

FREEDOM, SECURITY AND JUSTICE

The EU's Internal Security Strategy and the Stockholm Programme: A Challenge to Rule of Law and Liberty in Europe?

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The EU Internal Security Strategy (ISS) was adopted by the Council in February 2010 under the auspices of the Spanish Presidency with a view to setting out a common European Security Model.² This initial document followed the entry into force of the Lisbon Treaty and the adoption of the Stockholm Programme, which sets out the new five-year plan for the development of the European Union's (EU) Area of Freedom Security and Justice (AFSJ) in December 2009. The Lisbon Treaty formally abolished the old pillar structure in Justice and Home Affairs (JHA) policies and brought the different AFSJ policies into one fairly homogeneous legal and institutional framework. The implementation of the Stockholm Programme under this new Treaty framework and the development of an ISS have constituted central priorities for the JHA Trio Presidency Programme (January 2010 – June 2011).³ The Commission published in November 2010 a Communication titled "The EU Internal Security Strategy in Action: Five steps towards a more secure Europe" which identifies "the most urgent challenges" to EU security in the years to come and proposes a shared agenda of common strategic objectives and specific actions for the implementation of the ISS between 2011 and 2014.

The Stockholm Programme⁴ stressed that it "is of paramount importance that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of

law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced."⁵ Do the ISS and the Commission Communication "putting it into action" fulfil this political priority? This paper argues to the contrary. It starts by providing an overview of the objectives, principles and guidelines for action outlined in the ISS. The Commission Communication putting the ISS into action, and its five key strategic objectives is examined in Section two. Section three concludes by addressing the question of the extent to which the ISS will make the EU more secure or insecure, and it recommends to the Commission to develop a solid rule of law and liberty strategy.

The Internal Security Strategy: The old Third Pillar through the back door?

The objective of the EU's ISS is to establish a shared agenda on internal security that enjoys the support of all Member States, EU institutions, civil society and local authorities, and interestingly enough, the EU security industry. The ISS identified a number of principles and guidelines for action in pursuit of a "European security model".⁶ The principles included:

- Justice, freedom and security policies that are mutually reinforcing whilst respecting fundamental rights, international protection, the rule of law and privacy;
- Protection of all citizens, especially the most vulnerable;
- Transparency and accountability in security policies;
- Dialogue as the means of resolving differences in accordance with the principles of tolerance, respect and freedom of expression;
- Integration, social inclusion and the fight against discrimination;
- Solidarity between EU Member States; and
- Mutual trust.

On the basis of these principles, the ISS provided a number of guidelines for action "to guarantee the EU's internal security", which included a proactive (intelligence-led) approach driven by prevention and anticipation, the reinvigoration of information exchange between law enforcement authorities through the use of EU databases as well as an improved operation cooperation between EU security agencies (Europol, Eurojust, Cepol, Sitcen and Frontex) and ensuring stringent coordination between them by the Standing Committee on Operation Cooperation on Internal Security (COSI). Apart from that, the ISS did not specify the actual ways in which the specific guidelines were going to constitute an implementation of the above-mentioned general principles.

The Treaty of Lisbon and the Stockholm Programme have provided the legal and political impetus for the ISS to be developed and implemented. The Commission Communication thus comes indeed at a moment when there is much clearer responsibility within the EU

1. This contribution constitutes a revised version of written evidence submitted by the Justice and Home Affairs Section of CEPS to the inquiry currently carried out by the Select Committee on the EU of the UK House of Lords into the Internal Security Strategy

2. Council of the European Union, "Draft Internal Security Strategy for the European Union: Towards a European Security Model", 5842/2/10, 23 February 2010, available at: <http://register.consilium.europa.eu/pdf/en/10/st05/st05842-re02.en10.pdf>

3. Council of the European Union and Spanish, Belgian and Hungarian Presidencies, "JHA Trio Presidency Programme (January 2010 – June 2011)", 5008/10, 4 January 2010, available at: <http://www.statewatch.org/news/2010/jan/eu-council-jha-trio-5008-10.pdf>

4. European Commission, Communication, "The EU Internal Security Strategy in Action: Five steps towards a more secure Europe", COM (2010) 673 final, 22 November 2010, available at: http://ec.europa.eu/commission_2010-2014/malmstrom/archive/internal_security_strategy_in_action_en.pdf

5. Council of the European Union, "The Stockholm Programme: An Open and Secure Europe serving and protecting Citizens", 5731/10, 3 March 2010, p. 9. Available at: <http://register.consilium.europa.eu/pdf/en/10/st05/st05731.en10.pdf>

6. Council, *op. cit.*, "Draft Internal Security Strategy for the European Union: Towards a European Security Model"

institutions on competence for internal security generally; the framework of Member State / EU institution activity is more precisely delineated and the balance of powers among the EU institutions following the augmentation of the European Parliament's competences by the Lisbon Treaty is beginning to become apparent. That notwithstanding, the new institutional and legislative framework provided by the Treaty of Lisbon has not meant a formal end to the third pillar "way of working and thinking" on issues of security at EU level.

When reading the ISS and the Communication aiming at putting it into action, it appears as if the old third pillar spirit is not only very much present but it is also now contaminating other first pillar areas, such as for instance those of external border controls and migration / asylum policies as well as Frontex. The "depillarization" emerging from the Lisbon Treaty is allowing for the extension of the police and insecurity-led (intergovernmental) approach to spread over the entire EU's AFSJ. This raises concerns over the greater effectiveness, democratic accountability and judicial control as well as rule of law / fundamental rights consequences that the end of the pillar divide in JHA policies was expected to bring.

The former "third pillar" policies are amongst those in the new Title V of the Treaty on the Functioning of the European Union (TFEU) where more exceptions to the general rules have been allowed in European cooperation. This will further enhance the intergovernmental and "police-led" motif of future EU security measures. Not only the maintenance of law and order and the safeguarding of internal security remain exclusively a matter of national competence under the Treaties, but there are a number of derogations from the expansion of the Community method. "Cooperation between police, customs and other specialized law enforcement services in relation to the prevention, detection and investigation of criminal offences" remains under unanimity and consultation with the European Parliament. This goes along with the possibility offered to EU Member States to use "emergency brakes" and / or enhanced cooperation, with the limited jurisdiction of the Court of Justice to review the validity and proportionality of operations carried out by the police and other law-enforcement authorities, and with Protocol 36 on Transitional Provisions.

The Communication putting the ISS into Action

The Commission's position on an EU ISS presented in the Commission Communication "The EU Internal Security Strategy in Action: Five steps towards a more secure Europe" of 22 November 2010, commences with a series of arguments that move in one direction only: first, there is a need for "more security", and secondly the EU27 Member States share a common framework based on convergence of "security threats", which provides the objective framework for a common ISS. These assumptions need to be examined on the basis of the available evidence. One shortcoming of the Communication is a tendency to include assertions about factual matters, which lack any indication of the evidential basis

on which they repose. It is critically important that the EU develops policy on the basis of the best research, analysis and evidence available.

The Commission identifies five key themes which form the pillars of the ISS: 1. disrupt organised crime; 2. prevent terrorism; 3. raise levels of security in cyberspace; 4. strengthen external borders management; and 5. increase EU's resilience to natural disasters. The first question that needs to be addressed is the extent to which these five issues, all of which are concerns for at least some Member States, are concerns for all EU Member States and the extent to which the issues share common aspects in the 27 Member States at all.

Organised Crime

It is apparent that there are very wide differences regarding organised crime across the Member States. The 2009 EU Organised Crime Threat Assessment (OCTA) states that there are five criminal hubs with a wide influence on criminal market dynamics in the EU. These are the North West criminal hub, which acts as a distribution centre for heroin, cocaine and synthetic drugs, but influences the United Kingdom (UK), Ireland, France, Spain, Germany and the Baltic and Scandinavian countries. The South West hub is formed around the Iberian Peninsula and the issues for this hub are cocaine, cannabis, trafficking in human beings and illegal immigration. The North East hub, which borders the Russian Federation and Belarus, engages in human trafficking (women for sex), irregular immigrants, cigarettes, counterfeit goods, synthetic drugs and heroin. The Southern criminal hub is based in Italy, where in addition to drugs and irregular migration, it is involved in genuine and counterfeit cigarettes and the production and distribution of counterfeit euros. The South East criminal hub, centred in Bulgaria and Romania, is involved in drugs, heroin, counterfeit euros and payment card fraud.⁷ What is interesting from this summary, for the purposes of the ISS around organised crime, are the wide differences across the EU, which are evident even in a report designed to highlight synergies and homogeneity in the Union. There is clearly much competition in the field of organised crime and different parts of the EU face very different challenges. Any one-size-fits-all approach to policy is therefore likely to be highly counterproductive.

Terrorism

Turning then to terrorism, there do not appear to be many Member States touched by terrorist acts, and those that are affected appear to be primarily concerned with local terrorism. According to TE-SAT 2010, the EU's Terrorism Situation and Trend Report,⁸ in 2009, six Member States⁹ reported a total of 294 failed, foiled or successfully perpetrated terrorist attacks, and

7. Europol, "Organised Crime Threat Assessment (OCTA)", 2009, pp. 13-15, available at: [http://www.europol.europa.eu/publications/European_Organised_Crime_Threat_Assessment_\(OCTA\)/OCTA2007.pdf](http://www.europol.europa.eu/publications/European_Organised_Crime_Threat_Assessment_(OCTA)/OCTA2007.pdf)

8. Europol, "Terrorism Situation and Trend Report (TE-SAT)", 2010, pp. 6-8, available at: http://www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TE-SAT/Tesat2010.pdf

9. Austria, France, Greece, Hungary, Italy and Spain

the UK reported 124 attacks in Northern Ireland. Only one “Islamist” attack was reported (in Italy), while France reported 89 Separatist attacks and Spain 148. The next largest category of attacks was under the heading “Left Wing”, with 15 in Greece and 23 in Spain. Clearly, the vast majority of terrorist acts reported in the Member States relate to various separatist groups active primarily in particular parts of the affected Member States. The issues are so intricately related to specific local or national political issues, which are only fully accessible to the national and local authorities, that to call terrorism in the EU a common issue is problematic. Certainly, there is political violence in the EU, but a single common approach is unlikely to capture the specificities of the national and local situations. Further, it is an issue that affects less than a third of the Member States, which raises questions about the appropriateness of EU budgetary expenditure on the subject.

Cybercrime

Data regarding cybercrime are fairly limited. The Commission produced a Communication towards a general policy on the fight against cybercrime in 2007,¹⁰ in which it most helpfully sought to clarify what it is. Most importantly, it covers traditional forms of crime (such as forgery and fraud) carried out over electronic communications networks, the publication of illegal content and crimes to electronic networks such as attacks on information systems, denial of service and hacking. The Commission, rightly, identified the problem as one for the criminal justice systems of the Member States as the issues that hamper coercive action against cybercrime relate to the jurisdictional limitations of criminal justice systems. The Communication also recognizes that by its very nature, cybercrime is not limited to Member States, but may commence on the other side of the world. It can only be classified as crime if the places where it takes place have in their criminal code offences that encompass the activities that some EU Member States consider crimes. The current situation regarding the 2010 WikiLeaks revelations, which are subject to very different legal regimes depending on which country is host to the WikiLeaks activities, highlights the problem.

The EU's External Borders

According to the Council, there were an estimated 355 million entries by persons into the Schengen area in 2009.¹¹ Of these people entering, about 105 million were third country nationals (approximately 61 million non-visa nationals and the rest visa nationals). According to Frontex, over the first three months of 2010, 14,200 detections of irregular external border crossings were reported.¹² A yearly figure on that basis is 56,800 irregular external border crossings. Further, irregular border crossings in the first three months of 2010 dropped by

10. European Commission, Communication, “Towards a general policy on the fight against cyber crime”, COM(2007) 267, 22 May 2007, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0267:FIN:EN:PDF>

11. Council of the European Union, “Note from the Presidency to the Working Party on Frontiers/Mixed Committee”, 13267/09, 22 September 2009

12. FRONTEX, “Irregular immigration hits new low in first quarter of 2010, facilitator detections up 13%”, 7 July 2010, available at: http://www.frontex.europa.eu/newsroom/news_releases/art68.html

36% in comparison with the final quarter of 2009. The disproportionate nature of the two figures – the 61 million third country nationals who enter the Schengen area annually, against the approximately 56,000 people who are treated as entering irregularly most graphically indicates that border crossing by individuals is not a security issue in the EU. It is a matter of trade and tourism, industry and family relations. To the extent that there is a security dimension at all, this is in relation to travel infrastructure. The external border of the EU most properly facilitates the entry and exit of people who seek to enter the EU, whether they are citizens of the Union or third country nationals. The number of people who are treated as inadmissible and thus seeking to enter irregularly is statistically insignificant. In an EU of over 500 million people, there is a real need for a sense of proportion regarding the policy area of irregular migration.

Natural Disasters

Natural disasters are a subject where there is perhaps greater scope for common approaches. The eruption of a volcano in Iceland certainly showed many EU citizens, wherever they were in the world, the need for more consistent and coherent consular protection and assistance in the face of such disasters. The fact that many EU citizens were stranded in far-off countries, were provided highly misleading information by government departments of some Member States, felt abandoned by their authorities, and were unable to access assistance from other Member States’ authorities, leads to the conclusion that we could do much better in this regard.

Conclusions: Towards a European Liberty Strategy

A European ISS must be built on the basis of evidence and analysis of the security interests of the people of Europe as well as the added value and effects of new security policies. It must not be promoted on the basis of a lack of information or a wilful misrepresentation of the available data. Moreover, it may be easy for some parts of the media (and sadly also some EU leaders and politicians) to fan fears about irregular migrations, terrorist threats and organised crime among the people of Europe, but such irresponsible behaviour helps neither EU citizens to understand their world, nor policy-makers to promote sound and measured policy responses.

All five strategic objectives that the Commission Communication proposes as core pillars reveal substantial variations across the Member States whether it regards relevance to some Member States at all, fundamental heterogeneity or insignificance. This challenges assertions referring to a common EU model on internal security. Another issue of concern is that the strategy proposed by the Council and followed up by the Commission is to bring back the old “third pillar” logic of cooperation on JHA and spread it throughout the Freedom, Security and Justice domains, including policies and EU agencies dealing with migration, asylum and borders.

The ISS offers little in terms of new ideas or policies towards meeting the challenges that the Union will increasingly face in delivering liberty, justice and security to individuals across the EU. The field of an ISS which touches all Member States and touches a central concern of the people of Europe is the one least developed in the specific actions – promoting the Rule of Law and fundamental rights as the central planks of an EU ISS. By not addressing these elements, the strategy will lead to more insecurity for the individuals subject to these public policy responses.

The next JHA Trio Presidency Programme should give priority to build the EU's ISS around the objective of delivering to everyone living in the EU the twin rights of Rule of Law and protection of Fundamental Rights. The Trio Presidency should call for a solid rule of law and liberty strategy (model) to be jointly devised by the Directorate General of Justice, Citizenship and Fundamental Rights of the Commission, along with the one put forward by Home Affairs. Such a strategy should be not only focus on the development of better (fundamental rights) monitoring and – ex ante and ex post – evaluation of EU policies and their national implementation.¹³ It should also ensure a more integrated cooperation and coordination between EU (freedom) agencies, such as the European Agency for Fundamental Rights (FRA), the European Data Protection Supervisor (EDPS), the European Ombudsman, etc. The FRA should make use of its current (post-Treaty of Lisbon) powers to assess the ISS and it should also see its competences expanded as regards evaluation of EU policies covering police cooperation and criminal justice. All this should go hand-in-hand with the strengthening of the coordination role played by the COSI, and of democratic accountability in activities and cooperation conducted by EU security agencies.

13. See European Commission, Communication, "Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union", COM(2010) 573 final, 19 October 2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:EN:PDF>