

EDITORIAL COMMENT

The EU as an Area of Freedom, Security and Justice: Implementing the Stockholm programme

The concept of an Area of Freedom, Security and Justice, introduced by the Amsterdam Treaty, grouped provisions of the Community pillar (on border checks, asylum, immigration, and judicial cooperation in civil matters) and provisions that were then in the Third Pillar (Title VI TEU, police and judicial cooperation in criminal matters). The intention expressed at the time was that the European Union should form an area in which people could move freely – as was the case for goods – but without the risk that abolition of internal borders and border controls would threaten the security of EU citizens. This was in line with the initial objective of free movement of workers, following the logic of the internal market and European citizenship. The traditional formula was that “the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty” (Art. 14 EC, now 26(2) TFEU); and according to the provisions on citizenship, “every citizen of the Union shall have the right to move and reside freely within the territory of the Member States” (Art. 18 EC, now Art.18 TFEU).

The implementation of such an objective raises specific difficulties for two reasons. One is that questions of admission of people to the national territory are always very close to questions of sovereignty. The other is that the freedoms of the single market (goods, people, capital) also increase the threats to security, as they stimulate the development of new sorts of criminality and vulnerability. Within a single market where internal borders have disappeared, each Member State becomes dependent on the admission of third country nationals by the other Member States. Until the Amsterdam Treaty, Member States retained power as to migration policies and the Commission could only promote cooperation between them.¹ Change was slow and took place partly, as is well known, outside the Community framework, with the Schengen Convention as the landmark. The Treaty of Amsterdam gave a new impulse, but the process remained extremely complex due to the double EU and EC regimes and Member States’ reluctance to give up prerogatives in the area of security and public order; the practical effects of the measure adopted were slow to be felt.

1. Joined Cases 281, 283 & 287/85 *Germany v. Commission* [1987] ECR 3203.

At the Tampere European Council (October 1999) new orientations could be defined for asylum and immigration objectives, and a first working programme was launched, which was followed by a second pluriannual programme (2005–2010) adopted by the European Council of The Hague (November 2004). The Commission adopted a first report on the implementation of the Hague programme, on 28 June 2006, as well as a communication on the adaptation of the EC Treaty which would be desirable in order to guarantee more efficient judicial protection by the ECJ. On 3 July 2007, the Commission adopted a second report evaluating the implementation of policies in the Area of Freedom, Security and Justice (AFSJ) as defined in the Hague programme. It concluded that the results up to 2006 were mixed: good progress had been made concerning fundamental rights, citizenship, European strategy against drugs, international terrorism. On the other hand, progress was slow in the domain of police and judicial cooperation in criminal matters, and a number of Member States had failed to transpose correctly the texts adopted at EU level. The third Commission report, of 2 July 2008, covered 2007 and contained similar observations.

The entry into force of the Treaty of Lisbon on 1 December 2009 has meant a reshuffle of EU initiatives in this domain, as that Treaty has given the AFSJ a very far-reaching overhaul, based largely on the provisions of the Constitutional Treaty. The Stockholm programme adopted by the European Council in December 2009² sets the priorities for developing the AFSJ in the next five years. Its content reflects the discussions with the European Parliament, the Council, the Member States and stakeholders over the recent years. At its core are the perspectives outlined by the Commission in its June 2009 Communication.³ In another communication of 20 April 2010 the Commission proposes an action plan for the implementation of the Stockholm programme.⁴ It seems interesting at this stage to reflect on the objectives, on the methods and on some recent practical aspects of the implementation of this novel part of the Lisbon Treaty.⁵

Aims of the Action Plan and the Stockholm Programme

As to the objectives, the Commission Communication of April 2010 starts by presenting the reasons why the European institutions should deliver an Area of

2. Council document 17024/09, adopted by the European Council on 10/11 Dec. 2009.

3. COM(2009)262 “An area of freedom, security and justice serving the citizen”.

4. COM(2010)171 “Delivering an area of freedom, security and justice for the Europe’s citizens Action plan implementing the Stockholm Programme”.

5. Arts. 68 to 89 TFEU.

Freedom, Security and Justice to Europe's citizens. The ambition does not substantively diverge from the initial perspective of the single market, but it goes much further, including areas which are much closer to the hard core of Member States' sovereignty and their public authority tasks, and in a significantly broader context: "The European area of freedom, security and justice is, together with the Europe 2020 strategy, a key element of the EU's response to the global long-term challenges and a contribution to strengthening and developing the European model of social market economy into the 21st century". The Commission adds: "In a period of change, as the world only starts to emerge from the economic and financial crisis, the European Union has more than ever the duty to protect our values and to defend our interests. Respect for the human person and human dignity, freedom, equality and solidarity are our everlasting values at a time of unrelenting societal and technological change. These values must be at the heart of our endeavours".⁶

The reference to values is progressively added in order to build up the concept of the "social market economy". Various practical aspects are subsequently referred to. (1) "Women and men in Europe rightly expect to live in a peaceful and prosperous Union confident that their rights are fully respected and their security provided". This is the direct echo of discussions with stakeholders in recent years and public consultations launched by the Commission. The tandem composed of freedom of movement together with guaranteed security is in line with citizens' expectations. (2) With the entry into force of the Lisbon Treaty, the Charter of Fundamental rights has acquired legal force as primary law; therefore "a European area of freedom, security and justice must be an area where all people, including third country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union". This is a question of coherence. (3) With the development of international terrorism and the experience of the economic and financial crisis, the European Union is more and more conscious of belonging to a global society; the aim of the Commission's action plan is to "deliver ... priorities, both at European and global level", to bring a "determined and adequate European response to European global challenges".

The perspective of creating in Europe an Area of Freedom, Security and Justice implies a vast array of ambitions. This is reflected in the catalogue of about a hundred proposals annexed to the Commission Communication. The attached table "is a guide to the Union's action"; "it aims at delivering all the political objectives set out by the European Council in the Stockholm Programme It includes concrete actions with a clear timetable for adoption and

6. Communication, p. 2.

implementation”.⁷ An impressive series of actions are listed under titles such as: a Europe built on fundamental rights, vulnerable groups, rights of the individual in criminal proceedings, participation in the democratic life of the Union, increasing the EU’s international presence in the legal field, internal security strategy, more effective European law enforcement cooperation, more effective crime prevention, migration and asylum matters, external dimension of security, freedom and justice, etc.,⁸ with the indication of the responsible party – most often the Commission, sometimes Member States – and a corresponding date for action, going up to 2014. This catalogue might at first sight be considered as a sort of Christmas tree produced by the Commission, without any research in terms of consensus or even feasibility on the part of Member States. All the possible practical implications of the political objectives described in the Stockholm Programme have been taken into account and translated into potential action, without any visible effort to define priorities. On the other hand, for each and every action envisaged, there is a legal basis in the treaties – here, the entry into force of the Lisbon Treaty and the disappearance of the pillar structure does simplify things. The difficulties previously met as regards the definition of the correct legal basis concerning, for instance, the harmonization of certain criminal sanctions should no longer exist.⁹

The intention expressed by the Commissioners in charge of the AFSJ is that this dimension should be taken into account in every policy of the Union: “the Commission regards these actions as interlinked, indispensable and consistent with the scale of ambition the Union needs to demonstrate”¹⁰. If it had made choices it could be criticized for not following the political objectives of the European Council.

The role of the Commission

The Commission considers itself as the driving force for the successful implementation of this Action plan. “Progress in the area of freedom, security and justice requires successful implementation of these political priorities. To equip itself to match the ambitions set out by the Lisbon Treaty, the

7. Communication, p. 8.

8. The list of policy headings on the site of the Commission <ec.europa.eu/justice_home/index.html> covers: Judicial cooperation in civil and criminal matters, drugs policy coordination, childrens’ rights, contract law and consumer rights, fundamental rights, data protection, EU citizenship, asylum, immigration, Schengen area, visa policy, EU external borders policy, fight against terrorism, fight against organized crime, police cooperation, external relations.

9. Cf. Case C-176/03, *Commission v. Council*, [2005] ECR 7879.

10. Communication, op. cit. p. 8.

Commission has, for the first time, allocated responsibilities to two Commissioners, one of them a Vice-President of the Commission”.¹¹ In fact, in the new Barroso Commission, not only are there two Commissioners in charge: Mrs Viviane Reding, for justice, fundamental rights and citizenship, Vice-president of the Commission, and Mrs Cecilia Malmström, for internal affairs; but as of 1 July 2010, the Directorate-general for Justice, Freedom and Security has been divided into two separate directorates-general: one for Justice and one for Home Affairs. The Directorate-general for Justice itself consists of three directorates: Civil Justice, Criminal justice, and Fundamental rights and Citizenship; the Directorate-general for Home affairs is also made up of three directorates: Internal Security, Immigration and Asylum, and Migration and Borders. One should not usually pay too much attention to questions of internal organization of EU services; however this increase in the number of directorates is a sign of increasing responsibilities.

The entry into force of the Lisbon Treaty is intended to enable the Union to assume these responsibilities. First, the abolition of the Third Pillar, with its separate procedures and instruments, and the submission of most policy areas to the ordinary legislative procedure – Parliament as co-legislator – with qualified majority voting in the Council, will streamline decision-making, although certain exceptions remain in specially sensitive areas: family law, identification of new areas of criminal law with cross-border dimension where minimum common rules should be adopted, the decision to establish a European public prosecutor’s office from Eurojust, police cooperation, and administrative cooperation between Member States. Secondly, the greater involvement of national parliaments will make the EU more accountable for its actions in the interest of the citizens.¹² More specifically, in domains linked to the AFSJ, national parliaments will be involved in the control of Europol and the evaluation of the activities of Eurojust. Finally, judicial review will be improved, with the European Court of Justice assuming judicial oversight of all aspects of freedom, security and justice, while the Charter of Fundamental Rights becomes legally binding. For example, the possibility of infringement actions, which did not exist concerning the matters covered by the Third Pillar, is now introduced in the area of police and judicial cooperation in criminal matters. Commission Vice-president Mrs Reding expressed her satisfaction about this extension of the competence of the Commission and Court considering the low level of implementation by Member States of the acts adopted under the Third

11. Communication, *op. cit.* p. 8.

12. Under the Subsidiarity and Proportionality protocol, there is a reduced threshold (a quarter instead of a third) for a “yellow card” by national parliaments as regards ex-Third Pillar matters.

Pillar.¹³ Similarly, the preliminary ruling procedure, which was in the past reserved to the courts of those Member States which had expressly accepted it for Third Pillar matters, now becomes available to courts in all Member States according to the common rule of EU law, despite certain limitations with respect to validity and proportionality contained in Article 276 TFEU.¹⁴ As regards enhanced enforcement powers and judicial scrutiny, it should nevertheless be pointed out that these provisions are subject to a five year transitional period for ex-Third Pillar matters, during which the old rules continue to apply.¹⁵

Nevertheless, certain legal features in the Lisbon Treaty, intending to safeguard the national interests of Member States, limit the full efficiency of EU procedures and the impact of the Commission in the AFSJ. The Commission does not have the monopoly of legislative initiative in police and judicial cooperation in criminal matters: a quarter of the Member States may submit common proposals.¹⁶ Furthermore, in order to balance the introduction of qualified majority voting in the Council on the very sensitive question of judicial cooperation in criminal matters, the Lisbon Treaty includes “emergency brakes” which are available to protect important interests of the Member States. Where a Member State considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. The ordinary legislative procedure is suspended and a period of four months is allowed in order to try and find a consensus, so that the ordinary legislative procedure can resume; in such circumstances, the recourse to enhanced cooperation is made easier. In a continuation of the situation after the Amsterdam Treaty, the UK, Ireland and Denmark benefit from special regimes of opt in and/or opt out in the field of AFSJ.¹⁷

13. On this point see Commission Communication of the on the evaluation of implementation of The Hague Programme COM(2009)263; Reding, *Le traité de Lisbonne et l'espace de liberté, de sécurité et de justice*, L'observatoire de Bruxelles, avril 2010, No. 80 pp. 12–16, at p. 13.

14. Art. 276 TFEU provides: “In exercising its powers regarding the provisions of chapter 4 and 5 of title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity and proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.

15. Protocol on transitional period, Art. 10.

16. There have been initiatives of both the Commission and the Member States on the question of translation in criminal procedures.

17. On the UK and Ireland, see Fahey, “Swimming in a sea of law: Reflections on water borders, Irish (-British) – Euro relations and opting-out and opting-in after the Treaty of Lisbon”, 47 CML Rev., 673–707.

Generally speaking, in the new institutional balance created by the Lisbon Treaty, the status of the Commission appears weakened as regards its constitutional position, policy initiation, decision making and even implementation, due to the role devolved to Member States and the increased role of the European Parliament. In the Area of Freedom, Security and Justice, the Member States, as mentioned above, have retained certain powers, despite the overall “communitarization” of the Third Pillar. Therefore one may cherish doubts as to the serious possibility to translate the ambitious Action Programme announced by the Commission into reality. The task will certainly not be easy.

The characteristics of implementation

It is of course too early to express an opinion on the feasibility of the Commission's aspirations. Nevertheless some indications have already been given of how the Commission may best proceed. The two Commissioners will find inspiration in the way the internal market has been introduced along the years, that is to say progressively, and firmly but without precipitation. Great attention will be paid not only to the adoption of new texts but also to the implementation of those which already exist. Procedures of evaluation and public consultation will be followed in order to feed practical proposals. In that perspective, the dual requirements of care and timing are demonstrated by the fact that, while the Commission had initially intended to produce a communication on the Charter in the middle of 2010, this will be replaced by a package, made public later in the year, containing a communication on the Charter and a report on the implementation of the Charter by the EU institutions. The intention is to place the accent on the legislative procedure in Parliament and the Council, and on the risk that proposed modifications do not fully respect the Charter requirements in domains such as data protection, asylum and immigration, and many others.

Another concern of the Commission is that of a correct implementation by Member States. The two responsible Commissioners have announced a “zero tolerance” policy concerning infringements. Not that judicial procedures will be blindly introduced every time a non-enforcement is observed, but the Commission will not hesitate to start proceedings in areas where infringements prove to be repetitious and public; this seems to be the case as regards asylum policy in Greece, which has been publicly denounced by the German judicial authorities as not compatible with EU rules.¹⁸ Mutual trust between national

18. Cf. Commission report on the application of the Directive on minimum standards on procedures for granting and withdrawing refugee status published COM (2010)465 final, published 8 Sept. 2010.

judiciaries is of paramount importance, and despite the possibility under Article 259 TFEU for a Member State itself to start proceedings against another Member State, this possibility is used so rarely, the Commission must continue to take the major responsibility for dealing with such situations.¹⁹

As regards the substance of implementing the Stockholm Programme, the Commission has announced so many priorities that it is difficult to identify any main thread. Respect for fundamental rights is certainly one leading theme, but the political status of the European citizen is another. Initiatives will be taken to promote consular assistance all around the world, to encourage citizens' participation in European Parliament and local elections. In more classic areas of legislation, all the texts envisaged are listed in annex to the communication of the Commission of 20 April 2010; their number is impressive. Recently, Mrs Reding has pleaded, for instance, for a simplification of contract law, the adoption of the "28th regime" which would be optional for either national or transnational contracts and available in all languages of the Union.²⁰ The protection of personal data and the negotiation of a new agreement with the United States,²¹ and the simplification of cross-border divorces are also all of prime importance. It is worth mentioning that on 12 July 2010 the EU Council approved the first use of enhanced cooperation under the Lisbon Treaty; it concerns "international" couples. Fourteen Member States have agreed to be submitted to a new regulation which authorizes international couples to choose the law of the country which should apply to their possible future divorce. This is an example of the way in which the AFSJ may progress, even in areas subject to unanimity, if that unanimity is lacking.²²

Many other examples of fruitful recent initiatives of the Commission could be given, concerning terrorism, criminal procedure, etc. The very recent problems raised by the conditions of the Roma communities in the EU, highly publicized by the media, give interesting indications as to the way the Commission may accept being involved in relation to highly sensitive issues. A number of

19. On 24 June 2010 the Commission decided to start infringement proceedings against Belgium and Ireland before the ECJ concerning the insufficient transposition of the Directive on asylum procedures, see Press release IP/10/808. On the importance of mutual trust in criminal matters, see e.g. in this *Review* Rijken, "Re-balancing security and justice: Protection of fundamental rights in police and judicial cooperation in criminal matters", 47 CML Rev, 1455–1492.

20. On 1 July 2010 the Commission adopted a Green paper on the law of contracts, Press Release IP/10/872

21. The new agreement SWIFT II on the transfer of personal financial data to the USA for anti-terrorism purposes entered into force on 1 Aug. 2010. The European Commission still has to draft the guidelines rules concerning the role of Europol; Bulletin Quotidien Europe No. 10194, 4 Aug. 2010, p. 4.

22. Bulletin Quotidien Europe No 10179, 13 July 2010, p. 11. See also Press Release IP/10/917.

Member States, including Eastern and Western European countries, face difficulties with the settlement of Roma communities. At a Council meeting in Cordoba, in the spring of 2010, it was observed that few politicians showed real interest in the question of using EU funds in the best way in order to encourage policies of integration of the Roma, either in their country of origin or in the Member State where they have moved. The legal problems turn around the correct implementation and application of Directive 2004/38 of 29 April 2004 on the right of EU citizens and their families to move freely on the territory of Member States, in particular Article 28 on the conditions of expulsion (serious reasons of public order and security; consideration of the individual situation of each person), in the light of Article 2 TEU and Article 21 of the Charter of Fundamental Rights. The Commission does not encourage either illegal immigration or illegal expulsion. In case of difficulties in certain Member States such as France,²³ and to a lesser degree Italy, the Commission has convened bilateral meetings in order to check that national procedures of expulsion are in line with EU law requirements and that fundamental rights are respected. *Prima facie*, there may seem to be a contradiction in the Commission's policy compared with the "zero tolerance" announced by the Commissioners. Despite the brave language, the Commission will not easily feel it has a sufficiently watertight legal case to start formal proceedings against mass deportations of Roma by France (or Italy), even if it is not satisfied with the way a Member State applies EU law. In the meantime, the European Parliament, despite a sharp divergence of opinion between the main political groups, was able to adopt on 9 September 2010 a Resolution on the situation of Roma and on freedom of movement in the European Union, deploring the Commission's "late and limited response ... to the need to verify the consistency of Member States' actions with EU primary law and EU legislation".²⁴ Moreover, individuals may challenge the deportations before national courts with possible reference to the ECJ, which might take a rather different view of the matter.²⁵

The differences of perception between the Commission on one side, and the Member States on the other, are part of the dialectic of the EU, just as was the case for the Community. With the Treaty of Lisbon, the Member States

23. In a talk in Grenoble on 30 July 2010 President Sarkozy announced that camps where illegal Roma immigrants had settled would be dismantled, that the people concerned would be offered to be sent back to their country of origin, with a certain amount of money. Simultaneously President Sarkozy announced that the situations of abuse of the right to free movement would be fought.

24. Available through <www.europarl.europa.eu/activities/plenary/home.do?language=EN&date=20100913&tab=LAST>

25. The ECJ would also need to avoid the limitations under Art. 267 TFEU relating to "law and order and the safeguarding of internal security".

certainly entrusted the EU institutions with more powers in relation to a highly sensitive area. The institutions must not let the sensitive nature of the area paralyse them in making use of the new powers. The adoption of an ambitious action plan by the Commission in order to implement the Stockholm programme on the Area of Freedom, Security and Justice show that the Commission fully intends to play its part in fulfilling the Treaty's promise. A new chapter of the construction of the European Union is becoming operational, with all the questions such initiatives raise.