to persuade an AFSJ agency to disclose information in any area that is financed from the EU budget. This should not, however, be necessary if a new legal framework for access to classified information by the EP is adopted (see below).

Recommendation 4: The European Parliament should ensure its budgetary appropriation and discharge functions are fully linked to other aspects of its oversight of AFSJ agencies.

Keeping the European Parliament informed about security threats

The European Parliament needs to be informed about threats to the security of the EU and its member states in order to fully evaluate the measures that are needed to counter such threats. Without this information, it is hard for the EP to fully assess whether the AFSJ bodies may, for example, need new powers (i.e., requiring legislative amendments), additional resources or new cooperation agreements with particular third states. Indeed, this is an excellent example of an area in which the EP should ensure that there is a close relationship between its role as a legislator, budgetary authority and overseer. Making the EP aware of pertinent threats may also be in the interests of the agencies because in this way they can make MEPs aware of their need for additional legal powers or resources; MEPs may be useful allies in this regard (see chapter four). The EP could, for instance, be provided risk assessments and threat analyses from Frontex, the full version of Europol's Organised Crime Threat Assessment, or terrorist threat assessments from the Sitcen (see chapter two). Such assessments are classified and would therefore, need to be provided to the body within the EP designated to receive classified information. In this context, the responsible body could hold in camera discussions with relevant officials from the AFSJ bodies.

Recommendation 5: The European Parliament should receive threat assessments from the AFSJ bodies. This would enable Parliament to better assess whether these bodies have the necessary legal mandate, powers and financial resources to address such threats.

The European Parliament's relationship with the Joint Supervisory Bodies

The EP currently has very limited engagement with the two JSBs. Closer engagement with the JSBs could begin with inviting their chairpersons to discuss their biennial and thematic reports with the relevant body within the EP (see below). This dialogue would allow the chairs of the JSBs to express any concerns about their mandate, powers or the resources available to them. Meetings between the EP and JSBs could also serve as a forum to discuss the implementation of JSBs' recommendations. On this basis, the EP could use its political clout to raise any concerns with agency directors or management boards, and it could use its budgetary powers to address such matters. More regular engagement with the JSBs could also benefit MEPs in the carrying out of their work. The JSBs are repositories of significant amounts of knowledge and expertise which could benefit MEPs when, for example, preparing for hearings with agency directors or drafting own-initiative or legislative reports on Europol and Eurojust. MEPs and their staffers may benefit from this expertise not only through periodic hearings but also by reviewing the JSBs' reports and holding informal discussions with members of the JSBs and their secretariat.

In the context of closer engagement between the EP and the JSBs (or any other specialised non-parliamentary oversight bodies that are created), a body of MEPs may need to be given access to the inspection reports of the JSBs. What the EP will not need is access to data inputted into Europol's databases or Eurojust's CMS, and/or personal data shared with national authorities or third states. Access to this data would give rise to serious privacy concerns. If, in the context of its oversight functions, the EP does have access to documents which contain personal data, personal data should be deleted from these documents, as is foreseen under Annex Two of the 2010 Framework Agreement between the Commission and the Parliament.

The EP could consider adopting the practice used in some Member States whereby parliament can request a non-parliamentary oversight body to examine a particular matter (see chapter four). This is a more direct means by which a parliament can take advantage of both the expertise and independence of a non-parliamentary oversight body in order to examine particular aspects of an agency's work. To our knowledge, the EP cannot currently make such requests to the JSBs. Any provisions of this nature would need to be carefully formulated to ensure that the independence of a non-parliamentary oversight body, such as the JSBs, could not be compromised by such requests from the EP. Accordingly, much can be learned from the good practice on a national level, namely that non-parliamentary oversight bodies have the final decision on whether or not they will examine an issue at the request of parliament or any other entity (see chapter four).

Recommendation 6: The European Parliament should engage in regular dialogue with the Joint Supervisory Bodies (JSBs) of Europol and Eurojust, and should make use of the reports and expertise of the JSBs in its own oversight of the AFSJ agencies.

Standardisation of the European Parliament's right to summon the directors of AFSJ agencies

The EP currently has the power to require the Director of Europol and the Chairperson of the Europol Management Board to appear before it. This power should be extended to Frontex (the Director and Chair of the management board) and Eurojust (the Administrative Director and President of the college). While the European Parliament does not have these powers with respect to Eurojust and Frontex, it needs to be stressed that, in practice, directors of the AFSJ agencies often appear before the parliament upon its request and are aware that refusing to appear before parliament would make for bad publicity.

The power to summon agency directors and chairpersons of the management boards/college could be particularly useful outside the context of agency directors presenting an agency's annual report. It would, for example, enable the EP to require the appearance of a director in the event of a particular problem or scandal coming to light. However, the right to summon the director of an AFSJ body may be of limited value unless the MEPs involved have the right to discuss classified matters. Under existing procedures, directors cannot or choose not to answer questions which would entail disclosing classified information. This further illustrates the need to formulate a proper framework for parliamentary access to classified information before developing other oversight mechanisms (see below).

We have opted to confine this recommendation to the AFSJ agencies, i.e., not to include the director of Sitcen. It is difficult to envisage how this formal power could be extended to the director of Sitcen because it is not an autonomous agency. The EP can, however, request the High Representative for Foreign and Security Policy, under whom Sitcen falls, to appear before it.

<p>Recommendation 7: The European Parliament's power to summon the director of Europol and the chairperson of the Europol Management Board should be extended to the equivalent persons at Eurojust and Frontex.</p>

Oversight of the appointment of agency directors

Currently, the EP does not play any role in the appointment of AFSJ agency directors or the director of Sitcen. Yet, the EP has long expressed a desire to be involved in the appointment of directors of these bodies. Chapter four's survey of the role of national parliaments in the appointment of directors of intelligence agencies demonstrates that the majority of parliaments are not involved in the appointment of the directors of intelligence agencies.

There are a number of drawbacks associated with involving the EP in the appointment of directors; these are broadly similar to arguments relating to the role of national parliaments in this regard, outlined in chapter four. First and foremost, involving the EP in the appointment of directors risks politicising the work of agencies which are meant to be non-political. This concern would be magnified if parliament's role in the appointment of directors were to include the power to approve or reject a nominee. Secondly, the current process for selecting the directors/president of Europol, Frontex and Eurojust is already protracted and cumbersome because it involves representatives of 27 Member States seeking to find a compromise candidate. Adding the EP to this process would serve to

further complicate and drag out an already lengthy process. Moreover, the fact that 27 states are already involved in the selection of directors ensures that there are inbuilt checks and balances, which prevent any single party appointing a director to promote their interests. This removes one of the main reasons for which national parliaments are involved in the appointment of the directors of intelligence agencies: to prevent the incumbent government appointing someone to promote and protect partisan political interests.

All things considered, the authors are not persuaded that the European Parliament should be given a role in the appointment of directors of the AFSJ bodies. The parliament should, however, be kept informed regarding appointment processes. This should include information on the identity and credentials of proposed candidates.

Recommendation 8: The European Parliament should not be given a role in the appointment of the directors/president of the AFSJ bodies.

A role for the European Parliament in providing assessments on the human rights records of AFSJ bodies' cooperation partners

While the JSBs provide an opinion on the legal and institutional frameworks for data protection in third states, they do not examine the broader human rights record of particular foreign partners, such as a police agency in a third state. There is, therefore, no independent assessment of whether or not agencies with which AFSJ bodies share information use techniques which violate human rights. As is discussed in chapter four, this is relevant to both incoming and outgoing information. Foreign partners may collect information through e.g., torture or arbitrary detention and then share this information with AFSJ bodies. Equally, they may use information provided by AFSJ bodies as part of activities which violate human rights. These concerns are primarily relevant to the sharing of personal data.

Although the AFSJ bodies' own due diligence processes should prevent this from happening, it is good practice for an independent oversight body to provide some form of human rights assessment of the general human rights record/compliance of partner agencies in third states. There is precedence for this at the national level (see chapter four) and this is a role which could be performed by the EP or another independent body. If the EP were to assume this role, it would make sense to involve the AFET Committee's Sub-Committee on Human Rights, which has expertise in examining human rights matters outside the European Union. Such assessments would not be binding but could serve to inform the Council and AFSJ agencies' management boards in the context of entering into information sharing agreements with third states.

Recommendation 9: The European Parliament should ensure that either a (sub)committee of parliament or a specialised non-parliamentary body provides independent assessments of the general human rights records/compliance of agencies in third states with which the AFSJ bodies cooperate. Such assessments could take place before an information sharing or other cooperation agreement is signed with a third state, and during the implementation of these agreements.

A role for the European Parliament in reviewing the AFSJ bodies' information sharing agreements and memoranda of understanding

Information sharing agreements are an important part of agencies' policy and should therefore, be subject to review by the EP. Indeed, it is important that the EP is aware of the terms upon which the AFSJ bodies cooperate with each other, and with foreign entities. In our view, the EP should not play a role in the formulation or approval of agency to agency information sharing agreements or memoranda of understanding (which are distinct from agreements between the EU and third states, such as the SWIFT agreement). However, a designated body of parliament should be able to review, ex post, agreements that have been concluded and to raise questions or concerns regarding, inter alia, the content and implementation of such agreements. It is not sufficient for the EP to be simply made aware that such agreements exist. Accordingly, the AFSJ bodies should be required to forward agreements and memoranda of understanding to relevant bodies in parliament, even if such agreements are considered to be classified.

Recommendation 10: The European Parliament should have access to information sharing agreements and other memoranda of understanding concluded between AFSJ bodies within the European Union, as well as between AFSJ bodies and third states or organisations.

Access to and the protection of classified information by the European Parliament

As this study's analysis of oversight of intelligence agencies at the national level demonstrates, information is the oxygen that sustains oversight; a mandate to oversee an agency's work is of limited use unless it is accompanied by access to the relevant information. It will be extremely difficult to strengthen parliamentary oversight of the AFSJ bodies without clear and predictable rules and procedures for the EP to access relevant information from these bodies, the Commission and the Council. While access to relevant information is fundamental to oversight, the professional handling of this information by overseers is also crucial for effective oversight. Accordingly, improved access to classified information by the EP will need to be accompanied by the development of appropriate procedures for the protection of this information, as well as an ongoing commitment from MEPs to handle classified information in a professional manner.

Improving the European Parliament's access to classified information in the AFSJ

The development of an appropriate legal and institutional framework for parliamentary access to classified information is of fundamental importance to strengthening the EP's oversight of the AFSJ bodies. The discussion of the EP's access to classified information must take place alongside deliberations on the evolution of the EP's mandate to oversee the AFSJ bodies; indeed, we have argued throughout this study that an oversight body's information needs are inextricably linked to its mandate. Yet, regardless of which aspects of the AFSJ bodies' work the EP wishes to oversee and which institutional mechanism is chosen to carry out this oversight (see below for a discussion of these mechanisms), access to relevant classified information will be crucial. This is because various aspects of the work of AFSJ bodies are classified and/or involve the processing or creation of classified information.

Parliamentary access to classified information is currently being discussed in the context of deliberations regarding the revision of Regulation 1049—legislation which is ostensibly

about public access to information from EU entities. The EP's rapporteur on this matter, Michael Cashman, has opted to include provisions on parliamentary access to information in the broader draft legal framework for public access to EU documents. This approach has several advantages. First, it is aimed at ensuring that there is a general framework for the EP's access to classified information from all EU entities and across all policy domains. This may be preferable to a fragmented legal framework for parliamentary access to information based on inter-institutional agreements across different fields. The effects of this current framework are that the EP has access to classified information from, e.g., the Council, in some fields but not others and that different modalities apply to access classified information in different policy domains. Second, the inclusion of provisions on the EP's access to classified information as part of broader legislation on public access to information could help to ensure that these rules have the status of legislation rather than being enshrined in inter-institutional agreements, which are of a subordinate legal status.

In spite of these advantages, we are of the view that parliamentary access to classified information should be decoupled from provisions on public access to information. This is supported by practice on the national level, where freedom of/access to information laws are separated entirely from regulations on parliamentary access to information. Parliamentary access to classified information implies access to the specific categories of information which are justifiably exempt from public access, e.g., information regarding the work of intelligence agencies. It is precisely because such information is beyond the reach of public access that it must be available to certain parliamentarians and institutions established by parliaments for overseeing, inter alia, intelligence agencies. In almost every state analysed in this study, parliaments have privileged access to classified information to, among other things, enable them to oversee intelligence activities. This is premised on the notion that parliamentarians are elected by a population to hold governments and their agencies to account. In order to do this, they require privileged access to information which is not necessarily available to members of the public. Therefore, rules governing parliamentary access to classified information are set out in law and are disconnected from general freedom of/access to information laws.

Recommendation 11: New regulations on the European Parliament's access to classified information should be decoupled from legislation on public access to information.

The legal basis for access to information by the European Parliament

The EP could pursue a number of options with regards to developing a new legal framework for parliamentary access to classified information in the AFSJ and beyond. First, provisions on parliamentary access to classified information could be integrated in the new regulations on Europol, Eurojust and Frontex. Such provisions would be developed alongside regulations on parliamentary oversight of these agencies, thus ensuring that the EP's access to classified information from and relating to each agency is clearly tied to its oversight mandate and functions with regards to each agency. It is important to note that these regulations would need to extend to the EP's access to classified information from the Council because the Council has 'ownership' of a significant amount of information relating to the AFSJ agencies.

Second, the EP could attempt to negotiate a specific inter-institutional agreement with the Council covering the AFSJ. An agreement with the Council covering the AFSJ could help to ensure a uniform set of regulations on parliamentary access as well as one mechanism for such access (e.g., the special committee or sub-committee options discussed in chapter

five). It is not clear, however, whether an agreement with the Council could extend to parliamentary access to information from the agencies themselves. There may therefore be a need for some form of agreement between the EP and each of these three agencies regarding parliamentary access to information. This would likely require some form of amendment to the existing legislation on each agency, which is unlikely to happen given that the legislative basis for all three agencies is due to change within the next three years.

Third, as noted above, the EP's access to classified information in all policy areas could be regulated by overarching legislation that also deals with public access to EU documents. Under the current proposals, the EP could request access to classified information through, *inter alia*, the chair of the committee with responsibility for a given subject, e.g., LIBE for the AFSJ. If granted, the information would be made available to a special committee composed of seven members appointed by the EP's Conference of Presidents. The membership of the committee could consist of a core—comprised, for instance, of the leaders of the political groups—but it would not be a committee with a fixed membership. The merits of this particular institutional mechanism are discussed in more detail below. However, for reasons stated above, regulations on the EP's access to classified information should not be included in legislation on public access to information.

Recommendation 12: New legislation on the AFSJ agencies (Europol, Eurojust and Frontex) should include provisions on the European Parliament's access to classified information from and pertaining to these agencies. Such provisions should be anchored to the EP's mandate to oversee these agencies, which will be outlined in the same legislation.

In chapter three, it is argued that the legal framework regulating the EP's access to information relating to the Sitcen needs to be examined separately. This is because—in spite of Sitcen performing some functions which are relevant to the AFSJ—it falls in a different policy domain (the CFSP) in which the EP has fewer powers. Unlike the AFSJ agencies, it does not have its own legislative basis and there are no plans to 'Lisbonise' its legal basis.

The EP's existing special committee for the CSFP field may be able to access information pertaining to Sitcen but, to our knowledge, has never made use of this opportunity. The 2002 inter-institutional agreement between the Council and EP will probably need to be re-negotiated in view of the fact that the Lisbon Treaty has made profound changes to the CSFP field. For the purposes of this study, the most relevant change is that Sitcen is no longer exclusively a creature of the Council because it now falls under the EEAS structure. While the High Representative has declared that the existing inter-institutional agreement between the Council and EP, which regulates the EP's access to classified information in the CFSP field, will continue to apply, the modalities of the EEAS are so different that it seems likely there will be a need for a new agreement between the EP and EEAS, which would include provisions on parliamentary access to classified information. Yet, in view of the inter-governmental character of Sitcen, the Council may continue to be the gatekeeper to any parliamentary access to information regarding this body. Hence, the existing 2002 agreement between the EP and Council or an updated version thereof may continue to apply.

Recommendation 13: The European Parliament should consider negotiating an inter-institutional agreement with the European External Action Service, which would include provisions on parliamentary access to classified information.

The scope of the European Parliament's access to classified information from the AFSJ agencies

Rather than enumerating a specific list of the types of information the EP could have access to, it would be preferable for legislation to grant the EP a general right to request access to classified information which it deems to be relevant to its (new) oversight mandate and functions. In chapter four it is argued that this is a common good practice on the national level and helps to ensure that the responsibility for determining what information is relevant should, in the first instance, be the prerogative of the overseer. In the context of the EP's oversight of the AFSJ agencies, classified information would be requested by and made available to one of the institutional mechanisms outlined below. Access to classified information on the basis of requests would, however, be subject to appropriate limitations such as those outlined in Annex Two of the 2010 Framework Agreement between the EP and the Commission.

Recommendation 14: Legislative provisions on the oversight of the AFSJ agencies by the European Parliament should include a general right for a designated body of Parliament to access classified information it deems to be relevant to its oversight mandate and functions.

While the EP needs a general right to request access to classified information relevant to its mandate to oversee the AFSJ agencies, access to relevant information may be better ensured by requirements for the agencies to make proactive disclosures of particular categories of information. On the basis of what is advocated in chapter five, the following types of information could, for example, be subject to proactive disclosure:

- Annual work plans of the AFSJ agencies
- Threat assessments produced by the agencies
- Cooperation and information sharing agreements between the AFSJ agencies.=
- Cooperation and information sharing agreements between the AFSJ agencies and third states
- All information pertaining to budgeting and past expenditure

The proactive disclosure of these types of information is broadly in line with similar provisions which apply to proactive disclosures to oversight bodies on the national level (see chapter four).

Recommendation 15: New legislative provisions on the oversight of the AFSJ agencies by the European Parliament should enumerate specific categories of information, including classified information that must be proactively disclosed to a designated body of parliament.

The protection of information handled by the European Parliament

Improved access to classified information by the European Parliament will have to be accompanied by the concomitant development of rules and procedures pertaining to the protection of classified information handled by the EP.

Chapter four outlines three principal mechanisms used to ensure that members of oversight bodies do not disclose classified information without proper authorisation. The EP may wish

to consider each of these. Firstly, measures need to be taken to ensure that appropriate persons are selected for positions in which they will have access to classified information. One very simple way of doing this, which can be applied within the EP, is by group leaders carefully selecting MEPs to be members of bodies with access to classified information. The EP could follow the practice used in some national parliaments whereby members of committees that have access to classified information are selected by their peers, thus ensuring cross-party support (see chapter four). There is however, no precedent for this at the EP.

Vetting and security clearance processes are also used by some oversight bodies. While EP staffers should certainly be subject to security clearance before being granted access to classified information, the situation for MEPs is more complex. Chapter four illustrates that in the majority of (but not all) EU states, MPs are not subject to vetting and security clearance processes. This divergence in national practices has posed a problem for the EP because security clearance processes (of MEPs) have to be conducted by national authorities and, in many EU states, parliamentarians cannot be subject to security clearance. For this reason, the 2010 Framework Agreement between the EP and Commission left some scope for divergent Member State practices by inserting the phrase 'appropriate personal security clearance'. In view of the sensitivities associated with security clearing parliamentarians, it would be advisable for the EU institutions to follow this approach in developing the legal framework for access to classified information by MEPs from other EU institutions and bodies. However, it should be stressed that security clearance can be seen as a confidence building measure which can make it easier for overseers to gain access to classified information. In view of this, MEPs who are part of bodies that have access to classified information may wish to consider obtaining a security clearance, even when MPs in their state are not normally subject to security clearance processes.

Secondly, most states criminalise unauthorised disclosure of classified information by MPs and other overseers. At the EU level, penalties for unauthorised disclosure are complicated by the fact any prosecution of an MEP would have to take place under national law. The EP does, however, have its own disciplinary procedures which could be used in the event of an MEP making unauthorised disclosures of classified information. An assessment of the adequacy of these procedures is beyond the scope of this study. Indeed, more research is required on whether or not these procedures are effective, as well as on how national criminal law provisions would apply to unauthorised disclosures of classified information by MEPs or staffers. Ideally, there should be pan-EU consistency in this regard, in order to avoid the problem that MEPs are treated differently depending on their nationality.

Finally, physical protection measures and procedures play an important role in ensuring that classified information is not disclosed either accidentally or deliberately. At the time of writing, in May 2011, an EP working group was drafting new security procedures which will enable the EP to receive and handle classified information. This is taking place within the context of the implementation of Annex Two of the 2010 Framework Agreement between the EP and the Commission. While the development of these security procedures has been driven by an agreement that will facilitate the EP's access to classified information from the Commission, these procedures could be applied to information received from the Council, EEAS and AFSJ bodies. Given the highly technical nature of information protection procedures, the EP may benefit from discussions with national parliaments and non-parliamentary oversight bodies with experience in dealing with these matters.

It is important to note that these procedures alone will not be sufficient to persuade the AFSJ bodies, the Council, Commission and Member States that the European Parliament can be trusted with classified information. A relationship based on trust will need to gradually develop over time and will be greatly assisted by MEPs demonstrating that they will not disclose information without proper authorisation.

Oversight mechanisms

In chapter five we put forward different options regarding the mechanisms or bodies within parliament that could undertake the oversight functions discussed here. These are also the mechanisms through which the EP should be able to access classified information in the AFSJ.

It is preferable for the body that is given primary responsibility for the oversight of the AFSJ agencies to be the same body which has access to classified information in the AFSJ. Chapter four demonstrates that on the national level, specialised oversight committees are almost always one of the bodies (or the only body) in parliament that have access to classified information in the security domain (see Table 3). Having one mechanism for parliament to access information relating to AFSJ agencies and a separate body—without the same level of access to such information—for overseeing such bodies would seriously undermine oversight of these agencies. The reasons for this are self evident: bodies with a mandate to conduct oversight need access to relevant information, and bodies that have access to information relating to particular agencies but no clear mandate to oversee such agencies cannot make effective use of their privileged access to information.

Recommendation 16: The European Parliament body responsible for the oversight of the AFSJ agencies should also be the body of Parliament which has access to classified information in the Area of Freedom, Security and Justice.

It would be preferable for the EP to have one body (e.g., the LIBE Committee or a newly created sub-committee) that plays the lead role in the parliament's oversight of the AFSJ agencies. In order to ensure that the EP takes a coherent and coordinated approach to the oversight of the AFSJ agencies, there should be one body which has primary responsibility for all oversight functions vis-à-vis all AFSJ agencies. This responsibility should include not only the EP's own oversight mandate and functions but also cooperation with national parliaments and non-parliamentary oversight bodies such as the JSBs. An important exception to this is the financial oversight of the agencies which will, of course, remain the responsibility of the Budgets and Budgetary Control Committees. Nevertheless, whichever body has primary responsibility for the oversight of the AFSJ agencies should be closely involved in the work of the BUDG and CONT committees with respect to these agencies. It should be stressed that the 'body' discussed in this paragraph cannot be given primary responsibility for the oversight of Sitcen because it is situated in the Common Foreign and Security Policy field, under the High Representative.

Recommendation 17: The European Parliament should ensure that there is *one* body within parliament that has primary responsibility for the oversight of the Area of Freedom, Security and Justice (AFSJ) agencies.

The performance of additional oversight functions by the LIBE Committee

The development of a new body or mechanism within the EP is likely to be a complex and protracted process requiring the agreement of numerous other actors. Depending on which type of mechanism the EP opts to establish, it may not be possible until new legislation on Europol and Eurojust is drafted and there is a legal framework in place which regulates the EP's access to classified information in the AFSJ area. In view of this, it is necessary for the LIBE Committee to develop procedures that make it better suited to serving as a forum for the oversight of AFSJ agencies, at least on an interim basis.

One relatively straightforward option is for the bureau of the LIBE Committee to hold off-the-record briefings with directors/president of the AFSJ agencies and/or representatives of the management board (in the case of Europol & Frontex) and the College (in the case of Eurojust). This option could be utilised to permit MEPs to discuss sensitive matters with these individuals in small, private meetings. Matters under discussion could include anything which falls within the broader mandate of the LIBE Committee. For example, directors could use such meetings to brief bureau members on sensitive strategic issues or problems in the operation of their agency. During the course of our interviews, it became clear that some MEPs and the directors of the agencies would welcome the opportunity for more confidential meetings when particularly sensitive matters need to be discussed. Such meetings could be initiated at the request of the chair of the LIBE Committee, by directors/president of the AFSJ agencies, and/or by relevant figures from the management boards/college. While small, off-the-record meetings could be a useful option for ad hoc discussions on some issues, they could not serve as a mechanism for many of the oversight functions discussed above.

Recommendation 18: The European Parliament's LIBE Committee should develop procedures that make it better suited to serving as a forum for the oversight of AFSJ agencies, at least on an interim basis. For this purpose, the LIBE Committee could use off-the-record meetings between its Bureau and directors (or president in the case of Eurojust) of the AFSJ agencies and/or representatives from the agencies' management boards (or the College of Eurojust) to address sensitive issues which cannot be discussed in meetings of the full committee.

Special committee options for the Area of Freedom, Security and Justice (AFSJ)

Chapter three of the study examines the role of the European Parliament's 'Special Committee'—a small group of MEPs drawn primarily from the AFET Committee—used to enable the parliament to address matters which involve classified information in the CFSP field (hereafter, the 'Common Foreign and Security Policy - CFSP Special Committee'). There are a number of options for extending this committee's remit or using a similar model for the oversight of the AFSJ bodies. The remit of this Special Committee could potentially be extended, through an amended inter-institutional agreement, to the AFSJ field in order to allow the EP to address matters involving classified information relating to, inter alia, the AFSJ agencies. Alternatively, the EP and the Council could agree to create a special committee in the AFSJ along the lines of the CFSP special committee model. Both special committee options have a number of significant drawbacks.

A first problem is that a special committee of this nature is ultimately only a vehicle for its parent committee to have some access to classified information. Neither the existing special committee nor the proposed special committee for the AFSJ (as conceived of here) would have a specific oversight mandate. If it were to be given a specific mandate, it would

make sense to pursue the option of a security cleared permanent sub-committee instead (see below). Moreover, given that a special committee would be a small group of MEP's without its own secretariat and meeting on an occasional basis, it is difficult to see how it could undertake the various oversight functions outlined in chapter five, and summarised here.

Secondly, there are doubts about whether a special committee could make effective use of the classified information to which it had access in the context of discussions with Council and/or agency officials. Given that the special committee would not have a specific mandate or the capacity to produce reports, it is unclear what purpose would be served by it having access to classified information. Furthermore, members would obviously be prohibited from transmitting or referring to classified information in discussions with their colleagues in the LIBE Committee. This would make it difficult for the LIBE Committee to make use of the special committee's privileged access to classified information in its own work. For this reason, the use of a special committee in the AFSJ would be inconsistent with Recommendation 16 which stresses the need for the body responsible for oversight of the AFSJ agencies to be same body that has access to classified information relating to these agencies.

Thirdly, if members of a special committee for the AFSJ were not experts on the subjects and agencies being discussed, they may not have the relevant knowledge to ask the most relevant questions and/or seek access to relevant information. The risk of a special committee possessing insufficient specialised knowledge would be significantly increased if the EP and Council selected the option of extending the mandate of the existing CFSP special committee. This is because its members and staffers are primarily drawn from the AFET Committee and may not have specific knowledge or expertise relevant to the AFSJ.

Finally, a special committee arrangement for the AFSJ (and similar arrangements in other policy areas) would not obviate the need for a comprehensive legal framework on the EP's access to information in the AFSJ field and beyond. There is a risk that by granting access to classified AFSJ information to a special committee of MEPs, the Council may attempt to bypass the need for a fundamental reconsideration of the framework for parliamentary access to information.

Recommendation 19: The European Parliament should not seek to extend the existing Special Committee's mandate to include the Area of Freedom, Security and Justice (AFSJ), or to create a new special committee for the AFSJ.

The EP's existing CFSP Special Committee may address CFSP matters that include the discussion of classified information with the High Representative. Given that Sitcen falls under the purview of the High Representative, the CFSP Special Committee could use its meetings with her to address issues relating to Sitcen. Members of the CFSP Special Committee could, for example, seek to learn more about the composition of Sitcen, its current priorities, or the role it plays in providing assessments on threats to the EU's internal security.

Once again, the use of a special committee has a number of significant drawbacks. First, giving a very select group of MEPs access to information on the work of Sitcen may do little to raise broader awareness of the role of Sitcen amongst MEPs and staffers. The potential for such discussions to contribute to broader awareness of Sitcen's role would also depend on how much of the information discussed in a special committee meeting on Sitcen is deemed to be classified. Second, the success of this option would depend on the willingness

of the chair of the AFET Committee to take up the issue of Sitcen's internal security functions with the High Representative; this may be unlikely given that the AFET does not deal with internal security matters and has numerous other priorities to be addressed with the High Representative. Finally, there is, of course, no guarantee that the High Representative would be willing to discuss these issues given that Sitcen's work remains highly sensitive due to the presence of seconded officers from national intelligence agencies.

Yet, in spite of these drawbacks, the CFSP special committee is currently the only mechanism available to the EP for discussions about the work of Sitcen. As we have consistently stated, the EP is in a weaker position vis-à-vis Sitcen than it is with regards to the AFSJ agencies for a variety of reasons: e.g., Sitcen is not an autonomous agency funded from the EU budget, the EP doesn't have powers of co-legislation in the CFSP, and it doesn't have a clear treaty-based mandate to directly oversee Sitcen. The CFSP Special Committee is therefore, the only mechanism through which the EP may be able to conduct some limited oversight of the Sitcen.

Recommendation 20: The European Parliament should use its existing Special Committee to examine the work of the European Union's Situation Centre. The Special Committee could use its privileged access to classified information to address the role played by the Situation Centre in the Area of Freedom, Security and Justice.

Creation of a LIBE Sub-Committee for the oversight of the AFSJ agencies

The EP could consider establishing a sub-committee of the LIBE Committee to oversee the AFSJ agencies. This would be a permanent body, established in accordance with the EP's Rules of Procedure. We shall first put forward some suggestions regarding the modalities of such a sub-committee before outlining the reasons for which we believe this may be an effective mechanism for developing the EP's oversight of the AFSJ agencies.

Mandate

The mandate of any sub-committee would need to remain within the broad parameters of the LIBE Committee's mandate, which states that 'the Committee on Civil Liberties, Justice and Home Affairs Committee is responsible for [...] Europol, Eurojust, Cpol and other bodies and agencies in the same area'. Within this context, the sub-committee would assume primary responsibility for the oversight of AFSJ agencies by the European Parliament. We envisage that the sub-committee's jurisdiction would extend to all of the AFSJ agencies which currently fall under the remit of the LIBE Committee. Under the current division of responsibilities in the EP, the sub-committee of the LIBE could not directly oversee the Sitcen because it is part of the EEAS, which falls under the jurisdiction of the AFET Committee. It could nevertheless cooperate closely with the AFET Committee, its Sub-Committee on Defence and the CFSP Special Committee on matters relating to the activities of the Sitcen which are relevant to the AFSJ.

The sub-committee could, for example, be given the task of performing the oversight functions outlined in chapter five and any other functions which the EP deems to be relevant. If the functions and powers of the AFSJ agencies were to evolve, the sub-committee's mandate would be amended accordingly. On the basis of the oversight

mandate and functions outlined earlier in this study, the sub-committee's mandate may include, but should not be limited to:

- i. Serving as the forum for periodic and ad hoc meetings with, inter alia, the directors/president of the AFSJ agencies; representatives of the management boards/college; relevant officials from the Commission and Council;
- ii. Receiving and reviewing the annual work plans and reports of the AFSJ agencies;
- iii. Receiving threats assessments from the AFSJ agencies;
- iv. Relations with the Joint Supervisory Bodies and any other specialised non-parliamentary oversight bodies which are created to oversee the AFSJ agencies. This role would include reviewing the annual and thematic reports of the JSBs and maintaining regular dialogue with them;
- v. Drafting the LIBE Committee's own initiative and legislative reports on matters relating to the AFSJ agencies;
- vi. Performing the advisory functions of the LIBE Committee with regards to the appropriation and discharge of the budgets for the AFSJ agencies, thereby providing expert opinions to support the work of the Budgets and Budgetary Control Committees;
- vii. Cooperation with other committees of the European Parliament which have jurisdiction over matters related to the AFSJ agencies. Notably, the sub-committee could maintain dialogue with the AFET and the CFSP Special Committee regarding the Sitcen. If the EP decides to take up the option of drafting opinions on the human rights record of the AFSJ agencies' partners in third states, the sub-committee should consult with the AFET's Sub-Committee on Human Rights on this matter;
- viii. Reviewing certain aspects of the AFSJ agencies' cooperation with third states and international organisations, including scrutinising the information sharing agreements concluded in this context;
- ix. Reviewing relationships between AFSJ agencies, including their memoranda of understanding; and
- x. Coordinating relations with national parliaments and representing the European Parliament in inter-parliamentary meetings which are relevant to the AFSJ.

In line with our earlier comments regarding the role of the EP in overseeing the AFSJ agencies, we do not believe that the sub-committee should duplicate the work of the JSBs in examining the legality of the use of personal data by certain AFSJ agencies. Moreover, it would not play a role in examining other operational activities of the agencies, e.g., their work files or the joint operations which they coordinate. Equally, the sub-committee should not encroach upon the jurisdiction of national parliaments and other oversight bodies responsible for scrutinising the work of national authorities that is connected to the AFSJ agencies.

Membership

The membership of the sub-committee would need to be determined in accordance with the guidelines established under Rules 186 and 190 of the European Parliament's Rules of Procedure. The existing sub-committees (of the Foreign Affairs Committee) on Security and Defence, and Human Rights have 28 members and 28 substitutes, and 30 members and 21 substitutes, respectively. These MEPs generally (but not necessarily) hold concurrent membership in the Foreign Affairs Committee.

It is our view that these numbers are too large considering the fact that two of the principal reasons for proposing a sub-committee are: (1) the need for a small, confidential forum for

discussions with the heads of the agencies and management boards; and (2) the need for MEPs to have access to some classified information relating to the agencies. A committee with as many as 50 members and substitutes would not fulfil these needs. Indeed, many of the aforementioned concerns which the agencies (and the Council and Commission) have about the confidentiality of discussions and protection of classified information would not be addressed if the sub-committee contained so many MEPs. Aside from concerns about the protection of classified information, a sub-committee arrangement would need to create conditions in which, inter alia, agency directors would feel confident that they could raise concerns or sensitive issues with a group of MEPs, without the content of such deliberations being further disseminated. Ultimately, agency directors and officials from the Council, Commission and JSBs are likely to abstain from discussing sensitive issues with the EP if they are not confident that discussions will remain confidential.

On the national level, the overwhelming majority of specialised parliamentary oversight committees include five to fifteen MPs (see Table 1 in chapter four). As is discussed in chapter four, such committees are normally smaller than other parliamentary committees for reasons of maintaining confidentiality. Accordingly, it is our view that a sub-committee should contain no more than 15 MEPs (including substitutes). This may, however, be difficult to accomplish in view of the requirement that the composition of EP committees and sub-committees reflects the overall composition of the parliament.

It would be beneficial if members of the sub-committee were either full or substitute members of the LIBE Committee. This would increase the likelihood that sub-committee members would have sufficient knowledge of the AFSJ agencies to enable them to contribute effectively to the sub-committee's functions. Finally, the EP could consider including some MEPs that are members of other (sub)-committees that deal with matters related to the AFSJ agencies and/or have other expertise which is relevant to the oversight of AFSJ agencies. These MEPs could include members of the Budgetary Control Committee, the Foreign Affairs Committee and its Sub-Committee on Human Rights. Chapter four illustrated that there is precedence for the inclusion of ex officio members (of other parliamentary committees) in national parliamentary oversight committees. This can help to ensure that there is proper coordination between committees that deal with related matters.

Access to information

All members of the sub-committee and its staffers would have the right to access classified information within the parameters of the sub-committee's mandate. In addition, certain categories of information could be subject to proactive disclosure to the sub-committee by the agencies, their management boards/college and, where appropriate, the Council and Commission (see above). The sub-committee would not, however, need to have access to information held in the agencies' databases or any personal data. The sub-committee would be required to implement the measures to protect information, which are discussed in chapter five.

Resources

The sub-committee would need to be supported by full-time security cleared staff. This is particularly essential in view of the fact that MEPs are frequently members of several committees and have to divide their time between work in their own states, Brussels and Strasbourg. Staffers are also essential to developing the parliament's institutional

knowledge and expertise on the AFSJ agencies; they ensure that such knowledge is retained even when MEPs move to other committees or leave the EP.

Assessment

Whether or not the European Parliament needs to establish a LIBE sub-committee to oversee the work of the AFSJ agencies depends to a large extent on how its mandate to oversee these agencies is defined in the forthcoming legislation on Europol, Eurojust and Frontex. If the EP's oversight mandate and functions remain broadly similar to the way they are now, i.e., relatively limited, it is not clear that a sub-committee would be necessary. If, however, the EP assumes additional oversight functions along the lines of the options presented in chapter five, there is a strong case for the establishment of a sub-committee. There are four main reasons for which we believe a sub-committee could be created.

First, we have argued there is a need for the EP to have access to classified information from and pertaining to the AFSJ agencies, as well as the possibility of holding confidential, off-the-record discussions with agency directors and other relevant stakeholders. Yet, the EP's existing institutional arrangements for oversight are not well suited to such functions because too many MEPs are involved and there is no precedent for smaller, confidential discussions with the agencies. We have cautioned against solving this problem by using a mechanism or body which simply has access to classified information regarding the AFSJ agencies without an accompanying mandate to use this information as part of oversight processes. It is worth reiterating that access to information by a body of parliament is not an end in itself: it must be a means to enable parliament to oversee particular agencies. For this reason, we were critical of the possible use of a special committee model for the AFSJ. The need to link access to classified information with a clear mandate for oversight is one of the main arguments in favour of creating a sub-committee.

A second argument in favour of the creation of a sub-committee is that the LIBE Committee might not have the time to engage in many of the proposed oversight functions outlined in chapter five. If the EP wishes to play an increased role in the oversight of the AFSJ agencies, the creation of a sub-committee could be a persuasive choice.

Third, a sub-committee would correspond with our earlier recommendation that the EP should have one body which has primary responsibility for all areas of parliamentary oversight of the AFSJ agencies. The sub-committee would be able to draw together its findings from various oversight functions and ongoing dialogue with the agencies, Council, Commission, JSBs and national parliaments. This would enable the EP to produce recommendations which can improve the work of the agencies, while also providing inputs to feed into other aspects of its own work. Notably, the insights of the sub-committee could help to ensure that the various roles which the EP plays vis-à-vis the AFSJ agencies are fully connected. For example, the EP's co-legislation functions would be closely informed by the findings and recommendations of its oversight work, and the sub-committee's oversight would also inform the use of the EP's budgetary powers.

Finally, the creation of a sub-committee would enable the EP to gradually develop more detailed knowledge and expertise on the AFSJ agencies. In our view, this is something which is currently lacking within the EP, and yet is crucial if the EP is to play a more active role in scrutinising the work of the AFSJ agencies.

Recommendation 21: The European Parliament should create a LIBE Sub-Committee for the oversight of the AFSJ agencies. The precise scope and content of the sub-committee's

mandate would be defined in accordance with the Parliament's rules of procedure but would be closely tied to the oversight functions given to the EP by new legislation on Europol, Eurojust and Frontex.

Strengthening cooperation between the European Parliament and national parliaments in the oversight of AFSJ agencies

The Lisbon Treaty specifically requires that national parliaments should be involved in the oversight of Europol and Eurojust. While the precise nature and scope of national parliaments' role differs between states, this study highlighted three main ways in which national parliaments already exercise some oversight of these agencies (see chapter three). Firstly, some national parliaments oversee the work of their own government's representatives at the Council and on agency management boards, i.e., they scrutinise national inputs to AFSJ agencies. Secondly, national parliaments can engage with AFSJ agencies directly by, for example, holding hearings with directors and other senior officials, and producing reports on the agencies. This engagement has typically been aimed at generating awareness of the agencies' work rather than any direct review or scrutiny of the agencies' activities. Moreover, parliaments are part of national systems of oversight which scrutinise actions taken by national authorities such as the police. The modalities of such oversight are the prerogative of national bodies, and it is beyond the scope of this study to issue recommendations in this regard. A third dimension of national parliamentary involvement in the oversight of the AFSJ agencies is cooperation with other parliaments and the EP (see chapter three); this will be our focus here.

In our view, the aims of inter-parliamentary cooperation should primarily focus on strategic matters rather than any specific operations of the AFSJ agencies. There are three areas in which inter-parliamentary cooperation could be particularly useful. Firstly, national parliaments and the EP could benefit from further discussions, as well as exchanges of information, experiences and good practices, on their oversight of national authorities' activities that are connected with the AFSJ agencies. For example, there is a clear need for further information on how, if at all, national parliaments and other relevant national oversight bodies (such as judicial bodies) oversee: (a) national contributions or inputs to the AFSJ agencies, such as information sent to AFSJ agencies; and (b) the actions of national authorities taken on the basis of information provided and/or operations coordinated by these bodies, such as arrests and questioning of persons suspected of involvement in serious criminal activity. National overseers could use such information to inform their own approaches to scrutinising activities of, for example, the police or border agencies, which have a nexus with the AFSJ agencies. Secondly, national parliaments and the EP could, insofar as national law would allow, exchange information about particular problems (within their jurisdictions) related to aforementioned activities of national authorities' activities that are linked to the work of AFSJ agencies. Finally, national parliaments and the EP could work together to evaluate whether new and existing regulations relating to the AFSJ agencies comply with the principles of subsidiarity and proportionality.

There are different views as to whether this cooperation should be institutionalised through some form of permanent inter-parliamentary body or whether it should proceed more informally through existing inter-parliamentary fora. For example, in its communication of December 2010, the Commission made proposals for involving national parliaments in the oversight of Europol. The Commission proposed setting up a joint or permanent inter-parliamentary forum in which both national and European members of parliament would be

represented, along the lines of Articles 9 and 10 of the Protocol on the Role of National Parliaments in the European Union. It furthermore suggested that such a forum could establish a sub-group to liaise directly with Europol. The forum would be able to invite the Europol director and it could meet regularly and establish a sub-group responsible for liaising with Europol directly. The Commission's proposals have received some support from national parliaments. However, the added value of the creation of such an inter-parliamentary forum has been questioned by a number of EU member states and national parliaments. All of the forms of cooperation discussed above could potentially take place within the context of existing forums for inter-parliamentary dialogue.

Perhaps more significantly, it is highly doubtful that a permanent body including representatives from all national parliaments could be workable. National parliaments' positions on, levels of interest in, and knowledge of AFSJ related matters vary greatly across the EU. It would therefore, be very challenging to reach consensus on issues such as an agenda for oversight, let alone on more substantive questions. A forum which included so many actors with different agendas could be unworkable and yet, it would be difficult to devise a formula for a smaller forum because it would inappropriate to exclude any national parliaments. In addition national parliaments have both different levels of access to information – from national authorities – and access to different types of information on the AFSJ agencies. They may therefore, be starting from very different positions in terms of their awareness of particular matters.

In view of these challenges, we do not recommend the establishment of a permanent forum for inter-parliamentary cooperation on oversight of the AFSJ agencies. It would be preferable for national parliaments and the EP to address the AFSJ agencies in the context of existing inter-parliamentary forums. These include joint meetings/hearings between the LIBE Committee and relevant committees of national parliaments, as well as the COSAC. In fact, the AFSJ, the political monitoring of Europol and the evaluation of Eurojust's activities have become regular items on the COSAC agenda. A majority of COSAC's members have supported the idea of COSAC debates on Europol and Eurojust to be preceded by a hearing of the directors of the respective agencies and experts. A potential role for COSAC in the political monitoring of JHA agencies is founded on Article 10 of TFEU Protocol No 1 on the role of national parliaments. This article stipulates that COSAC should promote the exchange of information and best practices between national parliaments and the European Parliament, including their special committees, and may organise inter-parliamentary conferences on specific topics. COSAC could continue to provide a useful venue for the types of cooperation discussed above.

Recommendation 22: Inter-parliamentary cooperation on the oversight of the AFSJ agencies should take place within the context of existing forums for cooperation between the European Parliament and national parliaments. The European Parliament does not need to establish a new permanent inter-parliamentary body.

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