An Open and Secure Europe? Fixity and Fissures in the Area of Freedom, Security and Justice after Lisbon and Stockholm

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The European Union's Area of Freedom, Security and Justice (AFSJ thereafter) (-formerly known as Justice and Home Affairs Co-operation) has grown out of an institutional journey of remarkable experimentation and cautious trust-building among the Member States (MS thereafter) which has been both surprising and gripping. When the journey in the European Union formally began in the early 1990s with the establishment of the so-called third pillar of the Treaty on European Union (TEU) (2002) (in force 1 November 1993), nobody could have envisaged its road and turns in the fifteen year period that followed.[1] Nor could one have predicted the incremental and quick transition from the TEU's diluted intergovernmentalism to partial Communitarisation at Amsterdam, via the insertion of Title IV EC for migration, asylum, third country nationals and civic law matters, and to full Communitarisation in the aborted Constitutional Treaty and the Lisbon Treaty (2007)(in force on 1 December 2009).

Given the fact that MS have not traditionally welcomed a possible loss of sovereignty in areas of high politics such as policing, judicial cooperation in criminal law, migration and asylum policy, the smooth depillarisation of the AFSJ appears to be a

remarkable, albeit unforeseen, detour from the original itinerary. This detour has made secretive and national executive-driven decision-making a thing of the past thereby opening up new roads for better and more efficient law making in AFSJ matters. It has also made the European Union more open and accountable by infusing the AFSJ with effective parliamentary supervision and judicial scrutiny. In the course of different, structured processes of cooperation, MS have finally realized not only the many things they have in common and that mutual trust results in enhanced capacity for action, but also the irrelevance of national borders and domestic frameworks of control for challenges that by definition cannot be confined within national borders, such as terrorism, drugs trafficking, international crime, refugee matters and increased human mobility (Peers 2006, Walker 2004, Kostakopoulou 2007).[2] Accordingly, the search for improved institutional arrangements and better law and policy making eventually led to the road that was not taken at the very beginning.

The 'circuitous' road to the ordinary Community method has also been accompanied by positive integration measures, that is, ambitious legislative initiatives, and the embedment of the principle of mutual recognition[3] in the Lisbon Treaty (see section 2 below). Notwithstanding the recent transformation of governance in the AFSJ which holds the promise of a more efficient, accountable, transparent and democratic decision-making (Compare Peers 2004, White 2003), a constant feature of JHA cooperation in all its institutional forms thus far has been the prevalence of a security-centred paradigm. Institutional restlessness did not alter this underlying substantive logic. In the past, the fundamental principle of free movement characterising the first pillar was contrasted with the 'unfreedom' of the third pillar which had depicted asylum, migration

and matters relating to third country nationals as security threats alongside terrorism and transnational crime. The removal of internal frontiers facilitated the spread of a number of discourses on Europe's alleged security deficit thereby enabling, among other things, the securitisation of migration and asylum, that is, their depiction as existential threats requiring measures beyond the bounds of ordinary politics (Buzan et al 1998, Weaver 1995). The creation of a chain of equivalences among organised crime, migration and terrorism resulted in the creation of what Bigo (1992) has termed an 'internal security field' in which irregular migration, crime and terrorism were placed on a single security continuum. It is true that most policy observers as well as scholars believed that the bifurcation between the free movement paradigm, on the one hand, and the security paradigm, on the other, was the by-product of the different institutional configurations of supranationalism characterising the first pillar and integovernmentalism characterising the third pillar, respectively (Monar 1998, 2001, Kostakopoulou 2001). But as the third pillar began to dismember at Amsterdam first and later on in the aborted Constitutional Treaty, the security paradigm began to permeate the first pillar and to be promoted at the expense of freedom. Accordingly, not only was European citizens' freedom to cross borders (positive freedom) accompanied by a negative conception of freedom, that is, freedom from danger, risk or fear (- including the perceived threat of irregular migration), but the latter, which presupposes security measures, was elevated into a precondition for the former (Huysmans 1998, 2002, Bigo 2004, Kostakopoulou 2000, Lindahl 2004, 2009) As freedom and security became closely aligned and the external environment became more uncertain and risk-ridden, the concept of security stretched both conceptually and geographically (Bigo 2002, Andreas 2003). Internal and external security also became

closely linked, as attested by the presence of internal security objectives in EU external relations and the enhanced cooperation between the EU and third countries. Without any reservation, the European Union sought to imitate the protective function of states thereby increasing its social legitimacy. Only a 'protective' Union would provide high levels of security for its citizens while making free movement in the internal market a reality (Kostakopoulou 2000, Kaunert 2005).

At the Tampere European Council (1999, 2-3), the Heads of State and Government decided that 'the challenge of the Amsterdam Treaty [was] now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice available to all. It is a project which corresponds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives'. To this end, the Programme agreed at Tampere set out a number of ambitious policy orientations and priorities which would make the AFSJ a reality and prompted the articulation of a number of legislative initiatives in the fields of legal migration and asylum by the Commission.[4] By contrast, the Hague Programme (Council of the EU, 2004, European Council 2005), the five year programme that succeeded the Tampere Programme (2005-2010), lacked in ambition and had a more prominent security focus in light of the 9/11 terrorist attacks on the World Trade Centre and the Madrid bombing on 11 March 2004. Tackling terrorism, irregular migration and developing an integrated management of the Union's external borders became the central focus of the Hague policy agenda. In its Action Plan, the Commission (2005, compare also 2006) attempted to strike a better balance between freedom and security and a similar effort can be discerned in its contribution to the process of the adoption of the successor of the

Hague Programme, the Stockholm Programme (European Commission 2009) which is discussed below.

The discussion that follows examines the Lisbon Treaty's innovations concerning the AFSJ (section 2) and the new phase of the EU's Area of Freedom, Security and Justice by comparing and contrasting the legacy of the Tampere and Hague programmes with the policy priorities and recommendations of the Stockholm programme that was adopted by the Brussels European Council on 11 December 2009 (section 3). I argue that although the Stockholm programme does not represent a well-reasoned retreat from the paradigm of securitisation and control that has characterised justice and home affairs cooperation since the very beginning, it would be a mistake to assume that the restrictive and security-based logic is unchanging, solid and fixed. The new 'citizen-oriented' and 'rights-based' perspective is a welcome development, and the 'reweighing' of freedom, which is reflected in both the order and number of the Stockholm Programme's policy priorities, coupled with the Treaty of Lisbon's new reforms, can set in motion a dynamic whereby the more national executives seek to return to the securitisation paradigm from which they set out, the further they move away from it. But more work remains to be done in designing and implementing common juridicopolitical frameworks in the AFSJ which are coherent, normatively sound and effective.

THE AMBITIOUS TRANSFORMATION OF THE AREA OF FREEDOM, SECURITY AND JUSTICE IN THE LISBON TREATY

The Lisbon Treaty, which was signed on 13 December 2007, was the by product of the process of 'structured reflection' on the future of Europe that followed the rejection of the Constitutional Treaty in France and the Netherlands in 2005. It entered into force on 1 December 2009 following the positive outcome of the second Irish Referendum (2 October 2009), its ratification by the Czech Republic (13 November 2009) and a favourable decision by the German Federal Constitutional Court (2009). The new Treaty in the main absorbed the Constitutional Treaty's innovations in the Area of Freedom, Security and Justice.[5] One of the new objectives of the Union is to 'offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (Article 3(2) TEU). The insertion of this objective enhances the visibility as well as the constitutional status of the AFSJ, since it is no longer associated with the attainment of the internal market and the adoption of compensatory measures for the abolition of internal frontiers.

The New Title V on 'The Area of Freedom, Security and Justice' contains a chapter on General provisions (articles 67-76 TFEU) and chapters on policies on border checks, asylum and immigration (2), judicial co-operation in civil matters (3), judicial cooperation in criminal matters (4) and police cooperation (5). The unification of the institutional framework pertaining to migration related matters and judicial cooperation in civil matters, on the one hand, and police and judicial cooperation in criminal matters, on the other is the most significant innovation. Accordingly, qualified majority voting in the Council[6] and the ordinary legislative procedure (formerly known as co-decision

procedure which transformed the EP into a genuine co-legislative body) become the norm[7] and the exceptional legal instruments of the Amsterdam Treaty are replaced by the Community instruments (Regulations, Directives and Decisions) which can now give rise to directly effective rights for individuals enforceable before national courts. In addition, the Commission has the right of initiative, be it exclusive in the areas of border checks, asylum and immigration and civic judicial cooperation[8], and non-exclusive in criminal judicial cooperation, police cooperation and the ensuing administrative cooperation,[9] and the ECJ can now exert its jurisdiction over all aspects of the AFSJ, with the exception of reviewing the validity or proportionality of police operations and measures taken by MS in order to maintain law and order and the safeguarding of internal security mentioned above (Articles 276 TFEU and 72 TFEU).[10] Without a doubt, the binding nature of the Charter of Fundamental Rights will aid the ECJ's scrutiny of AFSJ legislation and will ensure its compliance with fundamental rights across the EU, with the exception of the UK, Poland and the Czech Republic where the Charter is not applicable.[11]

The Treaty also formalises the institutional role of the European Council which shall 'define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice' (Article 68 TFEU). The European Council's leadership role is thus enhanced and the election of a Council President for a period of two and half years, renewable once, will facilitate policy continuity. The effectiveness of decision-making in this field will also be enhanced by the separation between 'legislative' and 'operational' tasks and the reinforced coordination of operational collaboration by the new standing Committee within the Council on (broadly defined) 'internal security'. The new standing committee, which replaces the so called Article 36

TEU Committee, will facilitate the coordination of the action of MS' competent authorities (Article 71 TFEU), but does not have the power to direct the actions of national police and other authorities in relation to specific actions.[12] Notwithstanding the gains in terms of policy effectiveness, the all embracing concept of 'internal security' as well as the fact that the Committee will not be accountable to the European and national parliaments give rise to concern.[13] There exists a trend towards the securitisation of a number of policy issues and socio-economic problems, such as youth violence, road accidents, forest fires and energy shortages.[14] The application of a security based approach to such policy areas augments civil society's anxieties about authoritarian policy-making and the adoption of a European security model characterised by a generalised focus on prevention and the neutralisation of the threat.

Having said this, however, the increase in democratic control, oversight and transparency in justice and home affairs matters cannot be underestimated. Greater transparency is also promoted by the amended text of Article 255 EC, now Article 15 TFEU. The latter article reaffirms the link between transparency and participatory democracy by stating that 'in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies and agencies shall conduct their work as openly as possible' and that the Parliament and the Council (when it considers and votes on a draft legislative act) shall meet in public. To this end, the right of access to documents applies to the Union's institutions, bodies and agencies. Although each institution, body or agency shall determine in its own rules of procedure specific provisions regarding access to documents, Article 15(3) TFEU provides that Regulations will lay down the general principles and limits which govern the right of access and that

'each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own rules of Procedure specific provisions regarding access to its documents, in accordance with the afore mentioned Regulations. And under Article 15(3) TFEU, the European Parliament and the Council of Ministers shall ensure publication of the documents relating to the legislative procedures'.[15]

Given the chronic lack of democratic control and oversight in JHA matters, the strengthening of the role of national parliaments in the European governance is a welcome reform. National parliaments are now involved in the political monitoring of Europol and the evaluation of Eurojust's activities and may 'participate in the evaluation mechanisms' for the implementation of Union policies in the AFSJ (Article 12(c) TEU). Although it is unfortunate that national parliaments' participation in the mutual evaluation of the MS' implementation of Union policies in the AFSJ is discretionary, the position of national parliaments in the EU legal order has been considerably strengthened as a result of their monitoring of compliance of legislation in the AFSJ with the principle of subsidiarity (Article 5(3) TEU, Article 69 TFEU) and the amended protocols on the role of the national parliaments in the European Union and on the application of the principles of subsidiarity and proportionality.[16]

In addition to the above mentioned reforms, the substantive scope of the AFSJ has also expanded. Article 67(1) TFEU, which replaces Articles 29 EU and 61 EC, states that 'the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal traditions and systems of the Member States'. It also contains explicit references to the framing of 'a common policy on asylum, immigration and external border control, based on solidarity between the MS, which is

fair towards third country nationals', the prevention and combating of crime, racism and xenophobia and the application of the principle of mutual recognition of judgments in criminal matters and judicial and extrajudicial decisions in civil matters. Article 75 TFEU creates a legal basis for administrative measures with respect to capital movement and payments for preventing and combating terrorism. But the maintenance of law and order and the safeguarding of internal security fall outside the EU's competence (Article 72 TEFU), thereby meeting MS' sovereignty concerns.

As far as migration law and policy is concerned, the new legal basis for the gradual introduction of an integrated management system for external borders is noteworthy, even though there is no explicit reference to the establishment of a European Border Guard which was mentioned in the Conclusions of the Seville and Thessaloniki European Council meetings in June 2002 and 2003 respectively. Although this provision builds on the momentum created by the incorporation of the Schengen acquis into the EC/EU and the Tampere conclusions, the suggestion that any measure in this area must give 'due regard to the necessary safeguards for democratic control and the rights of individuals' was not adopted. It is also interesting to note that Article 77(2)(e) TEU entails the possibility of the abolition of internal controls for third country nationals. But given national executives' anxieties, the third paragraph of Article 77 TFEU states that the Community's competence in this area shall not impinge upon MS' sovereign powers concerning the geographical demarcation of their borders, in accordance with international law.

A welcome development in the field of asylum is the reference to a uniform status of subsidiary protection for nationals of third countries requiring international protection.

A provision that has given rise to many concerns, however, is Article 78(2)(g) which refers to measures concerning partnership and cooperation with third countries with a view to managing inflows of asylum seekers - a provision that was especially supported by the British Government. NGOs have argued that this may legitimise attempts to 'sub-contract' the MS asylum obligations to third countries via the establishment of reception centres or even resettlement schemes. Explicit references to combating of trafficking in persons and readmission agreements have also been made in the Treaty.[17] In addition, the EU has now express power to act against unauthorised residence, in addition to illegal immigration, including the removal and repatriation of persons residing without authorisation (Article 79(2) TFEU). But the Tampere commitment to the equal treatment of long-term resident third country nationals has not found its way into the Treaty. Article 79(4) TFEU establishes a legal basis for EU supporting action in the field of integration of long-term resident TCNs, 'excluding any harmonisation of the laws and regulations of the MS', while Article 79(5) TFEU specifically affirms the competence of the MS to 'determine the volumes of admission' of migrant workers from third countries. Furthermore, the embedment of the principle of solidarity and fair sharing of responsibility (including its financial implications) between the MS in the areas of immigration, asylum and border controls into the Treaty creates a specific legal basis for the adoption of appropriate measures in this area (III-268), thereby replacing the existing Community competence to adopt measures on burden-sharing related to asylum (Article 63(2)(b)).

While Chapter 3 of the AFSJ Title on civil judicial cooperation builds largely on the existing acquis in this area, the upholding of the principle of mutual recognition of

judgements and decisions in extrajudicial cases, the development of measures of preventive justice and alternative methods of dispute settlement and the adoption of measures designed to ensure a high level of access to justice are noteworthy. The latter provision cannot but have implications for the future establishment of minimum standards guaranteeing an appropriate level of legal aid for cross-border cases throughout the Union and special common procedural rules in order to simplify and speed up the settlement of cross-border disputes concerning small commercial claims under consumer legislation or to establish minimum common standards for multilingual forms or documents in cross-border proceedings.

The principle of mutual recognition of judgements and decisions (negative integration) has been proclaimed to be the cornerstone for judicial cooperation in the criminal field, too, since Tampere. It works in tandem with measures of 'positive' integration, that is, the approximation of procedural and substantive criminal laws. According to Article 82(2) TFEU, directives may establish minimum rules, which take into account the differences between the legal traditions and systems of the Member States – a reference that was inserted following pressure from the UK and Ireland which retain the option of not opting in, on: a) the mutual admissibility of evidence among the MS, b) the rights of individuals in criminal procedure, c) the rights of victims of crime and d) any other specific aspects of a criminal procedure identified by the Council in advance. The EU's competence in this area applies only to the extent necessary to facilitate mutual recognition of judgements and police and judicial cooperation in criminal matters. It is envisaged that the adoption of minimum rules concerning b) and c)

above will safeguard the rights of individuals who have been disadvantaged by the application of single market instruments in the field of criminal law.

A novelty of the Lisbon Treaty is the inclusion of the so- called ‘emergency breaks’ whereby, if a MS believes that harmonisation of certain elements of criminal procedure ‘would affect fundamental aspects of its criminal justice system’, it can request the referral of the draft directive law to the European Council (Article 82(3) TFEU). In this case, negotiations will be suspended and within four months the European Council can refer the draft directive back to the Council of Ministers for discussion. In case of disagreement, if nine or more states wish to go ahead, they can always activate the new simplified enhanced cooperation mechanisms by notifying their decision to the Parliament, the Commission and the Council. Although at first sight this provision can engender legal and political fragmentation in the EU, one should not also underestimate the extent to which the existence of such a mechanism can exert pressure for MS compliance. Otherwise stated, the emergency break mechanism has a Janus face: it appears to accommodate states’ dissent and their anxieties about possible loss of sovereignty, while it simultaneously induces compliance.

The extension of the Union’s competence regarding criminal procedural law also applies to substantive criminal law (Article 83 TFEU). As regards the approximation of substantive criminal law, directives may establish the minimum rules concerning the definition of offences and sanctions in 10 listed areas of serious crime with a cross-border direction, ranging from terrorism and trafficking in human beings to tackling computer crime and organised crime (Article 83(1) TFEU). However, Article 83(2) extends the European Union’s competence, if the approximation of criminal laws and regulations

proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. In other words, minimum rules with regard to the definition of criminal offences and sanctions can be adopted irrespective of whether areas of crime have a cross border nature. Article 83(3) also entails an emergency brake mechanism and the referral of a legislative measure to the European Council, thereby providing a safeguard of last resort. In addition, the new Article 84 TFEU gives specific legal basis for measures concerning crime prevention,[18] but Community action in this area excludes the approximation of legislation.

The remaining two articles of Chapter 4 focus on Eurojust and the establishment of a European Public Prosecutor respectively. According to 85 TFEU, Eurojust can initiate criminal investigations, propose the initiation of prosecutions to be conducted by the competent national authorities, particularly those relating to relating to offences against the financial interests of the Union, coordinate investigations and prosecutions and decide on conflicts of jurisdiction. Article 86 TFEU, on the other hand, envisages the establishment of a European Public Prosecutor's Office from Eurojust. Drawing on the Commission's green paper on the establishment of a European Public Prosecutor in the field of the Community financial interests,[19] the EPP shall be responsible for investigating, prosecuting and bringing to judgement, the perpetrators of and accomplices in offences against the financial interests of the Union and will 'exercise the functions of prosecutor in the competent courts of the MS in relation to such offences' (Article 86(2) TFEU). The establishment of a EPP requires a unanimous Council decision and the consent of the EP, as is the case with respect to the (future) extension of its powers.

The EU's powers concerning police cooperation, on the other hand, remain broadly unchanged. Article 87(2) TFEU envisages legislation concerning: a) the collection, storage, analysis and exchange of relevant information, b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime detection and c) common investigative techniques in relation to the detection of serious forms of organised crime. The possible extension on Europol's functions in the area of implementing investigative and operational actions carried out jointly with the MS's competent authorities or in the context of joint investigative teams where appropriate in liaison with Eurojust is mentioned in Article 88(2) TFEU. The last indent of this paragraph ensures the accountability of Europol by stating that European laws shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with the MS' national parliaments. But according to the third paragraph of the same article, any operational action by Europol must be carried out in liaison and in agreement with the authorities of the MS whose territory is concerned. The application of coercive measures remains the exclusive responsibility of the competent national authorities (Article 88(3) TFEU).

Taking an overall view, although the Lisbon reforms are commendable, it is true to say that the overall effectiveness and dynamic development of an enhanced AFSJ cooperation are largely dependent on the implementation of the new multi-annual Programme which defines the policy priorities and objectives for the period 2010-2014, the so-called Stockholm programme. It is also true that the Lisbon Treaty's commitment to a more open, democratic and participatory EU has fuelled expectations about a possible break with the security-driven logic of the Hague programme and the reframing

of rights from obstacles to law enforcement to preconditions for security in the EU. To this end, the Stockholm programme which is examined below makes a distinctive contribution.

THE STOCKHOLM PROGRAMME: THE PROMOTION OF A CITIZENS' EUROPE AND ELECTIVE AFFINITIES WITH HAGUE

The Stockholm Programme was adopted by the European Council (2009) in Brussels on 10-11 December 2009. Building on the previous AFSJ programmes, Tampere and Hague, it set out the policy priorities and objectives for the period 2010-2014 (Council of the EU 2009). In anticipation of the new programme, the Commission published a Communication on 'An Area of Freedom, Security and Justice serving the citizen' in June 2009[20]. The Communication highlighted the major successes of Member State co-operation during the last ten years as well as the challenges for the next five years and the main priorities. It recognised that ensuring the proper implementation of Community law by the MS remains a challenge, the need for an impartial evaluation of legislation and its implementation and the importance of improving the coherence of AFSJ policies with other Community policies, including external policy. Among the substantive highlights of the Communication was a clear effort on the part of the Commission to address the predominance of a security focus in the AFSJ and to make the policy priorities more balanced. To this end, it stated explicitly that the citizen must be placed at the heart of this project (European Commission 2009, 2). This approach was also echoed in the Stockholm Programme which has the subtitle 'An open and secure Europe serving and

protecting the citizen'. The citizen-centred discourse which counterbalances the security driven policy agenda of the Hague programme is highlighted on page 3 of the Programme, too: 'The European Council considers that a priority for the coming years will be to focus on the interests and needs of citizens. The challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe. It is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law, international protection rules go hand in hand in the same direction and are mutually reinforced'. Although the new 'citizen-oriented' approach is a welcome development in light of the restrictive and security-based focus of discourse and policy that prevailed in the past, the absence of references to 'Europe's Others', that is migrants, third-country national border crossers, asylum seekers and refugees is puzzling. Surely, important principles such as fundamental rights, respect for diversity, protecting the vulnerable and data protection cannot be confined to EU citizens.[21] In addition, as the AFSJ strives to complement the securitisation ethos with citizen friendly policies at the end of the first decade of the 21st century, progress cannot be made by looking backward and repeating the discourses and policies of the past. In this respect, the Commission's Communication (2009, 5) sought to advance the journey toward an Area of Freedom, Security and Justice, by including four key policy priorities for 'building a citizen's Europe'; namely, a) *Promoting citizens' rights: a Europe of rights*, which included the realisation of the Lisbon Treaty's fundamental rights provisions including the accession of the EU to the ECHR, the effective implementation of the Citizenship Directive (2004/38), respect for diversity, the protection of the rights of children, vulnerable people, including women who are victims of violence, and the Roma

community, a comprehensive data protection scheme, consumer protection and promoting participation in democratic life by having a common election day for elections to the EP and making easier for citizens to register on the electoral roll; b) *making people's lives easier: a Europe of law and justice*, which would facilitate people's access to the courts, improve legal aid schemes and utilise electronic resources (e-justice), further the implementation of the principle of mutual recognition and enhance judicial cooperation in civil and criminal matters; c) *a Europe that protects*, which would advance a domestic security strategy, set up an internal security fund, strengthen cooperation in police matters and law enforcement, the use of a European evidence warrant, develop an integrated border management and expand the operational capacities of Frontex, continue the development of the European Border Surveillance System (Eurosur), establish a European Schengen visa, combat human trafficking and the sexual exploitation of children and child pornography, intensify action against cybercrime, economic crime and market abuse and improve counterterrorism policy; and, finally, d) *Promoting a more integrated society: a Europe that displays responsibility and solidarity in immigration and asylum matters*. As regards the latter policy priority, the formulation of a common immigration and asylum policy, based on the global approach to migration, partnership with third countries and respect for fundamental rights and dignity, features at the top of the future European policy agenda. The Commission assumed a leadership role by stating that the EU needs to 'promote a dynamic and fair immigration policy' (2009, 32) based on a comprehensive, innovative and coherent framework (2009, 23) which adapts to 'increased mobility and the needs of national labour markets' (2009, 24). In this respect, it suggested the adoption of an Immigration Code which would end the present,

fragmented and uneven approach to legal migrants' rights[22] by ensuring a uniform level of rights comparable with that of Community citizens. The development of a positive approach to migration was complemented by a preventive and law enforcement approach to irregular migration, the development of single area of protection in the field of asylum and the promotion of consistency among these policies and the Union's external policy. Overall, the Communication was ambitious and successful in reversing the longstanding tend towards security and infusing more fairness and dynamism in justice and home affairs cooperation.

Thanks to the Swedish Presidency's efforts to embark upon a wide-ranging dialogue with the civil society and various stakeholders and its prudent assumption that the next phase of the AFSJ must not compromise ambition, respect for human rights and the rule of law and the quality of legislation on the altar of security, the Stockholm programme by and large did not alter the policy priorities identified by the Commission. It built on them, thereby creating a complex 'honeycomb' in whose cells an extraordinary amount of mandates for policy action have been placed. Some maintain the rights-based and citizen-friendly focus of the Commission's suggestions. Others increase the security dimension and surveillance on the Union, while others seek to improve coherence among the various Communities policies. Accordingly, the Commission's four priorities have now become six: the priority on 'a Europe that protects' has been subdivided into security and external border management while promoting the external dimension of the AFSJ now features as a general policy priority.

The first priority, *Promoting Citizenship and Fundamental Rights*, repeats the Commission's proposals on fundamental rights and Union citizenship, the protection of

children, vulnerable groups, victims of crime, the rights of the individual in criminal proceedings, individuals' privacy and adds the realisation of the European citizens' initiative which the Lisbon Treaty introduced (Article 11(4) TEU), while the second priority, *a Europe of law and justice*, focuses on the promotion citizens' access to justice, the promotion and extension of the principle of the mutual recognition of judicial decisions and judgments, the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, the adoption of new legislation on combating trafficking in human beings and the enhancement of cooperation among public professionals.

The main security-based priority, namely, *A Europe that protects*, focuses on the development of an internal security strategy and greater cooperation in law enforcement, criminal judicial cooperation, border management, civic protection as well as the development of a proactive intelligence approach (Council of the EU 2009, 35 et seq). The development, monitoring and implementation of the internal security strategy will be one of the core tasks of the Internal Security Committee set up under Article 71 TFEU (see the section above). In addition, the European Council considers it important to implement an EU information Management Strategy which includes the development of large scale IT systems. Interestingly, the EU Information management strategy will be based on a 'business vision for law enforcement, judicial cooperation, border management and public protection' (Council of the EU 2009, 37-8). Other proposed measures that fit the grid of security include the proposal for an EU Passenger Names Record System, a European Police Records Index System, a register for third country nationals who have been convicted by the Courts of the Member States, more effective

European law enforcement cooperation, the development of a Police Cooperation Code and more effective crime prevention and combating interventions. Although with respect to security and surveillance the logic is the same as in the Hague Programme, the fourth priority of the Stockholm programme, namely, access to Europe in a globalised world, fuses the extension of the logic of surveillance and control with the replacement of the 'Fortress Europe' image (Geddes 2000) with that of an 'open Europe in a globalised environment'. The former is reflected in the proposed enhancement of the role of Frontex, the development of an electronic system recording entry to and exit from the Member States, an electronic system of pre-entry authorisation, the use of automated border control gates and the development of a common visa policy, which could be based on personalised assessments of risk in addition to the presumption of risk associated with one's nationality. Europe's openness, on the other hand, is manifested in the explicit commitment that 'the Union must continue to facilitate legal access to the territory of the Member States' (Council of the EU 2009, 55), thereby lending credence to the argument that 'open Europe' represents more rhetoric than a substantive policy commitment.

The fifth priority, which deals with migration and asylum laws and policies, has been adjusted in ways that accommodate national executives' beliefs and interests. It is expressly stated that the European Council reaffirms the principles set out in the European Pact on Migration and Asylum (European Council 2008) as well as the Global Approach to Migration (European Commission 2006). The Commission Communication's reference to 'a fair migration policy' and the adoption of an Immigration Code have been replaced with references to 'well managed migration', flexible admission systems that take into labour market requirements and optimising the

link between migration and development (Council of the EU 2009, 59 et seq). At the same time, the law enforcement and preventative approach to irregular migration that featured in the Commission's Communication has been preserved.[23] As far as asylum law and policy are concerned, the Stockholm programme entails policy mandates for the development of a common European Asylum System based on a common asylum procedure and uniform status for those granted international protection in accordance with Article 78 TFEU by 2012 at the latest and for developing the external dimension of the European Asylum system in partnership and cooperation with third countries. Finally, with respect to the rights and status of TCNS in the Union legal order, the Swedish Presidency did manage to resurrect the Tampere mandate of 'ensuring fair treatment of third country nationals who reside legally on the territory of its MS. A more vigorously integration policy should aim at granting them rights and obligations comparable to those of EU citizens' (Council of the EU 2009, 64). This objective would have to be realised by 2014 and its implementation would require the consolidation and amendment of the four directives on legal migration and the 'evaluation and, where necessary, review of the directive on family reunification, taking into account the importance of integration measures' (Council of the EU 2009, 64). Although the contours of the precise action are uncertain at the moment, it is, nevertheless, the case that the 'Stockholm' discourse on 'proactive policies for migrants and their rights' has brought forth the alignment of the templates of intra-EU mobility and citizenship, on the one hand, and extra-EU migration, on the other. The same trend can be observed in the area of migrant integration; there exists a subtle discoursive shift away from the 'common basic principles' and mandatory regimes of language and civic orientation classes and tests towards the development of

indicators that monitor the results of integration policies in the fields of education, employment and social inclusion and more consultation with civil society.[24] The final policy priority for the next five years emphasises the importance of the external dimension of the AFSJ and the integration of the latter into the general policies of the Union, thereby replicating the Hague programme.[25] It identifies six thematic priorities for EU external cooperation (migration and asylum, security, information exchange, justice, civil protection and disaster management) as well as a number of key partners in Europe, the Mediterranean area and beyond.

The Commission's Action Plan, which was published in April 2010 (European Commission 2010), entails a clear discoursive shift away from restriction and control towards affirming migrants' fundamental rights and the values of human dignity and solidarity. Under the heading of 'delivering an area of freedom, security and justice for Europe's citizens' (European Commission 2010, 3), it emphasises the EU's duty to 'protect and project' the values of respect for the human person and human dignity, freedom, equality and solidarity and to ensure that 'citizens can exercise their rights and fully benefit from European integration'. In a clear attempt to reverse the downgrading of individual rights owing to the predominance of internal security concerns, it states that 'the Union must resist tendencies to treat security, justice and fundamental rights in isolation from one another. They go hand in hand in a coherent approach to meet the challenges of today and the years to come' (European Commission 2010, 4). To this end, it entails a number of measures to ensure the protection of fundamental rights, including a 'zero tolerance policy' with respect to violation of the charter of Fundamental Rights, the enhancement of data protection, the promotion of citizens' mobility, participation in the

democratic life of the Union and access to justice, the approximation of procedural and substantive criminal law and the establishment of a Public Prosecutor's Office from Eurojust.

Under the heading 'ensuring the security of Europe', the Action plan contains a number of actions and legislative proposal on Passenger Name Record data, the evaluation of the Data Retention Directive 2006/24/EC, a European register of convicted third country nationals, firearms legislation, a regulation on Europol, a proposal for information exchange among Europol, Eurojust and Frontex, a proposal on the establishment of an observatory for the prevention of crime, actions against trafficking in human beings and the sexual exploitation of children as well as the combating of economic crime and corruption. The counter-terrorist legal framework, including the definition of terrorism and terrorism lists, unfortunately remains unamended, and only two new legislative proposals are envisaged on precursors to explosives and security vetting of persons having access to chemical, biological, radiological and nuclear substances or explosives, respectively.

Under policy priority 6 on 'putting solidarity and responsibility at the heart of our response', the Commission observes that 'robust defence of migrants' fundamental rights out of respect for our values of human dignity and solidarity will enable them to contribute fully to the European economy and society. Immigration has a valuable role to play in addressing the Union's demographic challenge and in securing the EU's strong economic performance over the longer term. It has great potential to contribute to the Europe 2020 strategy, by providing an additional source of dynamic growth' (European Commission 2010, 7). In this respect, the Action Plan refers to the design of a common

immigration and asylum policy ‘within a long-term vision of respect for fundamental rights and human dignity and to strengthen solidarity, particularly between Member States as they collectively shoulder the burden of a humane and efficient system’ and resurrects the suggestion for an immigration code which was omitted in the Stockholm programme (European Commission 2010, 7). The latter would consolidate ‘a uniform level of rights and obligations for legal immigrants comparable with that of European citizens’ (European Commission 2010, 7). There also exist references to the congruence of a preventative irregular migration policy with the Charter of Fundamental Rights and respect for the fundamental right to asylum, including the principle of ‘non-refoulement’.

In sum, the Action Plan has set out a principled and ambitious legislative agenda, comparable to the Tampere one. Internal security is no longer the primary driver of EU legislation and action as it has been acknowledged that ensuring rights protection and engaging European citizens are essential for the legitimacy and credibility of enhanced cooperation in the AFSJ. As the Commission states, ‘the active, informed citizen for whom, all this being done is a key driver and actor in the whole process’ (European Commission 2010, 9). In this respect, it comes as no surprise that in its meeting on 3 June 2010 the Council noted that ‘some of the action proposed by the Commission are not in line with the Stockholm Programme and that others, being included in the Stockholm Programme, are not reflected in the Communication of the Commission’ (Council of the EU 2010, 2). And it urged the Commission to ‘take only those initiatives that are in full conformity with the Stockholm Programme in order to ensure its complete and timely implementation’ (Council of the EU 2010, 2). Accordingly, the AFSJ may have been infused with more freedom and a citizen-oriented approach, but the extent to which the

new ‘normative order’ will take hold remains to be seen. The shifting nexus of security and power, on the one hand, and rights and citizenship values, on the other, remains under negotiation.

CONCLUSION

Incremental integrationist efforts have brought surprises and unforeseen change in the AFSJ. The Lisbon Treaty’s depillarisation of justice and home affairs cooperation represents a major break from the past. It opens the way for the full involvement of the Commission, the European Parliament and the ECJ, an involvement that is bound to influence the substantive scope, and perhaps liberalise, legal and policy output in the years ahead. In addition, it marks a change in culture; we are witnessing less competition and strife among the supranational and intergovernmental institutions of the EU and more willingness on their part to remedy existing deficiencies and to work together to provide solutions to the multifarious challenges facing the Union. Obviously, disagreements and entrenched institutional interests still exist and domestic as well as international exigencies may preclude a wholesale agreement on many issues. But it is equally true that openness to experimentation and gradual trust building has yielded fruits. A different form of cooperation in AFSJ institutionally and substantively is digging out its space within the present, security-oriented and traditionally executive-driven architecture. The Stockholm Programme and the proposed Action Plan are a reflection of this. Present in them are aspects of the Hague programme and the logic of control and surveillance. But there also exist vessels of less ideology-driven policies, pragmatic responses to JHA

challenges and respect for citizens' rights, human rights and the rule of law. Whether the latter paradigm, which is wrapped up within the logic of security, remains confined and crammed in the next five years or will be given room to grow will depend on interventions from both the Commission, the EP and the ECJ as well as on pressure from below, that is from civil society, NGOs and Europe's citizens and residents.

REFERENCES

Andreas, P., 2003. Redrawing the Lines: Borders and Security in the Twenty-First Century. *International Security* 28 (2), 78-111.

Bigo, D., (2002). Border Regimes, Police Cooperation and Security. In: J. Zielonka, (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union*, London and New York, Routledge, 213-239.

Bigo, D., 2004. Criminalisation of "Migrants": the Side Effect of the Will to Control the Frontiers and the Sovereign Illusion. *In*: B. Bogusz et al, eds., *Irregular migration and Human Rights: Theoretical, European International Perspectives*, Leiden: Martinus Nijhoff, 90-127.

Buzan, B., Weaver, O. and de Wilde, J., 1998. Security: A New Framework For Analysis, boulder and London, Lynne Rienner Publishers.

Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, Brussels, 13 December 2004, 16054/04.

Council of the European Union, *The Stockholm Programme – An Open and Secure Europe serving and protecting the citizens*, Brussels, 2 December 2009, 17024/09.

Council of the European Union, *Council Conclusions on the Commission Communication 'Delivering an Area of Freedom, Security and Justice for Europe's Citizens – Action Plan Implementing the Stockholm Programme (COM (2010) 171final)*, Luxembourg, 3 June 2010.

European Commission, Communication to the Council and the European Parliament, *The Hague Programme: Ten Priorities for the next five years – the Partnership for European Renewal in the filed of Freedom, Security and Justice*, Brussels, 10 May 2005, COM(2005) 184 final.

European Commission, *Implementing the Hague Programme: the Way Forward*, COM(2006) 331 final.

European Commission, *The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, Brussels, 30 November 2006, COM(2006) 735 final.

European Commission, Communication, *An Area of Freedom, Security and Justice serving the citizen: wider freedom in a safer environment*, Brussels, 10 June 2009, COM (2009) 262/4.

European Commission, Communication, *Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme*, April 2010, COM (2010) 171.

European Council, Tampere Presidency Conclusions, Brussels, 15-16 October 1999, SN 200/99.

European Council, Presidency Conclusions, Brussels, 4 November 2004.

European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 3 March 2005, OJ C 53/1.

European Council, *The European Pact on Immigration and Asylum*, Brussels, 16 October 2008.

European Council, Conclusions, Brussels, 11 December 2009, EUCO 6/09.

Geddes, A. 2000. *Immigration and European Integration: Towards Fortress Europe*. Manchester: Manchester University Press.

Huysmans, J. 1998. Security! What do you Mean? From Concept to Thick Signifier. *European Journal of International Relations*, 4 (2), 226-255.

Huysmans, J. 2002. The European Union and the Securitisation of Migration. *Journal of Common Market Studies*, 38 (5), 751-777.

Federal Constitutional Court (BVerfG), 2 be 2/08 vom 30.6.2009, Absatz-Nr. (1-421), Judgement of 30 June 2009, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html [accessed on 1 November 2009].

Kaunert, C. 2005. The Area of Freedom, Security and Justice: The Construction of a European Public Order. *European Security*, 14 (4), 459-483.

Kostakopoulou, D. 2000. Protective Union': Change and Continuity in Migration Law and Policy in post-Amsterdam Europe. *Journal of Common Market Studies*, 38 (3), 497-518.

Kostakopoulou, D. 2001. *Citizenship, Identity and Immigration in the European Union: Between Past and Future*. Manchester: Manchester University Press.

Kostakopoulou, D., 2007. The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue. *In*: C. Barnard, ed., *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*. Academy of European Law, European University Institute, Oxford University Press, 153-191.

Lindahl, H. 2004. Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity. *European Law Review*, 29 (3), 461-84.

Lindahl, H., ed., 2010. *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*. Oxford: Hart.

Monar, J. 1998. Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation. *European Law Review*, 23 (4), 320-335.

Monar, J. 2001. The Dynamics of JHA: Laboratories, Driving Factors, Costs. *Journal of Common Market Studies*, 39(4), 747-64.

Peers, S. 2006 (2nd edn.). *EU justice and Home Affairs Law*. Oxford: Oxford University Press.

Peers, S. 2004. *The EU Constitution and Justice and Home Affairs: the Accountability Gap*, Statewatch.

Treaty Establishing a Constitution for Europe, 29 October 2004, OJ C 316/1.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJC 306/1, 17 December 2007.

Walker, N., 2004. In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey. *In*: N. Walker, ed., *Europe's Area of Freedom, Security and Justice*. Oxford: Hart.

Weaver, O., 1995. Securitisation and Desecuritisation. *In*: R. Lipschutz, ed. *On Security*. New York: Columbia University Press.

White, S. 2003. *European Constitution: What is New in the Area of Judicial Cooperation in Criminal Matters and Police Cooperation*, Federal Trust Online Constitutional Essay, 27/2003.

[1] For a discussion on the origins of justice and home affairs cooperation (- 1985) and the advanced intergovernmental cooperation (1985-1992), see Kostakopoulou (2007, 156-8).

[2] For the role of other conjectural factors in this process, see B. Donnelly, 'Justice and Home Affairs in the Lisbon Treaty: A Constitutionalising Clarification', EIPASCOPE 2008/1.

[3] The principle of mutual recognition was first included in the Presidency Conclusions of the Cardiff European Council in June 1998, was explicitly endorsed by the Tampere European Council (October 1999) Compare Joint Cases C-187/01 and C-385/01 *Gozutok and Brugge* [2003] ECR I-1345 at para 33.

[4] The first initiative was the proposal for a Directive on Family Reunification; COM (1999) 638 final, amended by COM(00) 624 final.

[5] Provisions III-257-277 became Articles 67-89 TFEU in the Lisbon Treaty. For a discussion on the Constitutional Treaty's provisions, see D. Kostakopoulou (2007).

[6] Interestingly, measures concerning border checks, a common European asylum system, and a common immigration policy have been removed from the domain of unanimity. The areas that still require unanimity are EU measures concerning passports, identity cards, residence permits and other documents necessary for the free movement of persons (Article 77(3) TFEU); family law (Article 81(3) TFEU); the establishment of a European public prosecutor and the future extension of its powers (Article 86 TFEU); measures concerning operational police cooperation (Article 87(3) TFEU); decision on the conditions and limitations under which law enforcement and judicial authorities may operate in the territory of another MS (Article 89 TFEU). QMV now requires the support of 55% of the MS representing at least 65% of the population of the Union.

[7] The traditional consultation and consent procedures are now 'special legislative procedures'. In the AFSJ consultation still applies to measures concerning passports and other documents (Art. 77(3) TFEU), the adoption of temporary measures in case of an emergency situation caused by a sudden influx of third country nationals (Art. 78(3) TFEU), measures on family law (Art. 81(3) TFEU), operational police cooperation and rules on the conditions and limits of the operation of law enforcement and judicial authorities in other MS. The European Parliament's consent is required for the identification of new areas of Euro-crime (Article 83(1) TFEU), the establishment of a European Public Prosecutor's Office and the extension of its powers (Article 86 TFEU), measures concerning operational police cooperation (Article 87(3) TFEU); decisions on the conditions and limitations under which law enforcement and judicial authorities may operate in the territory of another MS (Article 89 TFEU).

[8] The Commission already had an exclusive right of initiative in judicial cooperation in civil matters under the Treaty of Nice.

[9] In these areas, a quarter of the MS can initiate a legislative proposal (Article 76 TFEU). The Convention's Working Group X had suggested the introduction of a threshold of either 1/3 or 1/4 or even 1/5 of the Member States for a MS initiative to be admissible. Following this suggestion, the Constitutional Treaty

(Article III-264) stated that a quarter of MS can bring forward legislative initiatives in criminal matters including the operational cooperation between administrative and police bodies of the MS. The imposition of this threshold is designed to prevent governments from taking politically expedient decisions which do not reflect a wider European interest.

[10] A transitional phase of five years is envisaged by Protocol 36 annexed to the Lisbon Treaty: polices and judicial cooperation measures already in place before the Treaty entered into force will be reviewed by the ECJ under the pre-Lisbon regime during the next five years.

[11] Protocol (No 7) on the Application of the charter of Fundamental Rights to Poland and to the United Kingdom. The Protocol will be amended to include the Czech Republic in the next treaty of accession. On the Protocol and its implication for the UK, see House of Lords, Constitution Committee's 6th Report of Session 2007-2008, *European Union Amendment Bill and the Lisbon Treaty: Implications for the UK Constitution*, 28 March 2008, HL Paper 84.

[12] According to Article 4(2) TEU national security remains the sole responsibility of the MS.

[13] Internal security is not confined to police matters; it includes operational cooperation in the event of a major catastrophe, natural and man-made disasters as well as terrorist attacks.

[14] The Council approved an 'Internal Security Strategy for the EU' on 25 February 2010; 6870/10 (Presse 44), Brussels, 25 February 2010.

[15] The Amsterdam Treaty required the Council, when acting a legislator, to publish the results of its votes, but not its deliberations (Article 207 (3) EC). The Seville European Council (June 2002) obliged the Council to open its legislative meetings to the public. Implementing the conclusions of the Seville European Council, the new rules of procedure for the Council state deliberations on acts to be adopted in accordance with the co-decision procedure shall be open to the public.

[16] National parliaments have witnessed an incremental increase in their involvement in EU affairs initially by Declaration 13 appended to the Treaty on European Union and later on by the Amsterdam provisions concerning the prompt forwarding of consultation papers and legislative proposals or a proposal for a measure to be adopted under Title VI TEU to national parliaments within six weeks before the item is placed on the Council's agenda for decision (subject to exceptions on the ground of urgency).

[17] The Hague Programme envisaged the appointment of a Special Representative for a common readmission policy.

[18] Notably, crime prevention was mentioned in Article 29 EU, but it was not included in the specific legal bases of Articles 30 and 31 EU.

[19]COM(2001) 715 final.

[20] For a reflection, see E. Guild and S. Carrera, Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposals for the Stockholm Programme, CEPS Policy Brief, No. 196/20 August 2009.

[21] Guild and Carrera also suggest the replacement of the term citizen with that of individual; page 10.

[22] This is due to the four Directives on TCNs: Directive 2003/109/EC of 25 November 2003 *concerning the status of third country nationals who are long-term residents*, OJ L 16/44, 23.1.2004; Directive 2004/114/EC of 13 December 2004 *on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service*, OJ L 375/12, 23.12.2004; Directive 2005/71/EC of 12 October 2005 *on a specific procedure for admitting third country nationals for the purposes of scientific research*, OJ L 289/15, 3.11.2005; Directive 2009/50/EC of 25 May 2009 *on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment*, OJ L 155/17, 18.6.2009.

[23] 'In order to maintain credible and sustainable immigration and asylum systems in the EU, it is necessary to prevent, control and combat illegal migration'; European Council (2009, 11).

[24] Compare the Common Basic Principles on Integration adopted by the JHA Council of 19 November 2004; Justice and Home Affairs Council Meeting 2618, 14615/04 of 19 November 2004.

[25] Compare The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Council of the EU, Brussels, 22 October 2004, 13302/2/04 REV2, p. 37.