
INFORMATION PAPER

"The Stockholm programme: what's next?"

Contribution to the informal meeting of Justice and Home Affairs Ministers (Vilnius, July 2013)

In 2013 the European Policy Centre (EPC) launched a project called the "Post-Stockholm Programme". The project seeks to define further steps to be taken in the area of Freedom, Security and Justice. It is based on two 'structuring' elements:

- the 2009 Stockholm programme is coming to an end in 2014, and;
- the Lisbon Treaty inserted Article 68 into the TFEU, which states that the European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.

These two elements raised the question: ***how will the Post-Stockholm phase of JHA policies proceed and what will it look like?***

In this context the EPC set up a Task Force, composed of a permanent group of policymakers, stakeholders and experts, to reflect on the issue and to inform the discussions that will take place in the run-up to 2014. Five meetings covering relevant themes related to the area of Freedom, Security and Justice were organised. In-depth discussions addressed a wide range of questions:

- *Are JHA policies on the right track?*
- *What should be changed or transformed?*
- *Should the EU and member states develop new policies and/or adopt a new mind-set?*
- *What should future orientations be based on?*

The discussions enabled us to make some recommendations about what the future should look like and which main political orientations should be considered. Before the final report, due in December, this mid-term discussion paper will disclose the main elements discussed during the meetings.

Content

1. **Setting the scene** analyses the context within which the Post-Stockholm process is taking place and the options at stake
2. **Thematic approach** addresses key issues and proposals for further steps under specific topics:
 - Immigration, asylum and integration
 - Internal security and criminal justice
 - Civil justice
 - Transversal issues (including the external dimension, human rights and data protection)

1. Setting the scene

The need to put the tracks down

One of the first questions addressed by the Task Force was to determine whether a document defining a programme or orientations is needed. Two main competing "trends" emerged in this regard.

The first trend is based on the idea that there is little need to adopt another multiannual programme. Indeed, in the field of Justice and Home Affairs, the EU is today and will remain for the next couple of years in "**implementing mode**". Given the significant number of EU rules adopted so far, the priority is to make sure that these rules are implemented in the member states. In this view, the adoption of a multiannual document defining further steps to be taken is not a priority.

While emphasising the importance of implementing what has been adopted, the second trend followed the argument that – on the contrary – strategic guidelines in the field of Freedom, Security and Justice should be adopted. First, there are still **unfilled gaps** in several fields which call for further action. Second, new threats – e.g. cybercrime – and new challenges – e.g. Arab Spring – modify the landscape within which action is taking place. Third, **Article 68 TFEU** is a strong legal argument in favour of the adoption of strategic guidelines. Finally, given the results achieved so far, the remaining gaps and the forthcoming threats and challenges, Task Force members highlighted the need "**to put the tracks down**" in this specific policy field.

Learning from Article 68 TFEU

Once a general agreement on the need to adopt a document for the coming years was reached, a further question arose related to the nature of the document. While some consider the repetition of the existing 5-year programmes to be a logical progression, Task Force participants underlined the framework established by Article 68 of the treaty, which modifies the legal/political landscape and therefore invites consideration through different lenses. Article 68 TFEU:

- Entrusts the **European Council as the main player**. As a consequence:
 - the President of the European Council and his staff will have a leading role in the process;
 - the strategic guidelines will be adopted by the European Council in Brussels. This makes all the speculation about the name of the document (Rome, Turin or any other town name) irrelevant.
- Addresses "**strategic guidelines**". As a consequence:
 - from the group discussions it was agreed that a **distinction should be made between guidelines and a programme**. Guidelines adopted by the European Council should set out strategic orientations and define the objectives of the policy field. A programme is of a different nature as it aims to define concrete actions to be taken to achieve these objectives. In this regard, a programme is a document adopted by the Commission;
 - this first distinction can lead to different lengths of time for adoption. While a programme adopted by the European Commission could be established – as was the case with previous ones – for a period of 5 years, nothing calls for the same regime to be implemented for guidelines. On the contrary, Article 68 TFEU does not mention anything in this regard. Hence, the European Council may decide to adopt **guidelines which could be adopted for a defined period**, i.e. 5 years as was the case previously, 7 years to be compatible with the financial framework, **or without any clear deadline**. Some Task Force members expressed their preference for a long-term period, 10 years or more. However, this period should be subject to a regular review process to adapt guidelines to major and/or unexpected events;
 - finally, a strong majority of Task Force members supported the idea of short "**guidelines**". Hence, the forthcoming "guidelines" should avoid becoming a lengthy document like the Stockholm Programme and go back to a document more in the spirit of the Tampere conclusions.

Putting the question into perspective

The **historical perspective** should be taken into account to better understand the context within which Article 68 TFEU stands. Previous multiannual programmes were linked to major treaty changes (Tampere conclusions followed the adoption of the Amsterdam Treaty; the Hague programme was linked to the process leading to the adoption of the "EU Constitution"; the Stockholm programme came along with the entry into force of the Lisbon Treaty).

The **forthcoming phase is not linked to such Treaty change**. On the contrary it is perhaps the first time in the last 15 years that the field is not subject to such a fundamental modification. In this view the context is different. It should, however, be underlined that some changes will occur according to Protocol n° 36 on transitional provisions. From December 2014 onwards, the entire field of Justice and Home Affairs will be subject to the "normal" regime.

In addition, JHA policy is based on an impressive acquis made up of almost 15 years of important legislative action and operational developments. Therefore, the challenge is not merely to give ground to a new "constitutional" environment but rather to continue what has been achieved and define "strategic guidelines" for a policy field. Put differently, "strategic guidelines" should take into account what has already been completed and define orientations which could give a "**second souffle**" to the entire policy field.

Timing matters: when should the guidelines be adopted?

The treaty does not contain any rule on this matter. Guidelines may then be adopted in June 2014, as soon as the Stockholm Programme ends, i.e. December 2014, or later. Defining the appropriate timing is crucial as it interacts with diverse elements which have an important political impact:

- **National political calendars** may have an impact on decisions related to the area of Freedom, Security and Justice: Elections in Germany at the end of 2013, parliamentary elections in Belgium; local elections in France; the UK block opt-out; the Scottish referendum on independence, etc. To different degrees, each of these national political events will hold weight and have an impact on the content of the guidelines. More precisely, the results of these elections will define the scale of ambition.
- **At EU level, the 2014 turnovers** (European Parliament elections; nomination of the new President of the European Council, the High Representative/Vice-President, and the European Commission President) will have an **impact on the process**:
 - institutions will be in a transitional period which weakens their commitment/impact
 - should outgoing stakeholders commit incoming ones?
 - should guidelines be adopted within this period or later?

Possible scenarios regarding the adoption of guidelines:

- **June 2014?** The June 2013 European Council conclusions indicated that a discussion will be held to define the strategic guidelines. But how far will the discussions go and will they set in stone the driving principles and lines to be followed in the forthcoming guidelines?
- **December 2014?** This could be another solution where discussions will follow and modify/finalise the June Council's discussions. This will also leave some time to get contributions/discuss these issues with new incoming players.
- **1st semester 2015?** This is a third possibility which would enable the European Council to adopt the strategic guidelines after in-depth discussions and having considered contributions from other institutions and key stakeholders.
- **Later?** This would most surely demonstrate difficulties in reaching an agreement on guidelines.

How can other institutions and stakeholders take part in/influence the process?

The June 2013 European Council conclusions give some indications for two key players:

- **Rotating presidencies** are invited to begin a process of reflection within the Council. This will start with the Lithuanian Presidency in July 2013. How far will the Presidencies (Lithuanian; Greek; Italian; Latvian;...?) be able to influence the process regarding the content and the timing?
- The **European Commission** is "invited to present appropriate contributions" to the Council's reflection process. The Commission's participation is *a priori* not limited to the publication of a "Communication" to feed the debate. It will nevertheless be the Commission's choice to decide whether it limits its participation on the basis of a (internal) Communication or whether it launches a broader consultation process involving a wide range of players, in particular civil society. It should be underlined that in any case, the President of the European Commission will participate in the process as a full member of the European Council (Article 15 TEU).

The June 2013 European Council conclusions remain silent regarding the involvement of other institutions, in particular the **European Parliament**, and relevant stakeholders, such as **NGOs or civil society organisations**. The way in which these players should be/are involved in the process will have a strong political impact, in particular in terms of democratic legitimacy and acceptance.

A changing EU in a changing world

Several elements have or will have an effect on the guidelines:

- **Economic dimension:** while the EU is facing a tough economic crisis it is competing with new players at the global level, i.e. emerging economies. This situation has an impact on movement of people – migrant workers as well as EU citizens – and will have an effect on inflows and outflows.
- **Demographic dimension:** the demographic decline of the EU's population, which is accompanied by an ageing society, is a key concern. It will have an impact on member states' social welfare – in particular pension systems – and skill/labour shortages. These elements will affect movement of persons to, within and outside the EU. This will make the task of making the EU attractive in a globalised world even more challenging.
- **Structural limits:** the economic crisis has put national budgets under severe strain. Hence, member states will have to square the circle, i.e. be able to create jobs and growth and at the same time respond to budgetary constraints. This may affect, in a positive or restrictive manner, further developments in the field of freedom, security and justice (development of IT systems, legal aid, solidarity mechanisms,...).

Economic situation as a key driver

In any case, views exchanged within the different workshops made clear that **the economic situation will have a crucial impact on the content of the guidelines**. The perspective of economic recovery or otherwise, as well as the focus on growth, will definitely frame the content of the guidelines and therefore their level of ambition for the forthcoming years.

2. Thematic approach

This part of the discussion paper discloses some of the main points and issues discussed during the workshops.

General considerations

During the thematic meetings, recurrent items, concerns and trends emerged. They cover different topics and areas and have some impact on the way guidelines should be envisaged.

- **Implementing versus legislative mode:** this was the main recurrent item put forward and discussed during thematic meetings, i.e. the need to properly implement the enormous amount of already existing legislation versus the need to adopt new rules in order to fulfil already defined objectives. Striking the balance between these two "modes" will be crucial.
- The diverse background of persons attending workshops generated a significant number of proposals and ideas. This important contribution makes it necessary to **distinguish between orientations** – to fuel guidelines – **and actions** to put in place to reach objectives and to fuel an implementing programme.
- Finally, the **external dimension** of the area of Freedom, Security and Justice has repeatedly been highlighted as a key domain to further develop. This topic has triggered a lot of interest given in particular the role the European External Action Service (EEAS) should play in this field.

Immigration, asylum, integration

Since the entry into force of the Amsterdam Treaty, European action in this field has been one of the most visible EU policies. Immigration, asylum and integration form a nexus where **security** concerns, **human rights** obligations and **solidarity** are interlinked and interplay. This explains the reasons why these issues are often at the forefront of national, European and international political debates.

Exchanges regarding these issues were extremely diverse and intense and addressed mainly the fields of **legal migration, unauthorised migration** and the **external dimension**. Among the various proposals presented, some are very precise (the creation of an immigration code, the establishment of EU consular agencies, the adoption of binding mobility partnerships, etc.), whereas others may more easily fall within the context of guidelines (opening legal channels of migration, development of a real EU visa policy, circular migration, etc.).

Nevertheless, it is possible to streamline the ideas and to put them under different headings, which may cover the fields discussed and form the basis of discussions for further guidelines as follows:

- **Improving the attractiveness of the EU** through the adoption of coherent admission policies and enhancing intra-EU mobility rights.
- **Improving protection(s) of:**
 - Persons in need of international protection;
 - Human rights in EU rules and member states' implementation;
 - Victims and vulnerable persons;
 - External borders.
- **Enhancing policy coherence**
 - Internally: who takes the lead and coordinates?
 - Externally: which competences and what role for the EEAS?
 - Evaluation: what role for the European Parliament?
- Reinforcing the synergies between **migration and development** policies.
- Taking up the challenge of **integration**.

A final and overarching argument was brought to the attention of the Task Force members under the idea of **changing the mind-set/software from a security to a migration agenda.**

Internal security and criminal justice

Under the heading of 'internal security', members of the Task Force were invited to deal with issues related to judicial cooperation in criminal matters and police cooperation.

The EU has developed many instruments in this field and others are still in the process of being negotiated. Police and justice cooperation in criminal matters is a crucial issue. It should aim to ensure that criminals cannot take advantage of differences between member states' legislation. In this regard, strong and efficient cooperation between member states is positively echoed in public opinion. While striving to meet this aim, policies should be fully compliant with human rights.

Despite the adoption of several EU rules, Task Force participants also underlined that **this policy field lacks long-term vision and is not covered by any EU criminal policy.** Bearing this in mind, the proposals put forward are numerous. Among them, the following may fuel the discussion in view of forthcoming guidelines:

- **Avoiding 'over-criminalisation'** (deriving from post-9/11 policies) and reorienting the policy towards justice and protection.
- **Striking the right balance** between
 - Mutual recognition and approximation in the field of judicial cooperation;
 - Information exchange and protection of privacy in the field of police cooperation.
- **Strengthening evaluation**
 - Monitoring implementation of existing rules (legal and practical);
 - Using Article 70 TFUE to conduct objective and impartial evaluation of the implementation of Union policies;
 - Developing a scoreboard to monitor whether measures have been adopted;
 - Assessing the cost of instruments.
- **Developing statistical tools** to design evidence-based policy.
- **Improving training** of relevant national stakeholders and players.
- **Enhancing coherence, coordination and governance**
 - Coherence between documents adopted at EU level;
 - Between players at EU level (institutions, agencies,...) and in the external dimension;
 - Towards the creation of a European security agency.

Civil justice

The EU's action in the field of civil judicial cooperation aims to provide certainty and predictability over which rules apply in the event of cross-border disputes. It also aims to simplify applicable procedures for companies and freedom of movement of individuals.

Since the beginning of cooperation in this field, the EU has adopted an impressive *acquis* covering a number of issues connected to the everyday lives of citizens and companies. Task Force members underlined that the EU should be proud of results achieved so far and pointed out, for instance, that **the EU has currently the most advanced system of mutual recognition, civil and administrative cooperation and unified choice of law in the world.**

However, there is still some – at times substantial – improvement needed in "an area where the EU can make a difference to people's lives".

Based on the exchanges, the following orientations could form the basis of further discussions regarding EU guidelines in the field of judicial cooperation in civil matters:

- Respecting the **rule of law** and effective **access to justice** should be an overarching principle guiding action in the field.
- **Visibility and awareness** are key elements
 - Given the daily impact of this policy on citizens and companies, EU rules should be more visible, accessible and understandable.
 - Judges and professionals should be able to have access to and apply EU rules.
 - Trainings, as well as deepening a "common judicial culture" in particular between judges, should be a priority.
- **Coherence, simplification and cost efficiency**
 - The abolition of procedures (such as the exequatur) has exposed national systems to each other and showed that national (implementing) rules can be an obstacle. The adoption of further EU rules, in particular **minimum standards in procedures**, should then be considered.
 - **Codification** of existing rules could help in overcoming problems created by a fragmented approach (for instance in the field of divorce). This long-term objective should strike a balance between the rationalisation of existing rules and filling gaps created by the fragmented approach.
 - Using and developing **e-tools and electronic procedures** to enhance cooperation and cost efficiency.
- **Evaluation** of better access to justice: monitoring progress made through the Justice scoreboard and/or making use of Article 70 TFEU to enhance evaluation.
- **Enhancing and streamlining the external dimension.** This concerns the need to rationalise the EU's external action, in particular where it has exclusive competence. On the other hand, coherence and proper implementation should take into account the significant amount of EU, bilateral and multilateral conventions that exist in the field of civil justice. Finally, enhancing and streamlining the external dimension in specific domains regarding specific countries, for instance in the field of surrogacy, is key.

Transversal issues

The last Task Force meeting was devoted to so-called "transversal issues". This concerns themes which have been addressed during thematic meetings but which deserve, due to their importance, to be further discussed. The transversal issues in the framework of the Task Force were: external dimension; human rights and data protection; evaluation.

The external dimension of Justice and Home Affairs is a key issue. Indeed, dealing with third countries is crucial in order to fully address issues like transitional security threats, counter-terrorism, drug trafficking, trafficking in human beings, migration and human rights. Whilst tools, frameworks and approaches have shaped the EU's external action in the field of Justice and Home Affairs over the years, some improvements should be further considered:

- **Greater transparency between the EU and member states.** Exchange of information between the EU and member states about their respective actions and dialogue with third countries would enhance consistency. This could be done through flexible networks or establishing contact points in each institution to enhance information exchange.
- **Coherence vs. flexibility.** The external policy developed by the EU may be different according to the topic covered and the country with which it is dealing. Whilst flexibility is important, coherence when dealing with one partner country is crucial.
- **Taking into account new structures.** The EEAS did not exist when the Stockholm Programme was adopted. It should now be more involved in the drafting of orientations and strategies. In this regard, the role of EU delegations should be considered as a major asset.
- **Reactive vs. proactive policy.** Major developments in the field have followed events (European Arrest Warrant after 9/11; migration policy after 58 people died in a truck; counter-terrorism strategy after London and Madrid bombings; etc.). The EU should move away from a reactive policy and develop a more proactive external policy.

- **Cooperation with emerging countries.** EU cooperation with emerging countries, with the exception of Russia, is not at the level it should be. Efforts should be made in this regard (not only in the field of JHA though).
- **Mainstreaming human rights into the external policy,** including greater coherence between internal and external rights (treatment of migrants for instance), remains a key priority.

Dealing with Justice and Home Affairs cannot be disconnected from **human rights and data protection** concerns. In these fields, the Treaty of Lisbon has reinforced the legal framework; in giving legally-binding force to the **EU Charter of Fundamental Rights** and devoting provisions to the obligation to respect human rights (Articles 6, 21 and 67 TFEU) and data protection (Article 16 TFEU). Some further orientations deserve nevertheless to be considered:

- Developing a **positive approach** (mirroring the current negative approach) based on the **active protection of all human rights** enshrined in the Charter.
- In times of crisis, the active **promotion of socio-economic rights** (third generation) is a precondition of strengthening the EU's legitimacy in public opinion.
- Acknowledging the ever growing **e-dimension of society** and the rapid **development of ICT infrastructures/tools** in the field of Justice and Home Affairs, **maintaining and developing the legal infrastructure** regarding data protection, based on the standards of the EU Charter, is a continual need.
- The EU should invest in **developing international standards** setting frameworks and interoperability of national/regional systems.
- **ICT infrastructures are used for national security purposes but not always.** The EU, and in particular the European Court of Justice, should play a central role in drawing the line between national security issues, which are a national competence, and other issues which could fall within the field of human rights obligations.

Evaluation was a transversal issue dealt with in all the meetings. This topic concerns evaluation of the strategic guidelines and evaluation of the implementation of policies and measures. With respect to the **evaluation of forthcoming guidelines**, it will be the European Council's decision to establish such a mechanism and to define its pace according to the length of the strategic guidelines. Concerning the **evaluation of measures adopted**, several points deserve to be highlighted:

- **Ex ante evaluation** is based on impact assessments. While they have a strong impact on JHA issues, they are limited to the Commission and do not take into account the effects related to Council and European Parliament action in the legislative process.
- **Ex post evaluation** is based on scoreboards ("tick box tools"), which are limited in terms of implementation, and the role of the Court of Justice, which has the opportunity to play an important role in the JHA field due to poor legislation. In this regard:
 - Using **Article 70 TFEU** for developing evaluation of the implementation of Union policies in the Area of Freedom, Security and Justice should be considered
 - **Impact indicators** could be developed to assess the effectiveness of legislation, i.e. whether changes are induced by legislation or the environment (long-term process)
- **Alternative evaluation mechanisms/bodies** should also be taken into consideration, such as peer reviews for operational issues and reports from the Court of Auditors, which can influence policies.