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Border Security, Technology and the Stockholm Programme
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BORDER SECURITY, TECHNOLOGY AND THE STOCKHOLM PROGRAMME

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The draft document of the Stockholm programme places considerable emphasis on technology in the context of the EU's security policies. Among its most notable elements is the proposal to establish "an EU Information Management Strategy"[1] (Council of the European Union, 2009: 17). Despite an emphasis on citizens' freedoms and rights, and on the protection of their personal data and privacy,[2] the programme remains **overtly oriented towards the reinforcement of the reliance on technology within the context of EU security policies**, particularly computerised systems of information exchange and data processing. These, in turn, are **largely defined in terms of the priorities and viewpoints of security professionals**.

This paper will focus more specifically on issues related to technology and border security. In this area, the draft programme reflects an endorsement of previous tendencies, particularly of the Commission's 2008 "border package", tabled shortly before the departure of JHA Commissioner Franco Frattini, and of the 2008 "Future Group" final report. The tendency, in this regard, is towards the proliferation of computerised systems of information exchange and processing, with little regard to the question of proportionality.

1. Technology and security in the Stockholm programme

EU citizens' freedoms and rights come first in the various policy domains envisaged by the draft Stockholm programme, including the growing circulation and processing of personal data. The document dedicates a full section to the question of data protection and privacy. It is to be regretted, however, that the focus is placed only on EU citizens: "The Union must secure a comprehensive strategy to protect citizens' data within the EU and in its relations to third countries".[3]

The question of the protection of personal data of other persons, including citizens of non-EU member states and persons in need of international protection, however, falls beyond the scope of the draft – despite the fact that they are chiefly concerned with EU-wide information exchange schemes (e.g. Eurodac, the Schengen Information System, and the future Visa Information System). The Charter of Fundamental Rights, the European Convention of Human Rights, the jurisprudences of the European Court of Justice and European Court of Human Rights recognise the fundamental freedoms and rights of individuals in Europe irrespective of their nationality or residence status (Carrera & Guild, 2009, p. 9).

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[1] Council of the European Union (2009), *The Stockholm Programme – An open and secure Europe serving the citizen*, Brussels, 14449/09, 16 October, p. 17.

[2] Ibid., p. 7.

[3] Ibid., p. 7.

Furthermore, the document highlights that the EU "must also foresee and regulate the circumstances in which interferences by public authorities with the exercise of these rights is justified"[4] In the meantime, however, the possible interference of private entities is left aside – despite the fact that private companies are increasingly involved in the management of data at the European and national level.

A further element for concern, in this respect, concerns the exchange of personal data (of EU citizens, residents and non-citizens) with third countries. The draft programme identifies as a priority "*information exchange* that flows securely, efficiently and with adequate data protection standards between the EU and third countries".[5] Exchanges of information are particularly emphasised with regard to terrorism, where the document highlights: "Framework agreements should be entered into with the United States and the Russian Federation on the exchange of information while ensuring that adequate data protection safeguards exist".[6] The notion of 'adequate standards', however, is problematic: such exchanges should only be considered where guarantees that the highest standards of protection of personal data and privacy are in place. The Presidency draft emphasises the need for "a coherent legislative framework for personal data transfers to third countries" and evokes the possibility of establishing a 'framework model agreement' in this domain.[7] The elaboration of this model agreement should be considered as an overarching priority. It should clearly involve the relevant bodies in the field – the EDPS and network of national data protection officers, the Fundamental Rights Agency, the European Parliament LIBE committee on Civil Liberties, Justice and Home Affairs (taking into account the expanded role conferred onto the EP by the Lisbon treaty), the Art. 29 Working Party, the Commissioner for fundamental rights.

On the issue of technology, furthermore, the draft Stockholm programme largely embraces the priorities and viewpoints of security professionals. The Presidency document frames the issue as "[u]pgrading the tools for the job' and emphasises the 'development of information exchange and its tools that is driven by law enforcement needs".[8] The involvement of the European Union Data Protection Supervisor, of the Fundamental Rights Agency, the European Parliament LIBE committee and the national parliaments, or the Art.29 Working Party, is not foreseen as part of this so-called 'upgrade'.

In this perspective, the document also insists on the "interoperability of IT systems when developing such systems", further specifying that the Commission and Council "ensure that the priorities of the internal security strategy are tailored to the real needs of users and focus on improving interoperability" (idem). Apart from mentioning the need for a "strong data protection regime", the document does not provide any additional specification as to how interoperability 'by design' is to respect the principles of proportionality and purposefulness in the collection and exchange of personal data.

Finally, the draft programme "stresses the need for new technologies to keep pace with and promote the current trends towards mobility, while ensuring that people are safe, secure and free".[9] Such emphasis looks premature in a context where systems currently under development – SIS-II and VIS to mention only the most important – have not yet come online. It would seem important, in this respect, to run a full evaluation of technical systems currently in use at the European level before any new technology is put forward.

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[4] Op. cit., Council of the European Union, 2009, p. 7.

[5] Ibid., p. 31.

[6] Ibid., p. 33.

[7] Ibid., p. 35.

[8] Ibid., p. 17.

[9] Ibid., p. 17.

2. Border security and technology

Border related matters are relegated in the Presidency draft under the external dimension heading and the "More secure access to the territory" section – a somewhat ambiguous location, since border control and surveillance policies arguably link back into the EU's internal security policies. A first question, in this respect, is whether border control and surveillance should be considered as part of the EU's 'external dimension' of the Area of Freedom, Security and Justice – taking into account the problematic track record of this policy area in the field of fundamental freedoms and rights (Alegre, Bigo & Jeandesboz, 2009). The entry into force of the Treaty of Lisbon, by abolishing the pillar structure, will allow for the provisions of the Charter of Fundamental Rights to be extended to all the EU's external activities and allow for such activities to be justiciable in the European Court of Justice – particularly if they contradict the provisions of the European Convention of Human Rights, should the EU eventually become party to it.[10] It is important, with regard to border control and surveillance as well as with other aspects of EU external policy, that the Human Rights Action Plan envisaged in the Presidency draft, whose realisation is to be entrusted to the EU High representative.[11] does not result in the maintaining of a separation between the Union's internal and external policies. External commitment to fundamental freedoms and rights should flow from the same source as internal commitments. Regarding the specific issue of technology and security in relation to border control and surveillance, however, the Stockholm programme should specify the implications for the remit of bodies such as the European Data Protection Supervisor (EDPS), the European Union Agency for Fundamental Rights (FRA) or the Art. 29 Working Party (WP) of databases concerned with external borders.

A second general consideration regarding border security in the context of the Stockholm programme concerns the role of FRONTEX. The Presidency draft stipulates that "the Commission should consider including a mechanism for reporting and recording incidents that can be satisfactorily followed up by the relevant authorities".[12] In the light of recurrent claims that the agency has facilitated the violation by member states of their international obligations, particularly with regard to persons in need of international protection, this provision should be made more specific – i.e. a specific system for monitoring and reporting of fundamental freedoms and rights violations in the context of joint operations coordinated by the agency should be established. So far, the evaluations of the agency conducted by the European Commission (in 2008) and the COWI consultancy (in 2009) have failed to satisfactorily address this question. There is a need, in this respect, for an independent system that would draw both on bodies in the field of fundamental freedoms and autonomous academic research.

Moving to the more specific question of technology in the context of the EU's border control and surveillance policies, the Presidency draft for the Stockholm programme endorses the trend initiated by the Commission's 2008 'border package' of multiplying systems of information exchange and processing related to persons crossing the EU's external borders – and this despite the fact that the SIS-II and the VIS are not yet operational. The interest of such an approach, which incurs significant costs to the EU and the member states, remains to be demonstrated (Carrera & Guild, 2009, p. 7). The Presidency draft's following on the Commission's 'border package' is all the more problematic as the initial proposals were launched without involving the EDPS, despite their envisaging the setting-up of data intensive systems, including biometric data.[13]

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[10] Ibid., p. 22.

[11] Ibid., p. 32.

[12] Ibid., p. 33.

[13] For an overview, see Guild, Carrera & Geyer, 2008.

Notwithstanding, the Presidency draft signals that "the European Council looks forward to the continued development of the European Border Surveillance System (Eurosur)" and indicates that the sharing of "surveillance data relating to the Eastern and Southern borders [should start] no later than 2013".[14] It has to be recalled, in this perspective, that the original Eurosur proposal did not include any proposal for a legal act, and in fact did not specify any legal basis for this system. The same holds true for the various other systems envisaged by the Commission in the 'border package'. In the case of Eurosur, this issue is further aggravated by the fact that the system, should it be set up according to plan, would involve intensive data processing, including personal data, and significantly overhaul the remit of FRONTEX – an evolution that should *ad minima* require a modification of the regulation establishing the agency (Jeandesboz, 2008).

The Presidency draft comments, in addition, that "[t]he European Council is of the opinion that an electronic system of travel authorisation for recording entry and exit from Member States could complement existing systems [SIS-II and VIS]" by 2015 (idem). As the EDPS noted in its 2008 comments on the 'border package', however, complementarity with systems that are not yet operational cannot be demonstrated. Furthermore, "[w]ith a view to demonstrating the need for new measures, a thorough assessment of the effectiveness and weaknesses of existing databases should be conducted" (EDPS, 2008, p. 4). The same comment applies to the possible development of an EU 'fast track registered traveller programme' and 'electronic system of travel authorisation' evoked in the 2008 'border package' and envisaged in the Presidency draft.

3. Recommendations

1. A first, general recommendation is that the focus of the Stockholm programme be moved from a focus on the freedoms and rights of *citizens* to the freedoms and rights of *individuals* (Carrera & Guild, 2009, p. 10).

2. In this perspective, considerations on the implications of the intensive use of technical systems of information exchange and data processing in the context of the EU's security policies should be broadened, in two ways:

   - Firstly, to include not only the rights of citizens, but also of residents and non-citizens.

   - Secondly, to encompass possible infringements of *both* public authorities and private bodies.

3. A third set of general recommendations, in this regard, involves the exchange of information with third countries:

   - The Stockholm programme should make the realisation of a model framework agreement in this area an absolute priority. The conclusion of new agreements in this area, particularly with the United States and the Russian Federation, should be frozen until this is achieved.

   - The model framework agreement should aim at providing the highest level of protection, drawing on EU legislation in the field as well as on the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) of the Council of Europe, which is open to countries that are not members of the CoE.

   - The model framework agreement should be elaborated with the active contribution of the EDPS and a network of national data protection officers, the Fundamental Rights Agency, the European Parliament LIBE committee (taking into account the expanded role conferred onto the EP by the Lisbon treaty), the Art. 29 Working Party, the commissioner for fundamental rights.

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[14] Ibid., p. 34.

- The Stockholm programme should establish the principle of the prohibition of open-ended networks of exchange of information with third countries.

4. With regard to border security, the Stockholm programme should:

- Schedule a general evaluation of current systems of exchange and processing of data (in particular Eurodac and SIS), to be carried out in the first half of the five-year duration of the programme. The evaluation should be carried out by an independent network bringing together civil liberties organisations, academics and bodies in the field of fundamental freedoms and rights such as the EDPS, the FRA and the Art. 29 Working Party.

- Establish the principle that the development of new systems of exchange and processing of information dealing with persons crossing the EU borders should be halted until this evaluation is completed and its conclusions assessed.

- Establish the principle that the development of any new system of exchange and processing of information should involve the EDPS, FRA and Art. 29 Working Party.

- Particular attention should be paid, in this context, to the VIS regulation. Since it has not been used so far, it cannot be considered as part of the AFSJ *acquis*. It should thus be withdrawn and re-submitted with a legal basis in the Lisbon Treaty.

5. In this respect, specific attention should be paid to the Eurosur proposal, which is currently the most advanced:

- The Stockholm programme should call for a legislative proposal, with a legal basis in the Lisbon Treaty, concerning the Eurosur system.

- In addition, the Stockholm programme should call on the Commission, Council and Parliament to modify the Frontex regulation so as to take into account the overhaul that the Eurosur system would represent for the remit of the agency. In this respect, a change to the legal basis of the Frontex regulation should be considered to put it in conformity with the Lisbon Treaty.

- A further modification of the Frontex regulation would involve incorporating a mechanism for the monitoring and reporting of fundamental freedoms and rights violations arising in the context of the agency's activities. Such a mechanism would be placed under the joint responsibility of the FRA, of the new commissioner for fundamental rights, and of a joint commission composed of representatives from the European Parliament and the national parliaments, and involve independent expertise from the academic field.

6. Finally, further attention should be paid to the issue of fundamental freedoms and rights in the context of the EU's border control and surveillance policies. The Stockholm programme should envision the creation of the function of EU border monitor.[15] The monitor would ensure the compliance of EU border control and surveillance policies with EU law, including rules on the protection of personal data and privacy, and the Charter of Fundamental Rights.

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[15] As suggested in the final policy recommendations of the CHALLENGE programme (Bigo, Carrera & Guild, 2009).

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