

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**THE 'LISBONISATION'
OF
THE EUROPEAN
PARLIAMENT**

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

THE 'LISBONISATION' OF THE EUROPEAN PARLIAMENT

**ASSESSING PROGRESS, SHORTCOMINGS AND
CHALLENGES FOR DEMOCRATIC ACCOUNTABILITY IN
THE AREA OF FREEDOM, SECURITY AND JUSTICE**

STUDY

Abstract

This study examines the performance of the European Parliament (EP) in EU area of freedom, security and justice (AFSJ) law and policy-making from the entry into force of the Lisbon Treaty until the end of the first half of 2013. The study places the EP in the new post-Lisbon institutional setting, documenting its transition to 'AFSJ decision-maker', and its new powers to shape and make policy, covering the EU's internal and external security agenda. While the study finds that the EP has become an active co-owner of the EU AFSJ post-Lisbon, demonstrating a dynamic adjustment to its new post-Lisbon role and powers, the authors identify a set of new developments and challenges which have arisen in the exercise of democratic accountability by the EP in the AFSJ since 2009. These developments and challenges call for critical reflection ahead of the new parliamentary term 2014-2019 and the post-2014 (post-Stockholm Programme) phase of the EU's AFSJ.

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AUTHORS

Dr. Sergio Carrera, Senior Research Fellow and Head of the Justice and Home Affairs Section at the Centre for European Policy Studies (CEPS)

Mr. Nicholas Hernanz, Research Assistant, Justice and Home Affairs Section, CEPS

Ms. Joanna Parkin, Researcher, Justice and Home Affairs Section, CEPS

RESPONSIBLE ADMINISTRATOR

Mr Alessandro DAVOLI

Policy Department C - Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

E-mail: poldep-citizens@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:

poldep-citizens@europarl.europa.eu

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EXECUTIVE SUMMARY

The Lisbon Treaty finally brought parliamentary accountability and democratic scrutiny to the heart of the EU's Area of Freedom, Security and Justice (AFSJ), recognising the European Parliament (EP) as co-legislator across the spectrum of AFSJ policy issues and effectively formalising the role of the Parliamentary Committee responsible for Civil Liberties, Justice and Home Affairs - the LIBE Committee – as an 'AFSJ decision-maker', with new powers to shape and make policy related to the EU's internal and external security agenda.

Assessment of the EP's performance in EU AFSJ law and policy-making between 2009 and mid-2013 shows that the Lisbon Treaty has brought about a **'coming of age' of the European Parliament as decision-maker and co-owner of the EU's AFSJ**. During the 7th Legislature, the LIBE Committee has demonstrated a dynamic adjustment to its new role and powers, successfully navigating the inter-institutional decision-making processes and new institutional landscape post-Lisbon. LIBE's contribution has materialised in concrete and visible inputs in the content of adopted EU AFSJ legislation, a higher degree of democratic scrutiny in EU AFSJ cooperation, and the development of new working methods and practices in the conduct of negotiations of complex legislative dossiers.

However, acquisition of its new Treaty-based powers and the adjustment to the role of co-owner of the EU's AFSJ have been accompanied by a number of **new developments and challenges**.

While the Treaties clearly position the EP at the heart of the AFSJ institutional design and decision-making, a number of controversies which have arisen between the EP and its institutional counterparts since 2009 indicate that the **prevailing mindsets in the Council and the Commission have not yet internalized altogether the full scope of the EP's new authority**. Inter-institutional disputes on issues such as Schengen governance or EU-USA cooperation in the so-called "fight against terrorism" are visible examples of the Parliament's struggle to have its authority recognised before the Council. These struggles have come in parallel with **countervailing strategies for legitimation, as the EP has striven to be regarded by the Council and the Commission as a trusted and legitimate co-legislator** and to neutralize past framings of the EP LIBE Committee as a fundamental rights advocate and 'confrontational' actor.

The Parliament's search for legitimacy in the AFSJ means that, while LIBE has been successful in adapting its work to the new plural inter-institutional decision-making processes post-Lisbon, the Parliament has displayed a tendency to adopt or internalize ways of working previously more characteristic of the Council or the Commission. This has led to a **trend towards greater flexibility, informalities and early compromise agreements** with the rotating Presidency and Council in the course of legislative procedures in parallel with an **increasing 'technocratisation' and a degree of depolitisation** of its internal working methods which has, at times, stood in tension with fundamental rights scrutiny, transparency and accountable decision-making. The struggle for legitimacy has therefore presented LIBE with a **fundamental dilemma concerning its identity** both as co-legislator on AFSJ (especially security policy) and watchdog of fundamental rights and democratic scrutiny. Against this background, evaluating the EP AFSJ legislative performance in a post-Lisbon setting cannot rely on the concept of a 'responsible' institutional partner that is solely aligned with a logic of efficiency and rapidity. Rather, it must take as its reference point LIBE's recognised competences (as laid down in the EP Rules of Procedure) to ensure democratic scrutiny, proportionality and fundamental rights and which, by their very nature, imply controversy and confrontation as an essential ingredient of a healthy European democracy.

Post-Lisbon, **LIBE has gradually acquired a role as a 'policy-setter' through the adoption of own-initiative reports and resolutions** on important AFSJ-related

subjects. Although the EP does not have a right to initiate legislation recognised by the Treaties, these 'policy-setting' activities have enabled the Parliament to come forward with its own policy initiatives and strategies on JHA. These have revealed, however, **a number of follow-up and consistency shortcomings**, not only with regard to the Parliament's inter-institutional counterparts (in particular the European Commission), but also in relation to the EP's own policy and legislative work. A case in point is the internal policy inconsistencies generated by the establishment and activities of the Special Committee on Organised Crime, Corruption and Money Laundering (CRIM).

Finally, the EP LIBE Committee has continued to play an important role as a promoter of fundamental rights and rule of law in EU AFSJ cooperation, partly driven by the post-Lisbon legally binding nature of the EU Charter of Fundamental Rights. However, the EP's new role in the shaping and making of EU security policies (police and criminal justice), have caused it to face similar **dilemmas regarding fundamental rights protection as those which the Council and the Commission have long been experiencing themselves**. While the LIBE Committee relies on a number of instruments and safeguards to guarantee the fundamental rights monitoring of its own legislative work and that of the EP at large, the under-developed and fragmented nature of these tools limit their full and mainstream application during legislative procedures.

The new set of developments and challenges identified for the LIBE Committee's legislative and policy-making activities post-Lisbon call for critical reflection and consideration ahead of the next phase of the EU's AFSJ and the forthcoming institutional renewal of the EP and the European Commission in 2014. The EP's LIBE Committee should take full ownership of the AFSJ policy and legislative agenda by seeking to consolidate its own 'legislative and policy identity' firmly anchored in its democratic accountability and fundamental rights mandate and tasks. The EP should find **innovative ways to more effectively and consistently implement** this legislative identity, which should be firmly based within the overarching framework of an **internal horizontal 'accountability, transparency and fundamental rights strategy'**.

1. INTRODUCTION

European Union policies on Justice and Home Affairs (JHA) have traditionally presented a contested relationship with democratic accountability and legitimacy. Since its official kick-off 20 years ago, European cooperation in these domains has been of a predominantly intergovernmental and technocratic nature. JHA policy has been driven by the national interests of member states and the Council, developed through unaccountable and secretive ways outside the remits of the Community method of cooperation and parliamentary scrutiny at national and EU levels. The successive Treaty changes which have taken place since the 1992 Maastricht Treaty have striven to bring JHA, now denominated as the Area of Freedom, Security and Justice (AFSJ), policies gradually closer to the full toolkit of EU institutional, decisional and legal foundations composing the Union legal edifice, including the European Parliament's accountability powers.

One of the objectives of the Lisbon Treaty was to address the democratic and legitimacy challenges of the EU AFSJ. The Lisbon Treaty, which entered into force on 1 December 2009, repacked the previous Treaty framework into the new Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The expansion of the co-decision procedure, now called 'ordinary legislative procedure', to a large majority of AFSJ policy areas, and the scrapping of the First and Third Pillar divide in the Treaties, not only meant an injection of a higher degree of efficiency into EU decision-making. **It also placed parliamentary accountability at the heart of the AFSJ foundations** by formally recognising the European Parliament (EP) as co-legislator in areas which, until then, had remained reserved under the Council's remits (police and judicial cooperation in criminal matters) as well as in the conclusion of international agreements in these domains.

The progressive transition towards parliamentary participation coincided with the first steps of a newly elected European Parliament since July 2009 (7th Parliamentary Legislature). **2014 will be a decisive year for institutional renewal at the EU level**, with the five-year mandate of the European Commission and the EP coming to an end and new European elections envisaged for May 2014. This will also coincide with the end of the five-year multi-annual programme in the EU's AFSJ – the so-called 'Stockholm Programme' adopted by the European Council in 2009, which aimed at setting the AFSJ policy agenda between 2009-2014 – and the start of negotiations towards the post-2014 EU policy and legislative programming strategy by the Council, the Commission and the EP.

Questions related to democratic accountability and legitimacy of EU decision-making are also timely at European levels more generally in light of the ongoing period of economic instability. Decisions taken by the European Council to face the so-called 'economic and financial crisis' have received wide criticisms and concerns, not least by citizens across Europe who now see and experience the deep impact that decisions taken by European institutions have on their daily lives and more intimate liberties. **Calls for a stronger degree of legitimacy and democratic scrutiny of executive and technocrat-driven decision-making at the EU level are spreading across member states' populations.** It can be expected that the increasing the EU's incursion into AFSJ legislation may potentially face similar debates in the future. Individuals become more aware of the effects that EU-level security policies may have over their personal rights, such as data protection or the presumption of innocence, when subject to law enforcement activities and criminal proceedings. **The EP, directly representing the citizens of the Union,¹ is particularly well positioned to meet some of these challenges and ensure that EU decisions "are taken as openly as possible and as closely as possible to the citizen."²**

¹ Article 10.2 of the Treaty on the European Union, Part II (Provisions on Democratic Principles).

² Article 1 of the Treaty on the European Union.

This Briefing Paper examines the EP's performance in EU AFSJ law- and policy-making from the entry into force of the Lisbon Treaty until the end of the first half of 2013. When speaking about the EP, particular attention is paid to the work carried out by **the Committee on Civil Liberties, Justice and Home Affairs (LIBE)**, which has been entrusted with direct competence over a large majority of AFSJ policies and law-making. The LIBE Committee has since become one of the most dynamic Committees inside the Parliament with regards to legislative and non-legislative dossiers. What have been the main and most significant developments in the conduct of democratic accountability by the LIBE Committee in the AFSJ? Which have been the main challenges and shortcomings affecting the performance of its attributed tasks and competences? And finally, what lessons can be learned for its future activities and the next 8th Parliamentary Legislature?

The Briefing Paper shows that **the EP has become a co-owner of the EU AFSJ and actively performed its role as co-legislator.** The acquisition of these new Treaty-based powers has not, however, been without a **number of struggles for authority and legitimacy in its inter-institutional relations with the Council and the European Commission** on issues as sensitive as EU-USA cooperation in the so-called 'fight against terrorism' or discussions on the Schengen governance regime. These cases have revealed most strikingly that while the Treaties clearly position the EP at the heart of the legitimacy of 'the new EU institutional triangle' and AFSJ decision-making, **the mindset in the Council and the Commission might still have not fully envisaged and/or internalised the full reach and scope of the EP's new authority in these domains.** They have perhaps shown that **the EP is also still finding its own ways and patterns of doing things in the building of its new identity as co-legislator in charge of ensuring democratic accountability in the AFSJ, while taking one of the driving seats for security-related policy-making together with the Council.**

Since the end of 2009, LIBE has been successful in adapting its work to the new plural inter-institutional decision-making processes and guaranteeing a higher degree of democratic scrutiny in EU AFSJ decision-making. In this process, however, the Parliament has internalised the ways of working which had been used by the Council and the Commission in the former co-decision procedure as well as in the negotiations of international agreements. These have been driven by an **'efficiency, technocracy and rapidity logic' in the achievement of policy results and compromises that was not used to democratic controversy, transparency and critical debate (and potential disagreement) about their value added, necessity and impact on fundamental rights.** The LIBE Committee had gained a rather artificial reputation as a liberal, progressive and civil libertarian ('left wing') actor, often critical of Council and member states' security-driven priorities and paying too much attention to fundamental rights and proportionality considerations of EU AFSJ policies. After Parliament acquired its new legislative authority in a majority of AFSJ domains following the entry into force of the Lisbon Treaty, it was increasingly pressured and called upon to behave 'responsibly' and 'seriously' and therefore take a more 'balanced' and nuanced (non-controversial) approach, in line with the Council and Commission.

This has created a dilemma for the EP and its LIBE Committee. It has led to **greater flexibility, informalities and early agreement compromises** with the rotating Presidency and Council in the course of legislative procedures which have often come through increasing **'technocratisation' and a certain level of depoliticisation of its internal working methods and policy outputs, sometimes to the detriment of democracy,** where room for controversy and disagreement with its inter-institutional colleagues has often remained limited in practice. Also, the construction of LIBE as 'progressive' or 'left wing' because of its focus on accountability and fundamental rights policy tradition is largely misleading. The Treaties and the EP Rules of Procedure expressly confer upon LIBE the responsibility to hold the Council and Commission accountable in AFSJ decision-making, and to protect fundamental rights as laid down in the Treaties and the now legally binding EU Charter of Fundamental Rights.

That notwithstanding, **and as a result of this process of adaptation, the EP's own internal activities have been affected by accountability, transparency, consistency and even fundamental rights challenges.** Also, the transition of the EP to co-legislator and an institutional actor in the making of EU security-related policies has forced it to confront very **similar dilemmas to those it used to express concerns about when faced by the Council and Commission.** The EP has found itself immersed in working methods and philosophies where 'rapidity', 'responsibility', 'pragmatism' and 'seriousness' are the shared 'rules of the game' in negotiations. This has been accompanied by an **increasing presence and 'lobbying' by member states'** permanent representations in Brussels, which are influencing and passing their national agendas on to Parliament's internal work.

This Briefing Paper argues that these developments have too often played in favour of the Council, member states and the European Commission, sometimes **at the expense of the Parliament's scrutiny and accountability roles.** The EP should carefully plan and devise its own internal strategy towards the next phase of the EU's AFSJ democratic accountability based on the challenges and lessons learned from its role as co-legislator and co-institutional owner of the EU AFSJ agenda. In the next phase of the EU's AFSJ, the EP and its LIBE Committee should take full ownership of the AFSJ policy and legislative agenda by seeking to consolidate its own 'legislative and policy identity' and **finding new/innovative ways of implementing more effectively and consistently its own legislative identity firmly anchored in its democratic accountability tasks and fundamental rights powers.** Such a strategy would play a decisive role in strengthening its future legitimacy in its inter-institutional relations and for the citizens of Europe. The Briefing Paper recommends that the forthcoming parliamentary work and the post-2014 EP AFSJ agenda should be firmly based on **an internal horizontal 'accountability, transparency and fundamental rights strategy'.**

Structure and methodology

After this brief introduction, **Section 2** summarises the rocky road towards 'Lisbonisation' of the EU's AFSJ and the progressive development and expansion of democratic accountability over EU JHA policy. The main changes and innovations brought by the Lisbon Treaty to the role and functions of the EP are particularly highlighted.

Section 3 assesses the main developments in the EP's performance as regards legislative procedures in the scope of the ordinary legislative procedure, international agreements and policy programming in the EU's AFSJ. It examines *the progress made and main shortcomings/challenges* affecting this set of Parliament's activities. The Section focuses in particular on the following dimensions:

First, the post-Lisbon Treaty period has led to the emergence of struggles for authority between the EP and Council and the European Commission; despite the formal enshrinement of the EP as co-legislator and equal institutional partner in the Treaties and inter-institutional agreements, the 7th parliamentary legislature has witnessed a number of bitter battles between the three EU institutional actors which have been versed around the recognition of authority and legitimacy of the EP's democratic accountability competences (**Section 3.1**).

Second, the EP's adaptation to the ordinary legislative procedure has also revealed an increasing use of early (first reading) agreements and informal trilogues with the rotating Presidency and Council, as well as informal 'lobbying' of member states' governments and permanent representations. This system of fast-track law-making has not only transformed the ways in which the ordinary legislative procedure is supposed to work 'in theory and practice', but also poses challenges from the perspective of accountability and transparency of the EP's own internal working methods (**Section 3.2**).

Third, the EP has increasingly acted as a 'policy setter and maker' in AFSJ policies, with a large number of EU policy instruments and initiatives being enacted in own-initiative reports and resolutions during the last three years. These have, however, revealed a

number of follow up and consistency shortcomings not only regarding its inter-institutional counterparts (in particular the European Commission), but also in its own policy and legislative work (**Section 3.3**).

Fourth, the EP LIBE Committee has continued playing an important role as a promoter of fundamental rights and rule of law in EU AFSJ cooperation, partly driven by the post-Lisbon legally binding nature of the EU Charter of Fundamental Rights. The EP's immersion in the 'shaping' and 'making' of EU security policies (police and criminal justice), however, has caused it to face similar dilemmas as regards fundamental rights protection to those confronting the Council and Commission. While the EP counts upon a number of internal procedures and mechanisms in house to guarantee compliance of its legislative work with the EU Charter of Fundamental Rights, these remain scattered, limited in scope and underdeveloped in nature (**Section 3.4**).

Section 4 concludes and puts forward a set of policy recommendations for the next phases of democratic accountability in the current and post-2014 EU's AFSJ.

An assessment such as the one requested in this Briefing Paper requires a carefully crafted **methodological approach** combining desk research and interviews. Our examination has included in-depth desk research of relevant primary and secondary sources. It has involved an assessment of 'the state of knowledge' in the scholarly literature on EU law, decision-making and institutional frameworks, with particular attention on the EP's role, functions and contributions to democratic accountability and legitimacy in the European integration process. This has been combined with an analysis of the literature in political sciences, international political sociology and law covering the EU AFSJ (see the list of References Sources for this paper). Our research method has also included an assessment of relevant EP AFSJ legislative and policy instruments from the end of 2009 until mid-2013, as well as any relevant jurisprudence involving the EP and the AFSJ before the Court of Justice of the European Union (CJEU) in Luxembourg. The authors have also analysed statistics on legislative and non-legislative dossiers during the 7th Legislature of the EP and would like to express their gratitude to the Secretariat of the LIBE Committee for the provision of the statistical information. Desk research has been combined with a set of semi-structured interviews with a selection of MEPs (representing all the main political groups inside the EP), the LIBE Committee Chair, the Head of Unit of the LIBE Secretariat, as well as a number of political advisers and administrations who have been actively engaged in key legislative and policy files and debates in the EP, and presenting both a pre- and post-Lisbon Treaty experience/knowledge of the EP's role in the EU's AFSJ.

For the purposes of this Briefing Paper, a selective and targeted approach was deemed necessary when assessing the EP's post-Lisbon Treaty performance in the AFSJ. The EP's roles and functions are complex and multifaceted in nature and scope. Regarding the AFSJ-relevant aspects, these now include legislative, policy, supervisory and budgetary powers as well as relations with national parliaments. **Our analysis primarily focuses on the legislative and policy-shaping/setting powers that Parliament has acquired and developed since the Lisbon Treaty till the end of the first half of 2013.** More research will still be needed when examining the full range of EP LIBE Committee tasks and activities, in particular the EP supervisory and budgetary roles in AFSJ-related matters, as well as its full performance to mid-2014. The Lisbon Treaty granted to national parliaments the responsibility to take part in the evaluation of AFSJ policies and agencies (e.g. Europol and Eurojust), to develop a greater control of national governments on their EU strategies on these domains and to ensure a reinforced control mechanism of the principle of subsidiarity. However, an evaluation of the ways in which national parliaments have performed and implemented their Treaty powers in the AFSJ, and their cooperation with the LIBE Committee, falls outside the scope of this Briefing Paper.

2. THE EUROPEAN PARLIAMENT AND THE AFSJ: THE ROCKY ROAD TOWARDS DEMOCRATIC ACCOUNTABILITY

Over the past two decades, the EP's role and activities in the EU AFSJ have experienced a progressive evolution and mutation, not least for the EP's LIBE Committee which, since its establishment in 1992, has evolved into one of the most important and paradigmatic Standing Committees in Parliament. Understanding the developments of the EP's powers in AFSJ cooperation and the way in which these have influenced the identity and legislative and policy practices of the LIBE Committee after the Lisbon Treaty is a critical preliminary step in situating and assessing the wider progress of this institutional player in a post-Lisbon Treaty institutional landscape.

As this section will demonstrate, the so-called '**Lisbonisation**'³ of the EP in respect of the EU AFSJ took place some time before 2009. In fact, the EP LIBE Committee started to perform the role as co-legislator from 2005 in some of these policy domains, when the Council decided to transfer a majority of the areas covered by the former EU First Pillar (with the exception of 'legal migration') to the co-decision procedure. The most far-reaching innovation introduced by the Lisbon Treaty concerned the expansion of the Community method of cooperation to police and judicial cooperation in criminal matters, and the granting to the EP of a binding say (consent) in the conclusion of international agreements on the external dimensions of the EU AFSJ.

The first formalised steps in European cooperation on Justice and Home Affairs (JHA) began after the entry into force of **the Treaty of Maastricht** in 1993 when the Treaty on the European Union (TEU) and its so-called 'Third Pillar' (Title VI, Provisions on Cooperation in the Fields of Justice and Home Affairs, Article K) **introduced JHA as a new policy domain into the Union's wider integration process and formally opened the gates for EU cooperation in these areas**. However, JHA policy-making continued to be characterised by a predominantly intergovernmental, obscure and inefficient framework. The European Parliament remained, by and large, marginalised in the legislative process, something which led the literature to underline the 'democratic deficit' affecting EU JHA policies.⁴ Nevertheless, the Maastricht Treaty (Article K.6.2 TEU) stipulated that the

³ The term 'Lisbonisation' is one of the more recent additions to the EU lexicon. It has been used in several English versions of EU official documents. Refer as a way of example to European Parliament resolution of 15 December 2010 on the Communication from the Commission on the Commission Work Programme 2011, 2012/C 169 E/05. There is not a commonly agreed definition of this notion. It is generally understood as comprising the changes brought by the Lisbon Treaty, in particular when referring to the innovations introduced by the Title V (Area of Freedom, Security and Justice) of the Treaty on the Functioning of the European Union (TFEU), Articles 67-89). The term has been also used when referring to the still pending 'Lisbonisation' of Union legislative acts adopted prior the Lisbon Treaty in the areas of police and criminal justice cooperation and which are subject to Protocol 36 on 'Transitional Provisions' (Title VII, Article 10) of the Lisbon Treaty, which comes to an end in December 2014. For the purposes of this Briefing Paper 'Lisbonisation' is understood and used as mainly referring to the changes implied the Lisbon Treaty reform for the competences and powers of the EP in respect of the EU AFSJ, and in particular the expansion of the Community method of cooperation and recognition of its power to consent in international agreements.

⁴ E. Guild, S. Carrera and T. Balzacq (2010), "The Changing Dynamics of Security in an Enlarged European Union", in D. Bigo, S. Carrera, E. Guild and R.B.J. Walker (eds), *Europe's 21st Century Challenge: Delivering Liberty*, Ashgate Publishing, pp. 31-48; J. Apap and M. Anderson (2002), *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union*, CEPS paperback, Brussels; T. Balzacq and S. Carrera (2005), *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy*, CEPS paperback, Brussels; T. Balzacq and S. Carrera (eds) (2006), *Security versus Freedom: A Challenge for Europe's Future?*, Aldershot: Ashgate Publishing; S. Lavanex (2010), "Justice and Home Affairs: Communitarisation with Hesitation", in H. Wallace, M. A. Pollack and A. R. Young (2010), *Policy Making in the European Union*, Oxford University Press, Oxford, pp. 457-477.

Presidency and Commission should regularly inform the EP of discussions held on JHA areas and stated that the Presidency "shall" consult the EP on the principal aspects of JHA activities and "ensure that the views of the European Parliament are duly taken into consideration". The same article also allowed the EP to ask questions or make recommendations to the Council.

To oversee these new, albeit limited, competences in JHA, the EP decided to establish in 1992 a full Parliamentary Committee for 'Civil Liberties and Internal Affairs' – the first official incarnation of the Committee for Civil Liberties, Justice and Home Affairs (LIBE). Initially, the Committee's activities and tasks were significantly limited by the intergovernmental framework which then governed the JHA legislative process. Nevertheless, LIBE was from the outset characterised by **two core components** that progressively enabled the Committee to leverage its influence and role in the EU policy-making spheres. **The first was the Committee's role and mandate to protect and promote fundamental rights within the EU;**⁵ the second was **the strategic activism employed by LIBE as the Committee struggled to have its role recognised and its accountability competences strengthened and properly implemented in JHA cooperation.**

LIBE's efforts to gain authority during the Maastricht Treaty were primarily channelled towards realising the practical application of its 'right of information'.⁶ Simultaneously, LIBE turned its attention to stimulating the political debate around JHA,⁷ giving particular consideration to the protection of fundamental rights within the EU. One of the earliest initiatives by the new Committee was to produce LIBE's first annual report on respect for human rights in the Community, followed by a Resolution on the subject on 11 March 1993.⁸ Subsequent annual reports on fundamental rights were used by the LIBE Committee as an opportunity to advocate and widen the political debate on key fundamental rights-based priorities, including the accession of the EU to the European Convention on Human Rights.⁹

The adoption in 1999 of the **Amsterdam Treaty constituted a further step towards the recognition of the EP as an institutional player in JHA** when domains related to immigration, asylum, visas and other policies related to the free movement of persons were transferred to the Community sphere or cooperation method under the former 'First Pillar' (former Title IV of the Treaty establishing the European Community (TEC)). **Policies dealing with police and judicial cooperation in criminal matters** remained under the 'EU Third Pillar' (former Title VI of the Treaty on the European Union (TEU)), however, and **continued to be governed by an intergovernmental decision-making procedure**

⁵ LIBE's mandate in fundamental rights was formally embedded in Article K2 of the Maastricht Treaty which provided that: "The matters referred to in Article K.1 shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by member states to persons persecuted on political grounds."

⁶ The contestations around realising the Parliament's right to be consulted in certain key JHA matters were first evident in the controversy over the Council's failure to consult the Parliament over the Europol Convention which led the LIBE Committee to issue a Resolution in May 1995 emphasising that "in the context of cooperation between member states, Parliament will increasingly have to assume parliamentary scrutiny functions." See European Parliament, Second Report on Europol, Committee on Civil Liberties and Internal Affairs, 29.2.96, A4-0061/96 PE 215.803 fin., and amended Resolution, adopted 14.3.96. Refer to J. Monar (2012), 'Justice and Home Affairs: The Treaty of Maastricht as a Decisive Intergovernmental Gate Opener,' *Journal of European Integration*, Vol. 34, No. 7, p. 730.

⁷ E. De Capitani (2011), "The Evolving Role of the European Parliament", in J. Monar (ed), *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels, Peter Lang.

⁸ OJ C 115, 26.4.1993.

⁹ OJ C44, 1994, p.32. Repeated reiteration by the Parliament of its call for the Community's accession to the ECHR, prompted the Council to request the formal opinion of the Court of Justice on April 26th 1994. See Opinion 2/94.

which required the Council only **'to consult'** the European Parliament before adopting any measure referred to in Article 34.2.b, c and d TEU.¹⁰

Although with the entry into force of the Amsterdam Treaty in 1999 the LIBE Committee now had the right to be formally consulted on all legislative AFSJ acts, the application of the so-called co-decision procedure (then envisaged in Article 251 TEC) with regard to the 'communitarised' AFSJ fields would only come into effect after a transition period of five years. In the meantime, and as De Capitani has contended,

*faced with the ambitious but fragile perspectives opened by the Treaty of Amsterdam, the European Parliament decided to become a driving force in shaping the future EU action in the freedom, security and justice area and by turning the other community and Union policies into a tool to promote and not only protect fundamental rights.*¹¹

Such efforts were visible in 2000 when the EP followed the European Commission in calling for the Charter of Fundamental Rights to become legally binding¹² and used the Charter as a template for its annual reviews of the fundamental rights situation in the EU and a reference point in reports, resolutions and parliamentary questions.¹³

With the end of the transitional period instituted by the Treaty of Amsterdam in 2005, the LIBE Committee saw major developments in its institutional structure as co-decision was extended to asylum, irregular immigration, data protection, borders and visas and civil law cooperation (exceptions included cooperation in the area of legal migration).¹⁴ **These developments immediately increased the LIBE Committee's standing in the European Parliament as a co-legislative player.** However, even as the European Parliament was taking its place in the AFSJ, a counter-current was presenting **the EP as a 'controversial' and 'progressive' co-legislator.**

LIBE's tradition and efforts to implement its mandate on fundamental rights and the rule of law and to fulfil its responsibility to hold the Commission and Council (and the EU AFSJ decision-making process) more accountable and transparent had earned the Committee an artificial reputation within some EU policy spheres as 'libertarian', 'confrontationally left-wing' and in danger of applying a certain 'radicalism' to the previously intergovernmental and member-states-driven EU legislative process.¹⁵ This construction played into discourses around the validity of the EP's role as a 'trustworthy' and 'legitimate' co-legislator in the AFSJ inter-institutional setting, which became more pertinent with the entry into force of the Lisbon Treaty. The academic literature even engaged in assessing the extent to which 'liberal' EP policy positions or behaviours had shifted towards more 'security-friendly' and 'less confrontational' positions classically held by member states and the Council in light of examples such as the so-called 'Returns Directive'.¹⁶

¹⁰ As laid down in Article 39 TEU.

¹¹ E. De Capitani (2011), "The Evolving Role of the European Parliament", in J. Monar (ed.) *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels, Peter Lang.

¹² Resolution on the impact of the Charter of Fundamental Rights of the European Union and its future status (2002/2139(INI)), P5_TA(2002)0508.

¹³ The LIBE Committee was also an early supporter of the idea to establish a fundamental rights agency, proposing in 2000 to set up a network of independent experts as a preparatory measure and calling on the Commission in 2005 to submit a legislative proposal for the full establishment of an EU agency dedicated to fundamental rights oversight. E. De Capitani (2011), "The Evolving Role of the European Parliament", in J. Monar (ed.) *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels, Peter Lang.

¹⁴ Council Decision 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, OJ 2004 L396/45.

¹⁵ A. Ripoll Servent (2011), "Playing the Codecision Game? Rules' Changes and Institutional Adaptation at the LIBE Committee", *Journal of European Integration*, Vol. 34, No. 1, pp. 55-73.

¹⁶ Refer to Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, OJ L 348, 24.12.2008. See D. Acosta (2009), "The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive

This reputation of the Parliament was largely misleading and is not helpful when seeking to gain a better understanding of the EP AFSJ legislative performance in a post-Lisbon Treaty setting. Fundamental rights have been, and currently are, a key component in the LIBE's mandate, representing an essential ingredient of the 'accountability' that the Committee has been entrusted to deliver in light of its Rules of Procedure, and have little to do with 'left' or 'right' political ideologies. To frame the Committee as more 'left wing' or 'good' because it is fundamental rights-friendly cannot be accepted. 'Confrontation', understood as political controversy resulting from transparent and accountable decision-making, also constitutes an essential ingredient of healthy democracy rooted in the rule of law. Scrutiny of executive and intergovernmental decisions is not meant to be 'non-confrontational'. Here also, an ideological framing is not helpful and remains too simplistic when seeking a proper understanding the actual issues at stake to assess the role of LIBE Committee as co-legislator in the EU's AFSJ. **The stereotypical framing** of the EP LIBE Committee as a fundamental rights advocate and 'confrontational' actor **contributed to the EP adapting to the Council and Commission's working methods and patterns of decision-making behaviour of efficiency, flexibility and rapidity** which, as we argue in Section 3 below, form a difficult relationship with accountability, transparency and fundamental rights.

The EP 'authority-seeking strategy' still continued during the Amsterdam Treaty integration phase. This was, for instance, reflected in a number of EP Resolutions adopted after the Treaty of Amsterdam,¹⁷ where **Parliament reiterated concerns** about: First, the lack of transparency in the Council's legislative debates; second, the insufficient involvement and non-systematic consultation of the EP in international agreements on judicial cooperation in criminal matters and police and the wider EU's external strategy in the AFSJ;¹⁸ third, the non-involvement of the EP fully and in good time in the drafting and updating of the legislative and operational programme in the AFSJ; and fourth, the existence of outstanding deficits in the promotion and safeguarding fundamental rights and freedoms through policies linked to the AFSJ. These are all elements that the EP considered of fundamental importance when ensuring democratic legitimacy and legal certainty in AFSJ decision-making processes. To this we can add the use of litigation before the Court in Luxembourg which resulted in several landmark cases (as shown in Annex 2).

The Lisbon Treaty constituted a decisive recasting of the institutional, decision-making and legal configurations at the foundations of the EU's AFSJ of which the European Parliament and national parliaments were seen as the main beneficiaries.¹⁹ Lisbon's

2008/15: The Returns Directive)", *European Journal of Migration and Law*, Vol. 11, pp. 19-39. See also A. Ripoll Servent (2011), "Co-Decision in the European Parliament: Comparing Rationalist and Constructivist Explanations of the Returns Directive", *Journal of Contemporary European Research*, Vol. 7, No. 1, pp. 3-22.

¹⁷ See as a way of illustration European Parliament, Resolution on the future of the area of freedom, security and justice as well as on the measures required to enhance the legitimacy and effectiveness thereof (2004/2175(INI)), 29 September 2004. European Parliament resolution of 25 September 2008 on the annual debate on the progress made in 2007 in the Area of Freedom, Security and Justice (AFSJ) (Articles 2 and 39 of the EU Treaty), P6_TA(2008)0458. See points E and 1 of the Resolution.

¹⁸ The EP specifically called the Council Presidency and the Commission to consult it "*in respect of each international agreement based on Articles 24 and 38 TEU when the agreements affect the fundamental rights of Union citizens and the main aspects of judicial and police cooperation with third countries or international organizations*", and to keep the EP informed of negotiations on agreements covering the AFSJ, and to ensure that the EP's views were "*duly taken into consideration, as provided for by Articles 39 and 21 TEU and by Article 300 TEC*". Refer to Point 2 of the 2007 Resolution on an area of freedom, security and justice: Strategy on the external dimension, Action Plan implementing the Hague programme.

¹⁹ Addressing the democratic accountability of the EU's AFSJ was one of the priorities during the debates of the Convention on the Future of Europe. Working Group X on Freedom, Security and Justice (Convention on the Future of Europe), called for the 'de-pillarisation' and the incorporation of the old-Third Pillar into the main body of the Treaties, which considered 'democratic control' to be of central importance in the establishment of a common Area of Freedom, Security and Justice

principal innovations included the scrapping of the First and Third pillar division which characterised JHA policies under the Amsterdam Treaty framework and the expansion of the Community method of cooperation as a 'general rule' subject to few exceptions. The formal abolition of the legal duality of the (First/Third) pillar approach represented a major step forward, finally bringing police and criminal justice cooperation under the remit of the Community method of cooperation and common Title V named 'Area of Freedom, Security and Justice' in the Treaty on the Functioning of the European Union.²⁰

The Treaty of Lisbon extended co-decision, later to be re-christened "ordinary legislative procedure", enshrining the EP as co-legislator in areas previously reserved for EU member states' governments, in particular legal migration and the majority of policies on criminal law and policing. The 'unanimity rule' inside the Council was maintained for a number of policy issues considered to be particularly sensitive.²¹ In the majority of these cases, the EP is simply consulted, while in others it has a new power of consent. This is the case, for example, for Article 86.1 on the European Public Prosecutor Office (EPPO) where 'special legislative procedures' will apply. The EP also acquired the power to have **binding say in the conclusion of international agreements on JHA**. According to Article 218 (6) (a) – (v) of the TFEU, the consent (formerly known as 'the assent procedure') of the EP is now required for any international agreement covering areas within the scope of the ordinary legislative procedure.²² The EP is "*now in a strong position to insist politically that its views be taken into account during the definition of the negotiating mandate by the Council and during negotiations themselves*".²³

The resulting picture is one where **the EP LIBE Committee**²⁴ is responsible for the legislation and democratic oversight of the full range of policies linked to the construction of the EU AFSJ, including non-discrimination policy, data protection, free movement, asylum, migration and borders as well as judicial cooperation in civil matters, and, for the first time in the history of European integration, police and judicial cooperation in criminal matters. By becoming co-legislator over security-related (i.e. old Third Pillar-related) policy areas, and giving the EP a binding say in the conclusion of international agreements on JHA, **the Lisbon Treaty effectively formalises the role of the LIBE Committee as an 'AFSJ decision-maker'**, with new powers *to shape and make* policy related to the EU's internal and external security agenda. This role is in addition to LIBE's tasks on fundamental rights protection. One of the Committee's key responsibilities as laid down in the EP Rules of Procedure is stated as "*the protection within the territory of the Union of citizens' rights, human rights and fundamental rights, including the protection of minorities, as laid down in*

(<http://european-convention.eu.int/pdf/reg/en/02/cv00/cv00426.en02.pdf>). See Monar, J. (2005), "Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the Area of Freedom, Security and Justice?", *European Constitutional Law Review*, Vol. 1, No. 2, pp. 226-246.

²⁰ Title V is composed by the following Chapters: Chapter 1 (General Provisions); Chapter 2 (Policies on Border Checks, Asylum and Immigration); Chapter 3 (Judicial Cooperation in Civil Matters), Chapter 4 (Judicial Cooperation in Criminal Matters), and Chapter 5 (Police Cooperation). For an analysis of the changes brought by the Lisbon Treaty on AFSJ policies refer to S. Carrera and F. Geyer (2008), "The Reform Treaty and Justice and Home Affairs – Implications for the common Area of Freedom, Security and Justice", in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot: Ashgate Publishing, pp. 289–307. See also de Zwaan, J. (2011), "The New Governance of Justice and Home Affairs: Towards Further Supranationalism", in S. Wolff, F.A.N.J. Goudappel and J.W. de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm*, T.M.C. Asser Press, The Hague, pp. 7-25.

²¹ Article 86.1 on the European Public Prosecutor (EPPO), Article 87.3 on police operations, Article 89 on cross-border police operations, Article 81.3 on family law and Article 77.3 on passports.

²² In this case, "*The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent*". Moreover, the provision expressly states that: "*(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.*"

²³ R. Corbett (2012), "The Evolving Roles of the European Parliament and of National Parliaments", in A. Biondi, P. Eeckhout and S. Ripley, *EU Law after Lisbon*, Oxford University Press, pp. 248-261.

²⁴ See the LIBE Committee website at <http://www.europarl.europa.eu/committees/en/libe/home.html>

the Treaties and in the Charter of Fundamental Rights of the European Union."²⁵ **What have been the main developments and challenges in the conduct of these democratic accountability tasks by the LIBE Committee in the AFSJ?**

²⁵ See www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC. The Committee is also entrusted with oversight of the EU Home Affairs agencies and for determining the "clear risk of a serious breach by a member state of the principles common to the member states."

3. DELIVERING DEMOCRATIC SCRUTINY TO EU AFSJ DECISION-MAKING: DEVELOPMENTS, PROGRESS AND CHALLENGES IN THE EP

This section examines the main developments in, progress made and challenges characterising the delivery of democratic accountability by the EP in the making of the EU's AFSJ from the arrival of the Lisbon Treaty until mid-2013. It assesses the ways in which the LIBE Committee has so far handled the transition towards co-owner of AFSJ policy- and law-making, while maintaining its responsibilities for democratic oversight and fundamental rights scrutiny in the 'EU institutional triangle'.²⁶ It starts by assessing some of the main controversies and tensions experienced by the EP in its acquired role as legislative co-owner of the AFSJ (Section 3.1). The analysis then moves to the various ways in which the Parliament has adapted itself to the ordinary legislative procedure and the expansion of the Community method of cooperation to a large majority of AFSJ policy areas, including the police and criminal justice (Section 3.2). The role of the EP as 'policy setter and maker' in AFSJ-related policies is studied in Section 3.3. Finally, Section 3.4 moves onto assessing the relationship between the EP's legislative and policy tasks and the EU Charter of Fundamental Rights.

3.1. The European Parliament as co-legislator: Struggles for authority and legitimacy

A number of bitter battles have arisen between the EP, the Commission and the Council since the implementation of the new post-Lisbon AFSJ institutional design. Among those areas which have been the source of inter-institutional disputes, two policy issues have proved to be particularly contentious: EU-US cooperation on data processing for the purposes of the so-called 'fight against terrorism', and legislative developments reforming the Schengen borders system. How should we understand these inter-institutional controversies? Close consideration of the institutional tensions arising from these domains indicates a 'juggling act' being performed by the EP LIBE Committee as it wrestles with the dynamics of defining its authority while fighting to have its legitimacy acknowledged as a responsible and equal co-legislator by its institutional counterparts.

3.1.1. The SWIFT, PNR and Schengen affairs

The topics of EU-US data processing and Schengen offer instructive illustrations, not only because they have sparked the strongest confrontations between the European institutions since 2009, but also because they crystallise a new shift in the inter-institutional dynamics between the EP, the Council and the Commission in AFSJ cooperation.

The first such controversy arose with the EP's voting down of the **2010 Swift Agreement between the EU and the US**.²⁷ The interim agreement, which aimed to give a legal basis

²⁶ This term refers to the status that the EP has acquired and practiced in its relations to the Commission and the Council. P. Craig and G. De Búrca (2011), *EU Law: Text, Cases and Materials*, Fifth Edition, Oxford University Press. Refer also to R. Corbett, F. Jacobs and M. Shackleton (2007), *The European Parliament*, Harper, 7th Edition, p. 245.

²⁷ European Parliament legislative resolution of 11 February 2010 on the Proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (05305/1/2010 REV 1 – C7-0004/2010 – 2009/0190(NLE)).

for US requests for European data on financial transactions (within the scope of the US Terrorist Finance Tracking Program - TFTP), was the first time the EP had the opportunity to make use of its new powers under Lisbon to veto specific international agreements. The EP chose to put its new powers into effect by rejecting the agreement in February 2010 based on concerns over privacy, proportionality and reciprocity.²⁸ It was furthermore reported that parliamentarians were angry at the way the EU had negotiated the deal, without consulting or informing the EP at critical stages of the negotiation process.²⁹ The vote came as a shock to the Council and the Commission, but the Parliament itself was unequivocal. In the words of the former President Buzek,

The European Parliament's concerns on the use of data have not been fully met.... The Lisbon Treaty ... has given MEPs a right of veto over international agreements of this kind. The same governments must accept that the European Parliament will use this power in a way which reflects *its own assessment of the concerns of Europe's citizens*.³⁰ (Emphasis added).

However, the EP's rejection of the agreement was quickly followed by a renegotiated EU–US TFTP agreement that was approved by the EP only four months later, after it negotiated several safeguards with the Council and US Treasury Department.³¹ Despite the EP's input into the revised deal, the principal concerns that the Parliament had originally raised remained largely unaddressed.³² Indeed, the EU-US TFTP agreement has since drawn criticism for not doing enough to ensure the independent oversight of data exchanges between the EU and the US (the EP having compromised on its initial insistence in having a public “judicial” body responsible for receiving requests rather than Europol, as was finally agreed). A report on the inspection of the first six months of Europol's work by its own Joint Supervisory Body, published in 2011,³³ concluded that data protection was not ensured in light of several oral requests from the US Department of Treasury. Several MEPs interviewed for the purposes of this paper remain similarly sceptical about the respect of data protection rules regarding the private data of EU citizens that are sent ‘in bulk’ to the US.

In addition, concerns related to the EU-US TFTP Agreement, and its implementation, are amplified by a lack of access for the EP to classified documents that considerably reduces the information available to monitoring authorities and its scrutiny powers. The EP was also denied access to a document drafted by the Council's Legal Service, which was challenged in front of the Court of Justice of the European Union (CJEU).³⁴ Thus while the EP succeeded in having an input into the revised text of the international agreement, it was ready to accept the second compromise agreement even though it did not represent a significant improvement in terms of fundamental rights, accountability and transparency.

A similar scenario is depicted in the controversy that surrounded the EP's approval of the **EU-US PNR Agreement** in April 2012.³⁵ The agreement, which covered the transfer of

²⁸ European Parliament Press Release “SWIFT: European Parliament votes down agreement with the US” 11 February 2010.

²⁹ S. Pignal, “European parliament rejects US data swap deal”, *Financial Times*, 11 February 2010.

³⁰ European Parliament Press Release, “EP President Jerzy Buzek on the rejection of the SWIFT interim agreement by the European Parliament” 11 February 2010.

³¹ Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the EU to the US for purposes of the Terrorist Finance Tracking Program, OJ L 195/5, 27.7.2010. See also the European Parliament Press Release, ‘Parliament gives green light for SWIFT II,’ 08.07.2010.

³² See A. Amicelle (2011) “The Great (Data) Bank Robbery: Terrorist Finance Tracking Program and the “SWIFT Affair””, Research Questions Nr 36, Sciences Po CERI, May.

³³ See Europol Joint Supervisory Body, *Report on the Inspection of Europol's Implementation of the TFTP Agreement, Conducted in November 2010 by the Europol Joint Supervisory Body*, JSB/Ins. 11-07, Brussels, March 2011.

³⁴ See Case T-529/09 Sophie In't Veld v Council, 4 May 2012.

³⁵ Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, OJ L 215/5,

Passenger Name Records (PNRs) – personal data of passengers stored by airlines – to the US, was to replace a 2007 PNR agreement that had been provisionally applied since the CJEU annulled a 2004 PNR agreement following an action brought by the EP on data protection grounds.³⁶ In April 2012, the EP approved the new PNR agreement in a vote which proved so controversial that the rapporteur, MEP Sophie In't Veld, withdrew her name from the report in protest that the final vote failed to respect the EP's recommendations.³⁷ In't Veld contended that the agreement left serious data protection concerns, including concerns over the data retention period (15 years), compliance with the purpose limitation principle and the use of sensitive data for profiling or data-mining – all elements which were similarly criticised by the European Data Protection Supervisor (EDPS).³⁸

The pattern of the EU-US PNR agreement therefore took a similar shape to the EU-US TFTP deal. While the Parliament succeeded in inserting certain improvements, it nevertheless gave its consent to an agreement where the most serious sources of concern – principally those affecting fundamental rights – remained in place and largely open.³⁹

Schengen – one of the most important and symbolic policy areas in the AFSJ – has also been at the heart of controversy during the 7th Parliamentary Legislature. Unlike the above examples of tensions surrounding international agreements, Schengen and border controls were 'communitarised' several years before Lisbon and therefore it may be surprising that this domain has been the source of new inter-institutional disputes since 2009, most notably in the form of the so-called '**Schengen Freeze**'.⁴⁰ The controversy arose over the decision in 2012 by the Danish Presidency, endorsed by the JHA Council, to unilaterally change the legal basis of the Commission's proposed Regulation for a new Schengen evaluation mechanism.⁴¹ The move, effectively excluding the EP mid-way through a legislative procedure, revealed a pre-Lisbon mindset among member states in the Council, as did the Council's legislative amendments that significantly watered down the 'Union-focused' nature of the Schengen Governance Package.⁴²

11.8.2012; J. Faull and L. Soreca (2008), "EU-US Relations in Justice and Home Affairs" in B. Martenczuk and S. van Thiel (eds) *Justice, Liberty and Security: New Challenges for EU External Relations*, Brussels, VUB Press.

³⁶ Joined Cases C-317/04 and C-318/04, *Parliament v. Council*, [2006] ECR-I 4721.

³⁷ See European Parliament (2010) Resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada, P7_TA(2010)0144, as well as European Parliament (2010) Resolution of 11 November 2010 on the global approach to transfers of passenger name record (PNR) data to third countries, and on the recommendations from the Commission to the Council to authorise the opening of negotiations between the European Union and Australia, Canada and the United States, P7_TA(2010)0397.

³⁸ The EDPS listed the 15-year retention period, the purpose limitation and the inclusion of sensitive data as elements of concerns in its opinion - see European Data Protection Supervisor (2011) Press Release EDPS/12/11, Brussels, 13 December 2011.

³⁹ See also J. Santos Vara (2013), 'The role of the European Parliament in the conclusion of the transatlantic agreements on the transfer of personal data after Lisbon', *CLEER Working Papers* 2013/2.

⁴⁰ European Parliament Press Release, 'EP decides to suspend cooperation with Council on five JHA dossiers until Schengen question is resolved', 14.06.2012.

⁴¹ Commission proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, COM(2011)559, 16.09.2011, Brussels.

⁴² Commission proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, COM(2011)559, 16.09.2011, Brussels; Commission proposal for a Regulation amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, COM(2011)560, 16.09.2011, Brussels; Council of the EU (2013) Draft consolidated compromise text - Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis, Council Document 10273/13, Brussels, 30 May 2013; European Parliament (2013) Position adopted at first reading on 12 June 2013 with a view to the adoption of Regulation (EU) No .../2013 of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, P7_TC1-

While the reticence displayed by the Council over the Schengen Governance Package was nothing new (reluctance to share EU decision-making powers in AFSJ demonstrates continuity with the pre-Lisbon era), **what is new is the response of the EP**. The change of legal basis by the Council after two years of negotiations was perceived as an act of provocation by the Parliament which responded by taking the unprecedented decision to suspend or 'freeze' cooperation on on-going JHA dossiers.⁴³ This, together with the threats to resort to litigation before the CJEU in official EP statements and press releases, **was an unequivocal show of force by the Parliament's Conference of Presidents**.⁴⁴ Indeed, the decision by the Conference of Presidents to freeze all 'security' files was widely held⁴⁵ to be very efficient in facilitating the conclusion of an agreement with the Council that resulted in the EP achieving a 'de facto co-decision' arrangement. A formal declaration was agreed by the Council, stating that any change to the Schengen Evaluation Mechanism would be subject to consultation with the EP.⁴⁶

A similar readiness by the Parliament to demand full recognition of its authority and competences was evident in the successful action brought by the EP before the CJEU in 2010 annulling the Council Decision 2010/252 governing sea surveillance by the EU border agency Frontex (including **rescue at sea and disembarkation of migrants**).⁴⁷ The EP contested the Decision on the basis that it ought to have been adopted by the ordinary legislative procedure and not by the 'comitology' procedure (based on Article 12) of the Schengen Borders Code.⁴⁸ As with the Schengen Governance Package, the choice of legislative procedure (in this instance the use of a 'Decision' by the Council) effectively meant excluding the EP from the decision-making process. The CJEU upheld the Parliament's complaint, concluding that the contested rules were not minor, non-essential provisions as the Council and Commission maintained, but that "*adoption of such rules constitutes a major development in the SBC system*" and therefore required the approval of the European Parliament.⁴⁹ What do these controversies tell us about the ways in which each of the EU institutional actors have accommodated themselves to a more plural and democratic institutional setting in AFSJ decision-making?

3.1.2. The EP struggles for legitimacy and authority in a post-Lisbon context

The outcomes of these policy disputes need to be viewed in the context of the EP's struggles for legitimacy and authority as LIBE establishes its identity as AFSJ co-owner and legislator.

COD(2011)0242, Strasbourg, 12 June 2013. For an assessment of the Schengen Governance Package refer to S. Carrera (2011), *An Assessment of the Commission's 2011 Schengen Governance Package: preventing abuse by EU member states of freedom of movement?* CEPS Liberty and Security Series, Centre for European Policy Studies, Brussels.

⁴³ The five dossiers concerned were: Amendment of the Schengen Border Code and Convention implementing the Schengen Agreement; Judicial cooperation in criminal matters: combating attacks against information systems; European Investigation Order; Budget 2013 aspects relating to Internal Security; and EU Passenger Name Records.

⁴⁴ European Parliament Press Release, 'Schengen: MEPs strongly object to Council decision and consider legal action' 12-06-2012.

⁴⁵ According to several interviews with policymakers of the European Parliament.

⁴⁶ See Council of the EU (2013) Draft consolidated compromise text - Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis, Council Document 10273/13, Brussels, 30 May 2013.

⁴⁷ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union (2010/252/EU)

⁴⁸ Comitology is a process by which EU law is modified or adjusted not by legislative acts but within "comitology committees" chaired by the European Commission. Comitology procedures are reserved for what has been labelled as 'non-essential' elements or the technical details of the implementation of legislative acts. In fact, these elements are too often highly political in nature.

⁴⁹ Case C-355/10, *European Parliament v. Council of the European Union*, Judgment of the Court of Justice (Grand Chamber) of 5 September 2012

First, these cases reveal a set of struggles over authority and competence emerging since 2009 that indicate that the Council and the European Commission may still have not fully internalised the full reach and implications of the EP's new position as a powerful co-legislating actor in the post-Lisbon EU institutional landscape. Judging by the underlying dynamics of the controversies discussed above, the formal recognition of the EP's powers post-Lisbon have not been accompanied by a full transition in 'mindset' among the Commission, Council and member states. Indeed, the Schengen Freeze and the drawn out negotiations over the Schengen Governance Package were triggered by the resistance of member states to accept the Union-centred approach underpinning the Package (by pushing to maintain the features of an inter-governmental evaluation mechanism and retain decisional power over the reintroduction of internal borders) which revealed a strong preference to retain national sovereignty or even 're-nationalise' elements of the Schengen *acquis*.⁵⁰

In certain scenarios, the Council and Commission have resorted to alternative and inappropriate legislative procedures in order to circumvent the application of democratic oversight to AFSJ policy-making imposed by Lisbon. The choice of legal basis or the decision to use technical (non-accountable) procedures like **delegated acts**, while often justified by the use of highly technical arguments, in reality **often masks deep political issues and institutional struggles** and brings important implications for the degree of influence accorded to the EP in the decision-making process.

However, the EP's response – demonstrated most notably in the Schengen Freeze – reveals **a new self-assurance by the EP in 'flexing its muscles' and making use of the mechanisms at its disposal to exert its legislative authority**. Similarly, controversies sparked over the first voting down of the EU-US SWIFT/TFTP agreement, or the annulment action over the guidelines in the SBC for rescue at sea, **constitute visible examples of the Parliament seeking recognition of its authority before the Council**. These cases indicate that **LIBE's long-standing (pre-Lisbon) 'strategic activism'** in asserting its role and having its powers recognised and properly implemented by its institutional partners **has continued during the post-Lisbon Treaty phase**. The EP has shown itself ready to draw on the range of weapons in its armoury to assert its authority, whether that be litigation before the Court,⁵¹ suspending cooperation on a swathe of legislative files or exercising its powers over international agreements, and it has done so with a degree of success.

However, the EP's struggles for authority have been complicated by its concurrent effort to be considered in its new role as 'legitimate co-legislator' in its relations with the Commission and Council. The inter-institutional pressures to be a 'responsible partner' and the progressive adaptation of the EP as 'trusted' co-institutional owner of the EU's AFSJ has been accompanied by a growing dilemma inside LIBE as to the way in which its powers are to be used and exercised in its relations with the Council and the Commission. The dilemma can be encapsulated, in essence, by a phrase raised by one of our interviewees when asked about the new co-legislator role of the EP: *"the power to say 'no' changes when you have the power"*.

The search for legitimacy may therefore explain the willingness of the EP to pass controversial international agreements and legislation in the post-Lisbon era which, in certain cases, might represent a break or inconsistency with its own past policy positions. For instance, the Parliament's consent to the EU-US PNR agreement not only diverged from its previous stance on the same issue but, as highlighted by the literature, indicated an overall inconsistency with LIBE's previously strong defence of

⁵⁰ S. Carrera, N. Hernanz and J. Parkin (2013), "Local and Regional Authorities and the EU's External Borders: A Multi-Level Governance Assessment of Schengen Governance and 'Smart Borders'", Study for the Committee of the Regions, Brussels.

⁵¹ Refer to the list of European Parliament's use of litigation before the CJEU in Annex 2.

data protection within the EU.⁵² Pre-Lisbon, the LIBE Committee had resisted a policy paradigm – promoted by (among others) the Commission⁵³ – that relied on the so-called ‘balance metaphor’ which called for striking a right ‘balance’ between liberty and security, an approach which has proved to be particularly problematic when applied to data protection and privacy. However, the post-Lisbon EP has, in negotiating international data processing agreements, appeared to limit itself to “damage control” (to quote one senior member of the LIBE Committee)⁵⁴ rather than risk characterisation as a disruptive and unreliable member of the ‘institutional triangle’. This poses LIBE with a relatively new predicament when it comes to finding its post-Lisbon identity as both watchdog of fundamental rights and democratic scrutiny and co-owner of EU security policy. A similar dilemma can be observed when looking at the EP’s experience in the application of the ordinary legislative procedure to AFSJ cooperation, which we now analyse.

3.2. The European Parliament and the ordinary legislative procedure in the EU’s AFSJ

This section deals with the main developments experienced by the EP in its performance and application of the ordinary legislative procedure in AFSJ policy domains. The LIBE Committee is now consecrated as one of the most dynamic committees inside the Parliament. It ranks amongst those EP Committees dealing with the largest number of legislative dossiers and files. As Figure 1 below shows, during the 7th Parliamentary Term (2009 – 2014) LIBE has been responsible for 12% of legislative reports tabled by all the EP committees, making LIBE the second most ‘active’ committee as regards legislative activity (only behind the INTA Committee). Figure 2 reveals a slightly more nuanced picture when looking at the total number of files (legislative and non-legislative) handled by committee, with LIBE in 6th position. When paying attention to LIBE’s handling of ordinary legislative procedure files, it can be highlighted that it has dealt with 9% of those files during this term (2009-2014), compared 7% during the previous term (2004-2009).⁵⁵ This reflects the increasing importance of EU AFSJ legislation in a post-Lisbon Treaty context. As our analysis below demonstrates, LIBE’s incursion in the ordinary legislative procedure has also led to the emergence of a set of informal and flexible decision making processes/practices (Section 3.2.1), which raise in turn a number of accountability and transparency challenges (Section 3.2.2).

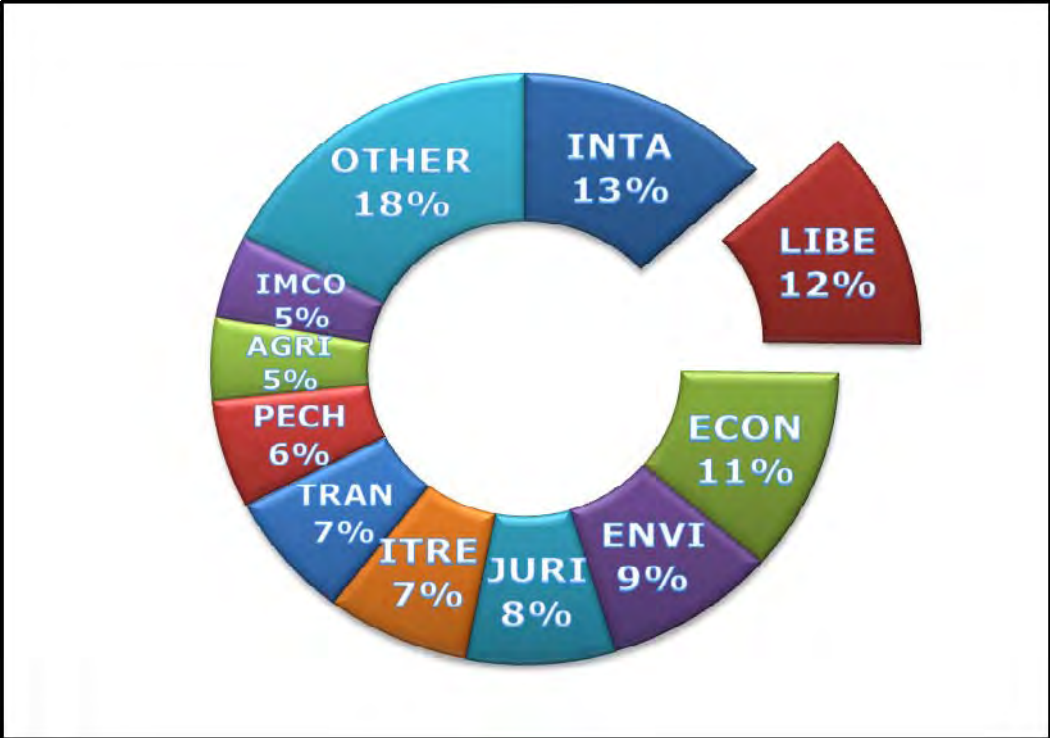
⁵² D. Bigo et al (2011), “Towards a New EU Legal Framework for Data Protection and Privacy: Challenges, Principles and the Role of the European Parliament”, study for the European Parliament’s Directorate General for Internal Policies, Citizens’ Rights and Constitutional Affairs (DG IPOL), November 2011.

⁵³ See, for instance, the Speech by Commissioner Franco Frattini “Data protection and transfer of PNR data”, Strasbourg, 13 December 2006, where Commissioner Frattini states that: “there is an important balance to be struck between measures to ensure security on the one hand and the protection of non-negotiable fundamental rights on the other.”

⁵⁴ See N. Hernanz (2012), “More Surveillance, More Security? The Landscape of Surveillance in Europe and Challenges to Data Protection and Privacy”, Policy Report on the Proceedings of a Conference at the European Parliament, SAPIENT Deliverable 6.4, January.

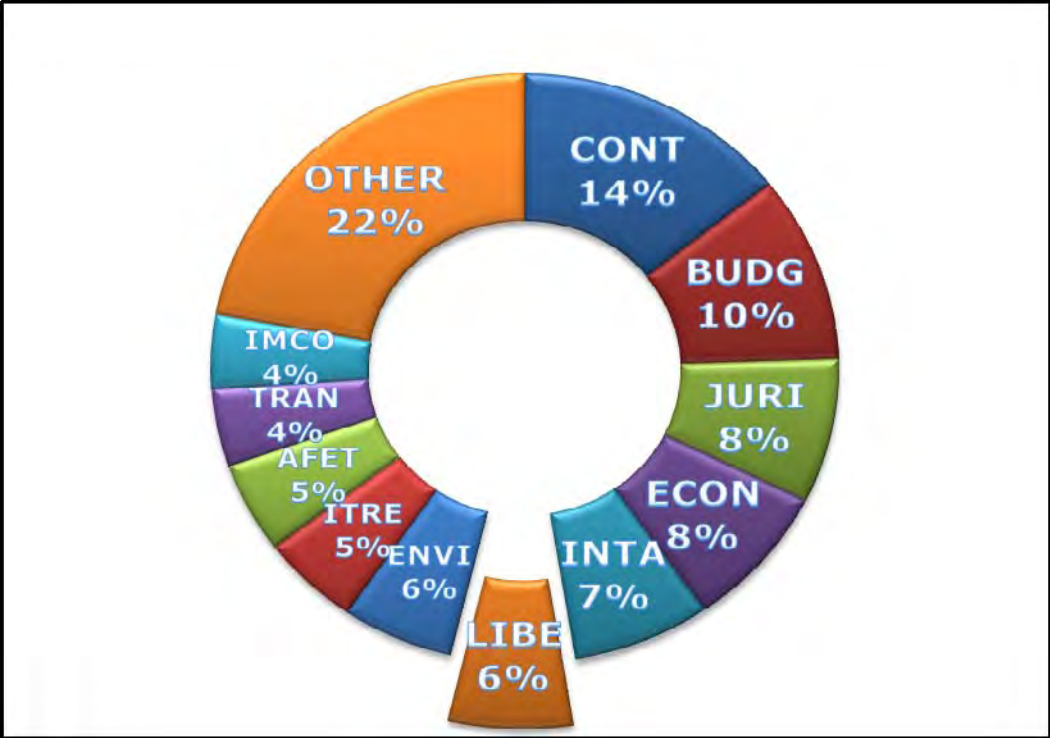
⁵⁵ See the statistics in Annex 1.

Figure 1. Distribution of legislative reports (COD, CNS and APP) by parliamentary committee, 2009–2013



Source: Authors' own elaboration.

Figure 2. Distribution of legislative and non-legislative reports by parliamentary committee, 2009–2013.



Source: Authors' own elaboration.

3.2.1. Informal Legislative Procedures and Methods

Since its establishment by the Maastricht Treaty in 1992, the ‘co-decision procedure’ (renamed the **‘ordinary legislative procedure’** by the Lisbon Treaty and now foreseen in Article 289 TFEU) has been one of the key components of European integration. Still, beyond the general knowledge on the joint adoption by the Council and the EP of a legislative proposal presented by the Commission, **its detailed specifics remain largely unknown or misunderstood**. This is particularly due to the ways in which it operates in practice. While the letter of the Treaties might be clear to a certain degree as regards its procedural steps, the inter-institutional methods that have been developed when applying it have fundamentally mutated this procedure in rather unexpected ways that disrupt its technical and procedural components.

One first revelation emerging from the incursion of the EP’s role in the ordinary legislative procedure into AFSJ-related matters has been **the increasing use of informal ways and paths of behaviour both internally as well as when engaging with the other institutional actors. Ordinary legislative procedure files are being concluded in very preliminary or early stages of the negotiation process** – at first reading or early in the second agreement.⁵⁶ The priority has been to reach agreements and ‘results’ as soon as possible in the procedures with the rotating Presidency and Council.

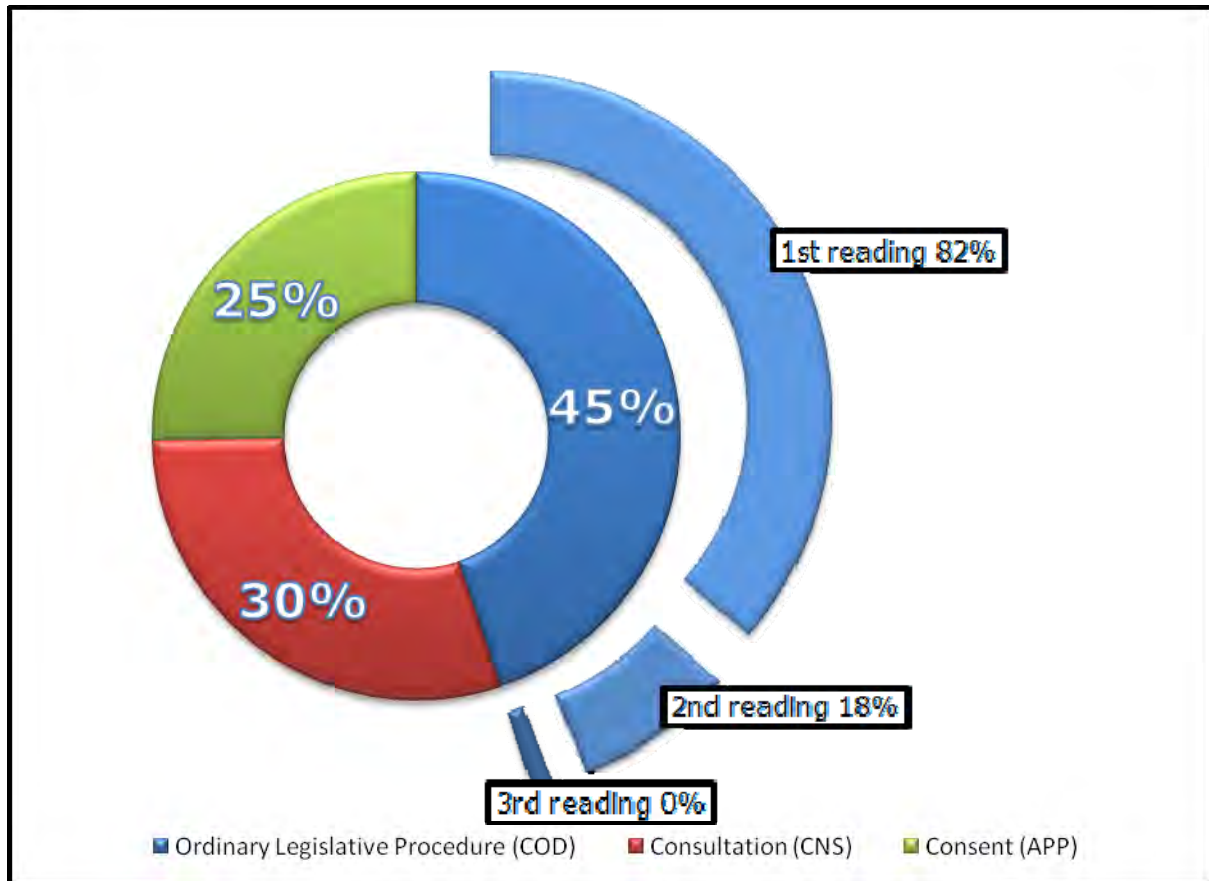
This tendency was not unknown in other fields of activity in Parliament. Also, as regards the AFSJ, it had already started back in 2005 for files falling within the remits of the old First Pillar. According to the EP’s activity report for 2004-2009, **a big majority (84.2%) of agreements reached under the ordinary legislative procedure** in domains transferred by the 2005 Council Decision to the Community method of cooperation (irregular immigration, borders, visas, asylum, etc.)⁵⁷ **was reached in the first reading agreement. The expansion of this practice to the wider AFSJ, however, raises a number of concerns due to the sensitive implications for fundamental rights inherent in its nature and effects.** This is particularly so for security-related policies (police and criminal justice cooperation), as these are areas where the need to ensure a higher degree of scrutiny and transparency is perhaps more crucial in light of their impact over the rights and liberties of individuals.

Since 2009, the ‘first reading agreements’ system has been confirmed and reinvigorated; the proportion of dossiers concluded in first reading has grown exponentially. Figure 3 below illustrates the total percentage of ordinary legislative procedure, consultation and consent reports tabled by the LIBE Committee, as well as the proportion of COD files that were adopted in first, second and third reading (see also Annex 1 of this Briefing Paper for a full statistical coverage of LIBE Committee activities during the reporting period). It is striking to see that 82% of the ordinary legislative procedure files handled by the LIBE Committee have been adopted in first reading between 2009 and the first half of 2013. Only 18% have passed to second reading, and none to third reading.

⁵⁶ See De Capitani, E. (2011), *op. cit.*

⁵⁷ See European Parliament (2009) Activity Report 1 May 2004 to 13 July 2009, PE427.162v01-00, Brussels, p. 11
(www.europarl.europa.eu/code/information/activity_reports/activity_report_2004_2009_en.pdf)

Figure 3: Distribution of LIBE legislative reports by type of procedure, 2009-2013



Source: Authors' own elaboration.

What might the main factors have been that played a role in the increasing use of 'first readings' and 'fast/informal' tracking decision-making by the EP? According to the EP's Conciliation and Co-Decision Activity Report (2004-2006)⁵⁸, it was deemed to be mainly related to "*the greater familiarity*" with the co-decision procedure of the Parliament, Council and Commission. The Co-Decision Activity Report highlighted that:

*Negotiations between the Institutions begin at an earlier stage in the procedure, and they often make faster progress, than was the case in the past. Greater trust and more flexibility in working together have enabled the Institutions to reach more quickly mutually satisfactory agreements on a growing number of legislative dossiers.*⁵⁹

In a similar attempt to explain the reasons behind the disproportionate use of first reading agreements, the EP Activity Report for the period 2009-2011 also alluded to the increasing familiarity with the legislative procedure and the possibility to conclude negotiations with the EP following a simple majority vote. The following factors were added:

Sometimes, it is also feared that files with controversial issues may be blocked in the Council. Also, there are more and better contacts between the institutions whose representatives start talking to each other earlier in the procedure. Furthermore, there is the agenda-setting at the highest level for politically sensitive files. Finally, the Council Presidencies seem eager to reach early agreements during their Presidencies and seem to favour first reading negotiations, for which the arrangements are more flexible than in later stages of the procedure (in the first reading there are no time-limits). The Parliament tends to try and use this eagerness and the internal debating in the Council to get better results in the negotiations. In addition, the Commission often pushes for an early adoption because it will

⁵⁸ www.europarl.europa.eu/code/information/activity_reports/activity_report_2004_2006_en.pdf

⁵⁹ Page 10 of the Report.

*be able to demonstrate efficiency and hopes that its proposal will be adopted with as few changes as possible.*⁶⁰

At this point, we need to bring to the attention of the reader that first reading agreements only require a simple majority by the EP, and a qualified majority voting in the Council, which constitutes another determining factor for their practical success.⁶¹ It therefore appears that the adaptation of behaviour patterns by the LIBE Committee to its new co-legislator role towards informal and early agreements with Council can be attributed to a number of factors related to **greater flexibility and faster progress in decision-making, in contrast with more 'formalised' and 'time-consuming' procedures envisaged by the Treaties**. What remains unclear, however, is the extent to which the development of these informalities does actually show an increase in 'mutual trust' between the relevant inter-institutional actors, particularly between the Parliament and the Council. As shown above in Section 3.1, mistrust and competition in the AFSJ's inter-institutional landscape appears to continue being the rule in a post-Lisbon Treaty context. **The extent to which these informal methods facilitate trust-building relations between the institutional actors involved is unclear**, as further developed and demonstrated in Section 3.2.2 below.

Informal relations have also been developed between the EP and member states in the phases preceding or coinciding with the conduct of AFSJ legislative dossiers. Our interviews have revealed an **increasing influence of national governments and member states permanent representations in Brussels on the relevant EP rapporteurs from the very early stages of ordinary legislative procedure negotiations**. This development had already been identified by Farrell and Héritier (2003) in respect to the wider EP's legislative competences in other EU policy domains:

*As the Parliament's influence over the legislative process has increased, individual member states have begun to realise that they may sometimes achieve outcomes which would otherwise have been difficult or impossible, through influencing MEPs... in a very important issue (MEPs) would mostly be advised by the governments what way they wish it to go...and they very often comply.*⁶²

The role of co-legislator for the LIBE Committee has meant that **MEPs are addressed on an increasing number of interests, including domestic agendas, by their respective national governments, third-party countries like the USA or private sector representatives** (such as airline and IT companies). The role of Permanent Representations in Brussels appears to have been increasingly decisive when looking at the changing dynamics of the inter-institutional relations between the Parliament and the Council, and the identified culture of early informal agreements in the ordinary legislative procedure. This seems to be particularly the case in respect of large member states, member state governments with similar political affiliations to the EP rapporteurs, or in the case those member states hold the Presidency of the EU.⁶³

A key question that remains open is **'who' wins with first reading or early informal agreements? Or, in other words, into 'whose interest' do these practices play?** The

⁶⁰ European Parliament (2012), Activity Report (14 July 2009 – 31 December 2011), 7th Parliamentary Term, DV\903361EN, p. 5

www.europarl.europa.eu/code/information/activity_reports/activity_report_2009_2011_en.pdf

⁶¹ In addition, as De Clerck-Sachsse and Kaczynski (2009) highlighted the informality also strengthens the role of Committees over Plenary in the decision making process for two main reasons: first, the composition of a specific Committee does not always match with that of Plenary; second, a pre-negotiated compromise by the Committee limits the room for action and debate by Plenary.

⁶² Page 28.

⁶³ It could be argued that this tendency may raise tensions in respect of MEPs' independence as outlined in Decision 2005/684 of 28 September 2005 adopting the Statute for Members of the European Parliament OJ L262/1; Decision of the Bureau of 11 and 23 November 2009, 14 December 2009, 14 December 2009, 19 April 2010 and 5 July 2010 amending the implementing Measures for the Statute for Members of the European Parliament C180/1.

priority given to reaching an early and fast compromise rather than allowing for 'controversy' and democratic debate (and potential rejection of proposals) could be said to follow, and therefore favour, the Council's working methods and hence the interests of member state governments, which also have increasingly early 'inputs' into the Parliament's AFSJ legislative work. As highlighted above, the rotating Presidencies might also 'win' as some are particularly eager and efficient in accelerating the conclusion of agreements on legislative dossiers during their six-month mandate. The Commission can be also said to benefit from these informal practices, as they often facilitate the adoption of a majority of its legislative proposals. It is therefore not clear the extent to which early and informal agreements benefit the Parliament's own scrutiny tasks which, as we assess in more detail in the next section, face important accountability and transparency challenges.

3.2.2. Accountability and transparency

Concerns have been raised over the **lack of transparency and scrutiny of these informal agreements and decisions**, as well as **lack of clarity and coordination** of the procedures to be applied.⁶⁴ The presence of transparency-related deficits in the conduct of legislative files by the EP has been signalled by civil society actors and the scholarly literature, which has regarded the ordinary legislative procedure as suffering from accountability gaps because it is increasingly subject to *ad hoc* and early negotiations between Parliament and Council staff that are not subject to clear rules. This has meant a consequent loss of transparency and of opportunity for democratic inputs.⁶⁵ The use of the so-called **informal 'trialogues' (also known as 'trilogues') or tripartite meetings** between the EP, Council and Commission in the phases preceding the first reading agreement represent another issue of concern. Decisions concerning highly technical, yet also highly political elements are often reached before using the formal decision-making procedural models and channels within the EP, as well as those applying to EP-Council relations.

Bunyan (2007)⁶⁶ and Farrell and Héritier (2003)⁶⁷ have raised concerns over informal trilogues and argued that the recognition of more powers for the EP has had unexpected side-effects over transparency, accountability and democratic legitimation. In the words of Farrell and Héritier, "*it is often extremely difficult for others within the Parliament, let alone outsiders, to have any idea of what exactly is going on in a specific brief*". This, in their opinion, may lead to "*the short-circuiting of democratic processes of deliberation in committee and in plenary*" and undermine the standards of democratic accountability that Parliament is supposed to live up to. Peers (2008) has raised similar concerns about the unsatisfactory level of openness and transparency regarding 'first reading' (former co-decision) deals. In his view,

*It is practically impossible for outsiders...to work out whether first-reading negotiations are underway, what stage negotiations are at, and what drafts are under discussion. Once an agreement has been reached between the EP and the Council, there is often little time for civil society or national parliaments to react before the adoption of the text.*⁶⁸

⁶⁴ For a theoretical discussion concerning the tensions between 'effectiveness' and 'democratic accountability', and the elusiveness of the concept of democratic accountability in EU decision making process, refer to N. Walker (2004), "In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey", in N. Walker (ed), *Europe's Area of Freedom, Security and Justice*, Oxford University Press, pp. 3-37.

⁶⁵ S. Peers (2011), *EU Justice and Home Affairs Law*, Oxford EU Law Library, Third Edition, Oxford University Press, page 121; P. Craig (2013), *The Lisbon Treaty: Law, Politics and Treaty Reform*, Oxford University Press, page 346.

⁶⁶ T. Bunyan, Statewatch Viewpoint: Secret Trialogues and the Democratic Deficit, September 2007.

⁶⁷ H. Farrell and A. Héritier (2003), "The Invisible Transformation of Codecision: Problems of Democratic Legitimacy", SIPES (Swedish Institute for European Policy Studies), Report No. 7, June, p. 8.

⁶⁸ S. Peers (2008), Proposals for greater openness, transparency and democracy in the EU, Statewatch Analysis, October 2008, (www.statewatch.org). The formal trialogues are expected to be used following the second reading of a legislative proposal. For a discussion on the differences

'Rapidity' and a low level of formality in reaching compromises and decisions with the Presidency and the Council seem therefore to be the determining factors behind this widespread practice. An obvious result of informal trilogues and early agreements leading to first reading adoption of a legislative file is its swift adoption 'without further delay', which has been traditionally framed by the Council and the Commission as an 'efficient way of working'. Indeed, the average speed of the negotiations procedures of some of the ordinary legislative procedure files has also increased in the first reading, from an average of 16.2 months during 2004-2009, to 14.4 months between 2009 and 2011.⁶⁹

It needs to be acknowledged, however, that **the 'rules of the game' covering these informal processes have been a matter of attention and reframing since 2007 inside the EP**, and some positive developments have taken place since then. The Joint Declaration on Practical Arrangements for the Co-decision Procedure by European Parliament, Council and Commission of 9 March 2007⁷⁰ expressly recognised that the cooperation between 'the institutions' often takes place in the shape of tripartite meetings or informal trilogues. It concluded that this system had demonstrated its "*vitality and flexibility*" in increasing the possibility for agreement at first reading stages. The Joint Declaration left it to each institution to further define, in light of its Rules of Procedure, the participants in each meeting and the mandate for the negotiations, and to inform in good time the other institutions of the meeting arrangements. It also stated that "*in order to enhance transparency, trilogues taking place within the European Parliament and Council shall be announced, where practicable*".

The challenges pertaining to informal and non-transparent procedures in the EP legislative activities were also addressed in a Report on Legislative Activities and Inter-institutional relations issued by the **EP Working Party on Parliamentary Reform of 2008**⁷¹ under the chairmanship of Roth-Behrendt. The Report concluded that the trend on 'early agreements':

*...demonstrates the flexibility of the procedure itself and, more importantly, a greater degree of trust and willingness to cooperate on the part of the Institutions. First and early second reading conclusions build on the practice of good cooperation obtained by the Institutions over the years and have the advantage of requiring only simple majority for their approval in the plenary. They speak therefore for speed, convenience and certain predictability as regards the vote in the plenary.*⁷²

The Report restated the previous formal early agreements as well as the quality of the legislation. It insisted that these 'fast-track decision-making methods' limited the scope of 'political debate' and highlighted that:

When Parliament is asked to confirm in plenary a pre-negotiated agreement reached at informal meetings between a small number of representatives of the three Institutions (on Parliament's side normally the rapporteur, sometimes the committee chair and one or more shadow rapporteurs) *this certainly does not increase Parliament's visibility in the public and the media, who are looking for political confrontation along clear political lines and not for a flat, 'technocratic' debate where the representatives of the three Institutions congratulate each other on the "good work" done.*⁷³ (Emphasis added).

between trialogues and conciliation committee, as well as the extent to which they represent a competing decision-making arrangement, refer to A.E. Stie (2013), *Democratic Decision-Making in the EU: Technocracy in disguise?*, London: Routledge, pp. 134-135.

⁶⁹ European Parliament (2012), Activity Report 2009 –2011), *op. cit.*, page 6.

⁷⁰ Council of the EU, Joint Declaration on practical arrangements for the co-decision procedure - Final revised version of the Joint Declaration, 7061/07, 9 March 2007.

⁷¹ European Parliament, Report on Legislative Activities and Inter-institutional Relations, Working Party on Parliamentary Reform, PE 406.309/CPG/GT, (www.europarl.europa.eu/eplive/expert/multimedia/20090326MLT52708/media_20090326MLT52708.pdf)

⁷² *Ibid.*, page 26.

⁷³ *Ibidem*.

This last sentence is particularly relevant in illustrating how **the adaptation of the EP to the Council's and Commission's technocratic ways of working in legislative procedures has perhaps contaminated the EP resulting in certain paths of behaviour, which limit controversy and political accountability inside and outside the Parliament's building**. There seems to be another fundamental tension stemming from this, when **certain issues under negotiation in a particular file are artificially qualified as 'technical' (instead of 'political')**. Depending on the labelling, it may or may not open up democratic accountability and debate inside the EP itself. This is also problematic as issues considered to be 'technical' might in fact prove to be **highly political during negotiations**.⁷⁴ A similar concern was also raised by a previous CEPS study (De Clerck-Sachsse and Kaczynski, 2009), which stated that

*The increasing bureaucratization of the EP seen under the last legislature might be seen necessary to allow the EP to operate efficiently and react swiftly to important policy events. But...these developments could undermine the EP's role as a public forum and a centre for debate [which] could be detrimental to the Parliament and to European integration in the long run.*⁷⁵

The above-mentioned EP Working Party on Parliamentary Reform proposed a number of specific and positive reforms to address these challenges, which included the need to limit early the number of agreements taking account of the distinctive characteristics of every individual file and should be politically justified (e.g. in terms of political priorities, the uncontroversial or 'technical' nature of the proposal, an urgency situation, etc.). It also recommended that the decision should be subject to a prior political debate in the relevant committee and should be taken either by broad consensus or by a vote, if necessary. A decision should be also taken to determine the composition of the negotiating team (rapporteur, committee chair, shadow rapporteurs) and a clear mandate for negotiations with the Council. Furthermore, after each trilogue the negotiating team should report to the Committee on the outcome of negotiations.

The 2012 Guerrero Report carried out by the EP Committee on Constitutional Affairs⁷⁶ followed up some of the elements identified in the 2008 EP Working Party on Parliamentary Reform by amending the Parliament's Rules of Procedure. The Guerrero Report sets the need for EP negotiations with the other institutions in the course of legislative procedure to be conducted with regard to 'the Code of Conduct' laid down by the Conference of Presidents.⁷⁷ According to Rule 70.2.a, the negotiating team shall be led by the rapporteur and presided over by the Chair of the Committee responsible or by a Vice-Chair designated by the Chair. It shall also comprise at least the shadow rapporteurs from each political group. Also, according to the new Rule 70.2.b, the negotiating team shall report back to the Committee responsible and make available the documents reflecting 'the outcome' of the last trilogue. When there is no time for this, the negotiating team shall report back to the Chair, the shadow rapporteurs and the coordinators of the Committee. The Committee "*may update the mandate in light of the progress of the negotiations*".

As the EP Activity Report 2009-2011 underlined, each EP committee has developed its own 'cultures' and 'practices' regarding the stage of conclusion and conduct of inter-institutional

⁷⁴ Other innovative methods of inter-institutional cooperation have been also developed informally. An interesting experiment to improve inter-institutional negotiations between Parliament, Council and the Commission took place in respect of the negotiations of the so-called 'Asylum Package'. It was launched under the Polish Presidency of the EU (July-December 2011) and consisted in the setting up of an informal Contact Group at the EP between the various rapporteurs of the legislative files and the organization of meetings in order to coordinate a general approach. It counted with the participation of the Home Affairs Commissioner Cecilia Malmström and the relevant Presidency.

⁷⁵ J. De Clerck-Sachsse and P. Maciej Kaczynski (2009), "The European Parliament – More powerful, less legitimate? An outlook for the 7th term", CEPS Working Document No. 314, May, Centre for European Policy Studies, Brussels.

⁷⁶ European Parliament, Report on amendment of Rule 70 of Parliament's Rules of Procedure on interinstitutional negotiations in legislative procedures, 20.9.2012, Committee on Constitutional Affairs, Rapporteur: Enrique Guerrero Salom, A7-0281/2012.

⁷⁷ http://www.europarl.europa.eu/pdf/meps/201305_Code_of_conduct_EN.pdf

negotiations.⁷⁸ LIBE has not been an exception. According to Ripoll Servent (2011),⁷⁹ the consequences of the developments and transparency concerns surrounding the informalities and early agreements in co-decision files led the LIBE Committee to establish an **orientation vote** at the beginning of negotiations with the Council, which was primarily intended to give an idea to rapporteurs of the state of affairs in negotiations, what might be acceptable and the main concerns of LIBE. However, the attractiveness of the use of the orientation vote in LIBE has changed since the beginning of 2013 with the Guerrero Report. The possibility for any political group to challenge 'the orientation vote' before the Conference of Presidents to be confirmed in Plenary renders it no longer such an attractive option.⁸⁰ Therefore, while the orientation vote is still possible,⁸¹ it appears that since January 2013, its practice has diminished. According to the new Rule 70.2, a simple majority vote is now required in parliamentary committees to adopt a decision starting the inter-institutional negotiations on a Commission proposal. That decision shall determine the mandate and the composition of the negotiating team.

While rules appear to have become clearer, **transparency and accountability deficits still remain in practice**. The actual implementation, and positive effects, of these sets of guidelines and codes of conduct are difficult to measure. Interviews carried out for the purposes of this Briefing Paper have, for instance, revealed that there is a lack of transparency as regards **the four/multi-column working document** which reflects the positions of each of the inter-institutional negotiations during the ordinary legislative procedures, including those of the Council and the European Parliament, with regards to each individual amendment, as well as any compromise texts distributed at the meeting(s).

Another unresolved question relates to 'who' owns and controls that strategic four-column working document during inter-institutional negotiations. The lack of inclusion of the Council's position in the document has been also pointed out as a common practice causing concern for our interviewees. The non-publication allows the Council to change and modulate its 'general approach' during the conduct of negotiations with the Parliament and to sometimes take a different position. There is no information being provided as regards the different positions of member states during negotiations. In addition, the majority of the key documents remains confidential in nature. As regard the EP's position here, in a majority of the cases the level of transparency still depends largely on the willingness and working methods of each EP rapporteur. **The main decisions and evolving positions of the actors involved are still commonly developed behind closed doors with secretive procedures and methods characterised by opacity, while dressed up with a number of bureaucratic features, guidelines and technical procedures**. Moreover, the orientation votes adopted by the LIBE Committee and other relevant

⁷⁸ European Parliament (2012), Activity Report 2009-2011, *op. cit.*, page 4.

⁷⁹ A. Ripoll Servent (2011), "Playing the Codecision Game? Rules' Changes and Institutional Adaptation at the LIBE Committee", *Journal of European Integration*, Vol. 34, No. 1, pp. 55-73.

⁸⁰ Rule 70.a paragraph 1 which says that "Any decision by a committee on the opening of negotiations prior to the adoption of a report in committee shall be translated into all the official languages, distributed to all Members of Parliament and submitted to the Conference of Presidents. At the request of a political group, the Conference of Presidents may decide to include the time, for consideration with a debate and vote, in the draft agenda of the part-session following the distribution, in which case the President shall set a deadline for the tabling of amendments". See also Rule 70.a.2 which says "the item shall be included in the agenda of the part-session following the announcement for consideration with a debate and vote, and the President shall set a deadline for the tabling of amendments where one-tenth of the component Members of Parliament coming from at least two political groups or at least two political groups so request within 48 hours after the announcement".

⁸¹ It is still possible "By way of exception, where the committee responsible considers it duly justified to enter into negotiations prior to the adoption of a report in committee, the mandate may consist of a set of amendments or a set of clearly defined objectives, priorities and orientations".

negotiation documents are extremely difficult to find on the EP LIBE's website and are often not publicly available.⁸²

It can therefore be concluded that **the Council and the Commission's readings of 'efficiency' might be deceiving from a democratic scrutiny viewpoint. The EP has been somehow caught up in these pre-existing working methods and bureaucratic procedures of the Council and Commission as negotiators.** It is therefore not clear the extent to which this plays in its favour when seeking legitimacy, in particular 'speed' and **early agreements might well contravene not only the very democratic principles that the EP purports to hold, but also the quality and consistency of the legislation** adopted. Further, lobbying by member state governments to have early inputs into Parliament legislative outputs **might well undermine the independence and agency of the EP** in delivering its duty of oversight and scrutiny effectively and its Treaty-based duty to represent the interests of the citizens, rather than those of the member states.

3.3. The European Parliament as a 'policy setter and maker' in the EU AFSJ

A second development which in the performance of the EP and its LIBE Committee from the end of 2009 until now has been its evolving role and contributions as 'policy shaper and setter' in EU AFSJ policies, including those related to old EU Third Pillar security-related policy domains, i.e. cooperation in policing and criminal justice. This section outlines the various ways in which the EP has developed its growing policy role in AFSJ programming and agenda-making in the shape of non-legislative instruments like own-initiative reports and resolutions (Section 3.3.1), and the shortcomings from which they suffer, which often relate to a lack of 'follow up' by the European Commission and a number of inconsistencies in the EP's own internal work (Section 3.3.2).

3.3.1. AFSJ strategic policy programming

European cooperation on the AFSJ has been characterised since the 1999 Amsterdam Treaty (and its transfer to shared competence of a number of JHA policies) by the adoption of **five-year programmes providing the policy agenda and legislative planning of the AFSJ** by the European Council. This process first started with the Tampere Programme (1999),⁸³ followed by the Hague Programme (2004)⁸⁴ and its final version under the guise of the Stockholm Programme (2009).⁸⁵ The exclusivity over the ownership of AFSJ multiannual programming held by the Council **reflected the predominance of 'intergovernmentalism' and member states' exclusive competences in EU police and criminal justice cooperation. It was also a clear manifestation of the lack of a proper European institutional pluralism** giving form to AFSJ policies, with the EP largely excluded from playing an authoritative role.

The implementation of the Lisbon Treaty's innovations since the beginning of 2010 changed the previously Council-dominated context, by consolidating the competences of the European Commission and formally recognising the Parliament as an equal co-legislator in these domains. The first steps taken in putting the Lisbon Treaty 'into practice' for AFSJ policies experienced **turf disputes between the Council and the Commission** over the

⁸² Surprisingly, the orientation votes can be found under the "Publications" heading on the LIBE Committee's website, along with a list of delegations' visits. See www.europarl.europa.eu/committees/en/libe/publications.html

⁸³ European Council, Presidency Conclusions of the Tampere European Council, 15-16 October 1999, SN 200/99, Brussels.

⁸⁴ Brussels European Council, Presidency Conclusions, 4 and 5 November 2004, 14292/1/04, Brussels, 8 December 2004, Annex I, "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union", point 1.5 (2005/C53/01, OJ C53/1, 3.3.2005).

⁸⁵ Council of the European Union, The Stockholm Programme: An open and secure Europe serving and protecting citizens, 5731/10, Brussels, 3 March 2010.

ownership of strategic policy and legislative programming in the AFSJ. These struggles materialised in what has become known as **the Stockholm Affair**.⁸⁶

After the publication by the Council of the Stockholm Programme in December 2009, the newly established Barroso Commission adopted a Communication (Action Plan) implementing the Stockholm Programme in April 2010.⁸⁷ The Action Plan was regarded by the Council as a clear act of provocation because it was deemed to go beyond the framework of policy priorities envisaged by the Council's Stockholm Programme. As has been argued elsewhere (Carrera and Guild, 2012),⁸⁸ the affair revealed **the new post-Lisbon Treaty institutional dynamics affecting European integration of the AFSJ, where Commission and Parliament are equal institutional partners in JHA decision-making**. 'Lisbon' has meant a new and more pluralistic institutional setting in AFSJ landscape which has affected the classical relational power and actor-based institutional design in AFSJ cooperation in the EU, where the member states' and the Council's wishes are no longer the only guiding motors. The resulting scenario since the end of 2009 is one characterised by an **increasingly multi-strategy policy programming setting, where diverse and competing (and sometimes even incoherent) AFSJ policy agendas emerge and develop from the Commission as well as the EP**.

The EP, and its LIBE Committee, has become a co-owner of the AFSJ policy agenda. While it does not have a right to initiate legislation recognised by the Treaties, LIBE has been increasingly involved in AFSJ policy priority-setting since the end of 2009. This has taken place mainly through **the adoption of own-initiative reports and resolutions on important AFSJ-related subjects**.⁸⁹ A number of high quality and forward-looking own-initiative reports have been adopted since the entry into force of the Lisbon Treaty, where the EP has put forward its own policy initiatives and strategies on JHA. Here, the EP has gradually acquired a role as a **policy agenda-setter**, no longer only depending on the Council's or Commission's initiatives and agendas as in the pre-Lisbon Treaty landscape. This had been already anticipated in its 2009 Resolution on the Stockholm Programme,⁹⁰ where the Parliament underlined that it reserved "*the right to come back with specific proposals when it is consulted on the legislative action programme*".

All these instruments contain forward-looking policy priorities and initiatives 'of its own', which do not necessarily match those outlined in the Council's 2009 Stockholm Programme and the Commission's Action Plan implementing it. This has, for instance, included putting forward its own proposals in AFSJ policy areas of special political salience such as the Internal Security Strategy (ISS), the EU's counter-terrorism policies or the alleged transportation and illegal detention of prisoners in European countries by the CIA.⁹¹ The **EP**

⁸⁶ Carrera, S. (2012), "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 E. Guild, P. Minderhoud and R. Cholewinski (eds), *The First Decade of EU Migration and Asylum Law*, Leiden: Martinus Nijhoff Publishers, pp. 229-254.

⁸⁷ European Commission, Communication, Delivering an area of freedom, security and justice for Europe's citizens: Action Plan implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20.4.2010.

⁸⁸ S. Carrera and E. Guild (2012), "Does the Stockholm Programme Matter? The Struggles over the Ownership of AFSJ Multi-Annual Programming", CEPS Liberty and Security in Europe Series, Centre for European Policy Studies, Brussels.

⁸⁹ These, and the procedure for their adoption, are stipulated in Rule 48 of the Rules of Procedure of the EP. Moreover, the EP can also adopt motions of resolution provided in Rule 47 of Rules of Procedure.

⁹⁰ European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, P7_TA(2009) 0090, Multi-annual programme 2010-2014 regarding the area of freedom, security and justice (Stockholm programme), paragraph 153.

⁹¹ European Parliament resolution of 14 December 2011 on the EU Counter-Terrorism Policy: Main achievements and future challenges; European Parliament resolution of 22 May 2012 on the European Union's Internal Security Strategy ((2010) 2308 (INI)); European Parliament resolution of 11

2012 Resolution on the situation of fundamental rights in the EU constitutes a case in point here. The EP launched the idea for a 'European fundamental rights policy cycle', calling on the Commission to carry out a swift revision of the EU *acquis* on police and criminal matters in compliance with the Lisbon Treaty and the EU Charter and to propose a detailed initiative for a clear-cut monitoring mechanism and early warning system, as well as a freezing procedure, to ensure that member states, at the request of EU institutions, suspend the adoption of laws suspected of disregarding fundamental rights or breaching the EU legal order.⁹²

Perhaps one of the most visible institutional outputs of an EP own-initiative report has been the setting up of a sub-committee on crime-related domains. The EP resolution on organised crime in the EU called for the setting-up of a special committee on 'mafia-style organised crime in the EU'.⁹³ This paved the way for the establishment of a new sub-committee named **CRIM (Organised Crime, Corruption and Money Laundering)**, which has been active since March 2012.⁹⁴ The CRIM Committee has recently delivered a Draft Final Report on organised crime, corruption and money laundering with recommendations on actions and initiatives to be taken, which aims at completing its one-and-a-half year work and is currently under negotiation.⁹⁵

CRIM

The Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) was set up in March 2012 following the recommendation in an own-initiative report from October 2011. In this resolution, rapporteur Sonia Alfano called for a special committee to propose and develop a strategy on the fight against organised crime, mafias and criminal systems in the EU. The CRIM Committee was established for one year but its activities were extended until September 2013. The main tasks of CRIM are to analyse organised crime in Europe and to assess the implementation of EU policies in the fight against it, to scrutinise the role of EU agencies working on home affairs issues, and to hold hearings with all relevant stakeholders.

3.3.2. Follow up and consistency

One of the challenges characterising the EP own-initiative reports and resolutions relates to **the lack of consistent implementation of the EP policy initiatives**. This dilemma not only applies to the fact that these instruments lack any legally binding nature, with the EP

September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: Follow-up of the European Parliament TDIP Committee Report (2012/2033(INI)); European Parliament resolution of 11 September 2012 on enhanced intra-EU solidarity in the field of asylum (2012/2032(INI)).

⁹² See EP resolution on the situation of fundamental rights in the European Union (2010-2011), 12 December 2012. See Paragraph 20 of the Resolution which says that the cycle would detail "*on a multiannual and yearly basis the objectives to be achieved and the problems to be solved; considers that this cycle should foresee a framework for institutions and the FRA, as well as member states, to work together by avoiding overlaps, building on each others' reports, taking joint measures and organising joint events with the participation of NGOs, citizens, national parliaments, etc*". The Resolution also called for the setting up of "*a yearly interinstitutional forum in order to assess the EU fundamental rights situation*" (paragraph 21). See also paragraph 31 on the mechanism and early warning system on fundamental rights monitoring.

⁹³ European Parliament resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), paragraph 15.

⁹⁴ During its lifetime the Committee has organised +/- 24 meetings and 15 hearings with the participation of external experts, fact-finding visits to a number of EU and third countries and held an inter-parliamentary meeting with national parliaments, see the CRIM Newsletters (<http://www.europarl.europa.eu/committees/en/crim/newsletters.html#menuzone>)

⁹⁵ <http://www.europarl.europa.eu/committees/en/crim/home.html>

not holding a binding say in contrast to ordinary legislative procedure files, but there is also **a lack of follow up** by the European Commission and even sometimes by Parliament itself.

3.3.2.1. *The European Commission's follow up*

The inter-institutional relations between the EP and the Commission are laid down in the Framework Agreement on relations between the two of November 2010,⁹⁶ which establishes the goal of effectively implementing a 'special partnership' and constructive dialogue between the two institutions. While regular dialogues and cooperation between the two institutions have been further developed since the beginning of 2010, **the specific ways in which the Commission follows up the Parliament's own-initiative reports and resolutions constitutes one example where shortcomings can be still identified and further progress is necessary.**

According to Article 225 TFEU, the EP has been granted the power, acting with a majority of its component members, to request the Commission to submit a proposal on matters on which it considers that a Union act would be necessary for the purpose of implementing the Treaties. If the EP's request is not followed and the Commission does not submit a proposal, it is under obligation to inform the EP of the main reasons justifying this. As Craig (2013) has rightly noticed, "*the European Parliament, however, accepted that it should be cautious in its use of this power*", and any request should emanate from an own-initiative report.⁹⁷

This has been further specified in the above-mentioned Framework Agreement of 2010. According to paragraph 16 of the Framework Agreement, the Commission has three months after the adoption of a Parliament Resolution to provide information in writing on actions taken in response to specific requests addressed to it in its resolutions, including in those cases where it has not been able to follow up on the Parliament's views. This period may be shortened where a request is urgent. The Commission shall also commit itself to reporting on concrete follow ups of any request to submit a proposal on the basis of Article 225 TFE (legislative initiative report) within three months of the adoption of the resolution in plenary. The Framework Agreement further states that

*The Commission shall come forward with a legislative proposal at the latest after 1 year or shall include the proposal in its next year's Work Programme. If the Commission does not submit a proposal, it shall give Parliament detailed explanations of the reasons.*⁹⁸

The Commission has not always responded satisfactorily or in a timely manner to the Parliament's resolutions and initiatives contained therein. For instance, the EP is still waiting for the European Commission's written reply to the above-mentioned proposals contained in the 2012 EP resolution on the situation of fundamental rights in the European Union (2010-2011). Unsatisfactory responses have been also received to the EP reports and resolutions on EU counter-terrorism policies and the alleged transportation and illegal detention of prisoners in European countries by the CIA, where the Commission's answers to Parliament's recommendations and calls for action can be regarded as largely inadequate, with the Commission too often referring to the limits of its legal competences as a way (or rather an excuse) to not to follow up the Parliament's initiatives.⁹⁹ In sharp

⁹⁶ Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304/49 of 20.11.2010 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:304:0047:0062:EN:PDF>)

⁹⁷ Craig, P. (2013) *op. cit.*, page 33.

⁹⁸ Framework Agreement, *op. cit.*, paragraph 16.

⁹⁹ The Commission's brief written response to the recommendations put forward by the European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: Follow-up of the European Parliament TDIP Committee Report

(www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/2033%28INI%29) constitutes an excellent example illustrating this deficit. The Commission's official answer was that this is an issue falling outside its legal competences. For a critical analysis of the this argument refer

contrast, **the Parliament's LIBE Committee has only in extremely exceptional occasions rejected in full a Commission legislative proposal** (see Section 3.4 below).

The role of the EP as 'policy setter and maker' is further limited by information-sharing deficits. Room for the EP to be better informed by the Commission in the phases preceding a legislative proposal constitutes another issue of concern from the perspective of information-sharing deficits between the Commission and the EP in a post-Lisbon Treaty setting, in particular with regards to international agreements on JHA.¹⁰⁰ Rule 39 of the EP Rules of Procedure (Access to Documents and Provision of Information to the EP) stipulates that the EP shall request access to all documents relating to proposals for legislative acts under the same conditions as the Council and its working parties and that

"During the examination of a proposal for a legislative act, the committee responsible shall ask the Commission and the Council to keep it informed of the progress of that proposal in the Council and its working parties and in particular to inform it of any emerging compromises which will substantially amend the original proposal, or of the author's intention to withdraw its proposal".

However, this appears to not be fully satisfactory in practice, and **lack of transparency and openness in Parliament-Commission relations has been signalled in our interviews.**

3.3.2.2. *The EP and policy consistency checks*

In our research, we have also noticed a **lack of follow up and consistency checks** by the EP itself as regards the non-legislative and legislative contributions and policy agendas/initiatives on AFSJ-related policies. It is not clear how the policy initiatives and agendas set in own-initiative reports and resolutions relate to the LIBE's work and position on specific legislative or international agreements files dealing with the same or related issues. An example of a lack of consistent follow up by the EP in its legislative activities relates to **one of the most important policy paradigms** which has been part of many EU policy debates since the 9/11 events in the US, i.e. the need to strike **'the right balance' between freedom and security in EU JHA policies.**¹⁰¹

Academic research has shown that such a 'balancing act' has actually favoured the development of a concept of security equal to coercion, surveillance, control and a whole series of practices of violence and exclusion at EU levels.¹⁰² It has also legitimised claims about 'collective security', 'global threats' and 'worst case scenario' situations, which have too often led to policy measures and practices falling outside of the remits of democratic

to S. Carrera, E. Guild, J. Soares da Silva and A. Wiesbrock (2012), *The results of inquiries into the CIA's programme of extraordinary rendition and secret prisons in European states in light of the new legal framework following the Lisbon Treaty*, Study for the European Parliament, DG IPOL, Brussels.

¹⁰⁰ According to the EP Activity Report (14 July 2009 – 31 December 2011):

The Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. If so requested by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

¹⁰¹ The scholarly literature has critically assessed the ways in which the use of the 'balance metaphor' at EU levels has been driven by a misleading understanding of freedom and security are analogous concepts, which can be compared with and weighed against each other. The use of the balance has justified the development of EU security policies where individual freedoms and rights have been too often sacrificed in pros of 'collective or State security'. For a critical account of the balance metaphor refer to D. Bigo, "Liberty, whose Liberty? The Hague Programme and the Conception of Freedom", in T. Balzacq and S. Carrera (eds) (2006), *Security versus Freedom? A Challenge for Europe's Future*, Aldershot: Ashgate Publishing, pp. 35–44.

¹⁰² D. Bigo, S. Carrera, E. Guild and R.B.J. Walker (eds) (2010), *Europe's 21st Century Challenge: Delivering Liberty*, Aldershot: Ashgate Publishing. See also D. Bigo, S. Carrera, E. Guild and R.B.J. Walker (2008), "The Changing Landscape of European Liberty and Security: The Mid-Term Report of the CHALLENGE Project", *International Social Science Journal*, UNESCO, pp. 283-308.

accountability and posing a number of important challenges to fundamental rights of individuals.¹⁰³

Perhaps aware of the deficits inherent to the balance metaphor, and in line with the official abandonment of this concept by the European Council's Stockholm Programme,¹⁰⁴ which instead underlined the need to ensure that law enforcement measures and those safeguarding individual rights, rule of law and international protection rules "*go hand in hand in the same direction and are mutually reinforced*",¹⁰⁵ **the 2009 EP Resolution on the Stockholm Programme** also sustained a critical understanding of 'the balance'. In its Resolution, the Parliament underlined that **security should not be 'balanced' against rule of law and fundamental rights, but rather must be pursued in accordance with the latter.**¹⁰⁶

The consistent application of this understanding of the relation between freedom and security appears to have become nuanced during the last three years of legislative activities by LIBE, even though it constituted a position of central importance for understanding the EP's role in performing its democratic scrutiny tasks and duties. **The LIBE Committee's green light to the EU-USA TFPT and PNR agreements analysed in Section 3.1 above illustrates that where a policy approach is driven by the 'balance metaphor', it can prove to be counter-productive in legislation concerning privacy and data protection, resulting in contradictions with the EP's previously held position on these same issues.**

The work and policy outputs of the above-mentioned **CRIM Committee** represent another **internal inconsistency challenge** when evaluating the EP's performance in a post-Lisbon Treaty setting. By and large, CRIM has worked independently from the legislative and policy agenda pursued in the LIBE Committee, which has often led to **unnecessary duplication and incoherencies in their respective policy approaches and work**. The predominant 'home affair, security and crime fighting-driven agenda' of this Committee has placed at the margins the **fundamental rights and rule of law repercussions** inherent to the nature of the sensitive security policies that it has covered. This is obvious when reading the first draft of its 2013 Report on organised crime, corruption, and money laundering¹⁰⁷ as well as the final draft published in June 2013. The Report includes few **scattered, generic and unclear references** to fundamental rights and rule of law implications, **with no clear indications as to the ways in which these are to be effectively implemented in EU organised crime methodologies and policies by the**

¹⁰³ D. Bigo, S. Carrera and E. Guild (2009), "The Challenge Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security", CHALLENGE Series Research Paper No. 14, CEPS, Brussels.

¹⁰⁴ In contrast with its predecessor – the 2004 Hague Programme, which incorporated the idea in the section entitled "Strengthening Freedom" stating that: "The European Council requests the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border controls as well as the management of these systems on the basis of a communication by the Commission on the interoperability between the Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC to be released in 2005, taking into account the need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals."

¹⁰⁵ Council of the European Union, The Stockholm Programme: An open and secure Europe serving the citizen, 17024/09, Brussels, 2 December 2009, p. 9.

¹⁰⁶ See paragraph 7 where the EP stressed that "... the EU is rooted in the principle of freedom; points out that, in support of that freedom, security must be pursued in accordance with the rule of law and subject to fundamental rights obligations; states that the balance between security and freedom must be seen from this perspective. (Emphasis added)." (www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0090+0+DOC+XML+V0//EN)

¹⁰⁷ Draft Report on organised crime, corruption, and money laundering: recommendations on action and initiatives to be taken (interim report), 22.2.2013, CRIM_PR(2013)506051, rapporteur Salvatore Iacolino.

relevant EU home affairs agencies.¹⁰⁸ Furthermore, it is far from evident the extent to which the CRIM Committee has satisfactorily met its mandate, which called it to

... ensure that Union law and policies are *evidence-based and supported by the best available threat assessments*, as well as to *monitor their compatibility with fundamental rights* in accordance with Articles 2 and 6 of the Treaty on European Union, in particular the rights set out in the Charter of Fundamental Rights of the European Union¹⁰⁹ (Emphasis added).

An additional issue of concern is the extent to which the initiatives and final recommendations put forward by the CRIM Committee Report **correspond to those standing in the LIBE Committee**, which is in fact the Parliamentary forum with primary competence in these areas, in particular in the legislative activities in these same domains. The CRIM Committee was tasked with investigating the relationships between organised crime, corruption and money laundering.¹¹⁰ The Final Report and its activities have illustrated, however, that the Committee has turned to general reflection on EU police and judicial cooperation, including deliberations on new Commission proposals and the post-Stockholm Programme agenda, which appear to go far beyond its mandate.

A welcome initiative on EP internal policy coordination in the AFSJ has been recently launched by the LIBE Committee's Secretariat. It follows up a previous Parliament Resolution on an EU approach to criminal law of May 2012,¹¹¹ and consists of the setting up of a **Contact Group on Criminal Justice**. The Group intends to bring together all the various rapporteurs at the EP working on criminal justice-related dossiers in order to ensure more consistency and coordination (including with the Council and the Commission) in the approach taken in current and near-future legislative proposals covering EU substantive criminal law. It is too early to know the extent to which the Contact Group will succeed in meeting its goals, however. **The initiative presents the potential for positively overcoming the unbalanced security-driven focus that has emerged from the CRIM Committee activities in these same policy domains.**

3.4. The European Parliament and the EU Charter of Fundamental Rights

As Section 2 of this Briefing Paper has illustrated, **the EP LIBE Committee has played a key role as a promoter of fundamental rights and rule of law in the EU's AFSJ legal edifice and cooperation.** The EP LIBE Committee has consolidated its role and activities as a promoter of fundamental rights and rule of law in the EU AFSJ, and has ensured a horizontal coverage of fundamental rights considerations over all JHA policies falling under its conferred mandate. The previously mentioned EP Resolutions on the situation of fundamental rights in the EU constitute a case in point (Section 3.3.1 above). A key development in the Parliament's performance in a post-Lisbon Treaty landscape, however, is that **its conversion into co-legislator has caused it to face similar fundamental**

¹⁰⁸ DRAFT REPORT on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report), CRIM_PR(2013)513067, 10.6.2013. Available at www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0175&language=EN

Amongst the few references to fundamental rights the following can be highlighted: First, paragraph 5 (EU proposals on criminal law must respect fundamental rights and the principles of subsidiarity and proportionality); Second, paragraph 20 (which acknowledges that border management involves a migration dimension related to "*the fundamental rights of migrants, including, where appropriate, the right to asylum*"), and paragraph 24 (which calls for more efficient information sharing between law enforcement and judicial authorities at national and EU levels "*in full compliance with the principles of subsidiarity and proportionality and with EU fundamental rights*").

¹⁰⁹ Refer to Point 1.b of the mandate as agreed by Parliament in March 2012. Retrieval from <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-78>

¹¹⁰ Refer to www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-78

¹¹¹ www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0208&language=EN&ring=A7-2012-0144

rights dilemmas to those experienced by the Council and the Commission, especially when legislating in security-related domains falling under the rubric of police and criminal justice cooperation. **How does the EP, and in particular its LIBE Committee, ensure fundamental rights scrutiny in its own legislative work?** There are a number of (*ex ante*) internal procedures and tools destined to fulfil this critical function, and which come in addition to the usual (*ex post*) safeguards guaranteed by the Treaties.¹¹²

Rule 36 of the EP Rules of Procedure constitutes the main provision dealing with the respect for the Charter of Fundamental Rights of the EU inside the Parliament's work. The Rule states that the EP shall respect in all its activities the fundamental rights as laid down in the EU Charter, as well as the general principles stipulated in Articles 2 and 6 of the TEU. Furthermore, Rule 36.2 states that

Where the Committee responsible for the subject matter, a political group or at least 40 Members are of the opinion that a proposal for a legislative act or parts of it do not comply with rights enshrined in the Charter of Fundamental Rights of the European Union, the matter shall, at their request, be referred to the committee responsible for the interpretation of the Charter. The opinion of that Committee shall be annexed to the report of the committee responsible for the subject matter.

The Committee responsible for its implementation is the LIBE Committee. Indeed, in light of Annex VII (Powers and responsibilities of standing committees) of the EP Rules of Procedure, LIBE is in charge of *"the protection within the territory of the Union of citizens' rights, human rights and fundamental rights, including the protection of minorities, as laid down in the Treaties and in the Charter of Fundamental Rights of the European Union"*. Rule 36 has proven difficult to put into practice, however, as it requires simple majority voting in LIBE to proceed and it needs to be confirmed in Plenary.¹¹³

Yet, the case of the **Anti-Counterfeiting Trade Agreement (ACTA)** was one of the first occasions when LIBE successfully invoked the Rule 36 procedure because of its tensions with the EU Charter of Fundamental Rights. In the previously quoted EP 2012 Report on the situation of fundamental rights in the EU, Parliament had already regretted the *"the lack of transparency and openness, as well as of appropriate respect for, and protection and promotion of, fundamental rights and of democratic and*

ACTA

The Anti-Counterfeiting Trade Agreement (ACTA) is an international agreement negotiated between the EU, its member states and ten other countries on international enforcement of intellectual property rights. The EU signed ACTA in January 2012, but in order to enter into force the agreement required consent from the European Parliament. The lead committee in the European Parliament was the International Trade (INTA) committee, but four other committees also drafted a report on ACTA. Among them, the LIBE Committee was in charge of reporting on the compatibility of ACTA with the Charter of Fundamental Rights, pursuant to Rule 36(2) of the EP rules of procedures. In the case of ACTA, it was a political group (the Greens/EFA) which invoked Rule 36 that ultimately resulted in LIBE adopting an opinion rejecting ACTA. All the other committees also voted negatively which led to the EP plenary voting down ACTA in July 2012.

¹¹² Refer to 'Human rights challenges of EU action' in P. Craig and G. De Búrca (2011), *EU Law: Text, Cases and Materials*, Fifth Edition, Oxford: Oxford University Press, pp. 372-381.

¹¹³ The interviews conducted revealed that it could be possible for MEPs concerned to send a request to the President of the EP who sends it back to LIBE for majority decision of LIBE Coordinators. Another option would be for the Chair of the LIBE Committee with the approval of the Committee of Coordinators.

*parliamentary oversight, in international negotiations, which has led Parliament to reject international agreements such as ACTA, which will lead EU institutions and Members States to change their current practices and respect citizens' rights".*¹¹⁴

During the 7th legislature, there has been only one example of the LIBE Committee rejecting a Commission draft legislative proposal on the basis of the tensions that it poses from a fundamental rights and proportionality viewpoint. This related to an initiative for the setting up of an **EU PNR system**.¹¹⁵ The proposal, which was negotiated inside the EP by

MEP Timothy Kirkhope as rapporteur, was rejected in April 2013.¹¹⁶ **The main concerns expressed by several MEPs who welcomed the rejection vote was the incompatibility of the initiative with fundamental rights** (in particular, the protection of privacy and data protection as envisaged in the EU Charter of Fundamental Rights) **as well as the disproportionate nature of its publicly intended goals** (including mass surveillance and profiling), with not enough evidence provided on its usefulness and necessity.¹¹⁷ The final destiny of the EU PNR system remains uncertain, as Parliament's Plenary has sent the proposal back to the LIBE Committee 'for further consideration' in accordance with Rule 175 of its Rules of Procedure. **This constitutes a unique case where the LIBE Committee has rejected 'in full' a Commission legislative proposal falling under the rubric of 'judicial cooperation in criminal matters' and 'police cooperation' due to fundamental rights considerations.**

Another route for conducting fundamental rights control in the EP's internal legislative work is foreseen by **Rule 126 of the Rules of Procedure**. This provision envisages the possibility for the EP to ask EU Agencies, including the European Union Agency for Fundamental Rights (FRA) or the European Data Protection Supervisor (EDPS), for advice, including on fundamental rights compliance of EP legislative amendments and agreements. Rule 126 does not foresee any limitation as regards the specific AFSJ policy domain. This has been of particular relevance to the FRA's current mandate, which does not cover the former EU Third Pillar (police and criminal justice cooperation).¹¹⁸ That notwithstanding,

EU PNR system

In the context of the negotiations on the agreement with the United States on the transmission of PNR data (see Section 3.1 above), the European Commission proposed a proper PNR system for the EU in February 2011. The objective of the EU PNR system is to oblige airlines to transmit passengers' data to member states' authorities for the purposes of fighting serious crime and terrorism. Inside the LIBE Committee, MEP Timothy Kirkhope (ECR Group) was appointed as rapporteur on this file. His report, however, was rejected by the LIBE Committee in April 2013 by 30 votes to 25. This vote came as a surprise to many MEPs and advisors interviewed for this briefing paper. In the June 2013 plenary session of the EP, the rejected report was sent back to the LIBE Committee following a request by rapporteur Kirkhope.

¹¹⁴ European Parliament (2012) Report on the situation of fundamental rights in the European Union (2010 - 2011), Brussels, 22 November 2012, (2011/2069(INI)), Rapporteur: Monika Flašíková Beňová, paragraph 16.

¹¹⁵ European Commission, Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, COM(2011) 32 final, Brussels, 2 February 2011. For a critical analysis refer to E. Brouwer (2011), "Ignoring Dissent and Legality: The EU's Proposal to Share the Personal Information of all Passengers", CEPS Liberty and Security Series in Europe, Brussels.

¹¹⁶ www.europarl.europa.eu/news/en/pressroom/content/20130422IPR07523/html/Civil-Liberties-Committee-rejects-EU-Passenger-Name-Record-proposal

¹¹⁷ See for instance the following Press Releases: www.socialistsanddemocrats.eu/newsroom/eupnr-citizens-data-protection-must-be-strengthened and www.greens-efa.eu/passenger-dataprivacy-pnr-9716.html

¹¹⁸ Council of the European Union, Council Decision establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights, 10449/12, Brussels, 13 June 2012

Parliament's requests have allowed the FRA to informally extend its thematic remit towards EU legislative proposals covering (old Third Pillar) security and criminal justice domains. A number of opinions have been issued by the FRA following requests by LIBE. These have included opinions on issues such as the confiscation of the proceeds of crime in December 2012,¹¹⁹ the proposed Data Protection Package,¹²⁰ the PNR Directive,¹²¹ or the draft Directive on the European Investigation Order¹²² of February 2011.

Our interviews have revealed that the EP's Legal Service role has increased in AFSJ-related legislative dossiers in the post-Lisbon Treaty context. The EP Legal Service has often been asked for advice in relevant files, some of which have included an internal assessment of fundamental rights concerns raised by specific initiatives or amendments to legislative dossiers.

That notwithstanding, **the actual impact that these instruments and opinions have on preventing fundamental rights dilemmas in the EP's own legislative work** is not clear. Their limits have been shown, for instance, in relation to the EP work on the Commission proposal for a Directive **on the freezing and confiscation of the proceeds of crime in the EU.**¹²³ Opinions from the EP Legal service and the FRA revealed concerns regarding the fundamental rights aspects of the EP's amendments to the text,¹²⁴ but these were not taken on board by the rapporteur. **This file has also shown the negative influence of the above-mentioned CRIM Committee.** The latter organised a hearing on the Protection of Financial

Freezing and confiscation of the proceeds of crime

In March 2012, the European Commission published a proposal for a directive on the freezing and confiscation of the proceeds of crime in the EU. According to the Commission, the purpose of this proposal was to make it easier for member states "to confiscate and recover the profits that criminals make from cross-border serious and organised crime". The LIBE Committee in the European Parliament appointed Monica Luisa Macovei (EPP Group) as rapporteur for this file in April 2012. Following heated debates inside and outside the LIBE Committee, and the publication of critical opinions by the FRA and the EDPS on the fundamental rights aspects of the text, the report was eventually adopted in May 2013 by the LIBE Committee with 48 votes for, 7 against and 2 abstentions. Several experts interviewed for this briefing note have noted that the main issue of controversy was the fact that the report extends the notion of confiscation beyond the context of criminal proceedings to allow the confiscation of the proceeds of crime without a criminal conviction.

(<http://register.consilium.europa.eu/pdf/en/12/st10/st10449.en12.pdf>) and Council of the European Union, Note on the Proposal for a Council Decision establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2013–2017 – Requesting the consent of the European Parliament, Brussels, 13 May 2012 (<http://register.consilium.europa.eu/pdf/en/12/st10/st10615.en12.pdf>).

¹¹⁹ http://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf

¹²⁰ <http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>

¹²¹ http://fra.europa.eu/sites/default/files/fra_uploads/1786-FRA-PNR-Opinion-2011_EN.pdf

¹²² http://fra.europa.eu/sites/default/files/fra_uploads/1490-FRA-Opinion-EIO-Directive-15022011.pdf

¹²³ European Commission (2012) Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, COM(2012) 85 final, Brussels, 12 March 2012.

¹²⁴ See the FRA opinion at http://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf - the EP Legal Service's opinion has not been made public.

Interests of the Union before the LIBE Committee had even appointed a rapporteur and where the proposal was discussed.¹²⁵

This resulted in several amendments to the Commission proposal by then rapporteur Macovei (EPP-RO) in which possibilities for confiscation were extended beyond the context of criminal proceedings to allow the confiscation of proceeds and instrumentalities without a criminal conviction where a court is satisfied, on the basis of specific circumstances and all the available evidence that those assets derive from activities of a criminal nature. **This system would have opened the door to the confiscation of goods without an underlying criminal conviction or criminal proceedings** that could not lead to such a conviction due to the death, illness or flight of the suspect. **The EP rapporteur's position did not change even though it contradicted the opinions of the EP legal service, the FRA and even the Council legal service**, which stated that this would not be in accordance with the legal basis pertaining to judicial cooperation in criminal matters, criminal law (articles 82 and 83 TFEU), even if certain member states may have such systems in place.

The ways in which fundamental rights compliance is ensured throughout the EU policy cycle remains a policy challenge, including for the EP itself. Both the European Commission and the Council have published internal strategies on the respect of fundamental rights.¹²⁶ A new development which may have positive implications in internal fundamental rights screening and monitoring has been the setting up of **a new Impact Assessment and European Added Value Directorate G (DG IPOL) inside the EP**, established in January 2012. It counts with specific units for Impact Assessment and for European Added Value, together with responsibility for Science and Technology Options Assessment (STOA) and other aspects of forward policy assessment.¹²⁷ The role that this Directorate will play in improving the EP's capacity to carry out policy assessment will be central. The services provided include the provision of in-house appraisals of Commission Impact Assessments and carrying out complementary IA in those cases "*where proposals have no Commission Impact Assessment or where the assessment is not comprehensive*".¹²⁸ This will be complemented with 'European Added Value' (EAV) Assessments to evaluate the potential impact of legislative initiative reports to be put forward by the Parliament under Article 225 TFEU.

The setting up of the Directorate G in DG IPOL constitutes a welcome development with clear institutional value. **However, the ways in which fundamental rights-related evaluation aspects will be carried out and taken consistently and horizontally in the scope of internal IA and EAV assessments are unclear at present.** Close linkages with the LIBE Committee would be also necessary and welcomed. This was also highlighted by the above-mentioned Parliament 2012 Resolution on the situation of fundamental rights in the EU, which called for the Parliament to "*strengthen its autonomous impact assessment on fundamental rights in relation to legislative proposals and amendments under examination in the legislative process and make it more systematic*".¹²⁹

¹²⁵ The hearing was organised on 28 November 2012, see the programme at www.europarl.europa.eu/meetdocs/2009_2014/documents/crim/dv/hearingprogramme28november2012_/hearingprogramme28november2012_en.pdf

¹²⁶ See European Commission (2010) Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, Brussels, 19.10.2010; as well as Council of the EU (2011) Draft conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union, Council document 6387/11, Brussels, 11 February 2011.

¹²⁷ www.europarl.europa.eu/the-secretary-general/en/activities/recent_activities/articles/articles-2012/articles-2012-october/articles-2012-october-2.html

¹²⁸ The Directorate will outsource IA on substantive amendments being considered by a Parliamentary Committee (such assessments are always prepared by outside experts).

¹²⁹ European Parliament (2012), *op. cit.*, paragraph 8.

4. CONCLUSIONS AND POLICY RECOMMENDATIONS

4.1. Conclusions

The ‘Lisbonisation’ of the EP has meant its realisation as an AFSJ decision-maker and institutional co-owner. Democratic accountability has been finally placed at the foundations of European cooperation on AFSJ-related policy domains. This Briefing Paper has examined the progress, shortcomings and challenges experienced by the EP from the entry into force of the Lisbon Treaty until mid-2013 in JHA domains. Particular attention has been paid to its legislative and policy-shaping powers. During this three-year period, the Parliament’s Committee responsible for civil liberties, justice and home affairs – the LIBE Committee – has demonstrated highly active and dynamic progress in adapting to its newly recognised post-Lisbon roles.

The EP’s contributions to the ordinary legislative procedure have transformed the classical ways decisions on JHA used to be shaped and taken at the EU level. LIBE has been successful in navigating the new inter-institutional decision-making processes and actors and ensuring a higher degree of democratic scrutiny in EU AFSJ decision-making. This has materialised in concrete and visible inputs into the actual content of adopted EU AFSJ legislation, a higher degree of democratic scrutiny in EU AFSJ cooperation, and the development of new working methods and practices in the conduct of negotiations of complex legislative dossiers. During the 7th Legislature, the LIBE Committee has positioned itself amongst the EP Committees holding the highest proportion of legislative dossiers and files subject to the ordinary legislative procedure.

This Briefing Paper has identified a number of developments and challenges in respect to the LIBE Committee’s legislative and policy-shaping/setting powers which – in order to foster innovation in upcoming EU institutional and policy configurations as from 2014 – call for critical reflection and consideration. A first key finding has been that **the Parliament’s new Treaty-based competences**, in particular those falling within the remits of classical EU security policies (policing and criminal justice cooperation) and in both their internal and international relations dimensions, **have experienced fierce struggles with the Council and the European Commission.** These inter-institutional disputes have most importantly revealed that there is still some way to go for the actual practices and mindsets of Council and Commission’s representatives to duly acknowledge and internalise the new standing of the Parliament as co-legislator in AFSJ cooperation. **The EP is at the same time also struggling in its search for its own identity as AFSJ co-owner and legislator** and its new position **in the driving seat for decisions in of security-related policies.**

Its long-standing strategic activism to have its role and powers recognised in the AFSJ, and its progressively attributed ‘accountability competences’ strengthened and properly implemented by its JHA institutional colleagues, has continued during the post-Lisbon Treaty phasing. Controversies, such as those relating to the first voting down of the EU-US SWIFT agreement or the so-called ‘Schengen Freeze’, constitute a few visible examples of the Parliament seeking recognition of its authority chiefly before the Council. This has been accompanied by strategies on the part of the EP to be regarded by the Council and the Commission as a trusted and legitimate co-legislator. This Briefing Paper has argued that it is perhaps **in this process of searching its legitimacy that the Parliament**, and more particularly the LIBE Committee, **has found itself with a fundamental dilemma that remains largely unresolved.**

The somehow artificial framing of the LIBE Committee as ‘controversial’, ‘lacking seriousness and responsibility’ or ‘left wing’ because of its pre-Lisbon Treaty calls for more democratic accountability, transparency, fundamental rights and rule of law in JHA cooperation has been largely misleading and counterproductive for the process of its adaptation as co-legislator. One of the arguments put forward by this Briefing Paper is that **these past framings are not helpful in evaluating the EP AFSJ legislative performance in a post-Lisbon Treaty setting** and when moving towards the next phase

of democratic accountability of the EU AFSJ. They are in fact erroneous, as **LIBE's recognised competences** in the EP Rules of Procedure are intrinsically related to **democratic scrutiny, proportionality and fundamental rights protection**, which should not be dependent upon any specific ideological (left, centre or right) tendency or parliamentary group, but rather constitute the basis for the liberal democratic principles upon which the Union, and the work of its institutional organs, is anchored.

That notwithstanding, the increasing pressures and strong lobbying by Council, rotating Presidencies, member state governments and the European Commission in Parliamentary legislative work have somehow succeeded in transmitting a message that after acquiring its role of decision-making in JHA, the Parliament needs to behave well, act 'seriously' and 'non-confrontationally', and hence go along with the Council's and the Commission's traditional ways of working. Our analysis demonstrates that this has led to **the emergence of technocratic practices in the form of informal paths of decision-making inside the EP, such as early informal agreements and confidential compromise-making**, which form a difficult relationship with the very principles of democratic accountability and transparency that the Parliament purports to hold, and **negatively affect the consistency of its policy-making initiatives and corresponding legislative activities and outputs**. Our analysis has also shown that, while the LIBE Committee can count upon a number of instruments and safeguards to guarantee fundamental rights monitoring of its own legislative work and that of the EP at large, their underdeveloped and scattered nature poses limitations to their full and mainstreamed application.

4.2. Policy recommendations to the European Parliament

While it can be concluded that the Parliament has achieved impressive progress in its new role as AFSJ actor and co-legislator, there are still a number of issues and shortcomings which call for closer attention and action. The EP has still to fully adapt to its recognised Treaty powers and growing legislative and policy-shaper/setter roles developed in its Rules of Procedures, and to make a strategic appraisal of its competences. This will constitute a decisive factor in ensuring its democratic oversight in legislative procedures at the EU level and strengthen the legitimacy of its actions and decisions before the peoples of Europe.

The EP should adopt **an internal horizontal 'accountability, transparency and fundamental rights strategy'**. A central priority for the post-2014 AFSJ from the perspective of the EP should be to develop new/innovative ways of implementing its working methods ensuring solid and horizontal democratic accountability of its own legislative activities and procedures, a stronger consistency checking between its policy-setting priorities and those bestowed in legislative files, and a stronger horizontal mainstreaming of fundamental rights protection and monitoring during the development of its legislative interventions and outputs, as well as *ex post*. This strategy should be guided by the following specific priorities:

1. More accountable, transparent and less technocratic decision-making in ordinary legislative procedure. The informal and early agreements in the ordinary legislative procedures should be limited and subject to closer internal scrutiny and transparency criteria. This should not only include a more effective implementation (and monitoring) of the current set of internal EP guidelines and codes of conduct of application in the development of 'trilogues' and conclusion of early and first reading agreements in the ordinary legislative procedure. It should also mean the opening of more venues for political debate inside the LIBE Committee. The Recommendations of the 2008 EP Working Party on Parliamentary Reform are particularly welcome and should be followed up effectively and further implemented.

The implementation of flexible and 'efficient' ways of working in line with the negotiation cultures developed by the Council and the Commission might be necessary for trustful inter-institutional relations, but they should not undermine the political accountability, debate and scrutiny roles with which the Parliament is being entrusted by the Treaties and

its Rules of Procedures. The EP is now in a position to develop its own legislative identity which, by its very nature, forms a difficult relationship with convenience, lack of controversy and rapidity in EU decision-making procedures. This identity has been closely anchored in the Treaties and its Rules Procedure to the delivery of effective democratic accountability and fundamental rights/rule of law monitoring, and consolidation should continue in that direction

All the main decisions and agreements by the actors involved inside the EP (e.g. rapporteurs, shadow rapporteurs, and relevant internal coordination committees), and in their relations with the Presidency, Council and Commission, should be fully accessible to all the members of LIBE as well as to the public at large. This should include the four/multi-column working document summarising the positions of each of the actors. The lobbying by member state governments (or any other third-party government) for ongoing Parliamentary legislative work should become subject to special and closer scrutiny, as it may undermine the independence of Parliament to safeguard the interests of citizens and those of the EU at large (not those of specific national governments) and might also disrupt 'the balance' of EU inter-institutional negotiations. While it should be assumed that this lobbying practice will continue and cannot be prevented (indeed, knowledge of member states' positions may even facilitate the EP's leverage during negotiations), the EP should amend its Code of Conduct to guarantee that legislative inputs resulting from member states' lobbying efforts are openly debated in the LIBE Committee. Rapporteurs and co-rapporteurs could, for instance, be subject to the obligation to divulge the origin of legislative amendments that result more or less directly from interventions by permanent representations. The EP should also call for more transparency from the Council as regards the negotiation positions of member states during trilogues, which are often not public.

Moreover, LIBE should continue to develop, and perhaps exercise less cautiously, the competences conferred upon it as co-legislator. This could mean, for instance, daring to express complete disagreement and launching critical democratic debate on the Council's negotiating positions and the Commission's legislative initiatives from the perspective of their added value, proportionality and fundamental rights compliance in light of its tasks envisaged in the EP Rules of Procedure. This could be accompanied by the development of a more dynamic attitude in requesting the Commission to submit legislative proposals on matters where it considers Union instruments would be necessary to implement the Treaties.

2. Stronger follow up and internal policy consistency checking. The Parliament should develop and put into practice closer scrutiny of the Commission's follow up responses to initiatives and recommendations expressed in the EP's own-initiative reports and resolutions. Particular attention should be paid here to a more effective strategy for Parliament to be better informed by the Commission about the latter's legislative and working planning, including ongoing negotiations on AFSJ international agreements.

Internal policy consistency has been identified as a matter for concern in this Briefing Paper. Stronger links should be ensured between the positions and recommendations put forward by non-ordinary legislative procedure instruments and those where Parliament is a partner in co-decision and international agreements files. This should include, for instance, building upon its critical appraisal of the balance metaphor between freedom and security principle as upheld in its 2009 Resolution on the Stockholm Programme. Security should not be balanced against rule of law and fundamental rights, but rather be pursued in accordance with the latter and under proper and full democratic scrutiny.

Experiences such as that of the CRIM Committee show how an exclusive 'home affairs or security-oriented' understanding of AFSJ policies is inadequate to satisfactorily reconcile security with liberty predicaments in EU cooperation. The CRIM Committee interim activities have moved to the margins the liberty-related considerations and rule of law implications of any crime-fighting policy of a national or supranational nature. The findings and recommendations contained in its draft Report provide no clear indications of the ways in which high-quality evaluation of threat assessments and fundamental rights protection of EU crime fighting policies and agencies work will be ensured in practice. It appears to have

created duplications and inconsistency tensions with the legislative work carried out by the LIBE Committee in EU police and judicial cooperation from both their substantive and institutional sides.

The CRIM Committee experience has, perhaps most importantly, shown that an internal splitting of the LIBE Committee into two, mimicking the current European Commission's DGs separation (DG Justice, Fundamental Rights and Citizenship and DG Home Affairs), could prove to be counterproductive in ensuring policy consistency and fundamental rights horizontal monitoring in Parliament's AFSJ work.

As regards EU AFSJ policy programming, and as the post-Stockholm Programme affair has revealed, the European Council is no longer the exclusive owner of JHA programming and there is no need for a new multi-annual document succeeding the Stockholm Programme as from 2014. The Parliament should instead implement its own policy strategies.¹³⁰ A priority could be to put Article 17 TFEU into effect and initiate *"the Union's annual and multiannual programming with a view to achieving inter-institutional agreements"*. A consultation process between the EP and the two relevant Commission DGs should be started as soon as possible, in order to find agreement on common initiatives and general priorities to be included in their respective policy and legislative agendas for the post-Stockholm Programme phase. The EP should also display closer follow up and scrutiny of the planning and implementation of the Commission's future Annual Work Programmes on EU AFSJ, from the perspective of the Parliament's own priorities, initiatives and recommendations.

3. Horizontal and mainstreamed fundamental rights monitoring. The EP should continue to develop and consolidate its tradition and competence in the EU Charter of Fundamental Rights monitoring. An 'internal fundamental rights strategy' should be adopted before the start of the 8th Parliamentary Legislature. This should include more active fundamental rights scrutiny of European Commission proposals and international agreements on AFSJ domains (in close cooperation with EU Agencies such as the FRA and the EDPS), as well as of the fundamental rights implications of its own substantive legislative contributions and amendments/agreements in the conduct of legislative procedures. The application of Rule 36 of the Rules of Procedures has proved useful in the particular case of ACTA, but remains too rigid in nature for its full effectiveness to be guaranteed in practice during the legislative procedure. Rule 36 should be accompanied by guidelines on its current modalities of application. This could also include a revision of the procedure in order to facilitate its activation during the legislative procedure and prevent situations such as that which occurred during the negotiations on the Commission proposal on the confiscation and freezing of the proceeds of crime. In particular, the possibility of liberalising its application could be explored by amending the current voting requirements (which at present call for a simple majority voting decision in the Committee), reducing the required threshold to a vote by one-tenth of the members of the LIBE Committee.¹³¹

¹³⁰ The LIBE Committee is currently working (together with AFCO and JURI Committees) on a new Report on the Mid-Term Evaluation of the Stockholm Programme, and the rapporteur is Juan Fernando López Aguilar. Refer to European Parliament, Working Document on the Mid-Term Evaluation of the Stockholm Programme, 13.5.2013. The Report aims at evaluating the achievements reached so far, identify the missing elements and propose a way forward for the post-2014 phase.

¹³¹ Similar to Rule 90.6 on international agreements.

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ANNEX 1: STATISTICS ON THE EUROPEAN PARLIAMENT'S ACTIVITIES, 2009-2014

Parliamentary Reports tabled by committees during 7 th parliamentary term (2009-2014), last updated 17 June 2013												
	CNS	COD (1st reading)	COD (2nd reading)	COD (3rd reading)	APP	Total: legislative	BUD/DEC	INI	OTHERS: ACI, IMM, REG	Total: non- legislative	TOTAL	TOTAL %
Delegations (+BUDE)				7		7	1			1	8	0.5%
(AFET)	1	4	1		10	16		61	1	62	78	5.0%
(DEVE)	2	3	2		3	10		27		27	37	2.4%
(INTA)	6	41	5		44	96		15	1	16	112	7.1%
(BUDG)	2	5	1		2	10	145	3	3	151	161	10.2%
(CONT)	27	1				28	185	11		196	224	14.2%
(ECON)	32	47			2	81		42	1	43	124	7.9%
(EMPL)	4	14	1			19		26		26	45	2.9%
(ENVI)	2	51	8		4	65		26		26	91	5.8%
(ITRE)	17	22	4		11	54		26		26	80	5.1%
(IMCO)		30	3			33		31		31	64	4.1%
(TRAN)	2	23	8		17	50		17		17	67	4.3%
(REGI)	7	6				13		23		23	36	2.3%
(AGRI)	4	26	3			33		18		18	51	3.2%
(PECH)	2	26	1		14	43		9		9	52	3.3%
(CULT)	1	3	1		3	8		22		22	30	1.9%
(JURI)	13	37	1		5	56		31	38	69	125	7.9%
(LIBE)	26	32	7		22	87		14		14	101	6.4%
(AFCO)	6	2			4	12		9	17	26	38	2.4%
(FEMM)		3	2			5		30		30	35	2.2%
(PETI)								11		11	11	0.7%
Special Committees								4		4	4	0.3%
TOTAL	154	376	48	7	141	726	331	456	61	848	1574	100%

Source: Authors' own elaboration based on statistics kindly provided by the LIBE Secretariat

ANNEX 2: LIBE'S USE OF LITIGATION BEFORE THE CJEU SINCE 2005

Date action brought	Date of judgment	Reference	Subject	Type of Action	Result
12 July 2010	5 September 2012	C-355/10 - Parliament v Council	Schengen Borders Code - Decision 2010/252/EU - Surveillance of the sea external borders - Introduction of additional rules governing border surveillance - Commission's implementing powers	Action for annulment under Article 263 TFEU	Court annulled Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union; The Court maintains the effects of decision 2010/252 until the entry into force of new rules within a reasonable time.
9 March 2010	19 July 2012	C-130/10 - Parliament v Council	Common foreign and security policy - Regulation (EC) No 881/2002 - Regulation (EU) No 1286/2009 - Restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban - Freezing of funds and economic resources - Choice of legal basis - Articles 75 TFEU and 215 TFEU - Entry into force of the Treaty of Lisbon - Transitional provisions - CFSP common positions and decisions - Joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and from the Commission.	Action for annulment under Article 263 TFEU	The Court dismissed the action
8 March 2006	6 May 2008	C-133/06 - Parliament v Council	Common policy on asylum - Directive 2005/85/EC - Procedures in member states for granting and withdrawing refugee status - Safe countries of origin - European safe third countries - Minimum common lists - Procedure for adopting or amending the minimum common lists - Article 67(1) and first indent of Article 67(5) EC - No power.	Action for annulment under Article 230 EC	The Court annulled Articles 29(1) and (2) and 36(3) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status;

16 November 2005	23 October 2007	C-403/05 - Parliament v Commission	Commission decision approving a project relating to border security in the Philippines - Decision adopted on the basis of Regulation (EEC) No 443/92 - Commission's implementing powers - Limits.	Action for annulment under Article 230 EC	The Court annulled the decision of the Commission approving a project relating to border security in the Republic of the Philippines to be financed by budget line 19 10 02 in the general budget of the European Communities (Philippines Border Management Project, No ASIA/2004/016-924)
27 July 2004	30 May 2006	Joined cases C-317/04 and C-318/04 - Parliament v Council (C-317/04) and Commission (C-318/04)	Protection of individuals with regard to the processing of personal data - Air transport - Decision 2004/496/EC - Agreement between the European Community and the United States of America - Passenger Name Records of air passengers transferred to the United States Bureau of Customs and Border Protection - Directive 95/46/EC - Article 25 - Third countries - Decision 2004/535/EC - Adequate level of protection.	Actions for annulment under Article 230 EC	The Court annulled Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, and Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection.
22 December 2003	27 June 2006	C-540/03 - Parliament v Council	Immigration policy - Right to family reunification of minor children of third country nationals - Directive 2003/86/EC - Protection of fundamental rights - Right to respect for family life - Obligation to have regard to the interests of minor children.	Action for annulment under Article 230 EC	The Court dismissed the action.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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