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The European "Area of Freedom, Security and Justice" - three fundamental dilemmas

1. The "Area of Freedom, Security and Justice" – its way toward the heart of European integration

Three pillars, three crises. The European "Area of Freedom, Security and Justice" is at the heart of the latest EU crisis, the "migration" or "refugee" crisis – indeed, all three terms in the title are relevant here with this problem or, to be precise, all four: Because "area" itself is a doubtful category for a political system. If we apply the Maastricht pillar trilogy – still apparently well known - , one might say that the financial, economic and state debt crisis affected the first pillar, focussing on economic integration, whereas the Ukraine-Russia crisis had much to do with the second pillar, i.e. foreign, security and defence policy. The migration crisis, then, puts into question the third pillar, "Justice and Home Affairs", to use the Maastricht terminology – the "Area of Freedom, Security and Justice" (AFSJ), as it became known after the Amsterdam Treaty (1997/1999).

Schengen and Dublin. This "Area" of policy has come a long way before arriving at the core of the European Union. It started with just a few countries, and outside the then existing treaties. "Schengen" and "Dublin" are still in use to designate some of the central features of the system: "Schengen" started at that small Luxembourg border city in 1985 with five countries convening upon the abolishment of their borders with each other: France, the Federal Republic of Germany and the three Benelux countries. Five years later, they concluded a "Convention" laying down the principles of such an "area" without borders, and another five years later, in 1995, the border controls fell completely/once and for all: a hugely hailed achievement, visible and appaling for every citizen who crossed what was no longer a border after this moment. "Dublin" went a similar way: Launched in 1990, it aimed at common rules regarding asylum, i.e. the treatment of immigrants fleeing to Europe from threat, war, torture and distress.

From Maastricht's "Third Pillar" to the "Area of Freedom, Security and Justice". The Maastricht treaty took these perspectives already into account, by creating the "Third Pillar"without, however, including "Schengen" and "Dublin" in the treaty itself. It is only with the Amsterdam Treaty, in 1997, that two important steps were taken in order to integrate the open border and common migration/asylum policies into the EU Treaty: The "third pillar" was renamed more prominently "Area of Freedom, Security and Justice" and some of the various sectoral policies covered by this large denomination were transferred from a purely intergovernmental sphere into the so-called "community method", marked by the supranational decision making, which characterised the "first pillar". This move triggered four structural consequences of great impact: First, an extraordinary European Council meeting at the Finnish city of Tampere further developed a programme of implementation of the Amsterdam Treaty in general terms. Secondly, this implementation dynamic led to quinquennial "action programmes" – after Tampere in 1999, it was The Hague in 2004 and Stockholm in 2009. Thirdly, hundreds of legal acts trickled down from these action programmes, creating an important share of the "aquis communautaire". Fourthly, no less than nine "agencies" saw the light of day, mandated to execute, promote, control andsurvey the various policies in the field of AFSJ, among them such important ones as "Frontex" and "Europol".

Lisbon: AFSJ is fully submitted to the "community method". The last important step in the evolution of AFSJ toward the heart of the EU before the current crisis was the Lisbon Treaty, which fully integrated all AFSJ policies into the "ordinary legislative procedure", i.e. put a definite end to intergovernmental cooperation in this field. AFSJ is now submitted to decision making marked by the Commission's right of initiative, by Qualified Majority Voting (QMV) in the Council and the equal right of the European Parliament to vote any legal measure under Title V of the Treaty on the Functioning of the European Union, that is the "Area of Freedom, Security and Justice". Consequently, in 2014 – five years after the Stockholm action programme, but now under the provisions of the Lisbon Treaty – there is no more "action programme", but "strategic guidelines" laying down the project for ASFJ legislation for the ensuing five years.

Differentiated participation. However, whereas the full integration into the "community method" has been achieved, things are still much more difficult with regard to the participation of EU member states and other countries. Some EU member states do not participate in the open border system ("Schengen", those who stay apart are the UK and Ireland, in earlier years Denmark, too), some are member states, but are, for the time being, refusing to participate (Romania, Bulgaria, Croatia and Cyprus), whereas three European countries, which are not member states of the EU, do participate in "Schengen", that is Norway, Switzerland and Iceland.[1]

Intermediate conclusion. On the whole, the "Area of Freedom, Security and Justice" has come a long way and arrived at the centre of European integration at the very moment when the "refugee crisis" has confronted the EU with constraints, perceived as threats, which have the potential to jeopardize the whole achievement. At any rate, this crisis, as it has developed since summer 2015, reveals three fundamental dilemmas.

2. Three fundamental dilemmas

2.1 The European Union and its Member States

Common (European) area of freedom vs. borders under state sovereignty. The first of these dilemmas is only too well-known in nearly all other policy fields – it is nothing other than the unsolved question of who holds the sovereign rights, the Union or the member states. "Freedom", "security" and "justice" have not been transferred equally from the state level to the European one. Whereas the abolishment of borders has opened the European wide area for the free movement of all citizens who enter this space at any given time, the control of security remains largely with the member states. To put it more precisely than the terms of the treaty : Freedom in this context means exclusively "freedom of movement" (not freedom of religion, speech etc.), and the abolishment of borders between the participating (member) states amount to giving up sovereignty at the limits of national territories. But the emerging common territory, the "area" of free movement, has not been submitted to any common sovereign control. "Security", in this sense, means mainly border control (not security in the streets of a European city, even if the "strategic guidelines" of 2014 put the emphasis on new issues like data security), and this border control is still conferred upon the member states, i.e. those member states who have an external border along the outer border of the European "area".[2] One might see an analogical situation in the field of Economic and Monetary Union, where the much-criticised imbalance between a fully-fledged Monetary Union, with a powerful and independent Central Bank, has no counterpart in the corresponding field of economic policy, which still remains under national sovereignty. It seems reasonable, however, to draw the consequences of the abolishment of internal borders and confer the security of the external borders to the authority which rules over the "area of freedom", and that is the European Union (with its differentiated membership, as indicated above).

The European Commission does openly recognize the problem: "At this moment in time, there are serious deficiencies in external border control caused by a lack of border surveillance and insufficient registration and identification of irregular migrants. As a consequence of the secondary movements triggered by these deficiencies, Member States have reintroduced internal border controls. These serious deficiencies therefore jeopardise the Schengen area as a whole, and are evidence of a threat to public policy or internal security in that area."[3]

Example: FRONTEX. A perfect example of this dilemma is the agency created by the member states and the European Union in 2004, and the name of the agency itself is sufficient to outline the whole problem – FRONTEX is the "European Agency for the Management of Operational Cooperation at the External Borders". First, the name does not explicitly mention which borders are concerned – the reason is that the differentiated participation of not only EU member states, but of some additional ones, makes it complicated to deliniate those borders. But that is a minor problem compared to the competences and mandate of FRONTEX: Far from being in charge of the external borders as such, the agency is only entitled to make the member states "cooperate", not to substitute a European border control in place of the multiple national ones. But even "cooperation" is downsized to its "operational" level, so that it is neither political nor strategic, and is even further away from sovereignty. And still this is not where restrictions end: Even the "operational cooperation" is not under the jurisdiction of FRONTEX, only its "management" lies within its mandate, a further retrenchment which ultimately leaves little space for this supposed counterpart to an area of freedom of movement for more than 400 million people – the poor 350 employees of FRONTEX may then indeed

be sufficient in number for such a limited mandate. In the face of the current challenge,The Commission has ventured to bring an end to this dilemma by proposing a "European Border and Coast Guard", which would indeed solve the problem in favour of a European approach.

Implementation of EU law. Finally, treaties, action programmes, strategic guidelines and hundreds of ensuing legal acts (regulations, directives …) are an impressive output of strategic thinking and planning, of primary and secondary law – but the real proof of their impact is the implementation of all these legal and political decisions by the member states themselves. Despite the fact that "Schengen" as well as "Dublin" provide rules for member states who wish to apply internal border controls and to postpone or interrupt the application of the "Dublin" rules in exceptional situations, the fragmentation of the "Area of Freedom, Security and Justice" is only too obvious today. Again, the European Commission has a clear stance on this issue: "The wave-through approach is incompatible with Schengen and Dublin rules. [...] Therefore, stopping the wave-through approach in a coordinated way is a requirement for the functioning of the Schengen and Dublin systems, as well as the relocation scheme."[4] Last but not least, the relocation of 120.000 refugees decided by QMV in the Council, convened on the 22 September 2015 according (for the first time) to the Lisbon rules, has not been executed by the member states – until now, only 600 refugees have been redistributed over the member states up until spring 2016. This refusal to implement decisions which have been taken according to agreed rules, in line with the primary (treaty) law of the EU, is more than an incident – it is a fundamental threat to the reliability of the rule of law in the EU and amounts to a retreat of member states from Europe to national sovereignty.

2.2. Freedom versus Security

Freedom "of movement", part of an overall free society. "Freedom", in the context of the "Area of Freedom, Security and Justice", must be understood as "freedom of movement", as outlined above. But taken as it stands, "Freedom" does mean much more of course, for a society which, since World War II, draws its identity from the idea that it was part of the "free world", in opposition to authoritarian and dictatorial regimes, ranging from the Soviet Union and the Eastern Bloc to nearly all other continents, and for many years to some European countries, too, like Portugal, Spain and Greece. Freedom is therefore a fundamental value of the European Union and ranks just below the most supreme of all values, human dignity, in the European Charter of Fundamental Rights[5], which itself owes its existence to the same exceptional European Council meeting at Tampere, where the AFSJ was transformed into a political programme. And that is far from being an accident. On the contrary it is the affirmation that the AFSJ approach has something to do with this fundamental value of freedom, despite its limitation to freedom of movement in the narrower sense of the AFSJ. The link between the limited AFSJ understanding of freedom and the fundamental value of freedom is indirect, but undeniable.

But "Freedom" is closely linked to "Security", at the European level as much as in many debates at the national level. In fact, the earliest origins of the AFSJ approach illustrate this link: The initial motivation to cooperate at the European level in the field of justice and home affairswas the threat of terrorism in the late 70s, in particular in Italy and Germany, and the initiative to make such sensitive bodies like the police and judiciary cooperate for the sake of better security led the heads of state and government at the time to already think about more freedom of movement for their citizens. The balance between freedom and security has always been, and still is, delicate, as the shifting back and forth of the "action programmes," starting with Tampere, illustrate: Whereas the late 90s were an era of enthusiasm about the huge steps toward an "ever closer Union" and laid the emphasis on more freedom, the terrorist attacks in New York, London and Madrid in the early 2000s recommended a shift towards what the The Hague action programme (2004) called a "balance between freedom and security"; Stockholm (2009) again restored the primacy of freedom, under the slogan of a "Europe of Rights", whereas the "Strategic Guidelines" (2014) aim at more data safety and security.

Freedom as a "negative" integration (abolition of borders)

Is it easier to provide for freedom than to assure security? It seems so, since "freedom" requires less effort , less legislation, less control than "security". The "negative" integration ("negative" in the sense of "abolishment", "cancellation") on the side of "freedom" has not in all respects been complemented by a "positive" integration ("positive" in the sense of "construction", "creation"), e.g. on the side of security at the (common) borders. Here, too, an analogy is obvious with other fields of European

integration. The way to the Common Market is, according to a classical theory, marked by three steps – (1) the abolition of internal borders (customs, tariffs; this is then a "free trade area"), (2) the creation of a common tariff all around the common area (that is a "customs union"), and finally, (3) common rules for the behaviour of all actors on the common market, which is the crucial step, because it requires common legislation (and only then a common market emerges). The first step is relatively easy, because it is only "negative", whereas the third is the most difficult, because it requires common decision-making, something "positive" (the second stage is "positive" too, but does not require much of the national sovereignty to be transferred to the common level). Similarly, in the field of AFSJ, much more has to be done in the field of security if its effect is to amount to the same level of integration as the abolition of internal borders.

9 EU Agencies – for security, and for justice, but not for freedom

The range of EU agencies created under the umbrella of the "Area of Freedom, Security and Justice" illustrate this emphasis on security, and ,respectively, justice. If one would categorize these agencies and relate them to either "freedom", or "security", or "justice", most of them would fall under the category of "security" (or maybe "justice"): That is the case with FRONTEX, EUROPOL (European Law Enforcement Agency)); CEPOL (European Police College); EUROJUST (The European Union's Judicial Cooperation Unit); ENISA (European Union Agency for Network and Information Security); EASO: European Asylum Support Office; The European Monitoring Centre for Drugs and Drug Addiction. Only two of them are more closely related to the ideas of „justice" seen as „rights", but none of them explicitly to "freedom": FRA (European Union Agency for Fundamental Rights) and EIGE (European Institute for Gender Equality). This does not necessarily mean that security is absolutely predominant in the EU approach to the AFSJ, just because of the argument advanced above: Freedom means to be free from control, supervision, legal constraints etc., whereas security (and justice) do require exactly e that whole range of rules and decisions. But it is a clear message that a European security (alongside justice) policy has widely spread at a level and in a sphere where there is not much transparency for citizens, and maybe even for parliaments.

2.3 Values versus utility

Roosevelt's 4 freedoms vs. 4 market freedoms. A final dual relationship relates "freedom" as a fundamental ethical value to "freedom" as a means, one among others, to implement the Single Market. Talk of the "Four Freedoms" has accompanied European integration as far back as the Rome Treaties (1957) and their core policy project, i.e. the creation of a common market for the member states of the European Economic Community. But the formula "Four Freedoms" goes even farther back in history: to the famous speech given by US President F.D. Roosevelt in January 1941, when the United States had to spell out their credo against Japanese and fascist aggression. In this sense, the four freedoms meant (1) freedom of speech, (2) freedom of worship, (3) freedom from want and (4) freedom from fear – four ethical requirements which have nothing to do with markets, remarkably. The European Economic Community and then, too, the European Union based their core policy project, the Single European Market, on a totally different understanding of "freedom", when they alluded to the "four freedoms" – in this context, it was all about free movement of the principle economic factors, which needed to be available without borders on a common market, i.e. goods, capital, services and workers. Freedom of movement in this respect was – and still is – a utilitarian, not an ethical idea.

Emancipation of ASFJ from Common Market. However, the ethical side of "freedom" of movement for citizens did not disappear, on the contrary: When the European Union achieved the political project of a common, or even single market, the idea of "freedom (of movement)" was on the way to emancipation from its utilitarian background. The decisive step was the Amsterdam Treaty, when the "Area of Freedom, Security and Justice" took shape and was conceived as a policy of its own, and no longer only at the service of any other political project. In the Lisbon Treaty, the two aspects of "freedom" as a useful means to establish the single market on the one hand and as the implementation of a fundamental right on the other, split decisively into two different series of provisions, spelled out in two different titles of the Treaty on the Functioning of the European Union: Part Three of the TFEU distinguishes between different "Titles" – Title IV elaborates on the policies aiming at "Free Movement of Persons, Services and Capital", in line with the market approach, whereas Title V is devoted to the "Area of Freedom, Security and Justice", which does not contain any hint as to its role for the single market, and stands therefore on its own.

"Back to Schengen". A Roadmap. As the treaty shows, both aspects of "freedom", the utilitarian and the ethical, are historically linked, but not systematically integrated – they dwell side by side in the TFEU, ignoring each other. A last illustration of this ambiguity is the way in which the European Commission argues in favour of re-establishing the "Area of Freedom, Security and Justice", more precisely the Schengen Area, in its "Back to Schengen – A Roadmap" communication, which has been quoted above. The twofold argument for freedom of movement – ethical and utilitarian – marks the whole text, starting with the introduction: "Schengen is one of the key means through which European citizens can exercise their freedoms, and the internal market can prosper and develop. [...] The stabilisation of the Schengen system through the use of its safeguard mechanisms is essential in order to ensure the subsequent lifting of all internal border controls. To fail to do so would not only deprive people of the huge benefits of free movement across borders, but it would impose major economic costs on the EU economy as a whole by damaging the Single Market. From an economic perspective, the Commission has estimated that full re-establishment of border controls to monitor the movement of people within the Schengen area would generate immediate direct costs for the EU economy in a range between €5 and €18 billion annually."

Conclusion

Obviously, the "Area of Freedom, Security and Justice" is a perfect example of how European integration works: pragmatic steps are taken under the premise of their usefulness, but with a hidden agenda – that is to turn them, sooner or later, into a value based foundation for a political union; these steps are incomplete and unbalanced, because national sovereignty does not allow for a reasonable implementation of a fully-fledged political entity at the European level, and the real challenges at any given moment in history do not require more; crises reveal these shortcomings and press for a more balanced, more logical, more complete construction; not all member states agree on such a dynamic, some withdraw from some of those steps, some of them join later, some stay apart. But a core majority of member states reluctantly accepts the need for a European solution of a transnational problem. The future will show whether this incremental method of community building will indeed continue to lead to an "ever closer Union".

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References:

1. For „Dublin", the map is similarly split, but differently. And smaller issues (like the participation of Monaco, e.g.) make the picture even more complicated. All in all, ASFJ is worth a case study in „differentiated integration".
2. To some extent, this is of course true for all the participating states, since airports are points of entry into the „area" as much as land or sea borders.
3. European Commission: Back to Schengen – A Roadmap. Brussels, 4.3.2016 COM(2016) 120 final, p. 11; online: http://ec.europa.eu-/dgs/home-affairs/what-we-do/policies/borders -and-visas/schengen /docs/communication-back-to-schengen -roadmap_en.pdf.
4. Back to Schengen, p. 8.
5. The second paragraph of the preamble of the Charter reads: „Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."

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