

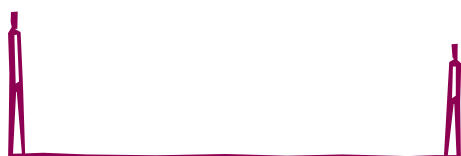
THE STOCKHOLM PROGRAMME

49

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"AREA OF FREEDOM, SECURITY AND JUSTICE"

Toby Archer

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EUROPE'S NEXT STEP ON ITS QUEST TO BE AN "AREA OF FREEDOM, SECURITY AND JUSTICE"



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- The Stockholm Programme sets the agenda for the European Union's actions for the next five years in the area of Justice and Home Affairs (JHA). It is the next step towards the goal of making the EU into an Area of Freedom, Security and Justice (AFSJ).
- Justice and Home Affairs became the third pillar of the EU after the Maastricht Treaty came into force in 1993. Originally, it was firmly intergovernmental area of policy-making but some parts were transferred to the supranational first pillar when the treaty of Amsterdam came in to force 1999.
- In the same year the EU decided it need a focused plan for cooperation in this field for the next five years; and the Tampere Programme was produced. This was followed in 2004 by the Hague Programme that ends this year, and the Stockholm Programme will lay out the next five years of JHA cooperation.
- Producing the programme has been complicated due to both the sensitive nature of many of the issues covered and by doubt until recently over whether the Lisbon Treaty would be ratified. The ratification of Lisbon changes the power balance between the European Commission, Council and Parliament and this has ramifications for the JHA area.
- With the success of the EU single market and the end of border controls within the EU, to stop crime within the EU, to guarantee the rights of citizens who are moving between EU member states, and to manage people from third countries who are seeking to come into the EU, requires cooperation across the Union. The Stockholm Programme seeks to lay out what path this should take.
- Migration policy is an important and difficult part of the programme. How Europeanised dealing with irregular migrants and asylum seeker should be has been one of the politically difficult areas within the programme.

The European Union research programme
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Photo: Sara Prestianni

The Stockholm Programme sets the European Union goals for the next five years in the areas of justice and home affairs. The EU is committed within its treaties to providing an area of freedom, security and justice (AFSJ) for its citizens, and the Stockholm Programme is intended to outline the next steps in this process.

Justice and home affairs (JHA), as a policy area of the EU, was created by the Maastricht treaty of 1993. Maastricht produced the pillar system of the EU. The first, or “Communities”, pillar dealt with predominantly economic matters related to the European single market. Here the European Commission played the central role with the right to initiate legislation, and unanimity amongst the member states was not required to pass legislation. The second pillar covered foreign relations and security matters for the EU. In pillar II, the EU’s Common Foreign and Security Policy (CFSP) and European Security and Defence Policy (ESDP) remained intergovernmental – all member states needed to agree before policy could be formulated. The same was true after Maastricht in pillar III, JHA, which covered policy fields that would be the remit of justice and interior ministries at the national level. Unanimity was required amongst the member states with the Commission and European Parliament having only minor roles in these areas.

Change in the JHA pillar began after the Treaty of Amsterdam in 1997. The EU members decided that some issues in this intergovernmental pillar would be moved to the supranational first pillar, most notably immigration and asylum policy and issues arising

from the Schengen agreement for passport-less travel inside the EU. After these changes with the Amsterdam treaty there was a sense that there was a need for better planning across the EU in JHA matters, both those issues that had moved to first pillar and those areas like police and judicial cooperation that remained in the intergovernmental third. The Tampere Programme, negotiated by the first Finnish EU presidency in 1999, was the result. The Tampere Programme ran for five years and was replaced in 2004 by the Hague Programme which is scheduled to run until the end of 2009. Hence, it fell to the current Swedish Presidency to prepare the programme for the next five years of JHA cooperation to begin in 2010 – the Stockholm Programme.

“Treaty neutral”

Work toward the Stockholm programme began some years ago, particularly with the advisory ‘Future Group’ formed in 2007, knowing that the Hague programme, like Tampere before it, was a five year plan and would run out at the end of 2009. But 2008 saw the Irish public reject the Treaty for the Functioning of the European Union (TFEU), better known as the Lisbon treaty, in its referendum and the EU being plunged into another period on constitutional angst. Even once the Irish government agreed to a second referendum, this left the Lisbon treaty and, as a result, the future institutional structure of the EU dependent on the will of the Irish people. The economic crisis and following global recession significantly changed the dynamics of the Irish referendum campaign but still through the first



Photo: re-ality/Steffen

half of 2009 it was far from clear whether the Irish would support the Lisbon treaty in the plebiscite scheduled to take place in October. Hence the preliminary work for Stockholm, and in particular the Commission's proposal for the programme that was published in June of 2009, had to be sensitive to the reality of the Irish referendum. This accounts for a proposal that arguably lacked the ambition of the preceding Tampere and Hague programmes according to a number of analysts. The programme still had to be usable if Ireland rejected Lisbon and the treaty never came into force. Secondly, the Commission would have had no interest in producing a communication that could become part of the Irish debate – the JHA area being one that easily becomes controversial due to questions of national sovereignty and of fundamental civil rights being involved. Also important was the understanding that there was reticence in many member states to continue integration in these fields.

Of course, the “Yes” campaign won the Lisbon referendum in Ireland in October, but the Swedish Presidency was kept guessing until the last moment as to when the treaty might come into force with the Czech President not immediately saying when the Czech Republic would ratify it. President Klaus eventually signed in November meaning that the treaty came into force on the 1st December 2009. This meant that the most recent drafts released by the Swedish Presidency, including the final one approved by the European Council (10–11 December) following discussion by the European Parliament and re-drafting by the Justice and Home Affairs Council of Ministers meeting (30 November–1 December)

have been ‘post-Lisbon’ and, thus, refer specifically to issues that arise from the treaty being ratified. One such example is the programme referring to the Standing Committee on Internal Security, or COSI, that is established by TFEU Article 71. COSI was not mentioned in Commission communication on the Stockholm Programme from June of this year, despite the origins of the committee going back to the Constitutional process in the early part of this decade. In the run up to the European Council Summit where the programme was approved, experts were described the Presidency drafts released after the Irish ‘Yes’ vote as more ambitious than earlier version.

Treaty changes, opt outs and opt ins

The Lisbon Treaty does have significant implications for the JHA area and hence for the Stockholm Programme. The treaty ends the three pillar system outlined above, where originally all JHA issues, and later after Amsterdam judicial cooperation in criminal matters and police cooperation, were separated off as intergovernmental areas of policy where the Commission and the European Parliament had little impact. After Lisbon, as the Council puts it, these areas “will be treated under the same kind of rules as those of the single market”. These rules are the co-decision system, where normally the Commission initiates new legislative ideas, the European Parliament also has a say and policies will fall under the remit of the European Court of Justice. Within the Council, where the members states meet, voting on new legislation moves from unanimity,



Photo: Noborder Network

that meant any single country could stop a proposal, to Qualified Majority Voting (QMV) where a group of member states have to vote together to defeat a proposal. In short, the policy area that the Stockholm Programme maps for the next five years, is now a far more supra-national field than its previous intergovernmental nature.

These changes have some implications for member states with special arrangements with regard to JHA policy areas. Denmark negotiated an effective opt out to all JHA cooperation after the Maastricht treaty. With Lisbon it now has the ability but no requirement to join JHA cooperation if it wishes. This is the opt in model that was developed for the United Kingdom and also for Ireland (although there are differences) after the Amsterdam treaty came into force. As noted above, Amsterdam moved a number of policy areas that had been intergovernmental in Pillar III into the supranational Pillar I where QMV was in effect. With QMV meaning no single member state has a veto, the UK negotiated the opt in systems for these issues where it could decide whether to take part on a case by case basis. The Lisbon Treaty moves all JHA issues into QMV, meaning that now, according to the House of Lords, “virtually all initiatives under the Stockholm Programme will then apply to the United Kingdom only if the Government opt in”.

Sensitive issues

The Stockholm Programme deals with very sensitive issues, many of which are relatively new to the community style policy making of the EU. It is for

this reason that certain member states negotiated the opt outs and ins to the JHA field as noted above, and why an “emergency brake” measure, available to all member states, was included in the Lisbon treaty for these areas. The brake mechanism allows a member state to halt legislative moves where they feel it would conflict with its criminal law system.

These various safeguards and the general sense of a careful balance being struck by the programme reflects the political sensitivity of dealing at this wider European level with what has been traditionally the internal politics of the nation-state. The need to engage with these issues at the European level comes out of the successes of the EU in other areas – most notably the single market. What began as a free trade area has deepened to include the almost free flow of people within the EU as well. This is most obvious with the Schengen Agreement that dismantled border controls within the EU (except for the UK and Ireland) but also important is the ease with which the citizen of one member state can reside permanently, or semi-permanently, in another member state. Therefore increasingly European Citizens are becoming subject to the laws of other member states; either criminal law, if they are suspected of a crime, or civil law in many other areas life such as family relations, business and work. Even member states that are reticent about the excessive transfer of JHA matters to the community level accept that cross-border crime within the EU requires cross-border cooperation to contain it, let alone defeat it, and this can be best coordinated by the EU.

Minimizing the differences between various European legal systems is designed to stop these differences from becoming de facto barriers to citizens exercising their right to move freely within the EU, and thus helps to make the idea of 'European Citizenship' a reality. The Stockholm Programme does not aim at the EU becoming the single source of law. With a number of very different legal traditions across the continent that give rise to the numerous different legal systems (27 member states with different legal systems, and with some countries having multiple systems; for example Scottish versus English and Welsh law in the UK); it is seen as simply too much of an imposition on national sovereignty to attempt this. Rather the programme focuses on moving further towards "mutual recognition" and "common standards" where member states have sufficient faith in the decisions of each others' legal systems to allow them to respect the decisions made in the courts of the other EU member states. The programme also envisages extensive contacts between law enforcement and judicial professionals across the EU to increase understanding and knowledge of the judicial and policing systems of other EU countries. This is proposed to be done through professional networks and exchange programmes modelled on the Erasmus student exchange scheme.

Protecting the Citizen, protecting the Citizen's rights

A central aim of the Stockholm Programme is in its sub-title: "protecting the citizen"; but this is to take place in an "open and secure Europe". Since the terrorist attacks of 9/11 in the United States in 2001, and also after subsequent attacks in Europe, there has been much focus on a supposed balance between security and liberty. Attempts to find this balance are apparent in the programme: despite numerous references to terrorism and counter-terrorism as something to be 'combated' or 'fought against' through the text, the idea of fundamental rights is even more apparent. The EU has always seen itself as a guardian of human rights, but this is even more obvious now as with the Lisbon Treaty coming into force, the EU gains the legal personality to accede to the European Convention on Human Rights in its own right.

One relatively new field in which the security versus liberty balance is tested is data protection. The right

to privacy is one of the fundamental rights that the EU seeks to safeguard for its citizens, yet at the same time some of its cooperative steps in fields such as cooperation on criminal justice issues and border control may undermine those rights. A number of major EU-wide databases are being constructed for the purpose of law enforcement, visa and border management across the Union, but the EU's own Fundamental Rights Agency (FRA) stresses that Stockholm Programme must ensure "measures and mechanisms guaranteeing that all European databases stick to the highest European standards of data protection".

Immigration and asylum

One of the most controversial areas that the Stockholm Programme deals with is immigration and asylum. With the removal of borders within the EU, movement of third country nationals into and around the EU has become a central question for the Union. The Stockholm Programme reflects a growing tension across Europe between the realisation that shrinking European populations will need immigrants to maintain the current social bargains, and that Europe has to compete for top talent in a global market, versus fears over the number of irregular or illegal immigrants.

The programme supports the idea of an EU global approach to migration; that migration if managed can have positive benefits for both sending and receiving countries. This will rely on cooperation with countries of origin and transit, promoting legal – probably circular – migration and trying to prevent illegal migrants. The programme also deals in depth with the question of irregular migrants who come to Europe and then claim asylum, extending right down to the minutiae of suggesting the joint chartering of planes to return those deemed to have no rights to be in Europe to their countries of origin. This is very difficult and complex area of policy making, balancing the requirements of international law with domestic political sensitivities. Some analysts think that the Stockholm Programme as conceived so far is not reaching that balance and is in danger of only granting the fundamental rights to 'citizens', rather than to 'individuals' and hence not ensuring the rights of third country nationals inside the EU.



Photo: Noborder Network

Solidarity?

A central issue related to asylum seekers is that of solidarity between the member states. What this has come to mean is the southern EU members, particularly small (Greece) and very small (Malta) members believe that the large numbers of asylum seekers they receive should be shared amongst the other member states. This is something that the northern EU states fundamentally do not agree with. The Dublin agreements that codify this area require that a refugee seeks sanctuary in the first safe state they arrive in. If they move on to a second EU member state, they can be and are returned to the member state that the refugee arrived in. This puts large pressures on the minimal resources that some of the southern member states have for asylum application and processing refugees.

The European Parliament's resolution on the Stockholm Programme is bullish, saying there should be more voluntary solidarity between the member states on this issue, and calls for a debate on the possibility of compulsory reallocation of refugees across the Union on the basis of the capacities of the individual states. This is something that is strongly resisted by many of the northern member states ranging from the UK to Finland. The Presidency draft of the Stockholm Programme reflects this reality – whilst saying the member states should find ways to support each other it notes these will be voluntary. The Finnish government's position for example is that whilst it will consider capacity building efforts to assist southern member states in processing asylum applications, and it supports EU efforts to

deal with the causes of immigration and to identify those with a real need of international protection before they even come to Europe, it will not accept a quota system for distributing asylum seekers to EU states beyond those that they first arrive in.

Next Steps

The European Council, consisting the EU Heads of State, met in Stockholm on 10-11 December and approved the Stockholm Programme. The Swedish Presidency will then bow out and the incoming Spanish Presidency will be responsible along with the Commission for creating an action plan that will serve as a timetable for implementing the various proposals contained in the programme. Whilst the Spanish Presidency intends to focus primarily on economic matters along with EU relations with Africa and Latin America, Spain has announced that it is particularly interested in the security fields that come under Stockholm, because of domestic terrorism from ETA, but will also continue to focus on producing a better European approach to immigration as a policy priority.

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