

# The EU after Lisbon: Toward a More Secure, Free and Just Europe?

## Introduction

The Area of Freedom, Security and Justice (AFSJ) belongs to one of the fastest growing policy fields within the European Union. Clearly intergovernmental in its origins, its supranational dimension has increased through consecutive treaty changes and necessity-driven actions undertaken by EU actors to advance integration in this field. This development has resulted in very specific dynamics that combine the intergovernmental origins with the classic community method. As a result, the AFSJ faces new challenges of both an institutional and a policy-oriented nature.

The policy paper aims at defining the key challenges in the implementation of the Lisbon Treaty in the AFSJ, analysing its impact through focus on three particular perspectives: liberty and security; transparency versus effectiveness; the external impact of internal policies. The paper also presents policy recommendations to be taken into consideration when reviewing the current state of affairs as defined by the Treaty of Lisbon, the Stockholm programme and the Commission Action Plan. The aim of the paper is thus to provide critical reflections and practical pointers to understand the present situation with the AFSJ and envisage potential evolutions.

## Liberty and Security: an existential tension

The cleavage between liberty and security has developed and steadily increased in recent years: too often the two concepts are presented as being opposite to the other and seemingly requiring the choice of one perspective at the expense of the other.

Whereas the security dimension has been emphasised due to an increased perception of threats such as terrorism and cross-border criminal activities, the AFSJ also includes additional issues which raise civil liberties concerns such as data protection, migration and border control, many of which are often not subject to a well informed or comprehensive political and public debate. In the absence of such a debate, political choices may be made reliant on legislation or policy documents agreed in extraordinary circumstances, **increasing the risk of emphasising security** to the detriment of liberty in an environment too often reactive rather than proactive.

Striking a balance between the two dimensions is a difficult and challenging task conditioned by a specific temporal and political context, as well as by the competences of the EU. The variety of constantly changing factors and tools at the disposal of policy-makers create a **feeling of uncertainty**. It is very difficult to know whether specific measures will be effective and what the long-term consequences and implications will be.

In this context, the implementation of the Lisbon Treaty risks increasing this sense of uncertainty. However, such changes are of major importance since they might deeply affect the functioning of the Council and thus decision-making as a whole. Similarly, the evaluation mechanisms proposed by the Stockholm programme might allow for a technical review but do not provide for a wider revision related to the proportionality and purpose of those measures.

Given the need for constant readjustment to new situations, new information and new challenges, **evaluation** should extend not just to a peer-review of the implementation of the legislation – as suggested in the Stockholm programme – but should rather **focus on the principles and values underpinning legislation**. This could perhaps call for a regular and thorough revision of existing legislative measure in the form of a sunset **provision**: namely a complete re-evaluation of the legislation and policy documents after a specific period of time, as it has been proposed now with the TFTP agreement on bank data sharing with the US (SWIFT). Such a re-evaluation would give an opportunity to readjust the political debate, in order to adapt the necessity and proportionality of existing measures to the most recent developments.

This would call for a repeated political choice by those who represent the peoples of Europe on the issues that are at hand. Issues of liberty and security are of direct impact on all of those within the European Union, and also often on those in neighbouring countries. However, often these issues fail to reach a public platform either at the national or European level. Rather than politicising these issues, or playing on the emotions of people, bringing informed, enlightened and nuanced debate to the fore will allow political representatives to make political choices which have been informed by those who they represent.

In this sense, the new provisions introduced by the Treaty of Lisbon in order to control subsidiarity would provide a good opportunity to extend the debate beyond the EU level. Given the new powers for a quarter of national parliaments to collectively raise awareness on JHA issues could bring engagement of national actors who could work together to shape a common agreement on the adequate balance between security and liberty.

### **Efficiency and democracy: a real trade-off?**

Just as liberty and security are juxtaposed in the political discourse, efficiency and democracy are often also presented at odds. The need to legislate rapidly has sometimes come at the expense of necessary democratic debates, transparency and more inclusive processes of deliberation. The Lisbon Treaty has been crucial not only to improve efficiency but also democracy. The hugely decreased number of instances where unanimity is required means that Member States are less able to block negotiations and water down proposals, while the European Parliament's increased participation has the potential to ensure more democratic debates. These innovations clearly enhance the legitimacy of the AFSJ and the EU as a whole.

However, such innovations bring with them certain risks. First, the low turnout in EP elections

reveals a gap between the actual capabilities of the EP and citizens' interest in what the Parliament can do for them. In this sense, there is a need to raise awareness and encourage participation in EP elections. This is especially necessary, since although it is expected that this gap will be filled by the enhanced participation of national parliaments, in practice they may not have the capacity to be fully involved in the decision-making process.

In the AFSJ, the majority of acts are now decided under co-decision. This means that the EP and the Council have to find a compromise. In recent years, the necessity to conduct efficient negotiations has sometimes brought agreements early on in discussion, which often come at the expense of broader and deeper debates on the consequences and proportionality of very sensitive measures.

The focus on cooperation and information sharing in the Stockholm Programme is a great opportunity to increase efficiency and effectiveness. In some instances it is also a threat to legitimacy and transparency offering an opportunity for circumventing mechanisms of democratic oversight and strengthening the role of the executive(s). Information flow between (national) executives can be shielded from domestic control mechanisms. At the same time, oversight may also render Member States more reluctant when transferring information to EU agencies, since they might perceive a potential misuse of information and the possibility of their actions being subject to public scrutiny against their will.

Accountability and control can and most probably will be improved by full inclusion of the European Court of Justice in the AFSJ. In spite of some limitations related to the *acquis*, subjected to a five-year transitional period, the ECJ should prove the greatest resource to ensure that the acts decided in this area conform to the values and fundamental rights protected in the EU treaties.

The rapid increase of legislation and tools often renders it difficult for citizens to understand the opportunities and challenges presented by EU policies. It is thus necessary that information is kept available and up to date. It is of particular importance that those tools, such as databases (such as SIS, VIS, Eurodac, TFTP) that have a direct impact on citizens are better communicated to people and rendered more transparent. In order to ensure the legitimacy of such tools and actions, citizens must be offered the opportunity to challenge their use, for instance by providing better opportunities to identify gaps and correct the use of personal data (*inter alia* by recurring to the new European citizens' initiative). Also the role of the ombudsman ought to be enhanced and better publicised.

### **The central importance of mutual trust and recognition:**

Mutual recognition has been recognised as an essential instrument to advance the AFSJ. It is also a way to improve efficiency and use time and financial resources more effectively. However, in order to achieve these results, mutual trust is also of great importance. Mutual

recognition cannot work in the absence of shared trust and values amongst practitioners.

Mutual trust should be improved through enhancing the use of common training of officials and through professional exchanges in related fields between various member states. Shared experiences and the development of a common working language is also essential for ensuring effective exchanges toward fostering a common understanding of the challenges and issues facing practitioners. Only by ensuring a common understanding of such issues can mutual trust be developed and the sharing and exchange of information made effective.

Moreover, mutual trust depends on the existence of solidarity among Member States and practitioners. Imbalances raised by the use of asylum tools such as the Dublin convention or the implementation of FRONTEX operations have underlined the necessity to improve solidarity and sharing the responsibilities of a common area of Freedom, Security and Justice.

### **Implementing European legislation:**

Good implementation is essential not only to improve effectiveness of EU legislation but also to ensure the legitimacy of EU actions. Intentional delays in implementation of European legislation as well as the failure to follow the spirit of legislation in Member States (“virtual acquis”) require some focused attention. Unequal implementation amongst Member States has come to be recognised as a major problem in relation to a number of measures such as in the unequal use of a common asylum policy or the data retention directive.

Recent examples of poor or unequal implementation reveal several pressing needs. including improving and controlling implementation as well as reducing the scope of flexibility and discretion allowed to Member States. Furthermore, recent decisions such as the Returns Directive show such a high degree of discretion for Member States that the central aspects of the Directive are diluted and lose much of their significance.

Finally, the streamlining of legal acts brought by the Lisbon Treaty might place a new burden on some Member States, opening the door for new implementation challenges and the necessity for the Commission and the ECJ to intervene.

### **The external impact of the AFSJ**

It is essential to fill the gap existing between the application and control of civil and human rights within the EU borders and what is taking place immediately beyond them, in neighbouring countries. In this effort the EU should better prioritise geographical areas of intervention in the Neighbourhood and promote different levels of cooperation that could make it easier for the EU to fulfil the objectives established in the Lisbon Treaty and the Stockholm programme.

In abandoning of the pillar structure, there is huge potential for enhanced integration of JHA and CSFP sectors, highlighting the link between internal and external security. However, there is still a lack of coherence between the two sectors. Furthermore, the legal basis for joint decision-making in the Council remains unclear.

In this sense, **stronger coordination and political consistency between JHA and CFSP (and ESDP) is of essence**. Such goals can now be achieved through the new institutional figures created by the Lisbon Treaty, in particular through the figure of the High Representative, who can improve coordination between the JHA Council and the External Action Service (EEAS). The latter could prove to be an essential tool in the incorporation of JHA issues in the external activities of the EU: a new coordination unit in Brussels and the EU delegations in third countries should take the external implications of the AFSJ into account.

### **Key recommendations**

- The AFSJ should be at the core of discussions on the next financial perspective (starting from 2014). Its rapid growth and development will also necessitate increasing funds in order to sustain the agencies, programmes and tools developed in this area;
- Evaluate existing programmes and legislation to examine both the quality and efficiency, while also examining the necessity and proportionality, of such measures;
- The AFSJ has to become a pro-active field tackling challenges from the outset instead of reacting to incidents in exceptional circumstances requiring urgent measures;
- Ensure a better coordination among the growing number of bodies and agencies;
- Improve communication with EU citizens on sensitive issues so that the AFSJ can be seen as a legitimate and accountable policy area;
- Streamline the safeguarding of human rights, both internally and externally, especially in light of the accession of the EU to the European Convention of Human Rights facilitated by the acquisition of legal personality.