ELISA ORRÙ

ALBERT-LUDWIGS-UNIVERSITÄT FREIBURG

Freedom, security and justice in the European Union: a short genealogy of the "Security Union"

Libertà, sicurezza e giustizia nell'Unione Europea: una breve genealogia dell'"Unione della sicurezza"

Abstract: This article focuses on the so-called "Area of Freedom, Security and Justice" (ASFJ), namely the policy field of the European Union (EU) that covers judicial and police cooperation, migration and asylum policies and the control of external borders. The article explores how the AFSJ has emerged and how, within it, the relationship between freedom and security has evolved over time and brought about a shift towards a "Security Union".

Abstract: *Questo articolo tratta del cosiddetto "Spazio di libertà, sicurezza e giustizia" (SLSG), ovvero il settore di politiche dell'Unione europea (UE) che copre la cooperazione giudiziaria e di polizia, le politiche di migrazione e di asilo e il controllo delle frontiere esterne. L'articolo analizza come lo SLSG sia emerso e come, al suo interno, il rapporto tra libertà e sicurezza si sia evoluto nel tempo e abbia recentemente portato all'emergere di una "Unione della sicurezza".*

1. *Introduction*

Since the modern era, the provision of security has been seen as one of (and often "the") most important task and legitimizing function of the state. It is not surprising, thus, that during the process of European integration, states have been for a long time reluctant to transfer competencies in this field to the EU. However, recently, the formerly almost exclusively economic integration has been broadened to areas pertaining to security policy. This development has crystallized into the AFSJ, which covers a broad range of

EU policies, ranging from judicial and police cooperation to control of the external borders[1].

In the following pages, I will illustrate how this area of EU policy has emerged over time and which dynamics currently shape it. Section 2 briefly sketches the emergence of the AFSJ from its initial phases to its current state and analyses how the core concepts and their mutual relationship has been laid down in the EU treaties. Section 3 moves the focus from EU primary law to the executive strategic programmes that have defined the lines of EU policy in this field since 1998. This section analyses how the relationship between security and freedom is concretely devised and translated into operative measures. Section 4 focuses on the main security measures that have been realised in the AFSJ, namely large information systems for the collection, processing and exchange of data among authorities of the Member states. It depicts the proliferation of such systems that has taken place during the last three decades and the current efforts to boost the capabilities of existing databases, especially by implementing biometric systems and increasing their interoperability. This boosting is motivated, as this section highlights, by a self-driving logic, in which security is the imperative to be realised also at cost of freedom of movement, once set as a priority. Section 5 concludes by recapitulating the main theses of the article.

2. *The AFSJ as an area without internal borders*

Since its creation, the policy field today covered by the AFSJ has developed from a subsidiary into a key field of EU activity. By the mid-80s the initiatives in this field were still considered compensatory measures to the abolition of border controls. The Treaty of Maastricht, in 1992, firstly recognized this action field as pertaining to „projects of common interest"[2]. Finally, in 1997, the Amsterdam Treaty clustered the policy measures under the common label "AFSJ" and elevated them to one of the central policy areas of the EU.

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[1] For an introduction to the AFSJ, see M. FLETCHER – E. HERLIN-KARNELL – C. MATERA, eds., *The European Union as an Area of Freedom, Security and Justice*. London/New York, Routledge, 2017.

[2] Title VI, Art. K.

The current legal basis for the measures adopted in the AFSJ is provided by the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU). Both treaties have been introduced by the Lisbon Treaty, entered into force in 2009, which amended the previous basic texts of EU and European Community law. In the Preamble of the TEU, the establishment of an AFSJ is set as a goal of the EU and presented as a way to facilitate the free circulation of people while guaranteeing safety and security. Neither the TEU nor the TFEU define the AFSJ. However, both documents provide clear indications on its nature and elements. First of all, Art. 3 (2) TEU clarifies that the AFSJ is to be understood as an area of free circulation of people without internal borders. At the same time, this paragraph makes the double sidedness of this area explicit:

> «The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime».

The freedom of movement within this area, according to this narrative, shall thus be accompanied by control and security measures both at the external frontiers and within this same area. The close link between freedom of movement and security, which had already been set by the Schengen treaties, is thus reaffirmed in EU primary law.

This understanding is specified in Art. 67 TFEU, which opens Title V of the Treaty, called "Area of Freedom, Security and Justice":

> 1. «The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
> 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters».

This Article provides precious insight for understanding key elements of the AFSJ. The first paragraph introduces the concept of an AFSJ, for which, in addition to the triad "freedom – security – justice" also the term "area" plays a critical role. The tripartition of the following part of Article 67 suggests that each paragraph is dedicated to the more detailed depiction of each of the elements of the triad "freedom – security – justice" respectively. However, only the terms "security" and "justice" are explicitly mentioned in the corresponding paragraphs (3 and 4), while the word "freedom" is not used in paragraph 2. Notwithstanding this omission, paragraph 2, as we will see below, contains important information for specifying the understanding of freedom which inspires this policy area.

"*Area*", to start with, refers to the idea of a single space including all member states. In the case of the AFSJ, the geographic dimension is strictly connected to a symbolic and value-laden component, as it is a space in which freedom, security and justice shall be realized.

In the context of European integration, the term "area" has often been used to refer to topics that are not yet object of a common policy field, but already involve more intense cooperation than ordinary intergovernmental collaboration. An example of this use is provided by the suggestion made in 1977 by the then French President Valéry Giscard d'Estaing to create a «European judicial area»[3]. The suggestion referred to the

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[3] The original French expression is «espace judiciaire européen» ("space" being the term used in the French equivalent of AFSJ, namely "espace de liberté, de sécurité et de justice"). See *Proposition de M. Valéry*

intensification of member states' integration in the field of criminal law. A more recent example is the expression "European Research Area", launched in 2020 to design a strategy aiming to overcome the fragmentation of the national research and innovation programs within the EU[4].

The term "area" then, in the context of EU politics, is often used with programmatic intents to denote policy spheres that are not yet completely transferred under the competence of the EU but shall become more and more object of a common strategy. The concept of a common area, thus, suggests the belonging to a community of states with a shared space of action. While this common space is thus entailed in (and set through) the use of the concept of "area", the character of the specific measures is still to be defined – indeed their shared definition is the main aim of the creation of the common area in the first place[5]. The use of the term "area", thus, has a strong programmatic character. In the AFSJ, a significant part of this measures has materialized into the creation of large databases and the intensification of information collection and exchange among the member states, as I will describe in more detail below.

Partially contrasting with this strong programmatic component, the word "area" is used in the TFUE also to define the common European market, which has been a core aspect of European integration ever since and one of the first to have been completely transferred to the area of competence of the European Community[6]. Not only is the internal market positively defined, while, by contrast, a univocal and explicit definition of the AFSJ is missing from the EU treaties. A significant asymmetry is also apparent at the theoretical level. The European internal market, indeed, is anchored in a defined

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Giscard d'Estaing concernant l'espace judiciaire européen (Bruxelles, 5 décembre 1977), https://www.cvce.eu/obj/proposition_de_valery_giscard_d_estaing_sur_la_mise_en_place_d_un_espace_judiciaire_europeen_bruxelles_5_decembre_1977-fr-c7f7171f-f73a-4ab4-829e-faa221acaeca.html [data ultima consultazione 19/07/2022].

[4] COM(2020) 628 final of 30.9.2020.

[5] In a similar vein J. MONAR, *Die politische Konzeption des Raumes der Freiheit, der Sicherheit und des Rechts: Vom Amsterdamer Vertrag zum Verfassungsentwurf des Konvents*, in: P.-C. MÜLLER-GRAFF, ed., *Der Raum der Freiheit, der Sicherheit und des Rechts*. Baden-Baden: Nomos 2005, 29–41, p. 30.

[6] Art. 26 (2) TFEU, ex-Artikel 14 EGV defines the internal market as an «area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties».

theoretical context, namely the economic doctrine of the Comparative Advantage, according to which the free movement of production factors and of products in a given territory would provide the precondition for achieving the "best" macroeconomic results[7]. No similar consistent theoretical background has shaped the AFSJ, whose development so far has been more the result of disparate practices than of a cohesive and theory-backed project. The AFSJ, in other words, lacks the theoretical self-reliance and coherence characteristic of the internal market. As we will see below, this condition is also reflected in the initial practical dependency of the policies that have merged into the AFSJ on the realization of the free market.

This dependency on the free market is also apparent in the conception of "*freedom*" which emerges from the illustration of the AFSJ provided by Art. 67 TFEU quoted above. As mentioned, the first introductory paragraph is followed by three further paragraphs specifying how freedom, security and justice shall be realized. Paragraph 2 should be concerned with the concept of freedom, in the same way as paragraph 3 is concerned with security and paragraph 4 with justice. However, as mentioned, the term "freedom" is not used in paragraph 2. Instead, the focus is on the absence of controls at the internal borders, on a coordinated management of the external borders and on a common migration and asylum policy. The application of these considerations to the concept of freedom may appear singular. However, at closer inspection this framing of freedom is consistent with the understanding of freedom as substantially identical with "free movement" that has ever since shaped the EU policy field of justice and home affairs.

In 1998, shortly after the Amsterdam Treaty, which introduced the expression "AFSJ" into Union law, the priority of free movement over other dimensions of freedom was prominently stressed by the «Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice»[8]. This document clarifies that the understanding of freedom as free

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[7] P.-C. MÜLLER-GRAFF, *Der Raum der Freiheit, der Sicherheit und des Rechts – Der primarrechtliche Rahmen*, in: MÜLLER-GRAFF, ed., *Der Raum der Freiheit, der Sicherheit und des Rechts*, cit., pp. 11–27: 13.

[8] Adopted by the Justice and Home Affairs Council of 3 December 1998, EG C 19/1 Official Journal of 23.01.1999.

movement has been so far the core of the conception of freedom adopted in this policy area. Under the title «a wider concept of freedom» it states:

> «Freedom in the sense of free movement of people within the European Union remains a fundamental objective of the Treaty, and one to which the flanking measures associated with the concepts of security and justice must make their essential contribution»[9].

The document itself, in the next lines, pleads for a broadening of the conception of freedom relevant for EU policy to also include the respect for fundamental rights, the respect for privacy and the protection of personal data. This plea confirms what is explicitly stated in the quoted passage, namely that the dominant understanding of freedom in this policy area consists in the freedom of movement of (certain groups of) people within a given territory.

Inherent to this conception of freedom is the absence of controls at the internal borders, which would hamper the circulation of people. According to the logic shaping this policy area, the absence of controls within the defined territory requires compensatory measures. These have to be realized through common actions in the domains of external border controls, migration and asylum policy and crime control, thus explaining the relevance given to these measures in paragraph 2 of Art. 67 TFEU, where the place of "freedom" is occupied by the "flanking measures" considered to be necessary for enabling the free movement of people within the EU territory.

Security thus, in the wording of Art. 67 TFEU, has infiltrated the space of freedom through measures meant to compensate the reduction of internal border controls. This goes beyond understanding freedom and security as «twin imperatives»[10] as it has been the case since the Schengen Treaties. The meaning of security relevant for the AFSJ is furtherly specified in paragraph 3 of Article 67 TFEU. This paragraph lists the kind of

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[9] Part 1, Paragraph 6.

[10] The expression is borrowed from W. WALTERS, *The Frontiers of the European Union: A Geo-strategic Perspective*, in «Geopolitics», IX, 3, 2004, pp. 674-698. 683 as quoted in S. ELLEBRECHT, *Mediated Bordering*, Bielefeld, transcript Verlag, 2020.

measures which shall sustain the search for a "high level of security" within the EU. These include the prevention and repression of criminality, racism and xenophobia, and, in the field of criminal law, an increased cooperation, the recognition of foreign decisions and possibly the approximation of national criminal law.

Security is thus first of all understood as internal, as opposed to external, security. However, the provision of security, as an exercise of the monopoly of force within a territory, is in the EU still a prerogative of the member states. Therefore, the sphere of competence for a common European security policy in the AFSJ is limited to the field of action associated to the freedom of movement within the EU territory and has its logical focus on the reaction to or limitation of the (perceived or potential) dangers that (are supposed to) derive from people's free circulation[11].

The mentioned passage of the 1998 Action Plan confirms this nature of security and justice as "flanking measures" for the realization of freedom of movement. The particular kind of security that shall be realized in the AFSJ, thus, is in a way ancillary towards the freedom of movement that shall be facilitated in the sake of the European free marked.

A similar dependency on the freedom of movement is also evident in the conception of *justice* encapsulated in paragraph 4 of Art. 67 TFEU. As main measure for the realization of justice in the AFSJ, this paragraph mentions the recognition of legal decisions in civil matters. According to this understanding, the legal framework shall thus facilitate overcoming the challenges that emerge in connection with the freedom of movement[12]. People living and working in different EU-Countries shall not be hampered by too time-consuming procedures for the recognition of national legal decisions by other member states. If compared with the common use of the term "justice", thus, the conception underlying this Article is very restricted. It focuses exclusively on the legal dimension of the term "justice", thus neglecting aspects connected with fairness and equality, to mention but a few. Even from an exclusively legal perspective, this

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[11] Vgl. H. G. FISCHER – M. KELLER, eds., *Justiz und innere Sicherheit im EU-Recht: die EU als Raum der Freiheit, der Sicherheit und des Rechts*, Köln, Bundesanzeiger-Verlag, 2014, chapter 1.

[12] Ibid.

conception appears very selective, since it only focuses on civil law and neglects other areas such as criminal and administrative law.

3. *The relationship among freedom, security and justice: Towards a "Security Union"*

The previous considerations have highlighted that the concepts of freedom, security and justice are closely linked to the concept of freedom of movement as a key element of the European internal market. Freedom is equated with the free movement of people, which, together with the free movement of goods, services and capital, is a precondition for the functioning of the internal market. Furthermore, security and justice are, according to the TFEU, functional to the realization of freedom (understood as freedom of movement), since they shall put in place a set of measures aiming to overcome the challenges that originate from the freedom of movement.

From this perspective, the four freedoms of the common market (freedom of movement of goods, services, capital and people), as they were set by the Treaty establishing the European Economic Community (ECC) can be considered to be the «germ cells»[13] of the later cooperation in the area of justice and home affairs. Moreover, a critical role in the process which led from the setting of the ECC to the establishment of the AFSJ was played by the Schengen treaties, which initiated the dismantling of controls at the internal borders[14]. Considering this long-term historical context, thus, freedom in the specific meaning of freedom of movement seems to be the primary concept, from which both security and justice conceptually depend.

If one looks at the way the AFSJ has been shaped and specified by strategic documents of executive bodies, however, another picture emerges. In 1998, in the Action Plan «on how best to implement the provisions of the Treaty of Amsterdam»[15], freedom, as mentioned above, is set as the key concept. However, its accomplishment is anchored in the realization of security measures. According to the Action Plan, namely, freedom

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[13] Ibid., p. 10.

[14] Ibid, chapter 2.

[15] OJ EG C 19/1 of 23.01.1999.

«is also freedom to live in a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power (nationally, at the level of the Union and beyond) to combat and contain those who seek to deny or abuse that freedom[16]».

This conception is reaffirmed a few lines below: «The full benefits of any area of freedom will never be enjoyed unless they are exercised in an area where people can feel safe and secure»[17].

This anchoring of freedom into security is also reaffirmed in several of the strategic programs released periodically by the European Council since 1999. Each of these programs aims to set the political guidelines to shape the development of the AFSJ in the five following years[18].

The first of these programs, the 1999 Tampere Program for the years 1999-2004, is rooted in the Amsterdam Treaty and provides the political impulse for the development of the AFSJ. According to it, the AFSJ should be «firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law»[19]. This program, thus, assigns to freedom, understood in a broad sense not confined to the freedom of movement, an important role. Nevertheless, the measures adopted under the umbrella of this program are in large part concerned with security. Indeed, 80% of the measures adopted by the Council of the European Union in 2001 and 2002, in the middle

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[16] Nr. 6.

[17] Nr. 9.

[18] See E. GUILD – S. CARRERA, *The European Union's Area of Freedom, Security and Justice Ten Years on*, in E. GUILD – S. CARRERA – A. EGGENSCHWILER, eds., *The area of freedom, security and justice ten years on: successes and future challenges under the Stockholm Programme*, Brüssel, CEPS, 2010, pp. 1–12.

[19] *Tampere Europäischer Rat, 15. und 16.10.1999, Schlussfolgerungen des Vorsitzes, Nr. 1.* See also T. BALZACQ – S. CARRERA, *The Hague Programme: The Long Road to Freedom, Security and Justice*, in T. BALZACQ – S. CARRERA, eds., *Security Versus Freedom? A Challenge for Europe's Future*, London, Routledge, 2006, pp. 1–32.

of the period shaped by the guidelines of the Tampere Program, are to be ascribed to security rather than to freedom or justice[20].

This tendence is strengthened in the next Program, adopted in 2004 by the European Council in the Hauge. The focus on security is clearly revealed by the very text of the Hague Program[21]. Formally, the parts of the Hague Programs containing specific guidelines are almost equally distributed across the three sections "strengthening freedom", "strengthening security" and "strengthening justice". It seems, indeed, that freedom gets the biggest share, since the section "strengthening freedom" is the longest one. A look at the contents of the measures assigned to this section, however, reveals a different configuration. Indeed, security-related issues are dealt with also in the other two parts, formally devoted to freedom and justice respectively. The section titled "strengthening freedom", apart from a first subsection dedicated to the European Citizenship, deals with topics related to asylum, migration and border policy, including return policy, "border checks and the fight against illegal migration", "biometrics and information systems". Under the last point databases such as the Schengen Information System (SIS), Visa Information System (VIS) and Eurodac are mentioned[22]. The section "strengthening justice" discusses not only topics such as speeding up the decision process by the European Court of Justice (EUCJ) and the strengthening of mutual trust, but also the improvement and intensification of cooperation in criminal matters. The selection of matters for this session highlights that the topic "justice" is considered much more from authorities' than from citizens' perspective. Adopting a citizen-centered perspective would have led to stress issues such as the effective protection of fundamental rights and the individuals' access to the judicial system and to complaint mechanisms. The Hague Program, in addition, frames the relationship between security and freedom and between the provision of security and order on the one hand and fundamental rights on the other

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[20] MONAR, *Die politische Konzeption des Raumes der Freiheit, der Sicherheit und des Rechts*, cit.

[21] The Hague Programme: strengthening freedom, security and justice in the European Union (2005/c 53/01).

[22] Ibid., Nr. 1.1 – 1.7; D. BIGO, *Liberty, whose Liberty? The Hague Programme and the Conception of Freedom*, in T. BALZACQ – S. CARRERA, eds., *Security Versus Freedom? A Challenge for Europe's Future*, London, Routledge, 2006, pp. 35–44 and BALZACQ –CARRERA, *The Hague Programme: The Long Road to Freedom, Security and Justice*, cit.

as a trade-off relationship, in which the different elements must be balanced against each other[23].

The trade-off rhetoric is abandoned in the following program, the Stockholm Program «An open and secure Europe serving and protecting citizens» [24] of 2009. This program sets a discontinuity in respect to the previous ones, focusing on the idea of «A Europe of Rights» (Nr. 2) as the precondition of any security measure.

Instead of claiming for a balance between security and protection of fundamental rights, the Stockholm Program posits that the two aspects must mutually support and strengthen each other. According to this document, the measures of the following years must «focus on the interests and needs of citizens» and «ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe» (Nr. 1.1)[25].

The document deals extensively with issues related to the promotion of fundamental rights, including data protection, to democratic participation and to the improvement of access to justice. These topics are discussed in dedicated parts, separated from measures concerned with security, asylum policy, migration control and border checks, which are also extensively discussed in the Program.

In 2014, the «strategic guidelines for legislative and operational planning», also known as "Post-Stockholm-Program" were adopted in the Belgian city of Ypern[26]. Compared with the Stockholm Program, they are sensitively shorter and formulated in a more general way. In contrast to the previous programs, no strategic vision is formulated in the guidelines and the focus seems to lye more on the consolidation of existing measures than on setting a roadmap[27]. Nevertheless, it clearly emerges from the guidelines that the focus has moved again from fundamental rights to security. Indeed, out of the 13 points of the guidelines, only two are genuinely concerned with fundamental

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[23] See GUILD – CARRERA, *The European Union's Area of Freedom, Security and Justice Ten Years on*, cit.

[24] Doc. Nr. 17024/09 of 02.12.2009.

[25] See GUILD – CARRERA, *The European Union's Area of Freedom, Security and Justice Ten Years on*, cit.

[26] European Council, Brussels, 27.06.2014, Doc Nr. EUCO 79/14.

[27] Vgl. S. LÉONARD – C. KAUNERT, *Searching for a strategy for the European Union's area of freedom, security and justice*, in «European Politics and Society», XVII, 2, 2016, pp. 143–149.

rights, basic freedoms and justice. These are the item nr. 4, which deals with the protection of personal data, and the item nr. 11, which is concerned with the rationalization of EU-law and access to it, as well as on the rights of defendants, children and victims, although this point includes measures aimed to strengthen judicial cooperation. Under point 12, the freedom of movement of European citizens is mentioned as one of the freedoms that must be protected. However, by a usual twist, the only specification of how this freedom shall be realized contained in this item links freedom and security, by stating that freedom must be protected «from misuse and fraudulent claim». Apart from the introductory and concluding points (nr. 1, 2 and 13 respectively), all other items of the guidelines of Ypern plead for the intensification of cooperation between Member States' authorities (including police authorities) or deal with issues related to migration, asylum and border controls.

In the following years, the centrality of security is stated also formally in a key document, «The European Agenda on Security»[28], which lays down the path for the transition from a still formally called AFSJ to a «European area of internal security»[29]. This transition shall ensure that the EU develops into an «effective and genuine Security Union», as the yearly communications released by the European Commission (EC) on the measures to be adopted in this area read[30]. The development of the EU in this area has thus entered in a new phase. The efforts are not directed any longer to setting strategic priorities. Instead, emphasis is put on consolidating the objectives that have been set as priorities, among which, as we have seen, the realization of security measures plays a crucial role[31].

Overall, the analysis of the strategic documents has shown that the subject matter of the AFSJ has progressively emancipated itself from its initial status of accompanying

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[28] COM(2015) 185 final, 28.04.2015.

[29] Section 1.

[30] Since 2016, these have been published twice a year. See for an overview: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-security/legislative-documents_en.

[31] See for instance *Security Union report: Keeping up the momentum on implementation of key initiatives*, Brussels, 9 December 2020 (https://ec.europa.eu/commission/presscorner/detail/de/ip_20_2328) and *Communication from the Commission to the European Parliament and the Council on the Third Progress Report on the implementation of the EU Security Union Strategy*, Brussels, 8.12.2021, COM(2021) 799 final.

measures and established itself as an autonomous policy area. In the course of this process and in its concrete implementation, the basic constellation internal to the AFSJ has also changed: The main component of the triad is no longer freedom as freedom of movement. Indeed, it can be seen that in the Council programs and subsequent practice, the relationship between the three elements of the triad is characterized by an imbalance in favor of security. In the AFSJ, both the term "freedom" and the term "justice" are strongly security-related in practice. On the one hand, freedom is reinterpreted as the creation of a secure space free of intruders, and is thus concretized in a series of surveillance measures that clash with the objective of strengthening fundamental rights, especially the protection of privacy and personal data. On the other hand, "justice" is partly defined by security through the emphasis on judicial cooperation and the fight against transnational crime[32]. Security, thus, over time has gained priority over the other two elements, so that today the AFSJ is, substantially, a "space of security".

4. *Circular, self-referential security*

Security, thus, seems to have advanced from a concept ancillary to freedom to the main value to be realized in the AFSJ. But which kind of security is it and into which measures is it translated in practice? A major bunch of the security measures effectively adopted in the AFSJ consists in the creation and maintenance of large information systems for the collection, analysis and exchange of information between the EU member states.

The centrality of European databases has been a key characteristic of the AFSJ since the very beginning of the measures to facilitate the freedom of movement within the EU. Indeed, the Schengen Treaties, which decided the loosening of border controls between the member states, also established that a system for the exchange of information had to be in place before the decided relaxation of border controls could be put in place. Only after the Schengen Information System (SIS) was put into operation in 1995, thus, border checks between the member states were effectively relaxed. During the process of enlargement of the EU in the afterwards years and decades, the newly accessed states

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[32] See MONAR, *Die politische Konzeption des Raumes der Freiheit, der Sicherheit und des Rechts*, cit.; D. BIGO, *Liberty, whose Liberty? The Hague Programme and the Conception of Freedom*, cit.

could effectively reduce or abolish border checks only after their successful connection to the SIS.

Since its establishment, the SIS has undergone several revisions. The version currently in use is called SIS II, or SIS of second generation. The SIS was followed by further databases, including central systems such as Eurodac and the VIS[33], and decentralized systems for information exchange such as the one established by the Prüm Convention (and then transferred within the EU policy framework in 2008) for the exchange of DNA data.

The creation of European databases has thus gone hand in hand with the process of European integration. During the last few years, however, the European information systems have experienced an unprecedent boosting. To the newest initiatives in this area belong the European Passenger-Name-Record (PNR) framework, the Entry/Exit System (EES) and the European Travel Information and Authorization System (ETIAS).

The PNR system, whose creation was decided in 2016, went live in 2018. The PNR Directive[34] obliges flight carriers to transfer the data of all passengers of EU-inbound and outbound (and optionally internal) flights to national information units, usually run by police authorities, where the data are analyzed in order to classify the passengers in different risk categories. In 2017, furthermore, the establishment of the EES was decided[35]. The system is currently developed by the eu-LISA, the European Agency for big information systems, and shall contain the data of third country nationals who enter the Schengen zone for short stays, independent of visa requirements. Since this database will only contain the data of travelers entering the Schengen zone by air or sea, in 2018 it was established to create a further database to collect the data of travelers entering the Schengen area by passing the land borders[36]. This system, called ETIAS, is expected to become operative by the end of 2022.

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[33] The two systems are operative respectively since 2003 and 2011.

[34] Directive (EU) 2016/681 of 27.04.2016.

[35] Regulation (EU) 2017/2226 of 30.11.2017.

[36] Regulation (EU) 2018/1240 of 12.09.2018.

The boosting of European data exchange, beyond leading to the creation of new information systems, has also impacted on previously existing databases in several ways. First, the integration between internal security (such as cooperation in criminal matters) on the one hand and migration policy and border control on the other has increased. While the SIS and VIS were since the beginning conceived as systems with both functions, Eurodac was explicitly introduced as a database to be used only for migration control. However, in 2013 its function has been extended to also include the prosecution and prevention of crime. Moreover, since 2018 also Frontex has formally gained access rights to the SIS II[37]. The Commission additionally plans to modify the legal framework in order to allow police authorities to access the VIS[38].

Second, the possibilities to use biometric data has considerably increased. For instance, while until 2017 it was possible to use biometric data in SIS only for identification purposes (namely for confirming the identity of a person for which the system provided a "hit"), it is now possible to also start searches using biometric data of unknown persons. The categories of biometric data used include fingerprints, DNA profiles (a category of data previously not allowed and newly introduced in SIS) and biometric face pictures. A similar biometric search function has been introduced also in VIS[39].

The last two developments are strengthened by a fourth tendence, aiming at establishing interoperability among the different systems. "Interoperability" indicates an increased interconnection of different databases, ranging from the possibility to search simultaneously different information systems through a common interface to the creation of a common data repository containing the core data of all existing information systems[40]. With respect to the increased fusion of criminalistic purposes and control of migration and borders, the planned interoperability of databases will make the very idea

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[37] Art. 50 Regulation (EU) 2018/1862.

[38] COM(2016) 205 final, p. 10.

[39] Vgl. eu-LISA, *Report on the technical functioning of the Visa Information System (VIS)*, August 2020, 4.

[40] COM(2017) 794 final, 12.12.2017.

of distinction between different uses and destinations of the European information systems obsolete. Also the increased use of biometric data would be furtherly boosted by interoperability: currently, technical innovations are implemented in order to centrally and simultaneously retrieve different databases using biometric data.

The just sketched increase of EU data collection, analysis and exchange has been driven by a logic aiming at "filling the gaps" of previous systems. In the evaluation reports of the EC, indeed, existing information systems are regularly praised for their effectiveness and usefulness. However, the EC regularly identifies new challenges or gaps in the areas covered by data gathering and pleads for an extension of existing databases.

In 2016, for instance, the Commission evaluated the functioning of the SIS as follows:

> «SIS II operates against a background of the most serious concerns on security, cross-border crime and irregular migration – some of the greatest global challenges. The overall evaluation confirms the outstanding operational and technical success of the system. It is clear that no operational system, nor its legal base, will be perfect and in this spirit of continuous improvement the Commission […] has identified opportunities for further enhancing the effectiveness, efficiency, relevance, coherence and EU added-value of SIS II […]»[41].

Similarly, the Commission justifies the introduction of new information systems as follows:

> «While existing information systems cover a very broad spectrum of data that is required in the framework of border management and law enforcement, there are also important gaps. Some of these gaps have been addressed by the Commission with legislative proposals, namely the proposals for an Entry-Exit System and for an EU Passenger Name Record (PNR) scheme. For other

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[41]   COM(2016) 880 final, 21.12.2016, 16-17.

gaps that have been identified, a careful assessment is needed as to whether additional EU tools are necessary»[42].

As seen above, the establishment of the EES generated further "gaps", related to the collection of data of travelers entering the Schengen area by land. In order to fill these newly arisen gaps, the creation of ETIAS was deemed to be necessary. A similar line of reasoning also shapes the Commission's considerations regarding the future development of the PNR measures. Currently, for instance, the date of birth is not part of the mandatory PNR-dataset to be collected and transferred by air carriers to the national PNR database run by police authorities. The lack of this information item has caused instances of mismatching when PNR data received from the air carriers were checked against police and other criminalistic databases. According to the EC, it would be therefore meaningful to compel airlines to also collect and transfer the date of birth of passengers booking a flight. Additionally, the option (currently not formally pursued by the EC) of extending the European PNR to maritime and bus travels has been advanced based on the same reasoning[43].

It is clear that there is in principle no limit to this security spiral: outside of total surveillance, there will always be "gaps" that have to be "filled". The logic driving the boosting of data collection and processing at European level also influences and transforms once more the relationship between security and freedom. Security measures within the AFSJ, are currently led by a circular and self-referring drive, instead of reacting to (perceived) external changes, risks or threats. This logic drives their expansion even when the increased security measures conflict with the basic values of the EU, among which the freedom of movement of people plays a crucial role. This is the case, for instance, of the collection of PNR data of EU-citizens flying *within* the Schengen area (as currently permitted, even though not prescribed, by the PNR directive and as practiced by almost all EU-countries that have implemented the PNR-Directive). Also the basic idea of the new ETIAS system, namely to introduce a travel authorization system for

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[42]   COM(2016) 205 final, 12.

[43] COM (2020) 305 final, 24.07.2020 and SWD (2020) 128 final, 24.07.2020.

travelers who were *exempted* from visa requirements is at odd with the - in this area once so important - freedom of movement. The EU security measures have today reached a point in which they override the very principles whose realization they were originally meant to facilitate. Indeed, as we have seen at the beginning of this article, the security measures were introduced in order to support the realization of the freedom of movement within the EU. Driven by a circular and self-referring logic, they are now turning into practices that restricts or hampers this very freedom and restrict other fundamental rights such as privacy and data protection.

5. *Conclusion*

This article has reconstructed the emergence of the "Security Union" from the EU policy area called AFSJ. The original phenomenon that gave rise to the measures in the AFSJ is the European free market with its fundamental freedoms, namely the free circulation of goods, persons, services and capital. In order for the free market to be successfully realized, individuals must be able to move freely and the obstacles that impede free movement, including border controls, must be removed. Only at first glance does this imply a restraint of public power, because active, public intervention was needed to guarantee that the potential of the free market could fully develop and that the conditions of free circulation were maintained. The initial impetus for the EU-driven expansion of security measures derives from this logic: to ensure that the free circulation of people, goods, services and capital functions smoothly. The European free market is thus the original phenomenon that provided the impetus for the creation of the AFSJ. In this space, freedom as freedom of movement was originally the most important value: the other two concepts, namely security and justice, were functional with respect to the concept of freedom.

However, in the process through which security measures were realized in the AFSJ, an upheaval took place. Security developed its own logic, detached from the challenges of the free market. Current EU security measures are thus, at their core, a form of personal control that has broken away from the original logic of compensation as the counterpart of the free market and spread beyond its initial borders. Consequently, the force driving

the expansion of power in the AFSJ, today, is no longer determined by the original sphere of the common market, but arises from a logic of its own. In this context, security through border-independent control of persons has become an end in itself, that can be justified independently of external challenges such an increase in criminality rates. According to this new self-referential rationale, existing and newly arisen "security gaps" have to be constantly filled.