



Centre for European Policy Studies

Thinking ahead for Europe

The Hague Programme & the EU's agenda on "Freedom, Security and Justice:

Delivering results for Europe's citizens?

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Strengthening the Area of Freedom, Security and Justice (AFSJ) is a strategic objective for the EU in the coming years. The AFSJ was established in 1999 when the Council agreed a very ambitious programme of measures with tight deadlines to provide the EU with a common area in justice and home affairs to mirror the internal market. However, in such sensitive fields as criminal justice, policing and immigration (which are at the heart of the AFSJ), legitimate concerns about national sovereignty and civil liberties have emerged opposing further EU integration. Amongst these, a considerable number of EU constitutional courts have questioned or even rejected the European Arrest Warrant, a crowning achievement of the AFSJ; a variable constellation of member states have effectively snubbed EU initiatives by making agreements to proceed independently on policing (for instance the Prüm Treaty or the Sarkozy initiative) and the issue of agreeing on common standards of legal migration to the EU has reached an impasse. Where is the AFSJ going?

The EU is at a crossroads: either it abandons the objective of integration in the AFSJ and leaves the field to member state sovereignty or it pushes ahead. But in the latter case, a change of strategy is imperative. While the member states in the Council express their enthusiasm for more AFSJ, individual ministries at the national level (and most commonly home affairs ministries) continue to act in their traditional fashion, which is at odds with the stated objectives. All too often, by the time the national experts from home affairs ministries have finished with an initiative in the field, it has been transformed so much that it provides either for the continuation

of national practices without any integration (for instance measures on irregular immigration) or for one-sided integration privileging the coercive institutions without ensuring equality of arms for the citizen (for instance the European Arrest Warrant or EAW). In both cases there is resistance – either criticism that ‘Europe’ does nothing, or societal (expressed as judicial) disquiet regarding the protection of constitutional rights.

The mechanisms for the adoption of measures in the AFSJ encourage both results by failing to provide sufficient centralising weight at the institutional level to counterbalance the voices of one set of ministries at the national level. While at the national level, the home affairs ministries must find consensus with other ministries such as justice, social affairs, development or education before proposing new national legislation, at the EU level the isolation of the AFSJ in the third pillar or a ‘muffled’ first pillar¹ means that home affairs ministry concerns are not counterbalanced by other ministries responsible for constitutional protection, social cohesion, development, education etc.

What are the answers to these challenges? Two measures are imperative. First, ‘more Europe’ through the expansion of ‘the Community method’ to all the AFSJ areas is highly desirable if not inevitable. Without a change in the mechanisms by which the EU operates in AFSJ and the abolition of the current pillar structure, the AFSJ is not going to succeed. Secondly, strengthening the freedom dimension of AFSJ (rule of law and fundamental rights) in all areas is urgently required if the project is to be acceptable to the people of Europe.

The second multi-annual programme on AFSJ, known as ‘the Hague Programme’, provides the political mandate and the overall policy agenda for the 2004–2009 period. A key error in the programme is its presentation of ‘freedom’ and ‘security’ as antithetical values and therefore requiring a ‘balancing procedure’ (i.e. the need to find the right balance between freedom and security). Its predecessor - the Tampere Programme of 1999 – rejected this understanding of the relationship between freedom and security: “*shared commitment to freedom based on human rights, democratic institutions and the rule of law*” was the starting place.² ‘Securing rule of law’,

¹ As Title IV EC, which incorporated immigration, asylum and borders into EC law, does not yet provide for full competence to the European Court of Justice and includes the participation of intergovernmental bodies such as SCIFA (Strategic Committee on Immigration, Frontiers and Asylum) in addition to COREPER, it does not yet come within the classic EU governance rules of the first pillar.

² See CHALLENGE, A Response to the Hague Programme: Protecting the Rule of Law and Fundamental Rights in the Next Five Years of an EU Area of Freedom, Security and Justice, retrievable from www.libertysecurity.org.

as rightly emphasised by the former UN Human Rights Commissioner Mary Robinson,³ needs to be at the heart of the project. The moment that coercive security is divorced from the rule of law and balanced against freedom rather than understood as a flanking measure to secure freedom within the rule of law there is going to be trouble with the constitutional courts of the member states. To exacerbate the problem, the Hague Programme marginalises the protection of fundamental rights and freedoms, fair and equal treatment of third country nationals and the key role of the European Court of Justice.⁴ The Hague Programme does not offer the policy and institutional mechanisms necessary to create the AFSJ.

There are two essential elements that the EU needs if it is effectively to meet the citizens' agenda in the light of a failing Constitutional Treaty and the deficiencies inherent to the Hague Programme:

First, the structure: the AFSJ which currently (and uncomfortably) straddles the first and third pillars of the Union must be consolidated in the first pillar. The dismantling of the current pillar structure is a prerequisite for comprehensive, legitimate, efficient, transparent and democratic responses to the dilemmas posed by the Europeanisation processes and the creation of a common AFSJ. The European Commission has already suggested in its Communication 2006/211 that it will make a proposal under Article 42 Treaty on European Union to this effect. The Finish Presidency should embrace this proposal and push forward its adoption. Paradoxically, 'more Europe' may be the only way to protect the principle of subsidiarity. More transparency by consolidating the whole of the AFSJ into one European Community pillar will permit member states to have more control over all the policy developments in these fields. The shortage of input in the AFSJ from other ministerial areas such as social affairs, development and justice can only be remedied by a radical change in the decision-making process. The EU has a tried and trusted system to ensure plurality of views: the Community method. Extending this system of decision-making to all AFSJ areas will also strengthen the protection of civil liberties and fundamental rights.

Secondly, the AFSJ needs to make its commitment to 'freedom' based on human rights, democratic institutions and the rule of law happen on the ground. To do this, the EU needs to adopt its Charter of Fundamental Rights and Freedoms as a legally binding instrument. The

³ See M. Robinson (2006) *Five Years on from 9/11: Time to Reassert the Rule of Law*, Justice, International Rule of Law Lecture, Middle Temple Hall: London, 20 March 2006.

⁴ UK Parliament, House of Lords Select Committee on the European Union, *The Hague Programme: A Five-year Agenda for EU Justice and Home Affairs, Report with Evidence, 10th Report*, HL Paper 84, Session 2004-05, London, 23 March 2005, pp. 11-13 and p. 34.

incorporation of the charter into the EU's legal framework is vital in order to give legal weight to those rights which are at the core of the EU and in whose name the AFSJ acts are being carried out. A uniform legal framework which incorporates fundamental rights as norms of Europe is obligatory, not merely desirable.

These two steps also resolve a number of the problems of democratic control: the European Parliament which has a full part in the decision-making process under the Community method; and judicial oversight: the European Court of Justice has competence to interpret issues of EC law (though the restriction regarding referrals from national courts found in article 68 and applying only to AFSJ matters needs to be removed).

In conclusion, we recommend two measures to the Finnish Presidency in the field of AFSJ:

- (1) Support the Commission's initiative to use article 42 TEU to transfer all the responsibilities of the third pillar into the first pillar;
- (2) Promote the position, taken by the German government in 2000, that the EU Charter on Fundamental Rights be given immediate binding legal effect in the EU's legal sphere.