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Costing Free Movement

Fear and Non-transposition in the Schengen Area

Roderick Parkes

Current concern at the poor implementation of EU Justice and Home Affairs policy is understandable. JHA cooperation aims to offset the risks arising from the removal of border controls within the Schengen Area, and widespread non-transposition could render freedom of movement a dangerous luxury. It is therefore heartening that the Lisbon Treaty will improve conditions for compliance. It is not just that the treaty boosts the EU's anti-infringement powers: by increasing the roles of the Commission and Parliament in drawing up policy, the treaty should herald a liberalisation of Home Affairs cooperation that would give immigrants, employers and NGOs a greater interest in implementation. There is one rub. This liberalisation could also dilute the substance of policy. With the transposition of security standards in their current form apparently so difficult, will the member states sustain the Schengen freedoms?

To offset the risks associated with freedom of movement, EU governments have agreed common rules on crime and migration. These aim to strengthen the EU's common external border and to help the member states deal with migrants and criminals who abuse free movement for their own purposes. Surprisingly, given the importance of faithful implementation in this sensitive policy area, transposition has been rather poor. The European Commission refers glumly to a "virtual" European acquis. Home Affairs measures, particularly in crime and policing, are formally adopted in Council but exist in some member states on paper only. Problematic rules include those on data exchange and the seizure of criminal assets.

The full extent of non-transposition is impossible to measure and there have been no high-profile security incidents arising from compliance failures. Yet, the heightened risks associated with visa liberalisation in the western Balkans and problems on the Greek-Turkish border have encouraged member states to think in pre-emptive terms: if a crisis does ensue because they have turned a blind eye to their partners' compliance failures, will they be able to defend this to voters? The mood in Home Affairs cooperation thus increasingly encapsulates the mood in the EU as a whole. Subjects are being broached that previously would have been unmentionable. Successes of European integration such as freedom of movement are no longer being treated as

sacred cows, and there has been mention of suspending membership in the Schengen Area to punish shoddy implementation.

The more punitive tone emanating from some capitals has so far been marginal and polemic, and many Commission officials feel that these concerns will dissipate in the wake of the Lisbon Treaty. This is because the paradox at the heart of EU Home Affairs will finally be overcome by the treaty: although member states view proper transposition as paramount because of the sensitivity of the subject matter, this same political sensitivity long led them to resist introducing robust supranational anti-infringement powers, particularly in policing and crime. It is only now, with the Lisbon Treaty, that the member governments have given the Commission tougher anti-infringement powers. In the coming years, as more Home Affairs measures are brought within the scope of these powers, implementation should improve. Indeed, the concern amongst Commission officials is rather that some member governments will lose their enthusiasm to sign up to future EU measures now that these have to be implemented in full.

Treaty or no treaty, though, many commentators remain sceptical about the chances of a real improvement in transposition: in some areas of Home Affairs cooperation such as asylum and immigration policy, the Commission already enjoys relatively robust anti-infringement powers. Even here, there have been glaring examples of non-implementation. Of the 13 odd directives policed by the Commission in migration policy (9 core directives on immigration and 4 on asylum), those related to asylum caused particular problems last year. The disparities in interpretations and their implementation received widespread attention (see SWP Comments 2010/21), with Greece emerging as a serial offender.

Lessons from migration policy

Sceptics are right that robust supranational anti-infringement powers are no guarantee of effective transposition. Compliance is a holistic process that relies upon three key ingredients: the existence of “sheriff’s deputies” to assist the Commission in monitoring implementation, the capacity of administrations to implement rules, and the existence of laws that are clear and well formulated. European Home Affairs policy shows real deficits in all three areas.

Sheriff’s deputies: the Commission is usually alerted to non-transposition cases thanks to complaints made by interested parties such as individuals and firms rather than through its own systematic monitoring efforts. EU statistics suggest that this is particularly the case in Home Affairs. Figures for 2009 show that cases brought by the Commission itself in Home Affairs made up just 1 per cent of all its new own-initiative cases. The number of complaints concerning suspected non-implementation of Home Affairs policy was, by contrast, as high as 30 per cent of the total of all complaints received (Table 1.4, SEC(2010)1143).

Yet, in Home Affairs, such complaints are most frequent in those pockets of policy, such as free movement and civil-law cooperation, where the rights of EU citizens are affected. In other areas, the Commission has fewer strong allies. Immigrants, employers and NGOs have gained little under a body of EU law that has been predominantly restrictive and coercive (see SWP Comments 2010/26). In many areas of JHA policy, therefore, the Commission’s potential allies may be unwilling or unable to complain about non-transposition. Of course, in the EU fora established to deal with “immigrant integration” and “e-justice”, compliance issues are discussed with stakeholders. All the same, these alliances do not pertain evenly to the whole of JHA.

Capacity for compliance: much of the concern about non-implementation in Home Affairs has focussed upon the member states that joined the Union in 2004 and 2007. Non-compliance by these mem-

bers has particularly serious implications for the EU for two reasons. For one thing, new members' previous JHA standards tend to be furthest from the EU norm. For another, these countries occupy key positions on the EU's external border, and thus take a high number of the more sensitive decisions about who gains access to the Union. Yet, precisely these factors make compliance less likely among the EU's newest members, whose administrations are subject to disproportionate pressures for adaptation and weighty new responsibilities.

Some governments simply do not have the administrative capacity for large-scale adaptation to new obligations. The EU is aware of this and has taken measures to support them (see SWP Comments 2010/21). Germany, for example, has been particularly active under the EU's Twinning mechanism, supporting its eastern neighbours with border control, and assisting countries such as Hungary and Bulgaria with judicial reform. Yet, few member states offer help beyond their own narrow self-interests. And the funds set up by the EU to build administrative capacity in JHA have often been most readily accessed by administrations that are well organised and have well-developed national activities in the particular area.

Poor law-making: the implementation-difficulties faced by national administrations can be exacerbated by a lack of clarity in EU obligations. And in EU Home Affairs, this is a very real possibility. Misinterpretation and poor wording have been a constant feature of European JHA laws. EU rules dealing with issues from border control to the retention of telecommunications data have been criticised for their masterfully oblique language. The Commission has done its best to remedy these deficits. To counteract misinterpretations, the EU has introduced measures such as the Pilot scheme, in which (now 19) national administrations can directly consult the relevant Commission desk officer in order to gain clarity about an obligation. It is nevertheless an uphill battle in a policy area where

wording is used by governments to maintain the maximum national discretion.

The Commission has followed other tried-and-tested methods to improve the quality of Home Affairs law. For one thing, the Commission has advocated soft cooperation where hard law can be avoided. This is supposed to reduce the "over-regulation", which has elsewhere led to transposition failures. Yet, in the area of Home Affairs, the Commission and Parliament have shied away from the name-and-shame tactics that are supposed to ensure the transposition of such policies, happy simply that governments are cooperating on deeply political issues such as immigrant integration. For another thing, the Commission has proposed the revision of existing EU migration laws, believing that many transposition failures reflect faults in the original rules. Yet, for the new member states in particular, this gives rise to a temptation to use non-compliance as a means to encourage a revision of existing laws. These states have, after all, adopted a European *acquis* that puts a disproportionate burden on them and in which they often had comparatively little input.

Catch 22?

Many implementation problems can be linked to the odd pedigree of European Home Affairs cooperation. Following the lifting of border controls in the Schengen Area, interior ministries have spent years trying to reassert their political autonomy in this sensitive policy area and to re-establish their control of crime and migration. This is a policy context that does not lend itself to sound implementation: the restrictive measures that resulted have robbed the Commission of many of its potential allies in monitoring compliance. Measures have also been poorly worded and of a lowest common denominator. And drawn up in largely intergovernmental fora, they have reflected a limited sense of solidarity and a heightened suspicion of free-riding. With the Lisbon Treaty in place, the situation

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may well change. Not only are the anti-infringement powers of the Commission boosted. The strengthening of the supranational elements in policymaking could also entail a liberalisation of policy and a gradual shift towards those holistic elements important for proper transposition.

This will not secure the future of Schengen. The liberalisation that would be so conducive to the proper implementation of EU security measures is widely viewed as a threat to their broader effectiveness. This gives rise to a Catch 22 situation and, faced with the unenviable choice between the shoddy implementation of security rules in their current formulation and their dilution, member governments may understandably look to restrict free movement. In return for accepting the liberalisation of security standards advocated by the Commission and Parliament, national governments may be tempted to demand restrictions to the freedoms which JHA rules were designed to sustain. They might explore mechanisms to partially suspend unruly member states from the Schengen Area, push for an increase in the scope to re-introduce national border controls and resist Schengen enlargement even if candidates have the proven capacity to join.

Or rather it would be a Catch 22 situation if fears of a weakening of security standards were founded. This is not necessarily the case. It is not only that the relevant reports show that the core Schengen controls function well. Analysts have long shown that more liberal approaches might actually be more effective than restrictive ones, and not simply because they are likely to be better implemented: in the area of data exchange, for example, a liberal data-protection regime can ensure that inaccurate information is corrected. Such a regime can also ensure that data are used only for the purposes for which they were exchanged, thus leading to greater trust between authorities. The trick for governments in the Lisbon-era will be to embrace the new limitations to their autonomy and powers as a means of improving policy.

This may involve submitting to greater scrutiny in a bid to increase the efficiency of policy (see SWP Research Paper 2007/5) or adopting a more consensual approach to migrants and NGOs as a means to bind them into policy (see SWP Comments 2010/26).

There is, however, one area in which governments can decisively extend their powers, and that is in each other's affairs. If the effectiveness and implementation of European JHA policy are to be improved, governments must be ready to act as sheriff's deputies, reporting to the Commission suspected non-compliance by their counterparts. They must pursue administrative cooperation as a means of monitoring and improving one another's JHA practices. And they must advance the construction of common European capabilities in the areas of border control, asylum and crime in order to reduce the scope for free-riding by other member governments (see SWP Comments 2010/21 and 2010/9). In other words, governments must accept that not only the European Parliament and Commission may encroach upon their autonomy, but so too may their counterparts.