

The President of the European Commission, José Manuel Barroso, has launched a brainstorming exercise about the future policy priorities for the development of the Area of Freedom, Security and Justice (AFSJ).¹ Migration

What Future for the Area of Freedom, Security and Justice? Recommendations on EU Migration and Borders Policies in a Globalising World

Didier Bigo, Sergio Carrera & Elspeth Guild

¹ See Commission Communication, *The European Interest: Succeeding in the Age of Globalisation*, COM(2007) 581 final, Brussels 3.10.2007, which states: “The EU is already working on many of the policy elements needed to equip it to take on the challenge of globalization with confidence...in the coming months, the Commission will be putting new ideas on the table to address these key challenges...Review of internal policies is already under way, aiming to reshape Europe to face globalisation and give it the right platform to look beyond its borders.” Further the Communication identifies “Migration in a Globalized World” as one of the key political objectives and states: “In a Europe with no internal borders, the changing demands of an ageing society and a labour market in constant evolution have challenged established assumptions about immigration... a new global approach is needed so that migration strikes the right balance between the risk of labour market shortages, economic impacts, negative social consequences, integration policies and external policy objectives”. Information about the current financial Framework Programme on Solidarity and the Management of Migration Flows for the period 2007-2013 and about the four Funds comprising it (European Refugee Fund, External Borders Fund, the European Return Fund and the European Integration Fund) can be found at <http://europa.eu/scadplus/leg/en/lvb/l14509.htm>. See the original European Commission’s proposal in the Communication on a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013, SEC(2005) 435, COM/2005/0123 final, 6 April 2005.

and borders will constitute two of the most relevant policies on which the next EU budget covering the AFSJ beyond 2013 will be focused. Migration represents one of the key dimensions in the EU agenda in light of globalisation and the demographic transformations of the region. The Commission plans to present a Communication on a European Migration Policy by June 2008. The upcoming French Presidency of the EU (July-December 2008) will focus on developing a common EU migration policy² and a European Pact on Immigration and Asylum (pacte européen pour l’immigration et l’asile).³

² According to a presentation of the French Prime Minister François Fillon to the Members of EPP and PSE Groups of the European Parliament in Strasbourg, the issues of immigration and asylum will constitute key priorities for the upcoming French Presidency. In particular, he stated: “We will push for the harmonisation of the legislation on the matter, for better controls at the Union’s borders and for an efficient development policy.” See the summary of his intervention (http://www.epp-ed.eu/press/psess08/report0802_en.asp#02).

³ According to information provided in the website of the French Government, this agreement will be based on the following principles: an improved control of the common EU external borders, the management of legal and labour

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It is expected that the French Presidency will closely collaborate with the European Commission to adopt a set of general policy guidelines on which the near-future EU policy on immigration will be built. These principles will serve as the foundation for the successor to the Second Multi-annual Programme on an AFSJ, The Hague Programme (which runs from 2004 until the end of 2009), which will be adopted under the auspices of the Swedish Presidency (July-December 2009). This Policy Brief puts forward a package of policy recommendations covering the following three themes:

- I. How to structure Justice and Home Affairs in the EU: to get the best results
- II. Mastering the integration debate and comprehensively framing the citizen/foreigner/immigrant relationship
- III. The utility of large-scale information systems with interoperable databases including biometric technology for the protection of people living in the EU.

I. Adjusting JHA in the European Commission to get value for money

1. The European Commission's Directorate-General responsible for Justice and Home Affairs, denominated as DG Justice, Freedom and Security,⁴ is relatively new – created after the 1999 reorganisation of the competences of the EU with the entry into force of the Amsterdam Treaty. At that time the Commission was given the competence to enact EU law in the areas of borders, immigration and asylum (Title IV of the Treaty establishing the European Community). Judicial cooperation in criminal matters and policing remained in the Third Pillar (Title VI Treaty on European Union). With the entry into force of the Lisbon Treaty, the pillar structure in the AFSJ will end.⁵ This is therefore the right moment to start thinking proactively about the possibilities for dividing the DG into three DGs – a Justice DG dealing with policing and judicial cooperation; a DG responsible for borders, immigration and asylum and a DG responsible for fundamental rights charged with ensuring that the democratic

immigration, management of the sustainable return of irregular immigrants (which would also include the organisation of joint flights and readmission agreements with third countries), the harmonisation of asylum regimes and a common approach on co-development and development aid. For a full explanation of each of these principles see http://www.premier-ministre.gouv.fr/information/questions_reponses_484/est_pacte_europeen_sur_59134.html

⁴ http://ec.europa.eu/justice_home/index_en.htm

⁵ S. Carrera and F. Geyer (2007), *The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice*, CEPS Policy Brief No. 141, CEPS, Brussels.

concerns expressed by the European Parliament and EU bodies, such as the Fundamental Rights Agency and European Data Protection Supervisor, are properly followed up. Key to this third DG would be the allocation of substantial resources, commensurate with those of the other two, and weight to enable it to carry out its work effectively. Such a division of tasks would permit much better cooperation with the member states where there is a similar division of labour. It would also facilitate better delivery of policy objectives while meeting citizens' expectations. Finally, it would reduce the contamination among these diverse policy areas which is occurring too often at present.

2. The European Commission needs to separate border and immigration policy issues from security imperatives. Border-crossing and migration only rarely engage security issues. Cross-border crime questions belong to the field of policing, particularly in the EU where much cross-border crime is committed across the control-free EU internal borders. They do not belong to the field of border controls and immigration. FRONTEX is not a substitute for or competitor to EUROPOL. Border controls are primarily about allowing visitors to enter the EU (the overwhelming majority of persons crossing the common external borders), and immigration is about attracting third-country workers to the EU⁶ and ensuring family reunification for those who are already here.

3. The European Commission's key task in managing the external border of the EU must be founded solidly in law and the rule of law. The Commission's work is cut out for it over the next 20 years at least to ensure that its newly adopted borders law, the Schengen Borders Code, is properly implemented in all the EU member states and by all the relevant EU agencies, wherever operating. The Borders Code is the EU's basic law on who should cross the external border and how the internal border is managed. Expensive projects of uncertain results involving massive data collection and retention, biometrics, etc. should only be contemplated if there is clear evidence that they are central to implementing EU law.⁷ So far the experiment initiated by the US Department of Homeland Security called the US-VISIT Program, which collects massive amounts of biometric data from visitors to the US, has proven to be extremely expensive with no apparent security gain. This sort of project does not offer value for money in comparison with policing procedures which are better targeted at security risks.

⁶ E. Guild (2007), *EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative*, CEPS Policy Brief No. 145, CEPS, Brussels.

⁷ See E. Guild, S. Carrera and F. Geyer (2008), *The Commission's New Border Package: Does it take us one step closer to 'cyber-fortress Europe'?*, CEPS Policy Brief No. 154, CEPS, Brussels.

II. Mastering the integration debate and comprehensively framing the citizen/foreigner/immigrant relationship

1. The integration debate needs to be disentangled from insecurity and immigration control. The use of integration as a mandatory state criterion to limit the legal channels of regular immigration is neither consistent with the way the EU has dealt with immigration and integration, nor is it coherent with the EU's new motto – 'united in diversity'. The principle of fair and near-equality for resident third-country nationals with EU citizens agreed at the Tampere Summit in 1999 should continue guiding EU law and policy. The fact that some member states aim to limit the European competence over immigration by using the subjective condition of integration, and to restrict the latter to the confines of their own legislation, is counterproductive to the political project of a common EU immigration policy. Also, diversity is a strength of the EU – not a defect in need of correction. It is not consistent to argue that migration weakens the EU because it may add to diversity.

2. The dual challenges of a demographic transformation of the EU which point to a contracting market through the reduction of fertility and the aging of Europe through the continuous extension of life expectancy requires a dramatic re-thinking of EU policies towards third-country nationals. The EU must become a more welcoming place to those who seek work and will enhance our economy. The use of integration as a condition to make residence for third-country nationals in a member state precarious and uncertain is an obstacle to providing the environment where third-country nationals may be willing to invest their energy and vitality in the EU. However, that investment by third-country nationals will be an important component in avoiding a dramatic contraction of the EU economy and the provision of key services to the elderly. A serious deficit is currently apparent in the delivery of fundamental rights in the EU particularly to third-country nationals. Turning around this deficit so that third country nationals are welcomed into the EU and enjoy fundamental rights in a framework of equality will take concerted efforts by the EU institutions over the next 20 years.

3. Combating social exclusion is one of the great challenges that the EU will face in the coming 20 years. In particular, with the aging of the population, ensuring that the elderly do not fall into social exclusion and that intergenerational solidarity is a reality will require complex strategies. Providing the environment in which the cohort of younger third country nationals already growing up in the EU are able to realise their potential and avoid social exclusion is critical. To this end, initiatives that tend to isolate and separate young third-country nationals resident in the EU should be avoided

as counterproductive. Differential treatment of Europe's young third-country nationals in comparison with nationals who are citizens, or worse, differential treatment of young citizens on the basis of where their parents or grandparents were born is stigmatising and excluding by definition. Instruments such as mandatory integration contracts on the side of immigrants as a criterion for having access to a secure legal status and being treated equally and fairly are a good example of how to foster social exclusion and separation in a diverse Europe. Social exclusion must be treated as the social ill that it is for all the EU's people founded as it is in economic exclusion. It must not be constructed around ethnic origin.

III. The utility of large-scale information systems with interoperable databases, including biometric technology for the protection of people living in the EU

1. The European Commission is committed to assure a better protection of all the individuals living in the EU, and to analyse what complementary measures can be taken at the EU level. It is an important task to carry out good communication among all the member states and the EU agencies in charge of this protection. The questions of adequacy and proportionality of the flow of information need to be addressed in order to avoid the idea that maximum technology is by definition the solution for better security. Gathering all the possible information is not a guarantee of adequacy. On the contrary, it substitutes human capacity to deal with a certain number of data, with computer-assisted models that have the capacity to deal with large numbers of data, but not intelligently when dealing with human behaviour and strategies. BIG is not a sign of efficiency.

2. Total information awareness is a security mistake that creates surveillance and resistance to it - leading to more contest, including that of a violent nature. A security that is reduced to the technology of surveillance without limit, which invades privacy, is contrary to the protection of both the individual and collective safety.⁸ It undermines social cohesion of societies, especially when the grounds for suspicion are not as such a risk for collective security (for instance overstaying third-country nationals are not a threat to collective security of the same sort as clandestine organisations using violence).

⁸ See D. Bigo, S. Carrera, R.B.J. Walker and E. Guild (2007), *The Changing Landscape of European Liberty and Security: Mid-Term Report on the Results of the CHALLENGE Project*, CHALLENGE Research Paper No. 4, February 2007. See Section B.2. on "Increasing Suspicion, Developing Technologies of Surveillance and Their Impact on Freedom".

3. The exchange of information has to be specified and channelled carefully through trusted agencies, and not largely disseminated among very different kinds of networks. The claims that any form of mobility is a security deficit leading to an increased danger for the EU collective identity and safety are not substantiated. It is against the very idea of freedom of movement and of citizenship at the EU level to consider neighbours and foreigners as potentially hostile. The EU projects (as they have been framed in the new Commission's Border Package, and in the relation to agreements with third countries on mass intelligence) cannot be a solution for the future. It is important to create instruments that do not escape EU law through an open-ended network of exchange of information with

third countries' governments, in the name of efficiency regarding collecting information, especially when communication is extending beyond the sphere of liberal regimes. Limits concerning the sharing of information, the connection between levels of information, the quality of agencies exchanging data and the implications of third-country participation have to be politically and openly discussed. In doing so, the European Commission should avoid the tendency to reduce specific political dilemmas to technological solutions. This is particularly so when the providers of solutions claim that the same solution (biometrics-database-profiling) is applied to every problem (terrorism, crime, fraud, irregular crossing, overstaying), because it is claimed to be able to predict future human behaviour.

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