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Lisbonising Back and Forth? Strategic Planning and Fundamental Rights in the AFSJ

A The Development of JHA Cooperation through Treaty Changes and Political Programming

While informal cooperation in justice and home affairs (JHA) in Europe occurred already in the 1960s, the more formalised cooperation in the area gained pace with the 1992 Maastricht Treaty and the creation of a three-pillar European Union (EU).[1] By its nature, this cooperation was intergovernmental and technocratic. Initial JHA decision-making was also characterised by secrecy and unaccountability, often justified with the close link between JHA issues and national sovereignty concerns.[2] The 1997 Amsterdam Treaty transferred certain JHA questions to the supranational first pillar (immigration, asylum and civil law measures) whereas others (police and criminal law cooperation) remained within the reformed third pillar. This entailed a partial supranationalisation of the JHA cooperation, but seen as a whole, JHA remained under strong member state control during both the Amsterdam and Nice treaty eras.

As long as the Area of Freedom, Security and Justice (AFSJ) was situated outside the ordinary EU legislative process, it was plagued by accountability deficits, mainly due to the absence of parliamentary scrutiny and judicial control combined with the use of extralegal mechanisms of law-making. One central goal of the 2007 treaty reforms was to address these concerns. With the Lisbon Treaty, the pillar structure was dissolved and most AFSJ legislation was brought within the so-called ordinary decision-making procedure. Most importantly, the treaty elevated the role of the European Parliament into a JHA co-legislator, widened the jurisdiction of the Court of Justice of the European Union (CJEU) in JHA matters, developed the role of national parliaments and increased the coordination and openness of policy-making within the area.[3] The treaty also brought with it important improvements in the fundamental rights infrastructure of the Union. Most notably, the Charter of Fundamental Rights of the European Union

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1 See further Steve Peers, EU Justice and Home Affairs Law (2011) (3rd ed.), 9.

2 Sergio Carrera, Nicholas Hernanz and Joanna Parkin, The 'Lisbonisation' of the European Parliament – Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice, CEPS Papers in Liberty and Security in Europe 58 (2013), 3.

3 See further e.g., Peers (2011), 118, and Carrera, Hernanz and Parkin (2013), 3-4.

(Fundamental Rights Charter) was given "the same legal value as the Treaties".[4] This is particularly important in respect of the AFSJ, as JHA measures often directly affect individuals.[5]

Apart from the treaty framework that sets the contours of JHA cooperation, law- and policy-making is strongly guided by the five-year political programmes adopted by the European Council. The first programme was approved at the European Council meeting in Tampere in October 1999.[6] The Tampere Council ambitiously placed the creation of an AFSJ at the top of the political agenda, and a course was set for widening European integration into issues of high sensitivity. The Tampere Programme (1999-2004) was highly ambitious;[7] it could have even been too ambitious had it not been for the 9/11 and 2004 Madrid terrorist attacks that markedly changed attitudes towards cooperation in security matters.[8] The changed political climate was also reflected in the successor programme, the Hague Programme (2005-2009),[9] which has been characterised as "security-oriented".[10] The third multiannual programme, the Stockholm Programme (2010-2014), was adopted in late 2009.[11] It has been described as a post-war-on-terror-programme due to its emphasis on fundamental rights and the creation of a "Europe of Rights".[12] The Stockholm Programme was recently replaced by the new *Strategic Guidelines for Legislative and Operational Planning in the AFSJ* (2015-2020) (2014 Strategic Guidelines).[13] In the guidelines, the focus is put on transposing, effectively implementing and consolidating the legal instruments and policy measures in place.[14] The guidelines stress the need to ensure the protection and promotion of fundamental rights, while addressing security concerns.[15] However, the wording and structure of the guidelines have raised critique of shifting the focus of AFSJ policy planning back towards a stronger security emphasis, and even that the guidelines counteract the advances in respect of democratic, legal and judicial accountability that already

4 Consolidated Version of the Treaty on European Union (TEU), OJ C 326/13 of 26 October 2012, Art. 6.

5 Helena Raulus, Fundamental Rights in the Area of Freedom Security and Justice, in: S. Wolff, F. Goudappel and J. de Zwaan (eds.), Freedom, Security and Justice after Lisbon and Stockholm (2011), 213 and 229.

6 European Council, Presidency Conclusions (15-16 October 1999).

7 E.g., Hans G. Nilsson and Julian Siegl, The Council in the Area of Freedom, Security and Justice, in: Jörg Monar (ed.) The Institutional Dimension of the European Union's Area of Freedom, Security and Justice (2010), 70.

8 In this regard, it has been referred to the "after New York" period. Cian C. Murphy and Diego Acosta Arcarazo, Rethinking Europe's Freedom, Security and Justice, in: Cian C. Murphy and Diego Acosta Arcarazo (eds.), EU Security and Justice Law: After Lisbon and Stockholm (2014), 5-6.

9 The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53/1 of 3 March 2005.

10 E.g., Thierry Balzacq and Sergio Carrera, The Hague Programme: The Long Road to Freedom, Security and Justice, in: Thierry Balzacq and Sergio Carrera (eds.), Security versus Freedom? A Challenge for Europe's Future (2006), 5 and 18.

11 The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115/1 of 4 May 2010.

12 Murphy and Acosta Arcarazo (2014), 6.

13 Extract from the 26-27 June 2014 European Council Conclusions Concerning the Area of Freedom, Security and Justice and Some Related Horizontal Issues, OJ C 240/13 of 24 July 2014.

14 2014 Strategic Guidelines, para. 3.

15 2014 Strategic Guidelines, para. 4.

had been achieved.[16] A "pre-Lisbon Treaty mindset among the EU member states and the Justice and Home Affairs Council" has hence been identified both as regards the way in which the guidelines were adopted *(procedural criticism*) and in respect of their content *(substantive criticism)*.[17]

As the adoption of the Lisbon Treaty largely brought the AFSJ within the ordinary decision-making framework of the Union, the "Lisbonisation" of the AFSJ has been regarded as a major advance for rule of law in the area. Features such as the extension of the jurisdiction of the CJEU to the AFSJ and the elevation of fundamental rights into a primary source of reference for law- and policy-making can indeed be regarded as a maturisation of the JHA cooperation. Departing in the progress achieved in terms of democratic legitimacy, accountability and fundamental rights protection this article sets out to discuss the 2014 Strategic Guidelines and the idea of a "de-Lisbonisation" of the AFSJ. This article asks whether the rule of law, once introduced, can be reversed by strategic planning. The key to an answer, the article suggests, can be found in the inherent tension between security and freedom (individual rights) in the AFSJ, and the role of political programming as an instrument for striking that balance. By revisiting the concept of "Lisbonisation" and the role of the European Council in policy-making, the article suggests that for all its shortcomings, the guidelines do also seem to leave room for institutional dialogue, which may be of value in itself.

B The Promise and Reality of "Lisbonisation"

Murphy and Acosta Arcarazo have argued that there is a "tendency in EU law scholarship to over-emphasise novelty and to pronounce a new dawn with each new treaty".[18] The Lisbon Treaty is no exception in this respect, and there is an abundance of academic texts in which the changes brought about by the treaty are considered. The "Lisbonisation" notion is often used to emphasise particular developments that were introduced by the Lisbon Treaty. In this respect, "Lisbonisation" has been used to refer to the enhanced role of the European Parliament and in particular to "the expansion of the Community method of cooperation and recognition of [...] [the Parliament's] power to consent in international agreements".[19] However, it can also refer to the liberalisation of the enforcement powers of the Commission and the CJEU and the conversion of former third pillar instruments into EU legislation.[20] In fact, although the "Lisbonisation" term

16 Sergio Carrera and Elspeth Guild, The European Council's Guidelines for the Area of Freedom, Security and Justice 2020: Subverting the 'Lisbonisation' of Justice and Home Affairs? CEPS Essay 13/14 (2014), 1.

17 Carrera and Guild (2014), 1ff.

18 Murphy and Acosta Arcarazo (2014), 1.

19 Carrera, Hernanz and Parkin (2013), 6-7 (note 3).

20 Valsamis Mitsilegas, Sergio Carrera, and Katharina Eisele, The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area? Report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) (2014), 11.

has also been used in several EU documents, there is no common definition of the notion. Instead it is used to highlight particular aspects of the changes that the Lisbon Treaty brought about.

While the Lisbon Treaty has entailed many improvements in the institutional infrastructure of the EU, it is still a product of political negotiations. In the AFSJ, the possibilities to opt-out and the remaining special legislative processes are examples of compromises that are prone to cause incoherence in the policy-making.[21] While the extension of the ordinary legislative procedure to the AFSJ was welcomed for involving the European Parliament, this move also brought with it the general challenges of supranational decision-making. The actors involved in the policy-making have now multiplied, and overlapping tasks and competencies are not uncommon.[22] Furthermore, the ordinary legislative procedure can be criticised for lack of transparency.[23] Finally, it is also important to note that the AFSJ has institutional features that are not regulated in detail in the founding treaties. Agencies, such as the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the European Asylum Support Office (EASO), play a central role in the institutional landscape of the AFSJ, and their tasks are often set in secondary legislation.[24] The autonomy of JHA agencies has been questioned and they have been criticised for expanding their scope of functions informally, hereby avoiding democratic, political and judicial accountability.[25]

The Lisbonisation of the AFSJ therefore reveals a two-fold image. On the one hand, the AFSJ has been brought into the general constitutional scheme of EU decision-making and has become part of a system of constitutional checks (including fundamental rights). On the other hand, this constitutional scheme has its own set of challenges. Moreover, the AFSJ still continues to be a policy area that is characterised by institutional peculiarities and novel forms of governance. The Lisbon Treaty may hence have solved some institutional issues, but also left others open and even introduced new concerns. The institutional improvements that the communitarisation of the AFSJ brought with it are counterbalanced by the challenges arising out of these special features. Phenomena such as agencification work against fully achieving the values of transparency, democracy, accountability, and with it, protection of fundamental rights.[26]

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21 See further e.g., Peers (2011), 64-88.

22 See further Section D.

23 Peers (2011), 121.

24 Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1 of 22 November 2011, and Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11 of 29 May 2010.

25 Elspeth Guild, Sergio Carrera, Leonhard den Hertog and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and Its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office, Report to LIBE (2011), 98-99.

26 Kaarlo Tuori, A European Security Constitution?, in: Massimo Fichera and Jens Kremer (eds.), Law and Security in Europe: Reconsidering the Security Constitution (2013), 79.

Similar conclusions can be made regarding the fundamental rights infrastructure brought about by the Lisbon Treaty. The enhanced role of the CJEU and the elevated status of the Fundamental Rights Charter are counterbalanced by the fact (which has become ever more apparent through the widened jurisdiction) that the CJEU is not primarily a human rights court for dealing with individual complaints. Rather, its main function is to evaluate whether the EU institutions have complied with EU law and to offer guidance to national courts on how to interpret EU law. Article 51 of the Fundamental Rights Charter also states that the provisions of the Charter are addressed to the institutions and bodies of the Union *"with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law"*.[27] Furthermore, for example, the recent CJEU opinion on the EU accession to the European Convention on Human Rights indicates that the obligation to accede to the convention in TEU Article 6 (2) is not that easy to implement.[28]

C The Role of the European Council in JHA Governance

While the founding treaties set the general framework for both JHA cooperation and fundamental rights protection, their *de facto* development is affected by many other instruments and processes. This brings us back to the multiannual policy documents adopted by the European Council, and the position of the European Council in EU decision-making. One of the most notable institutional changes that the Lisbon Treaty brought with it concerning the EU at large was the elevation of the European Council into an official EU institution.[29] This way the Lisbon Treaty confirmed the European Council's role as the supreme political JHA strategist, a role that was already established practice.[30] Article 68 TFEU provides that: "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice."[31]

In performing its role as a strategist the European Council uses a number of different tools. The decisions of European Council take the form of "conclusions". The multi-annual AFSJ policy programmes have, for example, been adopted this way. The European Council also guides law- and policy making through sectoral

27 Emphasis added. See further e.g., Gráinne de Búrca, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?, Maastricht Journal of European and Comparative Law 20 (2013), 168ff.

28 CJEU, Opinion pursuant to Art. 218 (11) TFEU − Draft international agreement − Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms − Compatibility of the draft agreement with the EU and FEU Treaties, Opinion 2/13 (18 December 2014).

29 Art. 13 TEU.

30 Art. 15 TEU. See further e.g., Yann-Sven Rittelmeyer, The Institutional Consecration of the European Council: Symbolism beyond Formal Texts, in: François Foret and Yann-Sven Rittelmeyer, The European Council and European Governance: The Commanding Heights of the EU (2014), 34. On how European Council historically has been considered in the founding treaties, see e.g., Steve Peers, The EU's Political Institutions, in: Catherine Barnard and Steve Peers (eds.), European Union Law (2014), 65-66, and Rittelmeyer (2014), 26-29.

31 The Treaty on the Functioning of the European Union (TFEU), OJ C 326/47 of 26 October 2012.

action plans and strategic programs and through monitoring their implementation.[32] The point of departure, however, as stated in Article 15 (1) TEU, is that the European Council "shall not exercise legislative functions". Hence, as a question of exercise of legislative competence, it is clear that the European Council does not have a formal role. The right of presenting legislative initiatives is generally withheld the Commission.[33]

The adoption of multiannual programming instruments within the AFSJ in essence means defining a strategy or a plan on how to use resources in the attainment of defined objectives. One of the core purposes of the planning is hereby to provide indicators and measures for day-to-day policy-making. Yet, strategies are by definition typically not very detailed.[34] Instead, formulations in programming instruments are often vague and programmatic. The European Council has also decided that its conclusions "shall be as concise as possible", limiting the main text to 15 pages.[35] Furthermore, while the Stockholm Programme was attached as an annex to the conclusions of the Stockholm Council, the 2014 Strategic Guidelines are incorporated into the text of the conclusions themselves.[36] Whatever the reason for opting for a less detailed approach, the limited length of European Council conclusions, combined with the decision of including the guidelines in their entirety within the main text, only underlines the overall priority of the 2014 Strategic Guidelines on transposing, implementing and consolidating measures already in place.

As legal instruments, the European Council conclusions have often been categorised as soft law instruments.[37] While this characterisation is formally true, it is at the same time problematic in that it is prone to downplay their significance. European Council conclusions do, in fact, have legal consequences even though their impact primarily is political. The CJEU has, for example, referred to European Council conclusions when interpreting the meaning of treaty provisions.[38] The TFEU further acknowledges that European Council acts may also produce effects towards third parties (and can in such cases be reviewed by the CJEU).[39] Above all, a claim can be made that the role of the European Council, as it now stands, has a

32 Nilsson and Siegl (2010), 69-72.

33 Arts. 289 and 294 TFEU.

34 Anna Horgby and Mark Rhinard, The EU's Internal Security Strategy: Living in the Shadow of Its Past, UI Occasional Paper (2013), 5.

35 European Council, Conclusions, 21-22 June 2002 (Seville). Also see Rittelmeyer (2014), 35. Although Werts indicates that the rule has not always been respected. Jan Werts, The European Council (2008), 62.

36 European Council, Conclusions (10-11 December 2009), paras. 25-33 and Annex III (a document submitted to the European Council).

37 See e.g., Oana Stefan, Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance, Maastricht Journal of European and Comparative Law 21 (2014) 2, 362, and Nikos Vogiatzis, Exploring the European Council's Legal Accountability: Court of Justice and European Ombudsman, German Law Journal 14 (2013), 1665.

38 See Case C-27/04, *Commission v. Council* (2004) ECR I-6649. Also see Frederic Eggermont, The Changing Role of the European Council in the Institutional Framework of the European Union: Consequences for the European Integration Process (2012), 148.

39 Art. 263 TFEU.

tangible impact in the legislative process by politically restricting the Commission's freedom of initiative.[40] The Commission can, for example, feel obliged to follow on decisions expressed by the European Council because of a fear that its proposals will otherwise fail in the legislative process.[41] For this reason, the European Council has been characterised as an informal pre-initiator of legislation.[42] In this light, the European Council could even be seen as a body that not only 'guides', but rather dictates the legislative agenda; a role that does not derive from its formal powers but from the impact its decisions has on EU institutions and member states.[43] It is due to this role that the European Council has been found to introduce a "new intergovernmentalism" into EU decision-making.[44]

Soft law governance does come with some drawbacks, one of the most important of which is that the adoption of soft law instruments tends to circumvent the formal law-making process. One of the obvious losers in that circumvention is the European Parliament. Another problematic feature of soft law is that it comes with question marks as to its impact. As the legal obligation to follow European Council conclusions is open to debate, the impact of those conclusions is uncertain and depends on how other institutions relate to them. If non-compliance stands out as an institutional failure, it even can have a negative impact on the legitimacy of the political bodies.[45] At the same time, non-compliance (and a questioning of the practical effect of conclusions) is also a way of marking political disagreement.[46]

D Institutional Struggle as Democratic Governance

Finding a proper balance between the EU's main bodies has always been a challenging task. All definitions of tasks have to respect the balance towards other bodies, and avoid imposing too much political power on a single actor. Rivalry in this sense is a characteristic of EU governance.[47] Superficially, the Commission has been compared to a federal executive branch, the Council to a senate-type state chamber and the

40 Paolo Ponzano, Costanza Hermanin and Daniela Corona, The Power of Initiative of the European Commission: A Progressive Erosion?, Notre Europe 89 (2012), 42-43.

41 On the symbiotic relationship, see Eggermont (2012), 347-351.

42 Ponzano, Hermanin and Corona (2012), 12.

43 See e.g., Pierre Bocquillon and Mathias Dobbels, An Elephant on the 13th Floor of the Berlaymont? European Council and Commission Relations in Legislative Agenda Setting, Journal of European Public Policy 21 (2014), 21, and Petya Alexandrova, Marcello Carammia, Sebastian Princen, and Arco Timmermans, Measuring the European Council Agenda: Introducing a New Approach and Dataset, European Union Politics 15 (2014) 1, 154.

44 E.g., Owe Puetter, The European Council – The New Centre of EU Politics, European Policy Analysis (SIEPS) 6 (2013).

45 Stefan (2014), 364-365. See also Jörg Monar, Experimentalist Governance in Justice and Home Affairs, in: Charles F. Sabel and Jonathan Zeitlin (eds.), Experimentalist Governance in the European Union (2010), 257-258.

46 This is also at the heart of the critique of Carrera and Guild, e.g., in urging the European Commission not to abide by the 2014 Strategic Guidelines, but to develop its own AFSJ agenda with an emphasis on fundamental rights. Carrera and Guild (2014), 15.

47 Jean-Claude Piris, The Lisbon Treaty: A Legal and Political Analysis (2010), 237.

Parliament to a popular chamber.[48] In this constellation, the central institutional expression of democratic governance is the compound nature of the Union legislator, and especially the representation of the interests and priorities of both states and citizens. The exact positioning of the European Council into this model is an uneasy task. On the one hand, it could be characterised as an executive body, working in "tandem" with the Commission.[49] On the other hand, this characterisation should not overlook its legislative impact. In fact, the increasing legislative impact of executive bodies is a trend that can be identified in many constitutional legal orders.[50]

The rivalry between the various EU institutions and the constant redefinition and reconstitution of the relationship between the main EU bodies is markedly visible also in the AFSJ agenda setting. Hence, the European Council multiannual programmes are not the sole instruments aiming to direct the development of policies in the AFSJ. Also other EU institutions have put forward various policy documents (strategies, action plans, road maps etc). For example, in March 2014, the Commission published two documents presenting its view on how the AFSJ should be developed after the Stockholm Programme, which is indicative of the division of AFSJ work in between the Directors General of Justice and Home respectively. As a consequence, the two documents focus on very different things; one on security, the other on justice.[51] The European Parliament, on its part, put forward a mid-term review of the Stockholm Programme containing numerous suggestions for action.[52] Some authors have in fact claimed that there has not been one EU AFSJ policy, but a plurality of AFSJ policy agendas.[53]

The tension between the Commission and the Union's "core intergovernmental bodies"[54] (that is, the Council and the European Council) is not a new phenomenon. The struggle over policy-making ownership was already a characteristic feature of the Stockholm Programme era.[55] In the first months after the adoption of the Stockholm Programme a heated exchange took place between the Council and Commission (the "Stockholm affair"). The Commission in its Action Plan was seen to go far beyond the wording and policy priorities of the Stockholm Programme. This made the Council remind the Commission to stick to the

48 Peers (2014), 39. Also see Joseph Weiler, Federalism and Constitutionalism: Europe's *Sonderweg*, Harvard Jean Monnet Working Paper 10 (2000), calling this Europe's unique brand of constitutional federalism.

49 Werts (2008), 54.

50 Robert Schütze, Constitutionalism and the European Union, in: Catherine Barnard and Steve Peers (eds.), European Union Law (2014), 85.

51 Commission Communication: An Open and Secure Europe: Making It Happen, COM(2014) 154 final and Commission Communication: The EU Justice Agenda for 2020 − Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final.

52 European Parliament Resolution of 2 April 2014 on the mid-term review of the Stockholm Programme.

53 Carrera and Guild (2014), 5.

54 Uwe Puetter, Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance, Journal of European Public Policy 19 (2012), 161.

55 Sarah Wolff, The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at Home What the European Union Preaches Abroad, Hague Journal on the Rule of Law 5 (2013), 125.

Stockholm Programme as its guide in AFSJ policy- and law-making.[56] The Commission also later refused to perform a mid-term review of the Stockholm Programme.[57] Another expression of institutional competition in policy-setting has been the occasional reluctance of the Commission to act upon the resolutions and initiatives of the European Parliament despite an obligation to do so in Article 225 TFEU.[58] Against this background, allegations that the European Council in adopting the 2014 Strategic Guidelines has ignored suggestions put forward at the preparatory stage by the Commission and Parliament (mainly concerning fundamental rights and rule of law issues)[59] stand out as yet another expression of an ongoing institutional struggle.

This institutional competition prompts the question of to what extent main bodies are expected to take into account and respect the priorities of others, and above all, how the scope and mandatory nature of Article 68 of the TFEU should be interpreted, which confers the task of defining strategic guidelines for legislative and operation planning upon the European Council. While the relationship between the European Council and Commission can be characterised as a functional division of powers between a political and an administrative body, room is nevertheless left for overlap and institutional competition in legislative agenda setting. Although the Commission has the right of legislative initiative, the factual impact of the European Council can be seen to erode the power of initiative of the Commission.[60] Some authors even identify a general trend of weakening the Commission, one expression of which is the gradual removal of the factual right of initiative from the Commission to the European Council.[61] At the same time, it is commonly acknowledged that one of the central flaws in JHA decision-making concerns the European Council. The European Council has been targeted for lacking a system for public input, for lack of accountability, and for being non-transparent.[62] This is the exact critique that has also been reinvoked in respect of the adoption of the 2014 Strategic Guidelines. Not only is the document targeted for aiming to limit multi-actor programming in the AFSJ, but also for the detrimental impact in terms of input legitimacy that a strong European Council brings with it. Because of this, there is good reason to underline the importance of involving the European Parliament more strongly in political planning.[63]

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56 See further Sergio Carrera, The Impact of the Treaty of Lisbon over EU Policies on Migration, Asylum and Borders: The Struggles over the Ownership of the Stockholm Programme, in: Elspeth Guild and Paul Minderhoud (eds.), The First Decade of EU Migration and Asylum Law (2012), 229-230.

57 Sergio Carrera and Elspeth Guild, Does the Stockholm Programme Matter? The Struggles over Ownership of AFSJ Multiannual Programming, CEPS Paper in Liberty and Security in Europe 51 (2012), 1.

58 See further Carrera, Hernanz and Parkin (2013), 27-28.

59 Carrera and Guild (2014), 7ff.

60 Bocquillon and Dobbels (2012), 22-23, with examples.

61 Werts (2008), 47. Admittedly, however, this is not the entire picture since at the same time the political influence of the Commission can be seen to have increased by using the European Council to make proposals. Ibid., 54, and Eggermont (2012), 347-351.

62 See e.g., Peers (2011), 122, and Vogiatzis (2013),1663.

63 Carrera and Guild (2014), 15.

While a discussion of the Lisbonisation of the AFSJ commonly takes hold of features such as the enhanced role of the European Parliament and the elevation of the legal status of the Fundamental Rights Charter, it should not be overlooked that the Lisbon Treaty also brought with it an affirmation of the status of the European Council. In fact, alongside the European Parliament, the European Council can be seen as one of the greatest "winners" of the Lisbon reform. Hence, while the strong legislative impact of European Council programming can be problematic from a democratic perspective,[64] the fact that the European Council was granted a formal role in EU governance did not come about by accident. Instead, the strong presence of the interests of member states, citizens, and the EU is the very defining feature of EU governance. A rivalry between the main bodies in agenda setting serves as a strategy to avoid the establishment of any single EU institution as too powerful.[65] In this way it could even be seen as an essential part of EU democratic constitutionalism.[66] None of this is to say that the role of the European Council in the AFSJ infrastructure would be unproblematic, for example, from a transparency perspective. The adoption of the 2014 Strategic Guidelines has been a reminder and an opportunity to underline this institutional dilemma at the heart of EU governance.[67] At the same time it must be recognised that the European Council has been positioned as one of the main EU bodies.

E Concluding Remarks

When focus is shifted from the institutional decision-making structures to the "mission legitimacy"[68] of the EU, the more interesting question becomes: which are the values and preferences that the European Council underlines in the 2014 Strategic Guidelines? Do the guidelines really disregard fundamental rights? In this respect, it should be noted that by being elevated into the body of primary law of the Union, the Fundamental Rights Charter cannot be contracted out from through strategic instruments. As European Council conclusions cannot derogate from EU law, policy programming can only prioritise within the limits of that law.[69] With this in mind, the 2014 Strategic Guidelines leave the reader in two minds. It is certainly true that the guidelines do not explicitly refer to the Charter and fail to mention a whole range of fundamental rights issues that have been considered in Commission and Parliament policy documents.[70] On the other hand, the guidelines recognise the inherent tension between security and fundamental rights (and do it,

64 On how the European Council has changed the institutional balance in the EU, see e.g. Werts (2008), 194ff. Although transparency of European Council has improved, it still displays problematic features such as "professional secrecy", see Rittelmeyer (2014), 34-35.

65 See e.g. Piris (2010), 236-237.

66 On liberal constitutionalism in the EU, see Schütze (2014), 86-91.

67 Carrera and Guild (2014), 6.

68 Gráinne De Búrca, Europe's *Raison D'Être*, in: Dimitry Kochenov and Fabian Amtenbrink (eds.), The European Union's Shaping of the International Legal Order (2013), 31 (defining mission legitimacy as "the foundational commitments of a particular state or political system, or the ideals for which it stands").

69 Eggermont (2012), 147.

70 For an overview, see e.g. Carrera and Guild (2014), 8.

moreover, in nearly identical terms to the Stockholm Programme). In respect of fundamental rights, the guidelines emphasise collaboration and better mobilisation of actors, such as the United Nations High Commissioner for Refugees and the Fundamental Rights Agency, indicating concrete measures for improving the fundamental rights record in dealing with migration and in developing a European justice policy.[71] While this is miles apart from the level of detailed attention paid to fundamental rights in the Stockholm Programme, so is also the nature of the two documents more generally. By stressing that the aim is to build upon past programmes and to focus on the transposition and implementation instruments in place, the 2014 Strategic Guidelines leave the door open for later specification.

The vagueness and lack of detail of the 2014 Strategic Guidelines may in fact be viewed both as a possibility and as a drawback.[72] Some commentators have feared that the guidelines will become a dead letter.[73] However, at the same time a lower level of detail avoids a monopolisation the planning process, this way potentially lowering the likelihood of institutional deadlocks. Given the decision-making framework, AFSJ law- and policy-making will always be a sum of the acts of different actors. It is therefore also possible to see the openness in the guidelines as an invitation to the Commission (and Parliament) to present their own priorities for law- and policy-making in the AFSJ. If and when they do, it is the discourse on the various proposals that is the guarantee of representation of different political priorities.

71 2014 Strategic Guidelines, paras. 8 and 11.

72 Werts (2008), 66 notes that such vagueness is a common feature of Council Conclusions. As a result "States who agree with the text declare it sacrosanct whereas those who do not like to stress that they are not bound".

73 See e.g., Philippe De Bruycker, The Missed Opportunity of the "Ypres Guidelines" of the European Council Regarding Immigration and Asylum, MPC Blog (29 July 2014), and Elizabeth Collett, The EU's Strategic Guidelines on Migration: Uncontentious Consensus, But Missed Opportunity, Migration Policy Institute Commentary (July 2014).