tgae Think Global - Act European

FREEDOM, SECURITY AND JUSTICE

EU's Area of Freedom, Security and Justice: From Post-Lisbon Tactics to EU Citizen-Oriented Strategy

Ivo Šlosarčík Associate Fellow, Europeum

At the beginning of the year 2010, the European Union (EU) experienced two fundamental changes in its domain of "freedom, security and justice". Firstly, the Lisbon Treaty has been (finally) ratified and structural changes of the EU regulatory powers in the AFSJ, as defined in the Lisbon Treaty, have started to have effect. Secondly, the five-year Stockholm Programme, establishing the EU's work programme in the AFSJ for 2011-2014, was agreed on, indicating key issues for the EU's medium-term activity.

The two changes mentioned created an institutional environment in the EU that could enable the AFSJ to be the most dynamic area of European integration in the second decade of the 21st century. However, the AFSJ visibility and its profile in the political debate seemed to decrease significantly in 2010; also, the ASFJ agenda received only relative modest attention in the Presidency programmes of 2011-2012.

Several explanations for this (temporary) implosion of the EU's AFSJ agenda can be offered. The most frequent explanation is that key EU decision makers' attention and political energy was consumed by other agendas than AFSJ in 2010 – primarily by the EU institutional debates in the foreign policy domain (for example, the debate on the role of the High Representative, negotiations linked with the establishment of the European External Action Service, discussion about role of the European Parliament in EU foreign policy) and by the response of the EU to the fiscal crisis in several Member States.

Another explanation for the lack of high visibility of the EU's activity in the AFSJ policy in 2010 is the character of the changes brought into the AFSP by the Lisbon Treaty. The decision making process in the AFSJ has changed since 1 December 2009, both in theory and in practice, albeit without a significant public attention. In particular, the expansion of qualified majority voting to the pre-Lisbon "third pillar" area enabled Member States to overcome the veto power of individual "dissenters". The European Parliament used its new competences in

the internal security policy domain, including activating its veto power over several international treaties (SWIFT agreement between the EU and the United States) with implications for internal security policy. Moreover, for the first time, the (post-Lisbon) mechanism of flexible cooperation was triggered within the EU and its first application concerned the AFSJ (i.e. EU rules on choice of law applicable to divorces with trans-border element).

At the same time, the EU had to finish the leftovers of the Lisbon Treaty concerning ASFJ. The Lisbon leftovers in this domain are not as vast as in other European integration areas, in particular in the EU's Common Foreign and Security Policy and its Common Security and Defence Policy (CFSP / CSDP), but they sill require a significant amount of energy and political bargaining at the EU level. For instance, the European Commission's internal structure had to be adjusted to reflect the division / separation of the AFSJ portfolio between two commissioners – Vivian Reding with responsibility for area of "justice, fundamental rights and citizenship" and Cecilia Malmström in charge with "home affairs" agenda. The Lisbon Treaty also required the European Union to open negotiations on the its accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which might result in an even more complex system of human rights protection in the EU (debated in more detail later).

And finally, with the rejection of Schengen space enlargement to Romania and Bulgaria, even the AFSJ has not escaped the EU's post-Lisbon fatigue – a step properly documented and supported by shortcomings in Schengen rules compliance in both countries, but also a political decision demonstrating a more sceptical and less enthusiastic mood within the core of the EU.

Therefore, concerning the AFSJ, the EU primarily spent its energy on negotiating and settling new inter-institutional rules and norms, a project whose practical implications will be visible only in the long-term perspective[1]. The risks of giving excessive attention to inter-institutional tuning can clearly be demonstrated by studying the adoption process of the first post-Lisbon Directive in the area of criminal law: the Directive on the rights to interpretation and translation in criminal proceeding.[2] The original proposal of the framework decision on the right to interpretation and to translation was presented by the European Commission in July 2009, but the final version of the document had not been agreed on before 1 December 2009, when the Lisbon Treaty (with its new rules on EU legislative procedure) entered into force. Therefore, the Swedish Presidency called for Member States' proposals on a Directive on the right to translation and interpretation, which was submitted by 13 Member States in December 2009. Regardless of the fact that the new proposal was substantively identical to the older framework decision proposal, and in spite of Member States' objections, the Commission submitted its own proposal, slightly different and more ambitious than the Member States' proposal, in February 2010. The European Parliament was then confronted with two similar proposals of a legislative document with the same objective. The European Parliament opted for using the Member States' proposal as the key document for further legislative bargaining and the Directive has been finally adopted in October 2010 (as the first legislative instrument in the criminal law domain to be adopted according Lisbon Treaty rules). The Directive itself is generally interpreted as a success and as an improvement of procedural guarantees in the EU, but it was also described as an unnecessary exercise of inter-institutional muscle-stretching and of "marking of the territory" by the EU's actors in the field of criminal law.[3]

As the post-Lisbon leftovers and inter-institutional tuning are gradually being settled, one can, with a relative high level of confidence, predict that both the legislative and non-legislative activities of the EU will expand in the following years. In addition to this, the new post-Lisbon systemic features regarding the EU's activity in the AFSJ – such as the shift towards qualified majority voting in the Council when individual Member States lose their veto power, direct application of certain categories of EU legal norms, the EU Court's new powers concerning review, interpretation and enforcement of the AFSJ's legal norms, and the simplified conclusion and ratification of international agreements by the EU, all have the capacity to increase the direct impact of AFSJ rules on the lives of EU citizens, and thus increase their awareness of the EU's new source of regulation in the internal security domain.

Hence, the "consolidation" and "enhancement" of post-Lisbon AFSJ activity also creates new challenges for the EU.

The EU's AFSJ actions have a high potential to both increase the positive perception of the EU as well as to simply endanger the legitimacy of the EU's actions – an example from the pre-Lisbon EU was the excessive interpretation of the EU-based non bis in idem principle, which was interpreted, from perspectives of Member States with slower and / or more punitive system of criminal justice, as a "European Union" measure preventing them from efficiently and legitimately punishing offenders who have already been sentenced or acquitted for the same delict by another EU state[4].

Therefore, the post-Lisbon EU must give increased attention to "explaining" its activities within the AFSJ to its citizens – with the objective to both prevent fears that the European Union hijacks Member States' legitimate interests in the AFSJ and to avoid excessive expectations from the EU's action. The human rights agenda provides an illustrative demonstration of this task.

1. It also should be mentioned that the EU's key post-Lisbon instrument for criminal law harmonisation is the Directive, whose implementation period shall expire only several years after adoption at the EU level
2. European Commission, Decision, "On the adequacy of the competent authorities of certain third countries", 2010/64/EU, 5 February 2010, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:035:0015:0017:EN:PDF
3. Steven Cras and Luca de Matteis, "The Directive on the Right to Interpretation and Translation in Criminal Proceedings – Genesis and Description", EUCRIM – *The European Criminal Law Associations' Forum*, March 2010, p. 161, available at: http://ec.europa.eu/anti_fraud/publications/agon/eucrim_2010-4.pdf
4. For broader debate on the *ne bis in idem principle* in the EU law, see Eleanor Sharpston and José Maria Fernández-Martín, "Some Reflections on Schengen Free Movement Rights and the Principle of *Ne Bis In Idem*", Catherine Barnard (ed.), *The Cambridge Yearbook of European Legal Studies*, 2007-2008, Volume 10, Oxford: Hart Publishing, 2008

The Lisbon Treaty provides a very complicated system of human rights guarantees in the European Union. Firstly, the Charter of Fundamental Rights of the European Union (EU Charter) has become an integral part of the EU's legal system. Secondly, the EU's Court continues to use human rights based argumentation in its jurisprudence. Moreover, the EU plans to adjoin the system of the ECHR and to directly[5] subject itself to the jurisdiction of the European Court of Human Rights in Strasbourg. When fully implemented, the planned human rights structure will be extremely complex, less predictable and very difficult to navigate.

The EU's accession to the ECHR is a complicated technical exercise both in the phase of negotiating the conditions of the EU's accession – representation of the EU in the European Court of Human Rights, the mechanism of the EU's representation in proceedings before the ECHR, definition of the exhaustion of other judicial remedies before the start of the procedure at the European level, relevance of reservations of Member States to individual clauses of the ECHR and to opt-outs from the EU Charter of Fundamental rights, issue of concurrent complaints against the EU and the respective Member State – and in the phase of ratification of the new treaty in all states of the Council of Europe. However, the technicalities of the accession process should not over-shadow the importance of the message this process sends to EU citizens, and the risk of deformation thereof. The outcome of the EU's accession to the ECHR will inevitably result in an extremely complicated system without a direct and straightforward judicial pathway towards the European Court for Human Rights. The "openness" of the final system will be influenced, among others, by the (un)willingness of the Court of Justice of the European Union to hear cases filed by the unprivileged applicants and by the (un)readiness of the European Court of Human Rights to prefer complaints against Member States, instead of complaints against the European Union, in cases where the EU general rules were implemented and applied in concrete cases by the Member States. Even such a scenario can be imagined where major beneficiaries of the EU's accession to the ECHR will be companies and individuals in competition cases and disputes about access to EU documents.

This (potential) ambivalence of the EU's accession to the ECHR should be explained to the public. The message from the EU should clarify that the EU's accession to the ECHR shall not be a panacea for human rights violations within the EU, but only one piece within broader system.

Concluding, the major tasks for the forthcoming Trio Presidency in the Area of freedom, security and justice is not only to tackle the subtleties of the Lisbon institutional leftovers and to start a process of adopting an impressive catalogue of legal norms in the internal security area, but also to intensely and systematically communicate EU actions to EU citizens and to explain that EU actions are often only a segment of a more complex and multilateral international regime.

5. The EU Court is already "indirectly" subject to the jurisdiction of the European Court for Human Rights via the Strasbourg's Court jurisdiction over actions of Member States implementing EU rules. The European Court for Human Rights already ruled on the compatibility with the ECHR in cases when EU states applied the EU's rules on the elections to the European parliament (Matthews v. UK), sanctions against Yugoslavia (Bosphorus v. Ireland) and the union rules on asylum (M.S.S v. Belgium and Greece)