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Freedom, security and justice: the new Lisbon (Treaty) agenda

By Jérôme Bacquias

Background

A November 2007 Eurobarometer poll suggested that about one-third of European citizens want crime and immigration-related issues to be top priorities for the EU. Given the declared wish of EU leaders to get 'closer to the citizens', this finding is striking – but the dilemma it raises is also obvious, given that decisions in both policy areas still often require unanimous agreement in the Council of Ministers, making progress slow and difficult.

The recently adopted Lisbon Treaty could be a major step forward in this respect. If successfully ratified, it could open the door to a new phase of European integration in which the Area of Freedom, Security and Justice (AFSJ) becomes a key driver for further institutional and policy developments.

Furthermore, there is now a greater demand for action in this area than ever before, driven by the gradual removal of internal border controls, the growing need to coordinate the fight against both terrorism and organised crime – and increasing concerns about protecting individual liberties.

The difficulties which have hampered progress to date will not disappear overnight. To meet citizens' expectations, the opportunities and constraints of the new Lisbon (Treaty) agenda must be considered in more detail.

Actors, drivers and weaknesses

The AFSJ has become a 'dense' policy-making area, with more than 100 texts adopted each year. The increase in the number of relevant actors is also striking, suffice it to mention the establishment of Europol, Eurojust, the Police College, the Joint Investigation Teams, and several immigration and justice-related networks.

This development has been fostered both by treaty change (especially the Maastricht and Amsterdam Treaties) and by the European Council itself, which has defined the AFSJ's strategic guidelines since the 1999 Tampere Programme. Tampere proved very useful in setting ambitious objectives, especially for criminal justice, asylum issues and the fight against organised crime, but its successor – the 2005-2010 Hague Programme – is often criticised for lacking the same level of ambition.

The AFSJ does not, however, correspond to traditional integration modes. While Member States remain the main drivers of the integration process, they have also taken a pragmatic approach by agreeing to pool specific aspects of policy related to freedom, security and justice. This has been relatively effective, but has been hampered by four structural weaknesses.

First, separating freedom, security and justice issues between the first pillar (immigration, asylum, visa and civil justice issues) and the third (police and judicial

cooperation in criminal matters) in the Amsterdam Treaty has led to problems when dealing with 'horizontal' issues such as the Schengen border-free zone *acquis*, data protection rules, and the external dimension of justice and home affairs.

Second, the unanimity rule in the Council has slowed down or even blocked the adoption of measures, both in relation to police and justice cooperation in criminal matters, and to some asylum and immigration issues which are still subject to unanimity.

More generally, the third pillar's intergovernmental nature has hampered efficient decision-making and implementation. The European Court of Justice (ECJ)'s limited jurisdiction and the fact that the European Commission cannot launch infringement procedures have hampered a uniform implementation of police and criminal justice measures.

In parallel, the European Parliament's very limited role in this area to date has strengthened the closed-door tendency in policy-making. This has reinforced concerns that the EU is focusing 'in secret' on security measures, to the detriment of fundamental rights' protection.

Third, the price which has been paid for the AFSJ's 'deepening and widening' has been an increase in the EU's geographical fragmentation, particularly as a result of the complex opt-outs secured by the United Kingdom, Ireland and Denmark from the Schengen *acquis*, and on immigration, asylum and visa issues.

Fourth, the overall increase in the number of EU-level actors, coupled with the related difficulties of ensuring common implementation of EU measures in the Member States, has highlighted the importance of improving overall coordination.

State of play

The Lisbon Treaty potentially provides the necessary tools to tackle at least some of these problems.

The AFSJ is grouped entirely in a new Title V of the Treaty on the Functioning of the European Union, formally putting an end to the third pillar. Symbolically too, it gains more prominence, as the development of a common Area of Freedom, Security and Justice is listed as the second objective of the Union in the new Article 3 of the Treaty on European Union – even before, for example, the internal market.

The ordinary legislative procedure (Qualified Majority Voting in the Council and co-decision with the Parliament) will be the rule in this entire policy area, i.e. for almost all civil justice, asylum, immigration and visa policies, as well as justice and police cooperation in criminal matters (see below for the exceptions).

This could facilitate the decision-making process considerably in areas where unanimity previously prevailed. The Commission's right of initiative will be also somewhat strengthened compared to its powers under the current third-pillar rules – although Member States will still have the right to make proposals if one-quarter of them agree to launch an initiative.

The end of the pillar structure also means that legislative instruments adopted in the AFSJ will have direct effect in the same way as the rest of EU law, i.e. they will give citizens direct judiciable rights before the courts. Furthermore, the Commission will have the power to launch infringement procedures against Member States. In parallel, the binding nature of the Charter for Fundamental Rights will strengthen the ECJ's capacity to ensure respect for fundamental rights in EU law – although its application will be restricted in the UK and Poland.

This comes with a broadening of the legal basis in some areas, especially for asylum and immigration issues, the approximation of criminal law, training for judges, and the powers of Eurojust and Europol. The principle of mutual recognition of judicial decisions is finally enshrined in the Treaties.

On the policy-actors' side, it is now clearly recognised that the European Council will define the AFSJ's 'strategic guidelines'. National parliaments will be given a greater role in monitoring the application of the subsidiarity principle in relation to justice and police cooperation in criminal matters, and the Union will be able to strengthen coordination between relevant EU actors through the creation of a Standing Committee on Internal Security (COSI).

The Lisbon Treaty also allows for the creation of a European Public Prosecutor under the auspices of Eurojust, provided there is unanimous agreement in the Council, and the European Parliament gives its assent. This would, for the first time, give the EU the power of prosecution. While this would be used to defend the Union's financial interests, it could be extended to serious crimes with a trans-border dimension (such as terrorism, drug or human trafficking).

Unresolved issues and open questions

In many respects, the price which has been paid for the abolition

of the third pillar has been the creation of new exceptions.

Unanimity will still be required in the Council in some areas, namely: certain provisions concerning passports and ID cards, family law with trans-border implications, operational police cooperation (which is not precisely defined in the Treaty), the extension of EU competences to aspects of procedural and general criminal law not mentioned in the Treaty, and establishing a European Public Prosecutor.

The ECJ's jurisdiction will remain unchanged for a five-year transitional period in relation to all the instruments adopted before the Lisbon Treaty enters into force. It is also clearly stated that "national security" will remain the sole responsibility of each Member State.

Furthermore, an 'emergency brake' mechanism has been created in two specific areas: minimum rules in procedural criminal law and the definition of criminal offences. Similar procedures have been introduced for operational police cooperation and for establishing a European Public Prosecutor.

Broadly speaking, if the Council of Ministers cannot agree in these areas, the legislative proposal can be referred to the European Council. If this happens, the ordinary legislative process is suspended and the Council has four months to find a consensus. If that fails, nine or more Member States could go ahead without the rest by simply notifying this decision to the Parliament, Commission and Council.

This simplified 'enhanced cooperation' procedure (the rest of the Council would not have to approve the move) is both an opportunity – to move ahead through a 'pioneer group' – and a risk, in that it could increase the EU's legal and political fragmentation. The Treaty of Prüm (signed by seven Member States which agreed to strengthen police cooperation outside the EU framework, before parts of the Treaty were incorporated into EU law) illustrates the possible ambiguities in such an *avant-garde* approach.

Even more worrying, perhaps, are other signs of fragmentation. A Protocol will restrict the application of the Charter of Fundamental Rights in the UK and Poland. The UK and Ireland will also have a full opt-out from all AFSJ measures (with the possibility of opting in on a case-by-case basis), including judicial and police cooperation in criminal matters, which was not the case previously.

The British and Irish opt-out/opt-in on AFSJ measures will work in the same way as it has up until now for asylum, immigration and civil justice issues unrelated to the Schengen *acquis*. Both Member States will have three months, after a Commission proposal has been submitted, to inform the Council President of their intention to opt in – and they would then participate in the decision-making process in virtually the same way as other Member States.

The impact of these new Lisbon Treaty's opt-outs remains very unclear, not only as regards the effectiveness of judicial and police cooperation in the EU, but also in relation to protecting individuals in criminal matters and fostering mutual trust between judicial and police authorities.

Moreover, the ECJ recently highlighted the possible unpredictable side-effects of the opt-in approach in the framework of the Schengen Protocol, when it ruled that the Council had the right to refuse to let the UK participate in the negotiations on establishing Frontex border-management agency. It did so on the grounds that this measure was a development of the part of the Schengen *acquis* which the UK had not previously opted in to.

Finally, Denmark will also retain its special status regarding justice and home affairs – although recently re-elected Prime Minister Anders Fogh Rasmussen has promised a referendum on whether Denmark should maintain its various opt-outs. It is also worth noting that a non-binding Declaration has been annexed to the new Treaty stating that, in most cases, Ireland aims to opt in and intends to review its opt-out regime after three years.

Prospects

Implementation of the Lisbon Treaty provisions is already uppermost in everyone's minds, given its likely entry into force within less than a year.

There is particular concern about legislative proposals which have already been approved by the Council, but whose formal adoption has been delayed until several parliamentary reservations are lifted (for example, the Framework Decision on the European evidence warrant), or those on which negotiations are already advanced (for example, the new Europol Decision). As these proposals will formally lapse when the Lisbon Treaty enters into force if they have not been adopted by then, the Commission is pressing for this to happen quickly.

This has put Justice, Liberty and Security Commissioner Franco Frattini in a difficult situation

vis-à-vis the Parliament, which is set to acquire more powers under the Lisbon Treaty and which is pushing for 'revision clauses' to be added to all pending AFSJ proposals.

The Commission has tried to allay MEPs' concerns by offering to implement an 'informal' co-decision procedure, even before the new Treaty enters into force. While it is still unclear how this will work in practice, concrete preparations are already under way to implement two aspects of the new Treaty.

The first relates to the future shape of COSI: who will sit on it, what competences will it have and, above all, will it be able to resolve the current coordination problems of the different AFSJ policy actors?

The second relates to preparations for the new multi-annual blueprint to replace the current Hague Programme. The 2007 German Presidency set up a 'future group' composed of Commissioner Frattini and interior ministers from the current and next five Council Presidencies, a representative of the troika of Presidencies after 2010, and an observer to represent those Member States with a common-law system.

The group's task is to provide input on the future of EU 'Home Affairs' after 2009. It has, however, been made clear that this group will not deal with justice issues proper. In January, the group submitted an interim report – with still modest content – to the Slovenian Presidency.

The right combination

Assuming the Lisbon Treaty is ratified, a number of (at times potentially contradictory) trends are likely to characterise the post-2009 period.

On the decision-making side, the extension of QMV should make it easier to adopt legislative texts. However, a complicated and still unpredictable balance of power will emerge from the new Council voting rules, the increased involvement of the European Parliament, the extended UK and Irish opt-outs, the new 'emergency brake' procedures and the possibility that Member States might threaten to resort to the new simplified enhanced cooperation mechanisms described above.

Some Member States may be sorely tempted to move forward quickly by creating a pioneer group, inside or more probably outside the Treaties – with all the unknowns and dangers that this entails, as shown by the Prüm Treaty experience.

Yet, compared to the Amsterdam Treaty rules, the general result will be a tangible strengthening of the legal framework for the new instruments adopted, as the ECJ's jurisdiction will be extended considerably. The bigger role given to the Parliament should also lead to more open decision-making.

On the policy side, it is likely that where Member States disagree over the best approach, progress will remain difficult: for example, on legal immigration, the approximation of criminal laws, or asylum. New perspectives are, however, also clearly open. The Lisbon Treaty will provide the EU with the instruments to explore new policies, such as progressively acquiring more prosecution powers, developing common procedural rights for EU citizens, training judges at the EU level, building up new aspects of a common asylum policy or mainstreaming rules on data protection.

The abolition of the pillar structure will also provide an opportunity to strengthen the AFSJ's external dimension, ranging from the fight against terrorism in third countries to developing a global approach to migration or creating common consular and visa services. Most importantly, extending the ECJ's jurisdiction (already on the rise in the AFSJ) and incorporating the Charter of Fundamental Rights in the Treaty can – hopefully – contribute to striking an appropriate balance between liberty and security.

National governments and EU institutions should, however, bear in mind that there is no guarantee of success. The numerous exceptions and loopholes retained – and the new ones created – by the Lisbon Treaty show that, torn between new opportunities and renewed constraints, the AFSJ could well become a giant with feet of clay.

This means that the European Council has no alternative but to agree on a new political mandate with a clear strategy, innovative and ambitious goals, and precise deadlines. What is needed, now more than ever, is a new comprehensive programme which is as visionary as Tampere and covers the entire AFSJ.

Opinion polls show that the public wants action in this area; the Lisbon Treaty gives the EU tools to meet those expectations. Now it is up to Europe's politicians to take up this challenge.

Jérôme Bacquias is a Programme Assistant at the European Policy Centre. The issues raised in this paper are among the themes discussed and analysed within the EPC's EU Governance Forum.

European Policy Centre ■ Résidence Palace, 155 rue de la Loi, 1040 Brussels, Belgium
Tel: +32 (0)2 231 03 40 ■ Fax: +32 (0)2 231 07 04 ■ Email: info@epc.eu ■ Website: www.epc.eu

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