



Brugge

College of Europe  
Collège d'Europe



Natolin



# The AFSJ and the Treaty of Lisbon A fundamental “regime” change?

University of Catania, Faculty of Political Science, 29/10/2010

Jörg Monar

# (1) From cooperation to integration?

- Before the Treaty of Lisbon the construction of the AFSJ was focused on **enhancing cooperation and coordination between national systems rather than their transformation (integration) into a single system** (emphasis on minimal harmonisation and coordination mechanisms/structures)
- The pre-Lisbon AFSJ was therefore essentially a **“cooperation regime”** – **although one going beyond classic cooperation between governments** (e.g. QMV, direct effect, independent assessments by agencies, judge-to-judge communication,...)
- The question: **Do the extensive reforms of the Lisbon Treaty mark a fundamental “regime change” from a cooperation framework towards an integrated system?**

## **(2) CRITERIA OF ASSESSMENT**

- **Competences** (powers and their limitations)
- **Legitimacy** (fundamental rights protection, parliamentary and judicial control)
- **Decision-making** (who decides and how)
- **Implementation** (at EU and national level)
- **Coherence** (legal structure and differentiation)

### **(3) THE JHA DOMAIN AS A CHALLENGE FOR EU TREATY-MAKING**

- the provision of security and justice as core functions of the state
- the principles of national sovereignty and territoriality as major obstacles
- two strongly intergovernmental origins: TREVI and Schengen

## **(4) PREVIOUS TREATY REFORMS**

- Treaty of Maastricht (1993): codification and institutionalisation of intergovernmental JHA cooperation
- Treaty of Amsterdam (1999): partial 'communitarisation', incorporation of Schengen, strengthening of legal instruments
- Treaty of Nice (2003): Eurojust and move to QMV/co-decision on most matters of asylum, immigration and borders

# (5) Lisbon: Competences (a)

- **EU competences are extended:**
- integrated border management (77(1)(c) TFEU)
- uniform asylum/subsidiary protection status (78(2)(a)-(b) TFEU)
- support of national action on integration of migrants (79(4) TFEU)
- common rules regarding criminal procedure (82(2) TFEU)
- seven 'new' fields of approximation of substantive criminal law - and potential extension to other fields (83(1)-(2) TFEU)
- support of national action on crime prevention (84 TFEU)
- European Public Prosecutor's Office (86 TFEU)
- legislation on conditions and limitations under which police officers can operate in other MS (89 TFEU)

# (5) Lisbon: Competences (b)

- **but there is no fundamental constitutional change:**
- principle of conferral (5 TEU) remains fully applicable: no 'general' JHA competence
- AFSJ domain of "shared" competence (4(2)(j) TFEU): MS remain free to "exercise their competence to the extent that the Union has not exercised its competence" (2(2) TFEU)
- Respect of "essential state functions" of MS, including maintenance of law and order and national security (4(2) TEU)
- Principle of subsidiarity (5(3) TEU): EU to "act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States"

## (6) Lisbon: Legitimacy

- **Significant shift of legitimacy base to EU level:**
- Binding Charter of Fundamental Rights and accession to ECHR: will impose a 'fundamental rights check' on all future JHA measures both internally and externally
- Extension of ordinary legislative procedure (co-decision) to nearly all JHA fields: long overdue empowerment of the EP in fields of special sensitivity to citizens' liberties, especially police and judicial cooperation (exceptions: 74, 77(3), 78(3), 81(3), 82(2)(d), 83(1), 86(1) and (3), 87(3), 89 TFEU)
- Extended rights of national parliaments regarding information and subsidiarity control (Protocol on Application)
- Removal of restrictions on the role of the Court of Justice

# (7) Lisbon: Decision-making (a)

- **European Council/JHA Council:** European Council reinforced (68 TFEU: strategic guidelines, semi-permanent President); JHA Council helped by removal of the pillar divide and more QMV – but relative loss of power because of extension of EP co-decision and added complexity because of extended opt-outs and four level working structure (71 TFEU: COSI)
- **European Parliament:** Extension of co-decision to most former ‘third-pillar’ issues makes EP (nearly) the co-equal of the JHA Council in legislative terms and a significant actor also in JHA external relations (SWIFT/TFTP case), but strategic orientation remains outside of its control (European Council) and subsidiarity control by national parliaments has become a new factor
- **European Commission:** Overall weakening of position because of extension of EP co-decision (which allows direct deals between EP and Council), codification of strategic role of European Council (68 TFEU), failure to gain exclusive right of initiative in newly ‘communitarised’ fields (76 TFEU)

# (7) Lisbon: Decision-making (b)

- **Court of Justice:** Restrictions on the role of the Court in former ‘third pillar’ fields removed – subject to five year transitional period for existing measures
- **Special agencies:** Evolution possibilities opened for Eurojust (85 TFEU) and Europol (88 TFEU), but no fundamental change to merely supportive role
- **Procedures:** Extension of QMV to most JHA issues (exceptions: 77(3), 81(3), 82(2)(d), 83(1), 86(1) and (3), 87(3), 89 TFEU) likely to contribute to the quality and the speed of decision-making, although certain decision might be slowed down by EP co-decision, national parliamentary subsidiarity control and ‘emergency brakes’ (82(3) and 83(3) TFEU)
- **Overall: Significant system change because of strengthening of both EP and European Council and relative weakening of Commission**

# (8) Lisbon: Implementation

- **At EU level:** facilitated by more continuity potential at the level of the European Council, new financial and operational solidarity clauses (67(2), 80, 222 TFEU), and – in external relations – by the new single legal personality (47 TEU)
- **At the national level:** pressure on MS is increased by extension of treaty infringement procedures (258-259 TFEU) to police and judicial cooperation in criminal matters (but with five year transitional period according to Protocol) and new provision for “impartial evaluation” of implementation (70 TFEU)
- **Overall: Some progress towards a more integrated system of implementation**

# (9) Lisbon: Coherence

- **Constitutional (treaty) framework:** coherence enhanced through abolition of ‘pillar divide’ (same legal instruments and single legal personality), but still substantial procedural differences between former ‘first’/‘third’ pillar AFSJ fields (right of initiative, unanimity exceptions, ‘emergency brakes’), and CFSP – important for external dimension - remains separate
- **Systemic coherence:** reduced by extension of British, Irish and Danish opt-outs to police and judicial cooperation in criminal matters (three MS now enjoy an extensive opt-out from the AFSJ although it has been ‘upgraded’ as a fundamental treaty objective (3 TEU!)); also facilitated access to “enhanced cooperation” via 86(1) and 87(3) TFEU
- **Overall: more rather than less differentiation**

# (10) Overall assessment

- The Treaty brings elements of a more integrated AFSJ regime primarily as regards the legitimacy base and implementation capabilities
- Yet primary competence for JHA matters still rests with MS, the decision-making system retains a strong tension between intergovernmental and 'communitarian' elements, and differentiation has overall increased rather than decreased
- The non-endorsement of the Commission's Stockholm Action Plan (COM(2010)171) by the Council in June 2010 indicates that the MS are not accepting any fundamental "regime change"
- Not a "new" regime therefore, but an enhanced potential of gradual and partial further evolution from cooperation to integration