



BULLETIN

No. 77 (672), 3 June 2014 © PISM

Editors: Marcin Zaborowski (Editor-in-Chief) • Katarzyna Staniewska (Managing Editor)
Jarosław Ćwiek-Karpowicz • Aleksandra Gawlikowska-Fyk • Artur Gradziuk • Piotr Kościński
Łukasz Kulesa • Roderick Parkes • Patrycja Sasnal • Marcin Terlikowski

The EU's New Justice and Home Affairs Programme: An Opportunity to Restore the Foundations

Janusz Gąciarz, Filip Jasiński*

The financial crisis and economic recession, as well as related social conflicts, have thrown into question key principles underpinning EU Justice and Home Affairs (JHA), not least mutual trust and solidarity. The bloc now faces persistent attempts to reverse its most important achievements in the area of intra-EU mobility and equal treatment of EU citizens, jeopardizing the core values and principles of the Treaty. With a new five-year JHA programme underway, the EU should provide all stakeholders with a clear scenario for restoring common understanding of the foundations of JHA, including freedom of movement. One rationale for this would be to point to the foreign policy context facing the Union.

Key Challenges. The Stockholm Programme that served as a legislative and operational agenda for EU Justice and Home Affairs (JHA) 2009–2014 will soon expire and the EU's JHA commissioners have questioned the need to replace it with another such document: under the Lisbon Treaty, JHA has become a "normal" EU policy area, with the Commission gaining its usual exclusive right of initiative as well as a central role in programming and coordinating operational cooperation. It has little appetite for the European Council to set the agenda. However, the European Council gained a formal right to set strategic guidelines under the Treaty, and it has declared that its June 2014 conclusions will guide the next five years of legislative and operational activities.

Even if Member States have thus decided to keep the status quo and work under an agreed policy document, as has been the case since 1999, this document will clearly be of a different quality than the outgoing programme. There will be no repeat of the programme-as-catalogue approach embodied by the Hague Programme (2004–2009) and repeated at Stockholm. The idea is rather to return to the Tampere Programme (1999–2004) template—a concise political declaration defining strategic goals, basic policy principles and key activities, but with no precise list of measures. This is where the consensus in the Council ends. With diverse interests and inconsistent attitudes towards problem-solving, let alone regarding the roles of EU institutions and agencies, it has been left to three sets of overarching political issues to frame the debate.

First, the EU is facing the threat of renationalisation and dismantling. The financial crisis has damaged the Union, and in political terms not just economic. JHA policies rely on mutual trust and solidarity, principles that are usually the first to suffer erosion. In 2011, the EU witnessed initiatives by the leaders of some of the most influential Member States that might have dismantled Schengen cooperation and its key benefits for EU citizens. Three years on, the EU faces persistent attempts to impose limitations on the free movement of persons that might further jeopardize the core values and principles of the Treaty.

Second, the bloc is also dealing with loose ends from the past. Since 2009, the Treaty of Lisbon has not been fully implemented, and policies were neither fully adopted nor applied. The Area of Freedom, Security and Justice (AFSJ) is a case

* This text reflects views presented by panelists during the conference organised by PISM on 2 April 2014. The authors are long-standing experts on JHA matters and work in the Polish Ministry of Foreign Affairs. The views presented here are their own. The authors thank in particular Yves Pascoau and Roderick Parkes for their valuable comments.

in point. Once established as a concept it developed relatively quickly, but some persistent shortcomings persist: legislation on legal migration, the implementation of effective asylum *acquis*, cooperation with third countries on irregular migration, and the coordination of internal and external security agendas, including the pragmatic use of EU agencies and avoidance of competence overlaps.

And there are, finally, specific politico-technical issues defining the EU's future agenda:

- Reconsidering the rules of common visa policy in order to make them more intelligent, responsive and flexible due in part to security and trade realities. The Member States will have to focus on revision of the visa code and on speeding up negotiations on visa-free agreements with third countries. Yet “perfection is the enemy of good” will be the motto here, as one should avoid recreating Schengen cooperation from scratch.
- Establishing a new framework for personal data protection, enabling effective protection of the right to privacy in the age of information and communication technologies, and in particular allowing for clarity in the global sense.
- Strengthening the protection of fundamental rights through the accession of the EU to the European Convention of Human Rights and with reference to the future agenda of the Fundamental Rights Agency.
- Enhancing the application of the principles of the rule of law by means of the full exploitation of existing evaluation mechanisms and setting up regular examination of the state of play in this domain by the highest EU political bodies.
- Dealing with the consequences—as yet unclear—of the British opt-out decision.

All this poses the need to rethink some basic assumptions underpinning AFSJ. Reflection and deep-rooted evaluation are needed to set a platform for coherent improvement. There needs to be both a new overarching vision and a new practical approach to the implementation of existing legal frameworks. This will appeal both to EU citizens and determine the way the EU is seen and assessed by its external partners, including international organisations and some key third countries.

Turning JHA Inside Out. In this difficult political context, however, the external dimension of AFSJ may be lost, despite the fact that external shocks were at the heart of the erosion of the *acquis* in this field, the failure to deal with external factors is making it so difficult to tie up Lisbon's loose ends, and the international context is a prime factor in shaping the EU's future agenda. This needs to be recognised in the new programme, and in a practical manner: current forms and channels of JHA activity are not coordinated well enough with external partners.

The EU therefore needs to pursue maximum synergy in this area beyond the typical bureaucratic approach. This applies to EU agencies (Frontex, Europol, Eurojust, European Asylum Support Office) and actions performed by the Member States. In this context, the role of the European External Action Service, in particular the EU representations, should be reconsidered, and all EU agencies and institutions should work together with the relevant agencies of Member States, in order to:

- contribute to the full implementation of fundamental freedoms by strengthening internal security and effective migration management to make sure that EU citizens may enjoy freedom of movement, equal access to justice, and protection of fundamental rights without any limitations or barriers in any Member State.
- promote EU standards of justice and law enforcement in relations with third countries. This would lead to an approximation of legal and institutional arrangements, enabling effective and beneficial cooperation between appropriate authorities in all of the countries concerned. Building confidence between the EU and partner countries would facilitate individual mobility and foster a business climate that would result in sustainable mutual relations.
- set a clear framework for reinforcing cooperation with third countries based on the “more for more” principle. The EU should offer support for democratic reforms, the establishment of independent judiciaries, implementation of fully fledged anti-corruption policy, and effective institutional protection of human rights and freedoms. Conditionalities should contain reliable cooperation on migration management, fighting terrorism and organised crime, and in reducing financial and economic misconduct.
- establish real coordination between the external dimension of the JHA and other EU policies, in particular common foreign and European security policies, as well as development and trade policies. This method, known as a comprehensive/holistic approach, proved to be effective in several cases in the past and seems to be one of the best choices for improving the EU's ability to achieve its goals in the area of external migration policy and selected aspects of internal security policy.

Recommendations. In the upcoming policy framework, the Commission should confine itself to programme implementation rather than policy-sketching, a role taken on for the sake of a clear sharing of competences. In return, it should be given a much more proactive role in helping national administrations implement EU legislation rather than simply taking Member States to court at any given occasion. Member States' lead role in defining political guidelines should also be predicated on not overstepping that which is necessary to provide political accountability and clarity to the upcoming programme, as well as improving the means of cooperation between national administrations and EU institutions.

As always, however, the discussions seem to be driven by wrangling between institutions and by a conceptual debate about the trade-off between openness and security or between a liberal or law-enforcement-oriented approach. The EU must detach itself from these polarising perspectives and focus more on the purpose and added-value of EU action. Are certain instruments really needed? Where could we do more if we use national capacities? Is institutionalisation the answer to every question? Does monitoring always and only mean tables and reports? The new programme needs to set a new style, oriented on a wide sense of reality, fast-paced changes, variable phenomena and new actors on the scene. AFSJ needs better clothing, even if made of old cloth. Back to the basics? Why not.