

## Towards the Next Phase of the EU's Area of Freedom, Security and Justice:

### The European Commission's Proposals for the Stockholm Programme

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The European Union needs a new five-year strategy for the development of the next phase of the Area of Freedom, Security and Justice (AFSJ). The existing plan, designed in The Hague Programme of 2004,<sup>1</sup> expires at the end of this year. The Justice and Home Affairs research unit of CEPS has already set out, in several contributions, the big issues and provided policy recommendations for the next five-year plan – The Stockholm Programme – which will be adopted under the Swedish Presidency in December.<sup>2</sup> In June 2009, the European Commission published its perspective towards the

Stockholm process in its Communication: “An area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment”.<sup>3</sup> In this Policy Brief, we take a closer look at the Commission's Communication and highlight the strengths and weaknesses of the approaches adopted for each of the different policy domains falling under the AFSJ rubric. The Communication assesses the AFSJ under three main headings: 1. successes, 2. ambivalent areas and 3. challenges. We will also follow these headings and comment accordingly. Our commentary on the three areas also provides answers to some of the thorny questions raised in the priorities for the Stockholm Programme. We spell these out in the conclusions and put forth a set of policy recommendations.

<sup>1</sup> European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C53/01, OJ C53/1, 3.3.2005.

<sup>2</sup> E. Guild, S. Carrera and A. Faure Atger, *Challenges and prospects for the EU's area of freedom, security and justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, Centre for European Policy Studies, Brussels, April 2009; S. Carrera and G. Pinyol, *Local and Regional Authorities in the Future Area of Freedom, Security and Justice: Towards a Multigovernance Strategy for the Stockholm Programme*, study commissioned by the Commission for Constitutional Affairs, European Governance and the Area of Freedom, Security and Justice of the Committee of the Regions, Brussels; refer also to D. Bigo, E. Brouwer, S. Carrera and E. Guild, *Freedom, Security and Justice in the EU: Recommendations for the Future*, Contribution by the Justice and Home Affairs Section of CEPS to the Open Consultation Procedure by DG JFS of the European Commission, 2008; J. De Clerck-Sachsse (ed.), *Time for Action: Immediate Priorities for the Next European Commission*, CEPS Policy Brief No. 193, Centre for European Policy Studies, Brussels, July 2009.

#### 1. Successes in the AFSJ

The Commission considers that there have been four main successes over the past five years of the AFSJ. The choice of these successes reflects the Commission's key concerns for the development of ‘the area’, so we will consider each in turn.

The first success the Commission highlights is **the lifting of Schengen border controls** between the EU13 (the pre-2004 member states minus Ireland and

<sup>3</sup> Commission Communication, An area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment COM(2009) 262, 10 June 2009, Brussels.

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the UK) and the EU9 (the states that joined in 2004 minus Cyprus). This event took place between December 2007 and May 2008, and is indeed one of the high points of policy-making and delivery in the AFSJ. With a few notable exceptions – with Ireland and the UK remaining in splendid and voluntary isolation, continuing to apply border controls on everyone entering their territory, while Bulgaria and Romania are waiting to join the border-free area and Cyprus is first sorting out its own border before it can join – the rest of the EU is a border control-free zone. While there have been teething troubles with the lifting of border controls, which we have criticised,<sup>4</sup> the achievement of eliminating border guards from the inter-member state borders is nevertheless impressive. EU citizens are very positive about their freedom to travel without administrative obstacles. While they continue to complain about identity checks at airports, the reduction of obstacles to free movement is generally hailed as a great improvement and a notable success of the internal market, thanks to the AFSJ.

There was much doubt about whether the EU9 were ready for the lifting of border controls. Some feared an explosion of cross-border criminality, others a rush of irregular migrants. None of this seems to have materialised. Bearing in mind the substantial difficulties associated with the preparation of comparative statistics on crime across the EU has presented, nonetheless EUROSTAT has succeeded, with caveats, to produce statistics on some crimes across 14 member states for the period 1995-2006. These statistics indicate a general downwards trend since 1995 when border controls were first abolished in many types of crime (motor vehicle theft being the most substantial with a 5.3% drop between 1995 and 2006), although this trend is less clear in other crimes.<sup>5</sup> EUROSTAT statistics indicate that in 2007, crimes in respect of which it was able to collect information continued to fall in the EU, notwithstanding the abolition of border controls on persons.

**Irregular migration** remains an uncertain category. The Commission estimates that there are 8 million undocumented persons in the EU, although whether such a figure is accurate remains unclear.<sup>6</sup> The results of one research project, for example, funded by the European Commission itself – CLANDESTINO<sup>7</sup> –

<sup>4</sup> A. Faure Atger, *The Abolition of Internal Border Checks in an Enlarged Schengen Area: Freedom of Movement or a Scattered Web of Security Checks?*, CHALLENGE Research Paper No. 8, CEPS, Brussels, March 2008.

<sup>5</sup> Eurostat ([http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-SF-08-019/EN/KS-SF-08-019-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-08-019/EN/KS-SF-08-019-EN.PDF)).

<sup>6</sup> Commission Communication (2009) 262, p. 4.

<sup>7</sup> CLANDESTINO (Undocumented Migration: Counting the Uncountable Data and Trends across Europe) is a research project

which has offered a rather different picture on estimations of irregular immigrants in the EU. In particular, it appears from the results coming out of a database set up by this project that the range is more likely to be between 2.8 and 6 million (both figures were calculated for 2005).<sup>8</sup> As an aside, this is still a small (yet illustrative) example of the ‘policy gap’<sup>9</sup> that often exists between research projects on irregular immigration funded by the EU institutions and the European Commission (in this case by DG Research) and the policies proposed and developed by DG Justice, Freedom and Security (DG JFS) of the Commission. This ‘gap’ undermines the goal of evidence-based and coherent policy-making at EU level.

In any event, there does not appear to have been a substantial increase of irregular immigration in the EU since 2007-08, as had been feared. In fact, according to the Council’s Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI), which monitors what they term ‘illegal immigration’,<sup>10</sup> according to (as yet unpublished) information from the member states for 2006, the largest national group of persons designated as ‘illegal immigrants’ in the EU25 were Romanian nationals. This group far exceeded all others.<sup>11</sup> As Romanians became citizens of the Union on 1 January 2007, they ceased to be irregular immigrants in the EU26 except in the most exceptional circumstances. Thus for completely different reasons, it is probable that the statistics will show that the number of persons irregularly entering and present in the EU27 will have diminished in 2007, notwithstanding the abolition of border controls.

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funded by the Sixth Framework Research Programme of DG Research of the European Commission (for more information see <http://clandestino.eliamep.gr>).

<sup>8</sup> The database is available at <http://irregular-migration.hwwi.net>. Refer to CLANDESTINO, Press Release, “Fewer Irregular Residents in Europe than assumed – New online information on irregular immigration”, 20 February 2009.

<sup>9</sup> This refers to the gap between the state of the art in research on a subject and the information/evidence used for the purposes of policy making by European institutions.

<sup>10</sup> CIREFI is a group of experts responsible for assisting the member states in studying legal immigration, preventing irregular immigration and ‘facilitator networks’, ‘in better detecting forged documents and in improving expulsion practice’. It meets on a monthly basis with the back up of the General Secretariat of the Council. Since 1999, an early warning system for the exchange of information on irregular immigration and facilitator networks has been taking place under Cirefi. Refer to Council Conclusions of 30 November 1994 on the organisation and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (Cirefi) OJ C 274, 19.09.1996.

<sup>11</sup> Refer to D Bigo, *Map of Undocumented Foreigners in the EU*, CERF, Sciences Po: Paris, forthcoming 2009. See also Council of the EU, CIREFI Summary Report January-June 2009, 11502/09, 1 July 2009.

The Commission counts FRONTEX, its external border agency, among its successes, pointing to the increased coherence of external border management. The FRONTEX press releases reveal a somewhat more uncertain picture. For instance, the FRONTEX operation ZARATHUSTRA, carried out between 26 March 2008 and 14 April 2008, had a budget of €236,390. Its focus was on the detection of irregular migrants from Iraq and Afghanistan at the European external borders. According to the Commission's report, "60 illegal migration related incidents were detected, 16 refusals and 15 forged documents were identified".<sup>12</sup> By participating in FRONTEX actions such as this one, Member States might endanger their human rights responsibilities under international treaties and EU law to provide protection to asylum-seekers and refugees. We fail to see how the Commission could hold up FRONTEX operations as a success when measured against the negative implications of these border control practices over the obligation to provide protection to refugees.

The second success the Commission claims is the **foundation of a common framework for immigration, integration and stronger action against 'illegal immigration' and human trafficking. Partnerships with non-EU countries** are equally highlighted as a success. We would agree that the two Council Directives – long-term resident third country nationals and family reunification<sup>13</sup> – are steps in the right direction. Neither is perfect; both include ambiguous integration clauses and so far the implementation at member state level leaves much to be desired.<sup>14</sup> The Commission itself has recognised that the minimum standard of family reunification contained in the Directive (2003/86) is insufficient to attract highly qualified migrants to the EU – separate and more flexible rules have been adopted for them.<sup>15</sup> Even with the Blue Card Directive, which allows member states to continue to apply their national work permit schemes and never use the system at all, it is stretching the point to say that the foundations of a common EU immigration system are now in place. There is still little coherence in how non-EU nationals first come to the EU for extended stays. While

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[http://www.frontex.europa.eu/examples\\_of\\_accomplished\\_operati/art28.html](http://www.frontex.europa.eu/examples_of_accomplished_operati/art28.html) visited 29 March 2009.

<sup>13</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

<sup>14</sup> European Commission, *Report on the Application of the Directive 2003/86 on the Right to Family Reunification*, COM(2008) 610, Brussels, 8.10.2008.

<sup>15</sup> Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L155/17, 18.6.2009, Art. 15.

common rules on students and researchers have been adopted,<sup>16</sup> the rest remains to be negotiated.

The suggestion included in the Communication that we have arrived at **a common agenda for facilitating the integration of foreigners into European societies** needs also to be considered with some care when qualifying it as a 'success'. It is true that in the last seven years the European Commission has managed to move policy coordination very dynamically into a domain in which subsidiarity and member states' national competences remain the driving factors. However, what have been the costs of having 'more Europe' in this field?

First, the EU framework on integration has lately constituted a vehicle for legitimising and promoting at European level certain member states' policies and immigration national laws, using integration as a tool for practising a restrictive immigration policy (i.e. limiting the number of legal entries and residence permits of immigrants, and their access to fundamental rights such as the right to a family life).<sup>17</sup> The use of mandatory integration programmes and integration abroad tests were not part of more traditional concepts of integration which formed part of EU's policy discourse since the 1970s,<sup>18</sup> and which considered integration as a process for equalization of rights and freedoms, security of residence, non-discrimination and family reunion. In addition to the conflicts that current nationalist approaches to integration pose to the fair and equal treatment paradigm that should continue guiding the EU's common immigration policy, the compatibility of these new policies with the rule of law and fundamental rights remains an issue of concern.<sup>19</sup>

Second, some of the policy tools upon which the EU framework on integration will be increasingly based (e.g. benchmarking) are too subjective in nature and lack methodological rigour – weaknesses that will

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<sup>16</sup> Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004. Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third country nationals for the purposes of scientific research, OJ L 289/15, 3.11.2005.

<sup>17</sup> A. Kraler and L. Kofman, *Family Migration Policies versus Family Migration Reality in Europe*, IMISCOE Policy Brief No. 16, forthcoming 2009 ([www.imiscoe.org](http://www.imiscoe.org)).

<sup>18</sup> For an in depth study see S. Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers, 2009.

<sup>19</sup> For a detailed analysis refer to E. Guild, K. Groenendijk and S. Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Ashgate: Hampshire, forthcoming.

prevent policy coherence and independent (ideology-free) output.<sup>20</sup>

Third, the exchange of national experiences and practices on integration has so far taken place within the scope of the network of National Contact Points (NCPs) on integration. This ‘exchange’ could more usefully include a pluralistic dialogue with civil society and local and regional authorities and networks of practitioners, and a proper democratic accountability and scrutiny of EU policy. The European Integration Forum<sup>21</sup> offers interesting perspectives on the input from civil society, yet its success will very much depend on the ways in which it ensures that its ‘voice’, inputs and opinions have an impact on the European Commission and member states’ policy priorities and agendas.

There is also a lack of any sustainable and structured involvement and partnership between local and regional bodies/networks and the Committee of the Regions in the EU framework on integration, including the work by DG JFS of the Commission. The local and regional dimensions could play a decisive role in channelling knowledge and practical experience to the national and EU arenas as well as in the evaluation of the adequate, timely and consistent transposition/implementation of common EU policies and funding on immigration and integration.<sup>22</sup>

**Stronger action against ‘illegal immigration’**, another success claimed by the Commission, is also somewhat ambiguous. First, the European Commission and Council’s insistence on using the term ‘illegal’ to refer to people is objectionable and discouraged in international fora. People are not illegal; their presence on a territory may not be authorised or their status as an immigrant may lack proper documentation, but that does not put them in a category where their very existence constitutes illegality.<sup>23</sup> The EU should refrain from using this term. As the Council of Europe’s Parliamentary Assembly stated in Recommendation 1509(2006):

<sup>20</sup> S. Carrera, *Benchmarking Integration in the EU: Analysing the Debate on Integration Indicators and Moving it Forward*, study commissioned by the Bertelsmann Foundation, Berlin, 2008.

<sup>21</sup> EESC, Elements for the Structure, Organization and Functioning of a Platform for the Greater involvement of Civil Society in the EU-level promotion of policies for the integration of third country nationals, Opinion, SOC/281, Brussels, 9 July 2008.

<sup>22</sup> For an in-depth analysis, see S. Carrera, *The Role and Potential for Local and Regional Authorities in the EU Framework on the Integration of Immigrants*, study commissioned by the Commission for Constitutional Affairs, European Governance and the Area of Freedom, Security and Justice of the Committee of the Regions, Brussels, 2009.

<sup>23</sup> E. Guild, “Who is an Irregular Immigrant”, in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff, 2004, pp. 3-28.

“the Assembly prefers to use the term ‘irregular migrant’ to other terms such as ‘illegal migrant’ or ‘migrant without papers’; (para 159) This term is more neutral and does not carry, for example, the stigma of the term ‘illegal’. It is also the term increasingly favoured by international organisations working on migration issues.” This has been confirmed by the European Parliament Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008,<sup>24</sup> in which it called upon EU institutions and member states to stop using the term ‘illegal immigrants’, and instead to refer to ‘irregular/undocumented workers/migrants’.

Certainly, in the past five years we have seen an increasing number of EU measures aimed at prosecuting employers,<sup>25</sup> transport companies and others as criminals for their association with third country nationals in the EU. But, as mentioned above, the most effective action, numerically speaking, has been transforming so-called ‘illegals’ into citizens of the Union – as with the accession of Romania to the EU. The second national category of ‘illegal’ immigrants in the EU, according to CIREFI on the basis of national government information, is Albania.<sup>26</sup> If current plans go as foreseen, and ‘all the conditions are met’, they will cease to be visa nationals by mid-2010.<sup>27</sup>

In the context of the so-called ‘Global Approach to Migration’ of the EU, **partnerships with third countries** remain somewhat uncharted territory. While there are an increasing number of agreements with third countries around migration issues, such as readmission agreements and visa facilitation agreements, there is no indication that there are any substantial consequences resulting from these agreements. Further, the mobility partnerships concluded between the EU, a selection of interested EU member states and third countries under the coordination of the Commission raise a whole range

<sup>24</sup> European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, P6\_TA-PROV(2009)0019.

<sup>25</sup> S. Carrera & E. Guild, *An EU Framework on Sanctions against Employers of Irregular Immigrants: Some Reflections on the Scope, Features & Added Value*, CEPS Policy Brief No. 140, Centre for European Policy Studies, Brussels, 2007.

<sup>26</sup> See website of CLANDESTINO, op. cit.

<sup>27</sup> European Commission, Press Release, Commission proposes visa free travel for Western Balkans, IP/09/1138, Brussels, 15 July 2009, which states that “Enlargement Commissioner Olli Rehn added “It is our goal, and our firm conviction, that Albania and Bosnia and Herzegovina will follow soon”... “The roadmap is still valid, and it is still perfectly doable if the authorities of the countries put their full will into delivering now. If this progress continues apace, I believe both countries will soon catch up with their neighbours. If all the conditions are fulfilled, the Commission could envisage making a new proposal, which would include them, by mid-2010”.

of open questions.<sup>28</sup> Mobility partnerships constitute non-legally binding agreements (Joint Declarations) covering issues of irregular immigration (return and readmission, as well as promoting cooperation on border controls), legal channels of human mobility and development cooperation. So far two have been concluded with Moldova and Cape Verde,<sup>29</sup> and countries like Mauritius and India have also expressed an interest.

Apart from issues of legal uncertainty related to their nature and effects, as well as the lack of democratic accountability when taking into account the exclusion of the European Parliament before and during their negotiations, these tools might constitute a far-reaching challenge to the policy coherency of the common EU immigration policy. When looking at the body of the partnerships, it is in our view clear that the Commission will encounter multifarious difficulties at times of coordinating the diversified and complex matrix of member states' interests, priorities and (bilateral and multilateral) projects involved. They also present serious deficits when trying to put into practice a temporary labour migration regime around the concept of 'circular migration' (i.e. the temporary and recurrent management of the movement of people back and forth – between the EU and their country of origin). Indeed, mobility partnerships advocate a framing of migration combining the old (yet unsuccessful) public authority ambition to control human movements in a way that prevents and disregards social settlement/inclusion, access to rights and permanent security of residence.<sup>30</sup> This policy framing is also driven by a utilitarian and selective logic of human movements, serving mainly the economic interests and labour market demands of participating states. They therefore leave aside (and marginalise) the liberty, security (and independence) of the individual subject to these new EU policy processes, in particular as they relate to human rights, and fail to acknowledge the 'unexpected sociology' surrounding any act of human mobility beyond narrow legalities and policies pretending to keep it 'temporary' in nature and scope.

The third success the Commission points to are the foundations of the **Common European Asylum System (CEAS) and a common visa policy**. Why

these two are lumped together is uncertain. One hopes that it is not an indication that a common visa system is seen as a tool that keeps refugees out of the EU. The leading countries of origin of refugees worldwide are, in order of total numbers: Afghanistan, Iraq (together these two account for almost half of the world's refugees), Colombia, Sudan and Somalia. All of these countries are on the EU visa black list; whether a refugee or not, a national of any of these countries cannot come to the EU without a visa (and there are no rules on issuing visas to seek asylum). Carrier sanctions dissuade airlines and ships from carrying persons without visas if they need them. The CEAS has many minimum standard instruments covering most of the asylum field. What it lacks is coherence at the point of implementation. Outcomes still vary far too much in the EU for asylum-seekers whose cases are similar. For instance, in respect of Afghan nationals, in 2007 Italy gave protection to 98% of the Afghans who sought it there,<sup>31</sup> the UK gave protection to 42%<sup>32</sup> and Greece did not give protection to a single Afghan.<sup>33</sup>

The fourth success the Commission stresses is the **European Arrest Warrant (EAW)**.<sup>34</sup> The Commission rightly stresses that extradition delays have been reduced dramatically from one year to between 11 days and six weeks. The system works very well where the person sought agrees to return to the state that wants him or her. It works much less satisfactorily when the individual challenges extradition. There are still substantial problems for the EAW – first an increasing number of member states complain about the resources that their police forces are required to invest in rounding up nationals of other member states over very minor criminal charges. A second problem is the European Court of Human Rights (ECtHR) condemnation of prison conditions in one member state as failing Article 3 of the European Convention of Human Rights (ECHR) test on inhuman and degrading treatment in the case of *Slawomir Musial v Poland*.<sup>35</sup> Now, it is difficult to see how any member state could fulfil an EAW without risking a breach of its own ECHR obligation not to send persons to a place where there is a substantial risk they will suffer torture, inhuman or degrading treatment or punishment.<sup>36</sup>

<sup>28</sup> A. Triandafyllidou, *Attempting the Impossible? The Prospects and Limits of Mobility Partnerships and Circular Migration*, ELIAMEP Thesis 1/2009, January 2009.

<sup>29</sup> Council of the EU, Joint Declaration on a Mobility Partnerships between the European Union and the Republic of Moldova, 9460/08, 21 May 2008, Brussels; and Council of the EU, Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde, 9460/08, Brussels, 21 May 2008.

<sup>30</sup> R. Bauböck, *Ties Across Borders: The Growing Salience of Transnationalism and Diaspora Politics*, IMISCOE Policy Brief No. 13, October 2008 ([www.imiscoe.org](http://www.imiscoe.org)).

<sup>31</sup> 663 applications.

<sup>32</sup> 2,720 applications.

<sup>33</sup> 1,061 applications. UNHCR Asylum Statistics 2007, Table 13.

<sup>34</sup> Council Framework Decision on the European arrest warrant and the surrender procedures between member states 2002/584/JHA of 13 June 2002.

<sup>35</sup> ECtHR, Application No. 28300/06, 20 January 2009.

<sup>36</sup> *Soering v UK*, ECtHR, Application No. 14038/88, 7 July 1989, 1/1989/161/217.

The final two successes the Commission notes are beyond our scope here – **combating crime including cyber-crime and progress in civil and commercial law**. We will leave these two successes to others to comment upon.

In sum, there have been real successes in the past five years of AFSJ. We are proud of the positive developments which have helped everyone in the Union to achieve their potential. But it does not help anyone's credibility to overlook the problems that persist.

## 2. Ambivalent areas

The Commission accepts that activity in the AFSJ has been less than fully effective in two specific areas: **criminal law** and civil and commercial cases. We will comment on the first only. We certainly share the Commission's assessment that there are problems with the limitations of the European Court of Justice's jurisdiction in criminal law cases. This needs to be resolved. The fact that the member states have not resolved this individually by making declarations, as foreseen under the Amsterdam Treaty, which permit their national courts to make references to the ECJ in such cases is a real shame. The member states could have shown their commitment to the rule of law by doing so but instead too many of them either failed to make a declaration at all or limited their courts of final instance to reference-making powers. The problem will be resolved if the Lisbon Treaty comes into force but a little more leadership from the member states would have been most welcome, particularly as they claim to be fervent supporters of the principle of rule of law.

Further, the Commission notes that the **member states' delay in transposing criminal law measures** has given them a 'virtual character' in the sense that it exists on paper but has not been transposed or put into practice in many member states. We would agree, once again the failure of the member states to live up to their obligations is frustrating and obstructive. If member states do not want legislation then they should ensure that it is not passed. If, on the other hand, they are in favour of it, they should transpose it within the time limits set out. There is no honourable third way. However, we would suggest that the problem may run deeper than just laziness or obstructiveness in some government departments in the member states. Apart from the EAW, it remains unclear as to whether there is really an appetite for more criminal justice measures at the EU level. The European Evidence Warrant has been adopted and is available for use but it seems to be a rather unpopular

measure.<sup>37</sup> Member states' criminal justice authorities seem to be happier to use the more traditional mutual assistance mechanisms developed by the Council of Europe. While they have a brand new instrument that is supposed to be better for criminal justice purposes, the users seem to be happy with the older, tried and trusted tools. There is a problem here, however. Either the new tools are indeed better, in which case their virtues need to be sold to the criminal justice community, or there is not enough benefit in the new tools to justify their existence.

## 3. The challenges ahead

The Commission sets out eight issues that it considers to be challenges for the future. These are: obstacles to residence in other EU member states; civil justice issues; cyber-crime; terrorism; border controls; migration and an ageing population; 'illegal migration' and asylum. We will comment on six of these (leaving aside civil justice and cyber-crime for other commentators).

The Commission is concerned about **obstacles that EU nationals encounter when moving to another member state**. It is right to be concerned about this and we agree that ensuring that EU nationals can enjoy the rights the Treaties promise them should be the top priority of the next five years of AFSJ. As the Commission's study of the implementation of the right of free movement of citizens of the Union shows, no one member state has correctly implemented the EU rules and not one of the rules has been correctly implemented by all the member states.<sup>38</sup> Considering that free movement of workers had to be achieved by 1968 this is a fairly unsatisfactory state of affairs. Of course we recognise that enlargement creates teething troubles in the free movement of EU citizens and their family members (especially if the latter are third country nationals). Officials have trouble adjusting to the idea that someone whom they considered an 'illegal immigrant' yesterday is today a citizen of the Union – entitled to entry, residence, economic activities, family reunification with third country national family members and social benefits, particularly those related to economic insertion.<sup>39</sup> Nonetheless, this is the

<sup>37</sup> Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L350/72, 30.12.2008.

<sup>38</sup> Commission Report on the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, COM(2008) 840 final, Brussels, 10 December 2008. S. Carrera and A. Faure-Atger, *Implementation of Directive 2004/38 in the context of Enlargement: A Proliferation of Different Forms of Citizenship?*, CEPS Special Report, Brussels, April 2009.

<sup>39</sup> European Court of Justice, C-22/08 *Vatsouras*, 4 June 2009.

commitment the EU makes on accession and the equal treatment of citizens of the Union is the promise we make to ourselves, which helps to make the EU the sought-after place it is for its citizens. Out of an EU of almost 500 million citizens, a mere 8 million of them exercise their right to move and reside elsewhere in the EU than their home state. Surely it cannot be that difficult to treat them equally and in accordance with the law? Further, as stipulated in the Commission Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, COM(2009) 313, the freedom of movement of persons is one of the foundations of the EU, and derogations from that principle must be interpreted strictly.<sup>40</sup>

What emerges clearly from this is that the presumption that the mechanisms of the EU legal system to ensure a correct transposition of EU law work satisfactorily in practice is no longer sustainable and calls for innovative strategies. Indeed closer attention needs to be given to address the mismatch between European norms and national implementation and on improving the use of (*ex post*) evaluation systems on rule of law standards and good administration conditions of member states' national regimes at play in the AFSJ.<sup>41</sup>

As regards **terrorism**, the Commission notes that this remains a threat to the Union, citing the existence of 600 terrorist attacks in 2007. However, it fails to point out that in 2007, according to TEL-SAT, Europol's report on terrorism in the EU, the largest number of attacks took place in Spain – 279 of which only seven were not motivated by separatist sentiment – followed by France – 253 where all but 14 were separatist attacks. The remaining 14 in France and 7 in Spain were not specified. Germany comes next on the list with 20 attacks, of which 15 were separatist, 4 left wing and one 'Islamist'. The UK also gave notice of two 'Islamist' attacks and Denmark had one. The only notified right wing attack took place in Portugal in 2007, which also had the only single issue attack. Greece had only 2 attacks in 2007, both left wing. In total, in 2007, there were four 'Islamist' attacks (no casualties), 532 separatist attacks resulting in two

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<sup>40</sup> Commission Communication, on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, COM(2009) 313, 2 July 2009, Brussels.

<sup>41</sup> S. Alegre et al., *Safeguarding the Rule of Law in an Enlarged EU: The Cases of Bulgaria and Romania*, CEPS Special Report, Centre for European Policy Studies, Brussels, 24 April 2009. Refer also to J. De Clerck-Sachsse (ed.), *Time for Action: Immediate Priorities for the Next European Commission*, CEPS Policy Brief No. 193, Centre for European Policy Studies, Brussels, July 2009.

casualties, 21 left wing attacks one each of right wing and single issue attacks and 24 unspecified attacks.<sup>42</sup> This means, in short, that most of what is called 'terrorism' in the EU is highly local and nationally oriented. If one takes this aspect into account, one could argue that terrorism is not a primary issue for the EU, but rather one for the member states. Thus, this category of crime in the EU might be better incorporated into the general activities of the EU on judicial cooperation in criminal matters.

**Border controls** are identified by the Commission as an issue for the future. This is certainly true as the continuing EU's enlargement programme makes it very uncertain where the external borders of the EU may be in two, five or ten years' time. There is no point investing substantial resources in 'hard' border controls in places where within a short period of time it is likely that there will be no border controls at all. This is not a good way to spend money. At the moment, the temptation inside the Commission is to resolve the question of 'border controls' via a technological fix.<sup>43</sup> Ideas such as 'smart borders' and an 'EU entry-exit system' with massive technological spending implications has caught on in some parts of the Commission. The wisdom of such an approach is unclear. Already the USA is having trouble with its smart border systems, which include chips in passports and RFID (radio frequency identification) – according to news reports not only is the technology a forgers' dream come true, the machines that are supposed to simplify life by recognising the chips and RFID fail to do so at an unacceptably high rate.<sup>44</sup> The real problem, however, is the perception of border crossing as an inherently dangerous activity. It is not. Millions of people cross borders every day. It is only in the most exceptional cases that there is something amiss in their objectives or activities. The border is not a place of danger but a place through which normal economic and social activity takes place. Old-fashioned policing provides a better approach to crime control and political violence than seeking to displace worries to border controls and then finding a technological magic fix. The only winners in this move are the companies that develop the technologies and their successes are financial at the expense of EU tax-payers.

The Commission considers that **migration and an ageing population** are among the challenges for the next five years of the AFSJ. It notes that migratory

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<sup>42</sup> DG H 2A, Council Document Number 8065/07 entitled TEL-SAT 2008 EU Terrorism Situation and Trend Report 2008, The Hague 2008.

<sup>43</sup> E. Guild, S. Carrera and F. Geyer, *The Commission's new border package: Does it take us one step closer to a 'cyber-fortress' Europe?*, CEPS Policy Brief No. 154, Centre for European Policy Studies, Brussels, March 2008.

<sup>44</sup> 15 July 2009, *International Herald Tribune*, p. 21.

pressure is likely to rise on account of population growth (but not in Europe, where we are struggling to stay constant), poverty in countries of origin and the ageing population in the EU. The use of the pressure analogy when discussing migration is not very informative or helpful. If we take the EU for instance, according to Eurostat in December 2008, unemployment stood at 2.7% in the Netherlands and 14.4% in Spain. Yet there is very little movement between the two. Statutory minimum wages are under €300 per month in Bulgaria, Estonia, Latvia, Lithuania, Hungary, Poland and Romania; between €301 and €999 per month in the Czech Republic, Greece, Malta, Portugal, Slovenia and Spain and more than €1,000 per month in the rest (at least the rest of those states that have a minimum wage). The highest minimum wage is in Luxembourg at €1,570 per month. Yet movement of EU nationals from Bulgaria and Estonia to Luxembourg is minimal. The average minimum salary in Denmark is the equivalent of €1,850 per month, €1,277 in Germany and €1,258 in France. But the average salary in Portugal is €470 per month, €246 in Poland and €92 in Bulgaria (for some of these countries there is a narrow range).<sup>45</sup> Pressure and relative poverty does not explain migration patterns any more satisfactorily than unemployment rates. There is no reason to think that non-EU nationals behave any differently from EU nationals. Perhaps the challenge of migration and an ageing population is more about how to convince people who, as they grow older, tend to be more conservative and fearful of accepting that migration, both in the form of immigration and emigration, is a good and necessary part of any healthy democracy.

**Tackling ‘illegal’ immigration** is also a challenge seen by the Commission. As we have mentioned above, ceasing to use the terminology of ‘illegal’ migration would be an excellent starting place in this regard. However, the Commission considers that addressing the factors that attract clandestine immigration is the way forward. A vibrant economy is a most attractive factor in the migration choices of individuals. Just as some EU citizens may be considering migrating to parts of the world with more job opportunities than the EU, so nationals of other countries are attracted to the EU when its economy is strong and producing job opportunities. Of course we are all in favour of better economic growth in the EU. No one in their right mind would suggest that dampening the labour market would be a good idea as it would make the EU less attractive to irregular migrants. So the question needs to be considered and addressed in other ways. In the term ‘illegal’ itself we can perhaps find an answer. What is needed is to

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<sup>45</sup> European Union Minimum Monthly Salaries 2008 ([http://europa.russianaffairs.suite101.com/article.cfm/european\\_union\\_minimum\\_monthly\\_salaries\\_2008](http://europa.russianaffairs.suite101.com/article.cfm/european_union_minimum_monthly_salaries_2008)).

change laws so that people do not fall into undocumented statuses. If we analyse the legal measures that lead to people being categorised as ‘illegal’ or undocumented we may find a more helpful approach.

For example, rules that prevent third country nationals and their prospective employers from applying for or receiving work authorisation while the third country national is in the EU state contributes to irregularity. Administrative delay in dealing with work authorisation, renewal of work and residence permits contributes dramatically to irregularity as individuals continue to live and work in the state after making their applications for extensions. The fact that their permission has expired because officials have taken so long to deal with the file results in irregularity. The rather infamous Italian notification to the Commission designating Italian Post Office registered delivery receipts as equivalent to Schengen visas for entry into the EU, was a result of exactly this problem of administrative delay.<sup>46</sup> Creating new criminal offences for employers, transporters, etc, is unhelpful in dealing with irregularity. First, there needs to be a common and accessible system whereby employers and individuals can obtain work authorisation.

Finally, the Commission highlights the challenge of **the CEAS**. This is indeed a matter of great concern. The inequality of asylum outcomes across the EU is undermining the whole system itself. As mentioned above, it is just not sustainable that asylum-seekers of the same nationality receive almost 100% recognition of protection needs in some member states and 0% in others. However, there is another challenge to the CEAS, and this is how to access it at all. As many commentators have noted, an increasing array of no-entry tools, such as visa requirements, carriers’ sanctions, hard border controls, agreements with third countries to prevent people from leaving, etc., make it increasingly difficult for refugees to get to Europe at all.<sup>47</sup> No amount of pious assurances that the EU respects the UN Convention relating to the status of refugees or the inclusion of reference to it in preambles to Directives can resolve this problem.

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<sup>46</sup> In 2007, the Italian authorities notified to the European Commission, as they are entitled to do under the Schengen Borders Code, a document, the production of which has the equivalence of a Schengen visa for the purposes of entry into the EU. This document was an Italian Post Office registered delivery receipt which documented that the holder had sent his or her residence permit to the Ministry of the Interior for renewal. Delays in dealing with renewals of residence documents which resulted from the consolidation of administrative powers in the Ministry caused the Ministry to make the notification in order that third country nationals resident in Italy and who needed to travel would be able to reenter the EU after having done so. The notification was valid for a six-month period.

<sup>47</sup> See UNHCR comments on the European Asylum Policy (<http://www.unhcr.org/pages/4a0d667c6.html>).

Indeed, such moves only make the EU look hypocritical rather than addressing the issue: ensuring that refugees who are fleeing to Europe are able to get protection in Europe.

#### 4. Conclusions and Recommendations: Towards a Europe of rights and justice?

The Commission sets out four political priorities for the Stockholm Programme: 1. promoting citizens' rights – a Europe of rights; 2. making life easier – a Europe of justice; 3. protecting citizens – a Europe that protects; and 4. promoting a more integrated society for the citizen – a Europe of solidarity. These are all user-friendly and catchy titles, but we need to think about what is behind them.

First, the Communication argues that the main thrust of the new multi-annual Stockholm Programme should be “**building a citizens' Europe**” and that all actions taken in the future should have ‘the citizen’ at their heart. It appears that the concept of citizen as used by the Communication refers exclusively to those individuals holding the nationality of one of the member states of the Union and therefore having the status of European citizenship. Such an AFSJ would be therefore too narrow and at odds with a Europe of diversity and of fundamental rights of all individuals who, independently of their nationality and administrative immigrant status, are holders of fundamental rights as recognised, among other instruments, by the Charter of Fundamental Rights of the EU, the European Convention of Human Rights and Fundamental Freedoms (ECHR) and the jurisprudence of European Courts – European Court of Human Rights (ECtHR) in Strasbourg and the European Court of Justice (ECJ) in Luxembourg.<sup>48</sup> The emphasis on ‘the citizen’ must not become a dividing line between citizens and third country nationals. The EU is committed to the fair and equal treatment of third country nationals and to the principles of non-discrimination and solidarity. The benefits of the EU in terms of rights must also be extended to those who live ‘here’ and are in the process of or have already acquired work and residence rights.

Second, while the focus of the Communication on a **Europe of rights** is welcomed, the Commission does not propose a clear strategy as to the precise ways in which a common area of fundamental rights could be further developed and guaranteed both at the EU institutional level and by member states' authorities while implementing and practising EU law. The text

<sup>48</sup> Refer to the work of the SOC Section of the European Economic and Social Committee (EESC) and the Own-initiative Opinion on Fundamental Rights in European Immigration Legislation, SOC 335, retrievable from [http://eesc.europa.eu/sections/soc/immigration\\_asylum.htm](http://eesc.europa.eu/sections/soc/immigration_asylum.htm)

fails to go beyond formalistic and official allusions to the existing system of tools and institutional structures in charge of fundamental rights and freedoms without presenting a proactive roadmap for the near future. Even though the European system of fundamental human rights is indeed already well developed, the full respect and protection of these rights at the time of member states' practical implementation of EU AFSJ law remains an issue of concern. Fundamental rights cannot be taken for granted in the EU and further strategies should be foreseen for the years to come beyond the symbolic power of a potential EU's accession to the ECHR.

**The Charter of Fundamental Rights**, as the Commission rightly states, must be put into practice. The rights that are contained in it need to become realities on the ground for everyone in the EU. The 2009 political row over the imposition of visa requirements by Canada on Czech nationals arises from exactly this problem – Czech Roma are not enjoying the rights promised in the Charter and are seeking instead to enjoy rights under the Canadian Bill of Rights.<sup>49</sup> Everyone is entitled to protection of his or her personal data and privacy, not just citizens. The EU's databases at the moment are heavily populated by third country nationals – the SIS, EURODAC and the proposed VIS.<sup>50</sup> Their privacy needs full protection already.

Third, **making criminal justice ‘easier’** in the EU can mean many things. On the one hand, it could mean making life easier for police officers to sidestep around citizens' civil liberties. If this is the meaning then there is a problem here. On the other hand, it could mean ensuring that a defendant anywhere in the EU enjoys the same high standard of defence rights. This would provide a good basis for further work on criminal justice. As the Communication states, an open-ended priority still remains regarding the need to ensure the rights of defence in criminal proceedings at EU level.<sup>51</sup> It is of serious concern that the EAW has been implemented and operating for several years now without being coupled with proper EU individual rights guarantees for suspected and accused persons under this supranational regime of cooperation. Judicial cooperation in criminal matters will be a source of substantial conflict if the standards of criminal justice across the member states are not improved in general so that those with the least

<sup>49</sup> Council of Europe, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy on 13-15 January 2009, published in Strasbourg, 16 April 2009.

<sup>50</sup> F. Geyer, *Taking Stock: Databases and Systems of Information Exchange in the Area of Freedom, Security and Justice*, CHALLENGE Research Paper No. 9, Centre for European Policy Studies, Brussels, May 2008.

<sup>51</sup> See p. 17 of the Communication.

effective and human rights-compliant practices are brought up to the standards of those that are more efficient and less prone to criticism at the ECtHR. The organising principle of the EU – supremacy of EU law over national law – may be placed at risk if there is more mutual recognition legislation without the improvement of rights standards. National police and courts will simply refuse to apply EU law as it will place them in an impossible position vis-à-vis their national constitutional obligations. Moreover, strengthening cooperation in police matters and law enforcement must mean ensuring the absence of corruption, the proper functioning of an independent judiciary across the EU and the delivery of a fair trial to all those who find themselves in the criminal justice system.

Finally, an **integrated society in the EU** is also an ambiguous objective. The concept of ‘difference’ is highly valued in the EU – we have chosen, for example, to respect language differences across the 27 countries and ensure that individuals anywhere in the Union can read and hear EU proclamations, laws and regulations in their own language. The Treaties themselves, and the Charter of Fundamental Rights, state that diversity is a key strength of the EU.<sup>52</sup> We should remember this when we are thinking about third country nationals as well. The objective of solidarity is an excellent one, but it must encompass everyone who is living in the EU and embrace those who are seeking protection from persecution.

In the light of the above, we propose the following four policy recommendations to DG JFS, European Commission, in prospect of the adoption of the Stockholm Programme and while performing the challenging task of implementing it as from the first half of 2010.<sup>53</sup>

1. The knowledge and research findings coming out of projects funded by DG Research of the Commission<sup>54</sup> and other European institutions and agencies<sup>55</sup> should better inform and support policy initiatives put forward by DG JFS. Addressing the current ‘policy gap’ affecting EU policies on ‘freedom, security and justice’ would not be only desirable to **ensure policy coherency and evidence-based policy-making** by the Commission, but it

<sup>52</sup> Refer to Article 151 EC Treaty and Article 22 of the Charter.

<sup>53</sup> For a full range of horizontal and vertical policy recommendations, we refer here to the previous contributions elaborated by the JHA Section of CEPS on the Stockholm Programme. Refer to footnote 2 above.

<sup>54</sup> See [http://ec.europa.eu/research/social-sciences/policy\\_en.html](http://ec.europa.eu/research/social-sciences/policy_en.html)

<sup>55</sup> As a way of illustration we can refer here to the studies on an AFSJ available at the European Parliament’s website (<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>) and the research by the European Union Agency for Fundamental Rights (FRA) ([http://www.fra.europa.eu/fraWebsite/research/research\\_en.htm](http://www.fra.europa.eu/fraWebsite/research/research_en.htm)).

would also show that an appropriate expenditure of public funding is taking place on research that is consistent with citizens’ and individuals’ expectations. The European Commission should develop an institutionalised strategy to benefit more from the work carried out by **independent networks of academics** *ex ante* (in the phase preceding the presentation of policy or legislative proposals) and *ex post* (monitoring the transposition and effects of EU law and in the evaluation of structural conditions of national legal, administrative and judicial systems – rule of law and good administration).

2. The Stockholm Programme needs to be based on a **more democratic and participatory policy process** in comparison to previous experiences under the Tampere and the Hague Programmes. The Stockholm process should not only incorporate the ‘knowledge’ acquired by networks of academics, but also the views and practical experiences of civil society, social partners and local and regional actors/networks in the framing and definition of the policies that will guide the AFSJ in the years to come. Identifying new European venues and developing existing ones, for channelling the experiences, ‘knowledge’ and monitoring role of these actors and practitioners to the construction of the EU’s AFSJ might actually constitute one of the key conditions to ensure the latter’s legitimacy and coherency in short and long-term perspectives.

3. **The personal scope of the AFSJ cannot be limited to those labelled as ‘citizens’ if European integration does not want to be in tension with a Europe of diversity, non-discrimination and fundamental rights of non-citizens and residents.** The added value of the EU is to play a role of facilitator and a promoter of the protection of the liberty and security of the individual in an enlarged common European space. **‘Strengthening Freedom and Solidarity’ of the individual (rather than exclusively those of ‘the citizen’)** should therefore constitute the starting guiding principle to be adopted by the Stockholm Programme. Further, the rights and protection of those third country nationals not falling within the narrow category of ‘legally resident’, and under irregular status of stay inside the Union – undocumented migrants – should also be at the heart of the EU’s attention and social protection strategies, particularly when taking into consideration their high degree of vulnerability and insecurity.

4. **A Europe of fundamental human rights needs to be implicated with a common immigration policy driven by a ‘rights-based approach’.** The Stockholm Programme and the Commission should place at the heart of its priorities the creation of an exhaustive and consolidated framework of protection that is respectful of the fundamental human rights of third country nationals. The normative patchwork of

rights and administrative procedures currently provided for TCNs under EU immigration law is too diversified, weak and incoherent, which is further substantiated by the silence over the fate of undocumented migrants. More effective mechanisms need to be envisaged in order to ensure the correct application and accessibility of existing EU rights and freedoms of third-country nationals. A rights-based approach ensuring the principle of fair and equal treatment needs to be one of the driving forces behind the Stockholm Programme.<sup>56</sup>

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<sup>56</sup> S. Carrera and A. Faure-Atger, *Yes! A Rights-based Approach is possible for the Stockholm Programme! Provided...*, ENARgy Newsletter, No. 29, European Network Against Racism (ENAR), Brussels, forthcoming ([www.enar-eu.org](http://www.enar-eu.org)).

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