

The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean

Filling the Gaps in the Global Approach to Migration

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Abstract

Recent events in North Africa and the Mediterranean have had consequences in terms of human mobility, and are putting the foundations and components of EU's migration policy under strain. The forthcoming European Council summit of 23-24 June 2011 is expected to determine 'the orientations for further work' under the Polish Presidency and the next JHA Trio Presidency Programme for the EU's policies on cross-border migration in the Mediterranean and internal mobility within the scope of the Schengen regime.

This paper constitutes a contribution to current and future EU policy discussions and responses on migration, mobility and security. It provides a synthesised selection of recommendations in these domains resulting from the research conducted by the Justice and Home Affairs (JHA) Section of the Centre for European Policy Studies (CEPS) during the last nine years of work.

This Policy Brief argues that for the EU's Global Approach to Migration to be able to satisfactorily address its unfinished elements and policy incoherencies, the Union needs to devise and develop common policy strategies focused on: first, new enforcement and independent evaluation mechanisms on the implementation of the European law on free movement, borders and migration, and the compatibility of EU member states and EU agencies' actions with the EU Charter of Fundamental Rights. And second, the development of a kind of cooperation (dialogue) with third states that goes beyond security-centred priorities and that is solidly based on facilitating human mobility, consolidating fundamental rights and the general principles of the rule of law upon which the EU legal system is founded.

The CEPS 'Liberty and Security in Europe' publication series offers the views and critical reflections of CEPS researchers and external collaborators on key policy discussions surrounding the construction of the EU's Area of Freedom, Security and Justice. The series encompasses policy-oriented and interdisciplinary academic studies and commentary about the internal and external implications of Justice and Home Affairs policies inside Europe and elsewhere throughout the world.

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The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean under scrutiny

Filling the Gaps in the Global Approach to Migration

Sergio Carrera*

CEPS Paper in Liberty and Security in Europe, June 2011

1. Setting the scene

Migration is now at the heart of EU policy debate. The events in North Africa and the Mediterranean are not only testing the efficiency of Europe's migration policies, but also the legitimacy of the political elements of European integration and the foundations of the EU's Area of Freedom, Security and Justice (AFSJ).

In addition to the EU's capacity to publicly demonstrate that it is 'doing something' to respond to the dilemmas surrounding human movements across the Mediterranean and into (and within) 'Schengenland', the main challenge for the Union remains its capacity: first, to provide common policy responses beyond (in)security-related agendas and in full compliance with the rule of law and fundamental rights standards; and second, to address the implications of the reactions by certain European leaders on the reintroduction of internal border controls and anti-immigration policies.

The political climate across Europe is currently not the most favourable one in which to address these dilemmas. Several EU member state governments are retreating into nationalism and populism in their politics of migration. This nationalism, tinged by ideas and rhetoric usually attributed to far right (extremist) national parties, is throwing into question the existing norms and principles upon which the EU is founded. It is challenging the Union's added value in terms of upholding the rights and freedoms of non-EU nationals on the move.

What have the EU's responses been so far to the events in the southern Mediterranean and inside Europe as regards human mobility?

The political discourses expressed at the highest EU levels have been consistent on the need for 'more Europe, not less'. Commissioner for Home Affairs, Cecilia Malmström has indeed appealed for a strong EU leadership that "can stand up against populist and simplistic solutions" and aiming at "strengthening existing rules, and not to undermine them" through "long-term

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measures based on the values of the respect for law and the respect of international conventions and, not though a short-term approach limited to border control”.¹

A similar line has been followed by the President of the Commission, José Manuel Durão Barroso, who in his speech to the European Parliament on 10 May 2011 underlined the necessity to address and strengthen the shortcomings of Schengen not to “give argument to the populists or the extremists, sometimes to the xenophobes that want to put into question the great ‘acquis communautaire’ in this area”.²

The specific policy proposals presented by the Directorate General for Home Affairs of the Commission were outlined in two Communications ‘on migration’³ (hereinafter referred to as the Migration Communication) and on “a dialogue for migration, mobility and security with the southern Mediterranean countries” (hereinafter referred to as the Dialogue Communication).⁴ These, along with other controversial member states’ ideas, such as those included in the joint letter from Silvio Berlusconi and Nicolas Sarkozy to Herman Van Rompuy and Barroso calling for “new possibilities” for re-establishing internal border controls “in case of exceptional difficulties in the management of common external borders”,⁵ were part of the discussions of the latest Justice and Home Affairs Council meeting of 9/10 June 2011.⁶ They will be also among the most sensitive items for debate in the upcoming European Council summit of 23/24 June 2011 in Brussels, which is expected to set “orientations for further work” in the context of EU’s policy on mobility, borders and migration.⁷ These issues will continue to be key priorities for the upcoming Polish Presidency of the EU in the second half of 2011, as well as in the scope of next JHA Trio Presidency Programme.⁸

This Policy Brief is therefore intended as a contribution to current and future discussions on the EU’s policy responses addressing cross-border mobility in the Mediterranean and internal movements inside Europe as a consequence of the democratic uprisings and violence in North Africa. It provides a selection of policy recommendations resulting from the research conducted by the Justice and Home Affairs (JHA) Section of the Centre for European Policy Studies

¹ C. Malmström (2011), *A better management of migration to the EU*, Press conference on communication on migration, Brussels, 4 May 2011, Speech/11/310.

² J.M.D. Barroso (2011), *Migration flows and asylum and their impact on Schengen*, European Parliament, Strasbourg, 10 May 2011, Speech/11/322.

³ Commission Communication on Migration, COM(2011) 248 final, Brussels, 4.5.2011. Refer also to the European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication, A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean, COM (2011) 200 final, Brussels, 8 March 2011.

⁴ Commission Communication, A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292/3, Brussels, 24 May 2011. Refer also to the European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication, A new response to a changing neighbourhood, Com(2011)303, Brussels, 25 May 2011.

⁵ The full text of the joint letter is available from the website of the Italian ministry of foreign affairs <http://www.esteri.it/MAE/IT/Sala Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110426 ItaliaFrancia.htm>

⁶ Council of the EU, Council Conclusions on Borders, Migration and Asylum, 3096th Justice and Home Affairs Council meeting, Luxembourg, 9 and 10 June 2011.

⁷ Council of the European Union, European Council (23-24 June 2011) – Annotated Draft Agenda, 9786/11, Brussels, 17 May 2011. Conseil Européen, Le Président, Lettre du président Herman Van Rompuy au Président Nicolas Sarkozy concernant la situation migratoire dans la région de la Méditerranée, Bruxelles, le 11 mai 2011, PCE 0108/11.

⁸ See the new European Council website on a Resource Centre on Free Movement and Migration at <http://www.eucouncilfiles.eu>

(CEPS) over the last few years. The Brief starts by outlining the dilemmas characterising the EU's Global Approach to Migration and the priorities guiding the Union's policy responses to human mobility from North Africa and inside the Schengen territory in section 2. Section 3 follows with a package of recommendations that aim to overcome current policy incoherencies affecting the EU's Global Approach to Migration and facilitate common European responses on mobility that are compliant with fundamental rights and European freedoms as well as the general principles rule of law upon which European integration is founded.

2. The EU's Global Approach to Migration: Human rights and rule of law dilemmas

As with previous crises and dramatic events (inside and outside Europe), the recent and ongoing phenomena in the Mediterranean have opened up new opportunities for 'more Europe'. Beyond the ambitions expressed by the European Commission in its various press releases and communications, the question that remains open is *the kind of Europe* that will be actually 'delivered' in the months and years to come in the domain of mobility, and its relationship with the rule of law and the rights and liberties of individuals on the move.

The movements of people triggered by the revolutions and war in the southern Mediterranean region have revealed the 'unfinished elements' and vulnerabilities in the current configurations and premises delineating European policies and approaches on migration, mobility and borders.

During the last twelve years the Union's responses in these areas have prioritised the security of the Union and its member states, through measures principally intended to address irregular immigration (e.g. through return, readmission and criminalisation) and strengthening external border controls and surveillance (e.g. the EU border agency Frontex and surveillance technologies). Since 2005, the EU formally subscribed to the goal of developing a 'Global Approach to Migration' combining not only measures "effectively combating irregular immigration" but also those focused on "better organising legal migration" and "maximising the positive impact of migration on development".⁹

Nevertheless, the Commission has encountered a number of obstacles as it translates its ambitions in these two policy dimensions (especially the one on 'legal migration') into legally binding (European law) instruments. The nationalism and intergovernmentalism practised by certain EU member states representatives on migration politics have constituted two decisive 'blocking factors' to the accomplishment of the agreed 'global' policy goals beyond insecurity restrictive measures. In the future, the above-mentioned populist and anti-immigration agendas spreading across European governments can only be expected to reinforce these barriers.

The ways in which the Global Approach to Migration has evolved over the last few years have resulted in a number of weaknesses and gaps concerning its actual scope, fundamentals and the forms it takes, which we shall now explore. These deficits also apply to the majority of the short, medium and long-term policy measures that have been outlined in the Commission Communications 'on migration' and 'a dialogue for migration, mobility and security with the southern Mediterranean countries'. Among others, the following weaknesses can be identified:

⁹ Presidency Conclusions of the Brussels European Council of 15 and 16 December, 2005, SN 15914/01/05, 30.12.2005. Commission Communication, The global approach to migration one year on: Towards a comprehensive European migration policy, COM(2006) 735 final, Brussels, 30.11.2006. European Commission (2007) Communication on applying the global approach to migration to the eastern and south-eastern regions neighbouring the European Union, COM(2007) 247 final, Brussels, 16 May.

2.1 Soft law

The tools by which the Global Approach has been put into practice make increasing use of (soft) law or ‘policy’ (EU coordination) instruments, such as ‘Mobility Partnerships’. The latter have been presented at EU level as one of the key or ‘crucial’ (long-term) responses to events in the Mediterranean. The EU is planning to develop Mobility Partnerships with several southern Mediterranean countries and primarily with Tunisia, Morocco and Egypt.¹⁰ The partnerships are conceived as “a long-term framework based on political dialogue and operational cooperation”.¹¹

Mobility Partnerships are political declarations that fall outside the classical remit of European law or international law. They need to be seen as an experimental method of external governance on migration management as they are not enforceable (legally binding) upon the EU member states. They aim to move Europeanisation forward through a kind of ‘policy coordination’, allowing for a great degree of flexibility and differentiation in terms of EU member states’ participation and actual content or material scope.

The ‘softness’ characterising these tools might be seen as a clear response by the Commission to calm the strong intergovernmental sentiments in certain EU member states concerning the division of competences on labour immigration, which continue to be contested. However, this very softness makes it a challenging endeavour for the Commission to guarantee a common and coherent European policy in their scope and implementation.

These declarations do not benefit either from the application of the basic rule of law or the institutional general principles (e.g. democratic control by the European Parliament and judicial scrutiny by the Court of Justice in Luxembourg) pertaining to the foundations of the EU legal system. The added value of the three Mobility Partnerships so far concluded with Moldova, Cape Verde and Georgia,¹² and the actual inclusion (and effectiveness) of workable labour mobility initiatives and/or ‘circular migration’ projects in their body, is yet to be proved by an independent (non-politicised) evaluation and pertinent objective monitoring mechanism.

2.2 Insecurity and conditionality

The kind of ‘dialogue and partnership’ that the EU is promising to give to third countries on ‘migration and mobility’ is one in which the security of the Union and its member states still function as the *sine qua non*. One of the guiding principles of Mobility Partnerships is ‘conditionality’ and a ‘performance-based approach’ by the partner country involved.¹³ The goal

¹⁰ According to the Commission “The Dialogue for migration, mobility and security will be launched progressively with the Southern Mediterranean countries, including through the development of Mobility Partnerships...on this basis, the Commission proposes to start dialogues with Tunisia, Morocco and Egypt”. Commission Communication, A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292/3, Brussels, 24 May 2011, page 11.

¹¹ Ibid, page 10.

¹² Council of the European Union (2008), Joint declaration on a mobility partnership between the European Union and Moldova, 9460/08 Add. 1, 21 May; Council of the European Union (2008) Joint declaration on a mobility partnership between the European Union and Cape Verde, 9460/08 Add. 2, Brussels, 21 May. Council of the European Union (2009), Joint declaration on a mobility partnership between the European Union and Georgia, 16396/09, Brussels, 20 November. For a political evaluation see European Commission (2009), Mobility partnerships as a tool of the global approach to migration, Commission staff working document, SEC (2009) 1240, Brussels, 18 September.

¹³ According to the Communication, A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011)292, Brussels, 24 May 2011, one of the principles guiding Mobility Partnerships is ‘conditionality’ understood as follows: “the expected outcomes of the Dialogue would

for the EU to offer facilitated mobility (visa facilitation agreements) and selected legal (and labour) migration is subject to the fulfilment by the third country of a number of conditions that come back to the traditional understanding of migration as insecurity (i.e. prioritising return, readmission, border controls and Frontex and surveillance technologies), as well as one focused on 'capacity-building measures' on migration and borders management.

This is, by way of illustration, evident from the text of the Commission Communication on dialogue on migration, mobility and security (2011)²⁹² which states that:

The increased mobility...*will depend on the prior fulfilment* of a certain number of conditions, aimed at contributing to the creation of a secure environment in which the circulation of persons would take place...*Specific measures* to be implemented can be listed ... as follows: putting in place voluntary return arrangements, concluding readmission agreements with the EU...concluding a working arrangement with Frontex, building capacity in the area of integrated border management, document security and the fight against organised crime, cooperating in the joint surveillance in the Mediterranean sea, including possible cooperation in the context of the EUROSUR project, demonstrating willingness to cooperate with the EU...in the field of police and judicial cooperation, as well as for the purposes of readmission and extradition...¹⁴

2.3 A migrant-centred approach?

The discussions surrounding the Global Approach to Migration have been mainly '*inter partes*' (the states of origin and destination) and have too often relegated the status of the rights, interests and voices of migrants. It is to be welcomed that the new Communication on dialogue on migration, mobility and security (2011)²⁹² has finally included express references to the need for the EU Global Approach to Migration to promote and respect migrants' rights.¹⁵ Yet the actual ways in which this particular dimension is going to materialise in practice in the framework of Mobility Partnerships remains to be seen, and will then need careful scrutiny.

2.4 Human rights

The impact of certain European migration legislations and border control/surveillance practices on the Union's human rights commitments, and now the set of rights envisaged by the legally binding EU Charter of Fundamental Rights, has also been absent from debates. Neither have they been accompanied by more solid initiatives and EU enforcement mechanisms automatically suspending contested national and EU practices that allegedly damage the fundamental rights and freedoms of individuals within the scope of EU border, migration and free movement law, or the activities of EU institutions/agencies such as Frontex. The EU does not employ independent and objective evaluation systems to scrutinise the lawfulness of the daily implementation of these rights-sensitive policies on the ground, and to ensure access by individuals to effective remedies in cases of alleged fundamental rights violations.

depend of the efforts and progress made in all areas (migration, mobility and security), and will take into account also progress made in governance-related areas", p. 7.

¹⁴ Ibid., p. 10.

¹⁵ The Communication states that one of the goals of Mobility Partnerships is "respecting the fundamental rights of any migrants, including those that are nationals of third countries". Ibid, p. 8. It also states that the EU Global Approach to Migration aims at "(4) the promotion and respect of migrants' rights, both of nationals of the partner countries and of third-country nationals transiting through their territories", p. 8.

3. Policy recommendations for the EU Global Approach to Migration

The resulting scenario is one where the circulation of people emerging from the democratic uprisings in the North African states and the subsequent war in Libya function as a magnifying glass that highlights these (and other) failings and unfinished elements in Europe's immigration policy and the Global Approach to Migration. The events in North Africa are prompting the Union to face policy dilemmas such as:

- Practical ways to ensure full compliance with its own legal and political commitments on rule of law and fundamental human rights, especially in the phases of member states' daily implementation of EU borders, free movement and migration law and/or activities of EU agencies like Frontex; and
- Concrete strategies to build a 'global' dialogue and solidarity-based approach with North African countries beyond 'security-related' priorities and scarce (selective, utilitarian and temporary/circular) labour mobility channels in full compliance with the rights and interests of migrant workers and meeting basic rule of law principles.

What should the EU do? The CEPS JHA Section has proposed a number of policy recommendations for the Union over the years to address some of the above-mentioned weaknesses in Europe's immigration policy. Some of these have already been taken up by several EU policy actors; while others are still relevant and should be taken into account in future EU policy interventions. A full list of our publications in which the recommendations have been developed in detail is provided in the Annex of this Policy Brief. This section provides a selection of recommendations to the EU Global Approach to Migration, and in particular to Europe's policies concerning freedom of movement and fundamental rights, borders and migration.

3.1 Freedom of movement and fundamental rights

RECOMMENDATION

The EU should adopt a new freezing mechanism

The current enforcement mechanisms provided by EU law should be strengthened, complemented and further de-politicised. The Roma affair in France during the summer of 2010 (where thousands of Romanian and Bulgarian nationals of Roma origin living in France were expelled by the French authorities), and the more recent Franco-Italian Schengen affair of April 2011 on the reintroduction of internal border controls and pushing back of hundreds of migrants and NGOs representatives have demonstrated that the current EU infringement procedures are not sufficient to provide sound and immediate actions when fundamental rights and European freedoms (such as the freedom of movement) are threatened by member states' authorities acts or practices.¹⁶

The CEPS JHA Section has proposed that the EU develop a new (preventive) freezing enforcement mechanism.¹⁷ This procedure would aim at guaranteeing that contested policies

¹⁶ S. Carrera and A. Faure Atger (2010), *L'affaire de Roms: A Challenge to the EU's Area of Freedom, Security and Justice*, CEPS Liberty and Security Series, Centre for European Policy Studies, CEPS: Brussels. Refer also to S. Carrera, E. Guild, M. Merlino and J. Parkin (2011), *A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair*, CEPS Liberty and Security Series, Centre for European Policy Studies, CEPS: Brussels.

¹⁷ Ibid, respectively, pp. 17-18 and 20.

and practices by EU member states and/or EU agencies (such as joint operations coordinated by Frontex) falling within the remits of EU law and fundamental rights would be automatically 'frozen' in cases of actual, suspected or imminent breaches of fundamental rights and/or freedoms of individuals, while the legality of the case is being examined in detail.

For such an *ex ante* procedure to be fully effective, careful attention should be paid to ensuring its overall objectivity, impartiality and democratic accountability. The procedure would be activated by the European Commission (on its own initiative or that of the European Parliament) on the basis of evidence provided by impartial actors such as the EU Agency on Fundamental Rights (FRA) or a new external network of independent and interdisciplinary experts/academics working in close cooperation with civil society organisations based in the different member states.

The operability of this precautionary procedure could lead to the launch of accelerated infringement proceedings against the EU member state(s) in question and to an expedited procedure (similar to the current urgent preliminary ruling procedure for AFSJ-related policies) before the Court of Justice in Luxembourg. This would consist of the application of a shorter period for the parties involved to submit statements of case or written observations and/or for the written phase of the case to be omitted.

In addition, the Court of Justice in Luxembourg could be also granted similar powers to those held by the European Court of Human Rights (ECtHR) in Strasbourg under the so-called Rule 39 procedure. The latter allows the ECtHR to adopt interim measures where there is an imminent risk of irreparable damage to human rights by a state party. Rule 39 means the effective freezing of the state party's practices while the case is under consideration. Such a possibility would be most pertinent in light of the imminent EU signing up to the European Convention of Human Rights.

The proposal for a freezing mechanism has been already welcomed by some EU civil society actors such as ECAS¹⁸ and EU consultative bodies such as the European Economic and Social Committee.¹⁹ It has also been included in the European Parliament (EP) Report on the Situation of Fundamental Rights in the European Union (2009) of 1 December 2010, which stated that the EP:

[b]elieves that EU action should not only address violations of fundamental rights after they have happened, but should also seek to prevent them; consequently calls for a reflection on mechanisms for early detection of potential violations of fundamental rights in the EU and in its member states, temporary freezing of the measures which constitute such violations, accelerated legal procedures for determining if a measure is contrary to EU fundamental rights and for sanctions in the event that these measures are nonetheless implemented contrary to EU law.²⁰

¹⁸ European Citizen Action Service, ECAS (2011), Hands off our right to move freely around the Union!, press release, available at <http://www.ecas-citizens.eu/content/view/393/1> Refer also to ECAS (2009), Mind the Gap: Towards a Better Enforcement of European Citizens' Rights of Free Movement, European Citizen Action Service, Brussels, December 2009.

¹⁹ Draft Opinion of the European Economic and Social Committee on the Communication on migration COM(2011) 248 final, SOC/418, Brussels, 9 June 2011.

²⁰ European Parliament, Report on the Situation of Fundamental Rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161(INI), A7-0344/2010, Rapporteur: Kinga Gal, 1 December 2010, para. 40 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2010-0344+0+DOC+XML+V0//EN&language=EN>).

The Vice-President of the Commission and Commissioner for Justice, Viviane Reding stated in plenary on 14 December 2010 that she had asked her services to explore the possibility of applying it. Since then no further follow-up initiatives have been seen.²¹

RECOMMENDATION

Schengen: The EU should ensure the closer follow-up and monitoring of the temporary reintroduction of internal border controls

The movements of people into Europe from North Africa during the last few months has led to the emergence of policy discourses and practices by certain European governments, putting under strain the principle of free movement of persons and the foundations of the Schengen regime. The JHA CEPS Section recommended that the Schengen system as defined in the 2006 Schengen Borders Code (SBC) should not be revised on the basis of nationalistic and opportunistic reactions that call for wider room for manoeuvre at times of exceptions to the general principle of freedom of movement.²²

The SBC already foresees the possibility for a member state to temporarily reintroduce internal border controls in cases where “there is a serious threat to public policy or internal security”. This possibility, however, constitutes an ‘exception’ and is firmly embedded in a set of procedural requirements and guarantees with which national authorities need to comply. It has been used by national authorities about 70 times since the mid 1990s.²³

The EU should ensure a closer follow-up, monitoring and transparent (democratically accountable) system (and record) of EU member states’ reintroduction of internal border checks, and their compatibility with the procedural criteria envisaged by the SBC and fundamental EU freedoms envisaged by the Treaties and secondary legislation. Particular focus should be placed on assessing the proportionality, adequacy and necessity of the grounds upon which the control of internal borders has been justified, as well as their effectiveness. The European Parliament, and national parliaments, should play a central role in the scrutiny of any national practice that derogates the freedom of movement principle.

The Commission’s proposal, as originally highlighted in the previously referred Communication on Migration COM(2011) 248 of 4th May, for a new coordinated EU mechanism to allow for the reinstatement of internal border controls under ‘exceptional circumstances and truly critical situations’ is in our view problematic on two main fronts:²⁴

²¹ Refer to the debate at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20101214+SIT+DOC+PDF+V0//EN&language=EN>: Reding stated that

...There is this idea of a ‘freezing mechanism’, as the rapporteur called it, this prevention system where one would intervene with regard to a measure being taken in a member state up to the point at which it is implemented. I have asked my experts to analyze this, and the institutional issues that such a mechanism raises are very complex. For the time being, although we will have to continue the analysis and see what is really happening, it seems to me that there is no legal basis to act in such a way and that a change in the Treaty would be needed to activate such a prevention mechanism. It is an attractive idea. We will carry on looking for a mechanism that could be used without changing the Treaty so as to deal with the most pressing issues.

²² S. Carrera, E. Guild, M. Merlino and J. Parkin (2011), *A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair*, CEPS Liberty and Security Series, Centre for European Policy Studies, CEPS: Brussels.

²³ Refer to Appendix ‘Reintroduction of Internal Border Controls’, *Ibid.*, pp. 23-26.

²⁴ The Communication stated, in rather vague language that:

First, the operability of an EU-coordinated instrument designed to react to emergency scenarios can be questioned. It appears unlikely that this mechanism could be swift enough to address what member states' collectively identify as situations calling for 'immediate action'. The conditions surrounding its activation, such as the existence of 'critical or emergency situations' and a 'serious threat to public security', suggest that in practice it would be rarely used, like the mechanism provided by the Temporary Protection Directive²⁵ designed to deal with situations of 'massive influxes' (or imminent ones) of displaced individuals from third countries in need of protection, which has not been used even once since its adoption in 2001.

Second, given that the initiative is liable to be interpreted as a concession to appease Presidents Sarkozy and Berlusconi, the proposal could set a precedent for opportunistic politicians who wish to evade their EU legal commitments in the scope of the EU borders and migration legislation. It may also unnecessarily re-open discussions inside the Council on already existing standards and procedures and in this way enable a watering down of current procedural (rule of law) principles set by the SBC.

3.2 Borders

RECOMMENDATION

The EU should perform an independent, impartial and effective evaluation of national and EU external border control practices

There is a 'knowledge gap' in the ways in which the provisions, administrative guarantees and fundamental rights foreseen in the SBC and the EU Charter of Fundamental Rights are applied along the EU's common external borders. The actions of national border authorities and Frontex (the EU border agency) to date are not being adequately scrutinised. The grey areas characterising practices on border control and the return of irregular immigrants across Europe (and the responsibilities of relevant domestic and EU law enforcement agencies) seriously undermine general democratic principles of accountability and scrutiny. They also make access to justice and effective remedies difficult for individuals.

There are several factors calling for the development of a new independent and politically accountable evaluation system at EU level of external borders policies and (control and surveillance) border practices, in short: first, the complexity of the EU's external borders; second, the blurred and narrow picture of competent national authorities involved in border

A mechanism must also be put in place to allow the Union to handle situations where either a member state is not fulfilling its obligations to control its section of the external border, or where a particular portion of the external border comes under unexpected and heavy pressure due to external events. A coordinated Community-based response by the Union in critical situations would undoubtedly increase trust among member states. It would also reduce recourse to unilateral initiatives by member states to temporarily reintroduce internal border controls....Such a mechanism may therefore need to be introduced, allowing for a decision at European level defining which member states would exceptionally reintroduce internal border control and for how long. The mechanism should be used as a last resort in truly critical situations,...The Commission is exploring the feasibility of introducing such a mechanism, and may present a proposal to this effect shortly, p. 8.

Refer to S. Carrera and J. Parkin (2011), *Schengen under strain: An opportunity for more, not less Europe*, CEPS News June 2011, Centre for European Policy Studies, CEPS: Brussels.

²⁵ Council Directive EC/2001/55 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof, 20 July 2001, OJ L212/12, 7.8.2001.

controls and surveillance; third, the deficits still affecting the practical implementation of external border controls; and fourth, the nuances in the areas of responsibility (between domestic border authorities, third states and Frontex) and access to justice (fundamental rights and administrative guarantees envisaged by the SBC) by individuals.²⁶

The CEPS JHA Section has regularly called for the need to ensure a better impartial monitoring of the compliance between EU external border controls and EU borders law and the EU Charter of Fundamental Rights. Our research has underlined the need to improve the current (intergovernmental, obscure and methodologically flawed) Schengen evaluation mechanism in order to ensure that the management of the external borders are firmly founded on the rule of law and that the SBC is duly implemented across Europe's external borders.²⁷ This would be feasible in light of the possibility expressly stipulated in the new Article 70 of the TFEU.²⁸

This idea goes in line (to varying degrees) with the European Commission's proposals for ensuring "a clear system of Schengen governance" and the initiative to revise the Schengen evaluation mechanism "on a Community approach with participation of experts from member states, Frontex and led by the Commission".²⁹ In the Commission's view "the proposed mechanism would ensure more transparency and improve the follow-up of shortcomings identified during the experts' evaluations".³⁰ However, these Commission initiatives would still fail to ensure the necessary degree of independence of the evaluation and the proper daily monitoring of external border practices in light of EU law and the SBC.

The JHA Section has recommended that an evaluation mechanism of such a nature be accompanied by the setting-up of a permanent European network of (interdisciplinary) academics and/or experts, which could offer independent expertise and analysis focused on the fundamental rights and rule of law aspects related to the AFSJ, and more concretely the national implementation and compliance of EU borders law.³¹ This would be, in our opinion, an effective way to ensure that the EU develops 'evidence-based policy making' in these domains. This should be further accompanied by a permanent monitoring system focused on the full and

²⁶ S. Carrera (2010), *Towards a Common European Border Service?*, CEPS Working Document No. 331, Centre for European Policy Studies, CEPS, Brussels.

²⁷ See S. Carrera, D. Bigo and E. Guild (2008), *What Future for the Area of Freedom, Security and Justice? Recommendations on EU Migration and Borders Policies in a Globalising World*, CEPS Policy Brief No. 156, Centre for European Policy Studies, CEPS: Brussels; See also S. Carrera, E. Guild and A. Faure Atger (2009), *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, CEPS, Brussels.

²⁸ Article 70 TFEU states that:

The Council may, on a proposal from the Commission, 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 referred to in this Title by member states' authorities*, in particular in order to facilitate full application of the principle of *mutual recognition*. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

²⁹ Commission Communication on Migration, COM(2011) 248 final, Brussels, 4.5.2011.

³⁰ *Ibid.*, p. 8.

³¹ S. Carrera, D. Bigo and E. Guild (2009), *The Challenge Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security*, CHALLENGE Research Paper No. 16, Centre for European Policy Studies, CEPS: Brussels; S. Carrera, E. Guild and A. Faure-Atger (2009), *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, CEPS, Brussels.

uniform application of the SBC on border checks and surveillance activities, which we now enter into analysing in the context of Frontex.

RECOMMENDATION

Frontex should be subject to independent and democratic scrutiny/accountability

One of the most visible EU responses to the southern Mediterranean events has been the EU border agency Frontex Joint Operation EPN HERMES Extension 2011, which has aimed at providing assistance to the Italian authorities in controlling vessels and identifying the nationality and access to asylum for the protection of those arriving onto Italian territory. The operation, which has been running since 20 February 2011, has mainly consisted of the deployment of around 20 experts on screening and debriefing from different EU member states to several immigrant detention centres in Italy, as well as assistance in maritime surveillance.³²

Since 2007, the JHA CEPS Section has underlined the deficits inherent in Frontex activities, especially those joint operations taking place in maritime territories (inside the EU or on high seas) as well as those engaging in the diversion of boats ('push backs') through extra-territorial border controls in the territories of third countries.³³ We have highlighted the lack of clear and solid accountability procedures affecting Frontex's activities, which only adds to the complexities and lack of transparency in the implementation of SBC across the Union's external borders and the allocation of responsibilities in cases of potential fundamental rights and administrative guarantees violations.³⁴

At present there is still no EU mechanism to scrutinise the impact, added value and effectiveness (and proportionality) of Frontex activities and joint operations, or the reliability of the risk analysis upon which the latter are based. The democratic oversight of the Agency's tasks by the European Parliament also needs to be significantly enhanced beyond budgetary control to cover a proper follow-up and scrutiny of all Frontex activities.

The JHA CEPS Section has proposed the establishment of a 'border monitor' that would be competent to carry out a continual evaluation of the border controls and their compatibility with the SBC, as well as joint return operations of irregular immigrants.³⁵ They should be independent of Frontex and could be responsible for initiating disciplinary measures in cases of improper application of the SBC or misconduct. The border monitor could be also in charge of

³² For detailed information on the HERMES operation refer to www.frontex.europa.eu See Frontex Press Release, *Frontex Guest Officers sent to work in Italy*, 25 February 2011, Warsaw; also Frontex Press Release, *Update to Joint Operation Hermes 2011*, 11 March 2011, Warsaw.

³³ S. Carrera (2007), *The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Document No. 261, Centre for European Policy Studies, CEPS, Brussels.

³⁴ S. Carrera and E. Guild (2010) *Joint Operation RABIT 2010' – FRONTEX Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System*, CEPS Liberty and Security in Europe, November 2010.

³⁵ S. Carrera, E. Guild and K. Groenendijk (2008), *Ten Policy Recommendations on Freedom, Security and Justice for the European Parliament Elections*, CEPS Policy Brief No. 173, October, Centre for European Policy Studies, CEPS: Brussels. Refer also to P. Hobbing (2010), "The management of the EU's external borders: from the Customs Union to Frontex and e-borders" in E. Guild, S. Carrera and A. Eggenschwiler (eds.) *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges under the Stockholm Programme*, CEPS, Brussels.

reporting periodically on the application of the SBC.³⁶ In addition, an accompanying recommendation was also made to set up an additional group of officials (fundamental rights supervisor/officer) which would be responsible for the evaluation and conduct of inspections focused on the protection of fundamental rights as envisaged in the EU Charter of Fundamental Rights and the SBC.³⁷

In February 2010, the European Commission presented a new proposal amending the Frontex Regulation, which has since been the subject of sensitive debates and contributions.³⁸ The negotiations on the Frontex Regulation open up an opportunity to introduce new mechanisms which would ensure greater accountability and scrutiny of Frontex activities. Input by both the Commission and the European Parliament indicate potential positive steps forward.

Among the main innovative elements put forward by the Commission in the revision of Frontex mandate, the Commission proposed that in those coordination activities related to joint return operations (by air) of irregular immigrants by EU member states the Agency would need to develop a ‘code of conduct’ that would describe:

common standardised procedures which should simplify the organisation of joint return flights and assure return in a humane manner and in full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data and non discrimination.³⁹

The proposal also included the figure of an independent ‘monitor’ of joint return operations that would act “from the predeparture phase until the hand-over of the returnees in the country of return.”⁴⁰ According to the Commission:

observations of the monitor, which shall cover the compliance with the Code of Conduct and in particular fundamental rights, shall be made available to the Commission and form part of the internal Final Return Operation Report. In order to ensure transparency and a coherent evaluation of the forced-return operations, reports of the monitor shall be included in an annual reporting mechanism.⁴¹

Moreover, the Commission’s proposals involved an obligation to draft an operational plan which should address mandatory components such as “the geographical area” of the operation, “command and control provisions” and “applicable jurisdiction and maritime law provisions”.

³⁶ S. Carrera (2010), *Towards a Common European Border Service?*, CEPS Working Document No. 331, Centre for European Policy Studies, CEPS, Brussels.

³⁷ *Ibid.*, p. 29.

³⁸ European Commission, Proposal for a Regulation amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union (FRONTEX), COM(2010) 61 final, Brussels, 24 February 2010.

³⁹ *Ibid.*, Article 9, pp. 26-27 of the proposal.

⁴⁰ Refer also to Article 8.6 of the Returns Directive which states that “member states shall provide for an effective forced-return monitoring system”. Directive 2008/115 on common standards and procedures in member states for returning illegally staying third-country nationals, 16 December 2008, OJ L348/98, 24.12.2008.

⁴¹ European Commission, Proposal for a Regulation amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union (FRONTEX), COM(2010) 61 final, Brussels, 24 February 2010.

These components may in the future lead to less diluted responsibilities amongst the relevant authorities, including Frontex.

The report adopted by the LIBE Committee of the European Parliament on the Commission's proposal was more ambitious regarding the need to ensure the protection of fundamental rights during Frontex activities.⁴² The EP proposed the setting up of a Fundamental Rights Advisory Board in Frontex that would assist the Frontex director and management board in those matters "concerning the Agency's activities having implications for fundamental rights".⁴³ The Advisory Board would have investigatory competences and the right to make any request for information on the compatibility of the Agency's activities (joint operations, rapid border intervention mission or pilot projects) with fundamental rights and "notably the relevant Union law, international law and obligations related to international protection."⁴⁴ The Advisory Board would consist of representatives from the European Asylum Support Office (EASO), the Fundamental Rights Agency (FRA), the United Nations High Commissioner for Refugees (UNHCR) and other relevant organisations. Each year, it would draft a report on compliance with fundamental rights by Frontex.

The LIBE Committee also recommended a suspension mechanism for Frontex joint operations, rapid border intervention mission or pilot projects "where there are cases of violation of fundamental rights and international protection obligations."⁴⁵ It also stated that "no Frontex operation may take place under the jurisdiction of any third country"⁴⁶ and went further by developing the Code of Conduct's idea, firstly by saying that it should be drafted in cooperation with other competent EU or international bodies and organisations, namely the FRA, EASO, UNHCR and IOM, and secondly by proposing a general operational Code of Conduct beyond joint return.⁴⁷ The Code should lay down:

procedures intended to guarantee respect for fundamental rights, with particular focus on unaccompanied minors and vulnerable persons, as well as practical measures to be taken for the purpose of identifying persons seeking protection and directing them to appropriate facilities.⁴⁸

⁴² European Parliament, Draft Report, on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union (FRONTEX), (COM(2010)0061 – C7-0045/2010 – 2010/0039(COD)), Rapporteur: Simon Busuttil, 12.11.2010.

⁴³ Amendment 102.

⁴⁴ Amendment 102.

⁴⁵ Amendments 32 and 102.2.

⁴⁶ Amendment 92.

⁴⁷ Amendments 24 and 81.

⁴⁸ Amendment 24. Refer also to Amendment 81 which refers to the need for the Code to ensure the implementation of the above-mentioned Article 8.6 of the Returns Directive to provide for "an effective forced-return monitoring system to ensure that the return is carried out in full respect for fundamental human rights". The EP also said that:

"Member states shall ensure that relevant international organisations are involved during removal procedures in order to guarantee compliance with proper legal procedure. Monitors should have access to all relevant facilities, including detention centres and aircraft, and receive the necessary training to perform their duties".

Finally, another important recommendation put forward by the EP, which is consistent with its previous positions on the matter,⁴⁹ was the need to strengthen the democratic accountability/scrutiny of Frontex activities through the monitoring of its risk analysis and the working arrangements and agreements with other EU agencies and third countries. It proposed several obligations for Frontex to inform the EP of these activities to that effect.⁵⁰ Furthermore, the EP proposed that the Frontex executive director be invited to report on the carrying out of his/her tasks, “in particular on the general report of the Agency for the previous year, the work programme for the coming year and the Agency’s multi-annual plan”.⁵¹

RECOMMENDATION

**No new EU level database to be used until existing security technologies prove proportionate, safe and reliable –
An independent evaluation/inventory and evidence-based approach**

The EU’s AFSJ has been driven by a firm belief in technology as the solution to every insecurity and border-related ‘threat’ facing the Union. Little consideration (and ex ante examination) has been given however to the ethical implications of security technologies over the principle of proportionality and fundamental rights, such as the protection of personal data envisaged in Article 8 of the EU Charter of Fundamental Rights and the right to respect private life as interpreted in the context of the Council of Europe, as well as that of non-discrimination foreseen in Article 21 of the EU Charter.

The Migration Communication labels these security and fundamental rights-sensitive policy initiatives under the rubric of ‘organised mobility’ and with the aim “to protect and to ensure a smooth passage for EU citizens and their family members, and for all third country nationals who come to the EU”.⁵² The untold dimension is the higher degree of insecurity that this ‘smoother’ system of technologically-based management of human mobility can exert over the liberties and fundamental freedoms of persons on the move.

The use of security and surveillance technologies has expanded since the early days of Schengen cooperation and an ever increasing quantity of data on persons and objects has been compiled and exchanged across the member states via several established large-scale IT databases and information systems. These include, among others, the Schengen Information System (SIS), EURODAC and the Visa Information System (VIS).⁵³ In addition, the Commission announced in February 2008 a package of proposals (the borders package) for the development of several new databases and biometric systems for the surveillance of external borders and for making border crossings for ‘bona fide’ travelers easier.⁵⁴ The Council is now expecting a Commission legislative proposal on the European Border surveillance system

⁴⁹ European Parliament, *Report on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI))*, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Javier Moreno Sanchez, 11 November 2008, para. 35.

⁵⁰ Amendment 64, 91, 94, 96.

⁵¹ Amendment 101.

⁵² Commission Communication on Migration, COM(2011) 248 final, Brussels, 4.5.2011, Section 3.1 “Organised Mobility”, p. 10.

⁵³ Geyer, F. (2008), *Taking Stock: Databases and Systems of Information Exchange in the Area of Freedom, Security and Justice*, CHALLENGE Research Paper No. 9, CEPS, Brussels, May.

⁵⁴ Guild, E., S. Carrera and F. Geyer (2008), *The Commission’s New Border Package: Does It Take Us One Step Closer to a ‘Cyber Fortress Europe’?* CEPS Policy Brief No. 154, March.

(EUROSUR) and a Communication on so-called 'smart borders' dealing with the setting up of an Entry-Exit System (EES) and a Registered Travellers Programme (RTP), which are expected to be quickly followed by concrete legislative proposals.⁵⁵

The CEPS JHA Section has put forward a number of concerns relating to the content and ways in which these technological tools are being developed and justified.⁵⁶ These relate, for instance, to the use that is made of the data stored therein, the level of access and exchange of these sensitive data and the consequences of data inaccuracies. The increasing use of 'profiling' as a data processing technique constitutes a worrying case in point and risky practice from a rights and freedom-of-individuals point of view.⁵⁷

These concerns call for significant revisions of the content, and rules governing access to information held on EU level databases so as to ensure their necessity, proportionality, safety and reliability. The negative implications of these surveillance policies (identified by EU-funded research projects on security technologies)⁵⁸ over the rights and freedoms of the entire population and especially of vulnerable groups, such as certain (stigmatised) categories of third country nationals should be carefully assessed from a human rights and non-discrimination point of view.

No new EU large-scale database should be set up until existing ones are found to be proportionate, safe and reliable. Questions of adequacy and proportionality of the flow of information need to be addressed in order to challenge the assumption that maximum technology is by definition the solution for better security.⁵⁹

Advancing the EU strategy on information management should begin with an *independent* inventory of current policies, tools and institutional structures involved in data exchange in the field of security at EU level and their practical implementation, building on the Commission's preliminary mapping exercise undertaken in 2010.⁶⁰ Moreover, both DG Justice, Citizenship and Fundamental Rights of the European Commission and the FRA should be engaged to conduct an in-depth fundamental rights proof-reading of existing and any upcoming database, including taking into account the risks implied by their potential inter-operability with other large scale databases.

The democratic accountability of policy-making relating to the development of large-scale EU databases must be ensured by allowing all EU institutions to have a proper and informed say in the policy processes. The European Parliament and national parliaments should be fully

⁵⁵ Council of the EU, Council Conclusions on Borders, Migration and Asylum, 3096th Justice and Home Affairs Council meeting, Luxembourg, 9 and 10 June 2011.

⁵⁶ S. Carrera, D. Bigo and E. Guild (2008), *What Future for the Area of Freedom, Security and Justice? Recommendations on EU Migration and Borders Policies in a Globalising World*, CEPS Policy Brief No. 156, Centre for European Policy Studies, CEPS: Brussels; Carrera, S., E. Guild and D. Bigo, *The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security*, CEPS CHALLENGE Research Paper No. 16, Centre for European Policy Studies, Brussels, September 2009.

⁵⁷ González Fuster, G., S. Gutwirth and E. Ellyne (2010), *Profiling in the European Union: A high-risk practice*, INEX Policy Brief No. 10, Centre for European Studies (CEPS), June, Brussels.

⁵⁸ D. Bigo and J. Jeandesboz (2010), *The EU and the European Security Industry: Questioning the Public-Private Dialogue*, INEX Policy Brief No. 5, Centre for European Studies (CEPS), February, Brussels.

⁵⁹ J. Parkin (2011), *The Difficult Road to the Schengen Information System II: The Legacy of 'Laboratories' and the Cost for Fundamental Rights and the Rule of Law*, CEPS Liberty and Security Series, Brussels.

⁶⁰ Commission Communication on an Overview of information management in the area of freedom, security and justice, COM(2010)385, Brussels, 20.7.2010.

informed of discussions and developments and given sufficient time to scrutinise proposals for future EU large-scale IT systems in light of the evaluation of existing ones. Parliamentary scrutiny should also focus on the proportionality between budgetary expenditure and the necessity and effectiveness of these technology tools and information systems.

Another recommendation that has been put forward in these areas since 2008 is that of ‘data protection by design’ advocated by several data protection authorities and privacy commissioners at international level.⁶¹ The latter has become a ‘motto’ across various EU policy documents.⁶² This principle has also received the support of the Article 29 Data Protection Working Party (which has recommended that it be binding for data controllers, as well as technology designers and producers),⁶³ and the European Data Protection Supervisor (EDPS) which has considered it as an “element of accountability”.⁶⁴

Our research has recommended that ‘data protection and privacy by design’ should be an explicit and integral part of information and security technologies. It should constitute an obligatory element in the programming and running of any new and existing databases. This principle would allow for automated solutions to data protection requirements since the very inception of security technologies, such as the automatic deletion of data at the end of the permitted period and other protection elements such as purpose limitation, rules on transmission, storage time, information to the data subject, etc. Individuals must indeed be adequately protected against the consequences of data inaccuracies or negligent data exchange and must be properly informed of their rights.⁶⁵ A challenge for the EU remains the clarification of the relationship between ‘privacy by design’ and the EU rights of privacy and personal data protection, and finding ways to effectively put legal requirements into practice.⁶⁶

⁶¹ Guild, E., S. Carrera and F. Geyer (2008), *The Commission’s New Border Package: Does It Take Us One Step Closer to a ‘Cyber Fortress Europe’?* CEPS Policy Brief No. 154, March, page 5. Resolution on Privacy by Design, adopted by the 32nd International Conference of Data Protection and Privacy Commissioners, Jerusalem 27-29 October 2010.

⁶² As a way of illustration refer to 3071st Justice and Home Affairs Council meeting (2011), *Council conclusions on the Communication from the Commission to the European Parliament and the Council: A comprehensive approach on personal data protection in the European Union*, 24 and 25 February, Brussels, p. 4. European Commission (2010), *Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A comprehensive approach on personal data protection in the European Union*, COM(2010) 609 final, 4.11.2010.

⁶³ Article 29 Data Protection Working Party and Working Party on Police and Justice (2009), *The Future of Privacy: Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data*, 1 December 2009, 02356/09/EN, WP168 (http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm).

⁶⁴ European Data Protection Supervisor (2011), *Opinion of the European Data Protection Supervisor on the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - "A comprehensive approach on personal data protection in the European Union"*, 14 January, Brussels, refer to point 7.3 “Privacy by Design”, pp. 23 and 24.

⁶⁵ See also the final policy recommendations of the Challenge Project (Changing landscape of European Liberty and Security) under the section ‘Data Protection.’ (Bigo, Carrera and Guild, 2009).

⁶⁶ G. Gonzalez Fuster, P. De Hert and S. Gutwirth (2011), *Situating Privacy and Data Protection in a Moving European Security Continuum*, INEX Policy Brief, CEPS, Brussels, p. 7-8.

3.3 Migration

RECOMMENDATION

Europe's Labour Immigration policy should be guided by a rights-based approach – An Immigration Code

Among the components of the EU Global Approach to Migration is “better organising legal migration”.⁶⁷ The EU 2020 Strategy has also identified as one of its priorities for ‘inclusive growth’ the need to develop a “forward-looking and comprehensive labour migration policy which would respond in a flexible way to the priorities and needs of labour markets”.⁶⁸

Over the last eleven years the EU has striven to develop a common approach to migration policy, including mobility for employment-related purposes. This political ambition has faced several obstacles, leading to the emergence of a legislative framework characterised by fragmentation and obscurity as regards the rights, freedoms and administrative guarantees of third country nationals. European immigration law is sectoral in nature, consisting of: first, a number of directives regulating the conditions of entry and residence of only certain categories of third country nationals (e.g. highly-skilled workers, long-term residents, students, scientists and family members); second, three legislative proposals dealing respectively with a single permit and common framework of rights, the status of seasonal workers and that of intra-corporate transferees; and third a number of legal provisions dispersed across other secondary legislation acts (for instance in EU asylum law) and association agreements between the EU and third countries.

The CEPS JHA Section has called for a ‘rights-based approach’ to be the driver of Europe’s migration policy.⁶⁹ The current selective approach to labour migration (purely based on the perceived labour market and skills shortages in the member states) should be replaced by one where the rights, interests and voices of all migrant workers, regardless of their immigration status, are placed at the heart of common European policy responses. Migrants should not be seen as economic units at the service of the state and the market, but rather as participants, residents, human rights holders and citizens-in-waiting. Such an approach should go along with the creation of an exhaustive and consolidated (coherent) regulatory framework guaranteeing common cohesive goals and strategies, both internally and when engaging in international relations with third states.

We have recommended that the EU develop a labour migration regime characterised by openness, flexibility, efficiency and compatibility with other policies.⁷⁰ The existing fragmented

⁶⁷ Commission Communication, A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292/3, Brussels, 24 May 2011, p. 8.

⁶⁸ Commission Communication, A strategy for smart, sustainable and inclusive growth, COM(2010)2020 final, Brussels, 3.3.2010.

⁶⁹ S. Carrera, A. Faure Atger, E. Guild and D. Kostakopoulou (2011), *Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020*, CEPS Policy Brief No. 240, April; E. Guild (2007), *EU Policy on Labour Migration: A First Look at the Commission’s Blue Card Initiative*, CEPS Policy Brief No. 145, November; S. Carrera (2007), *Building a Common Policy on Labour Immigration: Towards a Comprehensive and Global Approach in the EU?*, CEPS Working Document No. 256, February; S. Carrera and M. Formisano (2005), *An EU Approach to Labour Migration: What is the Added Value and the Way Ahead?*, CEPS Working Document No. 232, October.

⁷⁰ S. Carrera, A. Faure-Atger, E. Guild and D. Kostakopoulou (2011), *Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020*, CEPS Policy Brief No. 240, April, p. 12.

legal framework calls for sound consolidation and legal certainty. The CEPS JHA Section has proposed that the EU support an independent inventory of the current framework covering the rights and standards in the field of labour market access, rights and conditions for TCNs, which would also evaluate the dilemmas faced in implementation at the domestic level as well as the added value of the EU's intervention in this domain.⁷¹ In its 2010 Action Plan implementing the Stockholm Programme titled "Delivering an area of freedom, security and justice for Europe's citizens"⁷² the European Commission presented the initiative of an "*Immigration Code*"⁷³ which would mean the

consolidation of legislation in the area of legal immigration taking into account the evaluation of the existing legislation, needs for simplification and where necessary (an extension of) the existing provisions to categories of workers currently not covered by EU legislation.

The current state of policy dispersion and incoherency could indeed be potentially overcome by an Immigration Code subject to a number of conditions:⁷⁴

1. It should be guided by the principles of fair and equal treatment between EU citizens and third country nationals, as originally emphasised in the 1999 Tampere European Council Conclusions/Programme;⁷⁵
2. The personal scope would extend beyond those labelled as 'legally residing third country nationals' and also cover undocumented migrants;
3. The codification would not lead to lowering already existing legal standards and rights.

The Code could be also an opportunity for the EU to become a more active promoter of the UN, Council of Europe and International Labour Organisation legal (ILO) instruments and conventions protecting migrants' human rights amongst EU member states. It could also include provisions aiming at ensuring a better national implementation of these already existing human rights standards and building closer partnerships with these (and other) international, regional and European actors.

The CEPS JHA Section has equally underlined the importance of ensuring a democratic and participatory policy process by incorporating the knowledge and practical experiences of practitioners representing civil society, immigrants' organisations, local and regional authorities (cities) and social partners (trade unions and employers' organisations) in the definition/identification, consultation, implementation and (ex post) evaluation of the immigration policy priorities, legislative acts and financial frameworks.⁷⁶ Existing platforms such as the European Integration Forum and proposals like the European platform for dialogue

⁷¹ Ibid.

⁷² Commission Communication, Delivering an area of freedom, security and justice for Europe's citizens: Action plan implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20.4.2010.

⁷³ The original idea of the Code was presented in the 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.

⁷⁴ S. Carrera and A. Faure-Atger (2009), *Yes! A rights based approach to migration is possible for the Stockholm Programme! Provided...*, ENARgy, European Network Against Racism (ENAR), Brussels, pp. 11-12.

⁷⁵ European Council, Presidency Conclusions of the Tampere European Council, 15-16 October 1999, SN 200/99, Brussels, 1999.

⁷⁶ S. Carrera and A. Faure-Atger, *Impact of the Seasonal Employment of Third Country Nationals on Local and Regional Authorities*, report commissioned by the Commission for Citizenship, Governance, Institutional and External Affairs (CIVEX) of the Committee of the Regions, 2010.

on labour immigration constitute a step in the right direction. That notwithstanding, their competences and inputs should be significantly strengthened, especially in what concerns the monitoring and evaluation of the added value and impact of EU policies and budgetary instruments in migration-related domains.

RECOMMENDATION

Mobility Partnerships should be compliant with rule of law and fundamental rights principles

As has been highlighted in section 2 of this Policy Brief, the policy tool that has been presented as the main (long-term) EU response to the events in the southern-mediterranean are Mobility Partnerships. In 2009 the CEPS JHA Section assessed the origins, nature and vulnerabilities inherent in these external European (soft) governance instruments in the area of migration management, in particular the first two Mobility Partnerships with Moldova and Cape Verde.⁷⁷

The results of the examination revealed several deficits as regards their compatibility with the general principles of legal certainty and the rule of law, stemming mainly from their soft policy (non-legally binding) nature (constituting Joint political Declarations), the lack of democratic accountability (lack of involvement of the European Parliament) and their 'flexibility' and variable geometry features in terms of EU member states' participation and actual content (the projects, political priorities and bilateral agreements thereby included in their annexes). Our analysis also highlighted the contentious relationship between Mobility Partnerships and international and EU labour and human rights standards (because of the predominant temporary and selective understanding of migration) as well as the rather unbalanced nature of the 'partnerships' in question, reflected in the marked scarcity of labour and circular migration schemes offered by EU member states within the content of the agreements.

We have recommended that the three Mobility Partnerships concluded so far should be subject to an independent assessment of their effects on the rule of law and fundamental rights of migrants, as well as on their actual added value, especially from the perspective of going beyond 'security-related' policies towards cooperation, projects and agreements on labour migration schemes. The negative repercussions of the concept of 'circular migration' (according to which migration is managed in a recurrent and temporary manner fostering some degree of legal mobility back and forth between two countries)⁷⁸ over a rights-based and inclusionary approach to migration should be also carefully considered.

As long as Mobility Partnerships include labour-migration issues going beyond "the rights of member states to determine the volumes of admission of third country nationals" (quotas),⁷⁹ we recommend that the EU instead make use of international agreements (instead of Joint Declarations) as the framework of cooperation and dialogue with any third state, similar to those used in the context of readmission and asylum cooperation.⁸⁰ One could indeed argue that the recognition of the EU's competence to legislate on 'the internal dimension' of labour

⁷⁷ S. Carrera and R. Hernández i Sagrera (2009), *The Externalisation of the EU's Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?*, CEPS Working Document No. 321, October.

⁷⁸ For the understanding of this concept by the European Commission, refer for instance to the European Commission, Communication on circular migration and mobility partnerships between the European Union and third countries, COM(2007) 248 final, Brussels, 15 May 2007.

⁷⁹ Article 79.5 of the Treaty of the Functioning of the European Union.

⁸⁰ Articles 79.3 and 78.2 TFEU.

immigration policy in Article 79.4 TFEU has also opened the window for the Union to engage on the basis of implicit external legal competence on issues of labour immigration in its relations with third countries. This would be the only way to duly ensure legal certainty, policy coherency and the necessary democratic accountability and judicial control of their nature and potential effects.

RECOMMENDATION

The EU should develop a four-point plan to reduce irregular immigration

Another component of the EU Global Approach to Migration has been “to effectively combat irregular immigration”.⁸¹ The prevention of irregular immigration has high salience in the priorities of the EU’s response to migration from North Africa. Here the promotion of Europe’s return and readmission policy (mainly through readmission agreements with third states now framed in the scope of Mobility Partnerships) has constituted the main policy priority.⁸²

The CEPS JHA Section identified the ‘policy gap’ which still exists between EU policies on irregular immigration and the findings and results of social science research projects funded by different directorates-general of the European Commission.⁸³ It recommended that EU policy should recognise that undocumented migrants are among the most vulnerable groups in the EU and that they are in fact holders of fundamental human rights. As mentioned above, the EU should adopt a common legislative framework of protection for the rights of *all* third-country national workers, including undocumented migrants. That framework, potentially within the scope of the Immigration Code or by its own Council Directive, should focus on strategies to overcome the practical obstacles undocumented migrants face in access to the rights of health care, education, housing and fair working conditions across the EU, and ensuring, *inter alia*, equal pay for equal work, decent working conditions and collective organisation.

Our work has also highlighted the importance of official rhetoric and the negative repercussions of the EU’s discourse on illegality (i.e. illegal immigration) and verbs like ‘combating’, ‘fighting’ and ‘better controlling’ irregular human movements at times of justifying restrictive immigration policies and perpetuating an artificial link or continuum between the human mobility of non-EU nationals and criminality. It was recommended that EU should change its discourse towards other terms such as irregular immigration and undocumented immigrants by adopting a common terminology that is neutral. It is noteworthy that the Commissioner for Home Affairs, Cecilia Malmström now consistently uses the term “irregular migration” in her public speeches.⁸⁴ In addition, the EU should adopt a common EU manual on migration-related

⁸¹ Commission Communication, A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292/3, Brussels, 24 May 2011, page 8.

⁸² Refer for instance to ‘Section 2.4. Preventing irregular immigration’ of the Commission Communication on Migration, COM(2011) 248 final, Brussels, 4.5.2011.

⁸³ S. Carrera and M. Merlino, *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme*, CEPS Papers in Liberty and Security in Europe, Brussels, 2009.

⁸⁴ Malmström declared that “*For my own part, I try to avoid to speak about migrants as "illegal" or as a "burden" to society and rather use words as "irregular" and "responsibility sharing". These are just examples, but I find it important to encourage awareness of the power of the choice of words.*” Refer to Intervention by Commissioner Cecilia Malmström at the third meeting of the European Integration Forum, Brussels 24 June 2010. Refer also to C. Malmström (2011), A better management of migration to the EU, Press Conference on communication on migration, Brussels, 4 May 2011, Speech/11/310 (http://ec.europa.eu/commission_2010-2014/malmstrom/media/archives_2010_en.htm).

terminology to ensure that any EU policy documents avoid this kind of rhetoric in all EU official languages.⁸⁵

The CEPS JHA Section has also recommended that the Union develop a four-point plan to reduce irregularity in Europe and consisting of, in short, the following components:⁸⁶

1. EU member states should regularise (grant necessary documentation) and grant protection to those immigrants who cannot be returned within three months. This would also serve to address the “limbo situations” in which irregular migrants fall when EU member states acknowledge that a removal order cannot be executed but does not provide the individual with a residence permit.
2. Member states should have an obligation to deal with applications for the renewal of work permits in a timely manner and to enact legislation guaranteeing that between the application and the administrative decision, the individual has access to lawful employment and appeal rights.
3. Facilitated mechanisms for the issue of labour permits, particularly for those sectors most affected, should be adopted.
4. The EU should establish, in accordance with the provisions of international and regional human rights instruments, a common set of basic socio-economic rights applicable to everyone present in the EU. In particular, everyone present in the EU should have access to primary health care free of charge if necessary in order to protect the good health of everyone. The EU should address the vulnerability and inequalities faced by undocumented migrants in their access to the right to health care by explicitly including this group in its various policy strategies.

RECOMMENDATION

EU common visa policy should be guided by the principles of solidarity, transparency and legal certainty

Visa policy and reciprocity have a strong political and international relations dimension. They must be looked at in the broader context of the EU and member states' international relations. So far, EU visa policy places third states in three categories: those whose nationals need to fully comply with the EU visa rules, those whose nationals are altogether exempt from visa requirements and those whose nationals benefit from a relaxation of the visa rules. The Community Code on Visas sets out common procedures and conditions for issuing visas either for transit or intended stays of up to three months out in the member states and provides for an obligation for member states to motivate refusals and a right of appeal of negative decisions. The effective implementation of the common Visa Code should be welcomed. However, uniform application continues to constitute a huge challenge. It calls for a mechanism to closely scrutinise its consistent and harmonious implementation, in particular as regards the provisions related to deadlines and fees, as well as the ethical implications of cooperation with external service providers. Procedures for challenging negative decisions should also be available to those applicants who have been refused a visa.

⁸⁵ Ibid., p. 34.

⁸⁶ S. Carrera, E. Guild and M. Merlino (2010), *Policy Recommendations*, in S. Carrera and M. Merlino (eds), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, CEPS Liberty and Security Series, October, Brussels, pp. 32-35.

Today, the EU considers its visa policy to be part of a broader vision supporting both internal and external policy concerns. The 2009 Stockholm programme emphasises the need to make access to the Union's territory more efficient for individuals with a legitimate interest. The CEPS JHA Section welcomes this acknowledgement and has emphasised that any consideration of partnership between the EU and a country or a region should take account of the perspective of individuals living in these countries. It has in particular called for facilitating the movement of certain professionals, such as officials, diplomats, civil society actors, business persons, students and professors.⁸⁷ The Commission has approved this approach by announcing in the Dialogue Communication that it would, on a case by case basis, propose visa facilitation agreements to support at least "the mobility of students, researchers and business people".⁸⁸

The criteria for including a country in a negative visa list must be clarified and made public. Imposing visa conditions on the basis of nationality of the person (and hence considering an entire country a potential source of insecurity) is problematic, not least from the perspective of non-discrimination.⁸⁹ Clear roadmaps and benchmarks for being removed from such lists and for the country's nationals being viewed de facto as 'bona fide' travellers should be also established.⁹⁰

EU common visa policy constitutes a central tool for developing EU cooperation with third countries. The EU should only consider with caution any measure that would in effect blur this already complex framework. The Commission's proposal for a temporary re-introduction of visa requirements for citizens of a third country could seriously affect the visibility and legitimacy of the common EU visa policy.⁹¹ This is especially so when the operation of this so-called 'visa safeguard clause' would be motivated by a rapid increase of asylum applications. The nature and content of the post-visa liberalisation mechanisms set up by the Commission should be further clarified and made more transparent to the potential traveller. This kind of 'back and forth' on the part of the EU also detract from the credibility of the EU in its external relations.

⁸⁷ A. Faure-Atger and E. Guild, *Reinforcing Interregional Cooperation between the EU and the GCC Scenarios for a modification of visa policies*, CEPS Paper in Liberty and Security in Europe, January 2011.

⁸⁸ Commission Communication, A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292/3, Brussels, 24 May 2011, p. 9.

⁸⁹ See for example, A. Eggenschwiler (2010), *The Canada-Czech Republic Visa Affair: A test for visa reciprocity and fundamental rights in the European Union*, CEPS Liberty and Security in Europe, November 2010.

⁹⁰ Bigo, D., S. Carrera, E. Guild and R.B.J. Walker (2007), *The changing landscape of European liberty and security: Mid-term report on the results of the CHALLENGE project*, Research Paper No. 4, CEPS, Brussels, February.

⁹¹ COM(2011)290 final, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

4. Summary of Recommendations

RECOMMENDATION 1

The EU should adopt a new freezing mechanism

Current EU infringement procedures are not sufficient to provide sound and immediate (non-politicised) actions when fundamental rights and European freedoms are under threat. A new (preventive) freezing enforcement mechanism, activated by the European Commission on the basis of impartial evidence, would allow contested policies and practices by EU member states or EU agencies falling within the remit of EU law to be automatically 'frozen' in cases of actual, suspected or imminent serious breaches of fundamental rights and/or freedoms of individuals (such as the freedom of movement) while the legality of the case is being examined. The Court of Justice in Luxembourg could be also granted similar powers to those held by the European Court of Human Rights (ECtHR) in Strasbourg under the so-called Rule 39 procedure.

RECOMMENDATION 2

The EU should ensure a closer follow up and monitoring system of temporary reintroduction of internal border controls

The new Community-based mechanism to be proposed by the Commission for the coordinated reintroduction of internal border controls is likely to be unworkable in practice and, depending on the outputs during the Council negotiations, might put into question existing standards and legal principles in the Schengen Borders Code. The EU should focus on ensuring a closer follow-up and transparent monitoring system of member states' actions when re-instating internal border controls under the current rules, to ensure that member states' derogations from the freedom of movement principle are proportionate, adequate and necessary.

RECOMMENDATION 3

The EU should develop an independent, impartial and effective evaluation of national and EU external border control practices

There is a 'knowledge gap' in the ways in which the provisions, administrative guarantees and fundamental rights foreseen in the SBC and the EU Charter of Fundamental Rights are applied along the EU's common external borders by national border authorities and Frontex (the EU border agency). Commission proposals to improve the Schengen evaluation mechanism will only go some way to ensure the independent and daily monitoring of external border practices and should be accompanied by the setting up of a permanent European network of interdisciplinary academics and/or experts to offer independent analysis of the fundamental rights and rule of law compliance of national practices with EU borders law.

RECOMMENDATION 4

Frontex should be subject to independent and democratic scrutiny/accountability

The activities of Frontex, the EU's border agency, suffer from a lack of transparency, solid accountability procedures and no clear allocation of responsibility in cases of fundamental rights violations. To compensate for the absence of an EU mechanism for scrutinising the impact and added value of Frontex activities, an independent 'border monitor' – independent of Frontex and empowered to launch disciplinary measures – should be set up to carry out a continual evaluation of border controls and their compatibility with the SBC, as well as joint return operations of irregular migrants. Current negotiations on the new Frontex Regulation offer an important opportunity to institute mechanisms for independent and democratic scrutiny of Frontex. This should be accompanied by an additional group of officials (fundamental rights

supervisor/officer), which would be responsible for the evaluation and conduct of inspections focused on the protection of fundamental rights as envisaged in the EU Charter of Fundamental Rights.

RECOMMENDATION 5

No new Database should be set up until existing ones are proved to be proportionate, safe and reliable – An independent evaluation/inventory and evidence-based approach

The proliferation of large-scale IT systems and security technologies in the EU's AFJS has proceeded without proper consideration of the impact on the fundamental rights and freedoms of the individual and without adequate assessment of the proportionality, necessity, and added value of new systems. No new EU large-scale database should be set up until existing ones are found to be proportionate, safe and reliable. The EU must undertake an *independent* inventory of current policies, tools and institutional structures involved in data exchange in the field of security at EU level and their practical implementation. This should include an in-depth fundamental rights proof-reading of existing and any upcoming database. Data protection and 'privacy by design' should constitute an obligatory element in the programming and running of any new and existing databases, which should go along with a strong and effective application of data protection legal standards into daily practices.

RECOMMENDATION 6

Europe's Labour Immigration policy should be guided by a Rights-Based Approach – An Immigration Code

The EU's sectoral approach to labour immigration has led to an obscure and fragmented legal framework regarding the rights, freedoms and administrative guarantees covering third country nationals. The EU should support an independent inventory of this framework, itemising rights and standards in the field of labour market access, rights and conditions for TCNs and an assessment of their impact and added value in all EU countries. An immigration code, based on the principles of fair and equal treatment between EU citizens and all third country nationals and covering those categories of workers not already covered by EU legislation (such as irregular migrants) could help the EU to become a more active promoter of EU and international instruments protecting the rights of migrant workers.

RECOMMENDATION 7

Mobility Partnerships should be compliant with rule of law and fundamental rights principles – Towards international agreements

Despite comprising a central plank of the EU's response to events in the Southern Mediterranean, Mobility Partnerships reveal deficits when tested against principles of legal certainty, democratic accountability and international labour and human rights standards. The EU should instead make use of international agreements rather than non-legally binding declarations such as the framework of cooperation and dialogue with any third state, similar to those used in the context of readmission and asylum cooperation. This would be the only way to duly ensure legal certainty, policy coherency and the necessary democratic accountability and judicial control of their nature and potential effects. The European Parliament should become a central actor in this dialogue and negotiations.

RECOMMENDATION 8

The EU should develop a Four-Point Plan to Reduce Irregular Immigration

EU policies focused on preventing irregular immigration obscure the reality that undocumented migrants are among the most vulnerable groups in the EU and that they are holders of

fundamental rights. EU strategies should be devised to address the 'policy gap' covering this category of individuals, focused on the following four objectives: granting of documentation and protection to those irregular migrants who cannot be returned; labour and appeal rights for migrants awaiting renewal of work permits; facilitated mechanisms for the issue of labour permits; and access to primary healthcare free of charge.

RECOMMENDATION 9

EU common visa policy should be guided by the principles of solidarity, transparency and legal certainty

In order to reinforce the benefits of the Common Code on Visas, a mechanism to ensure the Code's uniform and harmonious application is required. The criteria for including a country in a negative list should be clarified, depoliticised and made public. Finally, the Commission's proposal for a temporary re-introduction of visa requirements for citizens of a third country could seriously affect the legitimacy and visibility of the common EU visa policy and should be treated with caution.

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