EU's Criminal Policy and the Possible Contents of a New Multi-Annual Programme

- From one City to Another...

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

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CITATION SUGGESTION

L. Salazar, "EU's Criminal Policy and the Possible Contents of a New Multi-Annual Programme", 2014, Vol. 9(1), eucrim, pp22–26. DOI: https://doi.org/10.30709/eucrim-2014-003

Published in
2014, Vol. 9(1) eucrim pp 22 – 26
ISSN: 1862-6947
https://eucrim.eu

The steps forward of the European Communities or of the European Union have always been quite associated with the names of the cities where the crucial decisions – very often long prepared in advance in Brussels, Strasbourg or elsewhere – were presumed having been finally taken: Rome, Maastricht, Amsterdam, Nice, Lisbon…

The same is true of the turning points in the field of Justice and Home Affairs after the entry into force, in November 1993, of the Treaty establishing the European Union (the Maastricht Treaty).

Immediately after the entry into force of the Amsterdam Treaty, on 1st of May 1999, a clear need emerged to streamline the future initiatives to be taken within the framework of the reinforced Justice, Freedom and Security (JLS) scenario provided for under the treaty in order to implement its new objective "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to … the prevention and combating of crime" (Art. 2 TEU).

In the years preceding the entry into force of the Amsterdam Treaty, the experience with "soft-law programs," such as the "Plan of Action against Organized Crime" adopted by the Council on 28 April 1997,[1] had already been tested by the Justice and Home Affairs (JHA) ministers with quite satisfactory results. Nevertheless, only on the occasion of the "special meeting" of the European Council held in Tampere in October 1999 (to date the only meeting of the heads of state and government of the EU exclusively devoted to Justice and Home Affairs matters), could a first "multi-annual program", providing the Union with real "political guidelines and concrete objectives" for all the JLS policies, be considered adopted.

It was indeed in Tampere that the heads of state or government (together with the president of the Commission) put forward ideas of paramount importance, such as the principle of mutual recognition of judicial decisions, the setup of Eurojust, or the abandonment of extradition in favor of a system of surrender, i.e., the European Arrest Warrant.

Five years later, the "Tampere Conclusions" were followed by "The Hague Programme"[2] (2004) and then by the "Stockholm Programme" [3] (2009).

If, in the Hague Programme, the so-called "principle of availability" for law enforcement authorities[4] could still be perceived as "the" strong message sent out by the document (though rapidly forgotten), it is generally acknowledged that none of these programs has ever achieved a level of ambition even comparable with the "Tampere Conclusions." The periodic exercise swiftly turned into a sort of "shopping list," where it was not always easy to make the distinction between "real priorities" and just a long (and increasingly longer) list of wishful thinking. The relatively concise 62 paragraphs of the Tampere Conclusions first expanded in The Hague from 14 pages in the Official Journal to a 38-page long program in Stockholm; one could even say that the actual content of the documents seems to be inversely proportional to the number of pages used to convey it.

I. Implementing Art. 68 TFEU

Art. 68 TFEU, introduced by the Lisbon Treaty, stipulates that "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice."

The Stockholm Programme was in fact formally adopted by the European Council just a few days after the entry into force of the Lisbon Treaty (1st December 2009) though conceived well before that date. As clearly stated at the very beginning of the document "this programme defines strategic guidelines for legislative and

operational planning within the area of freedom, security and justice in accordance with Article 68 TFEU," due to the fact that, for a few days, this provision of the TFEU had formally provided the European Council with a task that had in fact already been in its hands for a decade.

Hence, the Stockholm Programme became the first programmatic document of the new "Lisbonized" era, because (at least formally) it implemented the new provision of the treaty. At the same time, it can also be considered the last multi-annual program to have been adopted by the European Council under the "old" methodology inaugurated in Tampere.

It is no secret that the European Commission has never shown great enthusiasm regarding these types of programmatic documents coming from the European Council. This seems particularly due to the fact that the Commission looks at them as possibly jeopardizing its power of initiative in a sector in which Member States are still provided with the possibility of putting forward legislative proposals in the field of criminal justice and police matters.

It should be also recalled that, when the action plan for implementing the Hague Programme was presented, it was jointly adopted by the Council and the Commission.[5] After the Stockholm Programme, the implementing "Plan of Action" was instead adopted by the Commission alone,[6] without any negotiations with the Council, thus providing the best evidence of the strong wish on the part of the Commission to immediately firmly take back in its hands any room for maneuver that had only temporarily been abandoned in favor of the European Council.

What is even more important to note is that the relationship between the two documents is not always stable and well defined and, especially after the Stockholm Programme, the implementing document does not, at least in some cases, necessarily have much to do with its precursor.

II. The new strategic guidelines: When (and where)?

Less than four years after the adoption of the Stockholm Programme, the European Council of June 2013 decided that, at its June 2014 meeting, it "will hold a discussion … to define strategic guidelines for legislative and operational planning in the area of freedom, security and justice (pursuant to Article 68 TFEU). In preparation for that meeting, the incoming Presidencies are invited to begin a process of reflection within the Council. The Commission is invited to present appropriate contributions to this process."[7]

The rush in which the decision was taken to hold this debate well in advance of the sunset of the Stockholm Programme (December 2014) was a bit surprising and what was expected by many to be the "Rome Programme" will probably be recalled as the "Athens Programme." Putting aside any contention over geographic indications, the reasons for anticipating this debate in the European Council could perhaps be explained by the extraordinary situation of an "institutional jam" anticipated throughout 2014: successive changes in the European Parliament (elections in May), in the Commission (new President designated in June, with the new College due to become operational in November), and following the election of the new President of the European Council (October).

This already frightening scenario is accompanied by the additional incertitude in the JLS Area resulting from the end of the transitional period under Protocol No. 36 and – in direct connection with this – by the already decided UK opt-out from the overall pre-Lisbon *acquis.* The UK opted out in order to avoid becoming subject to the judicial control that the Court of Justice will be able to exercise over all the former "third pillar *acquis*" after the 1st of December 2014 (i.e., all the instruments adopted in the field of criminal justice and police cooperation before the entry into force of the Lisbon Treaty).

The accelerated process put in place by the European Council in June 2013 has pushed all the institutions to move on in order to be prepared for the *rendezvous* of June 2014 without having to devote an excessive amount of time to this task.

The Council started discussions among ministers under the Lithuanian Presidency already (2nd semester 2013) on the future "multi-annual program," and these discussions have continued under the Greek Presidency in the 1st half of 2014 in order to pave the way for the debate in the June European Council.

The European Commission launched in late 2013 two public consultations on the future of the JLS Area, one organized by the Directorate General Justice (DG Justice), in the context of a conference of the "*Assises de la Justice*" held in Brussels in November 2013,[8] and the other by the Directorate General Home Affairs (DG Home).[9] In response to the public consultations, a number of contributions were transmitted to the Commission by different stakeholders, including many EU Agencies.[10]

The debates contributed to the issuing of two parallel Communications, both released by the Commission on 11th March 2014: "The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union"[11] and "An open and secure Europe: making it happen," [12] which set out the political priorities that, in the view of the Commission, should be pursued for Europe to be a true common area of justice and security in which fundamental rights are guaranteed.

Shortly after the adoption of the two Communications, the European Parliament, for its part, held, on 19th March 2014, a joint Committee meeting together with national parliaments on the "Future Priorities in the field of Civil Liberties, Justice and Home Affairs;" the conclusions of the meeting devote particular attention (together with the crisis related to illegal immigrants in the Mediterranean sea, the future of Europol, and data protection and electronic mass surveillance) to the European Public Prosecutor's Office and judicial cooperation in criminal matters.

III. The new strategic guidelines: What should they look like…?

After analyzing all the different inputs and proposals provided by the Commission Communications, the debate of the JHA Ministers, and the other bodies involved, one could hardly argue that they contain a real impetus to move towards a new "Tampere", where strong ideas, somehow comparable to mutual recognition, Eurojust, or the European Arrest Warrant, could be found.

The above mentioned Communication of the Commission on "The EU Justice Agenda for 2020," using a sort of triple "C" approach, clearly states that *"… the focus of EU justice policy in the years to come should be on* ***consolidating*** *what has already been achieved, and, when necessary and appropriate,* ***codifying*** *EU law and practice and* ***complementing*** *the existing framework with new initiatives."*[13] The accent is clearly put on the effective implementation of the existing *acquis* and its "consolidation," while the codification of this framework or its integration with new legislative initiatives should be taken into consideration only when *necessary and appropriate*.

The focus on the concrete "*mise en oeuvre*" of the legal instruments, after the great legislative efforts of the first decade of this century, had in fact already been announced in the Stockholm Programme, where it was stated that "increased attention needs to be paid in the coming years to the full and effective implementation, enforcement and evaluation of existing instruments;[14] nowadays "*implementation vs. (new) legislation*" seems to become a sort of *mantra* which must be repeated in any contribution in the JHA sector, no matter what the Institution or the body providing it.

The only exception to this approach, which seems to view the possible adoption of new legislation as necessary or (at least) desirable in criminal matters, seems to be related to the improvement of procedural rights of the defendants, to "further strengthen the level-playing field and the consistency of the protection of the rights of suspected persons" and to continue the process inaugurated in 2009 with the "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings."[15] The roadmap was adopted by the Council at its meeting of October 2009, just before the entry into force of the Lisbon Treaty; it can be considered as *the* success story in the present EU criminal justice scenario and has been already substantially implemented through a number of different directives, based on Art. 82 § 2 TFEU, which have already adopted, are on the way to being adopted, or are still under negotiation in the Council. These directives provide "minimum rules" in the field of the rights to interpretation and translation, for persons involved in criminal proceedings to receive appropriate information, for them to have access to a lawyer, while the other three initiatives already put on the table by the Commission deal with the rights of children involved in criminal proceedings, legal aid, and the presumption of innocence.

While waiting for the finalization of the instruments still under negotiation, the time may be right for already starting a reflection on a possible new "Post-Stockholm Roadmap" to strengthen the procedural rights of suspects and accused persons in criminal proceedings.

Taking into account the results already achieved with the first roadmap and what still remains to be dealt with, a tentative (but surely not exclusive) list of measures, which could be taken into consideration in view of the drafting of a new programmatic document in the field of procedural rights, could include the right of a person to be heard before a custodial measure is imposed; the right to an effective appeal against certain decisions taken against him and to a remedy (including a compensation) in case of miscarriage of justice; a definition of the *ne bis in idem* principle going beyond Art. 54 of the Schengen Convention; and minimum rules to limit an excessive pre-trial detention, stressing the nature of the measure as a "last resort."

In favor of the idea of starting the process of a new roadmap, we could also consider that the more instruments of an horizontal nature providing for additional guarantees we have, the less necessary a discussion of the insertion of specific procedural guarantees into each single instrument under negotiation becomes. This was the case, for instance, in the debate surrounding the proposal for a regulation on the creation of a European Public Prosecutor's Office (EPPO), where the issue of whether or not one should provide specific procedural guarantees regarding the action of the new body has become central to the negotiations.

Another subject which would certainly require future (and further) attention is how to ensure that criminals and criminal organizations are effectively deprived of their illicit assets beyond the cases already covered at present by criminal convictions. The recently adopted Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime[16] has delivered a quite deceptive result as to the final aim of the instrument, which, unlike the original proposal of the Commission, does not include cases of "non-conviction based confiscation." If we wish to tackle organized crime in an effective way, we should move towards the full implementation of the principle of mutual recognition of judicial decisions also in this field, thus providing for the concrete possibility to recognize and execute any decision of confiscation pronounced on the territory of the Union, provided that it has a true judicial nature and is adopted with full respect for the fundamental rights of the persons involved.

IV. A "must have": Judicial Training

EU law is providing practitioners, particularly national judges and prosecutors, with instruments that are even more sophisticated and which at the same time increasingly have an impact on the daily lives of EU citizens (e.g., the European Arrest Warrant).

Practitioners need to be able to handle these instruments efficiently. To this aim, they must be provided with adequate training in order to respond to the high level of sophistication achieved by EU law in this field and, more generally, to the goal of building up a single area of justice throughout the EU based on mutual confidence, a goal that requires professional handling of all the legal resources provided and put in common by the EU.

The present situation of judicial training in the EU seems to be characterized by a certain disproportion between the target already announced by the Commission in its Communication (training 50% of the 700,000 legal practitioners within the EU, including all new judges and prosecutors) and the dimension and resources of the main actor in this field, the European Judicial Training Network (EJTN). Created as a network composed of the national institutions responsible for judicial training in the different Member States, the EJTN still has the legal form of a Belgian ASBL (i.e., a *non-profit* organization under Belgian law) and, even after adoption of the new financial framework, it is completely dependent on an annual grant from the Commission. This situation can be seen as even less satisfactory when compared with the far less sensitive training of law enforcement authorities (at least from the point of view of the handling of legal instruments), for which an EU agency (CEPOL) was created already many years ago.

In the "EU Justice Agenda for 2020," the Commission states that "the experience of the EJTN should be consolidated and expanded to include all new judges and prosecutors" but does not specify how this objective should be achieved. Notwithstanding the difficult financial situation and general reluctance of EU institutions and Member States to go along with the idea of creating new agencies, the possible "upgrading" of the already existing EJTN to the status of a real European Law Academy could be considered one of the best investments one could envisage for the future development and effective implementation of EU law.

V. What Next?

Together with the Union's external action,[17] the Area of Freedom, Security and Justice is the only area in which the European Council is explicitly called upon by the treaties to lay down or define "strategic guidelines." Reading this in connection with the other specificities peculiar to Title V TFEU, notably the derogation to the general principle that the "Union legislative acts may only be adopted on the basis of a Commission proposal," this seems to provide a clear indication that, in these two specific areas, the treaties decided to keep the task of orienting the action of the Union in the hands of the European Council (which is not an intergovernmental body but a full-fledged European institution under Art. 13 TEU).

After Tampere, The Hague, and Stockholm, the strategic guidelines to be adopted by the European Council in June will certainly constitute a turning point among the "old-fashioned" multi-annual programs (the Stockholm programme, though adopted after entry into force of the Lisbon Treaty, is still to be considered part of them). A "new" system, should inevitably be based on the true "strategic" nature of the guidelines, i.e., fewer pages of the Official Journal but more substance, in order to provide genuine input and orientation for the subsequent action of the Commission and the Council (as far as Member States still have the possibility to put forward proposals in the field of criminal justice and police matters).

Faced with a European Commission that appears progressively less inclined to be "guided" in the exercise of its right of initiative by the European Council, the more the guidelines are able to provide strong messages on selected topics, the greater the chance that they will gain acceptance and be transformed into concrete future initiatives or proposals by the Commission itself or by the Member States.

One can expect, for instance, that, in June, the European Council, after having probably agreed on the importance of EU justice policy to ensure economic growth, may also wish to send a strong message about

its wish to fight economic crime and illicit assets. It may also wish to see the proposed regulation on the European Public Prosecutor's Office adopted by a given deadline, taking on board as many Member States as possible on the common understanding that the unanimity required by Art. 86 TFEU for the adoption of the regulation does not include Denmark (which does not participate in title V of the treaty) nor the United Kingdom and Ireland (which have not opted into the regulation and thus will not participate into its adoption).

At the same time, the June conclusions could also express the wish to proceed towards the quick adoption of a new agenda on the procedural rights of accused persons, in order not to lose the *momentum* created by the results achieved with the first roadmap and without putting aside the need for further improvement of the rights of the victims, which are probably not yet developed as much as needed at the level of the Union.

Last but not least, knowing that the new multi-annual financial framework (MFF) will last until 2020, there seems to be an emerging consensus among Member States to align the duration of future policy planning with the financial planning period; if this indication is confirmed, the new program could be valid for at least six years after its adoption. The synchronization of the policy period with the MFF certainly sounds reasonable; at the same time, it could also raise some concerns about possible reduced flexibility due to such a long period, which, at the end of the day, will leave more margin for maneuver in the hands of the European Commission.

If the European Council is able to provide the Council and the Commission with such clear indications, the system will find its institutional balance again. Justice and Home Affairs are indeed at the heart of national sensitivities; if the times in which initiatives lay in the sole hands of Member States are definitely over, it is at the same time difficult to imagine that the Commission alone could really be able to provide an answer to all the political needs related to this area.

After 15 years of experience and the "golden age" of Tampere, the process seems to have progressively lost its "propulsive impetus" in The Hague and in Stockholm. Regardless of whether the new program is known as the Athens, Rome, or even the Brussels Programme, what is really at stake is the question of whether the European Council will again be able to firmly take into its hands the compass of the Area of Freedom, Security and Justice and provide clear orientation on the way forward. It is neither necessary nor desirable for the Commission to give up its role of initiating the Union's annual and multi-annual programming (see Art. 17 TEU) – and the Commission would not do so under any circumstances – but the co-legislators, the Council, and the Parliament, as well as the Commission, have an interest in being provided with a clear framework within which they can develop their respective actions.

If this is not the case and if the conclusions of June are (again) deceptive from the point of view of the substance of their content, one could question whether Art. 68 of the treaty has provided an efficient policy instrument or even whether a multi-annual program as such can still be considered an adequate policy instrument.

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1. O.J. C 251, 15.8.1997 p. 1.↩
2. O.J. C 53, 3.3.2005, p. 1.↩
3. O.J. C115, 4.5.2010, p. 1.↩
4. See point 2.1 of the Conclusions: "the principle of availability, which means that, throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State".↩
5. O.J. C 198, 12.8.2005, p. 1.↩
6. COM(2010) 171 final.↩
7. See p. 21 of the Conclusions (fn 4).↩
8. "Shaping Justice policies in Europe for the years to come", Brussels 21-22 November 2013.↩

9. A cycle of three Conferences, in Rome, Berlin and Brussels, on the subject "Debate on the future of Home Affairs policies: an open and safe Europe – What next?"↩
10. Results of the proceedings, discussion papers, and written contributions are available at: http://ec.europa.eu/justice/events/assises-justice-2013/index_en.htm. Among the European Political Center – EPC, "*The Stockholm programme: what's next? Contribution to the informal meeting of Justice and Home Affairs Ministers (Vilnius, July 2013)*", Brussels, 11 July 2013; Fundamental Rights Agency – FRA, "*Fundamental rights in the future of the European Union's Justice and Home Affairs*", Vienna, 31 December 2013; JHA Agencies Network, "*Common General Considerations by the JHA Agencies*", La Valletta, 27 February 2014.↩
11. COM(2014) 144.↩
12. COM(2014) 154.↩
13. COM(2014) 144 final, see point 4.↩
14. See point 1.2.3 of the Stockholm Programme, O.J. C 115, 4.5.2010, p. 1.↩
15. O.J. C 295, 4.12.2009, p. 1.↩
16. O.J. L 127, 29.4.2014, p. 1.↩
17. See Art. 16.6 TEU↩

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by the European Union