



Analysis

The next multi-year EU Justice and Home Affairs programme Views of the Commission and the Member States

Steve Peers
Professor of Law, University of Essex

Introduction

The next Justice and Home Affairs (JHA) programme, which will replace the current Stockholm programme adopted in 2009, is likely to be agreed (at least in principle) in June 2014. With this in mind, Member States gave their views on the possible content of the next programme over the last few months, and the Commission gave its views today.

There is a general view that the next programme ought not to set out a detailed programme like its predecessor, but rather set out some general principles with perhaps a few specific concrete objectives. The following analysis summarises the views of the Member States and the Commission, in order to assess the likely shape of the next JHA programme.

Views of the Commission

The Commission has set out its views in two communications – one dealing with Justice, and one dealing with Home Affairs. The Home Affairs communication proposes more concrete actions, perhaps because the Justice Commissioner was also presenting a separate communication on a new Commission process to ensure the ‘rule of law’ within Member States.

The first section of the Commission communication concerns **legal migration** – the area of home affairs where the EU has done least (as compared to borders/visas, irregular migration, asylum and policing). However, its impact should not be understated: the EU has adopted or agreed four Directives on legal migration under the Stockholm programme (on seasonal workers, intra-corporate transferees, single permits/workers’ rights and extending long-term residence status), in addition to prior measures on family reunion, long-term residents, students, researchers and highly-skilled migrants. A proposal to amend the legislation on students and researchers is already under discussion.

The communication suggests that the EU should: set up a system to coordinate joint assessments on labour migration; extend rules on job-searching, transfer of social benefits and recognition of qualifications to third-country nationals; codify and streamline the current

laws on legal immigration; and ensure the stability of permits for migrant entrepreneurs. This suggests a significant legislative agenda.

A contrary approach is taken as regards **irregular migration**, where the communication largely reiterates existing EU policy without suggesting much concrete action. The one specific suggestion made is to review the existing EU rules on smuggling of migrants, with a new comprehensive strategy on this issue. There is no specific mention made of the need to confirm that fishermen who save migrants from drowning should not be criminalised.

Next, the rules on **borders and visas** state that the EU's visa code should be amended (a proposal to this effect is imminent), but otherwise restate long-standing plans to adopt rules on 'smart borders' (now delayed to 2016), consider a possible European System of Border Guards, encourage Schengen visa centres, and move toward a system of individual assessment of the need for a visa requirement.

As for **asylum**, the focus is on transposition and implementation of the second-phase measures constituting the Common European Asylum System, the remainder of which were finally adopted in 2013. But the Commission does have some concrete suggestions for further measures: the mutual recognition of asylum decisions; rules on the transfer of protection; relocation of beneficiaries of international protection (which would necessarily entail rules on the transfer of protection); joint processing of asylum applications; and a more orderly arrival of persons needing protection, by means of protected entry procedures and possibly joint processing of protection claims outside the EU (without affecting the right to claim asylum within the Member States' territories).

The measures concerning policing are mostly operational actions such as information exchange, training and anti-corruption reports. More specific proposals are the possible need for criminal anti-money laundering legislation, examination of criminalising the intentional use of the services of trafficking victims, the adoption of new EU legislation on designer drugs (already proposed), potential new laws on firearms, the adoption of an EU framework and more international treaties on passenger name data, and the review of the data retention Directive, along with the e-privacy Directive. It should be noted that in the near future, the Court of Justice of the EU will rule on whether the data retention directive is valid, or whether it breaches the EU Charter of Fundamental Rights (Case C-291/12 *Digital Rights*).

As for justice policy, there are three aspects: consolidation, codification and complementary measures. The consolidation of existing measures concerns first of all fundamental rights, but no specific measures are proposed to this end. Secondly, it means ensuring effective remedies, but here the Commission has little concrete to suggest (it has already proposed amendments to the small claims regulation, referred to here). Thirdly, it means that there should be more judicial training, with a specific aim of training half of the judges in the EU by 2020. Fourthly, it means greater use of e-justice, and finally it means more operational cooperation, entailing further strengthening the effectiveness of Eurojust. It should be noted that the Commission proposed a new Regulation on Eurojust in 2013 (still under discussion); it is not clear if it thinks another proposal is needed.

As for codification, this might be relevant in particular to civil and commercial law, consumer rights and procedural rights in criminal law. Finally, the adoption of new measures in new areas (ie, complementing the existing law) is suggested as regards: mutual trust in civil matters (service of documents, taking of evidence and family law); new rules on mutual recognition of financial penalties, confiscation orders and disqualifications (there are already rules on the first two issues); further measures concerning the European Public Prosecutor; harmonisation of substantive insolvency law; the adoption of optional contract laws (there is already a proposal to this end); facilitating citizens' lives by ensuring the free movement of

documents; guaranteeing that crime victims receiving compensation from offenders; and completing the process of EU accession to the ECHR. It should be noted that there is no suggestion that the European Arrest Warrant rules should be reviewed, as recently suggested by the European Parliament, and no specific suggestion as regards rules on pre-trial detention, which many NGOs support.

Views of the Member States

The Commission's views are broadly consistent with the opinions of Member States, although its plans are more ambitious than some of them prefer. As regards home affairs, several support the idea of codification of legal immigration legislation (Czech Republic, Greece, Slovenia), and a large number support taking forward the 'smart borders' proposals (Finland, Croatia, Hungary, Germany, Bulgaria, Italy, a 'joint paper' of five Member States, Portugal, Poland). Several support the passenger name record proposals (Estonia, Hungary, Portugal), and some support a terrorist finance tracking programme (Estonia), an idea already dismissed by the Commission and not revived here. (Nor has the old idea of adopting EU legislation on domestic terrorists been revived). There is some support for rules on mutual recognition of asylum decisions and transfer of protection (Belgium, Italy, Malta).

Certain Member States lay more emphasis on solidarity as regards asylum applications than the Commission does (Croatia, Bulgaria, Greece, Malta, Slovenia), and Hungary is particularly keen on mutual recognition of expulsions, including a database of expulsions, as well as an electronic system of travel authorisation (moving toward the personalised visa suggestion; so is Lithuania, and the 'joint paper' of five Member States). Germany supports a central fingerprint database, and wants to revive the idea (rejected several years ago by the Commission) of a police records information system. Belgium supports the idea of measures on identity fraud, and the Czech Republic wants measures on cross-border surveillance and interception. Malta is more explicitly keen to punish third States which do not accept readmission than the Commission is.

As regards justice issues, many refer to accession to the ECHR (Estonia, Croatia, Sweden), as well as the European Public Prosecutor (Estonia, France, Germany, Italy). Several support the idea (also raised by the Commission) of completing work on the current data protection proposals (Estonia, Germany, Italy).

Other Commission suggestions also have some support (confiscation of criminal assets: Ireland, Croatia, France, Sweden; insolvency: Croatia, Czech Republic, Sweden; civil justice codification: France, Germany; money laundering: France; Eurojust: France; financial penalties: Belgium; firearms: Belgium; service of documents: Germany, Sweden). Some raise other issues (evidence about foreign law: Estonia; parental responsibility: Ireland; mutual recognition of fines: Hungary; protection of vulnerable adults: France; the remaining proposals on suspects' rights: France, Germany; transfer of criminal proceedings: Belgium, Sweden; child abduction: Belgium, Czech Republic, Sweden; databases of criminal acquittals: Czech Republic; detention rules: Italy; European Arrest Warrant: Slovenia).

Assessment

The Commission's communications are squarely placed in most Member States' 'centre of gravity' as regards new measures. Many of the ideas supported by only a small number of Member States are overlooked, in favour of measures (smart borders, PNR, the public prosecutor, asylum solidarity issues) that have some broader support.

The effect of publishing two communications is that there is no single Commission vision of the future of JHA in the EU, with the 'three Cs' in the Justice paper as compared to a subject-based approach in the Home Affairs paper. Nor there is any suggestion for a number

of basic themes for the future of JHA, comparable to the basic ideas adopted at the Tampere European Council in 1999: creating a Common European Asylum System, equal treatment of third-country nationals, civil and criminal law cooperation founded largely on mutual recognition.

Some of the proposals have been kicking around for years (joint processing of asylum claims, Schengen visa centres) without much movement toward accomplishing them, and some are proposals already on the table (PNR, data protection, ECHR, public prosecutor, smart borders). Here, there are obvious possible trade-offs (most obviously, PNR in return for data protection) which present themselves. Some of the ideas go 'back to the future': the Commission already proposed a codified law on labour migration, as well as a system for coordination of national policy on this subject, back in 2001, and a codified law on suspects' rights in 2004.

While there are frequent references to the protection of human rights, there is nothing concrete as regards the enforcement of the EU Charter of Fundamental Rights or the legislation relevant to fundamental rights. In light of its record to date, in which it has documented many important breaches of that legislation by Member States but failed to bring many infringement proceedings against them, any reference to ensuring the correct implementation of EU legislation and rhetorical commitments to the Charter mean nothing without the Commission binding itself to bring more infringement actions in such cases.

There would be some further legislation to implement human rights, by means of continuation of the current agenda for legislative proposals (data protection, suspects' rights), and this would be implemented further by means of codifying the rules on legal immigration and suspects' rights. But there are no suggestions to adopt criminal law measures relating to hate crime or violence against women, or to reform the European Arrest Warrant.

Overall, the suggestions on the table would in part be useful and practical (on asylum, legal migration, civil justice and suspects' rights, subject to concerns about the details of any rules on the offshore processing of asylum-seekers), and in part raise some concerns about civil liberties protection (as regards PNR and smart borders in particular). But there are no specific overriding themes that would bring together the EU's future JHA plans into a coherent system.

12 March 2014

Links

Commission communication on justice:

<http://www.statewatch.org/news/2014/mar/eu-com-post-stockholm-justice-agenda-com-144-14.pdf>

Commission communication on home affairs:

<http://www.statewatch.org/news/2014/mar/eu-com-post-stockholm-open-secure-com154-14.pdf>

Member States' positions: Council doc. 17808/1/13, 23 Dec. 2013

<http://www.statewatch.org/news/2014/jan/eu-council-new-jha-proq-17808-13.pdf>

© Statewatch ISSN 1756-851X. Personal usage as private individuals/"fair dealing" is allowed. We also welcome links to material on our site. Usage by those working for organisations is allowed only if the organisation holds an appropriate licence from the relevant reprographic rights organisation (eg: Copyright Licensing Agency in the UK) with such usage being subject to the terms and conditions of that licence and to local copyright law.