

**ELISE**  
*European Liberty and Security*

# **ELISE**

**EUROPEAN LIBERTY AND SECURITY:**  
*SECURITY ISSUES, SOCIAL COHESION AND  
INSTITUTIONAL DEVELOPMENT OF THE EUROPEAN  
UNION*

## **ELISE Conclusions & Policy Recommendations**

In EU Treaties “liberty” is always the principle against which any state interference on the basis of security must be limited, justified and open to judicial scrutiny. The perspective sketched here, along with the more specific research projects that inform it, suggest an urgent need for much more robust resistance to the marginalization of claims about liberty whenever the necessities of security are invoked. In general terms it might be said that where the possibilities of political liberty are currently being constrained by forms of structural and institutional fragmentation, they ought to be nurtured by imaginative forms of cooperation across existing jurisdictions; and where the possibilities of cooperation and unification are being sought in order to control human populations on a wider scale, they ought to be subject to greater scrutiny and control by many different democratically accountable communities and institutions. The policy implications advanced hereunder follow these principles.

### *1. The Rule of Law should Monitor Claims for Exception*

Faced with the revival of politics of exception that curtails the rule of law at national level and the strengthening of EU networks of control, the European regime of governance should be completed with a number of specific institutional safeguards and the existing ones should be adequately adapted in order to address the rise of new sources

**Contact:**

Sergio Carrera  
Centre for European Policy Studies, CEPS  
Place du Congrès 1, B-1000, Brussels  
sergio.carrera@ceps.be

of discretionary power in what has been qualified as the area of freedom, security and justice.

### **Developing and consolidating effective tools of control**

The argument of emergency and calls for derogatory measures by security professionals have to be carefully monitored through the establishment of institutional mechanisms of controls that will counterbalance the power granted to security agents. This should be done at both national and EU levels.

As far as the control of national authorities is concerned:

a. Mechanisms of mutual evaluation or peer review (as proposed under art.III-260 Constitutional Treaty), should lead to regular and thorough assessments as to the practical implementation of police and judicial co-operation.

b. The monitoring function fulfilled by the EU network of independent experts in fundamental rights with regard to the application of the EU Charter at national level should be further promoted, but also completed by thematic reports and comparable data to be provided by the European Union Agency for Fundamental Rights (see the Proposal for a Council Regulation establishing European Union Agency for Fundamental Rights. Art. 4.1. sets out the tasks of the Agency) . Moreover, monitoring should cover not only legislative measures, but also the application of law to individual cases as well as the practices and attitudes by national officials, notably by law-enforcement and security service agents.

c. A more active Fundamental Rights policy at EU level by a specialised agency, in connection with a separate Commissioner for Fundamental Rights, would be completed by ex-ante policy measures the human rights protection mainly provided by courts. Such policy should focus on areas of special interest to the individual residing in the Union: immigration, asylum, criminal investigations relating to terrorism and organised crime. This presupposes the adoption of the proposed decision of extending the competencies of the European Union Agency for Fundamental Rights to the EU Third Pillar [COM(2005)280]. The tasks of such policy might include public awareness activities, extensive dialogue with civil society actors, the exchange of best national practices on basis of interdisciplinary thematic reports, comparable data and, on a longer-term basis, the definition of indicators and benchmarks as well as non-binding codes of conduct in chosen policy-areas.

As far as the control of EU authorities is concerned:

a. The EU legislator should proceed by giving clearly defined mandates to executive agencies concerning their operational powers and the conditions of their exercise (e.g. joint-investigative teams with the participation of Europol's agents). The basic idea should be that liberty is the principle and security should be adjusted to it. To promote liberty, we need to build processes that set the principle of reciprocity at the centre of their functioning. In other words, the professionals of security have to recognize that if they have more capacities and more freedom to check identities, to limit privacy, to

connect data bases which were designed for other purposes, they should, equally, accept the loss of their own autonomy and freedom. This means that their activities have to be put under strict scrutiny. In practice, this can be achieved through, for instance, an “special envoy” on data protection working in sensitive teams of EU security professionals and reporting their behaviour; through a more formalized monitoring of their own practices; through frequent assessments of teams handling private data.

b. Effective political monitoring by the European and national parliaments should not be limited to the discussion of annual reports of activities by EU agencies. It might also include participation in hearings before the competent parliamentary committees and the obligation to comply with special requests for information. On a longer-term basis, the European Parliament, and possibly national parliaments, might be associated in the appointment of the heads of EU agencies.

c. ELISE consortium acknowledges that security may sometimes involve secret and speed. However, the actions of security agents must not be exonerated from accountability. An independent body needs to be set up at the EU level. This body dealing with human rights, anti-racism, anti-discrimination and data protection issues should be established with a budget in proportion with that required for the development of SIS II, VIS, Europol and Eurojust. External control by independent supervisory bodies involves a series of options not necessarily mutually exclusive: the creation of a special unit of the European Ombudsman to monitor the correct application of EU security measures. This type of control should be implemented in conjunction with the adaptation of patterns of internal control based on the operation of Joint Supervisory Bodies. Internal and/or external control may also take the form of a physical presence of a representative of the supervisory body within the operational centre of the security agency. In any event, special control mechanisms need to be established with regard to the management of personal data by a Data Protection Officer in liaison with the independent authority on data protection.

d. Furthermore, special procedures of administrative adjudication of individual complaints open to all persons likely to be affected by the operation of EU executive agencies (e.g. access to documents, right to obtain rectification of personal data, right to compensation by the usage of data) are in order. In this context, the option should be considered to invest an independent authority, namely the European Union Agency for Fundamental Rights, in connection with the Commission as the guardian of the Treaties, with the power to investigate allegations of human rights violations by EU institutions in general and by EU executive agencies in particular.

### **The requirements of the rule of law**

For ELISE members, a strict and consistent application of the rule of law stands as the necessary cornerstone of the European regime of governance as applied in the area of freedom, security and justice. This implies:

a. The introduction of legal provisions as to the means of redress available to individuals in all instances likely to affect their rights and legitimate interests. In particular, the “necessary legal safeguards” with regard to the adoption of lists of persons subject to

special restrictive measures (as proposed under art.III-322 CT) must include effective access to the European Court of Justice (ECJ) and the burden of proof should lie with law-enforcement services. Moreover, administrative complaints regarding the operation of EU executive agencies must also make provision for the eventual settlement of the disputes before EU Courts.

b. The adherence to the rule of law in the light of new challenges implies jurisdiction for the judiciary to scrutinize these fields and especially by the ECJ. It remains for the ECJ to determine the scope of its jurisdiction as to national law-enforcement measures initiated at EU level, to define the scope of application of the EU Charter to national measures in general and to decide in which cases natural and legal persons are directly and individually affected by the operation of EU executive networks.

## *2. To Win Trust the EU should strengthen Social Cohesion*

The reaction of selected EU governments to threats of terrorism in 1991 in light of the first Gulf War and post 2001 reveals a temptation to label all foreigners as potential enemies. The two periods are marked by the insertion into legislative texts of exceptions to international obligations to protect refugees. The comparative research carried out by ELISE consortium shows that circumventing human rights norms and regarding all immigrants as enemies have a deleterious effect on social solidarity and trust in national and EU institutions. This may be fought through a set of policy measures that defend equality, solidarity, racial and cultural tolerance; engage “panic politics” through training programmes; promote EU citizenship; and safeguard the rule of law. These measures are spelled out below.

As the reactions to September 11 and, to a lesser extent, the London attacks of 7 and 21 July 2005 have dramatically shown, the professionals of politics and the media have been the first groups to “panic” (in contrast with civilians and even victims). They were unprepared to deal with this kind of events. Their reactions have fuelled resentment against foreigners residing in the EU. To avoid this kind of behaviour, the EU should set up an emergency crisis group composed of specialists of complex emergency situations, historians, sociologists and psychologists to assess the danger on a larger scale in space and time.

The respect of the fundamental rights and freedoms of every human being (Liberty) and the rule of law (Justice), as guaranteed by international as well as European legal frameworks, need to be taken as a point of departure in security measures envisioned, discussed or adopted. ELISE consortium believes that “security” only comes from the respect and protection of human rights and fundamental freedoms through the rule of law. This major aspect of democracy must not be diminished for foreigners in such times. The right to habeas corpus, to a hearing before a judge on the merits of an application must remain in place not only for nationals, but also for foreigners. In addition, the weakening of rule of law in respect of foreigners, in particular for refugees, the most vulnerable of our communities, on account of heightened fears of political violence does not result in greater security but rather in a diminution of social solidarity and cohesion. And, EU Members States know this too well, culturally and politically fragmented societies offer a fertile terrain for violent political actions. Thus, a politics of solidarity and equality, not a

politics of security that undermines democratic rights should be pursued. Equal rights do not mean assimilation or cultural homogenization; they are the premises of a political community that is continuously transformed in a demanding global world.

The right of free movement should be reviewed without so much reference to the economic considerations that continue to limit its full exercise in a number of practical cases. In this sense, all the visible and hidden obstacles inherent to the “freedom to move” need to be openly debated and urgently overcome in order to make free movement and residence rights more inclusive in an enlarging EU. The restrictive transitional arrangements applied to workers coming from eight of the ten new EU Member States should be abolished in conformity with the right of equal treatment and non-discrimination on grounds of nationality, as enshrined by the EC legal framework and the proactive case law of the ECJ. These steps, the aim of which is to foster a successful transition from market citizen to Union citizen should effectively take place for the benefit of all in an enlarged EU.

Security officials involved in the definition and implementation of the fight against terrorism at the national and even the EU level do not have a comprehensive perception of the multiple facets of the issue of political violence, nor of the various stakes related to it. The organization of training seminars at the EU level may allow them to acquire the legitimate knowledge for the construction of an efficient counterterrorism policy including security, liberty and cultural aspects. For this purpose, these training seminars should address the underlying factors of tensions within EU Member States.

A comparative approach to different periods of time is important in order to learn from each other’s experience, especially in a knowledge-based society. It is therefore vital to develop a permanent, independent and interdisciplinary academic working group at the EU level that analyses the patterns of national cultures in relation to political violence and their way to deal with it. The trajectory of each state, the structure of its security services and their articulation, the political games and the previous lessons from antiterrorist policies success or failures should equally be examined.

### *3. Security Professionals should be Democratically Accountable*

The need to provide immediate policy responses and efficient solutions to security challenges dominating the political context, namely terrorism, may also open the way to more radical changes, i.e. the development of EU law-enforcement agencies as organic patterns of power with the power to address binding instructions to their national counterparts. Naturally, such option should be read in conjunction with the evolution of the general constitutional structure of the EU, especially the emergence of a single executive authority directly accountable before the European Parliament. Still, the provisions of the Treaties leave open the option for the gradual transformation of EU executive agencies into organic patterns of power, according to the precedent set by the European Central Bank in the monetary field.

The application of the agency model in the form of independent federal agencies with executive powers over police and judicial action in criminal matters would require a fully-fledged system of federal guarantees, possibly including a nomination procedure

involving not only the European but also national parliaments, supervision by an executive authority directly accountable before the European Parliament and, ultimately, the recognition of the EU Charter as the general standard of protection of human rights in the Union and the Member States alike.

EU Governance, in the form of an integrated approach to threats facing the security of the Union as a whole and its citizens, may not be effectively pursued solely on basis of intergovernmental structures under the authority of the Council and/or the European Council, such as the Art.36 Committee or the newly appointed Counter-terrorism Co-ordinator. The European Commission stands as the most qualified independent authority with valuable expertise and policy input with regard to all aspects of security management at EU level, ranging from market security in the broadest sense to the management of information as the main object of networks of control. The functional synergy between supranational and intergovernmental actors which lies at the heart of the so-called “Community method”, should be adequately translated to the EU patterns of power dealing with risks affecting the security of the market as well as individual safety. Consequently, the Commission should be fully and actively involved in the proceedings of the standing committee on internal security (as proposed under art.III-261 CT), in monitoring mechanisms of police and judicial co-operation (as proposed under art.III-260 CT) and especially in future arrangements providing for an integrated EU approach against “man-made disasters” covered by the solidarity clause (as proposed under art.I-43 & III-329 CT).

To sum up, the so-called “democratic deficit,” chronic across so much of the EU, is an especially serious problem in the context of security. Thus, the institutional initiatives proposed here need to be driven by a renewed commitment to a politics of accountability: by a willingness to resist seductive claims about the necessity for overriding liberties in the name of security and to ensure that exceptions to the primacy of liberty, equality and democracy under the rule of law are made only after sustained and multidimensional evaluation. There is no reason to abandon the achievements of modern political life to those who have been enabled to speak in the name of security and nothing but security, but there is very good reason to suspect that much too much ground has already been ceded to agencies and institutions which have become used to speaking in this way. Although threats of violence and terror may continue, the potential excesses of a new politics of exception must also be dealt with. This is not simply a matter of “civil liberties.” It is a matter that cuts right to the most fundamental principles of modern political life. In the end, it is not a matter that can be left exclusively in the hands of the security professionals, nor even the political professionals. Given the crisis provoked by negative public responses to the proposed European Constitution, this is a particularly good time to establish discussion on a much broader basis.

## **Policy Recommendations**

In view of the supremacy of the principle of liberty in respect of which security must always be subsidiary, the allocation of budgetary resources to the defence of freedom must exceed that allocated to security. Accordingly, any increase in budget allocation for security measures and the security industry must be accompanied by an equivalent and

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proportionate percentage increase in budget allocation for programmes enhancing freedom. We therefore make the following recommendations in respects of bodies to consolidate the meaning and exercise of liberty.

The establishment of:

- a. A Commissioner for Fundamental Rights with all the institutional implications that it involves.
- b. A fully independent Fundamental Rights Agency which has the full scope of tasks as set out in the Proposal for a Council Regulation establishing a European Union Agency for the Fundamental Rights [COM(2005)280, June 2005].
- c. A special branch of this Agency which has the power to send specialized data protection agents, without advance notice, to any place where Member States authorities are effecting data collection and management both within the Union and abroad, to ensure the conformity of such data collection and management activities with EU law, Article 8 of ECHR and other international commitments.
- d. A special Unit of the European Ombudsman to monitor the correct application of EU security measures.
- e. A permanent, independent and interdisciplinary, academic working group to advise the Commissioner and the Fundamental Rights Agency on European liberty and security.
- f. An emergency crisis group composed of specialists of complex emergency situations, historians, sociologists and psychologists to assess the danger on a larger scale in space and time.

In the elaboration of activities for the protection of freedom the following procedures must apply:

- a. The European Commission should be fully and actively involved in the proceedings of the standing committee on internal security, in monitoring mechanisms of police and judicial co-operation and especially in future arrangements providing for an integrated EU approach against “man-made disasters” covered by the solidarity clause.
- b. Any Agency established by the EU must be directly accountable to the European Parliament and its activities subject to review by the European Union Agency for Fundamental Right and subject to the power of the Commissioner for Fundamental Rights.
- c. Wherever individuals, rights and legitimate interests are engaged by measures taken either at the EU level or at national level as results of EU law, there must be effective and comprehensive legal remedies including appeal rights and ultimate supervision by the ECJ.
- d. Equality is the fundamental principle of citizenship and inimical to restriction on freedom of movement. The limitation on freedom of movement of workers, nationals of eight of the 2004 accession countries should be lifted forthwith.

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e. The right to habeas corpus and to a hearing before a judge on the merits of an application must be respected not only for nationals, but also for foreigners and guaranteed not only at the national level but also by the EU.