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Why was the EU not prepared for the refugee crisis and what to expect next?

Andreia Ghimis

Compendium of EPC publications on migration, asylum and mobility

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The word 'crisis' has been used so frequently lately that is has almost lost its substance. Yet, in the context of the 'refugee crisis', the European Union and its member states have experienced all that comes with a crisis: panic, disorder, instability ... the list is long. But how did we get here? Why was the EU not prepared? And how can negative effects be minimised in the future? This paper aims to address some of these questions by considering recent events in their wider context.

With the dramatic escalation of events in the past weeks, many will have forgotten that just over a year ago, in June 2014, the European Council adopted its strategic guidelines (SG) in the area of freedom, security and justice for the next five years. Following the Tampere (1999-2004), The Hague (2005-2009) and Stockholm (2010-2014) programmes, this new key document was agreed upon when migratory flows to the EU seemed 'under control'. Frontex reported approximately 68,500 irregular border crossings for the second quarter of 2014 and EASO mentioned a total of 130,900 applicants for international protection in the same period. Although higher than in the previous years, the numbers were not alarming. This situation was definitely reflected in last year's underwhelming document. Despite strong impetus from stakeholders, paradoxically the 2014 guidelines lacked a long-term strategic component. (See EPC Commentary The European Council's strategic guidelines and immigration: can the EU be bold and innovative?)

In fact, last year the European Council opted to focus on transposition, implementation and consolidation, which was much needed after the adoption of the second generation rules of the Common European Asylum System. However, even if politically opportune, this was not sufficient. The determination to ensure the accurate and full implementation of EU asylum law only became visible a few weeks ago, when the European Commission started a set of 40 infringement decisions against nineteen member states. The harsh reality at the EU's borders has highlighted the European Council's failure to adopt more forward-looking policy options.

The unequal distribution of responsibilities among member states brought about by the Dublin Regulation, the need for mutual recognition of positive asylum decisions, relocation procedures and joint processing schemes were already on the table when the strategic guidelines were discussed. (See EPC Discussion Paper: The future of the area of freedom, security and justice: Addressing mobility, protection and effectiveness in the long run). But while the European Council's document timidly hints at the "*Treaty principles of solidarity and fair sharing of responsibility*", the other concrete proposals outlined above were left unmentioned.

Yet, one year later, hotspots are functioning in Greece and Italy and the relocation of asylum seekers has slowly started as well. Despite the immense political reluctance, policy solutions that the EU leaders were refusing to talk about last year are now a reality. It is certainly neither politically smart nor politically healthy to wait until the twelfth hour before reaching a compromise. But against the background of increasing pressure, the remarkable efforts of the European Commission and of the Luxembourgish Presidency are starting to pay off. While these achievements must be acknowledged, they should not be overestimated.

The road towards sustainable solutions will be long and bumpy. A major part of the answer to this crisis lies within the remit of EU's external action: rethinking cooperation with transit countries, reinforcing or building their asylum reception, registration and integration capacities; boosting international aid; stabilising the situation in conflict-hit countries; creating the conditions for economic development in the EU's immediate neighbourhood, etc. While shaping its external response, the EU also has to keep in mind the very dangerous internal consequences of the refugee crisis and make sure to:

Protect Schengen

The current refugee crisis is not the first occasion that the Schengen agreement has been under pressure. In the context of the Arab spring, tensions between Schengen members rose as France decided to reinstall temporary border checks to stop Tunisians heading towards its territory via Italy (Lampedusa). The number of arrivals back then (around 48,000) is not comparable with the current situation. The complexity and the dimension of the two episodes are not similar either.

Still, in 2011, then French President Nicolas Sarkozy and Prime Minister Silvio Berlusconi convinced their partners of the need to reform the Schengen agreement. The intention was to make sure that it allowed greater possibilities for reintroducing border controls. The final compromise led to a new exception to the borderless Union being included in the agreement in cases whereby one member state showed 'serious deficiencies' in applying the rules on external borders. However, this exception is subject to important procedural safeguards. (See Collection of EPC Papers on Schengen, especially EPC Discussion Paper: The Schengen Governance Package: The subtle balance between Community method and intergovernmental approach)

It cannot be ruled out that a new desire to reform Schengen and include even more exceptions to a Europe without internal borders appearing will arise. Indeed, the current context could be even more favourable than it was in 2011 for such initiatives. However, with the refugee crisis, the Schengen agreement has proved its flexibility as national governments have been able to *a priori* legally install and extend border controls at times of huge pressure on their asylum systems. Still, the European Commission must oversee these developments attentively and ensure a swift return to a normal situation. (See EPC Commentary: The refugee crisis: Schengen's slippery slope)

Understand the interactions between its policies and ensure coherence

The EU has timidly started to move towards – as clichéd as it may sound – a more holistic approach to migration. Different Directorates-General of the European Commission are communicating more frequently on migration-related issues: DG Migration and Home Affairs, DG Development and Cooperation, DG Neighbourhood and Enlargement Negotiations, DG Trade and DG Agriculture and Rural Development. Federica Mogherini, the EU's foreign policy chief, has also been markedly present in the refugee crisis debate.

This change is very much needed. Some integrated EU policies – development, trade, agriculture, fisheries – might create or reduce incentives for third country nationals to move towards the EU. The failure of other, less integrated policies – common foreign and security policy – to stabilise the EU's neighbourhood is one of the causes that generate migratory flows. The interactions are numerous and complex, but policy makers have to understand them in order to anticipate and control the effects of the decisions they make. To contribute to this learning process, the EPC launched the 'Forced migration project: how can the EU play a greater and more coordinated role'. (The report of the project is due at the beginning of 2016, more information here)

Rethink its capacity to influence national migrant integration policies

Migrant integration policies are a national competence. The EU can only encourage exchange of information, policy coordination and ensure financial support. With 28 different migration histories in a Union armed exclusively with soft power, the result is no surprise: a large variety of national integration systems. Some very developed and some at an embryonic stage. (The EPC will soon publish a comparative report: Measures and rules developed in the EU member states regarding integration of third country nationals).

Therefore, the EU cannot afford to simply dismiss the legitimate concerns expressed by some governments as to their capacity to integrate the relocated asylum seekers. The future cohesion of EU societies is at stake. So, Europe should assist the less experienced states such as Latvia, Lithuania, Romania, Slovakia, Slovenia, etc. in addressing the sensitive integration matter by financing, deploying experts and providing guidelines. But the integration aspect must be kept in mind even before the asylum seekers reach the destination countries. For

instance, it has been proven that detention practices can have significant consequences on the subsequent integration of asylum seekers. Such measures must therefore only be implemented as a last resort. (See Evidence on migrants' integration in Europe – to which Yves Pascouau, EPC Director of migration and mobility policies contributed).

Prepare a strong response to populist anti-EU and anti-immigrant discourses

Anti-immigration populism has existed in Europe for a long time. The harmful discourse (but not only) that comes with it has earned populist parties more seats in the European Parliament than in the previous legislature. (See EPC Policy Brief Immigration and free movement in an unusual electoral race: what implications for the next political cycle? and EPC Commentary Post-European Parliament Elections Analysis)

Over the coming months and years, populists will feed the poisonous fruit of the refugee crisis to the already disillusioned European public. Mainstream EU political leaders must be ready to promote the advantages of migration and of the European project.

Andreia Ghimis is a Junior Policy Analyst at the European Policy Centre

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Commentary

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The European Council's strategic guidelines and immigration: can the EU be bold and innovative?

Yves Pascouau

The agenda of the June 2014 EU Summit will be particularly heavy. Alongside issues related to the conclusion of the European Semester, the climate and energy framework, possible debates about Ukraine, Iraq and Syria, EU leaders will have to decide on two key dossiers: the nomination of the next Commission President and the future of the area of freedom, security and justice.

Two key and interlinked dossiers

The discussions and possible future decisions about the next President of the European Commission will undoubtedly receive strong media coverage, already gaining major attention from EU leaders themselves. Interestingly enough, the 'Spitzenkandidaten process' has pushed members of the European Council to be very active not 'only' on the identity of the next President –likely to be Jean-Claude Juncker – but also on the Union's priorities for the upcoming years. The European Council will agree on a "strategic agenda" defining key priorities, to which EU institutions will be 'invited' to follow. Migration related issues are among the five priority areas defined in the draft document prepared by the President of the European Council.

The strategic guidelines for the area of freedom, security and justice included in the draft European Council Conclusions are more specific. Aimed at replacing the "Stockholm Programme", these guidelines should set political orientations regarding a series of policies which include immigration and asylum.

It may appear from the outset that the nomination of the President of the Commission and the adoption of strategic guidelines are two unrelated dossiers, but they are in reality interlinked. More specifically on immigration related issues, the European Council has shown willingness to keep control over future EU developments. This is expressed in the strategic agenda, where immigration is a priority, and more explicitly in the strategic guidelines. Concerning the latter, by deciding their adoption in the middle of a political 'no man's land' – where the Commission is in an 'outgoing mode' and the European Parliament has just been elected – the President of the European Council has decided to set the agenda without the contribution of the institutions, which will take part later in the EU legislative process. By doing so, the margins of manoeuvre of the next Commission have been limited.

Are future challenges addressed?

With the strategic guidelines the European Council needs to define orientations enabling the Union to further develop policies and address future challenges. In that sense, the guidelines need to provide orientations with respect to four key challenges:

First, the EU needs to reflect external parameters which are going to impact migration-related policies in the short and long run. The draft strategic guidelines mentions instability in some parts of the world and European demographic trends as main challenges regarding immigration, asylum and borders policy. While correct, it would nevertheless have been more relevant to extend the list of challenges. Hence, current and lasting effects of the economic crisis, Europe's ageing societies, the emergence of a new middle class in the world, the urbanisation of societies as well and the increasing digitalised society are factors which are going to have an impact on mobility worldwide and on the EU's immigration policy.

Second, the Union needs to overcome the current 'silo approach' where each EU policy field is addressed without taking into consideration its effects on other EU policies. Future developments in the area of freedom, security and justice should take into account the interactions between asylum, legal migration and irregular migration policies. The continuation of a policy where legal migration aspects are 'secondary' is no longer possible. This entails the development of admission schemes as well as solutions to enhance intra-EU mobility rights for third country nationals already residing in the EU. While the draft strategic guidelines and the strategic agenda identify legal migration as a priority, it is mainly geared towards talented and skilled people rather than embracing the policy as a whole.

Third, addressing future immigration policy requires taking into account the potential impact of other EU policies on migration. More precisely, whether development, trade, agriculture and other EU policies have an impact on the willingness or need for third country nationals to migrate. Regarding this point, the draft strategic guidelines move in the right direction by stating that "success or failure in one field depends on performance in other fields as well as on synergies with related policy areas".

Finally, the external dimension of immigration and asylum policies should be key, and consider in particular the most appropriate formula to provide for true mobility between third countries and the EU, the relevance of defining best ways to grant protection outside of EU's borders and the definition of the key role the European External Action Service should play in this policy field. In this domain, the draft strategic guidelines do not provide for major enthusiasm as the external dimension is mainly located in the paragraph dealing with irregular migration flows.

The final version of the strategic guidelines will of course deserve a more thorough analysis regarding its strengths and weaknesses. However, some general comments about the draft document can already be presented. It moves away from previous lengthy programmes. It tries to be comprehensive and balanced, especially regarding solidarity, without always being able to define clear political orientations. It proposes some further concrete actions some of which are new and interesting like the establishment of a dialogue with the business community and social partners regarding legal migration or discussions about mutual recognition of asylum decisions.

Will the Commission be confined?

The future strategic guidelines will frame the next Commission's programme. But what are the Commission's margins of manoeuvre?

In terms of content, the strategic guidelines identify priorities and actions the next Commission will have to implement thus limiting its leeway. However, the strategic guidelines do not block the Commission's capacity to remain a key player and policy leader in the field of immigration, asylum and integration.

First, nothing prevents the future Commission to think broader than the European Council and to better connect the dots between policies. Hence, the Commission may decide on its own to identify which EU policies may have an impact on migration related issues and to develop a comprehensive and coherent approach to better address those issues.

Second, the next President of the Commission remains free to organise their own administration to better tackle future challenges. Hence, they may decide to prioritise key issues and to organise the Commission's structure accordingly. In the field of migration related issues, the next President of the Commission could be innovative, not to say revolutionary, in two respects. The decision may be taken to de-link immigration from security issues. Since immigration is principally work and family related this policy is then not security-related but more linked with labour and social policies. Hence, the migration dossier could be shifted from Home Affairs to another Directorate General.

Furthermore, the next Commission could choose to address migration related issues under a bigger theme which could be mobility to and within the Union. In structural terms this would lead to the creation of a "mobility" cluster putting together issues such as immigration and asylum, intra-EU mobility, employment and social policies as well as issues related to skills and qualification recognition. In organisational terms, a Commission's Vice-President would coordinate the cluster and the work of Commissioners dealing with specific issues.

With the adoption of strategic guidelines and a strategic agenda, the European Council demonstrates its willingness to keep its footprint on sensitive issues related to immigration and asylum. While this will frame the next Commission's action, the latter will still have enough room for manoeuvre to develop new and innovative solutions, provided that the next Commission's President dares to do so to remain a key player in policy making.

Yves Pascouau is Director of Migration and Mobility Policies and Head of the European Migration and Diversity Programme, at the European Policy Centre (EPC).

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DISCUSSION PAPER

Yves Pascouau

The future of the area of freedom, security and justice

Addressing mobility, protection and effectiveness in the long run

The King Baudouin Foundation is the strategic partner of the European Policy Centre

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The EPC gathered a core group of relevant stakeholders and experts to discuss all the thematic areas in Justice and Home affairs. While the responsibility for the content of this paper lies with the author, the latter would like to thank all those listed below who attended and contributed to the Task Force through the series of workshops throughout 2013. He would in particular like to thank those who accepted to comment on earlier drafts of this paper.

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Stephan Auer	European External Action Service
Rosa Balfour	European Policy Centre
Luigi Berlinguer	Member of European Parliament
Pierre Berthelet	Researcher
Therese Blanchet	Council Legal Service
Jakub Boratynski	European Commission
Hugo Brady	Centre for European Reform
Israel Butler	Open Society European Institute
Gennaro Capo	Permanent Representation of Italy to the EU
Åsa Carlander	Permanent Representation of Sweden to the EU
Mugurel Chivu	Permanent Representation of Romania to the EU
Liz Collett	Migration Policy Institute - Europe
Oronzo Console	Permanent Representation of Italy to the EU
Raquel Correia	Permanent Representation of Portugal to the EU
Jean-Louis De Brouwer	European Commission
Mieneke De Ruiter	Permanent Representation of the Netherlands to the EU
Marianne Dony	Université Libre de Bruxelles
Leila El-Fahimi	European Commission
Lut Fabert-Goossens	European External Action Service
Carlo Ferrari	Permanent Representation of Italy to the EU
Bruno Frans	Police Judiciaire Fédérale of Belgium
Janusz Gaciarz	Permanent Representation of Poland to the EU
Madeline Garlick	United Nations High Commissioner for Refugees, Brussels Office
Roland Genson	Council Secretariat
Evelina Gudzinskaité	Permanent Representation of Lithuania to the EU
Peter Hustinx	European Data Protection Supervisor
Alex Lazarowicz	European Policy Centre
Richárd Leyrer	Permanent Representation of Hungary to the EU
Filip Jasinski	Polish Ministry of Foreign Affairs
Jean Lambert	Member of European Parliament
Maciej Lewandowski	Permanent Representation of Poland to the EU
Tautginas Mickevicius	Permanent Representation of Lithuania to the EU
Etienne Pataut	Université de Paris I Panthéon-Sorbonne
Steve Peers	University of Essex
Philippe Percier	European External Action Service
Kris Pollet	European Council on Refugees and Exiles
Annabelle Roig Granjon	United Nations High Commissioner for Refugees, Brussels Office
Richard Szostak	European Commission
Raoul Ueberecken	Permanent Representation of Luxembourg to the EU
Constança Urbano de Sousa	Universidade Autónoma de Lisboa
Karen Vandekerckove	European Commission
Ann Vanhout	European External Action Service
Wouter Van de Rijt	Council Secretariat
Anne Weyembergh	Université Libre de Bruxelles

Executive Summary

The area of freedom, security and justice has been for the last 15 years one of the most dynamic of EU policy fields. Subject to significant Treaty changes, aiming to strengthen the incorporation of justice and home affairs at EU level, it has also been accompanied with three successive multiannual programmes – Tampere (1999); The Hague (2004) and Stockholm (2009) – setting for a five year period of time the agenda of actions.

With the Stockholm Programme coming to an end in 2014, the "Brussels Community" is increasing agitated with a recurring question: what will replace the Stockholm Programme? Paradoxically, this uncertainty is fuelled by the existence of a new and clear Treaty provision – Article 68 TFEU – which states "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice".

Clear in its wording, this provision may lead to different understandings and unclear implications in practice. In order to provide more clarity, the European Policy Centre (EPC) set up a Task Force to reflect on the impact of this provision and more generally the future of the area of freedom, security and justice after 2014. Results of this process are reflected in this issue paper which addresses the process and content regarding the definition of future strategic guidelines.

Outcome and distributions of tasks

Drawing from Article 68 TFEU, past experiences and Task Force discussions, this paper comes to the conclusion that strategic guidelines for the legislative and operational planning should;

- set **policy orientations** in the field of justice and home affairs **for the next 10 to 20 years taking into account significant demographical, economic, political, social and technological changes** which have an impact over these policy fields;
- be **highly political, concise and avoid technical/technocratic language** so that citizens can be aware of and understand the objectives defined in the strategic guidelines;
- **reorganise the distribution of tasks between the European Council** – for the definition of strategic guidelines – **and the European Commission** – for the adoption of a detailed legislative and operational multiannual programme to achieve the strategic guidelines' objectives.

Timing

Policies on border checks; asylum and immigration; as well as judicial cooperation in civil and criminal matters impact citizens and businesses on a daily basis. Defining strategic guidelines in these fields whilst taking into account a fast and ever changing world, is crucial and should be subject to a **large and well informed debate engaging relevant EU and national stakeholders and civil society**.

However, given that the tight schedule for the definition of the strategic guidelines is June 2014, where the process stands today, **this debate is not about to emerge**. While this paper fully respects the exclusive competence of the European Council to define strategic guidelines, it recommends the European Council to **postpone the adoption of the strategic guidelines to June 2015**. This would allow all relevant stakeholders – newly appointed EU institutions,

national authorities, civil society – to contribute to the debate and the European Council to define political guidelines on the basis of a large and informed debate. This would give a high level of accountability to the guidelines and provide for wider political and public support.

Challenges

The driving idea of the Task Force was to identify current shortcomings and appropriate policy measures and orientations to move ahead. While the paper addresses a series of concrete policy actions to be developed, the following general orientations concerning specific policy fields came across in the discussions.

Immigration, asylum and integration: given the reality of demographics and labour shortages, and taking into account the integration of national and European labour markets, the EU needs to plan and organise mobility to and within the EU. With respect to asylum, EU's policy regarding international protection inside and more particularly outside its territory is key. Protecting borders and saving peoples lives are two sides of the same coin and require the development of a broad, coherent and balanced immigration policy.

Internal security: protection of citizens living in the EU against internal and external threats will remain high on the political agenda. Future orientations should strike a better balance between security and freedom/justice concerns. Moreover, the development of new forms of criminality and threats, in particular due to technological progress, require the EU and Member States to be able to forecast new phenomenon, address the appropriate needs, and develop suitable solutions involving all relevant EU and national players.

Justice: citizens and businesses will not stop moving to and within the EU. Increasing their mobility for the sake of economic efficiency or to lift up legal and practical problems deriving from ever increasing cross border situations should drive the EU's policy in the short and long run. The effectiveness of judicial systems, as a source of protection and economic growth, should be a central target alongside with the right to access justice. In order to make the EU a real area of justice, common judicial culture among national authorities should be strengthened.

Finally, cross-cutting issues such as **external action; human rights; data protection and evaluation** are crucial crosscutting themes which have to be addressed in the field of justice and home affairs.

Three strategic pillars

Making the strategic guidelines understandable for all citizens requires the European Council to include policy orientations under affordable concepts. For the sake of understanding and in order to cover all the policy areas and challenges at stake, the paper proposes the strategic guidelines to be established on three pillars: **mobility, protection and effectiveness**.

Mobility: movement of people worldwide will remain a strong trend in the years to come and a highly debated issue. The mobility pillar would allow the EU to address a broad range of issues covering the management of people coming to and moving within the EU. Less negative than "immigration", the theme of mobility is also one which citizens could easily identify with and understand as a value rather than a burden.

Protection: this pillar could encapsulate three policy fields: internal security policies which aim at protecting citizens in the EU against threats; international protection policies which aim at granting protection to people fearing to be persecuted and justice policies which aim at protecting citizens in cross border situations and ensure economic efficiency. Such an approach would portray the complexity but also complementarity of EU actions and invite policy-makers to think in a more transversal manner

Effectiveness: citizens are requesting policy-makers to develop effective policies. Within the framework of the area of freedom, security and justice, effectiveness should cover the proper implementation of policies and measures in the Member States and their evaluation (*ex ante* and *ex post*) to assess their policy relevance.

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INTRODUCTION

For the last couple of months, all stakeholders dealing with justice and home affairs issues in Brussels – institutions, organisations, NGOs, trade unions, think tanks… – repeat the same question: "what will replace the Stockholm programme?" Whilst difficult for the everyday man to understand, this question is nonetheless a crucial one and should urgently leave the "Brussels arena" and be known to a wider public.

Indeed, what is lagging behind this weird jargon of "post-Stockholm programme" may well have a tremendous effect on citizens' everyday life. More precisely, the "Stockholm programme" is the multiannual programme which sets the EU legislative and operational agenda in a number of issues which concern citizens living in and moving within the EU: divorce, child custody, data protection, immigration, asylum, cross border crime, counter terrorism, criminal law, civil and criminal justice, etc.

As the Stockholm programme is coming to an end in December 2014, the question which is now becoming the centre of discussions relates to the document which is going to replace it. Answering that question is all but easy. It comes at a time when different parameters should be taken into account, which blurs the picture for a large number of players.

This discussion paper, based on a series of meetings organised within a Task Force set up by the European Policy Centre (EPC), intends to present some responses addressed not only to the usual "Brussels' stakeholders" but also to a greater number of people dealing with justice and home affairs issues in the EU Member States.

To do so, this discussion paper will set the scene and expose the basis and role of a multiannual programming exercise which took place in the area of freedom, security and justice over the last 15 years (I).

It will then address the main question related to the future of programming in this policy field. Firstly, and on the basis of changes that have occurred in the area of freedom, security and justice, **the discussion paper will demonstrate that the next phase, and the process of establishing it, will not resemble the previous ones**. In this regard the discussion paper aims to highlight two main elements. It will first take as a basis the **new provisions of the Lisbon Treaty** and explain the major changes deriving from it in terms of content and process. Secondly, it will consider the **timeframe within which the future strategic guidelines should be defined** and discuss the political dangers related to the definition of an agenda which does not enable relevant stakeholders to properly take part in the debate (II).

The discussion paper will then address issues of content. More specifically, it will try to identify which are the **main strategic options to be discussed** in each of the specific policy fields covered by the area of freedom, security and justice (immigration and asylum, internal security, justice and various transversal issues). This part of the discussion paper is mainly based on discussions which have taken place within the framework of the EPC Task Force and aims to provide for some ideas and proposals which could be part of the debate regarding the definition of further strategic guidelines in the area of freedom, security and justice (III).

Finally, the discussion paper will be concluded with some recommendations addressed to EU stakeholders who will be in charge of defining the future strategic guidelines in the area of freedom, security and justice (IV).

While developed within the framework of regular meetings which took place in 2013 in Brussels, this discussion paper aims to bring these debates related to the future of the area of freedom, security and justice outside the circle of national and Brussels-based experts.

This paper considers that challenges which are at stake today regarding the definition of future developments in the area of freedom, security and justice should not only be discussed between a limited number of specialists but should also be debated with a wider audience.

The paper recognises that future strategic guidelines in justice and home affairs should be defined, as enshrined into the Lisbon Treaty, by the European Council. Indeed, defining the strategic orientations for the Union and its Member States in such sensitive and crucial fields is a political commitment which should be endorsed at the EU's highest political level. However, this paper is also of the persuasion that such a political decision should be taken on the basis of a well-informed debate involving a wide range of international, European and national players and stakeholders, including citizens and their representatives.

I. Programming in the area of freedom, security and justice: a "marque de fabrique"

A. From Tampere to Stockholm: three phases, three different outcomes

The incorporation of justice and home affairs issues within the ambit of the European Union has been a long process, in particular because the transfer of sovereign powers to the European Union in these specific policy fields is difficult. As a consequence, the 'communautarisation' of national policies has not followed the usual method and has been accompanied with many derogations to the normal Community method.

Alongside Treaty derogations, the field of justice and home affairs has also been combined with the development of a specific process of **multiannual programming**. Such a process has three main functions: **defining the orientations of the policy, identifying the timeframe of steps to be taken and assessing whether the measures have been adopted**.

Starting with the Vienna programme in 1998, the real programming phase began in 1999 with the Tampere European Council conclusions. Adopted a few months after the entry into force of the Amsterdam Treaty, the Tampere conclusions have initiated the process leading to the adoption of multiannual programmes every 5 years.

The three successive programmes – Tampere (1999), The Hague (2004) and Stockholm (2009) – share some similarities. All the programmes adopted since 1999 were linked with a major or potentiality major Treaty change. The Tampere programme followed the entry into force of the Amsterdam Treaty. The Hague programme was adopted in parallel to the negotiation of the Constitutional Treaty. The Stockholm programme was adopted just after the entry into force of the Lisbon Treaty. Hence, these programmes are all linked with substantial institutional and material modifications.

On the other hand, all of the multiannual programmes mentioned have been adopted for a period of 5 years corresponding more or less with the EU policy cycle, i.e. the parliamentary and Commission legislature. It should nevertheless be underlined that this timeframe results principally from the Treaty provisions which have encapsulated some institutional and policy developments within this five-year period.

In the content however, the respective programmes are nevertheless quite different. As the first forward looking document adopted by the European Council in the field of justice and home affairs, the **Tampere conclusions** remains a specific document in its content and to a certain extent the cornerstone of this policy field. Adopted just after the transfer of some key justice and home affairs issues within the framework of Community law, this programme was adopted in a specific general context. The policy field was brand new and created huge expectations. The economic situation was fairly good and the majority of governments in the EU were quite open to liberal policies, in particular regarding immigration. Finally, the newly appointed Commissioner in this field, Antonio Vitorino, played a crucial and visionary role. In a positive context, where "all lights were green", **the Tampere European Council adopted short, truly political oriented, forward looking and inspiring conclusions in the area of freedom, security and justice**. Although all the objectives set by the Tampere conclusions have not been achieved so far and remain relevant today, and some of which have been constitutionalised by the Treaty of Lisbon, these conclusions have not been repeated in neither format nor content.

The Hague programme was adopted in 2004. Following in parallel to the negotiations of the Constitutional Treaty this programme was different to the previous one in two main respects. The transformation of the political environment, due to the terrorist attacks in the US and on EU territory and the election of a growing number of conservative's governments, shifted the debate towards security concerns. Also of crucial importance was that, The Hague programme was established with the significant 2004 enlargement in mind. Furthermore, the development of a series of legal instruments over the five previous years changed the landscape and moved the priorities towards the implementation side of policies. **The Hague programme was the result of these dynamics which ended with the central aim of strengthening the area of freedom, security and justice**.

The Stockholm programme was adopted a few days after the entry into force of the Lisbon Treaty. The latter, in making a major step regarding the 'communautarisation' of justice and home affairs policies, was a strong basis for the European Council and policy orientations. Prepared a long time in advance and after a large consultation process, the Stockholm programme did not reach the level of expectations. Instead of taking advantage of a brand new Treaty to define the political lines justice and home affairs policies would follow in the subsequent years, the Stockholm programme acted as a magnet for all sorts of proposals and priorities of individual Member States. At the end of the process, the Stockholm programme comprised an enormous series of detailed objectives and measures compiled in a lengthy and hardly readable document. Moreover, instead of focusing on justice and home affairs issues, the Stockholm programme addressed issues not specific to this field, such as human rights or transparency, but also themes falling outside of the

scope of the area of freedom, security and justice, like freedom of movement of EU citizens. **At the end of the day, the Stockholm programme resembles more a "Christmas tree", than a political document of orientation**.

Despite the differences between the programmes and the political environment surrounding their adoption, it is clear that the adoption of multiannual programmes has become a "marque de fabrique". While these programmes have not always been able to set the strategic guidelines regarding the area of freedom, security and justice, they have nevertheless given ground to a strong culture where progress is evaluated against the background of a, sometimes overly, detailed programme. In this view, the adoption of the three successive programmes has put this large and crucial policy field under strain and left it with a certain duty to deliver.

B. "Post-Stockholm": a new phase in a new environment

At the close of 2014, the Stockholm programme will come to an end. It is therefore assumed that a new programming phase will start. Whether this assumption will become a reality or not is unclear, but what is sure is that the context within which the next programming phase will take place is vastly different from the previous ones in many respects. This will have a significant impact on the so-called "Post-Stockholm phase".

Such modifications have to be highlighted in order to understand the specific landscape within which the Post-Stockholm phase will be designed. First, there will be no Treaty change surrounding the programming phase (1). Second, the overall context will be more "normal" and will have a serious influence on the outcome and content of the process (2). Third, one Treaty provision – Article 68 Treaty on the functioning of the EU (hereinafter TFEU) – will definitely frame the whole process (3).

1. No treaty change

For the first time since the entry into force of the Amsterdam treaty in 1999, the programming phase taking place in the field of freedom, security and justice is not linked to a Treaty change. In this view, the forthcoming programing phase does not take place in a new political environment, with potential consequences for the process.

As a principle, the entry into force of a new Treaty opens new avenues for taking action and therefore creates a new and strong political impetus. This can be considered as a positive element. However, it is most often the case that new Treaties are accompanied by new legal and institutional frameworks which creates some sort of uncertainty as to how players act and interact and how new procedures interplay with old ones. This can make the process a bit more ambiguous.

The Post-Stockholm phase will not be surrounded by such a major political, institutional and legal modification. Therefore, to some degree this phase could be considered as the first one taking place in a new "normal mode", i.e. on the basis of a stable "constitutional" framework.

2. A new "normal mode": the increasing role of new or previously side-lined institutions

This new "normal mode" has first to be considered against the background of the considerable – not to say "impressive" – *acquis* the Union has adopted in the field of freedom, security and justice over the last 15 years. In this regard, defining further actions and orientations in these fields requires taking stock of what has been achieved, what remains to be implemented and what should be further developed.

The extensive amount of legislation in the field of immigration, asylum, criminal and justice cooperation requires relevant EU stakeholders involved in the process to act differently. Further action needs an in-depth evaluation of what has been achieved in terms of legislation and in particular in terms of implementation. On the basis of this thorough assessment, the post-Stockholm phase should identify the missing elements and further needs in each of the individual policy fields. It should then combine them in order to enhance coordination and coherence.

Secondly, the new "normal mode" implies taking a closer look at the legal and institutional context. After the entry into force of the Lisbon Treaty, the co-decision procedure was extended to almost all policies falling within the scope of the area of freedom, security and justice. The period from 2009 to 2014 may have been considered as a probation period for the European Parliament where it has experienced – both internally and in its relationship with the Council and the Commission – the role of legislator in this highly sensitive area. It is obvious now that it has acquired enough experience over the last 5 years to be considered a central player. Hence, **defining future steps in this specific field should continue this new "normal mode", in particular with respect to legislative acts and involvement of the European Parliament**.

A similar approach may also be applied to two other players: the President of the European Council and the High Representative. The activity of Herman Van Rompuy's successor will depend on two main factors. Firstly, will Van Rompuy be willing to take part in the process and content of the next phase? Despite little commitment from the current President regarding justice and home affairs issues during his mandate, the October 2013 European Council conclusions showed that the European Council has decided to take some important steps regarding strategic guidelines as early as June 2014. While this may highlight Van Rompuy's willingness to be more active in this field, adopting strategic guidelines before he leaves will also have the effect of binding the next President and his cabinet. They will inherit the guidelines irrespective of their "appetite" for such issues, or their willingness to be more active in this field.

With respect to the High Representative, two elements should be underlined. Whether or not the next High Representative will take an interest in justice and home affairs issues will have a crucial impact on how these issues will be integrated or mainstreamed into the EU's external action. This is closely linked to the second element which is the increasing power of the European External Action Service (EEAS). Established after the entry into force of the Lisbon Treaty, it has taken a while for the EEAS to find its feet.[1] However, the bedding in phase is now completed and the EEAS is fully operational. It is now in a stronger position and better placed to play a crucial role in EU's external policy and actions.

Henceforth, the way justice and home affairs issues will be considered by the future High Representative will be crucial. This will have a considerable impact on the way the EU will be able to deal with these issues with third countries. This is of major importance when considering the absolute need to involve third countries in the EU's immigration, asylum and security policies.

Five years after the entry into force of the Lisbon Treaty, the European Parliament, the President of the European Council and the High Representative have – to some extent – found their places within the EU's institutional structure and EU policies. This can now be considered a "new" normal way of functioning.

This situation from now on should be taken into account in the framing of the strategic guidelines. If their adoption remains scheduled for June 2014, as already announced, the European Council will have to think about the possible impact of the guidelines on the incoming teams and perhaps frame them in a manner that will not bind them. If the definition of guidelines is postponed, a coordination or cooperation process between the new "heads" would be welcomed in the definition process of strategic guidelines.

3. The overarching impact of Article 68 TFEU

Article 68 of TFEU is a key provision and will be the one from which the whole process of the post-Stockholm phase will derive. Already existing at the time of adopting the Treaty establishing a Constitution for Europe (Article III-159), Article 68 TFEU states "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice".

With this provision, signatories of the Lisbon Treaty, i.e. the Member States, have announced their willingness to ensure "the perpetuation of the practice of the five-year programme"[2] but also, for these issues to be dealt with at the highest political level: the European Council. In doing so, they have once again demonstrated their reluctance to transfer sovereign powers into "normal" community law. Article 68 TFEU constitutes the continuation of a trend or history whereby justice and home affairs issues have been kept under specific procedures to allow Member States to keep control over these policies.

Such movement is a long process which had already started with the Maastricht Treaty and the creation of the Justice and Home Affairs "pillar". Under this "pillar", justice and home affairs were considered as "issues of common interest" to be dealt with in an intergovernmental framework. With the Amsterdam Treaty this step towards EU integration was accomplished but not completed. Immigration and civil cooperation issues were included in the "First pillar", i.e. Community pillar, with significant derogations. Criminal cooperation remained in the third pillar.[3] The Lisbon Treaty constituted a step forward. While the distinction between pillars is abolished with the effect of transferring all policies related to the area of freedom, security and justice into the TFEU, some significant exemptions remain.

Alongside technical exemptions – related to judicial control, remaining unanimity of voting procedure or keeping the right of initiative of the Member States[4] – Article 68, with Article 70 TFEU)[5], illustrates the difficulties for Member States in accepting what they see as a depriving of their sovereign power in a crucial field.

Article 68 follows two objectives. As already underlined, it continues the existing "spirit" and practice of programming. This provision aims also to frame a field which now falls – with some exceptions – under qualified majority voting.

Therefore, the action of the European Council under this provision would help to define ex-ante "the priorities and a general framework of the Union's action, in particular regarding criminal law policies".[6]

To sum up, Article 68 is one of the various elements which constitutes a counterpart to the "communitarisation" of JHA policies. In order to keep control over those policies Member States have kept the power to define further orientations within the remit of the European Council. In this regard, Article 68 should not be underestimated and will play a central role in, and have a tremendous impact on, the post-Stockholm phase especially in terms of the process.

II. The process

Article 68 TFEU should thus be considered as a major basis for understanding the process which may take place regarding the post-Stockholm phase. It should be underlined here that the reference to Article 68 that already exists in the Stockholm Programme, is not sufficient to conclude that this provision has played a role in its drafting. This reference was introduced at the very end of the process due to the entry into force of the Lisbon Treaty. Hence the Stockholm programme has not been negotiated on the basis of Article 68 TFEU.

However, for the Post-Stockholm phase, this provision provides information regarding the type of outcomes this process should lead to (A) as well as for those responsible for it (B). Nevertheless, Article 68 TFEU does not contain any clue about the timeframe which is obviously crucial as it may trigger some very important political complications (C).

A. The adoption of strategic guidelines

The Treaty provision looks quite clear in relation to the outcome of the process which should lead to the definition of "strategic guidelines for legislative and operational planning". While this enables the drawing of some preliminary conclusions, the provision does not answer all questions and leaves some room for different options and interpretations.

1. Not a programme but guidelines

Referring to Jean-Claude Piris, Article 68 is "the perpetuation of the practice of the five-year programme".[7] While this makes sense as all the relevant programmes have been adopted by the European Council, none of them have used the wording "strategic guidelines for legislative and operational planning".

The first European Council devoted to the area of freedom, security and justice, held in Tampere in October 1999, defined "milestones" representing the agreement of the European Council on "a number of policy orientations and priorities" in the considered area of freedom, security and justice. Following Tampere, the European Council adopted two "programmes" in 2004 (The Hague Programme) and 2009 (Stockholm Programme) which both aimed at setting up "a new agenda" to enable the Union to build on previous achievements and meet future challenges.

It is difficult at first sight to conclude that the action referred to in Article 68 TFEU encapsulates one of these types of document. **While the Tampere milestones do comply with the idea of "strategic guidelines", further "programmes" have been more in line with the idea of defining legislative and operational "planning"**.

However, a three-pronged approach may help define more precisely the type of document the European Council will adopt. Firstly, the Treaty does not use the word "programme" but "strategic guidelines" which is more orientation-driven and allows for strategic thinking. In this view, the European Council's "mission" under Article 68 TFEU is more similar to the one that has been developed in 1999 in Tampere than in The Hague and even more specifically in Stockholm. Secondly, strategic guidelines should be adopted for the legislative and operational planning. In other words, the programming part should take place after the guidelines have been adopted. Finally, programming is – at EU level – more of a task for the European Commission. According to Article 17 Treaty on European Union (hereinafter TEU), the Commission "shall initiate the Union's annual and multiannual programming with a view to achieving inter-institutional agreements". On its side, and according to Article 15 TEU, the European Council "shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof".

It derives from the combination of the Treaties' provisions that the European Council is entrusted with the mission to define the policy objectives and orientations that will frame further developments to be included into a more detailed and precise programme adopted by the European Commission.

This division of tasks may also be considered as an illustration of the European integration process. Indeed, more than 20 years after the Maastricht Treaty which initiated cooperation between EU Member States regarding policies currently related to the area of freedom, security and justice, much has been achieved. The EU has adopted an impressive amount of legislation and developed important operational actions. As a consequence, the EU integration process has reached a level whereby the Commission is today entrusted with tasks previously exercised by the European Council.

In concrete terms, detailed programmes covering a five years period, such as The Hague and Stockholm, would now fall within the competence of the Commission. In this context, the European Council embraces a new high level political role where it defines the broad and long term strategic orientations which frame the Commission's programming action in this specific field.

2. Not a "Christmas tree" but policy orientations

On the basis of the previous point, it is then possible to define the shape of future strategic guidelines. Indeed, and as agreed during the EPC's Task Force discussions, the type of strategic guidelines that should be adopted for the next phase should avoid lengthy and detailed lists of actions, as was particularly the case in the Stockholm programme which was referred to as a "Christmas tree". On the contrary, it was acknowledged that **future guidelines should resemble the Tampere milestones**. Tampere's strength was in defining **short, forward looking and political orientations and steps** in a concise document.

While Tampere conclusions should remain a strong basis and example to follow for the future strategic guidelines, **these guidelines should avoid being adopted only for the "Brussels Community"**. Put differently, previous "milestones" and "programmes" have not been able to reach citizens to the extent expected. They have been drafted, used and commented on by a small group of people interested in or who deal with EU issues – mainly national and EU decision-makers, people working for and around the "Brussels bubble" and some select academics and researchers.

At a time where the EU is lacking in support of the citizens, **it should be of primary concern to reach out to citizens**. This is all the more necessary as issues covered by the area of freedom, security and justice are either very sensitive – like immigration and criminal justice – or which impact the everyday life of citizens, like civil justice. **On this basis, future strategic guidelines should be able to square the circle in defining policy orientations for decision-makers and citizens. Guidelines should be political and avoid getting bogged downed down in minutiae.**

This exercise will be a difficult one for the drafters of the guidelines who will have to avoid providing for a technical document that is only readable by people who know the EU political and technocratic language. If EU leaders want to avoid the "failure" of the Stockholm Programme – which was devoted to citizens but never embraced by them – this is a crucial challenge they will have to win.

In order to help people identify with the guidelines and the project, the EU has to accept that it must **embark on a kind of "marketing exercise"**. This implies doing at least three things: First and foremost, the EU has to restore citizens' trust in the European project and in the field of freedom, security and justice in particular. Secondly, to do so, the EU has to explain to citizens in layman's terms that the huge amount of work already done over the last 15 years has made citizens' lives better and more secure. Objectives of civil justice cooperation have been very helpful in this regard. Finally, the EU has the duty of coming up with strategic guidelines in a language that is understandable.

The EU should use policy orientations and concepts people are able to identify with and comprehend. Hence, and we will come back on this in detail later on, all issues that fall within the scope of the area of freedom, security and justice must be covered by the following strategic guidelines: promoting mobility, providing protection, and ensuring effectiveness.

3. Not necessarily a five-year document

Another question is related to the period for which such strategic guidelines should be adopted. Indeed, Article 68 TFEU remains silent on this point which leaves at least three sorts of scenarios open.

The first scenario would be to continue the five year period. This length was initiated after the Tampere summit because the Amsterdam Treaty had introduced a transitional period of five years after which some significant rules would be modified. This period was repeated later on for The Hague and the Stockholm programmes. Regarding the latter programme, this defined period of time derived from the fact that the Lisbon Treaty contains some provisions that make a direct reference to a five years period before the occurrence of significant change.

However, after 2014 five year transitional periods will cease to exist in the Treaty's provisions. Therefore, the legal reasons and constraints which grounded such a timeframe will also disappear. **As a consequence, a scenario based on that period of time is no longer motivated by a specific sequence organised by the Treaty. Opting for another five years period will then be considered as a repetition of previous cycles and be more related to habit.**

Another possibility would be to go for a period of 7 years. Such a scenario would link the strategic guidelines with the EU's budget, which goes from 2014 to 2020, and the EU 2020 strategy.[8] This solution would be a "pragmatic" one as it may help to make better use of ongoing instruments and to achieve already defined objectives.

However, such an option would also have some negative effects. It could diminish the political impact of strong policy orientations, as they would be based on already adopted financial decisions. Conversely, linking guidelines to the EU 2020 strategy may also dilute the specificity of justice and home affairs policies into a wider policy field. Finally, it should be underlined that in practice, the financial framework may have a greater impact on the Commission's implementing programme rather than on guidelines.

The third option would rely on an open approach which would not encapsulate the strategic guidelines in any precise timeframe. This scenario is based on two elements: the Treaty does not contain any timeframe and some of the orientations agreed upon in 1999 in Tampere are still relevant almost 15 years later. This is for instance the case for the policy objectives of developing a common immigration policy, which has been repeated in the Lisbon Treaty, and is yet to be completed. Therefore, framing policy objectives with a specific time limit is not an obligation.

However, **the definition of forward looking objectives without any calendar requires setting up regular "review mechanisms"** in order to evaluate progress and – if necessary – redesign objectives. It might be necessary to redefine objectives due to unexpected events which may have a tremendous impact on justice and home affairs policies. The 9/11 events, the economic crisis or the Arab Spring are topical examples of unexpected events which have had an influence on policies in the field of freedom, security and justice.

In the past, two types of instruments have been experimented with. At the beginning of the policy, the Tampere European Council invited the European Commission to publish a scoreboard every six months to identify steps taken. Although very helpful, the use of the scoreboard was abandoned before being used recently again but only by DG Justice. Under the Stockholm Programme, a mid-term review was expected from the Commission side. It was not delivered. Instead, the Cypriot presidency published a letter without creating much of a debate.[9]

Alongside these evaluation tools already used, a third option was discussed in the Task Force, based on the idea that an evaluation of the steps achieved under the guidelines could be performed every 18 months after three presidencies or on the basis of each trio presidency cycle.

To sum up the discussions that took place within the framework of the Task Force, the majority of participants announced their preferences for "Tampere-like guidelines" which would not necessarily be adopted for the same fixed period of time.

While treaty provisions give some clues about the format of future guidelines, not all answers can be found in them and most should derive from political decisions. These decisions will fall within the remit of the European Council, but not exclusively.

B. A process led by the European Council

1. The European Council in the driving seat

According to Article 68 TFEU, it is crystal clear that the guidelines for the legislative and operational planning will be adopted by the European Council. This is not only a legal question but also a political one. **Given the sensitivity of issues falling within the scope of the justice and home affairs field, it is obvious that Member States will not give up this "constitutional" power and will thus do their utmost to maintain this exercise at the level of the European Council.** As already underlined, the growing importance of the Community method regarding these topics is counterbalanced with specific mechanisms allowing Member States – through the European Council – to keep the control or to keep "ownership" over the area.

While the Treaty looks very straight forward and simple in its wording, Article 68 nevertheless calls for further consideration on the process it triggers in practice. In other words, the issue is not about who is going to adopt the strategic guidelines as such, but rather who is going to prepare and elaborate the strategic guidelines.

Since the entry into force of the Lisbon Treaty, the answer can be found in Article 15, paragraph 6 TEU devoted to newly established President of European Council. In charge of chairing and driving forward the European Council, the President must also prepare the work of the institution.[10] Hence the duty to define the strategic guidelines will be the task of the current President, Herman Van Rompuy, or his successor after the 30 November 2014. It should be added that in practice, the drafting of the next strategic guidelines will be the main mission of the European Council Cabinet.

In the end, the process regarding the drafting and adoption of strategic guidelines will stay at the level of the European Council, i.e. the Member States, through its President and his Cabinet.

2. The European Commission is invited

Through such a method, the role of the President of the European Commission remains unclear. It should be recalled that the President of the European Commission is a full member of the European Council, with a say in the process. It will therefore be the responsibility of the President of the Commission and relevant Commissioners to organise an internal consultation process to collaborate in an effective manner with the European Council. In this view, and while indicating the guidelines will be discussed in June 2014, the June 2013 European Council has invited the European Commission "to present appropriate contributions to this process".

In practice, this has taken the form of various consultation processes launched by the Commission's relevant Directorate Generals for Justice and Home affairs.[11] In doing so, the Commission hopes to present the different elements and orientations it deems necessary to include in the guidelines. This contribution from the European Commission should take the form of the presentation of two communications, one from each Directorate General, in March 2014.

While this may in theory help avoiding further divergences between the European Council and the Commission regarding the content of future strategic guidelines, there are some doubts about the effectiveness of the process. Indeed, the decision to define strategic guidelines in June 2014 has put high pressure on the Commission's consultation process. **This process has in practice been organised in a somewhat "speedy manner" with the involvement of some selected stakeholders and organisations but without properly setting the framework of the exercise, i.e. defining strategic guidelines for the next 10 to 20 years in a sensitive field subject to significant changes at the global level.** As a consequence of such a process, it might well be the case that contributions from a large variety of stakeholders would be too specific and therefore hardly compatible with the definition of political strategic guidelines.

3. The European Parliament and EU agencies are side-lined

While the European Commission is legally represented at the level of the European Council and invited to contribute to the process, nothing of that kind is planned for the European Parliament. The willingness of the Member States to keep control over policy orientations in the field of justice and home affairs leads to a situation where the co-legislator in charge of representing the people and protecting the public on civil liberties – is out of the process in almost all of the areas concerned.

Overcoming this situation requires two types of actions. The European Council may invite the European Parliament to collaborate in the process of defining guidelines. This would require a political gesture in this regard from the European Council and the definition of a scheme allowing for the Parliament to provide for some input to the discussions. However, and from now on, such an option has not been set in motion. Therefore the European Parliament will have to "raise its voice" in order to be heard in the process via resolutions, reports or the organisation of meetings. Nevertheless, and regarding the timing set by the European Council, the European Parliament will have to take steps rapidly.

Lastly, the involvement of EU Agencies in the debate seems underdeveloped. Regarding the ever growing action of the EU at operational level – which is explicitly recognised by Article 68 of the Treaty addressing the "operational planning" – the participation of the Frontex Agency, the European Asylum Support Office, Europol or Eurojust, inter alia, may also be helpful. These agencies have not been formally involved into the process despite their increasing role in the implementation of policies in the area of freedom, security and justice. They have however been invited to participate in different meetings, but their input in terms of the long term perspective has not emerged as yet.

While it may be too early to draw some conclusions about the participation, or lack thereof, of these players, it is obvious that the **timing will have a tremendous impact on the ability of relevant EU players and stakeholders to take part in – or contribute to – the process leading to the definition of strategic guidelines**.

C. Timing as a central issue

Alongside the content of the guidelines, the question of timing is clearly the most sensitive to deal with, especially in present times. The Treaty does not set any timing for the adoption of the strategic guidelines which leaves large margins of manoeuvre. However – and as a result – **the calendar chosen for defining the guidelines will have an effect on the ability of institutions and civil society to adequately take part in the process**. The decision remains that of the European Council but it can have significant political consequences. Hence the European Council has the choice of two scenarios: an undesirable one (1) and a preferable one (2).

1. The undesired scenario: June 2014

This scenario is currently most likely the one that will be applied. It plans the adoption of the strategic guidelines as early as June 2014. This schedule was agreed by the European Council in its October 2013 conclusions. Dealing with migration issues in the aftermath of the Lampedusa tragedy, the conclusions stated "The European Council will return to asylum and migration issues in a broader and longer term policy perspective in June 2014, when strategic guidelines for further legislative and operational planning in the area of freedom, security and justice will be defined".[12] This has been repeated in the conclusions of the December 2013 European Council.

It is obvious that the October and December conclusions took a major step towards the adoption of the strategic guidelines in June 2014. Indeed, the May 2013 European Council was less affirmative on this point. According to these conclusions, the European Council agreed to "hold a discussion (…) to define"[13] the guidelines in June 2014. There has therefore clearly been an acceleration in the process which should now be completed in a short timeframe.

Several reasons may explain why the guidelines should be adopted so quickly. Firstly, the situation regarding migration and security related issues at the EU's external borders in particular, makes it necessary to react rapidly and at the highest EU level. This option is not very convincing as the October 2013 European Council could have called for strong and immediate commitment in this field[14] and it obviously did not.[15] Moreover, migration covers only one part of the broad field of freedom, security and justice.

A second argument is based on the idea that current President of the European Council, Herman Van Rompuy, has some interest in this policy field, alongside his robust and consistent involvement in dealing with the financial and economic crises, and wants to push the issue. Although possible, this option does not convince much as he didn't show great commitment in the area of freedom, security and justice over the past years.[16]

A third and final reason would be simply for the Member States – through the European Council – to demonstrate that they are not willing to, under any circumstances, abandon the "constitutional power" to define the guidelines in this sensitive field.

In speeding up the process, the European Council demonstrates it wants the take the lead, and more precisely that it wants to go it alone, i.e. without any other key EU player fully involved. **June 2014 will then be a political "no man's land" where the European Council; where the Council of the European Union will be the only stable political institution.** The European Commission and the European Parliament will be in a transitional period which will not allow any of them to properly influence the content of the guidelines. While the Commission will be in an "outgoing mode" and mainly dealing with the "affaires courantes", the European Parliament will just have been elected and its President not even nominated. **In other words, none of the institutions taking part in the further legislative process that will derive from the legislative and operational planning framed by the strategic guidelines will have the capacity to participate, or even provide for a contribution.**

Some would argue that the Commission and the Parliament could participate in the process before the definition of the guidelines in June 2014. Others would add that these institutions have taken their steps and contributed on the basis of large scale consultations, resolutions, reports, communications or even as a full member of the European Council, as is the case for the Commission President. While this is true, this is far from satisfactory.

Firstly, the contribution of the Commission and the Parliament before the large 2014 renewal will be delivered under huge time pressure and will only commit the outgoing politicians. In other words, will the newly elected Parliament and the newly appointed Commission be bound by their predecessors? Nothing can be sure in this regard.

Secondly, the new European Parliament and European Commission will not have any possibility to provide input regarding the content of the guidelines, which they will be invited to put into effect regarding their right of initiative and legislative power. While it remains clear that under the Treaty the European Council is the sole institution in charge

of defining the strategic guidelines, "imposing" such orientations may carry a political risk and create the conditions of mistrust and conflict between the European Council and other institutions. The field of justice and home affairs is sometimes a theatre for such political opposition. It has already been the case between the European Council and the Commission after the adoption of the Stockholm programme where the Commission published a communication which did not fully follow the Stockholm programme and led the Council of the EU to adopt strong conclusions against this Communication. Recently, quarrels between the Parliament and the Council of the EU over the revision of Schengen rules has shown that when side-lined the European Parliament may take retaliatory actions.[17]

More generally, adopting the strategic guidelines without involving the European Parliament in a consultative way, raises some further questions of principles. Indeed, in European states all of the issues related to the area of freedom, security and justice fall within the legislative and political competences of national Parliaments, in particular because they address public and individual liberty issues. In the present situation, the European Council, although composed of democratically elected or nominated Heads of state and government, will decide on future policy orientations without the European Parliament being heard or consulted.

Furthermore, maintaining these issues at the unique level of the Heads of State and government leaves the door open to all anti-EU parties to demonstrate how anti-democratic the EU is. However overestimated[18] the fears are that the European Parliament will be composed of a large number of "populist" parties, one appropriate manner to combat anti-EU rhetoric is to invite these parties to the discussion.

Last but not least, it should be underlined that alongside a long list of national events which will have an impact on the discussions (Belgian elections, referendum for independence in Scotland and maybe Catalonia, British "block opt-out", etc.) the June 2014 European Council may well be centred on a unique theme: the nomination of the new Presidents. Hence, the future of the area of freedom, security and justice may well be overshadowed by this issue.

In the end, adopting the strategic guidelines in June 2014 does not seem to be the best solution. It would in any case be preferable to postpone this process until later.

2. Preferable scenarios: December 2014 or June 2015

As already mentioned, the Treaty does not contain any obligation to adopt the strategic guidelines at a specific moment in time. Hence, the guidelines may be defined later on, i.e. in December 2014 or June 2015.

The first solution, **December 2014**, would link the definition of strategic guidelines to the end date of the Stockholm programme. As a matter of fact, it would also leave some time for the newly elected Parliament and appointed Commission to contribute to the process and, to legitimise it to a certain extent.

While this solution is possible, it is perhaps not the most preferable. Although the European Parliament will be elected and its President nominated, there is no certainty that the different Committees will be up and running and if so, how? Will the current Committees remain as they are or will they be organised differently? How will the different Committees coordinate their work in order to provide for a sound and comprehensive contribution? Finally, it might be the case that new MEPs will be nominated in these Committees. Will they have enough time to get acquainted with the issues? Will they have enough time to contact relevant civil society organisations to better understand the challenges the post-Stockholm phase represents?

Similar concerns are applicable to the European Commission. Will the new Commission maintain the existing division between DG Home Affairs and DG Justice? Will the newly appointed Commissioners follow the paths opened by their predecessors or will they be willing to contribute differently to the process? In this case, and bearing in mind that the new Commission will be appointed somewhere in autumn 2014, will the new Commission really have the time to contribute to the process?

Taking into account the questions above, delaying the process from June to December 2014 would not make a major difference in terms of contribution from the new entrants. As a consequence, and in order to allow any relevant stakeholder to contribute to the discussion, one remaining solution would be to **postpone the process until June 2015**. Such an option is desirable for several reasons:

- First – and as already underlined – there is no obligation deriving from the Treaty to adopt the guidelines at a specific point in time.
- Second, there is no urgency to adopt these guidelines even if the Stockholm Programme comes to an end in December 2014. This deadline is imaginary and there are many actions listed in the Stockholm Programme which will not be

completed by that time. Thus, giving 6 more months to further complete the Stockholm Programme is entirely feasible.

- Third, delaying the process will allow all relevant stakeholders, institutions, agencies, civil society organisations, etc, to contribute to the debate in a structured and valuable manner.
- Fourth, the European Council will be able to define strategic guidelines on the basis of a significant amount of input and a well-informed debate. Whether or not they take on board all or some of the most relevant ideas, it would be very difficult to criticize the European Council for not having taken the time to listen and perhaps collaborate with such a large number of stakeholders. In such a scenario, the European Council would have taken a real political position and therefore reinforced its political leadership.

It should be added that given the "fears" regarding the composition of the future European Parliament, which may comprise more anti-EU/anti-migrant/anti-establishment parties, opening discussions with the new assembly on these "burning" issues could be an effective manner of curbing such rhetoric and their electoral prospects, as well as strengthening the political basis of the guidelines.

Conclusions on the process

- Article 68 TFEU is of significant importance in framing the process and further debate.
- This provision invites to distinguish between strategic guidelines and multiannual programme and calls also for a distribution of tasks between institutions.
- It is the responsibility of the European Council to adopt Strategic guidelines.
- It is the task of the European Commission to adopt a multiannual programme aimed at reaching the orientations and objectives set by the strategic guidelines.
- This division of labour reflects the integration process taking place in the field of justice and home affairs over the last 15 years.
- While the European Council is, according to the Treaty, the sole institution entrusted with the competence to define strategic guidelines, these guidelines should be adopted on the basis of a large and well-informed debate.
- The debate should involve a wide range of EU and national stakeholders and avoid being bogged down in minutiae. In this view, discussions about the future of the area of freedom, security and justice should be based on the following question: what should be the main policy orientations in the field of justice and home affairs for the next 10 to 20 years according to existing *acquis* and in the perspective of a fast changing European and global social and economic landscape?
- In order to organise a sound and well-informed debate involving all relevant national and European institutions and stakeholders, the European Council should postpone its decision to define the strategic guidelines from June 2014 to June 2015.
- On the basis of this large and well informed debate, the European Council will have all the elements to take high level orientations regarding the future of EU justice and home affairs policies.
- Although highly political, strategic guidelines should be short, forward looking and understandable for all citizens.

III. The content

After establishing the process, the content of forthcoming guidelines is the most crucial question that needs to be addressed. Dealing with the content may seem simple but what lies within is an outstandingly complex question.

Firstly, these policy fields are by their nature sensitive and complex. As a consequence, it is necessary to deal with each policy area as an autonomous entity and to identify the main policy objectives applicable to them. Indeed, priorities for the next 10 to 20 years regarding civil justice and immigration may differ greatly and require different approaches.

Secondly, these policy fields are interlinked and should be articulated in tandem to form a coherent approach. For instance, access to justice and justice cooperation in civil and criminal matters cannot be conceptualised

independently from each other. The same applies to irregular migration which cannot be addressed without having regard to actions developed in the field of organised crime. In addition, some transversal elements such as consistent external action, human rights or data protection should be taken into account which could make the coordination process between policies easier, or on the contrary, more difficult.

Finally, defining strategic guidelines in the area of freedom, security and justice cannot be disconnected from the outside world, and in particular overarching themes, or megatrends, which will have a great impact on justice and home affairs policies in the next 10 to 20 years.

This part of the paper seeks to address all of these issues, for the purpose of the debate which will take place for the content of future strategic guidelines. However, it is necessary to underline that this part of the paper will follow a specific method. On the one hand, it is based on the belief that strategic guidelines should set short political orientations and avoid a lengthy detailed approach. On the other hand, this report represents the outcome of discussions held in a series of meetings organised within the framework of an EPC Task Force. As a consequence, **the report does not seek to be detailed and exhaustive but to bring to the debate issues which have been discussed and which could constitute a basis of discussion in the perspective of high level political strategic guidelines**.

A. Overarching themes

As a matter of principle, policy orientations are grounded in the existing *acquis* and framed at a certain point in time within a specific political environment. In this view, the definition of strategic guidelines in the area of freedom, security and justice will be influenced by a series of external parameters which may affect the essence or ambitions of the guidelines. Amongst several parameters, the economic situation (1), forthcoming challenges (2) and the discussion over the implementation of existing rules (3) will definitely weigh on the content of strategic guidelines.

1. The impact of the economic crisis

In times of crisis a feeling of instability and fear is shared by a large part of the population. Policies developed within this climate often take a restrictive turn. This form of "political and economic contraction" is detrimental to more progressive policies and plays in favour of the development of a security-driven agenda to overcome citizens' fears. In this regard, and given the magnitude of the economic crisis, the political agenda of the area of freedom, security and justice has been seriously affected at least in two respects.

The economic crisis has put a stop to the possibility of developing ambitious policies in the field of legal immigration. Indeed, the possibility to plan the adoption of EU rules regarding the admission of third country nationals, in particular for the purpose of employment, has been frozen since 2008. Addressing labour migration issues has become very difficult due to the violent impact of the crisis on employment in several Member States.[19] As a consequence, discussions regarding labour migration issues have been systematically neglected or ignored.

Nevertheless, austerity measures which have been developed to cope with the crisis have put national budgets under severe strain. This has had an effect on several issues related to the area of freedom, security and justice. In particular, public expenditures regarding justice have sometimes been cut, in particular regarding free legal aid. Decreasing or even cutting down free legal aid is worrying in terms of legal protection and with respect to the establishment of an area of justice. Security related policies have also been targeted. In Greece for instance, the need to decrease public expenditure, but to simultaneously increase the action of the state regarding the control of the Greek-Turkish external border has led to a tricky situation which was underlined by the Frontex agency.[20]

Although profound reforms adopted at EU level and in the Member States have paved the way towards economic recovery, there are still some goals and efforts that need to be accomplished in order to fully escape the crisis. Hence, and despite the "ambitious" climate currently taking place, the crisis is not over yet. The recipe adopted to cope with the crisis will produce its effects over time. With this in mind, the calendar for the definition of the strategic guidelines becomes even more important.

While the content of the strategic guidelines may vary greatly according to the economic situation, the timing regarding their definition matters. In this context, it may certainly be the case that Member States and EU economies will be "healthier" in 2015 than in 2014. Therefore, the ambitions of the strategic guidelines may be different from one year to another.

Defining the strategic guidelines as early as June 2014 may lead to orientations where the scars of the crisis may remain strong. This could be translated through restrictive policy orientations in terms of immigration or even justice. On the

contrary, and according to economic forecasts, growth will increase in 2014 and continue in 2015. This could create the political and economic conditions for the definition of broader and more ambitious strategic guidelines in the area of freedom, security and justice.

In the end, whether the Union will still be "muddling through" the crisis or getting out of it, it will seriously weigh on the ambitions of the strategic guidelines. This is in particular true regarding discourse and measures in the field of immigration which have for the time being been brushed under the carpet. Addressing these issues in a favourable economic and social climate makes a huge difference. Conversely, pleading for the implementation of costly measures in security and justice fields is also easier. All in all – and here again the timing is crucial – it leads to the conclusion that **adopting strategic guidelines in June 2015 would help regarding the content of ambitious and forward looking policy orientations**.

2. Forthcoming challenges

Defining policy orientations for the medium or long term is an exercise which must take into account forthcoming expected – as well as unexpected – challenges. Despite being tricky, this exercise should be based on a two-pronged approach. Firstly, identifying the main challenges the EU and its Member States will have to deal with or even overcome. Secondly, put into place appropriate mechanisms to adapt the strategic guidelines where necessary given the magnitude of some unexpected events.

Preparing forthcoming challenges

Tomorrow's world will be different, and in some respects fundamentally so compared to today's. Many changes that will occur in the short, medium and long run may have a significant impact on each of the relevant fields of the area of freedom, security and justice.

It is now relatively well known, understood and accepted that the EU – in particular some of its Member States – will face strong **demographic shrinking**.[21] This phenomenon will be accompanied with an ever **ageing European society**. This future trend, which is going to start in 2015, will have a **tremendous impact on the movement of people, and in particular regarding future needs to fill in labour and skills shortages** in several sectors of activity covering all sorts of qualifications, high, medium and low. In other words, European Member States will in the short run have to increasingly recourse to workforce coming from outside the EU. This phenomenon will have a strong impact on the definition of forthcoming immigration policies. EU decision makers and Member States will also have to combine this phenomenon with the expected **explosion of the middle class worldwide** and the increasing urbanisation of societies, both of which will have a **major impact on people's mobility**.[22]

On the security side, two key challenges will have to be addressed amongst the EU Member States. Since the 9/11 bombings, **terrorism** is high on the Union's agenda. This issue will remain sensitive to attacks that might occur in the EU and which could be perpetuated by people already living in the EU, thus remaining on the internal affairs agenda. The external side of the issue will also be addressed given the political instability in some regions of the world, potentially fostering the emergence of **radical groups** which may be considered as a threat for Europe's security. This would require a better definition of common answers to be found in terms of peace-making and **stability in regions outside the EU**. Another key issue to deal with concerns **cyber criminality**. This topic of ever-growing importance, will certainly have to be included in the mind-set of strategic guidelines.

The need to appropriately address justice related issues is another overarching challenge the EU and its Member States will have to tackle. This goes from the continuous work on **transnational crime**, which should not benefit from remaining national borders, to the acknowledgement that national rules are not able to cope anymore with a series of individual situations going far beyond the national sphere. In this view, **civil and commercial disputes are even more transnational and require transnational or EU responses**. In summary, the overall discussion about strategic guidelines should be framed by conceptualising the EU as an area of justice where national laws are no longer able to address citizens' and companies' every day challenges.

In addition, over the last half-century technological progress has had a major impact on our societies and individuals. This pace will not stop and is on the contrary more likely to become faster and stronger. In this picture, **computing and access to the Internet will be a major challenge for policy makers**. They will have to **anticipate** trends and changes and also be able to manage and even organise these changes.

The development of technologies and the fast digitalisation of the world is a double-edged sword. On the one hand, they have increased individuals empowerment. The development of social media and e-tools have allowed **citizens to**

participate in the political debate and transformations, as it was the case for the Arab Spring for instance. It has also allowed citizens to **get easier access to information and public services** online through e-governance. On the other hand, technological progress is also a threat to societies. Information technology may endanger society through **cybercrime, terrorism, the diffusion of hate speech and xenophobia, or even the challenges new forms of participations are providing democracy**.

These challenges and opportunities cannot be left aside when thinking about and dealing with the future of the area of freedom, security and justice. While defining strategic guidelines, EU leaders should have this big picture in mind.

Finally, addressing issues related to movement of people, security and justice cannot be delinked from the changing face of the global balance of power. The EU project has started and been developed at a time where Europe was a strong and key international player. Today's reality is fundamentally different and tomorrow will be even more. In terms of demography, economy and political leadership, Europe will have to face a complete redistribution of power, where Asia and Latin America and even Africa will become central players. This will have a tremendous impact regarding the issue of values. Up until now, the EU has been able to portray and also export its values. It is difficult to predict whether or not the EU will be able to maintain EU core values at their current level in its relationships with the external world. Looking at justice and home affairs this question is of major importance since they are clearly linked with the respect of the rule of law, human rights and equality. This could also be extended to issues related to the European social model and secularism, etc.

Coping with unexpected challenges

It should nevertheless be acknowledged that some unexpected challenges or events may occur after the adoption of the strategic guidelines and have an impact on the definition of related policies. The New-York, London and Madrid bombings have heavily impacted on the EU's agenda in the field of freedom, security and justice. In the same vein, the "Arab Spring" has also had an impact on how to reconsider – positively or restrictively – the EU's migration policy towards its immediate neighbours. Conflicts occurring in many places of the world, such as in the EU's backyard in Syria, also play a central role in shaping policies and orientations.

All of these events were largely unexpected and have modified the political landscape at EU level and in the Member States. Other known events may happen but without any certainty regarding their timing and magnitude. This is for instance the case regarding the effects of climate change which may be significant on the movement of people and protection needs, or not.

While unexpected challenges are always… unexpected, the EU and Member States should be able to organise mechanisms to review policy orientations where necessary. This could be done **immediately** in case of serious reorientations of policies due to the modification of the global landscape. In this view, the adoption of European Council conclusions is a first immediate answer. However, some mid-term policy reorientations may also be needed at some stages. Here, and in the context of strategic guidelines adopted for an undefined period of time, the European Council may decide to organise every 18 months at the end of trio presidencies, a review of policy objectives and where necessary adapt the strategic guidelines to an ever evolving global environment.

3. Implementing mode vs strategic guidelines

The debate over the primary need to favour the implementation of existing policies developed in the area of freedom, security and justice was quickly raised in the debate surrounding the post-Stockholm phase. Indeed, almost 15 years after the adoption of the Treaty of Amsterdam and the Tampere conclusions, strong doubts about the need to adopt another set of orientations or multiannual programme have been put forward. Some observers have also answered clearly to this question by stating "the time for big new policy initiatives and multiannual programmes on AFSJ has past. The railway lines have already been built and it is time to consolidate these same lines and get the trains moving. Just like the policy on the internal market in its time, once a major policy objective and agenda have been set, the next step is faithful implementation, not an over-ambitious or radical change of policy direction and tactics every five years. Coherence and consistency with the previously agreed parameters of European cooperation and their founding Treaty-based principles should be seen as the indispensable driving forces for the next phases of European integration on freedom, security and justice policies at Union levels".[23]

While we understand the position, we would suggest at least **four reasons for which the need to define strategic guidelines remains important**. Although it is true that the correct implementation of policies is crucial, **the "implementation mode" does not apply to all policy areas**. Asylum policy is for instance the perfect example of a policy field where focus on implementation is a prerequisite before adopting any new legislative instruments. Indeed two subsequent sets of legislation have been adopted between 2003 and 2013 and it is time now to leave space for

implementation. Otherwise, practitioners, lawyers and judges alike, will get lost in a complex legal tangle and not be able to properly implement the rules. On the contrary, **in some policy fields there is a need to further develop EU legislative norms**. This is in particular the case with respect to legal migration, which has been treated as the "poor child of the policy". Here, the objective to set up a "common immigration policy" enshrined in the Treaty may not be sufficient. Hence there is a need for a strong political impetus to move ahead within the context of existing and forthcoming demographic challenges.

Secondly, the implementation argument is based on the fact that all policy objectives are set by the Treaty and other relevant instruments – such as the Charter of Fundamental Rights – and there is therefore no need for "policy orientations". In such a context, the Commission will have wide margins of manoeuvre to define the programme in order to meet the Treaty objectives. While we do agree that the post-Stockholm phase should illustrate a further step in the integration process, **we do not believe that Member States will abandon the "constitutional" power to adopt strategic guidelines** under Article 68 TFEU. Hence, and as previously stated, the European Council will exercise its power to define guidelines and – as a sign of EU integration – the Commission will adopt a programme within this framework and in order to reach the guidelines objectives.

Thirdly, it is worth remembering that **the specific policy field of freedom, security and justice needs a political agenda**. It is necessary to define orientations in a sensitive field, subject to global changes and which addresses people's everyday lives. **Avoiding tackling those issues at the highest EU political level would leave an empty space for extremist and anti-parties.** At the end of the day, this will weaken the EU's action in the eyes of the citizens.

Finally, **defining guidelines and adopting a programme to meet the objectives will help to evaluate progress made in this policy field**. One should remember that the culture of evaluation is key in this field. The use of 'scoreboards', in the immediate aftermath of the Tampere conclusion or in the field of justice, and the adoption of a brand new Schengen evaluation mechanism illustrate, amongst others, how central assessing progress is.

The debate over implementation therefore deserves to be nuanced. **It is indeed necessary to ensure proper implementation of EU rules in the Member States, and if necessary through infringement procedures. However, it is also essential to define policy objectives in strategic guidelines to pave the way for further actions.**

B. Asylum, immigration and integration

Among the issues dealt with within the framework of the area of freedom, security and justice, migration related topics are certainly those which are the most familiar to citizens. Immigration and asylum, without any clear distinction, are regularly on the front pages of newspapers and over-used in political rhetoric in particular during electoral campaigns. Hence, topics like "Fortress Europe", Schengen, Lampedusa, crises in asylum systems, Frontex, multiculturalism, etc. have become key elements in political and societal debates and decisions.

Since 1999, the EU has extensively exercised its competences in the fields of asylum and immigration and also regarding integration issues. Despite, the impressive amount of rules adopted at EU level[24], the role of the EU in this policy field is not always well understood, even though regularly criticised.

In the wake of the European Parliament elections where immigration will be at the forefront of the campaign and in the context of creeping anti-immigrants rhetoric in the Member States, the task of the European Council appears rather complicated. However, it will not escape the difficulty as it will have to draw policy orientations regarding asylum (1), immigration (2) and integration issues (3).

1. Asylum

Granting protection to persons who have a well-founded fear of being persecuted is rooted in EU Member States heritage.[25] It was therefore a natural move to entrust the EU with competence in the field of asylum when it acquired the power to adopt rules in migration related issues with the treaty of Amsterdam. The heritage was enshrined into primary law since EU asylum policy should be adopted in conformity with the 1951 Geneva Convention. The Treaty of Lisbon, while recognising the objective to develop a "common policy on asylum", went a step further with the European Charter of Fundamental Rights which recognises, according to Article 18, "the right to asylum".

The Tampere conclusions of October 1999 defined the objective of developing a "Common European Asylum System" based on the adoption of community rules which should "lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union". Following the same path, the Stockholm programme added that "the objective should be that similar cases should be treated alike and result in the same outcome".

After almost one decade and two waves of legislation, the EU has completed the legislative phase of the Common European Asylum System. While this achievement is significant, the objective has not been reached. Indeed, there are still important discrepancies between the Member States regarding asylum procedures and protection recognition rates. To sum up, and as underlined during Task Force discussions, **the legislative cycle has been completed but the Common European Asylum System has not been established**.

In this context, Task Force participants have pointed out shortcomings and possible ways of further developing asylum policy in the framework of the European Council's strategic guidelines.

Implementation rather than legislation

Asylum is, more than any other topic in the area of freedom, security and justice, the field which requires little legislative proposals. More precisely, two sets of legislation composed of directives and regulations have been adopted between 2003 and 2013. While these successive legislative processes have not been able to reach the objectives, the idea of engaging in a third round of negotiations was not addressed during Task Force discussions.

This general (silent) consensus is explained by a series of reasons. Firstly, the adoption of the last asylum package has been difficult. All EU legislative **players do not want to start another long, time-consuming and uncertain process**. It is worth adding that the development of further legislation should be based on the evaluation of previous legislation. In the present case, rules adopted in 2013 have not even been transposed which makes the evaluation process quite cumbersome.

Secondly, there is a widespread acknowledgement that the legislative process should now be followed by an implementation phase. This concerns actions taken by Member States to transpose and put these rules in motion. It also relates to practitioners – mainly lawyers and judges – who will have to get acquainted with the new rules to apply them to the individual situations they will have to cope with. **Adopting new rules every five years would have the effect to "lose" practitioners in a patchwork of rules, and increase the risk of EU rules and rights being disregarded.** In addition, the role of the Court of Justice will be significant in particular regarding the interpretation of rules

Thirdly, **the implementation phase will be supported by the growing role played in this field by the European Asylum Support Office**. This Office supports the implementation of EU rules by national authorities in order to ensure that individual asylum cases are dealt with in a coherent way by all Member States. In this view, the Office will provide a significant assistance to national administrations in their duty to properly implement EU rules.

In summary, the implementation of existing rules is by far the main priority. Although adopting a third set of legislation is not the way forward, asylum policy should not remain static as some legislative additions may improve the system.

Improving the asylum system

Discussions within the Task Force meetings were also an opportunity to raise some points on how current EU asylum rules could be improved. The suggestion was to make progress on a crucial question: the **transfer of protection between Member States**, i.e. the possibility for a refugee or a beneficiary of subsidiary protection to go to another Member State and keep their status in the second state. Such recognition of positive decisions – instead of negative decisions as it is currently the case – would constitute a major leap forwards to the creation of a Common system.

Solidarity between Member States, in particular towards States facing significant pressure regarding asylum seekers, was also an issue raised during discussions. Here, several options have been put forward, including the **revision of the Dublin regulation** – which is unlikely to happen in the short run due to political reluctance – to the development of **relocation procedures** and **joint processing** schemes. The two last options are the ones which are likely to emerge in concrete terms. A strong impetus in the development of such practices in the European Council guidelines would be a great incentive to make headway in these areas.

A third point discussed concerned the possibility to **grant a status to third country nationals who do not need international protection but who nonetheless cannot be returned** to their countries of origin. While this could trigger EU legislative action – on a legal basis to be defined, this proposal encounters two main obstacles. It is not sure Member States would show any willingness to act. However, there is a risk of creating a third weaker status, after the refugee and the subsidiary protection statuses.

Finally, and as with the Stockholm programme, the issue of **climate change** and its impact on protection duties was discussed. While this is an intricate legal question to be resolved, some doubts were raised about the relevance of such

a protection status in the EU. Indeed, the EU and its neighbourhood will not be – at least in the short run – the principle area of the world facing protection needs as a result of climate change. In the end, this question **should be dealt with in the framework of EU's external action rather than in its internal system**.

Institutional changes

Given the existence of a significant EU legal framework in the field of asylum, the idea of **setting up a Common European Asylum Appeal Court** is starting to be shared by a number of stakeholders. This question was also debated within the Task Force meeting. The aim of such a Court would be to reduce to a minimum the divergences in Member States' interpretation of EU legislation and the Geneva Convention.

While this idea appears very interesting, and has received some support from Task Force participants, there is no unanimity over this issue. Others consider this process too early. The amount of current case law before the Court of Justice does not suggest a specific need in this domain. Furthermore, reducing divergences between Member States' interpretations will be one of the European Asylum Support Office's tasks. In this view, some time is needed to determine whether a future move towards the creation of a dedicated Court for asylum issues is needed.

Others raised their concerns about the idea of "isolating" asylum related issues from the general jurisprudence of the Court of Justice. More precisely, there are "risks" of over-specifying the jurisprudence and disconnecting asylum issues from the logic of the rulings of the Court of Justice regarding general principles, human rights protection, dynamics deriving from the internal market, etc.

While **discussions about the creation of an EU Asylum Appeal Court deserve to be further explored, such an objective appears difficult to set up in the short run**. However, nothing prevents the European Council from identifying such a possibility as a long term option in the strategic guidelines.

External dimension: from asylum policy to protection policy

The major part of EU action developed in the field of asylum has concerned what could be called "asylum policy", i.e. the rules applicable once the asylum seeker has reached EU territory. The other side of the policy which has not been developed as much so far concerns **"protection policy", i.e. the ability of the EU to provide for protection to asylum seekers and refugees outside of the EU territory. This external side of EU's action should be one of the main priorities developed in the years to come**.

The share of refugee and asylum seekers the EU is receiving is minimal compared to the numbers of people fleeing for their lives and seeking protection worldwide. The example of Syria is very telling: In December 2013, almost 2 300 000 Syrians fled to different countries. Among those who fled, 97 % sought protection in five Syrian neighbouring countries (namely Lebanon, Jordan, Turkey, Iraq and Egypt) with only 55 000 in the EU.[26]

These figures show that **the challenge of international protection is outside of the EU. Hence, if the EU wants to play a greater role regarding the protection of refugees in the years to come, it should further elaborate ways to improve its input outside of its territory**. Several paths can be explored and form a basis for discussions about the definition of strategic guidelines.

While the EU is very active in providing technical and financial assistance to third countries and international organisations (UNHCR and IOM) helping refugees in Europe's neighbourhood, the level of the EU's commitment in this context should be discussed at the highest EU level. It would then be the task of the European Council to define the EU's strategy in this regard. In other words, it would determine whether the EU is willing to provide for unconditional technical and financial support and whether this support should be subordinated to the fulfilment of conditions.

This aspect of the policy should also be accompanied with a strong reflection and clear orientations regarding several crucial points which are: **the development and/or improvement of Regional Protection Programmes**[27], **increasing the number of persons resettled in the EU** – on a voluntary or binding manner – and determining the means and procedures to enable asylum seekers to **lodge an application outside the Union** through national embassies or consulates or EU delegations.

While the protection of people fleeing for their lives is part of the EU's heritage, it is a duty for the EU and its Member States to decide whether they want to limit the protection regime to asylum issues, i.e. internal protection, or whether they want to become a greater player in the global protection policy outside of EU's territory.

Improving EU's capacity in this regard would require to put into motion the abovementioned measures but also to improve two additional aspects. The EU, with its Member States, should be able to **develop scenarios for the future 10 to 20 years determining possible regions of tensions or conflicts**. These scenarios should be accompanied with an analysis of the economic and social development of neighbouring countries and regions to identify possible protection zone to provide for immediate protection. The other aspect concerns EU's ability to act as a peacemaker, i.e. **develop a proper common European security and defence policy to stabilise unstable regions** and limit refugee flows.

2. Immigration

Over the last 15 years, immigration policy at EU level has been addressed in quite an unbalanced way. Issues related to border management, visa policy and irregular migration have been subject to extensive action on the EU's side. Conversely, legal and labour migration has not benefited from the same level of commitment and has been addressed in a somehow piecemeal manner. As a result, one side of the policy now falls within the EU's competence – sometimes EU exclusive competence – and the other side remains entrenched at national level.

The main future challenges regarding immigration are threefold and complementary. Firstly, **restore the right balance between policy fields** in order to reach the Treaty objectives to establish a common immigration policy. Secondly, **address legal and labour migration issues with global challenges in mind**. Thirdly, **ensure implementation of existing rules** in the fields related to security.

Moving ahead on legal migration

Compared to results achieved in the field of irregular migration, admission policies should be considered as the "poor child" of EU policy. While it has been difficult for Member States to give up their sovereign powers, it is now time to overcome this reluctance.

It was frequently repeated during the Task Force discussions that legal and labour migration policy must be addressed with major challenges in mind. This concerns, firstly changes occurring worldwide which are going to have a great impact on movement of individuals in the medium term and therefore on EU's capacity as a whole to manage legal migration. Hence, **the urbanisation of societies, the rise of a global middle class and the ever facilitated means to travel around the globe are all elements of ever increasing movements of people worldwide**.

Moreover, EU Member States are exposed to a key challenge which will impact on their needs regarding migrant workers: **Europe's demographic trends**, which will result in a shrinking workforce and the ageing of Europe's societies. While the shrinking of the work force will impact on labour and skills shortages, taking care of an ever increasing number of "elderlies" will also create additional labour demand. In addition, if a sustained economic recovery can be achieved it will intensify the need for a bigger part of the workforce coming from outside the Union. **In essence, existing shortages experienced in some sectors in the EU Member States are likely to increase and will require the EU to attract a foreign workforce because the existing labour force will not suffice.** This phenomenon will concern low, medium and highly skilled workers and will intensify when the economic downturn ends.

Finally, the **economic crisis has pushed Eurozone Member States to significantly enhance the coordination of their economic policies**. From this perspective, the situation in Member States' labour markets, including the question of labour migration, will increasingly be relevant to the EU level. As a consequence, **Member States' labour migration will also have to be coordinated and to a certain extent harmonised**. Thinking about national labour market in isolation is no longer a long term perspective. **Addressing management of labour and legal migration flows should be based on an EU approach according to which, in future, national labour markets and policies will increasingly be interconnected and embedded in a single European labour market.**

All of these elements should drive the EU's future action. Establishing a single European labour market requires the EU to develop first coordinated and then common **admission policies**, defining **common conditions to enter and reside** in the EU Member States **for work purposes**. In addition, the single market should act as a strong incentive to **increase intra-EU mobility** for already legally residing third country nationals. The ability for third country national workers to move within the EU, in particular for work related purposes, should be a key driver of future thoughts about legal and labour migration. Finally, and given the fact that the EU is not the only region in the world in need of additional workforce, the EU will have to **consider its attractiveness**. While this implies developing common conditions for admission and genuine intra-EU mobility, further thinking should also envisage **strengthening or developing integration related rights**, such as family reunification, social rights and anti-discrimination policies, as well as providing a 'package' for migrants the EU wants to attract, including, for example, consideration of spouses' employment opportunities and education provision for their children.

All of the abovementioned elements should also be put into perspective regarding the external dimension of the EU in this particular field. Thinking strategically calls for the development of open external policies with third countries. Neighbouring countries are of course a priority but not only. The **EU should forecast and develop relationships/partnerships with specific third and emerging countries** to use the full potential of labour and legal migration to and within the EU.

The ability of the EU to become a region of destination for the workers will increasingly depend on the European Council capacity to consider the EU, and in the first place the Eurozone, as **a single area implying the development of common admission rules and the improvement of intra-EU mobility capacities**. The future guidelines should consider **opening legal channels of migration as a priority to fill in shortages, attract needed workforce and revive growth**. Labour immigration should be portrayed positively as **an opportunity rather than a burden**. Finally, future guidelines should remain within their scope, i.e. the area of freedom, security and justice, and not address others themes. More precisely, the **strategic guidelines should not tackle issues related to freedom of movement of EU citizens** which fall within a different chapter of the Treaty.

Implementing existing rules in the field of irregular migration

This area of action has been largely addressed to the extent that border management policy is one of the most integrated policies at EU level. As a consequence, Task Force participants have emphasised that the **priority is to implement existing rules** regarding border management, visa policy and irregular migration, including the proper implementation of the return directive.

This priority has not constituted an obstacle for some speakers to propose ideas worth exploring in the medium to long run. Regarding **visa policy**, the idea of **setting up an EU consular agency** linked to the European External Action Service to enhance local consular cooperation was proposed. There were some strong reservations expressed regarding such a project. They noted that current local consular cooperation is good enough and visa policy is also a "business" for Member States and they will not give up that source of income.

In the long run, however, one should have a look to the trend according to which the list of states whose nationals are subject to short term visa requirement is decreasing, in particular with EU's neighbouring countries. This raises the question as to whether visa policy as it stands today will last forever. **In an ever increasing mobile and digitalised world, should visa policy remain the same or should it be revised** towards an **individualised-based** rather than nation-based system? Or should it be replaced by another system on the basis of which **visas as such would disappear**?

Another possible option is to revive the idea of creating a **European Border Guard Unit** to ensure uniform control of EU's external borders. While always interesting to think about in the long run, Member States would currently be reluctant to accept such a move considering the link border management has with national sovereignty. In addition, missions performed by the Frontex Agency and the Rapid Border Intervention Teams are satisfactory enough for Member States, meaning a step forward is not seen as necessary for the time being. As a medium-term solution, the creation of **EU inspectorate teams** could be envisaged as an extension of the current Schengen evaluation mechanism.

In any case, the implementation of EU policy aiming at reducing irregular migration at the external borders, in particular sea borders, should be combine with the objective to eradicate people dying at sea.

External action

EU's external action in the field of immigration reflects an internal policy: it is heavily security based. Hence, and as a consequence of general ideas already developed, a **better balance between security and mobility issues** should be struck.

It has been widely acknowledged that the global approach to migration and mobility is a good framework for the establishment of a sound dialogue with third countries. However, **legal migration possibilities should be enhanced**. In this regard, and according to further developments regarding EU legislation on legal and labour migration, some speakers proposed to **transform mobility partnership into binding instruments**.

From a geographical point of view, **the immediate neighbourhood of the EU should be a priority** in terms of migration management, including irregular and legal migration. Turkey, the Balkans as well as the southern shores of the Mediterranean Sea should constitute key priorities, but not exclusively. Partnerships with other countries or regions should also be explored, in particular when linking the fight against irregular migration with the fight against organised crime.

In any case, many Task Force participants have made clear that dialogues, agreements, partnerships and initiatives with third countries regarding legal, and more especially irregular immigration, should have **due regard to human rights**. In this view, strategic guidelines should in particular emphasise the obligation to ensure the right to have access to an asylum procedure where Member States are confronted with mixed flows. The safeguarding of human rights is a duty enshrined in the Treaty and a prerequisite in the development of relationships with third countries.

In any case, demography, labour shortages, political and social development of third countries, increasing use of electronic systems to manage migration, and growing mobility are elements that should be included in the future definition of migration management with third countries. Rising migration of EU citizens to third countries should also be taken into account in the whole process and be part of discussions with third country partners.

3. Integration

In 1999, the Tampere European Council proclaimed "a more vigorous integration policy should aim at granting them [third country nationals] rights and obligations comparable to those of EU citizens". Hence, the heads of state and government, added to immigration and asylum policy the objective to promote migrant's integration in particular on the basis of a rights based approach and with the support of anti-discrimination rules.

The specificity of integration in EU policy resides in the fact that **Article 79 TFEU confers limited competence to the EU** in this field. Indeed, the EU has no harmonising power and may only adopt measures for the coordination of national policies. While this derives from the fact that the EU has no or little competence in a series of fields related to integration (access to the labour market, health care, housing, social systems, schooling, culture, etc), the reality is different as the EU has adopted a number of rules directly or indirectly linked to integration like the family reunification directive, the long term residence directive or a number of provisions granting access to the labour market, health care or education. In this regard, the development of EU law has followed the orientations defined by the Tampere European Council.

As a matter of fact, no immigration or asylum policy may be developed without addressing integration related issues. EU immigration and asylum policy does not escape this rule. However, the main problem at EU level is to identify the appropriate way to tackle integration in a manner that respects the division of powers between the EU and Member States. So far, the development of a series of integration coordination tools and bodies at EU level has safeguarded this balance.

Task Force discussions did not specifically focus on integration issues. However, some elements were highlighted which are linked to integration and could therefore be taken into account in the framework of future strategic guidelines. The **"rights based approach"** was underlined as a crucial element to be kept high on EU's action in the field. In other words, granting rights to migrants is a key element to ensure their sound integration into the society. This includes ensuring the implementation of existing rights, such as **family reunification**, to the creation of new additional rights, like **mobility rights** which **promote social inclusion** of migrants into the receiving society and in Europe. In this regard, it was emphasised that **integration should always seek to improve social inclusion and never be used for the purpose of social exclusion**, i.e. to impose integration conditions on migrants in order to benefit from a right or a more secured legal status.

Alongside the "rights based approach", thinking about the future of integration policies at EU level should address at least two additional themes. The **link between immigration and integration policies** is, up until now, not fully addressed. The effect of immigration policies and practices over further integration capacities of third country nationals in the receiving society should constitute one line of further reasoning. In concrete terms, EU rules have organised the possibility to detain migrants and asylum seekers under specific circumstances. While this portrays a trend in Member States to use detention of migrants as a migration tool, this is implemented without consideration regarding effects of detention on further integration capacities of migrants. In this view, and regarding other fields of immigration and asylum policies, a stronger linkage between these policies with integration should constitute an axis of reflection.

Another theme concerns the question of values. EU values, political, social, philosophical, etc are not universally shared. Although the majority of migrants will be a cultural boon – will bring benefits in terms of cultural richness and values, the Member States should not be shy in upholding EU values in the face of extremism. **Striking the right balance between maintaining EU values and embracing diversity** will be a major challenge for EU society and decision-makers.

Given the variety of forms and topics falling within the scope of integration, the EU should identify the right targets to address and ensure that all players dealing with integration issues coordinate their actions in order to ensure coherence.

C. Internal security

Security issues have been located at the top of EU's agenda, in particular since the 9/11 attacks and Madrid and London bombings. While security concerns are political priorities for decisions makers and citizens living in the EU's territory, the fields covered under the Treaty are impressively wide and therefore sometimes difficult to encompass and articulate. They concern chapter 4 related to "Judicial cooperation in criminal matters" and chapter 5 on "Police cooperation".

The width of the field is for instance portrayed by Article 83 of the Treaty. This provision entrusts the EU with the competence to adopt Directives establishing minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. The provision then lists the areas of crimes targeted which are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. However the list of crimes is not exhaustive as Article 83 indicates that "on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph".

While members of the Task Force have underlined the specificities of this policy field, in terms of content and institutional characteristics, they have also highlighted some serious problems and provided for some ideas to overcome these complications in the short and long run. The main issues discussed have dealt with difficulties related to defining policy perspectives (1), overcoming complexity and competition (2), strengthening training activities (3) and finally balancing the content of the policy (4).

1. Better defining policy perspectives

In the framework of the post-Stockholm phase, defining clear policy orientations and perspectives is, as already outlined, crucial. Relating to internal security issues, Task Force discussions underlined some shortcomings in this regard. However, some elements have been identified in order to better define forthcoming policy orientations.

Which policy orientations?

Article 2 of the Treaty of the European Union states "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". With the exception of this generic provision, the Treaty does not tell us much about which orientation internal security policy and rules should aim for; **should the policy be only security-oriented or, on the contrary, only justice/protection-based or, should this policy field try to strike the right balance by identifying a sound complementarity between these orientations?**

It is true that terrorist attacks and potential threats inside and outside the EU as well as cross-border security challenges have put a strain on this policy area and pushed players to act. The adoption in a short period of time of the European Arrest Warrant remains an example on how leaders can act quickly in sensitive dossiers. Furthermore, the expansion of institutions, bodies and strategies at EU level have created the conditions for development of several actions. More generally, the field of criminal justice and criminal law has been actively developed. However, for some stakeholders, a security driven approach has taken over a policy more inclined to protect victims. Such a trend has even driven some observers to underline that next steps in **this policy field should not lead to over-criminalisation**.

These criticisms illustrate the difficult balance the EU and Member States have to find between the prevention and repression of organised crime, and at the same time providing for a true judicial dimension, i.e. a justice-based policy.

Nevertheless, this position is not fully shared by all stakeholders. Representatives of nationals' agents active in the field of security have raised their concern regarding the protection of policemen, border guards etc. in their duty to protect citizens' security. In other words, agents performing security tasks on the ground consider that EU policies have been developed in a way that secures procedures and protects, more than they help police and justice cooperation.[28]

The difference between the two approaches demonstrates the divergences of perceptions which exist today in the field of internal security between the EU level and the national level. Without entering this discussion now, as we will come back on this later on, it should nevertheless be underlined that the broad picture shows that the steps taken in the field of internal security have indeed shown some imbalances but rather to the benefit of security related issues, as shown in some reports.[29] Hence, issues like judicial protection, i.e. access to justice, or data protection have not been

addressed to the extent expected and need consequently to be improved. The latest reports on the PRISM scandal show the imperative need to protect data in a wide range of fields, in particular in security issues.

In this context, it looks evident that strategic guidelines should contain clear policy orientations regarding criminal justice and police cooperation. In concrete terms, it should be EU leaders' responsibility to design the political framework within which future actions will take place. One of the messages portrayed during the Task Force discussions was to avoid over-criminalisation and **strike the right balance between security and justice, security and freedom**. In this regard, and alongside actions adopted to strengthen security on the territory, existing initiatives launched to enhance procedural guarantees should also be further supported and highlighted.

How to better define the policy?

Policy orientations should set the general frame within which policies will be developed. However, the content of policies should also be defined in an appropriate way, i.e. what does EU criminal policy want to address?

Concerning this element, a general consensus was reached during Task Force discussions: **the lack of statistical data** does not allow the EU and its Member States to define a genuine policy. Some participants have made it clear that from their point of view, **the EU has not developed any criminal policy and does not have therefore any long term vision**.

As already underlined by the European Commission; "statistics on crime and criminal justice are indispensable tools for developing evidence-based policy at EU level".[30] Despite the development of an Action plan aimed at improving the collection of statistics regarding crime and criminal justice, it looks like progress is slow.[31] It should be underlined that gathering statistics in criminal matters is at a cross roads between an operational need and a political problem as sharing such sensitive information requires strong and shared political will. However, once established, the existence of common data in the criminal field will provide for sound information and help in defining the right policies to address.

It should be added that according to the discussions held within the Task Force, and alongside Commission's statements[32], this data collection process should also be combined with a **stronger evaluation exercise** to assess to which extent policies developed and rules adopted at EU level have been implemented and helped to address transnational crime. In this view, the possibility to develop a **scoreboard** has frequently been identified as one way forward.

Furthermore, **impact assessments** – in other words *ex ante* mechanisms – should be improved. During discussions, one concern regarding the transparency of procedures and methods used was raised. More precisely, some doubts concern the independence and impartiality of consultancy organisations involved in impact assessments launched by the European Commission. Hence, greater transparency in this process was mentioned as an area to look at. In addition, impact assessments should be maintained as they are necessary to assess whether future policies are well suited to answer to current and forthcoming challenges.

Finally, it should be underlined that sound evaluation mechanisms are of added value when it comes to address security issues through budgetary concerns. Indeed, Member States pay attention to evaluation when weighing the cost of a policy and also base their opinion on the results of the evaluation.

In the end, criminal justice and police cooperation policies call for the development of a framework of exchange of information helping to design future EU criminal policy in the best way possible in order to address security threats and challenges in the most efficient way.

Better definition of policy perspectives, in general and concrete terms, will only be achieved if institutional obstacles existing in this field are overcome.

2. Overcoming complexity and competition

The process of addressing security related issues at EU level has over the last 15 years been accelerated and gave birth to a very **complex institutional framework**. Indeed, and as outlined during the meetings, internal security issues are discussed at several levels which create coherence problems. The different levels may be summarised as follows:

- At political level with the European Council and the Council of the EU for the definition of the Internal Security Strategy.
- At strategic level with the Commission in charge of adopting the Internal Security Strategy Action plan.

- At operational level with the Comité permanent de Sécurité Intérieure (COSI) for the management of the policy cycle.
- At tactical level with all EU agencies involved in security related issues.

This extremely complex approach presents two major **weaknesses** which were highlighted during the Task Force discussions. Firstly, the **division of tasks** allocated to different players does not always match the material scope of policies. For instance, the internal security strategy underlines the need to "strengthen security through border management". However, the development of this action brings together several players which do not always have the same mission and way of working like Europol, Frontex or customs authorities. While this could create unnecessary complexity, this could also give ground to **competitive strategies between players** with power grabs, or fiercely marking their territory without having regard to the whole policy objective.

Secondly, and more worryingly, the complexity of the way internal security issues are dealt with at EU level may cause further problems when national authorities have to implement actions "on the ground". It has been highlighted that there is sometimes a l**arge gap between EU decisions** – considered too abstract – **and what is actually happening in the Member States**. Furthermore, it might be difficult to understand the logic behind actions encapsulated in different documents – the Stockholm programme, the Internal Security Strategy and the EU policy Cycle – which overlap with one another. Finally, priorities identified in EU documents may not be the same as the ones highlighted at national level. Here again, there is a risk of misunderstanding, discrepancies between actions and to a certain extent competition between objectives and stakeholders.

All of these difficulties should nevertheless be put into perspective. They have not been an obstacle to the adoption of an enormous amount of legislations and documents which have over the last 15 years given shape to a so-called EU criminal "policy". It is true that the process has been empirical and gave rise to some "ownership" competition between institutional players. However, these difficulties may also be overcome with some clear policy objectives enshrined in the strategic guidelines and **enhanced coordination and cooperation mechanisms**.

Such mechanisms should concern **cooperation between EU bodies and national authorities**. For example, the action of the Directorate General for Enlargement in the Balkans is developed without any coordination with Italy, which plays a strong role in the region, and the EU policy cycle regarding security issues. These mechanisms should also address better **coordination between the EU and Member States**. This may happen for instance regarding the identification of priorities which may be different at national and European level. Hence, increased cooperation may be based on better exchange of information between stakeholders. Such a process should nevertheless have due regard to protection of privacy and data protection standards.

To sum up, enhanced cooperation and coordination regarding security issues is a field to be further exploited. In this regard, the potentialities of Article 71 of the Treaty may help a lot.

3. Strengthening training

In order to ensure proper implementation of EU actions and policies, t**raining is a key issue**. As is the case regarding justice issues, national authorities working in the field of security share one common strong belief: within the 28 national systems, their system is the best. While certainly true, national systems, institutions and bodies nevertheless have to cooperate and collaborate within an EU framework.

This means that national institutions and bodies have to properly implement EU rules. On the other hand, the Europeanization of criminal policy and justice brings national and European institutions and bodies together. In both areas, training is necessary to help **overcoming misunderstandings and create a common "law enforcement culture"**. It also helps to overcome complexities and ensure better implementation of common rules. Combining common culture and implementing reflexes is a strong asset to **increase mutual trust**, the cornerstone of the entire area of freedom security and justice.

Two ways may be further analysed in order to strengthen training. A **better evaluation process, based on Article 70** for instance, could bring some added information about shortcomings, their reasons and solutions to put in place to adapt national practices to EU actions. In this regard, it has also been highlighted that the evaluation process should also involve practitioners to ensure a more pragmatic approach.

The second way could be to create, alongside the proposal to create a "European Judicial Institute" as mentioned in the section justice of this report, a "**Collège of Europe for Police**". Such a common training structure would infuse a European culture in dealing with transnational crime and criminal justice. It would also enable "students" to learn the

same rules, practice the same language and get to learn from each other. Personal contact has always been a key factor to facilitate concrete and operational cooperation, especially in this particular field.

Through evaluation and a common learning structure, a strengthened common understanding of challenges and ways to address them in theoretical and operational terms should emerge and also create the condition of the emergence of a "common culture".

4. Balancing the content of the policy: approximation and/or implementation?

This is perhaps the oldest debate that takes place in the field of EU internal security developments and has pitted those supporting the development of mutual recognition against those in favour of approximation of national rules. The debate remains active almost 15 years later. It is now accompanied with another argument related to implementation. In other words, the need to implement existing rules first before launching other legislative proposals.

Here, like in the others policies relating to the area of freedom, security and justice, the system is not perfect and requires **finding a good balance between developing new tools and making sure that the ones already adopted and in motion are correctly implemented**.

In any case, discussions held during the Task Force meeting made clear that in several fields, there is a **need "to finish the job"**. This concerns **mutual recognition** in the field of judicial cooperation. This concerns **approximation** in the field of criminal procedural and substantive law. Moreover, recent events have shown that the specific question of data protection should be one of the main concerns addressed in the next phase of action. Finally, EU decision makers will have to take some decisions as to whether they want to set up new bodies like the **European Public Prosecutor** and strengthen the power of existing bodies like Europol and Eurojust. This said, the correct implementation of existing rules and mechanisms should also be a priority to identify shortcomings and define further steps.

Last but not least, the **external dimension** of the policy will of course be crucial. Not only because threats to European security also come from outside the EU but also because the coordination of this policy field with the European External Action Service will create a strong asset in terms of information, coordination and also cooperation with external partners.

Securing the everyday lives of people living in the area of freedom, security and justice is a hard task which is no more than the sole responsibility of individual Member States. Cross border criminality is evolving and using new technologies. While the transnational dimension is sufficient to justify EU action, the complexity of criminal behaviour calls for enhanced cooperation between EU states to better address the issue. The approach adopted over the last 15 years has brought some results but needs to be further elaborated.

In this view, the new phase should continue and improve the work already done. According to exchanges developed within the Task Force discussions, one participant presented the five following elements as possible further steps towards an EU criminal policy:

- Strengthening an evidence based policy on the basis of reliable statistics and multidisciplinary consultations involving practitioners.
- Ensuring correct implementation and consolidation of existing rules and develop training.
- Developing new rules respecting balances between mutual recognition in criminal matters and approximation in criminal procedures, exchange of information and data protection.
- Improving coordination between policies and relevant players.
- Develop transparency on EU criminal Policy through scoreboards.

D. Justice

In the opening speech at the « Assises de la Justice », organised at the end of November 2013 by DG Justice, former French Justice Minister Robert Badinter explained in a simple, elegant and highly accomplished manner **why the wind of history is blowing towards an ever more unified justice system in Europe**. Regarding transnational crime, he indicated that remaining national legal borders may offer a refuge to criminals. Regarding trade, the European Union is first and foremost a single market where disputes and contracts are by their very nature transnational. In line with Mr Badinter's view, it should be recalled that the Single Market has abolished the distinction between international and domestic contracts. Finally, he added that families are even more mixed because people are even more mobile. He concluded that all of these circumstances do not fit within the sole remit of national laws because national legislation is too limited and incapable of solving transnational situations on their own. As a consequence, the world we are living in leads us to think of justice issues in European rather than in national terms.

Discussions held within the Task Force meeting followed a similar line. They nevertheless pointed out some shortcomings regarding results achieved and proposed improvements to be put into motion in the future. These enhancements concern the need to let people know about the EU's actions in the field of justice (1), the necessity to simplify existing and forthcoming rules (2) and finally areas where making progress should be a priority (3).

1. EU justice policy: the unknown policy

It is considered as a matter of fact that the EU's track record in the field of civil, commercial and family areas is significant. Successions and wills, divorce, child custody, contract law, consumer protection, data protection, access to justice, etc. are – amongst others – domains in which the EU has acted and is still working on. During the Task Force, one of the participants underlined that **the EU should be "proud" of the legislative work performed so far** and mentioned as an example the fact that the EU has achieved **the most advanced system of mutual recognition in the world**.

However, **the enormous amount of work accomplished at EU level is barely known or misunderstood**. Indeed, citizens are not well aware of the issues dealt with at EU level which address numerous situations they are confronted with in their everyday lives, in particular when they are moving from one Member State to another. Put differently, citizens residing in the EU do not know that the EU as a whole is working on a daily basis to make their lives across borders ever more easy and secure. A similar reasoning may apply to small and medium size companies which do not always have great knowledge about the EU's action.

While citizens do often identify work performed at EU level in immigration and security related fields – using regularly themes such as "Fortress Europe" or the "EU's security deficit" – but they are unable to identify EU action in areas of civil, commercial and family justice. On this basis, it was highlighted within the Task Force that **the EU should be made more visible for citizens and companies**.

EU institutions should therefore start a **"marketing process"** underlining what has been achieved so far, concrete results and what should be completed in the next phase. In a period where the EU is lacking support from its citizens, underlining that it is trying to break down legal barriers in order to make mobile citizens' lives less complex is highly necessary. Furthermore, the EU should also highlight that some **rules are not only adopted for a "mobile EU pan-European elite" but also for all citizens**, as is the case for instance regarding the common European sales law.

This "marketing exercise" should of course be undertaken primarily by the European Commission. While the "2013 EU citizens' year", conducted by DG Justice, was an opportunity for people throughout Europe to learn about the rights and opportunities open to them through EU citizenship – particularly their right to live and work anywhere in the EU – the work should be further continued regarding the specific fields of civil, commercial and family law.[33] However, the European Commission should not be the only institution to uphold this task.

The European Council should take the opportunity of the strategic guidelines to push forward a clear **message about the EU's commitment towards mobility and protection of people's lives across the EU's borders**. Delivering this message is crucial for at least three reasons: It should continue to recall that **freedom of movement is a pillar** of EU integration. It should then **strengthen mobility of EU citizens** at a time where freedom of movement of people is under severe attack, especially from the British government. The European Council should finally **help citizens to understand in simple terms how the EU has been able to address the situations** that an ever increasing number of mobile people are facing throughout the EU.

In any case, forthcoming strategic guidelines should **avoid putting down a series of detailed measures to be adopted**, as was the case in the Stockholm programme. The Stockholm "Christmas tree approach" was a double failure; policy orientations were lost in a long series of measures and the Stockholm programme did not reach the citizens. In practice the Stockholm Programme was a genuine EU product, i.e. adopted for EU stakeholders and not for EU citizens. Therefore it is necessary for future strategic guidelines to address citizens and companies in showing what the EU has done in this crucial policy fields and what is to be accomplished in the next long term phase.

The European Parliament should also take its part in making EU civil justice more easily understandable for citizens living in the European Union. Concrete examples of how the EU has been able to simplify cross border disputes is something that talks to people and should therefore be used by the European Parliament to legitimate EU actions.

In this context, EU and national institutions should develop strategies **using e-tools** to better communicate. This communication exercise should primarily concern business and young people. These two categories are the ones that benefit from the EU's action in the fields of civil, commercial and family justice and are also increasingly connected

to the digital world. It is a duty for the EU and national bodies to take up this challenge and be able to portray positive messages to the widest audience possible, in particular to the young generation and businesses.

Finally, it should be recalled that effective justice is a strong factor of trust among citizens but also in the business sector. In this view, "Justice" as a whole – including criminal justice – should also be addressed as a strong factor for growth. Indeed, companies invest in secure environments for business and consumers. In this regard, and in times of crisis, shedding light on this potential positive aspect may also help in portraying a positive and welcome message.

2. Simplifying rules

In being extremely active in the different domains related to justice, **the EU has not been able to avoid a pitfall: complexity**. The EPC Task Force participants underlined this problem.

The complexity concerns firstly the **significant amount of legislation adopted**, and in particular in some specific sectors, which does not help people to easily identify whether EU law is applicable or not and how. For example, several Regulations have been adopted that might have an impact on international divorce procedures, leading to ever increasing complexity. It is obvious that the multiplication of texts does not help understanding how a person's personal situation is covered by EU law.

The second source of complexity is related to **competence problems**. More precisely, some fields sometimes overlap and it is not entirely clear whether these issues should fall within one policy area or another. An example in this regard is the question of family names. While this issue is dealt with within the remit of citizenship, i.e. Article 21 TFEU, it might be worth addressing it within the remit of civil justice. But in this case there is a problem because the procedure applicable under Article 81.2 TFEU is based on a unanimity procedure whereas Article 21 TFEU is based on co-decision.

To sum up, the EU has adopted a significant amount of legislation in this crucial field, and a lot of instruments are still in the pipeline, but it is subject to two types of inconsistencies. **A lack of consistency between rules**, which brings uncertainty regarding their implementation. There is also a **lack of consistency between policy areas** which may diminish the relevance of decisions taken. As a consequence, further developments regarding civil justice, commercial and family law should also be accompanied by some strong clarifications and coordination.

Adopting better legislation was underlined by Task Force members as one key priority. While this is a recurrent concern expressed over a long period of time at EU level, it is obvious that developing better legislation in an area where rules govern people's lives and companies operations of importance. In this view, making EU law and objectives understandable for people and businesses should be a strong driving force for the future.

While adopting clearer rules would represent a strong short term action to be put into motion, another long term aim should also be targeted: **codification**. Having regard to the development of numerous legal instruments in the same domains, as the example of divorce has shown, this kind of exercise should be welcomed. However, taking action towards achieving this is difficult. Alongside mere rationalisation of existing texts, it will require the assessing of current instruments and addressing remaining gaps existing between them. In the end, this may not be a simple task and may also lead to difficult policy choices and negotiations between the EU and Member states and between EU institutions. Codification could therefore be a mid or long term perspective.

However, adopting better legislation does not only mean adopting clearer rules or instruments of codification. It is also linked to two different types of actions which have been highlighted by several participants. One important element to reach better legislation would be to **engage practitioners in the law making process**. In addition, there is sometimes a significant gap between EU rules and their implementation in practice. Hence, involving practitioners would help better address concrete problems and improve the implementation of EU rules in practice.

Another important element would be **to include EU legislation regarding justice policies within the framework of budgetary constraints and leverages**. Bringing coherence and simplification in this "legal tangle" would be cost efficient. Indeed, adopting several sets of piecemeal legislation is time consuming and also costly. Addressing issues in a broad manner, codifying existing legislation and developing the use of e-tools may therefore be prioritised for budgetary reasons. This perspective may also be emphasised by the European Semester where well-functioning justice systems are considered as having a positive impact on growth and people's lives.

Finally, bringing clarity and consistency requires the development of appropriate coordination processes regarding

rules and between stakeholders. It will be the task of decision makers to enhance existing coordination mechanisms and to design new ones which would enable the EU to take stock of the results achieved, to define actions to be undertaken and to identify the right players to put them into motion. In this regard, Eurojust and other relevant EU bodies, as well as the European Judicial Network in civil and commercial matters, could play central roles and help to better coordinate relevant policy fields.

3. Options for the future

The EU will not stop moving ahead in a field of crucial importance for citizens and companies. However, some strategic options should be defined in order to make EU action more efficient.

Defining priorities and timelines

One first step should be to **set the priorities** in the different fields falling with the vast remit of "Justice Policies" and to adopt the appropriate measures according to the needs, the efficiency of existing instruments and legal parameters. In concrete terms, **developing the abolition of exequatur in other areas, extending mutual recognition instruments, adopting minimum standards in procedure law and harmonising substantive law** are policy options EU stakeholders will have to think about and discuss.

While every action will have to be set into motion in the next 10 to 20 years, EU decision makers will have to decide on priorities and timing. The options chosen and the timeline defined will be crucial as they will be strong drivers for people's understanding of and support for the common project. They will also enhance mutual trust between all of the players involved in this policy area, from decision makers to businesses, and be a source of economic growth.

Improving implementation

The second step would be to address the issue of the implementation of EU rules. On the one hand, it is the responsibility of the European Commission to **check how EU rules are implemented** in the Member States and to pay attention to national rules which have an impact on or are an obstacle to the implementation of EU rules.

On the other hand, different tools could be developed or further developed to ensure correct implementation in the Member States. The use of a **scoreboard** was presented as an option by several members of the Task Force without always receiving positive feedback. Indeed, these tools may have a "naming and shaming" nature which could have a negative impact on mutual trust.

An alternative was mentioned through the creation of evaluation mechanisms on the basis of **Article 70 TFEU**. Such a mechanism could allow the evaluation of the efficiency of policies within the Member States and could function like the Group of States against Corruption (GRECO) established by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards.

Finally, the implementation of EU rules and policies could also be better assessed through the **use of new electronic tools**.

Developing a common judicial culture through training

A third step would be to **develop and deepen a common judicial culture**. This concerns in particular the training of judges. While this training should improve the implementation of rules and policies in the Member States, it should also create the **conditions of growing mutual trust between judges**. In this field, like in many others, judges and practitioners believe their national system is the best. Enhancing and improving mutual training could be a serious way to get judges' confidence in and knowledge about common rules and tools, expand common cooperation between national judges and finally further develop a common judicial language.

In this view, Robert Badinter proposed in its opening address at the "Assises de la justice" to create, alongside the European Court of Justice, a **European Judicial Institute** where national judges would be invited to train for several months. Here again, the development of e-tools could support this process.

Better use of the potential of the external dimension

Taking into account the external dimension of policies undertaken at EU level is a fourth priority step. More precisely, it was underlined during the Task Force meeting that EU decision makers should pay attention to the **EU's exclusive competence** in several domains and consider its development in the external dimension.

The ability of the EU to conclude international agreements with some specific countries in particular areas was mentioned as a key element. As an example, concluding agreements regarding surrogacy with targeted countries, like Ukraine or India, should clearly help in defining clear and commonly agreed upon rules.

Moreover, **better cooperation at international level with other key stakeholders** – like the Hague Conference on private international law or the Commission Internationale de l'Etat Civil (CIEC) – would clearly improve the EU's strategy and collaboration with its external partners.

Human rights and access to justice as a framework

Finally, the next steps should bear in mind that EU rules in the field of justice should always be placed under the framework of human rights. While human rights form the basis of the European Union, **access to justice should remain a Union and Member State' priority**. Access to justice is a prerequisite to the protection of individual and company rights, to strengthening the EU's attractiveness and to ensuring EU's development and prosperity.

E. Transversal issues

Thinking about the future of the area of freedom, security and justice requires not only addressing specific topics in immigration, security and justice policies but also identifying themes which are common to all of these policy fields and have a crucial impact on the current and forthcoming decision making process. Among different possible themes, Task Force members have identified four main ones: external dimension (1); data protection (2); human rights (3) and evaluation (4).

1. External dimension

Freedom, security and justice is not purely an internal concept and project – it has an external dimension and needs to be linked to it in order to be fully achieved. Dealing with migration related issues requires the involvement of third countries when shaping and implementing policy. Otherwise EU migration policy would be "one-sided" and unable to properly tackle immigration, asylum and integration related challenges.

The same reasoning applies to the vast majority of issues that fall within the scope of the area of freedom, security and justice. Fighting against terrorism, drugs or trafficking in human beings, identifying common threats, developing data protection rules and strategies, ensuring human rights protection – none of these would be possible to the level expected without the participation and the contribution of third countries at different stages.

While the EU has developed important collaborations with third countries in the field of justice and home affairs, **future strategic guidelines should emphasise the need to maximise the EU's external potential**. During the Task Force meetings, different ideas were highlighted, some of which could contribute to the debate.

From a reactive to a proactive policy

Several internal and external developments in the field of justice and home affairs' policy have been achieved in reaction to unexpected events which have pushed EU stakeholders to act. The 9/11 attacks in New-York boosted the adoption of the European Arrest Warrant; the Madrid and London bombings accelerated EU counter-terrorism cooperation; the discovery of 58 dead Chinese migrants in a truck in Dover has reoriented immigration policies in particular regarding the fight against criminal network channelling irregular migrants within the EU; etc.

While it would be unfair to judge the EU's external policy as merely a reactive policy – especially given the important set of agreements it has signed with third countries in different fields – some improvements would nevertheless be welcomed. Such developments should be based on the **principle of differentiation**, which enables the EU to negotiate differently according to the State it is dealing with, and take into account forthcoming challenges and threats.

At first glance, the development of relations with neighbouring countries is a key component of the EU's external action in the field of justice and home affairs. Nevertheless two different groups of states should be distinguished. The **Balkan states** which have accession prospects to the EU and for which requirements will be high as they will be requested to "swallow" the entire EU *acquis*, including EU rules adopted in the field of justice and home affairs.

Relations with southern neighbouring states, i.e. **Tunisia, Morocco and Algeria**, are somewhat different. Here, the nature and content of the relationship is tailored according to the state concerned. In this group, Morocco is a "frontrunner". It is already engaged in a free trade agreement and has also signed a mobility partnership.[34] Tunisia

stands just behind Morocco as it has recently also concluded a mobility partnership with the EU and Member States. Finally, negotiations with Algeria are still difficult but have recently started. This lengthy process with Algeria is a problem alongside the importance of developing a mobility dialogue, as this country is a key player when discussing terrorism given its geographical position regarding Libya and Mali.

In addition to these specific countries, the EU should also continue working with **Turkey, Libya, Egypt and Syria** regarding justice and home affairs issues. However, according to the geographical position, the political structure, and progress regarding specific topics and in particular democracy and human rights, the state of advancement with each of these countries is different. This is in concrete terms the application of the so called principle of differentiation. Hence, the cooperation the EU will set up with Turkey will be different from the one it will develop with Libya.

However, the principle of differentiation which is principally based on a country by country approach should ensure coherence between the different relationships developed, i.e. **make sure that the relationship with one country is coherent with relationships developed with other ones in the same region**. Furthermore, the external side of the policies should also encompass a transnational perspective. This means that closer cooperation between countries should be enhanced. In addition, the effect of cooperation on other countries should also be considered. In this regard, solutions such as the "Sahel strategy" set up by the European External Action Service[35] should be further developed.

Furthermore, the discussions underlined that the EU should **be more strategic and proactive with emerging countries**. So far, and with the exception of Russia, EU's cooperation in the field of justice and home affairs with those countries can be qualified as being "poor". Therefore, there are some opportunities to develop new partnerships in these specifics fields with countries which have an increasing influence and power at global level.

Finally, and on a more thematic level, the EU should target specific countries regarding drug trafficking. Indeed, the cocaine route should force the EU to negotiate with western African states and the heroine route should lead the EU to deal with Afghanistan.

In the end, more than reacting to unexpected events the EU and Member States should further **develop a long term strategic and proactive vision of crucial challenges directly and indirectly linked to justice and home affairs**. Dealing with specific countries regarding migration management, data protection, terrorism and or counter-terrorism, should not prevent the EU to develop broader strategies including regional and transnational thinking, foreign policy issues and also specific issues which have regional impact like foreign fighters for instance. In this regards the EU and Member States should use all available tools to better understand and address forthcoming key challenges in the field of justice and home affairs.

In any case, the ability of the Union to develop relationships with an ever increasing number of third countries in the field of justice and home affairs, but not only, constitutes also a strong tool to share EU's rules and values, especially when based on agreements.

Thinking pragmatically and innovatively

Thinking pragmatically means that the EU and its Member States should acknowledge that they will not be able to impose their views and rules on some specific third countries. The best example is that of data protection. It is unlikely that the EU will be able to force the United States or Russia to fully apply EU standards in this field. And the same will apply in a series of other fields.

Realistically, the EU will have the power to impose its rules on "small" states but not on "big" ones. Hence, the principles of differentiation will here again play a central role. In this view, negotiating with the US or Russia should be a priority, but not the only one. Therefore, developing agreements with a series of other states, including neighbouring and emerging states, should also be part of a pragmatic and long term strategy. Such a differentiated approach should nevertheless not be detrimental to EU's credibility and ensure to the largest extent possible coherence.

In addition, the EU should develop innovative instruments to make its external policy **more attractive to third countries and third country nationals**. This need can be witnessed in the field of mobility rather than in the field of security issues. As mentioned during the discussions, the traditional visa policy based on "nationalities" – i.e. citizens requested to be in possession of a visa and those who are prevented from this obligation – should evolve and be based on individuals, i.e. the use of biometric database to identify bona fide persons and grant them easier access to the EU. Without further elaborating as to whether this proposal could be feasible and even desirable, it illustrates that this field may also be a source of innovative proposals.

Improving coherence and transparency

Coherence has to be combined with differentiation which is not an easy task. However, it is not impossible. While the EU must identify the fields which have to be primarily addressed with different partners, increased coherence would be beneficial. This would imply thinking in geographical and material terms, and considering which are the best partners to deal with specific issues having in mind the regional (positive or negative) impact such a cooperation could have.

On the other hand, in order to achieve coherence one must **take into account the inconsistencies in the Treaty and the level or lack of policy integration** of some policy fields. In other words, does the Treaty grant external competence to the EU and are policy areas developed enough internally to grant the EU external competence? Answering these questions may make the EU's external action more difficult, as is the case for instance regarding labour and legal migration. Here the EU's internal activity is not sufficiently developed to allow external action.

Finally, **improving transparency between the EU and Member States** would be an important step to enhance coherence. Put differently, it is necessary for the EU to know what kind of cooperation Member States are undertaking with third countries and *vice versa*. EU institutions and Member States should consider themselves as partners and inform each other to make sure that external actions are consistent. This can be neatly summed up by the following phrase: more cooperation for more coherence.

Maximising the asset of EU delegations

The 139 EU delegations that currently exist all around the world in states and international organisations are one of **EU's major assets regarding the external dimension**. The participation of EU delegations at different levels of the policy should nevertheless be strengthened.

In functional terms, EU delegations are composed of national diplomats and EU officials from the Commission and the EEAS, which creates the conditions for a good complementarity of competences. This diversity should be safeguarded and improved to maintain a crucial "policy mix" in the field of external relations.

In practical terms, **EU delegations could work as information providers and also be involved in policy shaping**. Therefore, the role of EU delegations should be enhanced and developed, and their participation in external policy at different levels promoted. Regarding justice and home affairs, the appointment of EU officials in EU delegations with appropriate background could be suggested, in particular regarding some specific or key countries.

In order to maximise the potential of EU delegations, Task Force participants have also underlined the need to **decrease tensions between the European External Action Service and some Commission's Directorate Generals in Brussels**, in particular with DG Development and Cooperation regarding the politicisation of Development Aid. To decrease the tensions, one option could be to work on horizontal issues involving a mix of different people. This approach based on personal relationships between different institutions has sometimes proven to be very efficient. It would also enable the broadening of the scope of issues and avoid focusing only on justice and home affairs issues. Thus, in practice, migration or security related issues would be dealt with through different lenses than the "home affairs" ones usually used at EU level. This could therefore help achieve a broader view on specific issues and to consider different ways of addressing them.

Enhancing the role of EU delegations worldwide to get the information about what is happening "on the ground" and to contribute to the policy shaping should be considered as one of the major tools the EU could have. While some resistance or obstacles remain strong regarding the variety of players involved including institutions and agencies, such a move could definitely give the EU's external action in the field of justice and home affairs a brand new, attractive and fruitful dimension to address mobility, security and justice challenges. It will be up to the European Council to decide whether it wants to make this step forward or whether it remains stuck to the old recipe.

2. Data protection

The exchange of information and the development of electronic databases and IT systems in the area of freedom, security and justice have been very dynamic over the last 15 years regarding law enforcement, judicial cooperation, border management and public protection.

In this perspective, the Treaty of Lisbon has developed a legal framework to protect individuals with regard to the processing of personal data on the basis of the Charter of Fundamental Rights and Article 16 TFEU. The Stockholm programme has emphasised this priority. It stated in particular "the right to privacy and the right to the protection of

personal data are set out in the Charter of Fundamental Rights. The Union must therefore respond to the challenge posed by the increasing exchange of personal data and the need to ensure the protection of privacy".[36]

EU law and the Charter have precisely developed two related but different concepts concerning, on the one hand, the right to private life, as a negative right, and, on the other hand, the right to be protected. The right to be protected does not forbid data collection but frames the legal conditions within which data can be collected. Hence, Article 8 of the Charter indicates that data should be processed fairly, for specified purposes, on legitimate basis laid down by law, opening the right to correction and under the control of a supervision authority.

Given the increasing development of exchange of information and electronic instruments to make this exchange more rapid and efficient in all the fields related to the area of freedom, security and justice, issues related to data protection are increasingly becoming a widespread concern throughout all justice and home affairs issues. As was commonly acknowledged during Task Force discussions, this point has also been put into the perspective of forthcoming strategic guidelines where some specific elements have been pointed out.

A difficult scope to define

According to Article 16 TFEU, the legal framework regarding data protection is applicable to all EU institutions. But the main difficulty arising in the field of justice and home affairs resides in the fact that exchange of information and the use of EU ICT infrastructures aim – in an overwhelming number of cases – to support national cooperation in the field of national security. According to EU rules, data collection for national security purposes does not fall within the scope of EU law but national law. Hence, the protection framework available in this case is not EU law but rather the European Convention on Human rights.

One of the major challenges the EU and Member States will face within the next couple of years will be to define **whether exchanges of information and data fall within the scope of national security or whether these actions may be included within the scope of EU law**. In this view, it has been highlighted that the role of the Court of Justice will be of major importance as it will have to decide whether data are collected for the purpose of security, and fall with the remit of national competence, or fall within a wider category which can be subject to EU law and ECJ scrutiny.

While the protection of individuals against data processing will become increasingly sensitive, the role of the ECJ and of its jurisprudence will have a tremendous impact on rules applicable and the protection granted to individuals. In this view **the right to have access to data and correct them, the organisation of supervision bodies, and access to judicial redress should be central**.

External action: "adequate" rather than "identical" protection

The EU and its agencies have developed a series of cooperation agreements with third countries regarding the exchange of information. However, the development of agreements with external partners allowing the exchange of information and data storage is always a source of preoccupation in particular in a field where exchanging personal data may have a tremendous impact on people's freedoms. The "PRISM scandal" has reinvigorated these concerns.

However, in a globalised world, the need to exchange information and personal data in particular for security concerns will remain high on the political agenda. At the same time, the importance of ensuring data protection and individual rights will also be increasingly raised. The most delicate issue will be to define how and **to which extent the EU will be able to impose its rules on data protection and the right to private life on third countries**. As already outlined, the imposition of EU rules on some third country partners, like the United States or Russia, will be a difficult task, not to say an impossible one.

In such circumstances, further cooperation should not be abandoned. Using the United States as an example, cooperation does not only mean the development and the adoption of "identical" rules between partners. It may also be the case that according to the development of rules and policies in other parts of the world **the negotiation may be based on an agreement on "adequate" systems of data processing and protection**.

In this regard, the need to offer sound data protection for the largest possible amount of citizens requires additional flexibility in the negotiation process with some specific but strategic partners. Nevertheless, this movement would necessitate an important exercise of supervision from the EU, and in particular the European Commission and the Court of Justice, to ensure that data and information are collected and stored by third country partners in an adequate manner and for a legitimate purpose.

Steps forward for guidelines

With the entry into force of the Lisbon Treaty, the adoption of specific EU rules and European human rights instruments, general principles regarding data protection already exist. Hence, some Task Force participants underlined that the development and adoption of new principles is not necessary. However, they outlined that the correct implementation of existing principles and rules would be one of the biggest challenges the EU and its Member States will have to cope with in the field of freedom, security and justice.

While the world is becoming ever more digitalised, particularly in terms of exchange of information, data protection will be even more linked to the processing, use and storage of data in the EU and international IT systems. In such circumstances, data protection is not only a technical matter but also a question of which rules are applicable to properly ensure that personal data will be used according to "adequate" safeguards. If this question is covered by EU law regarding data collected by EU institutions within the framework of EU law, some difficulties will appear in two situations. This will concern firstly national actions performed on the basis of EU infrastructure for the purpose of national security. Here, the European Convention on Human Rights remains an important safety net but further challenges would be to define when EU rules are applicable to those situations, and when not. The second situation concerns the organisation of data protection where data is processed by third countries with which the EU has an agreement. While the agreements would contain the rules applicable, their correct implementation may prove difficult in practice and the protection of individual rights will be endangered.

Issues related to data protection in all of the fields covered by the area of freedom, security and justice will remain extremely important to deal with. This will increase even further given the importance and willingness to develop electronic tools to facilitate the exchange of information between national authorities. The implementation of existing rules and the role of EU institutions, the Commission and the Court of Justice, will be crucial in this specific field and should be considered as one of the EU's next big challenges regarding EU society as a whole and the safeguarding of citizens' rights.

3. Human rights

Human rights are not specific to justice and home affairs issues. Indeed, Article 6 and 21 of the TEU illustrate the importance of human rights in the EU's internal and external actions. Moreover, the entry into force of the Lisbon Treaty, making the EU Charter of Fundamental Rights binding, has increased the importance of respecting human rights in the field of EU law.

Without being dealt with specifically, this paper has consistently underlined how human rights protection is crucial in the area of freedom, security and justice. If the EU is trying to maintain a high level of protection in its legislation and external relations, it happens that **the implementation side does not always match the expectations**.

More precisely, some policy fields like migration and asylum illustrate situations where states do not deliver on human rights. This has been the case with Greece and its failing asylum system which has enabled the European Court of Human Rights to condemn Belgium for sending back asylum seekers to Greece. This case law is an example of the fact that the European Commission does not play its role, through refusing to launch infringement procedures against failing states. Among the Task Force participants, it was recalled that the EU should do its utmost to respect human rights in the fields where the EU has competence. This includes during the law making process and the implementation phase.

Keeping in mind the importance and the impact of the Charter of Fundamental Rights which acts as a magnet across all EU policies, some participants have also emphasised its new potential. Encompassing classical human rights, which generally establishing prohibition to act; **the Charter also addresses new socioeconomic rights which could be granted to citizens**. For instance, these rights may be call upon by citizens to limit the impact of austerity policies imposed by the EU due to the economic crisis. Hence, elderly people may be entitled to claim that the drastic reduction of their pensions runs counter to Article 25 of the Charter.[37] The socioeconomic impact of human rights may help to develop positive policies and participate in the legitimation of EU action in public opinion.

Amongst other issues discussed during Task Force meetings on human rights, two points deserve to be highlighted. Some speakers have asked for the EU to **ensure consistency with and to mainstream human rights in its external action**. While this covers a wide range of issues falling under this umbrella the perspective of signing a readmission agreement with Belarus has been identified as a source of concern.

Secondly, discussions have also touched upon one sensitive issue when it comes to **"sanctioning" one Member State which deliberately violates fundamental rights**. It has been recognised that once admitted to the EU, there are very

little means for EU institutions and Member States to force a partner to fulfil its requirements regarding human rights. Indeed, Article 7 TEU has been compared to a "nuclear bomb" which would require a long political process, going far beyond justice and home affairs issues, to be put in motion. Hence, the EU should be able to limit deliberate violations of human rights, in particular in the area of freedom, security and justice, without the use of Article 7.

Given the importance of human rights in the field of freedom, security and justice, it was acknowledged that this transversal theme should consistently be upheld and should **continue to form an integral part of EU's internal and external policy now and for the future**. As Robert Badinter rightly pointed out in its opening address at the "Assises de la justice", Europe has been able to establish an area where human rights are the most protected in the world. This has been attained through a democratic process and the level of protection achieved should be maintained. This should constitute an overarching principle guiding future strategic guidelines in the area of freedom, security and justice.

4. Evaluation

The question of evaluating policies has been addressed several times in this report. As a consequence, this last paragraph will try to outline some of the main elements discussed during the last meeting. Evaluation is classically divided into two main phases: *ex ante* and *ex post* evaluation.

Ex ante evaluation

Ex ante evaluation is principally the task of the European Commission on the basis of impact assessments performed in the perspective of tabling legislative initiatives. While this action is important in all policy fields, it is not assessed by any other EU body. Hence, some have put forward the idea of **granting another EU institution or body the power to evaluate ex ante evaluations** conducted by the Commission.

Ex post evaluation

Ex post evaluation is of a different nature as it aims at defining whether EU rules are correctly implemented. This type of evaluation is in general considered to encompass two main forms: the Commission's assessment of whether Member States have transposed EU legislation in due time and the Court's evaluation of the correct interpretation of EU rules by national transposition instruments. Regarding this second form of evaluation, and given the bad quality of EU legislation in the field of justice and home affairs, the **role of the Court of Justice will most probably be very important in the next couple of years**, in particular if the trend of preliminary rulings increases.

However, Task Force discussions also broadened out the scope of evaluation and put forward some **other types of processes** that may be further used in the field of justice and home affairs. The development of a **scoreboard** to check whether rules have been adopted at EU level and implemented in the Member State was again deliberated. While this tool is considered interesting to evaluate who is properly performing in the field, its impact is limited to formal action and does not really address the content of the rules.

Also proposed was the development of **impact indicators** which would have the effect of assessing the effectiveness in the legislation. This type of evaluation could cover several issues such as the effectiveness of rules in practice, the changes introduced by EU rules and policies, the impact of the changing environment, etc. While based on a qualitative assessment, such an evaluation process would also require developing it over a long period of time and perhaps on the basis of a policy cycle.

A third type of evaluation exists in the possibility offered by **Article 70 TFEU** regarding implementation in the Member States. This exercise is interesting for two main reasons. It helps to properly implement EU rules at operational level. It ensures a de facto harmonisation process of policies and practices. In this regard the Schengen evaluation mechanism has proven to be fairly efficient.

Finally, all of these options should be put into motion by taking into account the importance of **distinguishing between legal and political evaluation**. Some of the above mentioned examples may fulfil both objectives. However, new or innovative evaluation mechanisms may also be considered. Hence, the role of the **Court of Auditors** could be taken into account in the whole evaluation process regarding the effectiveness of EU policies. Furthermore, strategic guidelines may also decide to set a **review system based on the trio presidency** which would evaluate every 18 months how the strategic guidelines are put into motion and whether there is a need to propose and agree on a reorientation of part or all of the strategic guidelines.

It is obvious that the evaluation process will be one key component of the future of the policy in the area of freedom, security and justice. Addressing the right level of evaluation and defining the appropriate tools will certainly be an interesting part of the negotiation process preceding the formal definition of strategic guidelines. As the EU is evolving in a fast changing environment it should have the tools to be able to evaluate the implementation and impact of its policies and to modify the orientation whenever needed.

CONCLUSIONS

Almost 15 years after the adoption of the Tampere conclusions, the area of freedom, security and justice has significantly developed. With entry into force of the Lisbon Treaty, the final leap towards full recognition of the European, and community's nature of justice and home affairs policies have been enacted. With this in mind, the phase which is going to follow the three successive programmes adopted from Tampere in 1999 to Stockholm in 2009 will be of different kind.

Based on Article 68 TFEU, this new phase will be characterised by the adoption of a specific political document leading to a division of roles among EU institutions. The European Council will adopt strategic guidelines for legislative and operational planning which will set the framework for a future implementing programme adopted by the European Commission. More precisely, and in line with Article 17 TEU, the European Commission will be entrusted with the task to define a detailed action plan to attain the orientations and objectives set by the European Council in the area of freedom, security and justice.

As a new process, strategic guidelines should also provide for a completely new document. According to the discussions held during task Force meetings, these guidelines for the legislative and operational planning should:

Focus on justice and home affairs issues, i.e. be limited to relevant provisions of the Treaty regarding justice and home affairs and exclude all other issues which do not fall within the scope of these provisions, such as freedom of movement of EU citizens (encapsulated in Article 21 and following of the Treaty).

Be forward looking and conceptualise the area of freedom, security and justice for the next 10 to 20 years: this approach should not only address forthcoming needs and developments in this specific area but also take into account global changes which will in the medium and long term affect the area of freedom, security and justice. Demographic, economic, political, social, technological changes in Europe, and worldwide will continuously change and modify Europe's relationships with the world. These various phenomena will have a tremendous impact on the area of freedom, security and justice and the strategic guidelines can therefore not disregard them.

Highly political, concise and understandable for all citizens: lengthy and detailed documents like the Stockholm programme should be abandoned. The European Council should talk to the citizens and explain in simple terms where the EU should aim at in policy fields that have a crucial impact on citizens' everyday lives.

The series of Task Force meetings organised by the EPC over 2013 have also discussed the content of each of the policy fields falling with the area of freedom, security and justice. While discussions have repeatedly heralded that implementation of existing rules is an overarching priority, further developments should also be considered either “to finish the job” or to adapt the EU to forthcoming challenges.

Meeting discussions have therefore outlined the short term and long term needs of each of the policy fields covered by the area of freedom, security and justice: **Immigration, asylum and integration, internal security and justice**. Transversal themes like external dimension, human rights, data protection and evaluation of policies have also been included into the framework of discussions.

Without entering into the details of the discussions which are reported in this paper, the central idea was to identify current shortcomings and appropriate measures to overcome them but also to think about these policies within the framework of a fast changing world. Against this background, some key orientations came across during the debate.

Immigration, asylum and integration: given the reality of demographics and labour shortages and taking into account the integration of national and European labour markets, the EU needs to plan and manage mobility to and within the EU. On the asylum side, the EU's policy regarding international protection inside and more particularly outside its territory is key. Protecting borders and saving people lives are two sides of the same coin and require the development of a broad, coherent and balanced immigration policy.

Internal security: protection of citizens living in the EU against internal and external threats will remain high on the political agenda. Future orientations should strike a better balance between security and freedom/justice concerns. Moreover, the developments of new forms of criminality and threats, in particular due to technological progress, require the EU and Member States to be able to forecast new phenomena, address the appropriate needs, and develop suitable solutions involving all relevant EU and national players.

Justice: citizens and businesses will not stop moving to, and within the EU. Increasing their mobility for the sake of economic efficiency or by lifting legal and practical problems deriving from ever increasing cross border situations should drive EU's policy in the short and long run. Effectiveness of justice, as a source of protection and economic growth, should be a central target alongside the right to have access to justice. In order to make the EU a real area of justice, common judicial culture among national authorities should be strengthened.

While it will remain the sole responsibility of the European Council to define the strategic guidelines for the legislative and operational planning within the area of freedom, security and justice, the paper would nevertheless like to highlight the following recommendations:

RECOMMENDATIONS

Postponing the process

Given the fact that strategic guidelines will frame the legislative and operational agenda of the EU in a series of fields which have an impact on citizens' daily life, like immigration, criminal and civil justice, the fight against terrorism and organised crime etc, the paper underlines that the timeframe decided by the European Council for the definition of strategic guideines is inappropriate.

Defining strategic guidelines in **June 2014 will not enable the emergence of an open and coordinated debate involving relevant European and national stakeholders** about the content and focus of strategic guidelines.

Moreover, June 2014 will be a **"transitional period"** with an outgoing Commission and an incoming European Parliament. Defining the strategic guidelines at that point in time will commit new institutions which did not have the possibility to contribute to the debate. There are political risks of confrontations which may have an impact on the achievement of strategic guidelines.

Finally, it is highly probable that the June 2014 European Council will focus one single question: the **nomination of "Presidents"** (European Council, the European Commission, and Foreign Affairs Council). In this situation, the definition of strategic guidelines will be overshadowed.

With this in mind, the paper recommends to **postpone the adoption of strategic guidelines until June 2015**. This would allow for the organisation of a large consultation process involving relevant European and national stakeholders. Institutions, authorities and civil society organisations at EU level and in the Member States should take part in a debate about key policies which are going to have an impact on citizens' everyday lives.

This new timing should allow for the framing of the debate around one question: considering a context where the world is rapidly changing, **which policy orientations should the European Council define in the area of freedom, security and justice for the next 10 to 20 years?** Delaying the process should then allow participants to prepare sound and valuable contributions to the debate.

In June 2015, **the European Council will be able to define high level political guidelines on the basis of a large and well informed debate**. In defining strategic guidelines after such a process, the European Council will avoid criticisms about the procedure followed and further confrontations with EU institutions in charge of achieving the policy goals set by the strategic guidelines.

Making the content affordable for citizens

In an ever changing and increasingly interconnected and complex world, where current balances in terms of political, economic, cultural and technological leadership would most likely be deeply modified, the EU and its Member States will face extraordinary challenges in the next 10 to 20 years. These challenges may affect justice and home affairs policies to a possibly unprecedented magnitude.

While the EU is requested to evaluate the existing *acquis*, to identify shortcomings and to define the appropriate policies and measures to develop to cope with the general redistribution of powers and cards, it will also have to

communicate about the future of justice and home affairs policies in understandable way to all citizens. **Language and format used will be as important as the content of the guidelines**. Hence, for the sake of understanding forthcoming challenges and in order to cover all the policy areas and challenges at stake, the paper proposes the strategic guidelines to be established on three pillars: **mobility, protection and effectiveness**.

- **Mobility**: movement of people worldwide will remain a strong trend in the years to come and a highly debated issue. The mobility pillar would allow the EU to address a broad range of issues covering the management of people coming to the EU but also the possibility for legally residing third country nationals to move within the EU. Less negative than "immigration", the theme of mobility is also one which citizens could easily identify with and understand as a value rather than a burden.

- **Protection**: this pillar would encapsulate three policy fields dealt with at EU level in the area of freedom, security and justice: internal security policies which aim at protecting citizens in the EU against threats; international protection policies which aim at granting protection to people fearing to be persecuted and finally justice-oriented policies which aim at protecting citizens in cross border situations and ensure economic efficiency. Putting these policy fields under the same umbrella would portray the complexity but also complementarity of EU actions and invite policy-makers to approach the issues in a cross-cutting and positive manner.

- **Effectiveness**: citizens are requesting policy-makers to develop effective policies. Within the framework of the area of freedom, security and justice, effectiveness should cover the proper implementation of policies and measures in the Member States and their evauation (*ex ante* and *ex post*) to assess their policy relevance.

Endnotes

1 R. Balfour and K. Raik "Equipping the European Union for the 21st century", The Finnish Institute of International Affairs, Report 36, FIIA Occasional Report 1, 2013; R. Balfour "In Search of a Role: Three Years of the European External Action Service", The Polish Quarterly of International Affairs, n° 3/2013.

2 J.-C. Piris "The Lisbon Treaty. A Legal and Political Analysis", Cambridge University Press, 2010, sp. 188.

3 On this point see for instance M. Poelemans, Y. Pascouau et T. Jouno "L'Europe de la sécurité et de la justice" in T. Jouno (sous la dir. de) "Questions européennes. Le droit et les politiques de l'Union", Presses Universitaires de France, 2009.

4 On this see, J.-C. Piris "The Lisbon Treaty. A Legal and Political Analysis", Cambridge University Press, 2010, sp. 188-192.

5 Article 70 on "mutual evaluation mechanisms" has been included in the Lisbon Treaty to counterbalance the introduction of infringement procedures, i.e. the community method, with the specificity of JHA policies. More precisely, and as explained, "while the infringement procedure as a classical instrument of enforcing legal obligations of Member States is essential, an evaluation of the of the practical efficiency and quality of the Member state action in this area is equally indispensable, and that mutual evaluation amongst the Member States, if conducted properly, can usefully apply beyond the inherent limits of a judicial enforcement of strictly legal duties". C. Ladenburger & S. Verwilghen "Policies relating the toe Area of Freedom, Security and Justice" in G. Amato, H. Bribosia et B. De Witte (ed.) "Genèse et destinée de la Constitution européenne/Genesis and Destiny of the European Constitution", Bruylant, 2007.

6 C. Ladenburger & S. Verwilghen "Policies relating the toe Area of Freedom, Security and Justice" in G. Amato, H. Bribosia et B. De Witte (ed.) "Genèse et destinée de la Constitution européenne/Genesis and Destiny of the European Constitution", Bruylant, 2007.

7 J.-C. Piris "The Lisbon Treaty. A Legal and Political Analysis", Cambridge University Press, 2010, sp. 188.

8 Communication from the Commission "Europe 2020. A strategy for smart, sustainable and inclusive growth", COM(2010) 2020 final, 03.03.2010.

9 Doc. 15921/12.

10 Article 15 paragraph 6 TEU.

11 Les "Assises de la Justice" for DG Justice, 21-22 novembre 2013. And for DG Home, Seminar on security-related issues (Rome, November 2013), Hearing on the future of migration and asylum (Brussels, December 2013), 2nd Seminar on security-related issues (Berlin, January 2014), High level Conference on the future of home affairs (Brussels, January 2014) to which should be included a consultation process opened on the DG Home website (which closed on 21 January 2014).

12 Council conclusions, Doc. EUCO 169/13.

13 "The European Council will hold a discussion at its June 2014 meeting 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", Doc. EUCO 104/2/13.

14 See for instance, European Parliament resolution of 23 October 2013 on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa (2013/2827(RSP)); Amnesty International, Letter to President Herman van Rompuy, Ref. B 1487, 17 October 2013; Human Rights Watch "EU: Improve Migrant Rescue, Offer Refuge", online article , 23 October 2013; Y. Pascouau "People dying a the EU's external borders : cant the Summit find the right answer ?", EPC, Commentary, 22 October 2013.

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17 During the negotiations of the Schengen package, the European Parliament has been excluded from the co-decision procedure regarding one instrument under discussion. As a matter of retaliation, it has blocked the negotiations regarding five critical dossiers in the field of justice and home affairs. On this issue, see Y. Pascouau "Schengen and Solidarity: the fragile balance between Mutual Trust and Mistrust", EPC, Policy Paper, July 2012.
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34 Mobility Partnerships allow to identify more channels for regular migration and to help third countries developing their capacities to offer protection in the region and to respect human rights in their territory. At the same time they allow to increase cooperation in fighting smugglers and traffickers who exploit migrants.
35 www.eeas.europa.eu/africa/docs/sahel_strategy_en.pdf
36 Stockholm Programme, point 2.5 "Protecting Citizen's Rights in the Information Society".
37 Article 25 - The Rights of the Elderly « The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life".

European Policy Centre
Résidence Palace
155 rue de la Loi, 1040 Brussels,
Belgium
Tel: +32 (0)2 231 03 40
Fax: +32 (0)2 231 07 04
email: info@epc.eu
twitter: @epc_eu

www.epc.eu

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SCHENGEN DEVELOPMENTS

2011 – 2014

A Collection of EPC papers

To mark the 30th anniversary of the Schengen Agreement, the EPC has put together a special collection of EPC papers on Schengen's developments between 2011 and 2014. Signed by France, Germany, Belgium, the Netherlands and Luxembourg on 14 June 1985, the Schengen Agreement has paved the way for the development of one of the EU's most symbolic achievements: the freedom of movement without internal border checks. Although the agreement has been one of the EU's biggest successes, the Schengen story has not always been a *'long fleuve tranquille'*, particularly in recent years. This year's anniversary offers the opportunity to revisit the latest developments in the Schengen cooperation and look back at the accomplishments of this landmark agreement.

Rue du Trône / Troonstraat 14-16, B-1000 Brussels, Belgium
Tel +32 (0)2 231 0340 | Fax +32 (0)2 231 0704 | E-mail: info@epc.eu | Twitter: @epc_eu | www.epc.eu
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Commentary

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Migratory flows from North Africa: challenges for the EU

Yves Pascouau and Sheena McLoughlin

The movement towards democracy, which started in Tunisia and Egypt, is spreading to other countries of the region, from Libya to Yemen, from Bahrain to Algeria. It is accompanied by people returning to their home country or fleeing instable situations, particularly in the case of Libya. These movements are not limited to the region, but concern also EU Member States as the arrival of more than 5,000 Tunisians onto the shores of Lampedusa has shown. Such unprecedented flows and the fear of an even larger number of migrants outline three challenges the EU and its Member States have to cope with: the capacity to protect their borders, the capacity to respect the human rights of those fleeing persecution, and the capacity to exercise solidarity.

Member States have already proven their capacity to react when it comes to securing their borders. Now they will also have to demonstrate their ability to respect human rights when managing massive migration flows from the south. With regard to solidarity, their commitment remains for now mainly financial as the minimal Justice and Home Affairs (JHA) Council conclusions of 25 February seem to confirm. Hence additional actions might be adopted at the extraordinary meeting of the European Council on 11 March.

Protection of borders

The arrival of more than 5,000 people on Italians coasts triggered two initial reactions from Europe's leaders. The first concerns the visit of high-level officials to the region to discuss security issues: beginning with Italy's Minister of Interior Roberto Maroni's visit to Tunisia, followed by a visit from High Representative Catherine Ashton. The second reaction concerns the adoption of a set of measures at EU level in order to cope with this situation. In order to help Italy - and potentially other southern EU countries - manage the unexpected inflow of migrants, the EU has focussed primarily on border control. Two types of measures have so far been discussed by the Commission and the JHA Council. First, a joint Frontex operation called Hermes was launched on 20 February. This operation brings together Member States' naval and aerial resources and experts in order to patrol, detect and prevent illegal border crossings. Second, financial assistance is to be made available to Member States on the basis of the European Border Fund.

Respect of Human Rights

However, border control should not undermine the obligation of the EU and its Member States to respect human rights. Hence, Italy and others affected by the movement of people from North Africa should ensure that asylum seekers are entitled to access asylum procedures. This implies the capacity to determine which migrants are in need of international protection and which are not, and to avoid any 'push back'. By being able to manage mixed flows, the EU and its members will demonstrate their ability to strike the balance between the protection of the state and the protection of individuals.

With regard to asylum seekers, the EU has proposed to mobilise the European Refugee Fund in order to help Italy cover costs resulting from the examination of asylum applications. Such support may concern *inter alia* accommodation structures, material aid and health care as well as legal aid or language assistance and other costs related to the procedure. In addition, the Commissioner in charge of Home Affairs, Cecilia Malmström, hinted at the possibility of asking the recently created European Asylum Support Office (EASO) to send teams to assist national

authorities with regard to the examination of asylum requests. However, this announcement, made on 15 February before MEPs during the Strasbourg Plenary session, will be hard to achieve rapidly as the EASO will only be fully operational from June 2011.

Exercise of solidarity

Solidarity entails first of all the capacity of the EU and its members to support third countries facing difficult, not to say dramatic situations. This is particularly the case for Tunisia since the wave of democracy swept to Libya. As Libya's leader refuses to surrender, subsequent conflicts occur in large parts of the country. Hence, and according to UNHCR, thousands of people are fleeing to Tunisia. The latter has already received immediate financial support from the EU. As announced by Catherine Ashton in Tunis, the country will receive €17 million immediately and €258 million from now until 2013. But, the ongoing flow of migrants to Tunisia - more than 10,000 on some days - demands additional EU support. On 3 March, the Commission decided to increase EU support to €30 million in order to cope with the humanitarian needs.

Coping with immediate needs does not prevent also planning midterm actions. Commissioner Malmström indicated in February that EU assistance would target development efforts to support income and jobs in Tunisia. Such action should also include the possibility for Tunisians to come legally to the EU. In other words, Commissioner Malmström has put legal migration issues on the future agenda of relations between the EU and Tunisia. This was emphasised by José Manuel Barroso, President of the Commission, who recalled during a press conference early in March the need to encourage mobility in order to contribute to open societies. Hence, he envisaged the possibility of offering, under certain conditions, a mobility partnership and visa facilitation regime for countries of the region. This is an encouraging sign of openness for future relations.

Solidarity also implies the support of all EU countries with Member States that are situated geographically on the frontline. At present, Italy and other southern EU countries have indicated that they would be in favour of a redistribution of asylum seekers among all EU Member States. Few have so far voiced their support for such an idea. The EU has also decided to allocate an emergency fund of €25 million. But, should the number of migrants arriving onto EU shores grow drastically, more radical solutions might be necessary. Indeed, it might be appropriate to make use of the never-before-used EU Directive on temporary protection adopted in 2001. This directive provides immediate and temporary protection in the event of mass influx or imminent mass influx of displaced persons and where Member States asylum systems are at risk of dysfunction. Making use of this directive will prove Member States' solidarity and willingness to respect the human rights of persons seeking international protection.

Beyond these challenges, events in north Africa call for a rethinking of the EU's external policy in the field of migration, taking into account the scope and content of the policy, including legal migration schemes, and countries with which agreements are signed.

Yves Pascouau is a Senior Policy Analyst and Sheena McLoughlin is a Policy Analyst at the European Policy Centre.

EUROPEAN POLICY CENTRE

www.epc.eu

03.05.2011

Commentary

Schengen area under pressure: controversial responses and worrying signs

Yves Pascouau

Hopes deriving from the "Arab Spring" have been accompanied by concerns of how to manage migration flows. This question has quickly become extremely contentious and, to a certain extent, it has overshadowed the reality taking place in Tunisia and Egypt, where new political systems based on democracy are being created, and the extremely worrying situations in Libya and Syria.

Since the beginning of the popular revolutions in North Africa, frightening scenarios including that of a "biblical exodus" have been heralded by some European leaders. Despite wild overestimations of new arrivals and political rhetoric some responses to the situation have been taken. At European level, financial and operational support is being provided to both sides of the Mediterranean. Responses at national level have been more questionable as Italy and France have begun a strange and unclear game, the latest development of which is the signature of a joint letter by Silvio Berlusconi and Nicolas Sarkozy asking for the modification of Schengen rules. These developments need analysis to better understand Schengen's functioning and demonstrate that the proposed modifications might severely undermine the whole philosophy of the system.

Political gestures and legal confusion

Faced with the arrival of around 25,000 Tunisians and not satisfied with the support from the EU and other Member States, Italy decided to grant temporary residence permits and travel documents to migrants who were transferred from Lampedusa to the Italian mainland. Such a decision, from the perspective of the Italian authorities, would allow the permits holders to move freely within the Schengen area, and presumably to France. But it is not certain that such a decision is in line with Schengen rules.

Under the Schengen system, Member States are responsible for the entry and residence of third country nationals on their territory. Taking into account the purpose of the stay and their financial and other means, those who fulfil the conditions are granted a short-stay visa or residence permit entitling them to move within the Schengen area. This possibility exists precisely because these persons are residing legally and have appropriate means, such as tourists or workers. In order to ensure a proper functioning of the system, Member States communicate to the Commission a list of residence permits allowing their holders to move within the area. In certain circumstances however, third country nationals do not fulfil the necessary conditions but are nevertheless granted a residence permit for humanitarian reasons. In this situation, the residence permit is only valid for the territory of the Member State that issued it and not for the entire Schengen area.

In the Italian case, it is unclear whether the residence permits and travel documents issued in the last few weeks belong to the list of residence permits communicated to the Commission or are "humanitarian" residence permits. This difference is important, as in the first scenario, migrants are entitled to move within the area, subject to limited internal checks rather than systematic internal border checks, such as being asked to prove they have sufficient resources. In the second scenario, migrants who hold a 'humanitarian' permit are not entitled to move and can be sent back to Italy. The matter in the Italian-French situation is that a grey zone is attached to the legal nature of the Italian permits.

There are two additional points: first, by issuing the temporary/humanitarian permits Italy has implemented obligations deriving from the EU's 2008 "Return Directive", which obliges national authorities faced with an irregular migrant to either expel the person or to grant the person a legal status. Second, after the arrival of some 3,500 Tunisians in France, the reaction of the French authorities has been to study the possibility of restoring internal border checks. Is this reaction proportionate when Tunisian and Egyptian authorities, with the help of the UNHCR and the IOM, have kept their borders open in order to cope with more than 600,000 people fleeing war in Libya? In the final analysis, this looks like a fool's game fuelled by national policy considerations.

Joint letter, old tools and mutual mistrust

After weeks of tension and controversial responses, Italy and France sent a joint letter to Van Rompuy and Barroso to present their common views on actions to be taken or reinforced at EU level. They mainly rely on old tools and methods. The "new partnership" is conditional on cooperation in the fight against irregular migration and enhanced solidarity between Member States based on existing schemes and rules. Most controversial is the proposal to reinforce security within the Schengen area. Alongside the usual calls for reinforcing Frontex's mandate and resources, both leaders call for more collective discipline and cohesion at all protection stages of common external borders. This would firstly take the form of a modification and reinforcement of the Schengen evaluation system involving more closely Member States' experts, the Frontex Agency and other agencies acting in the field of justice and home affairs. This move does not bode well for further enlargement of the Schengen area to Bulgaria and Romania. It would secondly introduce the possibility of restoring internal border controls in the case of 'exceptional difficulties'. In the joint press conference, Sarkozy and Berlusconi made it clear that they want to modify the Schengen safety clause to make the conditions for restoring internal border controls easier. Such a proposal implies a revision of the Schengen Border Code that would require a proposal from the Commission and be subject to co-decision. It will be interesting to analyse the content of the Commission's response to this idea.

If the modification of the Schengen rules is adopted, according to Sarkozy and Berlusconi's wishes, this will lead to a complete reversal of the Schengen philosophy. Since its inception, the Schengen system has been based on mutual trust between members. Each party had confidence in the border controls operated by its neighbour to the extent that the only possibility for restoring internal border controls was based on a serious threat to public order and internal security. This does not seem to be the case for a country with a population of 60 million receiving 25,000 foreigners. The Italian-French idea seems to suggest a broadening and softening of Schengen rules to restore internal border control due, not only to a threat to public order, but also in yet-to-be-defined exceptional circumstances. In such a situation, which could correspond to the situation where an EU member State fails to secure its borders due to exceptional difficulties, Member States could presumably be allowed to restore internal border controls, and, in other words, protect themselves behind their own borders. As a consequence, the driving force of this proposal does not rely on mutual trust and solidarity but rather on mutual distrust. In this regard, the Italian-French proposal would constitute a complete reversal of the philosophy underlying the Schengen system.

Alongside these EU internal political and legal considerations, the main signal the EU and Member States are sending to our southern neighbours is focused on border controls, be they exercised at the external or the internal border. Is this the new partnership we want to build?

Yves Pascouau is a Senior Policy Analyst at the European Policy Centre.

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EUROPEAN POLICY CENTRE

www.epc.eu

Commentary

Schengen area under pressure # 2: the Commission recalls the EU nature of the Schengen system

Yves Pascouau

The joint letter sent to EU officials by Nicolas Sarkozy and Silvio Berlusconi asking *inter alia* for a modification of Schengen rules has been considered as an attack on one of the EU's greatest achievements. This request warranted a response from the European Commission, which came in a Communication on Migration issued on 4 May. The response is a rejection of the attempts by Italy and France to "renationalise" some parts of the Schengen system. Instead, the European Commission recalls the European nature of the system and proposes modifications based on EU mechanisms.

An attempt to "renationalise" the Schengen system

The Italian-French letter must be considered in an overall context and seen as the expression of a trend taking place in several Member States where mutual distrust and temptation to withdraw constitute strong political lines. This is the case in several Member States which have to struggle with or please nationalist parties and therefore develop stricter immigration policies. These national trends have a significant impact on dialogue and negotiations at EU level. This is one reason why focus on migration issues since the beginning of the "Arab Spring" has been so important.

The Italian-French proposal to restore internal border checks has to be considered not only as a sign of mutual distrust but also as an attempt to "renationalise" a vital element of the Schengen system. Indeed, the joint proposal calls for a modification of the safety clause. But this clause leaves wide margins of appreciation to Member States. For instance, where Member States plan to reintroduce border checks for public order matters, they only have to inform the Commission which issues an opinion and not a decision on such a proposal. Hence, in asking to develop the safety clause, Italy and France wish to enlarge the possibility of reintroducing border checks within a framework that secures their margins of manoeuvre and their sovereignty.

The announcement of the Italian-French joint letter in a widely covered press conference gave strong support to the initiative and accordingly put a lot of pressure on EU institutions. The highest pressure was applied to the Commission as the Italian-French proposal would require a modification of the Schengen Border Code and consequently a formal legislative proposal. The Commission could have chosen to ignore the proposal, arguing that such a modification was not on its agenda and that current provisions are sufficient to cope with the situation. Alternatively, it could have acceded to the Italian-French proposal, revealing signs of weakness as a consequence. In the end, the option chosen by the Commission was to respond to the Italian-French letter in a way that secures the EU approach.

A response to strengthen the EU approach

In the Communication issued on 4 May, the Commission opens the possibility of modifying Schengen rules regarding internal border checks. The scheme presented by the Commission, under the heading "Schengen governance", is based on the idea that Schengen is a community achievement and must remain as such. In this regard, the Commission avoids any prospect of renationalisation of the Schengen system and even proposed further integration into EU law.

This concerns firstly the monitoring of the implementation of Schengen rules by Member States. Currently, the implementation of Schengen rules is monitored by Member States themselves and on the basis of planned on-the-spot inspections. More than two years ago, the Commission introduced a proposal to revise these rules. It proposed to establish a system of monitoring organised at EU level and comprising unexpected on-the-spot inspections. Up to now, Member States have not approved the proposal. Incorrect implementation of Schengen rules at EU external borders should not therefore come as a surprise, as this is the responsibility of Member States.

The second proposal concerns the possibility of restoring internal border checks in certain circumstances. Such a proposal was not planned at all by the Commission, either in the implementation report issued in October 2010, or in the proposal to modify the Schengen Border Code published in March 2011. Until the Italian-French letter, the only question of relevance was related to the limitation of internal border checks. In this regard, the joint letter has had the effect of changing the Commission's position. The Commission proposes to enlarge the possibilities of restoring internal border checks in two situations: where a Member State is not fulfilling its obligations to control a section of external borders, and where the external border comes under unexpected and heavy pressure due to external events. The crux of the matter is to define whether this proposal is relevant according to existing rules.

A distinction must be made between the current procedure allowing the reintroduction of internal border checks and the one proposed, because their roots and regime are largely different. Current rules allow Member States to restore internal border checks in case of "serious threat to public order or internal security" and place them at the centre of the process. Indeed, Member States are the most well placed to determine where serious threats to public order may occur. In this regard, the Schengen Border Code allows them to restore border controls either for foreseeable events or in an emergency. Here, Member States are at the starting point of the procedure because public order remains mainly a national issue.

The situation is totally different in the case of failure to fulfil Schengen's obligations and unexpected and heavy pressure at external borders. Management of external borders is an EU issue and any difficulty arising in this field should be dealt with at EU level. The mechanism presented by the Commission rightly follows this path. Where a Member State encounters difficulties in managing its external borders, the ability of other Member States to restore internal border checks is to be decided at EU level. Indeed, before approving such a limitation on free movement, the EU can activate all measures and supports available to help the Member State facing difficulties. This could for example take the form of financial support, the deployment of a Rapid Border Intervention Team (RABIT) or the deployment of national experts on the ground. It is "only at last resort [and] in truly critical situations" that a decision to restore internal border checks may be authorised. In other words, where alternative solutions have been unsuccessful or where the pressure on the external border is too high to cope with the situation, the decision to re-establish internal border checks may be taken. Such a decision should define which Member State is entitled to reintroduce internal checks and for how long. As a result this system would limit recourse to unilateral measures and consequent limitations on free movement in the Schengen area. With this position, the Commission preserves the distinction between public order, which remains principally a national issue, and management of external borders, which is an EU issue and deserves an EU-based answer.

In enhancing the EU's role in the management of external borders, this mechanism will contribute to bringing more objectivity. According to the State concerned and the actions and support awarded, EU institutions will be able to determine on an objective basis whether or not 25,000 migrants arriving in a Member State constitutes a manageable situation, and thus be able to take appropriate measures. This will also avoid unilateral and unfounded expressions of distrust.

A legislative proposal containing the Commission's suggestions will now be issued and it will be a matter for the Council and the European Parliament to adopt or reject it.

Yves Pascouau is a Senior Policy Analyst at the European Policy Centre.

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EUROPEAN POLICY CENTRE

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Commentary

Internal border controls in the Schengen area: much ado about nothing?

Yves Pascouau

Among other topics, the reintroduction of internal border controls in the Schengen area was very high on the European Council's June Agenda. The issue has been discussed intensely by EU leaders and the results are far from what was expected by those who initiated the discussion. The Council agreed to establish a mechanism to restore internal border checks but its implementation remains uncertain.

A contentious issue

Following their quarrel about the management of migrants coming from Tunisia, Presidents Sarkozy and Berlusconi sent a joint letter to the Presidents of the European Council and Commission asking them to examine the possibility of restoring internal borders checks in case of exceptional difficulties in the management of external borders.

On this basis, the Commission presented in a communication the outline of a mechanism allowing the reintroduction of border controls. Broadly speaking, such an action would be possible in two situations: where a Member State does not fulfill its obligations to control external borders or where the external border of an EU country is under unexpected and heavy pressure. The Commission added that the decision to reintroduce controls should be taken as a last resort and at EU level.

This mechanism was not unanimously accepted by Member States. Some considered that the decision to reintroduce border checks was a national responsibility and should not be grounded on a community-based mechanism. Others pointed out that the reintroduction of border checks in case of unexpected and heavy pressure is not fair because such a situation does not fall within their responsibility. Indeed, events occurring in Libya or Syria and leading to movement of persons are not EU countries' fault.

In a short period of time, the question relating to the mechanism to restore internal border checks became one of the most contentious points negotiated during the European Council. This is understandable, because beyond the definition of conditions related to the implementation of the mechanism the principle of freedom of movement in the Schengen area was endangered. Conclusions adopted during the summit fortunately limit this threat by the way the mechanism is framed.

Framing the mechanism

The mechanism for reintroducing internal border checks is based on a two-pronged approach.

First, where a Member State is facing heavy pressure at its external border, a series of measures should be implemented in order to assist the EU country concerned. Council conclusions underline that these measures could include "inspections, visits, and technical and financial support, as well as assistance, coordination and intervention from Frontex". In other words, the mechanism plans, at first hand, progressive and coordinated assistance rather than sanctions.

It is only as a "very last resort", then, that reintroduction of internal border controls could be decided. But here, the European Council enumerates a series of additional conditions. Restoration of border checks is exceptional and should intervene "in a truly critical situation" i.e. where a

Member State "is no longer able to comply with its obligations under the Schengen rules". In other words, where the country concerned is not able to control its external borders. In such a situation however, the decision to restore border checks is taken "on the basis of specified objective criteria and a common evaluation, for a strictly limited scope and period of time, taking into account the need to be able to react in urgent cases".

To sum up, the Summit Conclusions strongly framed the possibility of re-establishing internal border controls, which are made possible as a very last resort on the basis of specified objective criteria and following a common evaluation. *A priori*, the perspective of a reintroduction of internal border checks in the Schengen area looks rather thin.

Forthcoming negotiations and uncertain outcomes

Alongside this assessment, it is not entirely sure that the mechanism will be put in place. Indeed, additional conditions set by the European Council open the door to numerous questions and details that still remain unanswered and unresolved. For instance, how will the "specified objective criteria" be defined? Will they be numerous and exhaustive? What degree of precision or margins of appreciation will they have or leave to Member States? What does "common assessment" mean? Does that concern an assessment provided by Member States, the Commission or an agency such as Frontex? Which authority will decide the reintroduction of internal border checks? The Commission, or Member States? Finally, what does the sentence "taking into account the need to be able to react in urgent cases" mean?

It seems evident, therefore, that while the European Council has in some ways closed the debate about the modification of Schengen rules in framing the conditions to be fulfilled to implement the mechanisms it has, on the other hand, opened an uncertain discussion regarding the content of these conditions. The forthcoming legislative process could be long and tricky.

It will be up to the Commission to present a proposal in September that takes on board parameters defined by the European Council as well as options that please the majority of Member States. This will be a hard task, as EU governments are already opposed on several grounds. For instance, regarding the authority competent to decide the reintroduction of internal border controls, France and Germany wish this mechanism to remain in the hands of governments, whereas others consider that it should fall within the realm of EU institutions. It is therefore not certain that the Commission will find the right balance and that Member States will agree on the proposal. Moreover, the position of the European Parliament on this question remains unknown. Discussion among the Council and the European Parliament may prove very difficult, particularly if the principle of freedom of movement is perceived to be under attack. As a possible consequence, the process could become even more complex. Future discussions could be tough, with the 'devil in the details'.

In the end, and whenever a text is finally adopted, the practical reintroduction of such controls remains uncertain. Indeed, the vast majority of Member States have dismantled premises and other means necessary to organise proper border controls. Such actions could therefore be difficult, not to say impossible to organise in practice.

Much ado about nothing?

Summing up, one can wonder whether the story is "much ado about nothing". From a technical point of view, perhaps. Indeed, the outcome of forthcoming negotiations is very uncertain. There is no certainty that the legislative process would lead to a modification of the Schengen rules and even if it did, there is no certainty that it could be implemented according to the strict conditions outlined in the European Council Conclusions. From a conceptual point of view, however, there is a lot to be concerned about. The possibility of limiting and dismantling free movement has been voiced and accepted. Hence, whatever the outcome of the story, this constitutes in itself a worrying perspective that deserves debate and monitoring.

Yves Pascouau is a Senior Policy Analyst at the European Policy Centre.

EUROPEAN POLICY CENTRE

POLICY BRIEF

31 January 2012

The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock

Yves Pascouau

One of the immediate effects of the Arab Spring was the launch of intense discussions about 'Schengen governance'. While the package of proposals presented by the European Commission has opened a new debate regarding the possibility of reintroducing internal border checks, it has revived an 'old' proposal to make evaluating the implementation of Schengen rules more efficient. But discussions on the latter are blocked due to a problem related to the legal basis, which has a significant impact on the European Parliament's (EP) participation - or lack of participation - in the process.

BACKGROUND

Two types of evaluation mechanism

Evaluation is an integral part of the Schengen system and is based on two driving mechanisms. The first evaluates the ability of Member States to join the Schengen area. It aims to verify whether an applicant country is correctly implementing the rules in order to lift internal border checks. This mechanism is commonly described as the 'putting-into-effect' mechanism.

The second mechanism is applied once a Member State has been admitted to the Schengen area. It assesses whether the Schengen *acquis* is being implemented correctly. This 'implementation mechanism' seeks to reinforce mutual trust, which is the basis of the cooperation that ensures free movement of people in the Schengen area.

Both types of evaluation were initially carried out on an intergovernmental basis. At the outset, evaluations were managed by a standing committee composed of Member-State representatives. After the entry into force of the Treaty of Amsterdam, these tasks were transferred to the Schengen Evaluation Working Group within the Council.

Proposals to modify the Schengen evaluation mechanism

In March 2009, the Commission presented a proposal to modify the Schengen evaluation mechanism. It sought to move away from the intergovernmental approach by entrusting the Commission with the tasks carried out by the Schengen Evaluation Working Group regarding the implementation mechanism.

This was justified, on the one hand, by the integration of the Schengen acquis into the EU framework, especially with regard to areas falling within the first pillar and, on the other, by the need to make the evaluation mechanism more efficient, in particular regarding the implementation phase. This proposal was rejected by the EP, since the procedure was not based on co-decision and *de facto* excluded the Parliament from the decision-making process.

With the entry into force of the Lisbon Treaty at the end of 2009 and the establishment of a new legal framework, the proposal became obsolete. A new proposal was issued in November 2010 in order to comply with new rules and procedures. The proposal was further modified in September 2011 according to orientations deriving from the 'Schengen Governance' package.

The new proposals seek to boost the efficiency of the Schengen evaluation mechanism. The main modifications concern: (i) entrusting the Commission to lead the evaluation process with regard to the implementation of the Schengen *acquis*; (ii) establishing annual and multiannual programmes of both announced and unannounced on-site visits,

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and the conditions under which these visits are carried out; (iii) improving the involvement of Member-State experts and EU agencies in the evaluation mechanism, as well as the rules for following up on evaluation findings. Finally, the revised 2011 proposal introduces the possibility of a Union-based mechanism for reintroducing border checks at internal borders should a Member State show serious deficiencies in carrying out external border checks or seriously neglect its obligation to control its section of the external border.

While these proposals seek to improve the Schengen evaluation mechanism, the negotiation process is currently frozen due to problems regarding the legal basis.

STATE OF PLAY – A PROBLEM OF LEGAL BASIS

The Commission decided to base the proposal on Article 77.2 (e) of the Treaty on the Functioning of the European Union (TFEU). While this provision allows the EP to take part in the decision-making process, it seems that the Commission's choice of legal basis is false. It should have grounded the proposal on Article 70 (TFEU), but such a legal basis would have excluded the EP from the procedure. This creates a nexus between legal obligations and political issues.

A questionable legal basis

According to the Commission's proposals, the appropriate legal basis is Article 77.2 (e). Under this provision, the Council and the EP shall adopt measures concerning "the absence of any controls on persons, whatever their nationality, when crossing internal borders".

For the Commission, the absence of internal border checks is made possible by a series of accompanying measures related *inter alia* to external border management, visa policy, and police and judicial cooperation. Hence, the evaluation of these measures falls within the scope of Article 77, as they serve the objective of "maintaining the area free of internal border controls". However, there are a number of doubts regarding this choice of legal basis.

Firstly, Article 77 deals specifically with issues related to internal and external border checks. The fact that this provision pursues the objective of setting up an area of free movement of persons without internal border checks does not extend its scope to matters related to police and judicial cooperation, or even drug policy.

Secondly, the current situation regarding internal border checks is totally different from that which existed when the Treaty of Amsterdam entered into force. In 1999, the Treaty of Amsterdam set the objective of maintaining and developing "the Union as an area of freedom, security and justice, in which the free movement of persons is assured". In order to establish this area, the Council was entitled to adopt, on the one hand, measures with a view to ensuring the absence of any controls on persons when crossing internal borders and, on the other, flanking measures with respect to external border checks, asylum and immigration.

The exceptional development of EU policies in the field of migration, asylum, border control and criminal law since 1999 has radically modified the situation by satisfying the conditions for the existence of an area without internal border checks. This derives from the Lisbon Treaty, which states that "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers in which free movement of persons is ensured". The objective of the Treaty of Amsterdam was to "maintain and develop" the area, whereas the Lisbon Treaty "shall offer" an area without internal checks.

Article 77 of the Lisbon Treaty reflects the new situation. Hence the absence of internal border checks is a matter of fact and is ensured by existing and forthcoming measures adopted in various fields listed in Article 77.2, i.e. visa policy, external borders check and a forthcoming integrated management system for external borders. In this context, Article 77.2 (e), which is specifically devoted to the absence of internal border checks, takes on a specific meaning.

"The absence of any controls of persons" referred to in Article 77.2 (e) does not concern the reintroduction of internal border checks but instead relates to the lifting of border checks. This provision relates to the putting-into-effect mechanism rather than the implementation mechanism, which is embedded in other provisions.

Hence, a proposal seeking to strengthen the implementation evaluation mechanism cannot be based on this provision. In addition, this legal basis does not allow the Commission to ask one Member State to take specific measures such as the "closing of a specific border crossing point for a limited period of time".

While Article 77.2 (e) is not the appropriate provision on which to base action, the Commission should be able to employ Article 77.2 in its entirety as a legal basis for the evaluation mechanism. But such a modification would disregard the existence of a specific legal basis devoted to evaluation mechanisms covering the scope of the Commission's proposal: Article 70 TFEU.

A more appropriate legal basis

Article 70 is a specific provision introduced by the Lisbon Treaty. It paves the way for the Council to adopt measures

"laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies (…) by Member States' authorities".

This specific provision was proposed by the Constitutional Convention. The final report of a working group on 'Liberty, Security and Justice' highlighted the importance of evaluation mechanisms in particular regarding the effective implementation of rules adopted in the fields of freedom, security and justice. In more concrete terms, it called for "an explicit mention in the Treaty of this technique of mutual evaluation which is to be implemented flexibly with the participation of the Commission through procedures guaranteeing objectivity and independence". This was done through Article III-260 of the Constitutional Treaty, which then became Article 70 of the Treaty on the Functioning of the European Union after minor changes.

This historical insight reinforces the statement that Article 70 is the appropriate legal basis for establishing the evaluation mechanism proposed by the Commission for three key reasons.

Firstly, Article 70 is the result of a large-scale process which started with the Constitutional Convention, which involved all relevant EU actors and national parliaments. This was followed by an intergovernmental conference and finalised by a decision taken by heads of state and government. Article 70 is therefore the result of the willingness of all parties involved to establish an evaluation mechanism specifically applicable to issues related to the area of freedom, security and justice. In this sense, Article 70 constitutes a *lex specialis* for the creation of an evaluation mechanism that ensures the existence of an area of free movement of persons.

Secondly, the historical insight highlights the provision's underlying rationale for setting up an evaluation mechanism for implementation measures covering not only migration-related issues but also issues related to judicial and police cooperation. In this context, it is hard to decouple the Commission's justification laid down in the proposal from the scope of Article 70. The Commission explains that "the abolition of internal border controls must be accompanied by measures in the field of external borders, visa policy, the Schengen Information System, data protection, police cooperation, judicial cooperation in criminal matters and drugs policies. (…) Evaluation of correct application of these measures therefore serves the ultimate policy objective of maintaining the area free of internal border controls".

Finally, Article 70 indicates that evaluations must be conducted "in collaboration with the Commission". One could argue that this provision allows the Council to entrust the Commission with implementing powers. Despite their importance, implementing powers are not absolute. Thus the Commission may be entitled to exercise tasks such as sending evaluation questionnaires, establishing the annual evaluation programme, and drawing up lists of experts or accompanying national experts for on-site visits. However, it may not be entitled to exercise on-site visits on its own, as this would create problems related to sovereignty. Nor could the Commission take a decision requesting Member States to close a specific border crossing point, since that is related to legislative power.

The Commission's proposal should be modified as the appropriate legal basis is Article 70. While this relates to the correct legal implementation of the treaty provisions, a decision not to use Article 70 as a legal basis could set a precedent and definitively obliterate the provision and its *effet utile*.

However, modifying the legal basis would raise the issue of how to cope with the subsequent exclusion of the EP from the procedure.

PROSPECTS – INSTITUTIONAL PROBLEMS AND THE WAYS OUT

The exclusion of the EP from the procedure

Article 70 excludes the EP from the process leading to the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*. This situation creates major legal and political problems, as the EP will oppose the modification of the legal basis.

The EP rejected the initial 2009 proposal precisely because it was not based on the co-decision procedure. There is no reason for the EP to abandon this position. The EP has a democratic obligation to try to involve itself in the legislative procedure as much as possible, in particular when proposals deal with issues related to the free movement of people. In addition, the EP's rapporteur is the same person who was appointed in 2009 - and it would be a surprise if MEP Carlos Coelho were to change his position. Finally, parliamentary work on the proposal is ongoing and any delays in deciding to change the legal basis would strengthen the political position of the EP to maintain the current legal basis.

In the end, and whether or not the legal basis is modified, the procedure is trapped in a political nexus which in any case leads to a deadlock.

If the proposal is adopted under the current legal basis, the regulation would be at risk of being annulled by the European Court of Justice due to inappropriate legal foundation. A demand for its annulment is even more likely to be introduced by a Member State given

that the use of Article 77.2 (e) will have the effect of excluding the UK and Ireland from participating in the evaluation mechanism.

On the other hand, if the decision to change the legal basis is adopted, the EP would oppose it. It would be entitled to use this exclusion as grounds for making the adoption of other proposals presented in the 'Schengen package' - the modification of the Schengen Borders Code - far more difficult, as in this case the EP is involved as co-legislator.

In both cases, there is a major risk of the proposal not being adopted. This would mean that the evaluation of the implementation of the Schengen acquis would remain unchanged. Mutual trust would not be strengthened and the free movement of persons would consequently be weakened.

Although the situation appears highly complicated and politically sensitive, there are nevertheless still ways to get out of the trap and to limit the collateral damage.

How to get out of a tricky situation - The way forward

The first issue to resolve is how to convince the EP to accept modification of the legal basis. This may be possible on the basis of the Council's rules of procedure. According to Article 19.7, COREPER may adopt a decision to consult an institution or body wherever such consultation is not required by the Treaties. Hence, the issue is not a legal problem but relates to the capacity of the Council to persuade the EP that it will still be part of the process.

In this view, the Council is able to circumvent the limits set up by the Treaty and engage in an in-depth consultation process with the EP regarding the evaluation mechanism proposal. Moreover, the EP's role in this consultation process may be as strong as that of co-legislator. Indeed, the EP is currently co-legislator on the proposal to modify the Schengen Borders Code, which is the other part of the Schengen package. It may well make an extensive consultation process a condition of its acceptance of that proposal. At the end of the day, the EP is in a powerful bargaining position and the consultation process might be similar to a co-decision process.

Secondly, the modification of the legal basis for the evaluation mechanism should be accompanied by a restructuring of all the Schengen package proposals. More precisely, the evaluation mechanism should be redesigned to concentrate on arrangements concerning the evaluation of the implementation of the Schengen acquis; i.e. how evaluations should be conducted. This means that Article 14 of the current proposal, which allows the Commission to ask Member States to take specific measures such as reintroducing internal border checks, should be removed from the proposal and reintroduced into the draft Schengen Borders Code.

This would make the Schengen package more consistent. One tool would address evaluation issues, whereas the other would deal with decisions to be taken should a Member State encounter difficulties in managing its external border properly. In addition, in shifting Article 14 from the evaluation proposal to the Schengen Borders Code proposal, the Commission would introduce a central element that is sorely lacking - solidarity. Indeed, Article 14 of the current 'evaluation proposal' emphasises the need to support Member States facing difficulties before envisaging the reintroduction of internal border checks.

It is worth noting that by restructuring the proposals with a view to inserting more solidarity into the Schengen package, the Commission would comply with the June 2011 European Council Conclusions. These made the reintroduction of internal border checks conditional upon a series of clear criteria, including undertaking as a first measure to assist Member States whose external borders are under heavy pressure.

In conclusion, there are ways out of the current legal and political deadlock. However, it is uncertain whether the route towards a compromise with the EP will be taken. More precisely, some Member States do not want the Schengen evaluation mechanism to be modified, as the proposal awards too much power to the Commission. Hence, maintaining the current situation gives them a good opportunity to torpedo the process. Forthcoming discussions will reveal whether or not the area of free movement will be strengthened or further weakened.

Yves Pascouau is a Senior Policy Analyst at the European Policy Centre.

European Policy Centre ■ Résidence Palace, 155 rue de la Loi, 1040 Brussels, Belgium
Tel: +32 (0)2 231 03 40 ■ Fax: +32 (0)2 231 07 04 ■ Email: info@epc.eu ■ Website: www.epc.eu

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POLICY PAPER

Schengen and solidarity: the fragile balance between mutual trust and mistrust

Yves Pascouau

Foreword

The way in which the area of free movement currently involving 25 European countries works is based on a few simple principles. The abolition of permanent border controls at "internal" borders and the share out of responsibilities for the control of common external borders. In strictly defined circumstances, the organization of far more effective spot checks to guarantee security and public order, on the condition that these spot checks are not considered as a disguised reintroduction of internal borders. The possibility to invoke a "safeguard clause", which enables countries to reintroduce temporarily fixed controls on their national borders, for instance in the event of sporting or political events, with here again the objective to protect internal security and public order in the member state concerned. And lastly, the shared management of external borders, which are *ipso facto* "our" borders: this is a matter of shared responsibilities according to rules established at the EU level, because anyone crossing these external borders can travel freely to and within the other member states on the sole condition that they comply with European visa and resource rules.

As I was able to state when I was in charge of managing the "area of freedom, security and justice" at the European Commission, the area's proper functioning presupposes the existence of a high degree of mutual trust among member states. The ideal situation is for each member state to be certain that all of the others have both the will and the ability to effectively implement the rules forged in common for managing the area.

Such mutual trust is especially necessary in the monitoring of our common external borders, which is something of an "asymmetrical" affair because some countries' land and sea borders are more exposed to major migrant influxes than others on account either of their geography (Greece, for instance) or, sometimes, of their history (for instance, Malta in the wake of the Arab uprisings or the European countries with a colonialist past). This "asymmetry", which is clearly visible in the sphere of applications for political asylum, is partly to blame for the tension that we have seen in the past few semesters, but also for the issue over solidarity among neighbouring countries which, in theory at least, are just as closely concerned by the matter.

The primary merit of the Policy Paper drafted by Yves Pascouau lies in its reminding us that there do already exist several European solidarity mechanisms among the Schengen area's member states designed to cater for this lack of symmetry. As he stresses, asylum, immigration and border control policies and their implementation "are governed by the principle of solidarity and fair sharing of responsibilities, including its financial implications, between Member States". It is in that perspective that it is more important than ever for us to work in the short and medium term.

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The other merit of Yves Pascouau's Policy Paper lies in his correctly identifying the sources of the tension that has flared up among European countries in the past few semesters, in a context marked by the economic crisis, the migrant influxes spawned by the fall of the dictatorial regimes on the southern rim of the Mediterranean and by the recurrent problems on the Greek-Turkish border. As he stresses, these episodes may well be only one of the numerous facets in a more widespread phenomenon affecting the area of free movement and gradually undermining mutual trust.

At the heart of his analysis lie the issues in the "Schengen governance" package currently under negotiation, which we need to address in the light of what is absolutely crucial, namely safeguarding the free movement of people. In that connection it is important to move within the framework established by the conclusions of the European Council meeting in June 2011.

Facilitating the reintroduction of national border controls by member states while also extending the time frame within which those border controls can be reintroduced is an option that need not be ruled out, but only on condition that this reintroduction is only available as a measure of last resort, after a step-by-step procedure whose first step would involve a strengthening of pro-active European solidarity in favour of exposed or defaulting states.

It is equally crucial that public order and security issues remain the only reasons that can be claimed for re-establishing national border controls, and that no other reasons can be invoked, such as massive migrant influxes, which would lend themselves to all kinds of random interpretations. I would add, moreover, that it is important for the Commission to continue to be the main player when it comes to defining the measures to be adopted in "exceptional circumstances".

Yves Pascouau also explains in a clear, cogent and comprehensive manner how the European dynamic triggered by the migration issue is coming up against problems similar to those that can be detected in the context of Schengen cooperation. The development of mutual mistrust among member states has *de facto* had a negative impact on Romanian and Bulgarian membership of the Schengen area, on representation agreements among member states over visa issuing procedures, and on the "Dublin" system relating to share out of responsibilities among member states as regards the distribution and treatment of asylum seekers' demands.

In this connection, we may welcome proposals aiming to set up a new "common European asylum system", which is already two years late on account of differences among the member states... It is indeed crucial for member states' positions to move towards convergence in this area, because as long as the number of applications for asylum and, above all, the acceptance rate for those applications, are so different from one country to the next, we are going to be seeing very strong tension in connection with the monitoring of the Schengen Area's external borders.

Despite the existence of signals betraying a far from negligible level of mutual mistrust, Yves Pascouau concludes by highlighting the fact that there are also several good reasons for hoping that the integrity of the area of free movement will be maintained thanks to the positions held by the European institutions, the interaction among which will decide on any improvements that may need to be made to it.

In identifying both the main issues in the debate on solidarity in the Schengen area and the guidelines to be pursued if we are to come out of it on top, Yves Pascouau's Policy Paper also gives us good reason to hope that this major step in the construction of Europe will be safeguarded for the benefit of the millions of European citizens who enjoy a freedom of movement at once so unprecedented and so precious on a daily basis.

António Vitorino, President of Notre Europe

Introduction

With the fall of the Egyptian and Tunisian dictatorships in spring 2011 came new aspirations in terms of democracy and freedom throughout the whole Arab region. The hopes of the peoples have not, however, received the welcome they deserve from the European Union and from its Member States. Indeed, and with the exception of a communication from the EU's High Representative, Catherine Ashton, acknowledging the events and the prospects they offered[1], reaction at European level was instead characterised by security concerns.

More specifically, faced with the arrival of several thousands of Tunisians on the Italian shores of Lampedusa - a reflection of newly-acquired freedom - the response from Member States and from the European Union was to raise the external border of the Schengen Area as a defence against them. As Cecilia Malmström, European Commissioner in charge of migratory issues would later put it, the response was inadequate[2].

The events at Lampedusa not only revealed a 'protective reflex' but also highlighted the need for solidarity. Firstly, in relation to third countries that had to manage the internal revolutions and the movement of people affecting the region. In this case, EU support was strong and decisive insofar as it allowed Tunisia and Egypt to manage the situation and to assure the protection of several hundred thousand people fleeing Libya[3]. Secondly, in relation to Member States facing the sudden arrival of a large number of prospective immigrants. The Italian authorities were fast to call on the EU and its partners for support, but to no real avail. The European Commission reminded Italy that it simply needed to use the already available funds and that additional aid could be made available as necessary[4]. As for the Member States, they did not consider that the arrival of approximately 15,000 Tunisians on the Italian coasts was so insurmountable that it required the application of specific procedures.

Feeling ignored, the Italian authorities therefore made the decision to issue residence permits along with travel permits to the 'Tunisians' that had arrived in Lampedusa so that they could travel within the Schengen area and go to France in particular. This decision, whose legality in relation to the Schengen rules is questionable, sparked off a reaction from French authorities who temporarily intensified patrols on the internal borders of the Schengen area.

Although this episode may seem anecdotal insofar as it only concerned a limited number of persons[5], it sparked off a chain of reactions that called into question the principle of solidarity between Member States. In reality, this episode could simply be just one of the many facets of a phenomenon affecting the area of free movement and taking the shape of the steady erosion of mutual trust. This phenomenon does not just lead to weaker solidarity, it could threaten the maintenance and the existence of the area of free movement.

The objective of this Policy Paper is to highlight this development. Firstly, it addresses the issue of solidarity in the context of the migration policy and it recalls the fact that mutual trust constitutes a structural element of the Schengen area (Part 1). Secondly, it underscores the fact that the proposals adopted within the framework of 'Schengen Governance' in response to the Arab Spring carry the seeds of mutual mistrust that threatens the area of free movement (Part 2). It also emphasises that other fields of the Schengen acquis are showing signs of contamination (Part 3). Lastly, and despite existing signs of a sometimes large dose of mutual mistrust, the Policy Paper points out that there are also reasons to hope that the area of free movement will be kept in its current state (Part 4).

1. Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', COM(2011) 200 final of 8.3.2011.
2. During an event entitled 'One Passport, one People?' organised by FutureLab Europe in collaboration with the European Policy Centre, Cecilia Malmström indicated: 'It's easy to feel depressed about today's EU', citing as reasons the euro crisis, unemployment, lack of trust in our leaders and politicians, rising xenophobia and populism, protectionism, calls to close our borders and our inadequate response to the 'Arab Spring'.
3. See Y. Pascouau, 'Arab Spring and Migration: Will the New Global Approach to Migration and Mobility Respond to the Challenges?' in S. Biscop, R. Balfour & M. Emerson, *An Arab Springboard for EU Foreign Policy?*, Academia Press, 2012.
4. See 'Immigration flows - Tunisia situation', Cecilia Malmström, EP Plenary Session, Strasbourg, 15 February 2011, SPEECH/11/106.
5. According to Agence Europe, approximately 60,000 people arrived in Lampedusa and Sicily after the start of the 'Arab Spring'. The article indicates that the number of people arriving on Italian coasts has dropped significantly insofar as 709 people were intercepted during the first quarter of 2012. Agence Europe No. 10612, Friday 11 May 2012.

Part 1 - Solidarity and mutual trust in the context of the EU migration policy

Solidarity is a founding and functional element of the European Union. Founding, because it appears obvious that a Union of States cannot exist without solidarity between its partners. Functional, insofar as this principle of solidarity, which the Member States guarantee to respect[6], concerns all EU actions, both internal and external[7]. Solidarity and mutual trust are the founding and structural elements of the migration policy (1.1) the expression of which can be found in many tangible achievements (1.2).

1.1. Founding and structural elements of the migration policy

Although the principle of solidarity provides the foundations and structures for the internal and external dimension of EU action, migration policy benefits from 'preferential treatment' with regards to this principle. Two provisions of the Treaty on the Functioning of the European Union (TFEU) explicitly refer to this.

Article 67, which defines the objectives of migration policy, indicates that it is based on solidarity[8]. Article 80 specifies that the policies of asylum, immigration as well as border controls and their implementation are 'governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States'.

These two provisions are the reflection of a dual reality. Article 80 is a reminder that in an area of free movement, all Member States are not 'equal' when faced with migration phenomena. Indeed, some carry out more decisive action in the field of external border control whereas others have to manage an ever greater number of requests, especially for international protection. Also, Article 80 makes it possible to organise financial or operational solidarity when it becomes necessary.

While recalling the fact that solidarity is the cornerstone of migration policy, Article 67 echoes the very origins of cooperation in the field of migration, and in so doing recalls the conditions for its maintenance. The objective of establishing an area of free movement with no internal border controls implies adopting common rules in the field of external border management, and of immigration and asylum policy. This objective however, can only be achieved if two factors are present; solidarity, i.e. the ability to adopt common rules and to apply them correctly, and mutual trust, i.e. the certainty that the partner will apply the rules effectively. In the context of migration policy, mutual trust precedes and accompanies joint action.

It is precisely mutual trust that is the basis of Schengen cooperation. For example, France and Germany considered that external border controls carried out by each partner were sufficient and similar enough to accept the removal of controls at the shared 'internal' borders between the two States. Thus, there was no reason for France to doubt the controls carried out by the German authorities and, consequently, a person accepted to move around Germany was also lawfully able to do so in France, and *vice versa*.

It was on this basis that common action was possible. The two partners first of all signed the Saarbrücken Agreement before entering into Schengen cooperation with the Benelux countries through the Schengen Agreement in 1985 and the Convention implementing the agreement in 1990. Mutual trust also had to be strengthened by adopting accompanying measures and policies in the field of visas, asylum, return procedures, criminal judicial cooperation or computerised systems such as the Schengen Information System (SIS).

A reading of the 1990 Convention Implementing the Schengen Agreement, whose content would be included in the Schengen Borders Code adopted by the European Parliament and the Council[9], bears witness to an

6. Especially on the grounds of the principle of loyal cooperation laid down in Article 4(3) TEU.
7. In this respect, Article 21 TEU indicates that 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world : democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law'.
8. Article 67, 'It [the European Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.
9. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), Official Journal of the European Union, L 105, 13.4.2006.

extremely high level of mutual trust between the partners. In this way, the reintroduction of internal border controls can only take place 'where there is a serious threat to public policy or internal security'. In other terms, it is not envisaged that a partner can show signs of failure in controlling external borders justifying the reintroduction of controls at the common internal border. Only when serious events happen, such as the shooting on the Norwegian island of Utoya during the summer of 2011, or the organisation of political or sporting events such as football championships or a meeting of the G20, can the temporary reintroduction of internal border controls in the Schengen area be justified.

In short, Schengen cooperation lays down the principle that would later be included in the field of migration policy according to which, the action of a Member State is not just restricted to this State but applies to all partners involved in this cooperation. The obligation to control entry to the territory and the decision to accept the entry and the stay of a person has consequences on the other partners due to the principle of freedom of movement and the absence of internal border controls. In substance, Article 67 TFEU recalls that the common policy on asylum, immigration and external border control is based on solidarity in that the action of one State applies to all the partners.

Furthermore, the system can only function if mutual trust is preserved and maintained to a high degree[10]. This involves two types of solidarity, which are respect for the obligation of loyal cooperation in applying the common rules and the implementation of operational and financial support mechanisms.

1.2. Solidarity mechanisms in the field of migration policy

The inequality of the Member States faced with migratory phenomena creates an 'asymmetry' as Yves Bertoncini puts it[11]. Several solidarity mechanisms have therefore been adopted in order to remedy this situation.

Financial support is the first expression of this tangible solidarity between Member States. Four European funds were thus created in order to provide financial support to States, in proportion to their exposure to migration flows. These funds are the European External Borders Fund, the European Refugee Fund, the European Integration Fund and the European Return Fund.

Solidarity is also expressed through the operational implementation of the policy and more precisely in the area of external border management. The European Agency for the Management of Operational Cooperation at the External Borders (better known as Frontex) coordinates external border control operations and can, as part of its missions, provide operational assistance to Member States facing strong migratory pressure. This assistance has for example led to the coordination and the funding of joint sea patrol operations ('Operation Hermes' off the Italian coast in 2011). The agency can also send Rapid Border Intervention Teams also known as 'RABIT'. These teams constitute a rapid intervention reserve, made up of national border guards. They are deployed by Frontex at the request of a Member State confronted with a mass influx of third-country nationals trying to make irregular entry into the territory. Members of the RABIT teams are authorised, under the responsibility of the Member State hosting the intervention, to exercise all necessary competences in order to carry out surveillance of the external borders. In other terms, the national agents seconded to the territory of another Member State are authorised to exercise elements of border control that are normally carried out uniquely by national agents. These European teams successfully went into action in November 2010 when Greece requested assistance in order to better control the migratory flows at its common border with Turkey.

The field of asylum is also concerned by solidarity mechanisms. This is the case, for example, for what is called the Temporary Protection Directive. Adopted in 2001, this directive introduces special protection in the case of a mass influx of displaced persons and strikes a balance between the efforts made by Member States in managing these emergency situations. Within the meaning of the directive, temporary protection must be understood as an exceptional scheme providing immediate and temporary protection in the case of

10. On the issue of mutual trust see also H. Battjes, E. Brouwer, P. de Morree and J. Ouwerkerk, 'The Principle of Mutual Trust in European Asylum, Migration and Criminal Law', Meijers Committee, FORUM Institute for Multicultural affairs, Utrecht, 2011.
11. Y. Bertoncini, 'Migrants, 'Schengen area' and European solidarity', *Tribune - Notre Europe's Viewpoint*, June 2011.

a real or imminent mass influx of displaced persons from third countries and who cannot return to their country of origin in safe and durable conditions because of the situation prevailing in the country.

All these solidarity mechanisms have been adopted over the past ten years, as part of the progressive Europeanisation of the management of migratory flows. They make it possible to restore a sort of balance between Member States and consequently to strengthen mutual trust.

However, the observation of current events at European and national level shows some signs that may create the conditions for erosion of the principle of mutual trust.

Part 2 - The Schengen Area threatened by mutual mistrust

The events in Lampedusa that followed the Arab Spring have crystallised attention and highlighted certain weaknesses in mutual trust between the Member States (2.1). That being said, these weaknesses are deep-rooted as they do not only concern relations between two or more Member States, but more fundamentally Schengen cooperation (2.2).

2.1. The 'Arab Spring' as a revealing factor

From March 2011, the arrival of several thousand Tunisian nationals on the Italian shores of Lampedusa sparked off a chain of reactions that were excessive in every respect. Although the verbal blunders such as that of evoking the risk of a 'human tsunami' should be regarded as 'petty politics', national actions and European responses, however, created the conditions to call the Schengen system and its philosophy into question.

First of all, Italian and then French decisions adopted in reaction to the arrival of migrants in Europe raised serious issues of compatibility with EU law. Whether it concerned the Italian authorities' issuance of residence permits accompanied by a travel permit[12] to persons whose situation comes under the humanitarian clause[13], or France's reaction leading to increased controls in the Franco-Italian border area and to the blockage of a train coming from Italy[14], the legality of national measures is questionable[15].

This episode would be just a distant memory today, if it had not been exploited by the Italian and French presidents. During a press conference organised on 26 April 2011, Silvio Berlusconi and Nicolas Sarkozy circumvented the issue of their responsibility and shifted the debate onto European level. More precisely, they announced that they were sending a joint letter addressed to both the European Council President Herman Van Rompuy and to the European Commission President José Manuel Barroso, requesting the development of a 'strengthened governance of the Schengen area'. This should include changes to the Schengen evaluation mechanism and to the conditions allowing the reintroduction of internal border controls.

Although there was no real emergency really justifying it, apart from debates on deficiencies in controls and the Greek-Turkish border, the response from the President of the European Commission was given... just three days later. In a single paragraph, the letter validates both options. Although it is true, as Mr Barroso indicates,

12. See also, B. Nascimbene and A. Di Pascale, 'The 'Arab Spring' and the Extraordinary Influx of People who Arrived in Italy from North Africa', *European Journal of Migration and Law*, 2011, pp. 341-360. The European Commission recently adopted guidelines on the coherent implementation of the Schengen acquis. In the paragraph on the issuance of residence permits and travel documents to third country nationals, it indicates as an echo to the situation encountered in Italy, 'If a Member State decides to issue residence permits and has the choice amongst different types of residence permits in accordance with its national legislation, it should opt for issuing residence permits or provisional residence permits that are not equivalent to a short stay visa if the migrants do not meet the conditions for travelling within the Schengen area', Communication from the Commission to the European Parliament and the Council, 'Biannual report on the functioning of the Schengen Area (1 November 2011 - 30 April 2012)', COM(2012)230 final, 16.5.2012.
13. In this respect, see Y. Pascouau, 'Schengen area under pressure: controversial responses and worrying signs', *EPC Commentary*, 3 May 2011.
14. See for example, S. Carrera, E. Guild, M. Merlino and J. Parkin, 'A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair', *CEPS*, April 2011.
15. The statement made by Commissioner C. Malmström on behalf of the European Commission, indicating that only the spirit of the Schengen acquis in this particular case had not been totally respected by France and Italy, is not to our mind, irrefutable evidence of the legality of national measures, see 'Statement by Commissioner Malmström on the compliance of Italian and French measures with the Schengen acquis', MEMO/11/538, 25 July 2011.

that the issue of evaluation was under review, it cannot be assumed that the President of the European Commission intended to reintroduce borders as an element to strengthen 'Schengen governance'. Quite the contrary, a report from the European Commission dated October 2010 deemed the existing legal framework sufficient and instead highlighted the Commission's concerns about the reintroduction or the existence of checks observed at certain internal borders[16].

By giving a rapid and positive response to the requests of the two Member States, Mr Barroso drove the issue of 'Schengen governance' to the top of the political agenda and forcedly set the 'Community machine' in motion. Between May and September 2011, 'Schengen governance' was the subject of Commission communications (May), conclusions by the Justice and Home Affairs Council and then by the European Council (June), a European Parliament resolution (July) and legislative proposals by the Commission (September).

Nevertheless, by launching the process to revise existing rules with a view to enlarging criteria to reintroduce internal border controls, the Commission has paved the way for the weakening of mutual trust and solidarity in parallel. In other terms, this validates the assumption that a partner can fail in its mission of external border control and endanger the public policy of its neighbours. If this happens, and in accordance with the arrangements to be defined, the solution lies in the reintroduction of internal border controls. If mutual trust is eroded, solidarity is disregarded as the ultimate solution available for 'virtuous' States consists in retreating behind their borders.

Behind the discourse calling for changes to Schengen precisely to save cooperation, lies hidden another reality, that of foundations cracking and progressively revealing growing signs of mutual mistrust.

2.2. The Schengen Governance Package as an extension

The Schengen Governance Package is based on a communication and two legislative proposals. The first proposal concerns enlarging criteria allowing the reintroduction of internal border controls (2.2.1). The second aims to change the Schengen evaluation mechanism which ensures the application of Schengen rules by Member States (2.2.2).

2.2.1. The reintroduction of internal border controls

Once the prospect of changing the rules was acquired, the issue of how to reintroduce internal border controls still remained. This mainly concerned questioning the new criteria allowing the reintroduction of controls and the relevant procedure. The options discussed are not neutral when examined from the viewpoint of mutual trust and solidarity.

Which criteria?

The Franco-Italian letters and that of the President of the Commission mentioned the possibility of reintroducing internal border controls in the case of exceptional difficulties in the management of external borders. There was wide margin for interpretation and three uncertainties remained.

The first concerned the intense difficulties encountered by the Member States in their obligation to control external borders. The Commission proposed a solution based on persistent serious deficiencies concerning external border control[17]. The compromise accepted by the Council is more limiting. In fact, these persistent serious deficiencies must jeopardise, in exceptional circumstances, the overall functioning of the area without internal border control[18]. The Council therefore added a criterion.

16. Report from the Commission to the European Parliament and the Council on the application of title III (Internal Borders) of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), COM(2010) 554 final, 13.10.2010.
17 See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, COM(2011) 560 final of 16.9.2011.
18. The version of Article 26 of the Schengen Borders Code accepted at the Justice and Home Affairs Council of 7 and 8 June 2012 reads as follows: 'In exceptional circumstances where the overall functioning of the area without internal border controls is put at risk as a result of persistent serious deficiencies related to external border control (…) and insofar as these circumstances constitute a serious threat to public policy or internal security within the area without internal border controls or parts thereof, border control at internal borders may be reintroduced (…)', Doc. 6161/4/12, 4 June 2012.

The second issue amounted to determining whether the deficiencies encountered at external border level were enough to lead to the reintroduction of controls or whether they should be linked to a threat to public policy. The issue of maintaining a link with public policy is essential. It allows to assess the willingness to preserve the principles leading to the establishment of Schengen cooperation, but above all, it raises a substantial legal issue. Under the Treaties, exceptions to the principle of freedom of movement - set out four times - can only be based on protection of public policy. In other terms, separating the reintroduction of internal border controls from public policy raises serious legal difficulties.

Whereas several documents presented by the Member States do not always mention the link with public policy[19], the Commission's proposal as well as the Council's working documents do maintain it. In this way, the reintroduction of internal border controls must meet three requirements, i.e. be the result of a persistent and serious deficiency, jeopardise the overall functioning of the area without internal border controls and be a serious threat to public policy and internal security.

Lastly, one more point deserving to be defined is that of the exceptional nature of reintroducing controls. The European Council of June 2011 was extremely clear on this issue, indicating that the reintroduction of controls should be a last resort and on an exceptional basis. The compromise accepted by the Council in June 2012 transposes this approach. The reintroduction of border controls can only take place as a last resort and when all other support measures have not allowed the resolution of the serious threat to public policy[20].

In short, the reintroduction of internal border controls is regulated, given that it can only take place in exceptional circumstances threatening the overall functioning of the area without internal border controls due to persistent serious deficiencies related to external border control. These circumstances must, in addition, constitute a serious threat to public policy or internal security within the area without border control. Lastly, controls can only be reintroduced as a last resort when prior measures have not been effective.

The Justice and Home Affairs Council of June 2012 puts an end to the attempts made by certain Member States to separate the reintroduction of internal border controls from the notion of public policy, as was the case in the Franco-German letter of April 2012. In this letter, the Home Affairs Ministers of both States wished to be able to re-establish internal border controls in the case of 'failure by a Member State to fulfil its obligations under Schengen'.

Which procedure?

Another difficulty concerned determining the depositary of the decision-making powers. In other terms, who decides to reintroduce internal border controls? This question puts the European Commission and the Member States in opposition.

The former proposed a significant extension of its decision-making powers. In particular, it provided that the reintroduction of internal border controls would require a request from the Member States followed by the Commission's decision to accept or reject, taken in application of the comitology procedure[21]. In the same way, the Commission proposed to expand its role as regards the decision to extend border controls in emergency situations[22].

19. See for example the document sent by the Austrian, Belgian, French, German, The Netherlands, Swedish and the UK delegations entitled 'Common responses to current challenges by Member States most affected by secondary mixed migration flows', Doc. 7431/12, 9 March 2012.
20. The version of Article 26 (2) of the Schengen Borders Code accepted at the Justice and Home Affairs Council of 7 and 8 June 2012 reads as follows 'The Council may, as a last resort and as a measure to protect the common interests within the area without internal border controls, where all other measures, in particular those referred to in Article 19A(1), are incapable of effectively mitigating the serious threat identified, recommend for one or more specific Member States to decide to reintroduce border control at all or specific parts of its internal borders', Doc. 6161/4/12, 4 June 2012
21. Article 24 of the Commission's proposal.
22. Article 25 of the Commission's proposal.

The Member States opposed this proposal and largely understated the action of the Commission, whose role remained unchanged[23]. Although this option can be explained by a 'stringent' reading of the Treaty, it raises some issues.

Concerning the 'stringent' explanation, it is based on a legal requirement and a logical approach. Once it has been agreed that the criterion for reintroducing internal border controls remains linked to the threat to public policy, this falls within the exclusive competence of the Member States. This stems from Article 72 of the TFEU, which indicates that the measures adopted within the framework of implementing the area of freedom, security and justice, and therefore in the field of migration policy 'shall not affect the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

The logic then boils down to considering who, from the European Commission or from the Member States, is best suited to determine whether or not public policy is threatened? To put it crudely, is a civil servant from the European Commission working in Brussels really in the best position to assess the threat to Portuguese public policy? It would seem not. And as established case law of the Court of Justice recalls, 'nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty'[24].

The position of the Member States nevertheless raises two types of consideration. The first concerns the rigorous interpretation of the issue of enforcement powers. These are normally held by the Commission and it is only on an exceptional basis that the Council retains them. Granted, the issue concerns the public policy of Member States, but it is intrinsically linked to the freedom of movement of persons. In this context, a balance must be struck between the players so that the European Commission, without being the decision-making authority, can at least be given the power to make recommendations. There is a strong likelihood that the European Parliament will use its position as co-legislator in this case to negotiate the recognition of greater powers for the European Commission.

The second consideration is based on putting the issue of free movement of persons into perspective. Can one or should one be satisfied with this exclusivity in the decision to reintroduce internal border controls once the issue is raised as part of the implementation of a 'European' or 'common' area of freedom of movement? In other terms, it is 'national public policy' that defines the conditions for the temporary fragmentation of the European area of free movement. In reality, this raises the question of knowing whether the development of a common policy of free movement and of immigration does not in the medium term call for the definition of 'European public policy'. In this way, it would no longer be the threat to national public policy but rather the threat to European public policy that would justify the reintroduction of internal border controls. It is certain that it is a sensitive issue, particularly for Member States. Having said this, it deserves to be discussed in order to define the outline and the system of a 'European public policy' applicable in the field of freedom of movement and of the migration policy[25].

Which lessons?

It is difficult to say whether the Arab Spring constituted a reflex or a 'pretext'[26] to change the Schengen acquis. In any event, it led to the questioning of mutual trust between the Member States, and consequently, of the freedom of movement in the Schengen area.

23. See, in particular, the conclusions adopted by the Justice and Home Affairs Council of March 2012, 'Council conclusions regarding guidelines for the strengthening of political governance in the Schengen cooperation', 3151st Justice and Home Affairs Council meeting, Brussels, 8 March 2012. See also, Doc. 6161/4/12, 4 June 2012.
24. ECJ, 4 December 1974, 'Yvonne Van Duyn', aff. 41-74, Rec. 1974.
25. On this issue see, in particular, E. Néraudau, *Ordre public et droit des étrangers en Europe. La notion d'ordre public à l'aune de la construction européenne*, Bruylant, Bruxelles, 2006.
26. H. Brady, 'Saving Schengen. How to protect passport-free travel Europe', Centre for European Reform, 20 January 2012, p.33.

In the current state of negotiations, the main fears[27] on enlarging the possibility of reintroducing border controls have been allayed. On the one hand, the reintroduction of internal border controls in exceptional circumstances remains linked to the threat to public policy. On the other hand, the reintroduction of border controls can only happen as a last resort and after implementation of support measures, such as the deployment of European Border Guard Teams. In this context, support or solidarity measures precede sanction measures, i.e. the reintroduction of border controls.

The temptation to undermine the Schengen acquis by enlarging the possibility of reintroducing internal border controls has been contained. The result obtained following intense negotiations both at European Council level and at Council of Ministers level nevertheless remains fragile. Indeed, the approach that seeks to sanction States with deficiencies in their external border controls by reintroducing internal border controls or by excluding them from the Schengen area, has received certain steady support among certain players.

Charles Clarke, former British Home Secretary in charge of immigration under Tony Blair - whose country, it must be recalled, is not part of Schengen cooperation - mentioned the possibility of excluding Greece from the Schengen area if it did not fulfil its obligations under Schengen rules[28]. The French president-candidate Nicolas Sarkozy affirmed during a speech given on 11 March 2012, 'We should be able to punish, suspend or exclude from Schengen a failed State just as we can sanction a eurozone country which does not fulfil its obligations'[29].

Although the idea of excluding a State from the Schengen area might seem attractive, especially at a time of elections and creeping xenophobia, it is difficult to implement. Such a prospect would require a revision of the Treaty. In the same way, the parallel made with sanctions applicable in the eurozone is not a pleasant one as here again revision of the Treaty is necessary. Even though the provisions of the Treaty relating to the eurozone provides for a system of specific sanctions against States not complying with the rules, this is not the case for Schengen cooperation. Here, the only sanction applicable falls within the scope of the ordinary rules of procedure, i.e. a finding by the Court of Justice of failure of a Member State to fulfil its obligations under the Treaty. Although it is still legally possible to revise the Treaties, it is however, much more difficult politically as it requires the unanimous agreement of the Member States.

Having said this, the 'outbidding' that politicians are engaging in should not be overlooked. On the one hand, it endorses the idea that a punitive approach towards a failing Member State or States could be a desirable solution. On the other hand, it is likely to receive a positive response from other delegations, just as the April 2012 Franco-German letter highlights, or from senior EU officials. Consequently, there is no guarantee that the punitive approach based on sanctions and exclusion will not supersede in the short, medium or long term the requirement for solidarity. History shows that ideas once brushed aside can be born again from their ashes.

2.2.2. Strengthening of the Schengen evaluation mechanism

The problem applicable to the strengthening of the Schengen evaluation mechanism is of a different nature. Here, the issue stems from the difficulty in adopting a text whose implementation would have very significant effects on mutual trust between Member States.

27. See also a Discussion Paper entitled 'The Future of the Schengen Area', distributed under the Polish presidency before the Informal Justice and Home Affairs Council, Sopot, July 2011, where the title of the sub-sections evoked wavering trust ('Why is trust in Schengen at risk?'), and the rebuilding of confidence ('Strengthening confidence in Schengen'). See also the commentaries published by the European Policy Centre, Y. Pascouau and S. McLoughlin, 'Migratory flows from North Africa: challenges for the EU', *EPC Commentary*, March 2011; Y. Pascouau, 'Schengen area under pressure: controversial responses and worrying signs', *EPC Commentary*, May 2011; Y. Pascouau, 'Schengen area under pressure # 2: The Commission recalls the EU nature of the Schengen system', *EPC Commentary*, May 2011; Y. Pascouau, 'Internal border controls in the Schengen area: much ado about nothing?', *EPC Commentary*, June 2011.
28. 'But the EU should conduct a special review that confronts the issue of whether the Greek authorities can fulfil their responsibilities under the Schengen agreement. If such a review finds that Greece does not satisfy the criteria now being applied to would-be Schengen entrants Bulgaria and Romania, considerations should be given to expelling Greece from the free-passport zone until it is in a position to carry out its responsibilities properly.' in C. Clarke, 'The EU and Migration: A call for action', *Essays, Centre for European Reform*, 2011, p. 27.
29. Speech given by Nicolas Sarkozy, national public meeting, Villepinte (Seine-Saint-Denis), Sunday 11 March 2012.

The need to strengthen the Schengen evaluation mechanism

Within the framework of Schengen cooperation, the Executive Committee, composed of ministers in charge from each State party, created 'a Standing Committee on the Evaluation and Implementation of Schengen'[30] in September 1998. The mission of this Committee, composed of Member State representatives, was firstly to ensure that all the necessary conditions for the implementation of the Convention in a candidate State were present and secondly to ensure the correct application of the Schengen acquis by the States already applying the Convention. In this latter scenario, one of the tasks of the Committee, within the framework of visiting committees, was to evaluate external border control and surveillance.

This evaluation mechanism seemed satisfactory, particularly as it preserved the intergovernmental and sovereign nature of Schengen cooperation. On the one hand, the evaluations were carried out by peers. The European Commission participated in the work with observer status, and the European Parliament was excluded. On the other hand, visits to Member States were carried out 'in an order and at intervals' to be laid down by the Executive Committee. In other terms, on-site visits were planned.

Following the entry into force of the Amsterdam Treaty, and the integration of the Schengen acquis into the EU, the tasks carried out by the Standing Committee were transferred to a Council working group, i.e. they retained an intergovernmental nature.

From 2009, the European Commission presented a proposal[31] with two main objectives. The first was to follow the movement of the communitarisation of migration policies and to entrust the tasks formerly carried out by the Standing Committee and then the Council working group to the European Commission. The second was to strengthen evaluation methods in particular by providing for the possibility of paying unexpected visits to the external borders[32].

Although the text presented in March 2009 underwent several changes of a political or technical nature[33], the currently pending proposal pursues the same objectives. But negotiation of the proposal is complicated by a series of problems.

Political and legal problems

Two main problems affect negotiation of the text. The first problem concerns the legal basis. The issue is technical and can be summarised as follows. The European Commission's proposal is based on a provision of the Treaty that provides for the participation of the European Parliament under the co-decision procedure. Given the content and the subject of the proposal, the legal basis chosen is debatable. In fact, there exists a provision of the Treaty, introduced by the Lisbon Treaty, that specifically concerns evaluations[34]. However, the Commission has not based its proposal on this legal basis, in particular because it results in exclusion of the European Parliament from the procedure, which leads to a political problem.

Faced with this legal problem, two avenues were open: status quo, i.e. maintenance of the current legal basis with the European Parliament as co-legislator, or modification of the legal basis and exclusion of the European Parliament from the procedure. After several months of negotiations, the Justice and Home Affairs Council of

30. Decision of the Executive Committee, 16 September 1998, setting up a Standing Committee on the Evaluation and Implementation of Schengen.
31. Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis, COM(2009)102 final of 4.3.2009.
32. See, in particular, Y. Pascouau, *La politique migratoire de l'Union européenne. De Schengen à Lisbonne*, Fondation Varenne, LGDJ, 2011.
33. See, in particular, Y. Pascouau, 'The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock', *European Policy Centre, Policy Brief*, 2012.
34. See, to that effect, Y. Pascouau, 'The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock', *European Policy Centre, Policy Brief*, 2012. For a contrary opinion, S. Carrera, 'An assessment of the Commission's 2011 Schengen Governance Package. Preventing abuse by EU member states of freedom of movement?', *Centre for European Policy Studies, Paper n° 47*, 2012.

June 2012 decided to act in accordance with the opinion of its legal service and to change, with the unanimity of its members, the legal basis on which the proposal is founded[35].

This decision immediately caused an uproar among the political groups of the European Parliament. Evoking 'a step backwards' in relations between the Parliament and the Council, a 'breach of the Treaties' or even a 'declaration of war', several political groups highlighted their intention to refer this matter to the Court of Justice. In real terms, this means that once the new evaluation mechanism is adopted by the Council, the European Parliament will ask for it to be cancelled before the Court of Justice of the European Union.

The decision made by the Council to consult the European Parliament to ensure that its position will be taken into account in the broadest possible manner, will probably not suffice to calm passions. It will then be up to the Court of Justice to decide on the issue and to determine whether or not the legal basis now chosen by the Council is the right one.

This 'issue of changing the legal basis' deserves to be examined with some hindsight, for on closer examination, the responsibility of the situation belongs with both the European Commission and the Member States. The Commission, firstly, because the choice of legal basis was questionable. Refusing to alienate the European Parliament, the European executive did not wish to present a modified proposal based on a different legal basis, even though discussions and national pressures to that end were strong. In this situation, it was the Council's responsibility to do this. But the process within the Council was long and difficult. On the one hand, the Polish Presidency of the second half of 2011 did not decide on the matter, mainly due to the lack of consensus between the Member States. Consequently, the dossier was handed over to the Danish Presidency. This slowdown in procedure allowed the Rapporteur of the European Parliament to fully deal with the dossier given that without modification of the legal basis, the EP remained co-legislator. On the other hand, it appeared to be extremely complicated to obtain unanimity in order to change the legal basis. Portugal and Luxembourg had been opposed to this for quite a while. Once these countries had rallied to the cause, Romania showed its opposition to the change, just a few days before the June Council. In substance, up until the day before the JHA Council, the issue of unanimity remained pending.

These difficulties were a boon for the European Parliament. As time passed, it became more and more difficult to withdraw the matter from it. Although one might legally challenge the attitude of the European Parliament, which knew the legal problem perfectly and had done so for a long time[36], it however took full advantage of the political opportunity in order to obtain powers that the Treaty had not explicitly entrusted to it. The Parliamentary Assembly is therefore today in its role when it vilifies the Council's decision to change the legal basis with the result that it is excluded from the procedure. It remains to be seen, now, how far the reprisals of the European Parliament can go. In a best-case scenario, the Parliament could limit its refusal to cooperation in the Schengen issue, i.e. it could refuse to adopt the changes to the Schengen Borders Code in relation to reintroducing internal border controls. In a worst-case scenario, the Parliament could call into question its relationship with the Council by refusing to negotiate the Schengen issue but also other fields under the co-decision procedure. Visibly, the Parliament chose the second option. On 14 June it decided to suspend its cooperation with the Council on five dossiers[37] until a satisfactory solution is found concerning Schengen governance.

Whatever happens in this 'issue', the European Parliament must nevertheless keep in mind several elements governing its action. On the one hand, the issue of the legal basis is key in a Union built on respect for the

35. Legally, modification of the legal basis of a Commission proposal is possible with a qualified majority in the Council if the Commission accepts it, or if not, with unanimity in the Council. In the present case, the Commission did not deem it necessary to modify its proposal, thus refusing to alienate the European Parliament, which obliges the Council to obtain the unanimity of its members in order to modify the legal basis featuring in the Commission's proposal.
36. The European Parliament mentions this in the Resolution adopted on 7 July 2011. On this occasion, it stressed that 'any attempt to move away from Article 77 TFEU as the proper legal basis for all measures in this field will be considered to be a deviation from the EU Treaties, and reserves the right to use all available legal remedies if necessary': 'European Parliament Resolution of 7 July 2011 on changes to Schengen', P7_TA(2011)0336.
37. The five dossiers concern: amendment of the Schengen Borders Code; combating attacks against information systems; the European Investigation Order; budget 2013 relating to internal security and EU passenger name records.

rule of law. This in fact defines the scope of an act, its adoption procedure and the competence of the different institutions. If the institutions have a different interpretation of the choice of the legal basis, it is up to the Court of Justice, as a last resort, to resolve the issue. Increased politicisation of the debate would simply call into question this balance that guarantees the rule of law. On the other hand, the temptation to call cooperation with the Council into question finds limitations in the EU system as there is a principle of mutual sincere cooperation that applies to all these institutions[38]. In other words, suspension of cooperation with the Council could not endure without violating the principle of mutual sincere cooperation.

This episode is certainly a blow to mutual trust between the Council and the European Parliament. It is not certain however, that Schengen cooperation has received a similar blow. A small exercise in forecasting would even prove the contrary.

On the one hand, the European Parliament is reversing its decision to suspend cooperation with the Council but still intends to mark its disapproval by blocking changes to the Schengen Borders Code. The conditions for reintroducing internal border controls have not been enlarged and the current situation remains. The outcome is positive insofar as the request for a useless change has not been followed up. Firstly, the current conditions for reintroducing internal border controls are sufficient. Secondly, no follow up has been given to the request formulated by two officials who today no longer hold political office.

On the other hand, today, the Council cannot legitimately retreat on the 'Schengen Evaluation' issue. It must therefore within a short time frame, amend, and improve the mechanism. In doing so, this will lead to stronger mutual trust. The latter can only be consolidated with the implementation of an integrated (with major involvement of the European Commission) and strengthened (including unexpected visits) evaluation system of external border controls.

Ultimately, the 'issue of the legal basis' could have a positive outcome in strengthening mutual trust in the management and functioning of the Schengen area.

The theory of radioactivity

Although Schengen cooperation is based on mutual trust, it would be naïve to consider that this cooperation is, in the same way as cooperation in the field of internal security, exempt from a certain degree of mutual mistrust between Member States. The same applies to this field as it does to radioactivity. The latter exists in a natural state but it is only when its intensity increases abnormally that it becomes dangerous.

Thus, the abnormal or artificial increase in mutual mistrust in the field of Schengen cooperation undermines freedom of movement. On the one hand, the temptation to reintroduce internal border controls is stronger and the opinions/avenues to achieve this are more pressing. On the other hand, the will to accept the strengthening of mutual trust through greater integration is less pronounced. Both phenomena do not help to solidify the framework of free movement of persons - quite the opposite in fact.

Current events and the sensitive nature of issues affecting Schengen make it a 'high-priority' field of analysis. Also, the question is raised of whether other fields of migration policy are following the same trends.

Part 3 - Signs of contamination in other fields of the Schengen acquis

Migration policy is a field that is characterised by strong activity both at European and national level. In certain fields, this momentum, both legislative and operational, goes hand in hand with a phenomenon identical to that encountered in the framework of Schengen cooperation. Thus, several signs raise fears of mutual mistrust developing between the Member States in several fields linked to the area of free movement.

38. Article 13(2) TEU indicates that 'Each institution shall act within the limits of the powers conferred upon it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.

These fields touch upon Romania and Bulgaria's accession to the Schengen area (3.1), to the 'Dublin' system relative to the distribution of asylum seekers (3.2) and to representation agreements between Member States in the field of issuance of visas (3.3).

3.1. The delayed accession of Romania and Bulgaria to the Schengen area

The first sign of mistrust that is blighting Schengen cooperation concerns the refusal to accept the entry of Bulgaria and Romania into the Schengen area. Although both candidate States fully meet the conditions for accession to the area of free movement[39], several delegations are opposed to this, in particular on the grounds of corruption problems observed in these Member States.

This opposition raises two issues. The first falls under the link made between accession to the Schengen area and corruption. The latter has never been a criterion to be taken into account to determine whether a State meets the conditions required to join the Schengen area. By using the issue of corruption, States have therefore shifted debate from the technical arena (evaluation of conditions required to eliminate internal border controls with Romania and Bulgaria) to the political arena. This shift is the source of the second issue. As long as a delegation uses the argument of corruption to oppose the entry of Romania and Bulgaria into the Schengen area, their accession remains impossible, as the accession decision must be unanimously taken by Council members.

This situation therefore raises the issue of the reasons causing the political blockage. It would seem difficult, a priori, to invoke the fear of misapplication of Schengen rules insofar as the Commission and the European Parliament both recognise that Romania and Bulgaria meet the technical conditions for accession. It is therefore not on these States that the blame for mistrust should be laid. A quick glance at the Schengen map, however, provides us with an explanation. When Bulgaria enters the area of free movement, there will be territorial continuity in the Schengen area with Greece. Now, the difficulties encountered by this Member State in managing migration flows, especially at its border with Turkey, is a source of concern for several Member States[40].

Thus, the possibility of Romania and Bulgaria's accession to the Schengen area is in fact delayed because of the mistrust of certain States regarding Greece. Although Greece benefits from a support plan, it is not sufficient to allow it to restore effective controls and mutual trust. Consequently, Romanian and Bulgarian citizens are still deprived of the fundamental freedom to move in an area with no internal border controls. This situation should evolve in any case, as the European Council of 1-2 March 2012 requested that a decision concerning Romania and Bulgaria's accession to the Schengen area be adopted in September 2012.

3.2. The 'Dublin System' and the suspension clause

The European Union adopted a set of rules with a view to establishing a Common European Asylum System (CEAS). Featuring amongst these rules is the 'Dublin' regulation. This text establishes the rules applicable to determine the Member State responsible for an asylum application[41]. The Regulation lays down the principle that only one Member State is responsible for examining an asylum application. The objective is to avoid asylum seekers being sent from one country to another but also to avoid abuse of the system in the case where a single person makes several asylum applications. Although determination of the State responsible is carried out on the basis of prioritised criteria, the implementation of these rules, in practice, makes the State in which the asylum seeker has entered the common territory bear the responsibility.

39. See, in particular, the report by the European deputy Carlos Coelho in which the following is indicated: 'At this moment, both Romania and Bulgaria have proved that they are sufficiently prepared to apply all the provisions of the Schengen acquis in a satisfactory manner', 'Report on the draft Council decision on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania', A7-0185/2011, 4 May 2011.
40. See 'Note from the Belgian, the French, the German, The Netherlands, the Austrian, the Swedish and the UK delegations on Common responses to current challenges by Member States most affected by secondary mixed migration flows', Doc. 7431/12, 9 March 2012.
41. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union, L 50 of 25.2.2003.

For example, a person enters through Poland and lodges an application for asylum in France. When the application is lodged, the French authorities will try to determine which State is responsible for the asylum application. In most cases, it is the State through which the asylum seeker entered that is responsible, in this case, Poland. This system serves to attribute the responsibility of examining the asylum application to the States situated along the periphery of the area of free movement.

However, this system of distributing asylum seekers has shown its limits, particularly for peripheral States which, in addition to receiving a large number of asylum seekers, have an 'asylum system' with major deficiencies. This is precisely the case of Greece, whose asylum system does not allow it to receive asylum seekers or to process the applications in compliance with EU law and the European Convention on Human Rights, as demonstrated by the European Court of Human Rights in the M.S.S. case[42], and by the Court of Justice of the European Union, in the N.S. case[43].

Faced with these difficulties, which can lead to violation of EU law and of human rights, the European Commission had proposed to establish a mechanism allowing the suspension of the transfer of asylum seekers towards these Member States. More precisely, the Commission proposed that 'when a Member State is faced with a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure, and when the transfer of applicants for international protection in accordance with this Regulation could add to that burden, that Member State may request that such transfers be suspended'.

The Commission's proposal was not accepted by the Member States. Certain delegations highlighted, in particular, that implementation of the suspension clause would result in encouraging asylum seekers and migrants to enter Europe through the State in difficulty. In this way, these persons would be assured that they could lodge an asylum application in a Member State other than that through which they entered, as the Dublin mechanism would be suspended.

Instead of a suspension mechanism, the Member States proposed the introduction of an early warning system. It provides that when a problem in the functioning of the asylum system of a State jeopardises the application of the Dublin Regulation, corrective mechanisms must be put in place. The main objective of this mechanism is to avoid risks of dysfunction rather than to deal with the consequences. In any event, this mechanism does not provide for suspension of the Dublin mechanism[44].

At first sight, the refusal to establish a suspension mechanism between the Member States could be considered as the expression of a lack of solidarity between partners. This assertion must however be qualified insofar as there is now the suspension obligation resulting from the case law of the European Court of Human Rights and of the Court of Justice[45]. The two courts now compel Member States not to transfer asylum seekers when they risk inhuman or degrading treatment in the country of transfer. Once the obligation established by case law is formulated, it could appear unnecessary to try to include it in secondary legislation.

Although the issue of suspension of Dublin transfers is now resolved, this is not the case for the issue relative to relocation mechanisms. These would aim to redistribute beneficiaries of international protection among the Member States. For example, when a Member State has a large number of refugees on its territory, these refugees could be 'relocated' on the territory of another Member State as a token of solidarity and to free up the protection systems of Member States receiving large numbers of refugees or beneficiaries of subsidiary protection. Here again, however, the Member States refuse to be constrained by such a mechanism. There is a relocation mechanism concerning Malta, but this mechanism only functions on a voluntary basis.

42. ECHR, 21 January 2011, 'M.S.S. v Belgium and Greece'.
43. ECJ, 21 December 2011, 'N.S. v Secretary of State of the Home Department', C-411/10.
44. See S. Peers, 'The revised 'Dublin' rules on responsibility for asylum seekers: the Council's failure to fix a broken system', Statewatch Analysis, April 2012.
45. On the M.S.S. case, see, in particular, F. Maiani and E. Néraudau, 'L'arrêt M.S.S./Grèce et Belgique de la Cour EDH du 21 janvier 2011 - De la détermination de l'Etat responsable selon Dublin à la responsabilité des Etats membres en matière de protection des droits fondamentaux', *Revue du droit des étrangers*, 2011.

Solidarity among Member States does not seem to be a priority in asylum policy. The suspension mechanism for the transfers of asylum seekers only exists under the constraint of European jurisdictions and relocation still remains a remote project. The low level of solidarity in the field of asylum fuels the development of the 'every man for himself' rule, and consequently mutual mistrust.

3.3. Suspension of visa representation agreements

The field of visa policy is the source of interesting forms of cooperation between Member States as they do not have consular services in every country in the world. When a third-country national wishes to obtain a visa for a Member State that does not have a consular service in the applicant's country of origin, s/he must in practice go to the nearest neighbouring third country in which the Member State has established a consular service. In order to avoid these sometimes long and costly procedures, the Member States have signed bilateral agreements through which a Member State with a consular service in a third country accepts on behalf of another Member State to process the visa application and issue the visa once the application has been accepted.

France, which has the most extensive consular network in the world[46], has signed several agreements of this type with its European partners. At the end of 2011, France announced that from 1 January 2012 it would terminate a representation agreement signed with Denmark. The end of the cooperation is based on France's impossibility, under Danish legislation, to refuse to issue a visa. In other terms, the French authorities are only authorised to issue visas and cannot be a substitute for the Danish authorities and refuse to issue a visa even if the Danish authorities would have accepted. In a press release dated 4 April 2012, the Danish Foreign Minister mentioned that the representation agreements with France, but also with Germany and Austria, remain suspended or terminated[47].

While this situation creates major problems for third-country nationals who require a visa in order to go to Denmark, it also shows a lack of mutual trust between the European partners. In fact, the reason for the breakdown lies in the impossibility for a delivering State to refuse the issuance of a visa, when the destination State has accepted. The will to preserve a veto power demonstrates that a Member State may have no confidence in the decision made by another. It could be a further sign of mistrust between Member States.

These examples reveal how mutual trust has been undermined to give way to mutual mistrust. Although these signs are reasons to fear a weakening in the freedom of movement, are they irremediable? Nothing could be less certain insofar as there are reasons to hope that the free movement of persons will not be repeatedly infringed but can instead be preserved and guaranteed by the EU institutions.

Part 4 - Reasons not to lose hope: the institutions taking responsibility

The area of free movement has been put under pressure in recent months, sometimes in an extremely violent way and without joint consultation as the last letter from the French and German Home Ministers has shown. For all this, should we fear that the principle of free movement is being threatened?

The more pessimistic among us will recall that for several years now, freedom of movement, particularly that of European citizens, has been repeatedly attacked by Member States. While the Metock case, judged by the Court of Justice in 2008, allowed certain Member States, in this case Ireland and Denmark, to express their willingness to call into question the acquis in the area of freedom of movement[48], several other Member States

46. Y. Tavernier, 'Les services des visas, parents pauvres des Affaires étrangères', French National Assembly, information report No 1803, 1999.
47. http://um.dk/en/news/newsdisplaypage/?newsID=5BC5B233-62F3-4223-8917-CF75026293B2
48. The Metock case concerned the right of residence for family members of EU citizens. The Court of Justice, opting for an extensive interpretation, indicated that the right of residence for family members of a citizen of the European Union must be guaranteed, whether or not the person had previously resided lawfully in another Member State, and whether or not the person entered that Member State before or after the union. The lack of criteria concerning lawful residence was a main source of discontent among Member States. ECJ, 25 July 2008, 'Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform', case C-127/08.

followed in their footsteps for different reasons. This was the case in 2010 when France criticised the freedom of movement benefiting Roma people. In 2011, the Netherlands raised the possibility of sending Polish workers who were unemployed back to their country. Recently, in May 2012, the British Secretary of State indicated that the United Kingdom was examining the possibility of limiting freedom of movement for European workers, especially Greeks, in the case of a collapse of the eurozone. These elements, when aligned, show that a 'negative coalition' of the Member States could press for changes to the rules relating to freedom of movement of EU citizens. Recent proposals to change Schengen rules could therefore become part of a general movement of mistrust, which, if we need reminding, moves forward in fits and starts and is more often than not dictated by national electoral agendas.

The more optimistic among us will, on the contrary, highlight the fact that freedom of movement, as a major achievement of European integration, is not threatened. While this assertion corresponds to reality, in our view, it is nevertheless important to emphasise that preserving freedom of movement implies that each institutional player contributes. Furthermore, analysis of the role of players in the 'Schengen governance' framework shows that balances should be preserved.

4.1. The Council: enemy of freedom of movement?

At first sight, the Council, through the Member States, seems to be the institution that is most inclined to infringe on freedom of movement. The joint letter sent by Claude Guéant and Hans-Peter Friedrich is an eloquent example of the attempt made by certain delegations to weaken Schengen cooperation and mutual trust by forcing their national political agenda on their European partners[49].

That being the case, this type of manoeuvre, which consists in asking other delegations to approve a political approach and to transform it into a legal instrument can only come to fruition if it receives approval of a qualified majority in the Council. As it happens, the reactions shown during the Justice and Home Affairs Council of April 2012, during discussions relating to the Franco-German proposal demonstrate that the Member States are extremely divided on enlargement of the criteria to reintroduce internal border controls. Therefore, several Member States cautiously welcomed the letter from the French and German Home Affairs Ministers. Certain delegations, headed by Sweden, expressed their attachment to freedom of movement and their refusal to go any further in legislative changes. The position of certain delegations could be summed up in this way: 'Schengen is not the problem but the solution'.

In addition, the result of the French presidential elections on 6 May 2012, entrusting the role of President of the French Republic to François Hollande, will have a decisive impact on the issue of 'Schengen governance'. While France spent several months seeking to enlarge as far as possible the reasons for reintroducing border controls, the new President of the French Republic will most certainly join the fold of Member States concerned about preserving the principle of freedom of movement. From the role of hot-headed discussion leader, France will probably now slip into the garb of responsible peacemaker. That, in any case, is the tone of the press conference given by the new Home Affairs Minister Manuel Valls, at the end of the Justice and Home Affairs Council of 7 June 2012, during which he made clear in particular his desire to 'renew a climate of confidence and appeasement'.

In this context of protecting freedom of movement and of modifying the European political landscape, the adoption of a decision relating to the accession of Romania and Bulgaria into the Schengen area in September 2012 is a realistic prospect.

49. While the French presidential campaign led the president-candidate Nicolas Sarkozy to toughen his discourse on the theme of border reinforcement, there was nothing to indicate that a German minister could co-sign this type of letter with a French minister. On the contrary, Germany has shown a careful and responsible approach in this field. Furthermore, Guido Westerwelle, the Minister for Foreign Affairs, declared he was greatly in favour of freedom of movement. Should we see in this the isolated act on the part of the Minister for Home Affairs?

4.2. The Commission: the delicate exercise of 'damage control'

While the Commission seemed surprisingly receptive to the Franco-Italian requests following events in Lampedusa, it is not certain that it will welcome new proposals with the same fervour, such as those presented by Messrs Guéant and Friedrich. First of all, the great reluctance shown by several Member States during the Justice and Home Affairs Council of April 2012 is sufficient to justify this restraint. Moreover, it is imperative that the Commission remain focused on the ongoing negotiations. In this respect, it plays a role of 'go-between' for the Council and the European Parliament in order to guarantee that the text is adopted. Furthermore, it must ensure that the content of the proposal does not constitute a disproportionate interference to the principle of freedom of movement.

The Commission is also under pressure to achieve results. Firstly, the interruption of negotiation would be a failure for it. It is in fact in the Commission's interest to reach an agreement on the text it has presented. Failing this, it would prove that the proposal was unnecessary or that it did not convince the legislator of the importance of adopting it. Secondly, the Commission is obliged to monitor the negotiation process to limit interference to freedom of movement as much as possible. In fact, and whatever happens, the Commission will remain the institution that formally accepted to propose a change to Schengen rules. Furthermore, and so as not to appear as the 'initiator of the dismantling' of Schengen, it must be guarantor of the mechanism. This involves, on the one hand, preserving the link between reintroducing controls and a serious threat to public policy, and, on the other, recalling that any interference to freedom of movement must be as limited as possible.

4.3. The European Parliament: guarantor of freedom of movement?

In this exercise, the Commission should be able to hope for strong support from the European Parliament. In fact, the parliamentary institution clearly affirmed in July 2011, that 'on no account, can the influx of migrants and asylum seekers at external borders *per se* be considered an additional ground for the reintroduction of border controls'[50]. It also indicated that any proposal by the Commission should aim at specifying the implementation of existing provisions.

It seems obvious that the European Parliament will bring all its weight to bear in order to avoid any excessive interference of the principle of freedom of movement and that its role in negotiations will be vital. A contrary outcome would be the negative sign of the European Parliament's ability to guarantee civil liberties in an area of freedom of movement that is unequalled at international level.

Changes to the legal basis determined by the Justice and Home Affairs Council of June 2012 in the 'Schengen Evaluation Mechanism', nevertheless muddy the waters on the outcome of the Schengen Governance Package, as indicated earlier. Although it seems clear that certain parliamentary groups will strongly push for the European Parliament to introduce an action for annulment against the future evaluation mechanism, the Parliament's position in relation to changes to the Schengen Borders Code - which could waver between total blockage and feeble or full collaboration with the Council - remains much more blurred and deserves to be closely monitored.

4.4. The Court of Justice: keeper of the temple

Since the beginning of European integration, the Court of Justice has worked incessantly to preserve the balance of the Treaties and to guarantee the full implementation of the four freedoms of movement. While little demand has been placed on it in the field of migration policy, which is highly regrettable, the Court has nevertheless sketched the main thrusts of case law which, firstly, restricts the attempts to limit the rights conferred by the European Union, and secondly, champions solidarity and mutual trust as the cornerstones of freedom of movement.

50. 'European Parliament Resolution of 7 July 2011 on changes to Schengen', P7_TA(2011)0336.

Case law of the European Court of Justice has always considered freedom of movement as a principle and limits to this freedom as exceptions that must be interpreted in a restrictive manner. Nothing suggests that the Court of Justice should follow a different path regarding migration policy and the issue of reintroducing internal border controls within the EU.

On this last point, the Court also pointed out in the Melki and Abdelli case[51] that although the national authorities are still empowered to carry out identity checks in the border area between two Schengen States, the exercise of these checks would not be considered as equivalent to those carried out systematically at the borders.

The Court took a similar stance in the Chakroun case[52] concerning the justification of personal resources as part of exercising the right to family reunification. It recalls that the authorisation of family reunification is the general rule and that the Member States' right to enforce the 'sufficient resources' requirement 'must be interpreted strictly'.

Lastly, in relation to mutual trust, the Court of Justice highlighted, in a case concerning the removal of asylum seekers to Greece[53], that it is the basis for achieving the area of freedom, of security and of justice and more particularly the Common European Asylum System. In the same case, the Court recalled the importance of Article 80 TFEU which sets forth that the implementation of migration policy is governed by the principle of solidarity and fair sharing of responsibility between the Member States.

In this way the Court is successively sketching a working framework applicable to migration policy. It indicates, first of all, that the leeway preserved by the Member States in the implementation of EU law shall not have the effect of disproportionately infringing the exercise of the rights conferred on individuals. It also indicates that this policy is based on mutual trust and governed by the principle of solidarity.

Conclusion

There are many reasons to hope that the freedom of movement of persons will not be weakened due to certain circumstances. The role and the responsibility of each institution helps to limit the 'infringements' that could affect freedom of movement. In other words, the Schengen area will not explode any time soon under the impact of increasing introduction of internal border controls. And that is good news.

However, it would be irresponsible not to consider the signs of mutual mistrust surrounding Schengen and the migration policy for what they really are. Firstly, if they are to be considered as a response to the 'radioactivity' in the field of freedom of circulation, it is necessary to measure their intensity. Moreover, it is not because the Member States challenge the European Commission's intervention that mutual mistrust has reached a high level throughout the entire political field. Very often it is an institutional issue that drives reservation. For example, the ministers willingly accept to cooperate with each other but refuse to allow the Commission to look after cooperation, as in this case it is considered as an outside player. By contrast, when the intensity of mutual mistrust threatens the functioning of a policy, as is the case in the field of asylum, it is necessary to pay attention to it and to take the necessary measures to contain it, especially by showing solidarity.

Secondly, signs of mutual mistrust must be put in context along with their possible effects. While it seems today that the progressive 'dismantling' of the Schengen area is requested by a very small group of Member States, it is the underlying logic that should be given consideration as it appears to be particularly worrying. This logic is reversing over fifty years of European integration devoted to the constant quest for greater freedom of movement. For the first time in 'the history of the Community', the European Union, driven by the founding States, could choose the path towards curbing freedom. This groundswell, which is reflected in recent events, is disturbing enough for it not to be taken at face value. Freedom of movement is an invaluable good and it is our common duty to preserve it.

51. ECJ, 22 June 2010, 'Aziz Melki and Sélim Abdeli', cases C-188/10 and C-189/10.
52. ECJ, 4 March 2010, 'Rhimou Chakroun', case C-578/08.
53. ECJ, 21 December 2011, 'N.S. V Secretary of State for the Home Department', case C-411/10.

Executive Summary

Solidarity and mutual trust are the cornerstone of the Schengen area of free movement of persons and they ensure that it is upheld. They are the cornerstone because this area is based on a high level of mutual trust between partners, particularly concerning controls carried out at the entry into the common territory. They uphold it, because solidarity mechanisms, both financial and operational, offset the burden that weighs mainly on the States situated along the periphery of the area.

However, just as with many policies linked to internal security, mutual trust and solidarity are often confronted with mutual mistrust. The balance between mutual trust and mistrust could thus be compared to radioactivity. The latter exists 'in a natural state' and it is only when its intensity increases excessively that it becomes dangerous. In this way, there is a 'normal' degree of mutual mistrust in the area of free movement but its 'abnormal' or 'artificial' increase could damage the development and the maintenance of freedom of movement.

The advent of the 'Arab Spring' and the subsequent arrival of several thousands of Tunisian nationals on the shores of the Italian island of Lampedusa, was followed by several measures that resulted in a sudden increase in mutual mistrust. The request formulated by France and Italy aimed at changing the Schengen rules in order to enlarge criteria to reintroduce internal border controls and the acceptance to give substance to this, are the main symbolic elements.

This Policy Paper reviews in detail the various stages that followed this episode, but also analyses other fields linked to freedom of movement, in order to determine whether solidarity and mutual trust are giving way to growing mutual mistrust that would jeopardise the free movement of persons in the Schengen area.

Although this Paper illustrates the fact that signs of mutual mistrust are indeed tangible, their impact seems to remain limited as yet. The Policy Paper emphasises, however, that maintenance of freedom of movement is not yet a given, and that its preservation requires that the European institutions - Council, Commission, European Parliament and Court of Justice - act in their official capacity in order to ensure its protection. To that effect, the Policy Paper reminds us that 'Freedom of movement is an invaluable good and it is our common duty to preserve it'.

European Policy Centre ■ Résidence Palace, 155 rue de la Loi, 1040 Brussels, Belgium
Tel: +32 (0)2 231 03 40 ■ Fax: +32 (0)2 231 07 04 ■ Email: info@epc.eu ■ Website: www.epc.eu

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DISCUSSION PAPER

The Schengen Governance Package: The subtle balance between Community method and intergovernmental approach

Yves Pascouau

After two years of negotiations, which were often tense and occasionally characterised by political theatrics, the Schengen governance legislative package has finally been adopted. Stemming from a context of political crisis and with the objective (for the French and Italians) of reinforcing Member States' control of the Schengen mechanism, the legislative package yields quite a different result. Firstly, it has paved the way for quicker adoption of a new evaluation mechanism verifying the application of Schengen rules by Member States and has reinforced their implementation and efficiency. Further, the amendments to the Schengen Borders Code give greater clarification to the conditions under which States can reintroduce control at internal borders. Finally, the amendments to the Schengen rules were concurrent with a strengthening of the roles played by the European Commission and European Parliament in Schengen governance. Ultimately, this episode illustrates a strong movement toward integration, where confrontations between the Community method and intergovernmental approach have given way to more subtle balance.

In April 2011, in the wake of the Arab Spring, several thousand Tunisian migrants arrived on the shores of the Italian island of Lampedusa. The Italian government, which deemed the situation difficult to manage, appealed for support from its European partners. However, they did not reach the same assessment of the situation and denied Italy's request for support.

Deeply offended and with a backdrop of dramatic rhetoric[1], the Italian government decided to grant the Tunisian nationals residence permits with authorisation to travel. These documents were intended to allow the Tunisian nationals to travel in the Schengen area and, more specifically, to enter France. However, these residence permits were granted in violation of the rules of free movement within the Schengen zone, as stipulated in the Schengen Borders Code.

Given this situation, France retaliated in two ways. Firstly, for public security reasons, several trains from Vintimille were blocked and police controls at the Franco-Italian border were ramped up. Secondly, France seized the opportunity to force Italy into the legally questionable act of jointly asking for a revision of the Schengen rules.

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On 26 April 2011, Nicolas Sarkozy and Silvio Berlusconi announced during a press conference that they had sent a letter to the President of the European Commission, requesting a revision of Schengen governance. The revision was to include a modification of the evaluation mechanism and a modification of the conditions permitting the reintroduction of internal border control.

On 29 April 2011, with unusual speed, the President of the European Commission agreed to the Franco-Italian request. In a letter to the French and Italian presidents, José Manuel Barroso highlighted that 'the temporary restoration of borders is one of the possibilities, provided this is subject to specific and clearly defined criteria, that could be an element to strengthen the governance of the Schengen agreement'.

In June 2011, in a strained political climate, with different national and European actors in opposition over the modification of Schengen governance, the European Council defined the framework of action to be taken. It highlighted the need to strengthen the system of Schengen evaluation and agreed to the proposal to create a new procedure for reinstating internal border control. Although the European Council accepts the principle of such a procedure, its implementation is strictly structured since it must only be applied as a 'last resort' and 'in exceptional circumstances'.[2] With the framework presented, the Heads of state and government invited the Commission to present a legislative proposal in September 2011.

On 16 September, the Commission presented a communication entitled 'Schengen Governance – strengthening the area without internal border control'[3] and two legislative proposals, one related to strengthening the Schengen evaluation mechanism[4] and the other related to the reintroduction of internal border control.[5]

Even as outlined by the European Council, the proposals presented by the Commission revealed a complicated context in which contradictory issues are pitched against one another. Firstly, on a logical level, the Commission remains responsible for ensuring the free movement of people whilst introducing legal amendments for a new procedure allowing for the reinstatement of internal border control. The paradoxical and delicate nature of the task is clear.

Subsequently, on a functional level, the Commission went on to take the opportunity, using the legislative proposals, to significantly augment its powers. In an area in which intergovernmental tendencies remain strong, the Commission's proposals were received by the Member States as a provocation. This was evidenced by the high number of subsidiarity warnings[6] issued by several national parliaments in response to the Commission's proposals. The Commission's ambitious proposals were thereby counterbalanced by the Member States.

After two years of negotiations, fraught with tensions between the different actors – between the Council and the European Parliament[7] in particular – Schengen governance underwent a transformation. Analysis of the two texts relative to the procedure by which internal border control[8] is introduced (I) and the Schengen evaluation system[9] (II) demonstrates that Schengen cooperation is still characterised by strong tensions between intergovernmental and Community methods. That said, the new measures define much more clearly the conditions under which internal and external border control can be implemented by Member States. Furthermore, the intergovernmental approach is weakened by European integration and gives way to the Community method.

I. Internal border control in the Schengen area

The amendments to the Schengen Borders Code[10] affect two areas. Firstly, they touch on already existing regulations regarding the reintroduction of internal border control. The new draft of the Code brings in requirements which apply a stringent framework to Member States' realm of action (A). Secondly, the amendments confirm the creation of a new procedure for the reintroduction of border control. The application of this measure seems, however, illusive given the difficulty of fulfilling all the required conditions (B). In both areas, the new measures introduce greater control of the sovereignty clause within EU law and, in consequence, an advance of communitisation.

A. The demarcation of existing rules: subordination of the sovereignty clause

The option for Member States to reintroduce internal border control is a *sine qua non* for their participation in the Schengen agreement. Conceived as a veritable 'sovereignty clause', this option is described in a paragraph of the convention implementing the Schengen agreement adopted in 1990. The measures put forward the basic conditions under which border control may be reintroduced, namely: the need for the existence of a threat to public order or national security; the temporary nature of the reintroduction, be it premeditated or applied in an emergency; and the obligation to inform other parties in cooperation.

Following the integration of the Schengen *acquis* into the European Union through the Treaty of Amsterdam, the adoption of the Schengen Borders Code in 2006 provided the European Parliament and Council with the opportunity to bring the conditions governing the application of the 'sovereignty clause' under the framework of EU law. In four articles, the Schengen Borders Code defines and clarifies the conditions for the application of border control, the procedure to adhere to, especially in emergency situations and, finally, the conditions under which Member States may extend the duration of border control.

The new draft of the Schengen Borders Code[11], adopted under the Schengen governance package, brings in new elements relating to the conditions (1) and procedure (2) of reintroducing border control that limit the discretion of Member States in the implementation of the 'sovereignty clause'.

1. Conditions and criteria for the reintroduction of border control at internal borders

The new article 23 of the Schengen Borders Code reiterates the essential conditions for border control to be reintroduced, namely a threat to public policy and the exceptional nature of such a measure. It also introduces several clarifications.

The first clarification indicates that the reintroduction of border control may be applicable at 'all or specific parts' of internal borders. This addition simply reflects the reality of the situation inasmuch as the reintroduction of border control need not necessarily be applicable at all borders but only at certain sections.[12]

Secondly, the Schengen Borders Code clarifies the maximum duration for which border control may be reintroduced, whether it is planned or in an emergency. Planned reintroduction is still authorised for an initial 30-day period, and the new measure states that 30-day prolongation periods are possible, but with a maximum duration of 6 months. The new regulation thus introduces a new limit which did not exist before. With regard to emergency situations, it stipulates that control can be reintroduced for an initial 10-day period and extended for a maximum period of two-months. In reality, however, these limitations do not have a great impact, since until now Member States have not reintroduced control for periods exceeding this.

The third clarification is, however, more significant. The regulation highlights that such measures 'should only be adopted as a last resort'. Furthermore, this requirement should be read in combination with the new article defining the criteria which must be met for border control to be reintroduced. More precisely, in order to decide upon the reintroduction of border control as 'a last resort', the Member State must assess its necessity and proportionality. When a State decides to reintroduce border control it must evaluate whether it would firstly be 'likely to adequately remedy the threat to public policy', and secondly, assess the proportionality of the measure in relation to the threat. Over the course of the assessment, the Schengen Borders Code adds that the State should take two elements into consideration. Firstly, it should assess 'the likely impact of any threats to its public policy' including terrorist threats and threats posed by organised crime. Secondly, the assessment should take into account the likely impact of such a measure on the free movement of persons.

Concretely, these measures oblige Member States to weigh up the interests of free movement and security. Is the reintroduction of border control indispensable to counter a threat to public policy? Is the measure proportional? In other words, is there another measure which may counter the threat without

interfering with free movement? In this respect, the preamble to the regulation reiterates that 'in accordance with the case-law of the Court of Justice of the European Union, a derogation from the fundamental principle of free movement of persons must be interpreted strictly and the concept of public policy presupposes the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[13]

The amended measures in the Schengen Borders Code thus impose new requirements upon States which must be able to prove both the necessity and proportionality of border control reintroduction. The assessment and monitoring procedure of these new requirements also underwent some modifications.

2. The procedure for reintroducing border control at internal borders

From the beginning of the Schengen agreement, States that decided to reintroduce border control at internal borders, whether planned or in an emergency, have had to inform their partners. This requirement, formed in rather general terms in 1990, was given greater precision in the adoption of the Schengen Borders Code. It provides a list of information to be presented and details the conditions under which consultations would take place in order to organise cooperation and assess the proportionality of the intended measures. The new amendments maintain this structure and comprise some specific points.

In the 2006 version, the Schengen Borders Code states that the Member State planning to reintroduce border control or doing so in an emergency must inform its partners of the reasons for the intended reintroduction and provide details of 'the events that constitute a serious threat to public policy'. The new text goes further. States must now provide 'all relevant data detailing the events that constitute a serious threat to its public policy'.

Henceforth, simply referring to an event will not be sufficient to reintroduce border control at internal borders. It will fall upon the State in question to present all relevant information concerning the event and to justify the decision to reintroduce border control on the basis of an evaluation of attending interests. The amendment also states that the Commission may, if necessary, 'request additional information from the Member State concerned.'

The obligation to supply more information is accompanied by the organisation of an extended consultation process. Firstly, information provided by the concerned Member State, including classified information, is presented to the European Parliament and Council. This demonstrates a certain 'communitisation' of procedure as well as allowing for political supervision, notably by the European Parliament.

Furthermore, the Commission, and now the Member States too, can issue an opinion on the submitted information. The Commission is also required to issue an opinion if it deems that the intended reintroduction does not meet the criteria of necessity and proportionality.

Finally, the consultation phase following the issuing of opinions can now be completed through 'joint meetings' between the Member State intending to reintroduce border control and the other States, especially those directly affected by such measures. Thus, intervention by concerned parties will no longer only be carried out through informal consultations but will, in certain circumstances, take place in meetings which will allow each party to examine the necessity and proportionality of the intended measures.

In short, States which want to reinstate border control must provide details of the situation to the Commission and its partners and, if required, convince them of the necessity of such measures through joint meetings. This 'explanation process' carries three major consequences. Firstly, the new measures strongly restrict Member States' discretionary powers. Or, from a different angle, the Member States' 'safeguard clause' is subject to a powerful instance of 'communitisation'. Further, the amendment gives the Commission and the Member States the opportunity to appeal to the Court of Justice when, for instance, a state reintroduces border control without having convinced its partners of the necessity and proportionality.

Finally, in a strained political context in which the free movement of persons is exploited, especially for electoral ends, the adoption of a constraining legal framework safeguards the area of free movement.

Certainly, the amendments to existing Schengen Borders Code measures, by subordinating the sovereignty clause, constitute a major step in the Schengen integration process. The limitation of Member States' sovereignty has been eclipsed, however, by the debate over the creation of a new procedure for the reintroduction of border control at internal borders.

B. The new procedure of reintroduction of border control

This point has certainly attracted the most attention. A product of the 'political posturing' by Sarkozy and Berlusconi who turned the reintroduction of border control into a symbol of State authority within the Schengen zone, the outcome is far from what they were hoping for. Indeed, the new procedure is deeply European in its internal approach (1) and may never be implemented (2).

1. A national decision taken 'under a specific Union-level procedure'[14]

The new article 26 of the Schengen Borders Code provides for the possibility of temporary reintroduction of control at internal borders 'in exceptional circumstances where the overall functioning of the area without internal border control is put at risk'. This is a complex procedure and raises numerous legal issues.

It is worth reiterating that this measure preserves the Schengen cooperation approach. On the one hand, the new procedure does not detract from the possibility for a State to reintroduce border control on the original basis of a serious threat to that State's public policy.[15] On the other hand, the new procedure does not amend the principle by which the decision to reintroduce border control belongs to the Member States.

In its legislative proposal, the Commission had actually proposed to amend this measure by giving itself the power to decide to reintroduce border control. The proposal was both politically unacceptable for the Member States and difficult to uphold on a legal level. Indeed, article 72 TFEU (Treaty on the Functioning of the European Union) states that the responsibility for the maintenance of law and order and the safeguarding of internal security is incumbent upon Member States. If the reintroduction of border control is based on a threat to public policy, as proposed by the Commission, the decision to reintroduce control at internal borders falls upon the Member States.[16]

That said, the new regulations place this national prerogative within a 'specific Union-level procedure' which warrants clarification and discussion. Certainly, what is new here lies in the fact that the national decision to reinstate border control is adopted on the Council's recommendations, itself adopted on proposal from the European Commission.

It is therefore two EU institutions – the Council and the Commission (following the established procedure or requested by Member States) – that initiate the procedure. Although the recommendation does not constitute a legal obligation, it does assume a real political dimension. To begin with, the recommendation is adopted by the Council, which is to say, by peer review, and on proposal by the Commission. The effect of this organised procedure is to politically instruct the State in question to reintroduce border control. Furthermore, paragraph 3 of article 26 states that a Member State which does not implement the recommendation 'shall without delay inform the Commission in writing of its reasons'. The article adds that the Commission will then present a report to the European Parliament and Council assessing the reasons presented by the recalcitrant State and the consequences of the inaction on the common interests in the area without internal border control. Ultimately, the process is politically persuasive and fits entirely within a European institutional dimension.

The European dimension is strengthened yet again when one examines the conditions which may lead the Council to recommend the reintroduction of border control. Among the numerous conditions which can

form the basis of a recommendation, which we will come back to later in more detail, is the condition that the exceptional circumstances 'constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof'. It is therefore no longer the threat to national public policy that triggers the procedure, but the threat to public policy in the common area of free movement of persons.

Given this formulation, an observer could draw two radically opposed interpretations. The first leads one to consider that this condition forming the basis for the reintroduction of border control has no legal basis in the Treaty. Indeed, in application of article 72 TFEU[17], dispensation from the principle of free movement of persons can only be based on a threat to the public policy of a Member State.

The alternative interpretation is more progressive and rests upon the dynamic of European integration. It would be to consider that the European Union and the Member States have reached a new stage in the formation of a common area and have taken a step towards the creation of a 'European public policy'. We have already highlighted that 'national public policy', which forms the basis for the reintroduction of control at internal borders, and in consequence breaks up the European area of free movement, brings into question the definition of 'European public policy'.[18] The formulation given in article 26 of the Schengen Borders Code could be seen as the manifestation of this new approach. Thus, the reinstatement of border controls would be based, in exceptional circumstances, on this concept of public policy raised to Union level. Following this approach, much in the manner of European citizenship, 'European public policy' would not replace but be in addition to national public policy.

It is difficult to establish which of the two interpretations is the correct one. Natural optimism would lead us to lean toward the second. The Court of Justice alone can solve it, if ever it comes to that.

Whatever the case may be, and to return to the measures of the Schengen Borders Code, the national decision comes under a 'specific Union-level procedure'. This measure is certainly rather removed from the concerns that stirred Mr. Sarkozy and Mr. Berlusconi during the first stages of the Arab Spring, who saw in Schengen governance the opportunity to regain national power.

2. Conditions so strict as to render the application of the procedure illusive?

Any obscurity surrounding the criteria for implementing the new procedure was quickly dispersed by the European Council in June 2011. The Council clearly defined the framework which the new regulations must adhere to. The legislature did not deviate from directives from the European Council.

Article 26 of the Schengen Borders Code defines the conditions in which the Council can recommend the reintroduction of internal border controls to one or several Member States. Thus 'in exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control … and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced … for a period of up to six months'. It adds that the Council's recommendation comes 'as a last resort and as a measure to protect the common interests'.

Put more simply, the Council cannot act unless several elements are in play, notably: the exceptional circumstances putting the common area under threat; the serious and persistent deficiencies of a Member State's ability to control its borders; a serious threat to public policy in the common area; and finally, if no support measure recommended by the Commission during its evaluation of serious deficiencies, such as the deployment of European border guard teams or the proposal of a strategic plan has adequately remedied the identified serious threat. Furthermore, the new regulations oblige the Council to evaluate the necessity and proportionality of such 'recommended' measures on the basis of 'detailed information' provided by the various concerned parties. Finally, it should be highlighted that the Council recommendation can only be

taken on proposal from the Commission. In other words, the Commission has to be convinced that the conditions are met in order to present a proposal to the Council.

It is therefore rather difficult to imagine the context in which the Council would adopt a recommendation to reintroduce internal border control for one or more Member States. Indeed, only under exceptional circumstances could all the required conditions be combined.

Greece, which has shown some serious difficulty in managing its external border, could, for some, represent a situation in which all the exceptional circumstances are combined. It is, of course, impossible to prove such a claim. The assistance Greece receives is greatly improving its capacity to manage its external border. And more to the point, no procedure relative to a serious threat to public policy – national or European – was initiated. And finally, the lack of territorial continuity between Greece and other countries in the Schengen area[19] tempers any suggestion of a serious threat to public policy and internal security in the area without border control.

Ultimately, it is possible to conclude that the specific procedure defined in article 26 of the Schengen Borders Code may never be implemented. This is supported by the idea that, even before this procedure can begin, Member States would have had to instigate the original procedural process of reintroduction of border control based on a threat to national public policy.

The new procedure is similar to a nuclear weapon; the important thing is not to use it, but rather to possess it. The usefulness of such a 'weapon' can be called into question, however, in an area where free movement of persons is the principle. Unless the procedure is intended to 'sanction' Member States who do not fulfill their responsibility to manage external borders. But here, too, it is disproportionate in as much as EU law possesses strong corrective mechanisms such as financial and operational support, and where appropriate, procedures for failure to meet obligations.

The amendments to the Schengen Borders Code enforce the communitisation of the original procedure of reintroduction of internal border control, especially through the addition of criteria that increase Member States' responsibilities. Similarly, the new procedure of reintroduction of border control follows the same approach, but in a slightly less pronounced way. Although it is subject to a procedure that requires the intervention of both the Commission and Council, the decision to reintroduce border control remains national. Also, in the Commission's assessment of the serious deficiencies in external border control management, it can recommend that the concerned Member takes specific action, but it cannot recommend the closure of a border crossing point. Although this possibility is noted in point 8 of the preamble, it is not mentioned again in article 19a, which hints at Member States' reticence to recognise the Commission's authority in this respect.

Despite a few points of resistance related to the sovereign nature of the issue, the revision of the Schengen Borders Code has resulted in an important instance of communitisation. A similar quality also marked the second part of the Schengen governance package relating to the Schengen evaluation mechanism.

II. The Schengen evaluation mechanism

The evaluation mechanism is of crucial importance to Schengen functioning and has, for a long time, been an area reserved for a select insider group. This process emerged from the shadows during negotiations as a result of disagreements between the Council and the European Parliament about the legal basis for the proposed amendment. Sidelined by the Council[20] from the legal procedure following amendments to the legal basis, the European Parliament reacted strongly. It threatened to bring annulment proceedings against the future regulation amending the evaluation mechanism and, in violation of the principle of mutual sincere cooperation[21], to put a year-long freeze on discussions with the Council about five proposals relating to justice and internal affairs. Once the theatrics and gesticulations were behind them, the Council, in close collaboration with the European Parliament, adopted the amendment for the creation of a new Schengen

evaluation mechanism.[22] This defines the new means to evaluate and verify the application of the Schengen acquis (B) and in doing so, defines the roles of the Commission and Council (A).

A. A new division of powers

The evaluation mechanism of the Schengen *acquis* was created in 1998 within the framework of Schengen intergovernmental cooperation. As it gave pride of place to national authority, the measure had to be amended in order to increase its effectiveness and to secure it within the new legal and institutional framework brought about by the communitisation of 1999 and the entry into force of the Treaty of Lisbon. Aside from the improvements to assessment, to which we will return later, is the central question of the division of authority. In other words, which powers would be attributed to the European Commission?

Unsurprisingly, and in a way that has become habitual in the European legislative process, the Commission presented an ambitious proposal in which it also generously defined its role. The Commission considered that, as of 2010[23], it should be 'responsible for the application' of the evaluation mechanism, and have the power to make recommendations with regard to evaluated Member States.[24] This organisation of powers reflects the Commission's desire to re-establish its role and area of responsibility in the new institutional framework and within its role as guardian of the treaties.

Although the Schengen *acquis* has been well integrated into the European Union, the approach that prevails in terms of EU cooperation reflects intergovernmental tendencies even more greatly. Therefore, to take away the monitoring and control of the evaluation process from the Member States was not acceptable. The final text therefore re-establishes Schengen cooperation in a more 'balanced' way.

Firstly, it is both the Commission and the Member States that are jointly 'responsible for the implementation of the evaluation and monitoring mechanism'.[25] Therefore, the Commission is included in the new measure, but in a more progressive way. It is responsible for the planning and preparation of the evaluations, in the evaluation process itself and for the adoption of evaluation reports.

Following this, the power to recommend corrective measures addressing any deficiencies of evaluated Member States comes under the Council's jurisdiction. The justification of the preservation of power gave rise to the composition of one of, if not the, longest preamble points in the history of legislation.[26] The Council's maintenance of power is justified in three points. Firstly, through the specific reasoning of article 70 of the Treaty which allows for the establishment of exceptional peer review in place of assessment usually carried out by the Commission. Secondly, this specific procedure guarantees that the political process is upheld since any shortcomings must first be peer reviewed, which is to say, discussed at ministerial level. Finally, conferring the power to the Council also deals with the sensitive nature of the issue since the recommendations are 'often touching on national executive and enforcement powers'.

Essentially, evaluating the application of the Schengen *acquis* is a sensitive area for Member States which fully intend to keep control of a process which could implicate one or more of them with regard to their border activity. Whichever way one looks at it, the new procedure constitutes a step in the direction of 'communitisation' of the Schengen evaluation system compared with what was in place previously. The permanent Schengen evaluation commission, founded in 1998 and composed of Member State representatives, has been replaced by the Commission and the Council. What was an intergovernmental structure is now managed by EU institutions. Furthermore, the Commission's presence at every stage of the evaluation process, especially in the planning and preparation stages, will, in practice, reduce the role of the Member States in the process. Also, each stage of the evaluation process is subject to legal review by the Court of Justice and political review by the European Parliament and national parliaments. The mechanisms for cooperation that were developed outside the legal framework of the EU, effectively to sideline the Commission, Court and Parliament, have been brought around to the Community approach.

With the sensitive question of power distribution settled, next comes the simpler question of the definition of the new evaluation process and its governance.

B. The organisation of the evaluations

The amendment details the scope of the evaluations (1), the kind of evaluations that can be used (2) and the consequences of these evaluations (3).

1. The scope of the evaluations

In compliance with the amendment, an evaluation verifies the 'application' of the Schengen acquis and verifies that the 'necessary conditions of application' of Schengen regulations are met. This distinction relates, firstly, to the application of the rules by States that are members of the Schengen area and, secondly, to the evaluation of the conditions of application for candidate states. The text does state, however, that the evaluation for entry into the Schengen area is not applicable to Member States whose 'evaluation will already have been completed at the time of entry into force of this Regulation.' In other words, the evaluations already completed concerning Romania and Bulgaria are not affected.[27] Since the evaluation concerning Cyprus has already commenced based on the old procedure, the new one will not apply until January 2016.[28]

As stated in the regulation's preamble, the evaluation mechanism and monitoring 'should' cover all aspects of the Schengen *acquis*.[29] Although this concerns, first and foremost, the evaluation of external border control and the absence of internal border control, article 4 of the amendment makes it clear that the scope of evaluation is much broader. Evaluations may cover the effective and efficient application of accompanying measures in the areas of visa policy, the Schengen Information System, data protection, police cooperation and judicial cooperation in criminal matters. It is not only aspects related to border control *sensu stricto* that constitute the main focus of evaluations, but the combination of measures which allow and maintain the area of free movement of persons without internal border control. The breadth of scope justifies the use of article 70 of the Treaty as a legal basis.

The preamble then goes on to make a few important reminders. It emphasises first that the evaluation of the application of Schengen rules should encompass all relevant legislation and operational activities.[30] That is, the evaluation covers normative action relating to implementation as well as its operational counterpart. It then states that the evaluation should ensure that the application of the Schengen *acquis* is carried out with respect for fundamental principles and norms, which is to say, with respect for human rights. The preamble adds that, during the evaluation and monitoring process, 'particular attention to respect for fundamental rights in the application of the Schengen *acquis* should be paid'.[31]

The emphasis put on respect for human rights gives rise to a certain number of consequences. First and foremost it is the Commission's responsibility to guarantee that the framework of the evaluation, whether it takes the form of questionnaires or detailed inspection programmes, is committed to respect for fundamental rights. If this requirement is not satisfactorily fulfilled, it could constitute powerful means of leverage and pressure from the European Parliament. It is easy to imagine legal proceedings at the Court of Justice to annul an evaluation's questionnaire for failing to properly address fundamental rights.

2. Types of evaluation

Article 4 states that evaluations can be carried out through questionnaires or on-site visits which can be planned or – and this is what constitutes real progress in the area – unannounced.

Inspections are organised on a multiannual basis covering a five-year period as established by the Commission. The programme states the order in which Member States are to be evaluated each year and that each Member State must be evaluated once in the five-year period. The Commission also establishes annual evaluation programmes on the basis of risk analyses provided by Frontex.[32] These programmes include a provisional time-schedule for on-site visits, list the Member States to be evaluated and include proposals for the areas of evaluation with regard to the application of the Schengen *acquis* by a given Member State or group of states when an evaluation targets a specific area of the Schengen *acquis*. The annual evaluation programme also includes an un-communicated section which lists the unannounced on-site visits.

Although sending out questionnaires and organised on-site visits were already part of the framework of the old procedure, the possibility of sending out unannounced on-site visits surely must significantly reinforce the evaluation mechanism and, therefore, mutual trust between Member States. However, this can only be possible if the visit is, in fact, unannounced and its secrecy upheld. This condition must be met for all visits to internal borders which are not subject to any prior announcement. However, this supposition is not guaranteed for external border visits. The regulation states that the detailed programme of visits, as established by the Commission, is to be communicated to the State in question 'at least twenty four hours before'. This means that the intention to carry out a visit could be communicated several days before, thereby reducing the unannounced nature of the visit. Another measure in the regulation presents a possibility for leaks; national experts participating in unannounced visits are appointed at least 11 days before they begin.[33]

Aside from the risk of information leaks, unannounced on-site visits are clearly an important element of improving the evaluation mechanism. Indeed, this type of inspection replaces peer review, which was particularly ineffective because it was planned. Also, the role conferred to the Commission in creating the questionnaires, the management of visits and establishment of detailed programmes for on-site visits, guarantees the 'objectivity' of the evaluation.

Ultimately, the new measures guarantee a good balance between the different actors invited to participate in the whole evaluation process. The measure should also assure a 'high level of mutual trust' is maintained, without which Schengen cooperation cannot properly function.

3. The outcomes of evaluation

The evaluations, questionnaires or on-site visits conclude in evaluation reports drawn up by experts from the Member States and representatives of the Commission. These reports collate lists of deficiencies identified during the evaluation which are classed as 'compliant', 'compliant but improvement necessary' and 'non-compliant'.

The draft evaluation report is sent to the evaluated Member State which can provide comments which may be included and reflected in the draft evaluation report. These documents are then sent to Member States who can also submit comments. Following these exchanges, the Commission then adopts the evaluation report. The report may be accompanied by recommendations for remedial measures to address identified deficiencies, such as engaging Frontex assistance. Based on this, the Commission can then present a proposal to the Council for adoption, by qualified majority, of the recommendations.

The recommendations require the state in question to present, in variable timescales according to the seriousness of the situation, an action plan to address the identified deficiency or deficiencies. The Member State is also invited to report on the implementation of the action plan at regular intervals. In the case of persistent deficiencies, the Commission may organise further on-site visits. If the deficiencies continue and are deemed to constitute a threat to the overall functioning of the area without internal border control, the procedure to reintroduce border controls at internal borders can be instigated.

The new measures aim to provide the evaluation with tools that will adequately address the identified deficiencies and that can lead to – if necessary and as 'a last resort' – the initiation of the procedure to reintroduce control at internal borders. Although it has been mentioned that the likelihood of internal border control actually being reintroduced seems rather slim, the procedure is not lacking in measures to exert political pressure. Indeed, the Commission is required to keep the European Parliament and national parliaments informed at all stages and of evaluation results. Such institutions could well play an important political role in addressing the deficiencies.

The Schengen evaluation mechanism has been anticipated for several years now, and it is finally in position. It distributes the powers and responsibilities between the different European institutions in an area in which they were previously absent. It provides mechanisms to respond – one hopes in an efficient manner – to identified deficiencies in the application of the Schengen *acquis* at internal and external borders. The amendments are

crucial to assure a high level of mutual trust between Member States and therefore, for the continuation of free movement of persons in the Schengen area.

Conclusion

It took two years for the Schengen governance package to be adopted. The highly politicised negotiations were certainly no easy process. From the very beginning, the European Commission presented legislative proposals which, since they conferred greater power to the Community executive, antagonised Member States. Then, the Council's decision to amend the legal basis and exclude the European Parliament from the adoption procedure of the Schengen evaluation mechanism caused further political tension. Upon learning of the amendment, the Parliament reacted fiercely and tried, for several weeks, to re-establish its role at whatever cost. It attempted to link the text relating to the evaluation mechanism with the Schengen Borders Code using a 'bridging clause'. This would have enabled a linking-up of the two texts and meant that any amendment in one would bring about the same change in the other and, in doing so, would have enabled the European Parliament to play a part in decisions relating to the two texts. Despite repeated effort, Parliament managed only to assure itself the right to be informed.[34] Member States, for their part, were highly vigilant in order to protect their rights as far as possible.

Despite a particularly heated political climate in which institutions were obliged to concede, if not surrender, certain powers, negotiations came to a rather balanced result. Member States made sure their rights were respected in the areas of public policy, the Commission gained a greater role in all areas, including the evaluation process, a role that is very likely to increase in practice, and the European Parliament became an actor in its own right in Schengen governance. Ultimately, the outcome of the Schengen governance package is a far cry from the political histrionics that characterised its beginnings in April 2011. It reflects an instance of European integration in which the confrontations between the Community method and intergovernmental tendencies have given way to a more subtle balance.

Yves Pascouau is a Senior Policy Analyst and Head of the European Migration and Diversity Programme at the European Policy Centre.

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Endnotes

1 The Italian President, Silvio Berlusconi, referred to the situation as a 'human tsunami'.

2 The European Council mentions specifically that "a mechanism should be introduced in order to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons. It should comprise a series of measures to be applied in a gradual, differentiated and coordinated manner in order to assist a Member State facing heavy pressure at the external borders. These could include inspection visits and technical and financial support, as well as assistance, coordination and intervention from Frontex. As a very last resort, in the framework of this mechanism, a safeguard clause could be introduced to allow the exceptional reintroduction of internal border controls in a truly critical situation where a Member State is no longer able to comply with its obligations under the Schengen rules. Such a measure would be taken on the basis of specified objective criteria and a common assessment, for a strictly limited scope and period of time, taking into account the need to be able to react in urgent cases. This will not affect the rights of persons entitled to freedom of movement under the Treaties." European Council 23 & 24 June 2011, doc. EUCO 23/1/11.

3 Communication from the Commission to the European Parliament, Council, the European Economic and Social Committee and the Committee of the Regions 'Schengen Governance - strengthening the area without internal border controls', COM(2011) 561 final, 16 September 2011.

4 Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, COM(2011) 559 final, 16 September 2011.

5 Proposal of regulation from the European Parliament and Council to amend the regulation (EC) n° 562/2006 in order to establish the common criteria relative to the temporary reintroduction of internal border controls under exceptional circumstances, COM(2011) 560 final, 16 September 2011.

6 According to the protocol relating to national parliaments within the European Union, annexed to the Treaty of Lisbon, national parliaments may issue reasoned opinions, also called warning mechanisms, if they believe the principle of subsidiarity has not been observed in a proposed legislative act.

7 The European Parliament indeed reacted fiercely against the Justice and Home Affairs Council's decision in June 2012, to amend, by unanimous action, the legal basis of the Schengen evaluation mechanism. This amendment effectively excluded the European Parliament from the legislative procedure. In a strongly worded communication to Council, the European Parliament even threatened to submit an appeal before the Court of Justice.

8 Regulation (EU) N° 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) N° 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 295, 6.11.2011.

9 Council Regulation (EU) N° 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013

10 Regulation (EC) n° 562/2006 of the European Council and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ, L 105/1, 13 April 2006.

11 Regulation (EU) n° 1051/2013 of the European Parliament and the Council of 22nd October 2013 amending the regulation (EC) n° 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 295/1 6 November 2013.

12 Regarding this point see the Commission's biannual reports on the functioning of the Schengen area.

13 Point 6 of the preamble of regulation (EU) n° 1051/2013.

14 See point 9 of preamble.

15 As indicated in article 26, paragraph 5, "This Article shall be without prejudice to measures that may be adopted by the Member States in the event of a serious threat to public policy or internal security under Articles 23, 24 and 25."

16 Without going into the hypothetical decision that would implicate States associated with the Schengen area which have not taken part in the vote.

17 "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with4regard to the maintenance of law and order and the safeguarding of internal security."

18 Y. Pascouau, (2012) Schengen and solidarity: the fragile balance between mutual trust and mistrust, Policy Paper 55, *Notre Europe/European Policy Centre*, p. 19.

19 Until the inclusion of Romania and Bulgaria in the Schengen area.

20 The proposal to amend the Schengen evaluation was initially based on a legal foundation involving a 'co-decision' procedure (art. 77 TFEU). In June 2012, under advice from its legal services, the Council unanimously decided to amend the legal basis of the text (art. 70 TFEU) reducing the European Parliament's role to that of simple observer.

21 Article 13, paragraph 2 of the TEU states that, 'each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.'

22 Council Regulation (EU) n° 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 06 November 2013.

23 Proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis*, COM(2010) 624 final, 16 November 2010.

24 Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis*, COM(2011) 559 final, 16 November 2010.

25 Article 23 of regulation n° 1053/2013.
26 Point 11 of the preamble of regulation n° 1053/2013.
27 Point 28 of the preamble of regulation n° 1053/2013.
28 Point 27 of the preamble of regulation n° 1053/2013.
29 Point 13 of the preamble of regulation n° 1053/2013.
30 Point 15 of the preamble of regulation n° 1053/2013.
31 Point 14 of the preamble of regulation n° 1053/2013.
32 Within the framework of its responsibilities, Frontex publishes an annual report on migration flow over the external borders of the European Union.
33 Article 10, paragraph 2, 'In the case of unannounced on-site visits, the Commission shall, no later than two weeks before the on-site visit is scheduled to commence, invite Member States to designate experts. Member States shall designate experts within 72 hours of receiving that invitation.'
34 The new article 37a of the Schengen Borders Code states only that, "the European Parliament shall be immediately and fully informed of any proposal to amend or to replace the rules laid down in Council Regulation (EU) n° 1053/2013."

NOTES

European Policy Centre
Résidence Palace
155 rue de la Loi, 1040 Brussels,
Belgium
Tel: +32 (0)2 231 03 40
Fax: +32 (0)2 231 07 04
email: info@epc.eu
twitter: @epc_eu

www.epc.eu

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Schengen: travel is free

The abolition of borders between different European states was undoubtedly a revolutionary process, not only for citizens but also for trade and consequently the economy. But what now seems a matter of fact has had a thirty-year history, specific access requirements and a clear idea of freedom and security.

- by **Cecilia Toso** / ***Oxygen 24 / 24.10.2014***

 *Interview with **Yves Pascouau***
Director of Migration and Policy Mobility of the European Policy Centre

What has become a habit today, moving back and forth between the territories of different European countries without having to worry about border controls, is actually a revolutionary milestone. But, as often happens, we have forgotten what life used to be like for travelers, if we exclude the nostalgic moments when we think back to the long lines at the border, or when we set foot in one of the European countries that were unwilling or could not join the Schengen area. And above all, we know very little about how this important achievement of free movement came about. Therefore, we have spoken with one of the people who is responsible daily for our mobility in Europe, Yves Pascouau, the Director of Migration and Policy Mobility of the European Policy Centre, an independent think tank specialized in integration.

How was Schengen converted from an agreement by 5 States to an essential part of European Union law?

The story of the Schengen Area started in 1984 in France and Germany. At that time, both States were performing checks at their common land border, creating major traffic problems. The existence of long queues of lorries, buses, and cars was a double failure: the proclaimed freedom of movement was not ensured in Europe and internal border checks had a strong economic impact in delaying goods and products from being rapidly delivered in the Common Market. In order to overcome this situation, in 1984, France and Germany decided to sign a bilateral agreement establishing the progressive suppression of border checks between them. Belgium, Luxembourg, and the Netherlands, already engaged in a similar type of cooperation, asked to join the project. It started a few months later with the 1985 Schengen Agreement which was supplemented five years later with the Schengen Implementing Convention. Under the Schengen Agreement, signed on June 14, 1985, five countries committed themselves to gradually abolishing the borders between them, accompanied by more effective surveillance of their external borders. It established: short-term measures simplifying internal border checks and coordinating the fight against drug trafficking and crime; and long-term measures such as the harmonization of laws and rules on drug and arms trafficking, police cooperation, and visa policies.

The Convention implementing the Schengen Agreement, signed on June 19, 1990, set out how the abolition of internal border controls would be applied, as well as a series of necessary accompanying measures. It aimed to strengthen external border checks, define procedures for issuing uniform visas, establish a Schengen Information System, and take action against drug trafficking. The implementation of the Schengen Agreements started in 1995 with the abolition of borders controls between the five founding States and also Spain and Portugal. From that point onwards, the Schengen Area has constantly expanded to new States. While developed as an intergovernmental cooperation, the Schengen Acquis (the 1985 Agreement, the 1990 Implementing convention and decisions taken by the Schengen executive Committee) was integrated into the legal framework of the EU by the 1999 Treaty of Amsterdam.

What requirements do States have to meet in order to join the Schengen Area?

Joining the Schengen Area is a technical and political decision. From a technical point of view, applicant countries must fulfil a list of pre-conditions, such as their readiness and capacity: to take responsibility for controlling the external borders on behalf of the other Schengen countries and the issuing of uniform Schengen visas; to cooperate efficiently with law enforcement agencies in other Schengen countries, in order to maintain a high level of security once border controls between Schengen countries are abolished; to apply the Schengen Acquis including *inter alia* control of land, sea, and air borders (airports); issuing of visas; police cooperation, protection of personal data; to connect to, and use the Schengen Information System. The European Commission evaluates whether the applicant State fulfils the requirements. If so, the European Commission issues a report stating that the conditions for joining the Schengen Area are technically met. The full participation in the Schengen Area is made conditional upon a political decision taking the form of a unanimous decision made by the Council of Ministers of the European Union. This double mechanism explains why Romania and Bulgaria remain outside the Schengen Area. Although these States have satisfied the technical requirements, there is still no unanimity among the States to let them in.

Does any European Union Member countries have not adhered to it yet and why? Is the free movement of their citizens in the Area restricted accordingly?

While some States are in the process of becoming a Member of the Schengen Area, the United Kingdom and Ireland choose not to take part in this project. This decision does not affect the rights of freedom of movement their citizens enjoy under EU law.

More concretely, UK and Irish citizens have the right to enter and reside in another Member State for up to three months or for work, family, or study purposes for a longer period. By remaining outside the Schengen Area, United Kingdom and Ireland continue to perform border checks at their external borders. Conversely, people flying from Ireland or the United Kingdom to the Schengen Area are subject to border checks at Schengen Area entry points.

It is also commonly perceived that the abolition of controls on persons, whatever their nationality, when crossing internal borders represents a danger for the security of the European Union. Do you share this concern?

It is a widespread idea that the Schengen Area brings 'security deficit'. It should be underlined that from the very beginning, the Schengen cooperation (the 1985 Agreement and the 1990 Convention) has devoted several provisions to police and justice cooperation in a number of fields related *inter alia* to combating crime, particularly illicit trafficking in narcotic drugs and arms, the unauthorized entry and residence of persons, customs and tax fraud, and smuggling. Cooperation in the security field has constantly evolved over the years. Hence, and since the opening of internal border checks, the Schengen zone has not been transformed into an insecure Area to live and travel in.

In what situations is a Member country authorised to reintroduce internal border controls?

Member countries are allowed to reintroduce internal border checks for one reason; where there is a serious threat to public policy or internal security. This can happen in three specific situations: immediate action (Utoya massacre), planned situation (sports events) or where deficiencies in controlling external borders constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof. In all of these cases, reintroduction of internal border checks has to follow a specific procedure and should be temporary.

The European Policy Centre continuously works on a range of themes, also covering mobility and immigration. In order to clarify for States their obligations on these issues stemming from their membership in the European Union. Last year you and some other researchers launched an interesting project.

The European Migration Law project has been developed alongside my position at the European Policy Center. Gathering a group of lawyers and academics, the project is based on one strong belief, rights created by EU immigration and asylum law will

produce their full effect if professionals and practitioners know those rules and use them. But professionals and practitioners (judges, lawyers, trade unions, social workers, academics, researchers, NGOs, governments, international organizations …) may struggle to keep on top of constantly evolving EU rules and their interpretation by the Court of justice of the EU. EuropeanMigrationLaw.eu has been developed to respond to their needs. It is a useful tool that offers direct, simple, and updated information on legal and jurisprudential developments in this particular field. In addition, the website offers users the possibility of subscribing to regular updates sent by e-mail informing them about relevant news (texts, jurisprudence, reports, press releases, etc.) adopted at EU level.

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Commentary

22 September 2015

The refugee crisis: Schengen's slippery slope

Andreia Ghimis

While the European Union (EU) is facing one of the most divisive crises in its history, the pressure to take immediate action is enormous. Yet, negotiations in the Council have shown that the prospect of a common European response to the manifold effects and underlying reasons of the refugee crisis still belongs to the distant future. Only a few days after Commission President Jean-Claude Juncker delivered his State of the Union address – avowing that Schengen will not be abolished under his term – national decisions to reintroduce temporary border controls are multiplying. Germany, one of the most ardent defenders of a borderless Union, decided to temporarily reinstate border checks. Austria and Slovenia came next. Slovakia, the Czech Republic, Poland, the Netherlands and France might follow.

In the year that the EU celebrated Schengen's 30th anniversary, the EU has to deal with Schengen's most severe crisis so far. The European Council President Donald Tusk convened an extraordinary summit to discuss, among other issues, the increasing fragmentation of the Schengen area. To better understand what could be the impact of this summit, several questions must be addressed concerning the temporary introduction of border controls.

Are they legal?

A priori, yes. The Commission has been fairly quick in stating that the choices made by Berlin, Vienna and Ljubljana were, *prima facie*, in line with EU law. The Schengen borders code includes a procedure (Article 25) allowing a state facing serious threats to public policy or internal security to immediately reintroduce controls. Initially, a state can do this for a period of up to ten days. If the threats persist, the exception can be extended for several renewable periods of up to 20 days (for a maximum period of two months).

The code obliges the member state that introduces the controls to evaluate their "necessity" and "proportionality". Concerning the "proportionality" of the measure, they must take into account (1) the likely impact of the threats to the domestic public policy and internal security and (2) the likely impact of border controls on the EU citizens' freedom of movement. The "necessity" of the controls refers to them being an adequate remedy to the identified threat. In addition, the Commission must keep the European Parliament and Council informed and make sure that the measures are "necessary" and "proportionate".

Despite these clarifications, the two concepts remain vague and are open to interpretation. Nevertheless, in the current situation, the unparalleled numbers of asylum seekers arriving in Germany – over 63,000 in Munich and Hillenbrand since 31 August – and the death of the 71 refugees in an abandoned truck in Austria can justify the temporary introduction of border controls in order to maintain the public order in these countries. Slovenia, however, took this decision in anticipation of the asylum seekers' arrivals. Therefore, this measure might require further investigation from the Commission.

Are they the 'right' thing to do?

This question cannot be answered with a simple yes or no. Clearly, countries such as Germany were not only logistically, but also politically overwhelmed due to the increasing intensity of the domestic debate. Berlin was in need of some breathing space to absorb the masses of people asking for protection on its territory. German officials had not foreseen that asylum seekers would be arriving so quickly in such numbers. In this context, Chancellor Merkel was left with little choice but to introduce controls. However, this does not mean Germany's borders are closed; it will continue receiving asylum applications.

Still, there is more to these decisions than meets the eye. It is therefore worth decrypting the political message(s) they are likely to hide.

The timing of the German choice to reinstall border controls – just before the extraordinary meeting of the Council on 14 September – might be a way to try and coerce solidarity among EU states. The Commission also hints in the same direction. When DG Migration and Home Affairs publishes a statement related to the validation of the temporary border controls, it underlines the "pressing need to agree on and quickly implement the measures proposed [on 9 September]", which are focused on a more equitable share of responsibility among EU states.

Undeniably, there is no faster way to show that this problem also concerns countries currently 'protected' from the influxes of asylum seekers. The almost instantaneous consequences of one country's unilateral decision – see the change of refugees' route via Croatia after Hungary sealed its border – show the obvious interconnection within the EU. However, political leaders must resist the temptation of fragmenting the Schengen area to convince their partners of how European this crisis is. In the end, exposing the weaknesses of a cherished European accomplishment can, in times of high uncertainty, be very dangerous. It undermines Schengen's credibility, even more so if this comes from a driving force behind European integration, like Germany.

Another motivation can lay behind the decision to reinstall border checks, notably from the side of Central and Eastern European states, which are not facing significant influxes of asylum seekers: satisfying public opinion. However – be it in the context of key domestic political events, such as this year's Polish and next year's Slovak parliamentary elections, or not – this can also backfire. Whereas public opinion in these countries is strongly divided on hosting asylum seekers, most citizens are in favour of maintaining the freedom to move, especially the ones who, as citizens of new EU states, have seen their dream of free movement come true not so long ago. In addition, the perspective of slowing down economic growth can also impact public opinion. In this sense, the disruption of the economic activity by border controls must not be underestimated.

Are they the beginning of the end?

Probably not. Despite its frailty, Schengen remains attractive not only for those inside, but also for those who have been knocking on its doors for a while now: Romania and Bulgaria. The Romanian Prime Minister, Victor Ponta, even indicated conditioning Romania's generosity in terms of asylum seekers' relocation upon its accession to the Schengen area.

Yet, the Schengen area is increasingly fragmented. The outcomes of the extraordinary European Council can significantly influence the current unmatched 'chemical reaction' damaging the credibility of the Schengen commitments. Whereas an agreement on the relocation of 120,000 asylum seekers – from Italy, Greece, Hungary, but also Croatia should be included on this list – will not solve Europe's refugee crisis, it has the potential of reducing the pressure on Schengen, enabling a swift return to a normal borderless Europe. However, if the EU leaders do not find a compromise on this issue, the legal time limits of these border checks will be up without any improvement of the situation on the ground. In this case, with the intense political pressure that exists in Europe, the Commission might show flexibility with respect to EU states' legal obligations. This could subsequently lead to a prolongation of the temporary border checks, creating even more damage to Schengen's trustworthiness.

The lesson to be learned from what we can now call a "Schengen crisis" is that mutual trust amongst EU states and between EU states and EU institutions is at a worryingly low level. At a time when Europe is accumulating crises without truly solving old ones (Ukraine/Russia, Greek crisis), trust is a very precious currency. In order to restore it, the EU should take advantage of a possible calmer winter to enhance the level of preparedness for a similar scenario in the future. Otherwise, the current situation will only be the first episode of a dangerous saga for the European project.

Andreia Ghimis is a Junior Policy Analyst at the European Policy Centre (EPC).

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KING
Knowledge for INtegration Governance

Evidence on migrants' integration in Europe

edited by *Guia Gilardoni, Marina D'Odorico and Daniela Carrillo*

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4. LOCAL INTEGRATION POLICIES IN THREE DIFFERENT DIMENSIONS

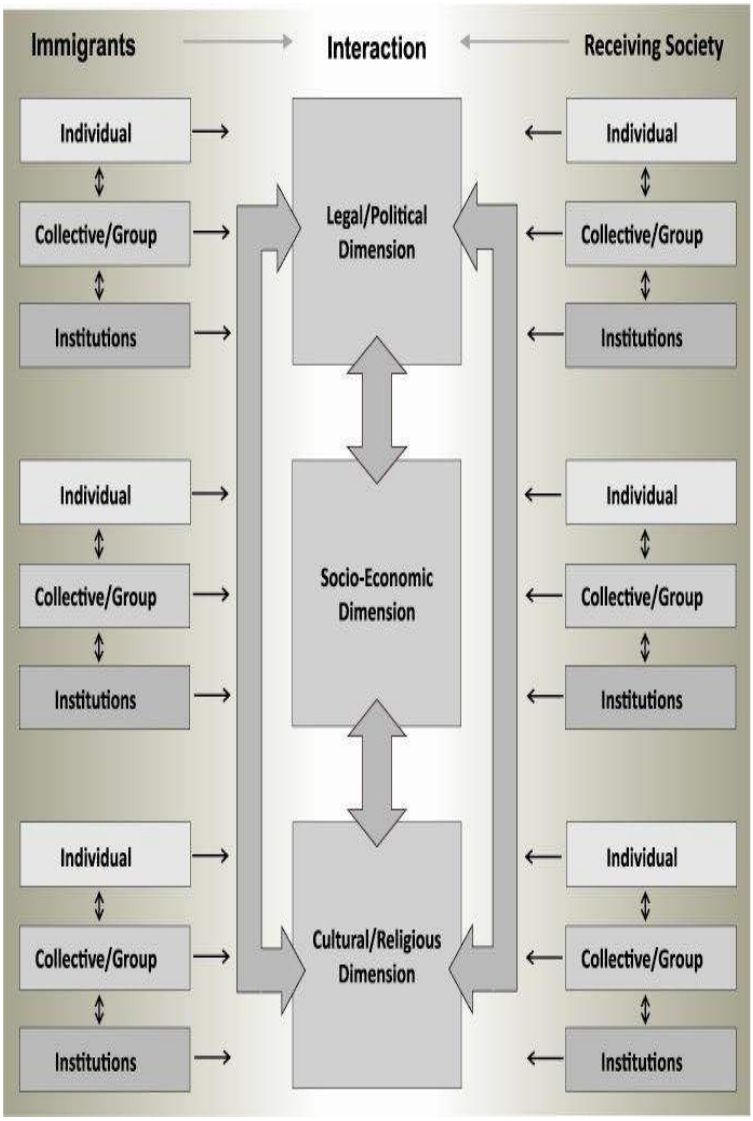
This chapter will focus on **what has been done** at different levels of governance to integrate migrants into the receiving society.

In some cases, a state or a city may choose to ignore migrants' presence and therefore avoid any special responsibility for them. This non-policy response constitutes a choice, and as such should be understood as a policy in itself. In other cases, new policies may be formulated to cater for certain immigrants' needs but under specific conditions due to the alleged temporary nature of their stay. Under this "guest-worker approach", immigrants' otherness may be "tolerated" and even encouraged though their (residence) rights may be curtailed in the long run. Finally, if migrants are perceived as permanent residents, inclusion may be the main response.

In order to have a comprehensive picture of how integration is supported it would be important to go beyond the mere integration policy and also consider other policies such as those in the field of education, housing, health and employment. Although we acknowledge this here we limit our analysis to integration policies implemented at European, national and local level. Specifically, we analysed these policies by dividing them into the three dimensions proposed by Penninx in his heuristic model: legal and political, socio-economic and cultural and religious (Penninx *et al.*, 2014a).

As shown in Figure 5 below, there are two main actors who interact with one another: migrants and the receiving societies. Then, as depicted in the middle, integration can be divided into three dimensions that are constantly influencing each other: the legal-political dimension, the socio-economic dimension and the cultural and religious dimension. Finally there are three levels of analysis: the *individual level*, which refers directly to migrants and natives, the *collective level*, which refers to organisations of migrants (e.g. migrant associations), organizations of the receiving society (e.g. trade unions, churches) and organizations of both of them; and finally the *institutional level*.

Fig. 5 -Penninx's heuristic model for the study of integration processes



The nature of the interaction between the two constituent populations (**receiving societies and migrants**) determines the direction and the temporal outcomes of the integration process. However, **these two 'partners' are fundamentally unequal in terms of power and resources**. Since integration policies are defined politically by (the majorities within) the receiving society, there is an inherent danger of representing the expectations and demands of this society, or dominant parts of it, rather than the possibility that these policies are defined on the basis of participation, negotiation and agreement with immigrant groups.

The study of the **legal-political dimension** of integration has been developed extensively, both the part that focuses on the legal status attributed by admission policies and its consequences for integration (including the absence of an official legal status) and the part on (non) participation of immigrants in politics in the broadest sense, a branch of studies that often goes under the name of citizenship studies.

The analysis of the **socio-economic dimension** regards the (development of the) position of immigrants in key fields of societal stratification: work and income, education, housing and health. If the benchmark is the native/non-immigrant, such studies often go under equality studies; if they are longitudinal within the group, they go under the label of (intergenerational) social mobility studies.

Concerning the **cultural-religious dimension**: while the study of the cultural and religious adaptation of individual newcomers has been central, nowadays the perception and acceptance of newcomers by natives has become increasingly important. Furthermore, immigrants' culture and religion are studied as collective phenomena, as is often dictated by the political and societal organization of cultural and religious diversity and its recognition in the society of settlement (equity studies).

Using these three dimensions to analyse integration is a valuable way for understanding the process and, therefore, for providing recommendations on how to govern the phenomenon. Meanwhile, **recognising the interconnections among the dimensions is crucial in order to implement strategies supporting integration. These three dimensions are different as far as their direct objectives are concerned, but they are interconnected and should always be considered as such.** As a matter of fact, evidence sheds light on the negative, if inadvertent, impacts of one domain on the others due to misplaced policies or attitudes. On the other hand, evidence highlights good practices in promoting efficient migration and integration policies that can have results in more than one dimension at the same time.

The socio-economic dimension of integration may be strongly influenced by the legal-political one, particularly if access to and rights in these critical fields are limited or even denied. Potentially, the outcomes of immigrant integration in the socio-economic dimension may also be influenced by the ethnic/cultural/religious one, for example, where negative perceptions relating to certain groups of migrants lead to prejudice and discrimination by the receiving society (individuals, organisations or institutions). That brings – even if access is legally guaranteed – fewer opportunities and lower scores for immigrants in the so-called hard domains of employment, education, housing and health care.

4.1 Integration policy in the legal-political dimension

The legal-political dimension refers to residence and political rights and statuses of immigrants. The basic question here is whether, and to what degree, immigrants are regarded as fully-fledged members of the political community. The position of an immigrant or the `degree of integration' has two extreme poles: on the one hand there is the position of the illegal foreign resident who is not a part of society in the legal-political sense (but is part of it in the other two dimensions, i.e. socio-economic and cultural-religious dimension). At the other extreme there is the position of an immigrant who is (or has become) a national citizen. In between there is an enormous variation, which has increased in recent decades due to attempts of European states to `regulate' international migration and integration, and as a consequence of new statuses and rights of the European Union migration regimes (among others EU-nationals *versus* Third Country Nationals).

The competence over the legal and political dimension of integration lies predominantly at the national level, particularly when it comes to the legal status and formal political participation through voting. This means that in these respects conditions are set for local policies. Local authorities have to deal with these conditions, by using their discretionary power in implementing national policies and/or by promoting specific initiatives to facilitate immigrants' access to secure a legal status.

Although main competence over the legal and political dimension of integration lies at the national level, **local authorities enjoy a considerable margin of manoeuvre in implementing national policies and/or can promote specific initiatives to facilitate migrants' access to secure legal status** (e.g., a dedicated office

providing information on the naturalisation procedure) **or programmes that promote migrants' political participation** (e.g., consultative committees). The analysis also shows how cities can play a relevant role in matters which are primarily of a national competence, i.e. access to legal status and citizenship on the one hand and immigrants' political inclusion on the other. The literature review shows a highly varied picture, with different kinds of policies unfolding within different frames of immigrants' legal and political integration (Caponio, 2014a).

4.1.1 Access to legal status and citizenship: the role of cities

Migration policies are implemented at national level. Governments decide who can enjoy the right to enter the territory and permission to stay. However, **the irregular presence of immigrants is a crucial issue for each level of governance**. Although irregular migrants are not considered a target of policies because they are not supposed to exist, their presence is a fact. Cities cannot pretend that they do not have this category of migrants but their response varies widely depending on existing national laws and local rules.

For instance, on the one hand, in **Spain**, through the institution of the *padron municipal*, which is an administrative register where immigrants who live in a city can register with their foreign passport and therefore without necessarily having a regular residence permit, the local administration can play an active role in favouring (or discouraging) undocumented immigrants' access to legal status. In fact, since 2003, Spanish immigration law assigns municipalities the task of producing the so called "social rooting" (arraigo social) report, which is a fundamental requirement for seeking regularisation. On the other hand, in **France** the municipalities have no formal competence on matters of immigrants' legal status. At a local level the Prefect (Préfet), as representative of the Ministry of the Interior and therefore of the national government, enjoys a considerable amount of discretion in establishing who cannot be expelled and has to be regularised on the basis of humanitarian considerations (Caponio, 2014a)**.**

➔ **Irregular migration should be considered as a reality which should not only be dealt with by the local level, specifically with regard to integration policies.**

Legislative amendments and proposals in several EU Member States have made citizenship harder to obtain. A general shift to more demanding integration conditions has taken place, resulting in the exclusion of large numbers of migrants from obtaining citizenship, notably in Austria, Denmark and the Netherlands. Again cities can play a relevant role by promoting different kind of actions aimed at fostering access to citizenship such as language courses, information to would-be citizens and/or specific preparation to pass citizenship tests or examinations. The naturalisation campaigns carried out in some German cities, such as **Berlin** or **Hamburg** are a case in point. In Hamburg, volunteer facilitators from various different communities have been trained to provide advice about citizenship procedures to those who are hesitant or need guidance because of linguistic barriers, fear of bureaucratic processes or lack of knowledge of the benefits of naturalisation.

To address this:

➔ **Citizenship should be regarded as an important integration tool and should therefore be facilitated at the national level.**

➔ **States should provide more transparency and clarity in administrative procedures for accessing citizenship.**

➔ **Governments should promote actions aimed at fostering access to citizenship at the local level (e.g. advice on citizenship procedures, naturalization campaigns).**

4.1.2 Political participation of migrants: direct or indirect participation

The extent to which migrants participate politically relies upon both the political opportunity structure and several individual variables such as political ideas and values; individual characteristics – level of education, linguistic skills, gender; previous involvement in politics in the country of origin; level of social capital; reasons for presence in the territory (permanent or temporary migration); and sense of belonging to the destination country.

The political participation of migrants may be considered as a collective or as an individual prerogative. The experience of **Turin** highlights that, after the failure of the *Consultative committ*ee in the mid-2000s, immigrants political participation was redefined as an individual right, implying the inclusion of immigrants and their participation in general elections at the district level, rather than special rights and groups' representation. Such an approach appears to be consistent with the support of the Deputy Mayor on Integration Affairs to the initiatives aimed at leading to a revision of the nationality law and, more generally, with the discourse on second generations as "citizens of tomorrow" (Caponio, 2014c).

Migrant participation in the political arena can be classified as direct or indirect political participation. In order to analyse these two forms of participation, it is important to consider whether or not some rights, i.e. voting rights, and opportunities, i.e. consultative bodies, are offered by national or local administration.

4.1.2.1 The right to vote

With regard to direct political participation, in some countries migrants have the right to vote in local elections after three years of residence (**Sweden**) while in others, such as **Italy**, they enjoy very limited political opportunities and non-EU residents cannot vote in local elections. **The right to vote in national elections is strictly linked to the naturalisation process: this poses some problems for long-term residents who are excluded from representation despite their role in the society and being subject to the laws of the land.**

➔ **The political participation of immigrants through the right to vote deserves specific attention in each context in order to understand its meaning for immigrants themselves and its potentialities.**

From the case studies of cities analysed within KING Project, only two cities, **Turku** and **Amsterdam** grant full active and passive voting rights to immigrants. But interestingly, "respondents in Turku and Amsterdam seem to take this participation for granted". It looks as if such individual participation is not seen as representing the immigrant community and thus as less relevant than other forms of collective representation, such as immigrant organisations. **The Turku case, however, has recently shown that a significant representation of Councillors with immigrant background may lead to specific policy initiatives. In the Amsterdam case, this also happened in the past** (Penninx, 2014).

The right to vote in local elections does not mean that political participation of migrants will automatically follow. Some cities, recognizing this limitation, promote a series of initiatives in order to foster an actual engagement of migrants in the receiving country, for example through training courses in voting education, information sessions on local politics, and information campaigns on electoral rights. A case in point is **Dublin**. Caponio states that:

> "in **Ireland**, legally resident non-EU citizens can vote in local elections, yet participation had historically been very low: in the 2007 election, only 8,400 out of a potential of 75,000 migrants registered to vote. Barriers identified included the very young profile age of foreign potential voters and a lack of targeted information on how to register and why they should vote. In view of the 2009 local elections in Dublin, the Migrant Voters Campaign Project was launched with the aim of raising awareness of migrants' voting right. In particular, the city organised one day voting

education training for 74 community leaders who were then involved in delivering voters' information sessions within their respective communities and in other communities across the city. Posters advertising the project were translated into 25 languages as part of the registration campaign. To carry out the project, immigrant communities and their associations were involved since the very beginning: a steering committee of 16 immigrants from 12 countries representing ethnic, religious, cultural groups and business interests was established" (Caponio, 2014a).

➔ **States should encourage the political participation of migrants with voting rights by providing information in appropriate forms and through many platforms on local politics and on voting systems.**

➔ **The positive effect of allowing voting rights for third country nationals should be further explored by Member States.**

4.1.2.2 Consultative committees: role and limits

With regard to indirect political inclusion, the eight case studies of the King Project found a common tendency among all cities: all of them have invested in consultative committees, platforms or councils that bring together stakeholders in integration policies. Still there is a great variety in their composition and to a certain extent in their function. Indeed, while the access to the right to vote is generally restricted, the access to less formal spheres is more open.

First of all, there are platforms that bring together immigrants (mostly coming from immigrant organisations) when they are the target group of a particular policy. They are asked to function as a communication, mobilisation and evaluation agency between target groups and policymakers. **Milan** once had its *Migrants' Coordination* (Coordinamento Migranti) (1985) and **Turin** had its *Municipal Consultative Committee* (1995). **Stuttgart** used to have an International Council whose members were chosen by Stuttgarters with an immigrant background, but in the present Council, members are appointed on the basis of their expertise in migration and integration issues. **Amsterdam** still has an *Advisory Council*, although its status has declined in the course of recent years. The case studies suggest that overall such forms of representation – as a kind of alternative political representation – is rather vulnerable and does not have a long life.

Secondly, there are platforms that primarily gather direct stakeholders in integration policies and have a primary focus on mobilisation, policy instrumentation and implementation. Immigrant organisations may constitute an important part of the members, but then as stakeholders and participants in policies rather than as representatives of a group. The broad 58-member *Immigration Council* of **Barcelona** and the current *International Council* in **Stuttgart,** are good examples. Membership is based on the expectation that members will contribute to policy making or implementation; or the expectation that members scrutinise the administration's policies and practices" (Penninx *et al.*, 2014b).

Another example of an initiative that may favour an active engagement of migrants in issues of public interest is **participatory planning**, an approach aimed at including migrants in the decision making process. Nonetheless, the relation between participation and empowerment of citizens is not univocal: **in some cases participation has a rhetorical meaning or even has a conservative function in the maintenance of the status quo. Sometimes it is simply an instrumental tool of legitimising decisions previously taken. The following cases show effective and non-effective examples of the participatory planning approach.**

In the participatory planning initiative for the Station Area in **Reggio Emilia**, the vast majority of citizens who got involved turned out to be natives, in an area where the majority of residents are of foreign origin. But there are also successful examples of participatory planning. However, when given time participatory planning has been a success in **Berlin**. *The Quartiermanagement (QM) programme* was set up by the Senate in

1999 in 15 neighbourhoods, most of them with a high migrant population. A dedicated 'resident fund', a form of participative budgeting, led to previously unseen levels of local citizen involvement. With a particular focus on people with a migrant background, this participative policy enabled the city to have a better understanding of the needs and priorities of migrant communities. By involving migrant residents' decisions to shape the use of 'resident funds' the feeling of shared ownership of local policies increased. Also, developing effective structures which allow migrants to input their views on common community activities such as festivals and events encourages wide ranging participation as was the case with the Peoples of the World Festival in **Bilbao** (Humphris, 2014).

Consultative bodies are established by cities in order to give migrants or migrant communities a venue for their representation and to represent them in the political sphere. Nonetheless, their efficacy varies greatly and in some cases, they are merely an attempt to compensate for the lack of access to political rights (Matusz-Protasiewicz, 2014a).

Most of existing studies on immigrant consultative committees do not point to a conclusion that these institutions can effectively compensate for the absence of local voting rights. In other terms, their involvement in policymaking processes should be further investigated.

In general, these committees seem to have a quite limited role in the definition of local policy. In the case of **Lyon** for instance, the *Conseil des Rdes Rl d Etrangers Lyonnais (CREL)* is regarded as a place of reflection and proposal. It must gather at least four times a year in plenary assembly, and has a formal right of information about local policies; furthermore it can make proposals, spontaneously or when consulted by the City Council. Yet, the City Council has neither the obligation to consult the CREL each time it examines a special issue related to immigrants' integration, nor to follow its advice.

Similarly the *Consell Municipal d'Immigració* established in 2001 by the City of **Barcelona** is a consultative body aimed at favouring immigrants' participation and at creating the necessary conditions for their access to full citizenship, regardless of their administrative situation. To this end, different actors are taking part in the Consell, not only immigrant associations, but also pro-immigrant autochthonous organisations and 'mixed' organisations, as well as representatives of the local authorities and of employers' associations. Yet, its concrete functioning reveals how the Consell played a limited role in local policymaking, since it met rarely, only once or twice per year, and only on the initiative of the city council, while requests for extraordinary meetings coming from the associations were systematically disregarded (Caponio, 2014a).

Other examples on the role of consultative bodies may clarify this point:

The city of **Amsterdam** established advisory councils for minorities in the early 1980s, mirroring the national Minorities Policy. The goal was to provide venues for the representation of immigrant communities living in the city and promote their involvement in processes of policy formulation. In more concrete terms, five advisory councils were established, i.e. Turks, Moroccans, Surinamese/Antilleans, South Europeans and refugees, Chinese and Pakistanis, each one constituted of representatives of individual minority organisations and were financially and administratively supported by the city administration. In 2003, the advisory councils were discontinued, and a new Diversity Council was set up in 2005. This includes representatives of different immigrant associations and acts as a public inquiry institution, i.e. it airs criticisms and gives voice to the concerns of the ethnic communities. It meets about four times a year with the Advisory Board on Diversity and Integration, which also includes experts (Caponio, 2014).

In **Copenhagen** since 1998, an Integration Council has been established "to 'attend to the interests of ethnic minorities and act as their mouthpiece', as well as to 'guide the politicians, the standing committees and the administration of the city on how to secure an efficient and coherent integration policy'". It used to be composed of nominated representatives of ethnic organisations, in addition to experts and representatives of the social partners, housing corporations and educational institutions. Since 2006 the representatives of immigrant groups are directly elected from the population of residents with (non-western) immigrant origin, and immigrant organisations as such are not involved anymore. A shift from group representation towards individual participation seems to have taken place (Caponio, 2014a).

➔ ***Encourage migrants to use participation opportunities through*** **targeted distribution of information; awareness of rights; exchange best practices and experience; follow-up policy implementation.**

➔ **Create opportunities to participate:**

- **ensure participation and inclusion in policy decision-making processes of all (migrant) groups affected by a certain decision;**
- **create specialized migrant consultative bodies which have a concrete say in policy-making processes (rather than committees with just symbolic functions);**
- **institutionalize the participation of migrant representation in local consultative bodies/councils**
- **strive for intercultural openness in all administrative levels, e.g. by increasing the proportion of employees with a migrant background.**

4.1.3 Migrant associations and integration in the legal-political dimension

Migrant organisations, both in terms of membership and services provided by them, play an important role in the settlement process and in integration. Notably, the study of *Refugee Community Organisations* (RCOs) highlight the role of migrant organizations in providing pre-arrival assistance, initial reception in the form of translation, interpretation, and support; assistance with skills development and the provision of cultural knowledge; facilitating access to volunteering opportunities, as well as providing opportunities in social spaces to promote social contact (Kindler, 2014).

On the whole, migrant associations often face several limitations. While in certain cases they do represent an important actor in receiving countries and do favour migrants' mobilisation, in others cases they suffer from a lack of representativeness, and a low capacity to deal with institutions that do not consider them as interlocutors.

Often migrant associations are internally divided. Numerous ethnic organisations in **Flanders (Belgium)**, were fragmented along ethnic lines and often divided politically and religiously. In addition, the electoral impact of ethnic minorities remained limited for demographic reasons (Kindler, 2014).

Two examples make clear how and to what extent migrant associations are limited through lack of organization or resources.

With respect to immigrants' political participation, **Turin** has undergone two main phases: the mid-1990s, which was characterised by the representative frame and the 2000s, when an approach based on mediation started to take place. In the first period immigrants' political participation featured as a particularly prominent issue in the local political agenda, as pointed out by the decision of establishing in 1995 the *Municipal Consultative Committee*. This was directly elected by immigrants who had been living in the city for more than three years on the basis of a complex electoral system aimed at ensuring the representation of the main geographical areas of origin of the immigrants living in the city, i.e. Europe, Eastern Europe, North Africa, Sub-Saharan Africa and Asia. However, the *Municipal Consultative Committee* was abandoned in 1997, given the scarce participation of immigrant associations in the meetings. It was revealed to be structurally weak, and often lacked the resources to organize on a permanent basis (Caponio, 2014a).

Nonetheless, in some cases the marginalization of migrant organisations is due to other factors, as the case of Milan shows.

In **Milan**, migrant organisations played a relevant role in the mid-1980s, when the Consultative Committee was put in place with the goal of promoting their participation in policymaking processes. This was abandoned in the early 1990s, after the electoral victory of the Northern League Mayor, Marco Formentini. Since then, immigrant associations have been marginalised vis-à-vis the more reliable and experienced Italian NGOs, which have been running most of the municipality services for immigrants' reception and assistance. […] However, a change of approach started to take place with Mayor Letizia Moratti, who, while being a prominent figure of centre-right Berlusconi movement, still showed a certain interest in immigrant associations as a resource for the city, in particular with regard to the EXPO 2015 event. In more concrete terms, the Mayor held three meetings with immigrant organisations operating in the city area. However, no consultative institution was established, and relations with immigrant associations appear today to be primarily of an informal kind (Caponio,2014b).

➔ **Support migrant organisations (however informal) as they have an important role in fostering integration processes.**

4.1.4 The attitude of the receiving society on migrant integration in the legal-political dimension

The attitude of the receiving society is crucial for the integration of migrants, and also in the legal-political dimension: if migrants are perceived as outsiders or as a menace it is less likely they will be granted rights, such as voting rights in the local election. If the perception of migrants is more favourable it is more probable that they will be accepted as full members of the society, with rights and obligations comparable to those of other citizens. Over the last decade, and especially after the terrorist attack in 2001, migration has become an increasingly politicised issue with the widespread diffusion of xenophobic attitudes among natives. This hinders any process of migrant inclusion in the receiving society and specifically in the legal and political dimension of integration.

In some countries, such as Italy, the debate of migrants' political rights is highly politicized and the adverse attitude of a part of the public opinion hinders the effective participation of migrants in the political arena. An interesting example is the city of **Milan** where after the electoral victory of the Northern League Mayor, Marco Formentini […] the issue of immigrants' political participation was side-lined and became a sort of *taboo* for the centre-right majorities governing the cities since the 1990 (Caponio,2014b).

Nonetheless, the political discourse on migrant participation does not always correspond to practices and the case of Milan is again a case in point. Indeed today, under the current centre-left city government, the official discourse appears far more open to cultural accommodation and participation, yet policy practices are rather contradictory. The City World Forum has been established, which however is not an institution allowing for the political participation of immigrant associations, and no resources have been allocated to them to develop their projects (Caponio, 2014b).

Another interesting example of initiatives put in place to influence the attitude of the national level toward a specific issue, namely the citizenship of the second generations, comes from **Turin** where the Deputy Mayor on Immigrant Integration has always supported initiatives aimed at putting pressure on the national government for the revision of the current restrictive national law. A case in point was the petition "*L'Italia sono anch'io*" (I'm also part of Italy), undertaken in 2013 by various NGOs and associations of second generations, which aimed at collecting the 50,000 signatures needed in order to register a new bill in Parliament that revised the 1992 nationality law. The initiative was explicitly endorsed by the Deputy Mayor in various public events held in the city (Caponio, 2014c). This initiative is an example of a mobilization from the local level in order to influence the attitude of the receiving society as a whole.

➔ **Policymakers should put migrants at the centre of the action, engaging as many levels of governance and as many stakeholders as possible.**

4.2 Integration policy and migrants' integration in the socio-economic dimension

Integration in what may alternatively be called hard domains, structural domains or socio-economic domains is fundamental. A migrant needs to find a job to meet her/his and her/his family needs, a home, schools for the children, healthcare facilities. But integration in these spheres is not necessarily more important than in the other spheres. Finding a place in society in the social or cultural sense is equally important, as is being protected by the law or politically participating in the receiving society. But socio-economic aspects are both means and markers of integration: means because they generate integration; and markers because they allow to see whether there is equal access or not (Phillimore, 2014).

Exclusion and deprivation have enormous impacts upon the ability of new migrants and existing minorities to integrate, and reach their potential, to develop social connections and social capital. Furthermore, given the economic emphasis associated with migration, down-skilling and, in migrant children, poor education outcomes and economic activity levels, have an economic (as well as social) opportunity cost. Thus introducing national mechanisms for recognising or converting qualifications, enhancing employability, providing work experience and supporting migrant children in school are likely to impact on their integration in other domains (Phillimore, 2014).

The challenges migrants face in their integration process in these domains call for responses on the part of public authorities. These responses come from national, regional and/or local authorities. They lean against a backdrop made up of distribution of competence, immigration history, labour market features and so forth (see Chapter 1). It remains that these challenges are mostly felt at local level since practical difficulties are first encountered there and local institutions are first interlocutors.
As Phillimore states:

> "Migrants essentially settle into their country of migration at local level. It is at this level they find housing and employment, their children enter education, they build social connections (in addition to those elsewhere) and utilise services" (Phillimore, 2014).

For some fields, namely healthcare, education and labour market, a national regulatory framework exists in most cases. For housing however, local authorities have greater margin of manoeuver. Notwithstanding, the capacity of local authorities or political will to act in one way or another in these four fields leads to differences from municipality to municipality throughout the EU (Garcés-Mascareñas, 2014a).

It is important to bear in mind the tension between access to socio-economic facilities and migrants' legal statuses. Legal migrants have, in principle, the right to access facilities that irregular migrants, being undocumented or refused asylum seekers, have not. This is problematic because legal statuses may change over the life-course but the impact of not profiting from integration policies will, most likely, endure. One may become irregular if one fails to satisfy residence permit renewal conditions. One may also be regularized. Deprivation of access to one field of structural integration or another may have dire consequences on the process of integration. For that reason, the following section deals with both regular and irregular migrants. Education is the most relevant example. A child that cannot attend school due to restrictions stemming from legal status may suffer from unequal opportunities if and when his or her stay is regularized.

4.2.1 Labour market

Access to the labour market and employment are fundamental features of the process of integration. Both scholarly literature and governments' attention to the matter underscore the place labour integration takes in the process of integration. Employment is regarded as the best way to foster integration in other domains as it avoids poverty. That is, poor economic conditions may lead to concentration in poor housing areas and

isolation from work and education opportunities, to poor health and problems of disaffection (Craig, 2014). Likewise, empirical studies show that having a job is also perceived as fundamental by migrants themselves. Beyond economic security and professional development, work gives migrants a routine, a sense of worth and the opportunity to meet other people (Phillimore *et al.*, 2014a).

Literature on market integration altogether points to migrant labour market outcomes generally below those of the receiving country.

To conclude, for successful market integration, migrants must have overcome three barriers: participation; unemployment; and employment quality (Kahanec *et al.,* 2014a). These barriers are mediated by discrimination.

- ***Migrants participation to the labour market***

Studies show that migrants' **participation** rate in the labour market remains lower than nationals' participation rate overall, but this gap decreases with the passage of time after migration (Craig, 2014; Kahanec *et al.,* 2014). This statement seems to hold less when we look at migrants' residence purpose: economic migrants display higher participation rates than natives whereas humanitarian and family reunion migrants are less likely to participate. More open economies, i.e. those with a higher export-to-GDP ratio, provide favourable conditions for labour force participation and perhaps also employment of immigrants (Kahanec *et al.,* 2014b).

Nonetheless, **barriers to participation in the labour market are often set in national legislation, as a part of the mechanism of exclusion** mentioned in chapter 1.

In **France**, labour market access and integration are complicated by existing barriers, which often explicitly exclude non-citizens from a number of positions, such as civil servants, lawyers, doctors, dentists, midwives, surgeons, pharmacists, brokers, chartered accountants, bailiffs, notaries, etc.

In the **Netherlands** the native-immigrant gaps remain, aggravated by limited language knowledge and, as a consequence, negative perceptions by natives. The Netherlands decided to leave aside cultural integration and boost economic aspects of integration (Blom, 2014). That said, access to the labour market is not granted without condition. At the same time, at national level, participation in the labour market follows a twofold logic that discriminates undocumented migrants and rejected asylum seekers. With the exception of those migrating through family reunification or asylum seekers with an on-going procedure, regular residence is the condition to access labour market. In addition, employment has increasingly become a condition for gaining a residence permit (regularization and renewal) (Garcés-Mascareñas, 2014a).

Until recently, **Germany** did not focus on integration of guest workers and paid insufficient attention to language skills or other skills necessary for successful economic and social integration. This helps to explain the low qualification of migrants, insufficient linguistic skills and limited education, especially of second-generation migrants living in Germany, which have created barriers for successful employment. Consequently, there are significant employment participation and earning gaps between natives and second-generation migrants due to low educational levels and insufficient vocational training of the latter group.

➔ **The set of rights laid down in EU directives providing access to the labour market requires proper implementation and monitoring, with the aim of ensuring equity and equality.**

➔ **Legal access to temporary jobs or occasional employment could be facilitated by reducing legal and administrative barriers (e.g. through easier bureaucratic procedures for hiring people temporarily or occasionally, such as the Italian "voucher system"), subject to regulation conditions.**

➔ **Information on European labour market opportunities and needs (skills shortages) and requirements (bureaucracy, procedures, etc.) should be more efficiently communicated to both migrants already living in the receiving society and potential migrants.**

- ***Employment insecurity and unemployment***

Migrants are over-represented amongst the **unemployed** throughout Europe (Kahanec *et al.,* 2014a), but here again, the gap decreases with time after migration. Indeed, significant differences within and between immigrant groups remain, with women doing generally less well than men (Craig, 2014).

It is interesting to note that migrants from Eastern Partnership countries fare better than other migrants, mostly due to the nature of the agreement between the EU and these countries (Kahanec *et al.,* 2014a). Disadvantage in this respect is accentuated for those coming from poor countries and/or have poor command of the receiving country language, in spite of their young age and education level. Migrants also tend to be distributed in industrial sectors with low professional prospects (Craig, 2014).

Employment policies have mostly been adopted at national level. Cities have provided complementary programmes to promote employment, ethnic entrepreneurship and diversity in the composition of the municipality's workforce, to name a few examples. Cities' ability to act in this direction also depends on exogenous structural factors. The organization of job centres is a good example. Where these fall under local administration (e.g. **Sweden** and **Ireland**), the city may orient their activities towards specific groups. Where these fall outside the scope of municipalities (e.g. in the **UK** or **Belgium**), they do not enjoy of this lever for local employment policies. More generally, it seems that cities somewhat act at the margins, using their own imagination to favour employment and diversity: some (but few) cities seek to promote ethnic entrepreneurship; some others buy private goods and services to providers employing immigrants or promoting diversity amongst their employees (Garcés-Mascareñas, 2014a).

The **transformation of industrial relations** pertains to all sectors at almost all levels **(**e.g. flexible contracts and atypical forms of employment, often resulting in extreme exploitation). Although that presents potential concerns for the entire economically active population in 'developed' economies, it is important to focus particularly on the consequences that such transformations can have on the integration process of migrant populations across European countries (Kahanec *et al*., 2014a).

The fragmented bargaining systems in the UK and the lack of collective agreements in most enterprises allows management to take advantage of immigrant labour forces and use them, for example, as a buffer against fluctuations in demand.

The **German** economy, whilst formally classified as a coordinated market economy, has developed strong signs of a serious insider-outsider cleavage within the labour market. While insiders are still covered by collective agreements and enjoy a great degree of employment security, those outsiders not covered have to put up with much more flexible and individualized contracts, more wage dispersion and unstable working conditions. Immigrants in Germany are disproportionately concentrated in atypical employment forms, including short-term contracts, mini-jobs and temporary agency work. The changes in the bargaining system were not deliberately aimed at segregating migrants; in effect, however, they impinged mostly on non-nationals.

The collective bargaining system of **Spain** unites certain elements of the dual and the fragmented labour market models, but its distinctive features are informality and state intervention. From the perspective of migrants, the benefits of this system are apparent in the relative ease with which construction, agriculture and personal service jobs could be taken up in the booming Spanish economy during the early 2000s. Similarly, to the **UK**, migrants provided the buffer to meet increased demand in good times, and there was no collective bargaining in the affected sectors that could have prevented massive inflow of foreign-born

labour. Nevertheless, significant social and individual costs stemmed from informality: these included forgone tax revenues on the receiving society's side, and no possibility for claiming benefits on the side of the new inhabitants.

➔ **National governments should ensure implementation of existing laws against exploitation, impose a minimum set of standards in those sectors not regulated by collective bargaining, increase controls, make sure that trade unions represent all workers (both natives and migrants), promote laws and regulations for the conciliation of work and family life.**

➔ **Local levels of governance and local contact points of national agencies (environmental and health agencies) should increase regulation and inspectorial regimes in sectors where vulnerable migrants concentrate; and introduce stronger transparency measures in supply chains.**

➔ **Relevant stakeholders (trade unions, employers' associations, migrant workers' representatives, employment agencies, NGOs) should more widely promote existing regulations and protection for migrant workers, educating migrant workers about their rights on arrival.**

➔ **Legally employed migrants should be able to accumulate social benefits (pension, healthcare, etc.) in temporary/occasional jobs.**

- ***Employment quality and recognition of qualifications***

Beyond obtaining a job, the role of the labour market is also about **employment quality**, about "the *appropriateness of that job* and the *role of the workplace* itself in promoting integration" (Craig, 2014). Throughout Europe, labour migrants have ended up in the worst labour market conditions, filling the gaps left by nationals. Migrants tend to be employed in jobs for which they have more skills or qualification than appropriate. Besides discrimination and lack of qualification recognition, barriers to fit employment are also lack of language fluency and of social networks.

It is worth noting here that this situation is not encountered by all migrants. Highly skilled migrants, to the contrary, are the object of a competition for talents between states: more rights and more extensive rights are granted to them (Kahanec *et al.,* 2014a).

➔ **The huge achievement of a European-wide system of recognition of qualifications, extended to third country nationals, should be put in place.**

➔ **The scope of Directive 2005/36/EC on the recognition of professional qualifications should be extended to all third country nationals.**

➔ **In certain high-skilled sectors, regulations that require national language proficiency should be eliminated.**

➔ **Priority checks (giving precedence to European citizens) could be eliminated.**

Integration policies in **Turku** go through promoting participation through work and reduce dependency on welfare. In order to favour labour market integration, migrants are given the opportunity to equip themselves with knowledge and skills (including language) to adapt to the market's needs. Structural integration seems to prevail over the two other dimensions: legal-political and cultural-religious. Despite these efforts, there still is a gap between labour market outcomes for migrants and natives. According to most policy-makers, this is due to lack of skills, including language skills. Consequently, the city deploys much of its energy on training and skills provision (Penninx, 2014).

As of today, integration in Turku is guided by a programme for integration for the period 2014-2017. Clinging to the national legal framework, the programme accords special emphasis to labour market integration. Integration is defined as an:

> "interactive process of immigrants and the society that aims to provide them with the knowledge and skill to function in the workplace and in society 'while contributing to the possibility of immigrants to maintain their own language and culture'" (Penninx, 2014).

Education is also a key element. In the Finnish system education and vocational training is free, and is a responsibility borne by the municipalities. Some national funding is transferred to municipalities for special expenses cities may bear for immigrant children. Adult education, particularly Finnish language courses, is also important for migrants and for the city. If national funding is available, 43% of these courses are financed by the city itself (Penninx, 2014).

4.2.2 Education and training

Education is a fundamental stepping stone towards integration, not only for children, but also for adults (see 4.3.1). As touched upon above, migrants tend to down skill into positions requiring skills below their level of formal education. For children, education is a way to break the circle and ensure they enjoy better opportunities. For adults, it is a way to recognise or validate their skills in the receiving society.

- ***Access to education***

Education policy is decided at national or regional level. Localities may also intervene to complement or repair (or worsen in some cases) policies adopted above. Education is regarded as a right of all children, at least formally. In practice, some impediments arise when it comes to children of irregular migrants: even though they are guaranteed the right to education by law, they are most often victims of disincentives (fear of parents to be detected if their children go to school; request of proof of residence by schools in some countries; no economic aid for books, transportation etc., due to their legal status). Here again, it is up to local bodies to respond to shortages which may lead to disparities from one municipality to another. Some localities may be supportive (coverage of expenses such as school books or transportation), whilst others may try to discriminate against particular groups (exclusion of irregular children in nursery schools in **Milan**, discrimination against Roma people in some **French** municipalities) (Garcés-Mascareñas, 2014a).

With regard to children of regular migrants, the trend is to bridge the gap in school achievements between minority and majority pupil populations. However this gap is not to be found everywhere. If migrant children perform worse in some countries, they perform the same or even better in some others. At national level, policies aimed at reducing the gap in school achievements consist of increases in resources allocated (financial or in terms of staff) or specific support when a target group is clearly identified (language support classes or setting up of particular reception classes for newly arrived migrants). At local level, policies are generally extra-curricular support, establishment of additional neighbourhood schools or vocational schools (as in **Rotterdam**), programmes to reduce the share of migrants in underperforming schools (Garcés-Mascareñas, 2014a).

In some Member States, Third Country Nationals with a long term residence permit are charged higher fees to access education, which goes against the provisions made by the Long Term Residence directive.

One example of practical barriers can be cited: even if national law prohibit schools from asking for documentation from migrant children, many schools actually do so, in order to avoid having undocumented migrant children amongst pupils. In countries such as **the Netherlands**, **Poland** and **Hungary,** schools also justify identification document requests by arguing that funding is allocated according to the number of

students enrolled. Other possible barriers include the fact that minors may not live with their parents and some schools deny school registration by other family relatives. Other problems include the fact that, though access to primary education is free, undocumented families are excluded from economic aid for extra expenses such as books, transportation, school meals, etc. Finally, undocumented children tend to have no access to education before and after compulsory schooling (Garces-Mascarenas, 2014a).

The institutional arrangements of the education system, as it is, is entirely inadequate in many European countries because, not only migrants, but also more generally native disadvantaged people are affected by problems such as segregation, poor access to education, and so on. Many research projects illustrate the specific structural factors that may explain differences in (migrant) children's performance. These factors include features of the education system (such as ability tracking, age of selection, transitions between early, primary and secondary education, ethnic majority bias in textbooks and teaching practices); resources allocated; legal framework for enrolment (according to legal status, parental choice or residential catchment area); integration policies; and national discourses on migration and integration.

The set of rights laid down in EU directives requires proper implementation and monitoring, notably equity in treatment. Thus:

- ➔ **States should remove all *legal* barriers (at the legislative level) and all *practical/administrative* barriers, to ensure effective access to education for migrant children.**

- ➔ **The institutional arrangements of the education system should be revised, in order to: a) tackle problems affecting disadvantaged people in general, whether they are migrants or natives (through mainstreaming measures), b) be ready to welcome and treat diversity as a positive characteristic of society.**

o *Equal access, equal use and equal outcomes*

The following experiences are examples of the efforts made in order to ensure equal access, equal use and equal outcomes in the education system, by developing pre-school language tuition, compensatory programmes and access to tertiary education.

In **Italy**, migrant children with a poor grasp of the Italian language are often kept down one year in primary school, and even in the lower levels of secondary school. The impact of this appears to further disadvantage the children throughout their school and subsequent careers and to compromise their possibilities for full integration.

In *Kindergärten* (nurseries) **German** language courses were established: 15,000 children were offered extra training **in German** language every year. For those children who did not succeed, a further year of intensive German teaching was offered. More than 1,000 teachers were teaching within this programme, and nearly all parents accepted it. The measures were effective: between 2002 and 2012 the percentage of children with an immigrant background, who were not ready for school, decreased from 35.7% to 12.4%.

Compensatory programmes have had an impact on closing the attainment gap. These include universal nursery provision, (which has been available in many countries for some time), better managed and fair admission systems so that some schools do not become effectively educational ghettoes, and specific help for those migrant children who arrive with no effective prior experience of education at all. Early years programmes such as the **UK** *Sure Start programme* have had some impact on improving attainment for migrant children but these programmes, as with many other special programmes, have been affected by austerity-driven cuts in public expenditure and Sure Start itself was open to the criticism that it was structurally quite racist in its overall approach and was not *targeted on migrant and minority children* (Craig, 2014).

In the **Netherlands** the example of Turkish migrant young people shows that despite strong pressures to study high status subjects such as law and medicine, they are compromised by the structural barriers to accessing those sorts of courses. As a result many Turkish young people end up in courses such as business studies in professional colleges which satisfy their parents' aspirations and their own desire to gain qualifications and to have a better work-life balance than those of their parents, whilst not meeting their original aspirations.

➔ **Provide additional support to migrant children, in order to ensure that they have equal access, equal use and equal outcomes in education. Such measures should also serve the needs of native children. Such improvements would in turn result in the increase of the number of migrant children and disadvantaged natives accessing tertiary education.**

- ***School segregation and dropout***

A large number of young migrants are not in education, or employment, or training schemes, which raises concerns and underlines the need for further research in this domain. This phenomenon is attributed to racism in the education system and the system's questionable appropriateness. Structural obstacles have created a segmentation of education attainments that translates into vocational training and segmentation between migrants and nationals at secondary school level and, discrimination and delusion at tertiary education level.

Although ethnic minority participation rates in tertiary education exceed those of the native population in many countries, this apparent success story does not at present provide adequate data distinguishing between different kinds of migrant career within the broader ethnic minority picture. However, it would be surprising, given what is known about the way in which institutional racism and discrimination operates within education and within higher education in particular, if it were not more difficult for certain kinds of migrants to achieve entry to higher status higher education and higher educational institutions.

The case of **Barcelona**, is relevant. As Garces-Mascareñas (2014b) reports:

> "less than half of the schools in Barcelona are public, the rest are private. Children of low-income families are mostly concentrated in public schools. Consequently, we see that foreign pupils account for 12% of all pupils between 3 and 16 years old, and they represent more than 22% of the pupils in public schools" (Garces-Mascareñas, 2014b).

As Craig states:

> "If full integration means having the same life choices as host country nationals, then clearly the compromising by institutional barriers of parental aspirations leading to young migrants 'realism' suggests that full integration through enjoying equivalent higher education choices will not be attained until the issue of racism is dealt with" (Craig, 2014).

Significant individual and institutional discrimination leads to lower educational attainments that may in turn damage equal opportunities and further increase labour market gaps between migrants (and people with immigration background) and natives.

With regard to **segregation** in education, in **Germany**, interethnic friendships between minorities and host country national in particular neighbourhoods depends critically on the **level of education** of minorities and are less likely in areas with greater degrees of ethnic segregation. There are many examples of local initiatives taken to reduce school segregation. The analysis of available evidence shows that **very few countries** have **translated local initiatives** and ad hoc projects in this area **into national policies**. One key point which facilitates integration in relation to education is improved **training of teachers** at all levels to ensure they are

sensitive and equipped with the skills to work with a range of cultures and ethnic and national origins (Wilkens *et al*., 2014b).

In **Sweden** there is an identified and increasing **gap in educational achievement between young people with and without a Swedish background**. An innovative approach was promoted by using systems already in place to improve integration outcomes. The aim consists of promoting immigrant youth participation in Swedish cultural life; intercultural exchange through writing, storytelling and other art forms between Swedish and migrant youth; and to develop the role of libraries in integration processes by developing partnerships and networks. These actions identified the importance of an equal gender balance: (project evaluation disaggregated findings for male and female participants). In **Oslo, Master's students acted as diversity mentors** in secondary schools. There was a 30 percent increase in university admissions from these schools, compared to an average 7 percent increase in Oslo schools more generally. A mentoring scheme for mature students from minority backgrounds helped to lower dropout from university. In 2012, there were 11 percent minority students with the target of 15 percent likely to be reached within the next two years. Encouragingly, Oslo University turned the project into a permanent diversity office (Humphris, 2014).

Drop-out levels seem to be higher for migrant children overall (Wilkens *et al*., 2014b).

There are concerns about the relatively larger number of migrant children not in education, or employment or training schemes, although the research base in this area is relatively weak. More data are required particularly around the intersection between education, training and employment. In the **Netherlands** and other countries, high rates of early dropout and unemployment amongst young migrant people has been attributed largely to their own action (or inaction). In **Rotterdam,** new types of school have been introduced to stem the high dropout rates. A substantial amount of evidence demonstrates the continuing impact of racism within the education system, which, despite some contradictory trends within certain migrant groups, impedes educational attainment for minority and migrant young people. Additionally the appropriateness of education at the top end of secondary school is often questionable. This has led, in some countries, to an increased focus on vocational education opportunities. Such evidence seems to contradict the recorded motivation and increasing educational attainment of migrant children and points to increasing segmentation between different groups. This differentiation is also apparent in established minorities where children (and particularly girls) of Indian and Chinese origin tend to do much better than most other minority children in terms of educational attainment.

➔ **The education system should:**

- **train teachers at all levels, to ensure that they are equipped with the special skills needed to be sensitive to diversity and to deal with disadvantaged groups;**

- **organise local school-based bridging programmes and gap filling programmes to help students reach the standards they need to succeed alongside their peer group.**

o ***The importance of parental support***

Some cultures are strongly pro-learning and schools need to recognise this by affirming the role of appropriate parental support. It is clear that migrant children (and their parents in general) are at least as keen and frequently more so, to exploit the benefits of education as TCN children and this motivation should be recognised and built on. One of the most critical factors in the education domain is fluency in the receiving country's language (acknowledged by virtually every relevant commentator).

Children's language attainment can be held back by a lack of linguistic continuity between school and home. A study has shown that when migrant women were more socially mobile, their children had better educational attainments. The greater migrants' aspirations regarding their children's educational attainment, the more their children feel encouraged to study up to tertiary education levels and the more they are socially mobile.

A study of parental aspirations in **Spain** for their migrant children shows how these aspirations can be diluted in the context of generally modest expectations of both native and migrant young people; the study notes that if government and school were to make effective use of migrant parental ambitions for their children, focusing particularly on parents who were amongst the poorest and most disadvantaged, it would not only help the integration of migrant children and address racial discrimination but raise educational attainment more generally. There is a more general literature showing how discrimination within educational systems can shape the aspirations of minority and migrant children (Craig, 2014).

The following recommendations specifically address the local level, schools and civil society:

- ➔ **Motivate, recognise and build on the pro-learning attitude of immigrant children's parents.**
- ➔ **Build relationships between schools, the children's parents and the communities in which the school is situated.**
- ➔ **Stress the linguistic continuity between school and home by providing language courses for parents at school and within the workplace, involving trade unions.**

4.2.3 Health care

Health represents the milestone of the migratory experience. Indeed, an individual relies on his or her good health for facing all the challenges that migration entails and it is the basic condition of his/her participation to the labour market. Migrants' health outcomes differ from natives. Migrants may have difficulties in accessing, or making use of their right to health care, for several reasons. Language barriers, communication problems, socio-cultural factors, newness or cultural factors may hamper proper medical treatment. What is more, migrants also have difficulty in accessing care because of confusion about the system itself and the failure of healthcare systems to clear up confusion about its functioning and what people's entitlements are (Craig, 2014). In addition, research shows that newcomers tend to be inhibited when it comes to use healthcare services, all the more so when they have not received any introductory course on the system's functioning (Garcés-Mascareñas, 2014a).

The issue is of the utmost importance since migrants' health may deteriorate in the post migration phase due to the stress caused by the integration process as well as by the acculturation process. Many migrants, especially labour migrants, for the most part arrive in an initial healthy state. It is then that their health condition deteriorates. This is markedly different for asylum seekers that arrive with physical and psychological problems due to persecution in their country of origin (Phillimore, 2014).

Amid the causes of deteriorating health, poor housing, low income, working conditions, poor health practices and knowledge about entitlements, poor language provision by healthcare services, cultural insensitivity of care providers, structural and individual racism, and detention should be acknowledged (Craig, 2014; Bathily, 2014).

Again, for irregular migrants, the issue is twofold. First, a direct barrier exist in the formal right to access healthcare and what kind of care is accessible. Second, indirect barriers exist and may consist of: the exclusion of state-funded health schemes for uninsured persons and therefore migrants have to pay the full cost of care (which acts as a strong deterrent); and a lack of knowledge as to entitlements. These barriers operate

at a national level. At local level, the picture becomes more complex. Healthcare institutions enjoy great autonomy which translated into large disparities across municipalities. For instance, some of the nineteen municipalities in Brussels have eliminated cumbersome procedures to ease irregular migrants' access to healthcare, whereas Munich implemented a medical contact point for uninsured people (Garcés-Mascareñas, 2014a).

As for regular migrants, they enjoy extensive, but not unlimited, access to healthcare services. In addition, difference in health outcomes between migrants and natives are enduring. This is arguably due to disparities in the set of healthcare services, in turn due to barriers of different sorts. Despite such differences, only 11 out of 25 European states (**the UK, Ireland, the Netherland, Austria, France, Germany, Italy, Portugal, Spain, Sweden and Switzerland**) have provided specific national health policies for migrants. For some countries, these are integrated into broader policies (merged with policies concerned with "race" and "black and minority ethnic" groups in the **UK**; falling under the umbrella of "cultural differences" in **the Netherlands**), for some others policies are explicitly addressed to migrants (**France, Austria, Germany, Italy, Spain**, *inter alia*). A good deal of these policies aim at tackling what could be called institutional discrimination. They attempt to overcome linguistic, cultural and administrative barriers through interpretation and cultural mediation services, training staff to diversity, or diversifying the workforce, to name some examples. They may be adopted at different levels of policy-making (Garcés-Mascareñas, 2014a).

Specific needs also need to be acknowledged. Jobs occupied by migrants tend to be difficult, dirty and dangerous ones. This implies specific attention to ensuing health needs: psychological, physical and psychosomatic stress.

Another issue is undocumented workers' health. Since they have no legal existence, they are invisible in policy formulation. Remaining in an irregular situation exposes migrants to exploitation and ill-treatment, and thus increase the likelihood of substantial health needs. This may be even more critical for children of undocumented parents. Notwithstanding international law provisions in this domain, some countries provide no specific protection to children of undocumented parents and, in some countries, irregular migrants using healthcare services must be reported to the authorities, which is a huge disincentive. Information about entitlements is here critical but often inappropriate (Craig, 2014).

- *Equal access and equal use of health care*

A **wide range of problems** to accessing health services have been identified. **These include**: not understanding health systems, language barriers, poor interpretation/translation and over-reliance on family members for interpretation, lack of awareness about health prevention and inoculation systems, cultural misunderstandings by medical practitioners in language and terminology used to describe symptoms, bureaucratic barriers to registering for healthcare, high levels of poverty restricting access to fresh or healthy foods, overcrowding and exploitation in housing or employment leading to increased propensity to communicable diseases, unfamiliarity with culture/climate and/or exploitation increasing stress levels, depression associated with lack of social mobility and isolation, poor access to antenatal care associated with higher infant and maternal mortality, lack of trust in health services or fear of being charged, exclusion from health services for undocumented migrants in some countries (e.g. **Sweden**), charging for services in others (e.g. **UK**), racism and discrimination by individual professionals, institutional racism and pathologising of ethnicity.

The difficulty migrants have in accessing care are generally thus caused by **confusion about the system** and the **failure of healthcare providers** to be effective in explaining how health systems are structured and what people's entitlements are. A study of migrants' experience of healthcare in **Ireland** suggested that migrants' perceptions were that the system was poor in adapting to the needs of a rapidly diversifying population and that, where possible (e.g. for economic migrants), they would prefer either to access healthcare in their own countries or at least to confirm diagnoses and medical advice with medical practitioners in their own country. These migrants felt that there was a notable **lack of sensitivity** amongst providers and practitioners to

cultural aspects of health care including views about conditions, ways of accessing healthcare and negotiating care arrangements.

Although some efforts have been made by IOM, on the whole the **monitoring of migrant health is poor**. The lack of appropriate monitoring of outcomes means that in most countries it is not possible to explore health outcomes by migration status, while in others, naturalised migrants become invisible in the data. Alternatively health outcome data is based around ethnicity or even a basic minority/majority binary with scant consideration of other demographic characteristics that may have more extensive impacts upon migrant/minority health (i.e. age and gender).

- ➔ **States should be more aware of migrants' problems in accessing health services and should develop a better monitoring system, taking into account variables such as age, gender, immigration status and ethnicity.**

- ➔ **Materials should be made accessible to migrants on health promotion and how most effectively to access services so that the focus is on prevention.**

- ➔ **The receiving society should be educated about the contribution that migrants make to health services.**

- ➔ **Doctors and healthcare personnel should be equipped with the skill sets needed to deal with the different needs of a highly diversified population. Cultural mediators should work alongside healthcare personnel in hospitals, clinics and health centres.**

- ➔ **Given many budget cuts and constraints in the national funding of healthcare, governments should collaborate with civil society organisations to help support appropriate provision within communities.**

4.2.4 Housing

Housing is another less explored matter on the path towards integration. It is however not devoid of critical issues, at the top rank of which we find housing conditions and location of dwellings. It goes without saying that it is important to have good quality, affordable, secure (in safety terms and in time) housing. Craig (2014) reports the four roles played by housing as identified by Phillimore: "as shelter, status and identity; as a nexus for social relationships; providing safety and freedom; and as the site of the integration process" (Phillimore, 2014).

Migrants with low bargaining power end up at the bottom end of the housing scale. Housing markets are usually fairly competitive and resources are limited. Private housing is relatively flexible and compensates the unavailability of mortgages for low incomes and more rigid social housing (ineligibility or long waiting time). Private housing thus prevails over public housing. In summary, **the difficulties migrants face are: first, being eligible for social housing since the right to social housing is very limited for most groups of migrants and eligibility gives precedence to family over single people; second, accessing accommodation, because of a lack of accurate and timely information and inappropriate locations (isolated areas); third, migrants can hardly maintain these places due to low income; fourth, they may be obliged to live in housing of poor quality, overcrowded and overpriced, and otherwise exploitative** (Craig, 2014).

As in the other aspects of structural domains, the difference between legal statuses is distinct. That said, the governance structure of housing, in contrast with the other three domains, gives much more leeway to municipalities: they do not complement or respond to national policies but they are the primary actors of housing policies. Irregular migrants for instance are most likely to resort to private housing, less regulated and potentially more exploitative.

Irregular migrants are excluded from state-subsidized housing and must rely on alternative strategies such as the private housing market, their own network (relatives, friends or acquaintances), paying rent to a legal resident who acts as the formal tenant, or renting on the unofficial market. Such a situation often results in abuses (overcrowded, overpriced apartments), all the more so in countries where landlords can be sanctioned for renting to irregular migrants (**the Netherlands**, **Italy** for instance). The issue is often addressed at the local level where NGOs may provide temporary accommodation. These initiatives are mostly funded by local authorities. Garcés-Mascareñas (2014a) reports that:

> in comparison to the national government, local authorities tend to feel a higher need to provide a safety net for destitute migrants. This is justified on the basis of three arguments. The first is of a humanitarian nature: moral arguments on the inclusion of those residing in the municipality prevail over national regulations aimed at exclusion. The second argument is in terms of public health, public order and safety. In this case, imperatives to prevent overcrowded housing and urban decay may be of higher priority for local authorities than those related to immigration control. The third argument is in response to national policies: feeling burdened with the practical implications of the shortcomings of national migration policy, local authorities protest and try to persuade the government to reverse certain aspects of its migration policy (Garcés-Mascareñas, 2014a).

In **Milan, housing has become a key issue.** The city's intervention in immigration matters was first initiated by a need to respond to those emergencies that were beyond the scope and capacity of charities. Thus that the municipality granted migrants access to public housing in the early 1980s. Access was, however, to be limited to municipality-owned public housing until the Region of Lombardy ruled out the restriction in 1983. Political tensions arose at that point due to the high costs of renting in the city. Notwithstanding, the data provided by the city of Milan over the 2000s show that migrants' access to public housing has increased. It passed from 12.3% of migrants of the total beneficiaries in 2000 to more than 30% of the total number of the beneficiaries applying every year (Caponio, 2014b). The municipality also provides temporary accommodation facilities for migrants and especially newcomers which are run by NGOs. Some of these facilities address the needs of specific categories of migrants such as disadvantaged families, trafficked women, and single women with children. The great majority of public housing however targets the disadvantaged in general, not migrants in particular.

As for regular migrants, research finds that discrimination in the housing market is commonplace. With regard to migrants' access to decent and affordable **housing,** the problem is framed in terms of equality. As highlighted in the CLIP final report on housing, ethnic discrimination, as well as discrimination of migrants in the housing market, is a widespread phenomenon. Discrimination and racism can be direct, for instance by excluding non-nationals from city-owned social housing schemes or reducing migrants' chances of accessing particular housing as a result of anti-segregation quotas. Discrimination can also be indirect, mostly resulting from unequal treatment and unequal opportunities in the private housing market on the basis of class, ethnicity or place of origin or as a consequence of migrants' unequal access to information in a highly intransparent housing market (Penninx *et al*., 2014a).

Either direct (explicitly providing limitations) or indirect (unequal treatment on the private housing market), discrimination have been addressed by local authorities, for example through the setting up of agencies mediating between owners and tenants. In most cases, municipalities do not explicitly target migrants but rather low or middle income households. Measures may be directed at the demand side, by increasing the renting or purchasing capacities of the target households through premiums or subsidies, reductions in mortgage payments, free loans or reductions in borrowing costs. Or they may be directed at the supply side by increasing the offer of affordable housing in the city. Policies may also aim at reducing spatial segregation in specific neighbourhood through the establishment of quotas and resettlement for instance.

Overall, housing opportunities result in concentration of migrants into specific neighbourhoods, usually deprived areas, which do not result from a self-segregating tendency. It is much more a consequence of migrants' lack of bargaining power, which is in turn a consequence of *inter alia* low income (Craig, 2014). This

is for instance the case in **Turku**, Finland, where cheap and available housing is concentrated in few areas (Penninx, 2014). This has dire impacts on integration as a whole. The combination of spatial, social and ethnic segregation has negative consequences on social and cultural integration (improvement of language capacity and reliance onto social capital are made harder); and on their structural integration (by risking to be trapped within their ethnic communities) (Garcés-Mascareñas, 2014a).

4.3 Integration policy in the cultural-religious dimension

The *cultural and religious* dimension concerns perceptions and practices of migrants and of the receiving society and their reciprocal reaction to differences and diversity. It is especially on the basis of perceptions *in the cultural and religious domain* that prejudices take form and differences are categorized.

This dimension is ambiguous and more difficult to capture because identities and perceptions change over time, as do stereotypes and discrimination, depending on historical and broader political changes. For instance, while immigrants of Turkish origin in **Germany** were labelled as "gastarbeiter" in the 70s, nowadays they are labelled as "Muslims".

The debate between different integration models – multiculturalism, assimilationism, and so on – revolves around the assumption that migrants have to be incorporated and have to integrate fundamentally from a cultural point of view. Moreover, culture and religion have a large impact on public opinion, which is crucial for accepting or rejecting different policies.

As said in chapter 2, the burden of integration, and specifically, of cultural integration, has been progressively moved from a state to a migrant responsibility.

Notably, in first-generation immigration countries since the mid-1990s, integration started being conceived in cultural terms, with cultural and value-based commonalities being thought to be essential for social cohesion. In this view, the cultural dimension of integration is seen as an obligation for immigrants. Acquisition of national citizenship was no longer conceived as an instrument that would facilitate structural integration and started being increasingly redefined as the end point in a sequential model of integration and process of cultural adaptation. This new cultural conception of integration policies went hand in hand with redefining the identity of Northwest European countries. The claims and outcomes of such discussions on the 'identity' of receiving societies (as modern, liberal, democratic, secular, equal, enlightened, etc.) were translated into civic integration requirements for immigrants and civic integration courses of an assimilative nature. In this sense, *cultural* integration was made a *condition* for civic inclusion, rather than an *outcome* of it (Penninx *et al.*, 2014a).
The fact that migrant integration is conceived pre-eminently in cultural terms is reflected by the analysis conducted within the KING research both of European natives' perceptions of immigration and of migrants' understanding of the very concept of integration. Indeed, on the one hand, **European natives demonstrably perceive immigration more as a cultural problem than as economic one** (Poletti, Regalia, 2014a).

Also analysis of migrants' perceptions of integration in the **UK** demonstrated that **the integration process is framed by migrants in cultural terms**.

With regard to the *analysis of policies* in this domain, a significant part of the KING study was devoted to the analysis of local policies, especially city-level ones. Cities' policies are particularly interesting because the mere presence of migrant populations in their neighbourhoods compels cities to develop integration policies, and this is all the more the case in the absence of explicit integration policies at the national level. Cities often

show a pragmatic approach for dealing with integration-related issues, often contrasting, "mitigating" or re-shaping national integration policies.
The cultural – religious dimension of immigrant integration seems to be the most flexible area in which cities' authorities have formulated and implemented their own strategies adapted to specific local needs. When contrasted with practices at the national level, cities seem to be skilfully *spontaneous*, *flexible* and capable to *easily targeting* the most acute issues in integration policy-making, negotiating in the everyday governance practice with the other local stakeholders. This is not to say that local policies do not have ideological elements: but these refer much more to strategic elements (needed in pragmatic approaches), such as the concept of interculturality and the keywords of diversity and participation, which emerge in local policy documents rather than national ones (Matusz-Protasiewicz, 2014a; Penninx *et al*., 2014b).

Cities' policies in the cultural-religious dimension can be classified into three main categories (Matusz-Protasiewicz, 2014a):

- *Cultural integration aiming at economic growth* - In local cultural policy documents, diversity may be perceived as a source of attractiveness, innovation and competiveness. Cultural integration is then developed as a cross-sectorial issue engaging different stakeholders such as public institutions, business organizations, media, NGOs, civil society organizations, immigrant organizations, churches and trade unions by managing diversity in the most effective way. Literature on urban development has connected diversity with the growth of attractiveness for investments and innovations in the city. This long-term systematic diversity-oriented approach assumes that culturally diverse communities may contribute significantly to innovations and economic growth. This way of approaching integration shows that the constantly redefined concept of social cohesion and cultural integration is interdependent with integration in the economic and political domains.

- *Cultural integration aiming at avoiding conflict* - Growing ethnic and cultural diversity can aggravate difficulties in intergroup relations and hinder communication between immigrant groups and the local population. The depiction of specific immigrant groups is easily manipulated, for example by presenting Muslims as a threat to societal peace. In such cases cultural integration or diversity management aims at conflict avoidance and combating negative attitudes towards immigrants, xenophobia and racism. The coexistence of cultural, religious and linguistic diversity might lead to conflicts over values and competition for resources. There has been a whole variety of tools developed by cities in order to promote intercultural dialogue and intergroup relations within community such as educational campaigns, cultural events promoting diversity, information campaigns about equal treatment and non-discrimination. All this has been aimed at strengthening a common sense of belonging but also combating discrimination in both the hard domains (education, labour market, health care) and private life.

- *Cultural integration aiming at recognition of diversity* - In the case of the cities **Wrocław** and **Lublin** in Poland, for example, one may witness a set of promotional practices based on an appeal to their alleged multicultural and multi-religion heritage in order to attract investors and tourists.

In official documents, the key terms are *interculturality* and *diversity*. Both terms do not refer so much to cultural diversity as a right, but to the possible use of (certain forms of) cultural diversity for economic development and social cohesion of the local society. In the concept of interculturality a selectively used concept of diversity (not all cultural diversity is positive) is combined with a strategy that mobilises different stakeholders such as public institutions, business organizations, media, NGOs, civil society organization, immigrant organisations, churches and trade unions in order to manage diversity both for economic purposes and for societal cohesion. In such a definition it is a (normative) strategy – rather than a model to describe and analyse reality. The term inter-cultural policies has replaced multicultural policies as far as that term was used before (Penninx *et al.*, 2014b).

➔ **Governments at all levels should support policies and strategies which try to impact on relations amongst all ethnic, national, religious groups within the city.**

➔ **Policies should enhance the role of volunteering in connecting the host population with migrants and improving the efficacy of integration projects.**

What follows is a compilation of examples of policies concerning the cultural-religious domain classified by issue. Most cases are drawn from European cities' policies, but examples of regional and national policies are also included.

4.3.1 Language instruction

Migrants define **language learning** as one of the key challenges for their own integration (Phillimore *et al.*, 2014). It is widely acknowledged in integration literature that language learning is a necessary step towards integration: for children, so they can make the most of their education opportunities; for adults, so they can improve their job position and human capital, and do not place too heavy a burden on their children's shoulders (for example being used as translators) (Craig, 2014). As the case studies on Turku, Finland, shows, despite some observers attributing the employment gap to discrimination and the lack of anti-discrimination policies, most policy-makers in Turku see this as a consequence of the lack of relevant skills (including language) of foreigners.

Excellent examples of targeted language courses and of vocational top-up training are offered by **Swedish** and **Norwegian** policies (especially concerning asylum seekers). All migrants in Sweden (aged 20 – 64 and also for persons between 18 and 19 who came to Sweden without their parents) receive a personalised 'integration plan' and assistance to help find a job and housing. Swedish for Immigrants (SFI) is a free language course which includes mandatory job preparation such as internships, and work experience. The goal is to offer 40 hours of full-time activity per week for a maximum of 24 months.

Some cities recognize language as an element in the educational curriculum of primary schools – be it facultative – as was the case in **Amsterdam** and still is in **Turku**, or when the home language of an important group receives a status of preferred foreign language in secondary education. Another case in point is the project carried out by the **Turin** city administration *In Piazza s'impara* (*You can learn in the square*), where voluntary teachers and university students of different nationalities offer informal and free Italian language classes where many immigrants meet in Porta Palazzo, as well as basic courses of Chinese and Arabic for Italian citizens. The project, started in 2008, has been repeated every year (Penninx *et al*., 2014b).

The Mercator Special Instruction Project in **Germany** is one example of innovation. Mercator approached universities to ask if they would train their students to teach German as a second language. Through a series of negotiations with schools and universities, and with improved grades and positive testimonies from participants to evidence its success, the teacher training model and curriculum has now officially been instituted throughout North Rhine-Westphalia by the state government. A change of law in 2008 now requires every university to implement the programme (Humphris, 2014).

Wuppartal, Germany, is a nation-wide leader for language class attendance and provides classes at different times, different levels, different locations, with crèche facilities and also in sign language.

Despite the many successful experiences carried out all around Europe, the provision of language teaching is still variable in its quality and with regard to the conditions required for accessing courses. In the Netherlands and in the UK (for specific target groups), immigrants have to pay for use of such language support. This is demonstrably a barrier for those on low income.

Civil society organisations are limited and they often provide language training which can result in oversubscribed and basic level language programmes (Humphris, 2014). Many successful initiatives have been implemented in partnership with schools such as Frankfurt's '*Mama learns German – even Papa*' (Cities of Migration). While these are positive developments for some situations, such programmes may not help parents meet the demands of knowledge- and service-related jobs.

- ➔ **Migrants' employability can be enhanced through ensuring access to targeted language courses, vocational top-up training and by facilitating access to internships and apprenticeship schemes.**

- ➔ **Vocational top-up training is to be considered as lifelong learning and is available to migrants and natives (as a mainstream measure), both for unemployed and employed persons.**

- ➔ **Language and vocational training courses should be flexibly scheduled, to make them accessible to all, e.g. persons with different/unsocial working hours, mothers of young children, etc.**

- ➔ **Language acquisition needs to be encouraged through appropriately shaped classes to meet the needs of migrants, regardless of age, gender and socio-economic status.**

- ➔ **Innovative approaches to language acquisition should be encouraged, for example the use of language mentors or 'buddying' systems.**

- ➔ **Language courses and other training should be accessible for those who want to participate.**

The city of **Barcelona** represents an interesting example in their attempt to combine recognition of cultural diversity and also uphold the centrality of the Catalan language and culture, on the basis of a so-called "**principle of interculturality"**. Cultural diversity is recognized, "but emphasizing what we have in common and fostering ties and positive interaction among citizens on the basis of the cultural heritage of the host society".

In other words, diversity is acknowledged within a unit which has to be constructed on the basis of interaction. As a result of such theoretical premises, one of the stated goals of the city's integration policy is the promotion of Catalan language learning as the condition for achieving equality of opportunities and as a guarantee of social cohesion and maintaining Catalonia's cultural singularity. For example, the *Catalonia's Pacte Nacional per a la Immigració* (National Immigration Agreement), signed in 2008 by the Catalan Government, including most political parties and the leading social and economic agents, indicated the need to "boost the cohesion dimension offered by the public use of Catalonia's own language".

Similarly, the most recent Plan (2014-2016) presents Catalan as a "language of opportunities which should foster interrelationship among all the people who live in Catalonia". If the centrality of the Catalan language as a factor of integration and social cohesion has been constant throughout all the different plans and integration policies, the way in which it is promoted has been gradually changing. From being a *right* of the immigrant and a condition for equality of opportunity, it has come to be a *duty* of the immigrant and a requirement for legal status. In particular, the 2010 Law on Reception of Immigrants and Returnees to Catalonia conditions the *arraigo* (social inclusion) reports (required in order to regularise) and also those on integration (for renovation of permits) on the "successful completion of cultural, linguistic and work-related courses".

The 2012-2015 Municipal Integration Plan is even more explicit, in that it states that "Barcelona ought to be an aggregate of people who interact with one another against a backdrop of diverse languages, cultures, beliefs and ideologies, but within a common frame of reference based on Catalonia's tradition (developed over time by embracing new contributions) and in which Catalan, as a lingua franca, must aid cohesion" (Garcés-Mascareñas, 2014b).

4.3.2 Civic integration

As a result of the attention paid to cultural integration concurrently with the policy shift that places the responsibility of integration onto migrants, national integration policies in first and second generation-immigration countries in Europe have introduced “integration agreements”. Migrants also are required to attend “civic integration courses” as a condition for stable residence.

Italy introduced the “Integration Agreement”, a sort of contract that migrants have to sign when they obtain their permit of staying in Italy. The agreement includes language command requirements (A2 level of the Common European Framework of Reference for Languages) and a requirement of the basic knowledge of laws and institutions. However, the language tuition system, as it currently stands, does not allow the achievement of the established target. Evidence shows that language tuition courses are increasingly attended by those who wish to learn Italian to improve personal knowledge or to have a better employment position, rather than by those who are supposed to sign the integration agreement.

Compulsory pre-immigration courses, such as those developed in **the Netherlands**, function as instruments that, under the pretext of integration, restrict immigration and select migrants. All actors who have introduced integration requirements abroad should consider that this is not in line with EU law (as evidence from court cases demonstrates). The Conclusions of the latest Council and Representative of Governments and the Member States on integration of TCN (June 2014) stress the need for "voluntary cooperation between receiving countries and countries of origin in a pre-departures phase" which would facilitate reception and integration in destination countries. Besides, the reference to “voluntary cooperation” clearly underlines that the introduced integration requirement, adopted by some Member States, that could impede family reunification is not in line with EU law.

Compared to compulsory courses, the National Integration Plan adopted since 2009 in **Luxembourg**, seems more promising and has shown successful voluntary agreement. A project to improve integration that played a lead role was OLAI (*Luxembourg Reception and Integration Office*). The role of OLAI was to coordinate and implement a national integration strategy. The plan involved four key factors (Ministry of Family and Integration, 2009), firstly, guidance for newcomers; secondly, assistance in social, economic, political and cultural integration; thirdly, to fight discrimination; and finally, to study migration. One key element of the integration plan was the *Welcome and Integration Contract* (CAI). The CAI is a two-year agreement aimed at any foreigner over the age of 16 year’s old living legally in Luxembourg. The agreement is also seen as holding symbolic value as it is not obligatory. It has therefore been seen as indicative of an individual’s willingness to commit to integration and settlement in Luxembourg (Humphris, 2014).

- ➔ **Integration measures, tests and contracts must promote integration and should not be the condition for accessing rights.**

- ➔ **Social inclusion into society should be incentivized through free and equal access to institutions and public goods and services, and not through compulsory frameworks of civic and language courses, which have been proved not to be successful.**

4.3.3 Religion

At the *national level*, following the 9/11 attacks on the United States, many European states feared that the growing international tensions would have repercussions at home. They tried to encourage or create Islamic institutions on the model of churches, to constitute a dialog partner with whom they would be able to solve any problems emerging, hoping to foster a "moderate" Islam. They wanted to integrate Islam, and thus limit the appeal and the reach of terrorist and fundamentalist networks. The idea was to "domesticate" Islam, and to help a German, French or "European" Islam come into existence, by asking them to create united Islamic organizations on the model of the institutions of other religious communities. However, the lack of representativeness in migrant communities remains evident almost everywhere around Europe. In particular, Muslim associations founded in the last decades cannot compare with churches with respect to tradition, public influence, established networks, broad membership and organization (Thränhardt, 2014b).

In **Germany,** the Federal government decided to give initial funding for Islamic academic centres at universities. They were established in four places: Frankfurt-Gießen, Münster-Osnabrück, Tübingen and Erlangen. Their aim is to institutionalize Islamic theology at German universities, and train Imams and teachers of Islamic religion. The federal ministry expects them to lay the ground for a well-founded denominational religious instruction and at the same time to create a "chance to introduce historic-critical methods dealing with the Quran". This introduces the classic dilemma between academic freedom of research and teaching on the one hand and denominational attachment on the other that has been fruitful and conflict ridden for the Protestant and particularly the Catholic Theological Faculties in Germany over more than a century (ibid, 2014b).

In **France**, students do not get any faith-based religious instruction in public schools leaving this in the hands of religious communities. Schools offer classes on Wednesday afternoon's and religious bodies are free to use school buildings in these open hours to offer religious education on their own. Mosques are active in teaching religious education, parallel to the Catholic Church, and Protestant and Jewish communities. Some Muslim web sites even speak of *"catéchisme musulman"*, using a traditional Christian term. The teaching is often practised in Mosques, parallel to other activities, and particularly on Wednesdays' and Saturdays'. In contrast to Catholic practice using school premises, Islamic teaching is mainly takes place in Mosques, possibly on practical grounds, due to the smaller numbers of Muslim students in school. Religious education in France, for Muslims as for other faiths, is much more a task for parents and civil society, and less state organized (ibid, 2014b).

At the *regional level*, in **Germany**, Länder have prerogatives concerning education. Therefore, each Land can decide if and how to introduce Islamic religious instruction in school curricula. As a result, the picture is extremely varied, and the following examples testify the vast array of solutions that local German authorities have found in order to provide Muslim pupils equal access to religious instruction in public schools.

Bavaria has established a curriculum in cooperation with the Erlangen Islamic religious community, Islamic and Protestant theologians, school teachers of religion, professors of religion, Islamic and Arabic studies and education and the Bavarian ministry of culture.

The **Land of Hamburg** opted for "dialogic religious instruction for all", which is a cooperative solution including all religious groups – Protestant, Islamic, Alevi, Jewish, Buddhist – under the coordinating responsibility of the Protestant (Lutheran) Church as the traditional church of the city. The intent is to establish religious competence in an open and mutually tolerant setting. This practice has been developed over decades, step by step, in a consensus between the city government, the traditional Lutheran Church and other religious partners, particularly Islamic and Alevi organizations, and is motivated by the wish to create a common religious instruction for all children, to further mutual understanding and to have an integrative approach. The establishment of an interreligious "Academy of World Religions" in 2010, comprising research and teaching of all the related religions, has complemented the comprehensive religious instruction in schools.

The concept stresses interrelated theological and didactic research and practice. It includes Professors for Christian, Jewish, Islamic, Alevi, Hindi and Buddhist religions.

Other Länder have introduced interim arrangements, consulting Islamic organisations but not conceding the definition of doctrines and contents of religious instruction. They want to be less dependent on Islamic organizations. **North Rhine Westphalia**, for instance, has established an advisory council *(Beirat)* where Islamic organizations have a voice but not the power of decision. However, the concept does not meet the peculiarities of the German Constitution, and does not position Islamic instruction parallel to Catholic and Protestant instruction, giving the state more say in Islamic religious affairs.

Some *Länder* did not react at all when the German Islam Conference urged them to introduce Islamic religious instruction. The new *Länder* (former East Germany) are not engaged on this issue as they do not have a large Islamic population (ibid, 2014b).

For German *Länder*, one of the main difficulties is the clear identification of interlocutors and partners among the Muslim community, due to the very non-hierarchical and non-institutional structure of this religion. This represents an obstacle, as religious instruction in public schools can only be offered if there is agreement between the public authority and the representatives of the religious community as provided by the German Constitution. So, the provision of Islamic religious instruction is considered troublesome because Islam is not institutionally organized like the Christian religion and, therefore, as long as Muslims are not able to reach an agreement with regard to their representation, Islamic religious education in accordance with the Constitution cannot be offered.

Some have argued that the articles of the German Constitution hide a structural discrimination in this regard: while *de jure* Muslims have the same rights to exercise their religion, *de facto* they cannot not due to the structure of their organization. A deeper analysis of the case of the Land of Hessen can provide us with interesting insights on how to best ensure the non-discrimination and the equal treatment of religious groups with regard to the provision of religious education. After a thorough examination of the issue from the juridical point of view, Hessen established ten baseline requirements that need to be fulfilled in order for a religious community to become partner of the *Land* in the implementation of religious education. According to these requirements, provided that the religious community has a minimum of institutionally organized structure, the community has to set clear rules governing its representation so that authorities can recognize the negotiating partner as a legitimated spokesman of the religious community (ibid, 2014b).

However, the State cannot interfere with such rules, as the community has the right to organize itself in accordance with the doctrines of the religion. The invocation that Muslim organizations be organized on a "democratic basis", represents an undue interference of the State with religious affairs (additionally, the lack of such democratic representation is often used as a pretext in order not to recognize them as legitimate partners).

- ➔ **The practice of diverse culture and religions should be guaranteed in applying the principle of equity in treatment.**

- ➔ **Specific attention should be given to the issue of equal treatment the implementation of decisions.**

A clear example of the application of the principle of equity occurred in the land of Hessen. According to the requirements established by the State, a religious community does not have to be organized on a democratic basis: the Land just requires that it abide by the law and the Constitution. Furthermore, Hessen acknowledges that complete homogeneity of the religious community is not necessary. This allows it to overcome another apparent obstacle, i.e. the existence of many different Muslim communities (Sunnis, Shiites, Alevis, Ahmadiyya, etc.). Just as the different Christian communities (Protestant, Catholic, Greek Orthodox, Adventist, etc.) do not have to agree on common religious education, this also applies to the different Muslim communities. Hence, Hessen has followed the traditional state-church relations, concluding a separate treaty

with two Muslim organizations (DİTİB Sunni and Ahmadiyya), which fulfilled the above-listed requirements for being recognized as a religious community and thus as a partner of the State, giving them responsibility for the content of religious instruction, taught by state-trained teachers. This enabled different Islamic religious education for different confessions. While the religious contents of religious instruction are decided by recognized religious communities, the state is allowed to determine the pedagogical and scientific standards for the qualification of teachers, approves the curricula and controls that they are in line with the general educational goals and the German Constitution. This is one of the reasons why Islamic religious education has to be taught in German (Kindermann, 2014a).

Wisely applying the principle of equity, the Ministry of Hessen gained success in overcoming the hot debate on Islamic classes within the public education system.

At the *local administration level*, cities may engage in having 'new religions' taught in the educational curriculum in the same way as `native religions' are part of such a curriculum. **Stuttgart** has made some attempt to do this. Such policies may have the important practical consequence of bringing immigrants into the educational system – as teachers. But above all, they have an important symbolic function: the message of recognition of `culture' as heritage and home language and religion as an important element of immigrants' identity. They are, however, not present yet in all cities (Penninx *et al.*, 2014b).

The following series of examples provides a picture of the varied relationships between cities' administrations and religions in domains other than religious instruction.

In the case of the city of **Turku**, Finland, the Finnish principle of separation of Church and State forbids explicit relations between the city's institutions and religions. At the same time, there was early recognition and institutionalisation of Islam by the city that has certainly eased the difficult position that this `new religion' had to face in many other European countries and cities. The result of Finland's specific legacy and history has resulted in a more general acceptance of the religious factor in civil society, but also that the state and the city of Turku handle religious aspects by formally keeping at a distance. This is particularly the case, when it comes to religious activities in the strict sense, but also when it comes to activities of religious organisations in general. Inter-religious dialogue and activities is left to the initiative of civil society and the stakeholders themselves. And actually, there are indications that such dialogue exists, be it out of sight of the city itself (Penninx, 2014).

Barcelona was the first Catalan (and Spanish) city council to promote a proactive approach to religious minorities, setting up the *Oficina d'Afers Religiosos* (Office for Religious Affairs) in the 90s. While it always came under the auspices of the *Regidoria de Drets Civils* (Department of Civil Rights) of the Barcelona City Council, the management of the Centre was taken over by the *Catalan UNESCO Interfaith Association* in 2004 and the Bayt-al-Thaqafa Foundation in 2013. (2012). The Office is in charge for creating a regularly updated database with basic information concerning the main religious groups established in the city, with defending the right to religious freedom, acting as a 'defender' of religious minority rights, by mediating between communities and urban planning specialists, or helping them gain access to municipal facilities for support in festivities and special events. Furthermore, in 2009 the Catalan Law on Centres of Religious Worship (16/2009), which had the threefold aim of making it easier to practice the right of freedom of worship, to support municipal councils in their guaranteeing of this right, and to ensure the proper conditions of security and hygiene in places of worship, gave local governments a leading role in the management of religious diversity. For example, the law made it obligatory for municipal councils to set aside urban land for uses of a religious nature, and also gave them powers to issue municipal licenses for opening and the use of centres of religious worship. This led many town and city councils to draft policy for managing religious diversity for the first time (Garcés-Mascareñas, 2014b).

In recent years, **Milan**'s administration has been positively appreciating and promoting cultural diversity in the context of the city' branding international strategy. However, this does not seem to take religious diver-

sity into account. More generally, no policies of inter-religious dialogue have been promoted by the municipality. Relations with religious groups, and in particular with the Muslim community, have been not always easy. The request of an area on which to build a mosque has remained unanswered for a long time. The centre-left majority elected in 2011 abandoned such a hostile attitude, and at the beginning of its mandate promised to take the Muslim community request into account. Yet, the mosque issue has been highly politicised by the right-wing opposition parties, and only recently the municipality came to a decision. In the context of the EXPO internationalisation initiatives, three lots of public land are going to be allocated to religious communities for the building of their places of worship, and one of these is going to be assigned to the Muslim community. The mosque will be built only with private funding. Yet, the Milan mosque is not going to be opened in time for the 2015 EXPO (Caponio, 2014b).

In any case, that administrations – at each governance level – should more proficiently engage with the religious dimension of migrant integration as is demonstrated by the role played by religious networks and associations in the facilitation of migrants' settlement. As shown by research carried out within the KING project on migrants' access to integration resources through social networks, religious networks are extremely significant in helping new migrants make meaning in their new lives (Phillimore *et al.*, 2014).

- ➔ **The promotion of inter-faith dialogue is crucial in order to prevent the isolation of certain groups and to promote mutual understanding between faiths.**

- ➔ **All actors must differentiate better between acceptable cultural norms and those that are not within a European framework (for example, wearing a hijab is generally acceptable, but female genital mutilation is not).**

EUROPEAN POLICY CENTRE

POLICY BRIEF

20 May 2014

Immigration and free movement in an unusual electoral race: what implications for the next political cycle?

Andreia Ghimis

BACKGROUND

For the first time, the President of the European Commission will be elected by the European Parliament (EP) on a proposal made by the European Council taking into account the outcome of the EP elections. In this context, European political parties chose to put forward 'top candidates' at EU level campaigning for this job, simultaneously with the candidates competing, at national level, for seats in the future European Parliament.

Throughout the campaigns at national and EU level, migration is among the main issues addressed and has some potential to determine the outcome of the elections. The economic, financial, social and identity crisis in addition to the rise of populism have provided a backdrop for migration to come to the foreground. This, together with concerns expressed in some Member States on issues like demography and labour force shortages, has laid the groundwork for thought-provoking and heated debates on migration. This policy brief seeks to analyse the content of the arguments brought forward at national and EU level and their potential to influence the Union's future political agenda.

Without any pretence of exhaustive analysis, this paper focuses on how EU immigration policy and free movement of EU citizens are discussed in the three biggest EU Member States where these issues have fuelled high tensions in recent years: France, Germany and the United Kingdom. It is worth highlighting, these topics are debated in different terms and from different perspectives in other EU Member States. Nevertheless, the choice of these three is motivated by their capacity to influence the evolution or involution of the EU's immigration and free movement policies in the next political cycle.

Regarding the EU level, the paper examines how these policies are debated between the four aspirants for the Commission's Presidency who have participated in several debates: Jean-Claude Juncker (EPP), Ska Keller (Greens), Martin Schulz (PES) and Guy Verhofstadt (ALDE).

This paper will focus on the following key issues: external border controls, legal migration, intra-EU solidarity in the field of immigration, the Schengen area and the so-called 'benefits tourism'. This will help identify the possible priorities and trends on the future European immigration and free movement agenda.

From the analysis, it is clear that two different campaigns are unfolding with respect to these two policies. The tense domestic debate in Germany, France and the United Kingdom is not uploaded to the EU level, where instead we are witnessing a rather serene 'confrontation'. Therefore, several questions deserve particular attention: What impact will this have on tomorrow's immigration and free movement agenda? How will this influence the development of these policies? What will the consequences be, if any, in institutional terms?

STATE OF PLAY: the disconnection between two debates

An unbalanced debate at national level: from an aggressive tone to muteness

In the three abovementioned countries – but not exclusively – immigration and freedom of movement are intensely debated and create great anxiety. Although discussed together at domestic level, these two policies are fundamentally different. The freedom of movement is a fundamental right granted to EU citizens whereas the immigration policy defines rules regarding entry, residence and movement of third country nationals to and within the EU.

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National parties have put forward different political programmes which can help us anticipate the trends among which debates in the future EP might take place in terms of immigration and free movement. These issues are likely to be 'hot topics' for the next European political cycle, therefore it is important to pay attention to how they are currently being approached at national level.

Some parties chose to play the 'aggressive card'. Ultranationalist parties such as UKIP (UK) and Front National (France) have put the generic 'migrant' – no distinction between mobile EU citizens and third country nationals – at the centre of their campaign, wrongly mixing up the two categories in doing so. In any case, their focal points are different. UKIP aims to end the 'social welfare tourism' of EU citizens moving to the UK. The Front National's goal is to stop "both legal and clandestine immigration" and to revise the Schengen agreement in order to "regain control" over French borders.

A milder tone can be found amongst some mainstream political parties which have decided to bet on the 'reduce immigration card'. Their agendas concentrate on different concrete issues, but have three more or less common, elements. First, as the parties mentioned above, they mix issues of free movement and immigration. The Bavarian Christian Social Union (CSU), the British Conservatives and German Alternative für Deutschland (AfD) intend to reform the free movement rules in order to – as they put it – limit migrants' access to social benefits. Second, some envisage a revision of the Schengen rules. The French Union pour un Mouvement Populaire (UMP) wants sanctioning, suspending or even excluding a 'failing' Member State from the Schengen area to be possible. Moreover, the UMP wishes to suspend France's participation in the Schengen area within 12 months if "substantial progress" is not made. Third, in terms of immigration, UMP and AfD talk about controlling immigration by strengthening border controls.

The 'shy stance on immigration and/or free movement card' is played by the German Christian Democratic Union (CDU) and Sozialdemokratische Partei Deutschlands (SPD), the British Labour Party and Liberal Democrats (Lib Dems) and the French Socialists, although there are some differences worth mentioning. As for the freedom of movement, the French Socialists timidly invoke it only in relation to workers. Their objective is to fight social dumping which is also a priority on the SPD and Labour Party agendas. In this vein, the two parties want to press for stronger controls in Europe. The benefits of free movement are however pointed out in the Lib Dem agenda, together with the commitment to fight the abuse of the British social system. These parties are nevertheless a bit bolder on immigration. The French Socialists want to boost development aid and enhance intra-EU solidarity to assist Mediterranean countries. Development aid for origin and transit countries is also put forward by the German Christian Democratic Union (CDU). The same goes for Germany's SPD which also highlights the need for a system of legal migration.

Finally, the 'some things are better left unsaid card' has been put forward by the British Lib Dems and Labour Party in terms of immigration (not freedom of movement). The immigration policy is not mentioned in the Lib Dem manifesto. Although it has a chapter entitled "immigration that works for Britain" in its manifesto, a thorough analysis of the Labour Party's programme shows it is mainly – if not exclusively – composed of free movement policy proposals.

Three main conclusions can be drawn from this analysis. First, immigration and freedom of movement are – with some exceptions (ex: British Lib Dems, French Socialists, German SPD) – debated together. It cannot be stressed enough that blurred lines and forced overlapping of dossiers could lead to instilling the idea of EU citizens as immigrants and envisaging a restriction of the rights they enjoy. Considering that free movement is perceived by EU citizens as one of the biggest EU achievements, this distortion and its possible consequences are particularly dangerous for the future of the European project.

Second, some mainstream parties have borrowed populist arguments creating an imbalance between, on the one side, arguments depicting migrants as a burden for the host society, speeches on revising the Schengen rules and strengthening external border controls and, on the other, a hesitation to highlight the benefits of migration. This is not very surprising. After all, politicians are elected by voters and migrants are not part of the electorate (for EP elections) with the exception of the UK for some specific third country nationals. In addition, mobile EU citizens, who do have a right to vote in EP elections, represent a very small share of people and, consequently, voters.

Finally, although competing in European elections, the political agendas of national parties are also characterised by fundamentally different objectives due to different social, economic and political situations that impact the way immigration and free movement is addressed.

At the EU level: a mild debate

For the four 'top candidates' who have participated in several public debates – Jean-Claude Juncker, Ska Keller, Martin Schulz and Guy Verhofstadt – immigration and free movement are less controversial and have been less arduously and

extensively debated than subjects like: youth unemployment, austerity or the crisis in Ukraine and energy dependence on Russia. Furthermore, they bring forward other policy elements – sometimes different than the trends identified at national level – which might also be priorities on tomorrow's EU immigration and free movement agenda.

Immigration is not the item which distinguishes the four agendas although it receives different attention from candidate to candidate. Verhofstadt speaks of the need for "a legal common immigration policy" without detailing it. Keller mentions a switch from a "Europe which sees migrants as a security threat" to "an open Europe that cares for people in need". Juncker presented a five-point plan on immigration: implementing the Common European Asylum System, boosting the role of the European Asylum System Office, cooperating with third countries, encouraging legal migration and tightening the control of EU borders. Schulz talks about temporary protection, intra-EU solidarity, cooperation with transit and origin countries and a system of legal migration.

From the debates between the top candidates, two common elements can be identified. The first one is the need for more legal migration channels. Yet, the motivations of the four candidates vary. Verhofstadt portrays legal migration as a way to cope with irregular migration. Keller depicts it as a way of preventing people from resorting to dangerous journeys towards the EU. Although similar, these two positions differ because they emerge from opposite angles. If Verhofstadt approaches this issue from the point of view of the EU, Keller looks at it from the migrants' perspective. Schulz claims that migrants could contribute to fighting the consequences of an ageing European population. Juncker also stresses the fact that the EU law should be revised in order to favour legal migration.

The four candidates agree on one point: legal migration can be a growth factor for the EU by addressing the labour market shortages which cannot be fulfilled by the labour force inside the EU. However, no candidate brought up the 'need for innovation' argument even though the 'innovation union' is one of the Europe 2020 flagship initiatives and academics (Venturini and Sinha) have shown that migrants play a positive role in promoting innovation.

The second common element among the four candidates is the need to boost intra-EU solidarity in the field of immigration. However, once again, their views have different nuances. Juncker wants EU Member States to show more solidarity in supporting the costs of the return policy to reduce the burden that weighs on the EU Mediterranean countries, but he also specifies that Member States should no longer reduce their development aid budgets. Schulz envisages a temporary protection system, which should enable the EU to grant protection to people fleeing conflicts in their home countries. Keller points to EU's shameful performance in offering protection to Syrian refugees, so she wants EU Member States to engage more into resettlement programmes. Verhofstadt pleads for "burden sharing for the people in need".

A distinction can be noticed between those in favour of more protection (Keller, Schulz, Verhofstadt) and Juncker as a supporter of the return policy.

To sum up, legal migration and intra-EU solidarity are addressed at EU level while *quasi* absent from the national debate in France, Germany and UK.

Regarding the freedom of movement, the controversial issue of 'benefits tourism' is given little attention. However, although not in great detail, the four candidates do affirm the importance of free movement for the EU clearly distinguishing it from the immigration policy. Another point of consensus among candidates is the intention to allow Romania and Bulgaria to enter the Schengen area, although this is an issue for some political parties such as the French UMP. Furthermore, despite it being an important topic at national level, especially in France, the revision of the Schengen rules is not envisaged by any of the four candidates.

Two campaigns in one

Clearly, at present the European citizens – to the extent to which they follow the debates at EU level and/or at national level – face two significantly different campaigns particularly regarding immigration and freedom of movement.

On the one hand, the tone is significantly different as there are no right-wing populists involved in the debate for Commission presidency, which allows a serene debate among the headline candidates.

On the other hand, national and EU campaigns differ in the message they send. At national level, citizens are invited to vote in order to choose representatives for the EP who, during the campaign, present purely national propositions in terms of immigration and free movement. At EU level, citizens are told that they can select the future President of the European Commission, but the plans the four candidates present in their campaigns related to these two policies have a more European wide angle. All in all, and although this might not be exclusively limited to immigration and free movement policies, this double discourse from politicians is very confusing for voters.

PROSPECTS

It is difficult to define the consequences of such a scattered political landscape regarding the future agenda in the field of immigration and freedom of movement. Clearly the two different debates have not influenced each other throughout the campaign. It is therefore hard to determine which of the approaches will frame the next political agenda on immigration and free movement. This will mainly depend on the future Commission President – whether they are one of the top candidates put forward by the European parties or not – and the future composition of the EP. If extremist parties score high, they might influence the political agenda more strongly, especially in the fields of immigration and free movement as these policies are in the core of their political programmes.

In the medium run, what room for manoeuvre will the future Commission President have to ensure the implementation of the programme promoted during the campaign? Although there is no clear answer to this question, several factors will influence their capacity to stick to their 'promises':

- Heads of State and Government will at the June 2014 European Council, i.e. before the new Commission will have entered office, define the strategic guidelines in the area of freedom, security and justice. Although none of the candidates mentioned these guidelines during the campaign, their duty is to define the orientations regarding the legislative and operational planning in these fields. As a consequence, the Commission's future agenda will be framed, or even limited.

- Decisions taken under the previous legislature may also have an impact on the future Commission President's commitment to their campaign agenda. The multiannual financial framework 2014-2020 already sets – through the allocated funds – certain priorities and actions to be taken by the next Commission. In addition, the Commission adopted two Communications in March 2014 – one by DG Justice and one by DG Home Affairs – which may also act as a '*fil rouge*' to follow and develop.

- Finally, the profile of the future Commissioner/Commissioners in charge of immigration and freedom of movement is another key element. A highly complex political game will, at the end of the day, decide who gets this/these job(s). As these fields are increasingly politicised, national governments are likely to attach great importance to these portfolios, and the nomination of the next Commissioner(s) will be strongly determined by EU governments. However, the European Parliament will also have a say as it did in 2004 when it rejected the nomination of Rocco Buttiglione for the Justice, Freedom and Security portfolio. All these factors will have an impact on the future priorities regarding immigration and freedom of movement.

Scope for a DG Citizenship and Mobility?

Regardless of whose programme will prevail on the European agenda, who among the Commission Presidency candidates – if any – will become Commission President, this new political cycle should be an opportunity for the next head of the Commission to rethink the distribution of the immigration and free movement portfolios in the next college. While none of the programmes presented by the four candidates envisaged this institutional aspect, a fundamentally different Commission administrative structure is worth considering. Certainly, EU citizenship, freedom of movement and immigration are separate and autonomous dossiers, but they are also interlinked if one thinks of immigration and freedom of movement in terms of mobility of people to and within the EU. Hence, the idea of grouping them into one big portfolio 'Citizenship and Mobility' (see Fabian Zuleeg, EPC Commentary, April 2014) – dealt with by a cluster of Commissioners under the supervision of one Commission Vice-President – could have several advantages.

The new structure could lead to a more comprehensive approach of the challenges mobile people (EU citizens and immigrants) face when entering and moving within the EU. Moreover, this new reorganisation would allow the EU legislator to envisage a change of paradigm for the EU immigration policy and eliminate the remnants of the former third pillar – placing the immigrant in the same basket as the drug dealer, the terrorist and other serious criminals. Now that the third pillar is history in the Treaty, the EU can take the opportunity to change policy perceptions and reinforce the protection pole of its immigration policy.

Andreia Ghimis is a Programme Assistant at the European Policy Centre (EPC).

European Policy Centre ■ Résidence Palace, 155 rue de la Loi, 1040 Brussels, Belgium
Tel: +32 (0)2 231 03 40 ■ Fax: +32 (0)2 231 07 04 ■ Email: info@epc.eu ■ Twitter: @epc_eu ■ Website: www.epc.eu

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EUROPEAN POLICY CENTRE

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Post-European Parliament Elections Analysis

Summary

European citizens went to the polls this month in order to elect a new European Parliament. Under the Lisbon Treaty the number of seats has been reduced to 751; and heads of state and government are compelled to take into account the result when choosing the next President of the EU Commission. This year's elections saw key gains for parties opposed to the EU project, particularly in France and the UK.

Despite the buzz, the 2014 European Parliament Elections might turn out to be not as 'historic' as some people had predicted. Janis A. Emmanouilidis, Corina Stratulat and Fabian Zuleeg explain in this report what this could all mean for Europe, at this stage.

EPC Senior Policy Analyst, Corina Stratulat believes that despite the hyperbole surrounding these elections, they were less historic and more 'business as usual'. Before the elections there had been various 'sensationalist' claims: that the European Parliament was on the brink of an invasion by Eurosceptics; that these groups would stop the Parliament from functioning; and that the now familiar 'voter fatigue' was at an end.

Turnout

With turnout only up very slightly, the European Parliament had in effect failed again to generate voter interest. Voter apathy stems from the perception among most citizens that there is 'little at stake' in EP elections: they do not determine the composition of the European executive, nor its policy agenda.

To try to inject a greater sense of purpose into the European vote/ballot, and thus raise citizens' involvement/participation, the European political parties had put forward and endorsed candidates for the role of Commission President. There was however, no clear evidence to suggest that this device had enticed more citizens to vote.

While turnout in countries such as Slovakia, Poland and the Czech Republic showed record lows, Stratulat speculates that it was probably greater public awareness about the relevance of EU for national politics in the context of the crisis in countries like Germany, Greece and Sweden, that had kept turnout stable at least/prevented the overall participation rate from declining again

Another factor influencing the turnout figures was that several Member States had held other simultaneous elections on various national issues (e.g. presidential election in Lithuania) at the same time.

The issue of the ongoing low turnout figures raised questions about the overall standing of the European Parliament as an institution and its role in representing EU citizens – not least the young, less educated and low status among whom engagement generally low. The relatively low turnout figures also raised questions about the legitimacy of the process for determining the next EU Commission President – assuming that one of the 'top candidates' is selected.

Stratulat perceives a continuing disconnect between the voters on one side then the European candidates, and their national parties. It is generally the national parties rather than European who campaign, and ultimately they are not taken with European issues, or in this case the Spitzenkandidaten experiment. This issue has not been properly addressed, and the procedures involved in the concept of the Spitzenkandidaten or 'top candidate' need further improvement.

Greater strength of the anti-EU parties

Many of the anti-EU, populist parties have increased their vote share but are not exclusively on the political right of the spectrum, as many may perceive. This grouping includes a huge range of parties and groups from the Right and the Left. While they collectively look set to take 24% of seats in the Parliament, this should not represent an impediment to the mainstream parties.

Some examples of these types of parties include:

- ECR (European Conservatives and Reformists), described as 'soft' Eurosceptics, would face problems re-forming in the new Parliament because they had lost various constituent MEPs and Parties.

- EFD (Europe of Freedom and Democracy), which includes Britain's UKIP, as 'hard-core' Eurosceptics. Stratulat said this group too could face re-formation problems if it loses the support of Italy's Lega Nord – who have said they may form an alliance with France's Front National; and of the True Finns and Danish Dansk Folkeparti (who themselves were undecided). However there were now other parties (e.g. Alternative für Deutschland (AfD), and Italy's 5 Star Movement) who might consider forming an alliance with the EFD.

- France's Front National is at the forefront of the EAF (European Alliance for Freedom). Observers are now watching to see if the Lega Nord, Austria's Freedom Party (the FPÖ) and the Dutch Freedom Party (the PVV) will join this grouping. It is questionable whether the Swedish Democrats would also join, given national elections are scheduled for the autumn making them unlikely to express an opinion beforehand. Despite this, if the EAF could reach the required threshold of 25 MEPs to form a Parliamentary group, there's still some doubt as to whether the 7-member-states threshold could be achieved, especially as MEPs from the German National Party, Greece's Golden Dawn and Hungary's Jobbik Party might be seen as too radical to be permitted to join the EAF.

- GUE (the radical left group) had done reasonably well, not least in view of the performance of Greece's Tsiriza Party, Spain's Izquierda Unida and the Portuguese left.

Concluding on the anti-EU and/or anti-Euro, populist parties, Stratulat believes that it is unlikely that these groups and parties could come together to form coherent and lasting alliances. Continuing, she states that there is sufficient evidence to show that they regularly vote against each other; or, as in the case of UKIP, that they have a reputation for simply not turning up to vote at all.

Therefore the centre-ground parties could continue to dominate in what she described as a 'Europhile consensus'.

Significance of the results

Stratulat poses the question about the significance of the stronger showing for the 'anti' parties. In this view, these MEPs could have the ability to shift the discussions in Parliament, particularly on such subjects as immigration – especially as now they would receive increased speaking time in Parliament and would inevitably assume the chairs of some committees. As already seen in France and the UK, these parties also have the ability to make an impact on national politics in their home countries.

The success of these parties has shifted the focus, from a financial crisis, to a political crisis and it is clear that no one is clear about how to deal with this 'new' crisis.

The EPC's Director of Studies, Janis A. Emmanouilidis, has analysed the elections in four main parts: turnout, rise of the anti-EU parties, selection of the European Commission president, and finally the long term lessons that can be drawn. He believes that despite it being too soon for a deep analysis, the situation had remained fluid enough for preliminary conclusions to be made.

Turnout

Emmanouilidis believes that while voter turnout had stabilised to around 43%, it could not yet be said whether the downward trend had been stopped, nevertheless there is a clear issue with citizens still appearing not to understand that their votes made a difference.

The apparent rise of the anti-European parties and its consequences

Janis A. Emmanouilidis uses the term 'antis' as most of this group which appears to be heterogeneous can be described anti-establishment and anti-elite; and could therefore votes cast could be interpreted as protest votes, showing the 'yellow or red card' to more established parties. In addition, despite the results in the UK, Greece and France, which is 'worrisome' in itself, several of these 'antis' parties had not done as well as predicted: The Netherlands Freedom Party (PVV); Finland's True Finns; Hungary's Jobbik.

What would be the consequences of this? The influence of these votes, and the power of these parties, much as Stratulat has said, would be felt more at national parliament level than in the European Parliament. Emmanouilidis believes that the European Parliament has shown itself to be adaptable, and that it would therefore cope with the new political landscape. There would however have to be more 'grand coalitions' in mainstream politics in order to combat the impact of the 'anti' parties. It must be remembered that despite the popularity, anti-establishment parties are not a coherent force and tend to use the European Parliament as a platform to 'broadcast their views to a home audience'; but are less interested in the real work of the European Parliament.

It is then the impact at national level which is more concerning, indirectly allowing EU policy making to be more difficult, as national parties and governments would adapt their positions to align with some of the rhetoric of the 'anti' parties, being seen currently in France. Currently French President Hollande has been unfavourable in the polls, and that weakness has been manipulated by the Front National. As in Germany, some members of the ruling CDU-CSU party have been espousing some of the ideas of the AfD (Alternative für Deutschland).

Emmanouilidis believes that UKIP's top position in the UK polls was a strong message, and would strengthen anti-EU sentiment in the UK eventually likely to influence the UK's in/out referendum. Voters in Scotland's referendum on leaving the United Kingdom (to be held in September 2014) might also take the UKIP poll into account, considering that if the rest of the UK is indeed moving towards leaving the EU, then the referendum for the Scots this year also becomes a choice between staying in the EU or leaving it (assuming that an independent Scotland would be permitted to stay in or join the EU).

Would this lead to political instability? In the case of Greece, the situation is complex. Tsiriza's impact has peaked meaning early elections are not likely. National parties – e.g. the UK's Conservatives, Germany's CSU and Italy's Forza Italia – had also taken some of the rhetoric of the populist parties, but had not fared so well in the European polls. It is too soon also to provide an analysis of this, but should be watched closely.

Impact of the elections on the selection/election of next EU Commission President

For Emmanouilidis, the process of how to select the next EU Commission President is clearly set out in the Lisbon Treaty – but has seen many varying interpretations by the European Parliament and national governments. This could turn into a 'battle' between the Parliament and the Heads of State and Government. One which might development from a political battle into a war.

A meeting of Heads of State and Government in Brussels on Tuesday 27 May is not likely to find a decision, and is more likely to come either at the June summit or in the autumn, in which case incumbent President Barroso would be asked to stay on as a caretaker president. In between, there is a lot of compromises to be made and much horse-trading to be done,

especially as UK Prime Minster, David Cameron, has already said 'no' to both Mr Schulz and Mr Juncker becoming president, saying they were too federal in outlook; and the Hungarian Prime Minister, Viktor Orbán, had said he also would not support the candidacy of Mr Juncker.

Emmanouilidis therefore predicts that neither Mr Juncker nor Mr Schulz would become EU Commission President, but rather that a compromise candidate would be found.

Long-term lessons to be learned from the 2014 Elections

The new 'top candidates' process had been an experiment and cannot be judged too quickly but does require improvement for the next elections. National governments need to give more thought to the link between the European Elections and the candidacies for the role of Commission President, given that this was being 'sold' to the electorate as one way in which their votes had more impact on the running of the EU.

For Emmanouilidis, these elections are not a turning point for the EU project. Contrary to Stratulat, he believes that a 'business as usual' attitude would not be a good idea, but concedes that national governments would promote the idea of 'keeping calm and muddling through'.

The Chief Executive of the EPC, Fabian Zuleeg provided another analysis, focusing on the UK, posing the question: "Who won the elections in the UK?"

According to Zuleeg, the obvious answer was UKIP but a number of Conservative MPs were now saying British voters were actually voting in order to have an in/out referendum now. Losers then, were those led by the Conservatives who had been promoting the idea of reforming the EU with the hope to hold a UK in/out referendum at a later date. These election results nevertheless mean an increase in the probability of Britain withdrawing from the EU.

Would the results help the EU focus on its core tasks, such as tackling unemployment, creating jobs, dealing with the Russia-Ukraine crisis – as well as examining the so-called democratic deficit and looking at the future direction of Europe?

"I think we'll see a spread of the 'British disease'," he said. "People will say we can't move because of the strength of the anti-EU parties at home."

Zuleeg is of the opinion that even in the most pro-EU countries, people have had enough of 'more Europe', meaning there could possibly be a period of EU political stagnation during which time it would be difficult to tackle the problems faced by the bloc.

Discussion

During the discussion, one member of the audience commented that the rise of the 'antis' in the European Parliament would 'put the brakes on' national governments, afraid to upset the anti-establishment parties. But the audience member also hoped that the change in the make-up of the European Parliament might lead to a 'true' opposition in the Parliament. She expressed concern that the vote might turn into a trend. She also advised against 'lumping all the antis together' as this failed to understand the complexities involved.

Corina Stratulat said she felt the success of the 'antis' was a reflection of what she called a crisis of representation in the Member States and citizen disenchantment with European leaders. She said this had created a gap between governments and the governed; and the 'anti' parties had stepped in to fill that gap. Stratulat went on to say that politics was cyclical and the appeal of the 'anti' parties would come and go but were now part of what has been referred to as a 'pathological normalcy'.

On the subject of the selection of the next EU Commission President, Stratulat said there was a chance that the next President would not be one of the so-called 'top candidates'; but she felt if that were the case, it would be difficult to justify this to the electorate (as they had been led to believe that one of the 'top candidates' would take the role).

Janis A. Emmanouilidis said it was correct not to put all the 'antis' into one basket. He said it was necessary to look at each national picture on its own merits – but that made it difficult to come up with a European solution to the 'problem'; and trying to do so could even back-fire because amending rules to satisfy one member state would not necessarily go down well in other member states. Emmanouilidis concurred that in his view the 'antis' would not engage in the real work of the Europe Parliament.

Asked if he felt the election results represented a permanent shift to the Right, Emmanouilidis said 'no'. There was, he said, a lot of work to be done to deal with the problem but this would be mostly at national level. The worry was that people had dared to vote for the 'anti' parties – and so in some ways a rubicon had been crossed meaning calls for 'deeper' union now had eased.

Fabian Zuleeg said it was too easy to describe the crisis as one of neo-liberalism. There was a lot of opposition to austerity; that the Left parties were in some trouble; and that there was a strong mood of anti-establishment but felt that common European policies would now only come about if there were absolutely no alternative.

Asked about what impact the election results would have on the TTIP discussions (Transatlantic Trade and Investment Partnership), Fabian Zuleeg said that would depend on the deal being worked out and on what sort of coalition emerged in the Parliament. He felt TTIP would probably form part of coalition discussions among the parliamentary groups. He said on the whole he wouldn't expect 'antis' to oppose TTIP.

In response to a further question about the election of the next EU Commission President, **Janis A. Emmanouilidis** said if a row between the heads of state and government and the European parliament went on too long, the European Parliament would lose out, as it would be viewed as uncompromising.

When asked whether the election results would mean a more social Europe, **Fabian Zuleeg** said there would be no more funding at European level to work on this; so even if people saw this as a function of the EU, the EU would not be able to resolve this issue – and this in turn would lead to further citizen disaffection with the European project.

To a question about the impact of the elections on EU foreign policy, **Rosa Balfour**, the EPC's Director of Europe in the World, took to the floor. She said the EU's foreign policy was struggling and she didn't expect the European Parliament to hinder any major foreign policy decisions; but she said that as the 'antis don't really like the rest of the world', there might conceivably be problems with, for example, something like the ratification of a treaty for Montenegro joining the EU.

Balfour said the European Parliament played an important informal role on the international stage, as election observers for example. She wondered how this might be affected by the election results.