

# Challenges and Prospects for the EU's Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme

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## Abstract

The upcoming Swedish presidency of the EU will be in charge of adopting the next multi-annual programme on an Area of Freedom, Security and Justice (AFSJ), during its tenure in the second half of 2009. As the successor of the 2004 Hague Programme, it has already been informally baptised as the Stockholm Programme and will present the EU's policy roadmap and legislative timetable over these policies for the next five years. It is therefore a critical time to reflect on the achievements and shortcomings affecting the role that the European Commission's Directorate-General of Justice, Freedom and Security (DG JFS) has played during the last five years in light of the degree of policy convergence achieved so far. This Working Document aims at putting forward a set of policy recommendations for the DG JFS to take into consideration as it develops and consolidates its future policy strategies, while duly ensuring the legitimacy and credibility of the EU's AFSJ within and outside Europe.

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**CHALLENGES AND PROSPECTS FOR THE EU'S  
AREA OF FREEDOM, SECURITY AND JUSTICE:  
RECOMMENDATIONS TO THE EUROPEAN COMMISSION  
FOR THE STOCKHOLM PROGRAMME  
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ELSPETH GUILD, SERGIO CARRERA AND ANAÏS FAURE ATGER\***

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## **Introduction**

Since 1999, when the first multi-annual programme on justice and home affairs policies was agreed at the Tampere European Council,<sup>1</sup> the Directorate-General of Justice, Freedom and Security (DG JFS) of the European Commission has lived up to a majority of the political commitments made as part of the policy agenda on European integration. Yet, 10 years later is the EU actually delivering a common Area of Freedom, Security and Justice (AFSJ)? The Commission's endeavour of fostering Europeanization in areas so closely intertwined with member states' national sovereignty – such as borders, migration, integration, asylum, police and judicial cooperation in criminal matters – has experienced obstacles difficult to circumvent. These obstacles have greatly influenced the ways in which DG JFS attains 'results' in an EU at 27 as well as the quality and policy coherency of these results at the European level. Intergovernmentalism and the principle of subsidiarity have predominated in the building of a common AFSJ, with member states showing resistance and competing strategies towards the development of common European policies. That notwithstanding, and owing to a large extent to the proactive role of the European Commission, the AFSJ has been subject to concerted policy-making and now counts numerous substantive and institutional mechanisms diversifying, and at times enriching, the EU's legal landscape.

This contribution starts by reviewing the European Commission's activities from 2004 to 2009. The timeframe under scrutiny corresponds mainly to the implementation of the second multi-annual programme adopted by the Council on the AFSJ, known as the 2004 Hague Programme, which succeeded the Tampere Programme and presented the policy agenda on AFSJ for the period 2004–09.<sup>2</sup> The European Council thereby endorsed a roadmap describing key political priorities for the establishment of an AFSJ, which was accompanied by a Commission

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<sup>1</sup> European Council, Presidency Conclusions of the Tampere European Council, 15-16 October 1999, SN 200/99, Brussels, 1999.

<sup>2</sup> European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C53/01, OJ C53/1, 3.3.2005(a). For an analysis of The Hague Programme see S. Carrera and T. Balzacq (eds), *Security versus Freedom: A Challenge for Europe's Future?*, Hampshire: Ashgate Publishing, 2006.

Communication proposing an action plan for its practical implementation.<sup>3</sup> As we are reaching the end of The Hague Programme's mandate, it is a critical time to reflect on the achievements and shortcomings in the current level of European integration affecting those policy areas falling under the responsibility of the DG JFS. Given the Commission's involvement in preparing the next multi-annual programme on the AFSJ taking over from The Hague Programme – the Stockholm Programme,<sup>4</sup> which is to be adopted under the auspices of the Swedish presidency in the second half of 2009 – our contribution aims at putting forward a set of policy recommendations covering both horizontal and targeted elements of the EU's future AFSJ.

## 1. Driving factors of the AFSJ

What kind of AFSJ has been achieved so far? The prevailing intergovernmental logic driving policy-making strategies at the EU level around these domains has led to the establishment of an AFSJ characterised by at least **five driving factors**: first, differentiation, flexibility and fragmentation; second, the first/third pillar divide; third, alternative methods of cooperation; fourth, the EU law of 'minimums', which mirrors member state interests too closely and offers wide discretion at times of domestic transposition; and fifth, fundamental rights and the rule of law being taken for granted.

**Differentiation, flexibility and fragmentation.** The political desire to enhance cooperation at the EU level around AFSJ policies has left the door open to flexible and differentiated integration processes of 'various speeds', with small groups of member states moving ahead through enhanced, privileged or discrete degrees of transnational cooperation. By way of illustration, we refer to the opt-outs of Title IV of the Treaty establishing the European Community (TEC) by the UK, Ireland and Denmark<sup>5</sup> and the diverging Schengen memberships in an enlarged EU. Further examples are the Prüm Treaty/Decision<sup>6</sup> and exchange of information in the field of law enforcement cooperation, and the mobility partnerships on labour migration and irregular immigration coordinated by the EU with third countries (so far with Moldova and Cape Verde)<sup>7</sup> and involving small groups of member states. The potential entry

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<sup>3</sup> European Commission, Communication on The Hague Programme: Ten priorities for the next five years, COM(2005) 184 final, Brussels, 10.5.2005(a).

<sup>4</sup> The Vice President of the European Commission, Jacques Barrot, has announced the publication of two communications dealing with the evaluation of The Hague Programme and the future of an AFSJ. (See speech, "Préparer le programme de Stockholm", SPEECH/09, at the College of Europe, Bruges, 3 March 2009).

<sup>5</sup> Title IV of the TEC deals with "Visas, Asylum, Immigration and other policies related to the Free Movement of Persons".

<sup>6</sup> See the "Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration" ('Treaty of Prüm'), (Prüm, 27 May 2005); see also European Council, Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210/12, 6.8.2008(d); and E. Guild, *Merging security from the two-level game: Inserting the Treaty of Prüm into EU law?*, CEPS Policy Brief No. 124, Centre for European Policy Studies, Brussels, March (2007a) and T. Balzacq, D. Bigo, S. Carrera and E. Guild, *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats*, CEPS Working Document No. 234, Centre for European Policy Studies, Brussels, January 2006.

<sup>7</sup> See the Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde, Council Document 9460/08, Brussels, 21 May 2008; see also the Joint Declaration on a

into force of the Treaty of Lisbon would develop these aspects by expanding enhanced cooperation and the exceptionalism granted to member states in relation to their variable participation in AFSJ-related matters.<sup>8</sup>

**The first/third pillar divide.** The existing tensions characterising the AFSJ also relate to the division between the EC first pillar (Title IV TEC) and the EU third pillar (Title VI of the Treaty on European Union or TEU), which creates distinctive institutional and decision-making configurations and numerous legal complexities. While qualified majority voting and co-decision now apply to most of the areas falling within the scope of Title IV TEC (until 2004, unanimity and the consultation procedure applied to all aspects under Title IV TEC),<sup>9</sup> unanimity and consultation are still the rule for many other AFSJ domains. In fact, AFSJ policies would be among those policies most affected by the entry into force of the Lisbon Treaty<sup>10</sup> through the remodelling of this institutional architecture, the expansion of the Community method of cooperation to a majority of freedom, security and justice (FSJ) policies and the 'formal' disappearance of the pillar divide.

**Alternative paths of supranational cooperation.** The European Commission has practised and proposed 'alternative' cooperation mechanisms often not aiming at formal harmonisation but at coordinating member states' policies through the exchange of information and post-evaluation mechanisms based on commonly agreed general principles and goals. These alternative paths of transnational cooperation fall outside the traditional decision-making methods, EU law and the institutional framing of EU law. They rather constitute formal (or informal) open methods of coordination (OMC). This has been the case for instance in the field of integration of third-country nationals (TCNs) and it has been proposed by the 2008 Communication on a common immigration policy for Europe<sup>11</sup> and the European Pact on Immigration and Asylum<sup>12</sup> for the wider policy domain of migration.

**EU legislation of minimums and the principle of national predominance.** The prevalence of the unanimity rule in the Council in certain policy areas has provoked the adoption of EU laws on legal migration and visa-related policies that involve the lowest common denominators and very much reflect the interests and policy priorities of certain member states that are particularly successful during the Council negotiations. The resulting normative shape of EU law leaves large discretion to the member states at times of national transposition – something that might endanger consistency, coherency and the very *common* nature of European policies. This sort of law-making calls for a 'stronger Europe' for reviewing timely and proper domestic implementation of EU law as well as protecting the fundamental rights and EU guarantees provided to TCNs and Union citizens.

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Mobility Partnership between the European Union and the Republic of Moldova, Council Document 9460/08, 21 May 2008.

<sup>8</sup> S. Carrera and F. Geyer, "The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice", in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Ashgate: Hampshire, 2008, pp. 289-307.

<sup>9</sup> European Council, Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the EC Treaty to be governed by Art. 251 TEC, OJ L 396/45, 31.12.2004(a).

<sup>10</sup> *Ibid.*

<sup>11</sup> European Commission, Communication on a common immigration policy for Europe: Principles, actions and tools, COM(2008) 359 final, Brussels, 17.6.2008(d).

<sup>12</sup> See European Council, 2887<sup>th</sup> meeting of the Justice and Home Affairs Council, 11653/08, Presse (205), Brussels, 24 and 25 July 2008, 2008(b); see also European Council, European Pact on Immigration and Asylum, 13440/08, Brussels, 24.9.2008(a).

**Fundamental rights and rule of law.** Fundamental rights and the rule of law are among the main foundations of the AFSJ.<sup>13</sup> They have been often and too easily taken for granted, however, and put into a balancing relationship with the security of the state (the balance metaphor).<sup>14</sup> Protection of the liberty and security of the individual continues to be at stake in the AFSJ and the policies it embraces. This is especially the case in relation to the human rights of TCNs, which have too often been neglected and not considered a central political priority in particular by some EU member state representatives. Similar concerns pertain to the ethical implications of the use of new security technologies (e.g. the Commission's 2008 border package)<sup>15</sup> and the exchange of information within and outside Europe (e.g. the Passenger Name Record)<sup>16</sup> for the fundamental right of data protection. Finally, the proper evaluation of all EU member states' compliance with fundamental rights and the rule of law in the scope of EU law related to FSJ remains an open question in a context where common policies on police and judicial cooperation in criminal matters are progressively expanding at the EU level.

What have been the implications of these five factors characterising the current stage of the AFSJ in the European Commission's work (more specifically, achievements and shortcomings)? What are the main policy challenges for the Commission's role in the AFSJ for the five years to come?

## 2. The European Commission's activities in 2004–09: Implementing an AFSJ

### 2.1 Achievements

**The abolition of internal border checks** within the Schengen common area has been framed as a key priority within the enlarged EU. The role played by the Commission in the preparatory phases of this historic process has been essential and great attention has been given to its activities in this challenging operation. After this process encountered a number of delays, often being blamed on the Commission's inability to ensure technical preparedness for enlargement,<sup>17</sup> the removal of borders with the 2004 member states was finally completed in March 2008.<sup>18</sup>

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<sup>13</sup> Art. 6(1) TEU states: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

<sup>14</sup> On the balance metaphor in the AFSJ, see E. Guild, S. Carrera and T. Balzacq, *The Changing Dynamics of Security in an Enlarged European Union*, CHALLENGE Research Paper No. 12, Centre for European Policy Studies, Brussels, October 2008.

<sup>15</sup> European Commission, Communication on preparing the next steps in border management in the European Union, COM(2008) 69 final, Brussels, 13.2.2008(g).

<sup>16</sup> See European Commission, Proposal for a Council Framework Decision on the use of passenger name record (PNR) data for law enforcement purposes, COM(2007) 654, Brussels, 6.11.2007(a); see also E. Brouwer, *Towards a European PNR System? Questions on the added value and the protection of fundamental rights*, Briefing Paper for the European Parliament, PE 410.649, Directorate-General Internal Policies for the Union, January 2009.

<sup>17</sup> And in particular the establishment of the second generation Schengen Information System figured prominently. See E. Brouwer, *The Other Side of the Moon – The Schengen Information System and Human Rights: A Task for National Courts*, CEPS Working Document No. 288, Centre for European Policy Studies, Brussels, April 2008(a).

<sup>18</sup> A. Faure Atger, *The abolition of internal border checks in an enlarged Schengen area: Freedom of movement or a scattered web of security checks?*, CHALLENGE Research Paper No. 8, Centre for European Policy Studies, Brussels, March 2008.

The fact that this has taken place despite the original resistance of some member states merits praise. Indeed, that no major obstacles were encountered is mainly attributed to the European Commission's dynamism and role in addressing member states' fears and reluctance. By facilitating exchange of information and practices among the member states, it has managed to serve as a platform for facilitating a constructive and efficient dialogue towards this historical move.

Based on The Hague Programme's call for the establishment of a 'comprehensive approach' to all stages of migration (the so-called 'global approach'), in 2005 the Commission presented a policy plan on **legal migration**.<sup>19</sup> It was announced that five new proposals were to be presented before the end of 2009 dealing with the conditions for entry and residence of TCNs for employment-related purposes. Yet so far, only two (the EU Blue Card and the common framework of rights)<sup>20</sup> have been put forward, and they appear to be encountering certain difficulties in their adoption processes in the Council. Although it is regretful that preference has mainly been given to the EU Blue Card laying down common rules for the purpose of 'highly qualified migration' over providing a common framework of rights for all TCN workers,<sup>21</sup> that the Commission has finally managed to progress discussions on 'regular migration' at the EU level can be considered a significant step. The September 2008 Council confirmed overall support for the Blue Card proposal providing for the establishment of most favourable rules and procedures for highly qualified TCN workers,<sup>22</sup> but in the end the latter was not adopted under the French presidency (the second half of 2008) and discussions continue in the Council under the auspices of the Czech presidency. The current state of European economies and the related effect on protectionism have even given rise to some doubts among certain member states as regards the proposal's ultimate shape for adoption, which we recall needs a unanimous vote in the Council.

The field of migration offers a paradigmatic example of the significant resistance the Commission has faced from some member states when moving Europeanization forward. That notwithstanding, the entry into force of the Council Directives on the right to family reunification (2003/86) and long-term resident status (2003/109) has had fundamental consequences for member states' discretionary powers over this policy domain. These two Directives represent a transnational framework of guarantees and rights, below whose ceilings member states will not be allowed to cross. Moreover, member states' actions under the scope of EU immigration law are subject to monitoring by the European Commission,<sup>23</sup> judicial review by Community courts and the general principles of EU law (proportionality, fundamental rights, legal certainty, etc.) when applying exceptions and derogations to the

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<sup>19</sup> European Commission, Communication on a policy plan on legal migration, COM(2005) 669 final, Brussels, 21.12.2005(b).

<sup>20</sup> See European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, Brussels, 23.10.2007(b); see also European Commission, Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638, Brussels, 23.10.2007(c).

<sup>21</sup> E. Guild, *EU Policy on Labour Migration – A first look at the Commission's Blue Card initiative*, CEPS Policy Brief No. 145, Centre for European Policy Studies, Brussels, November 2007(b).

<sup>22</sup> European Council, 2890<sup>th</sup> meeting of the Justice and Home Affairs Council, Brussels, 25 September 2008(f).

<sup>23</sup> See for example the European Commission's, *Report on the Application of the Directive 2003/86 on the Right to Family Reunification*, COM(2008) 610, Brussels, 8.10.2008(e).

common EU rights of TCNs.<sup>24</sup> Therefore, the sovereignty of member states has been significantly reshaped through this process; that most of them are now realising that they no longer have the final say might explain their caution and political hesitation in agreeing to new EU rules in this field. Furthermore, these pieces of European legislation provide solid grounds for challenging before Community courts corresponding national laws in the phase of transposition or falling within the scope of EU immigration law where these are considered unlawful by affected individuals. As the case *European Parliament v. Council* (C-540/03) has shown,<sup>25</sup> the increasing judicialisation of these areas are further deepening and liberalising European integration processes as well as the protection of the legal status of TCNs in EU law.

In addition, while the 1999 Tampere Programme had already provided for the setting of a common European **asylum** system, its development is still ongoing. The 2004 Hague Programme also called for the creation of a common asylum procedure and of a uniform status for those granted asylum or subsidiary protection. It has been progressively recognised among member states that the finalisation of the first phase and in particular the so-called ‘Dublin system’<sup>26</sup> has been unsatisfactory. The 2008 policy plan on asylum<sup>27</sup> published by the Commission announced a number of amendments to the existing legislative measures. The three proposals for amendments presented by the Commission in December 2008<sup>28</sup> are to be welcomed as positive signs of a willingness to improve critical or contested aspects in current European legislation. Still, the final results that are likely to emerge from member states’ discussions in the Council should have been taken into account more carefully when proposing measures to advance Europeanization in these (human rights) sensitive areas.

## 2.2 Shortcomings

One of the main shortcomings comes from the prevailing intergovernmental logic driving policy-making strategies at the EU level on AFSJ-related policies and the five factors characterising it as presented in section 1 above. It appears that the European Commission, anticipating the negotiations in the Council, chooses to privilege consensus and thus to make

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<sup>24</sup> See European Council, Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003. Refer also to S. Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers, 2009.

<sup>25</sup> Case C-540/03, *European Parliament v. Council*, 27 June 2006, [2006] ECR I-5769.

<sup>26</sup> The system was established by the Dublin Convention of 15 June 1990 and is now defined in Council Regulation No. 343/2003 and Eurodac Regulation No. 2725/2000. It intends to allocate responsibility for asylum seekers according to territorial criteria.

<sup>27</sup> European Commission, Communication on a policy plan on asylum: An integrated approach to protection across the EU, COM(2008) 360, Brussels, 17.6.2008(f).

<sup>28</sup> These range from the European Commission’s amendments to the Dublin Regulation, which determines the member state responsible for an asylum application (Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM(2008) 820 final, Brussels, 3.12.2008(b)) to the Directive on reception conditions for asylum-seekers (Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers, COM(2008) 815, Brussels, 3.12.2008(a)). They further extend to the Eurodac Regulation, concerning the database containing the fingerprints of asylum seekers that supports the operation of the Dublin Regulation (Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation No. [.../...], COM(2008) 825 final, Brussels, 3.12.2008(c)).



**substantial concessions to member states in relation to the common European standards it seeks to promote, as early as the proposal stage of the EU decision-making process.** The watering down of European standards is now occurring not only in the Council but also at an earlier stage in the Commission, with the latter proposing initiatives constituting already-low common denominators and too closely following the current national policy/political priorities of particularly powerful member states. A similar concern relates to 'alternative paths of cooperation'. An example in this regard is the quasi-OMC being applied in the area TCN integration (within the EU framework on integration), which has allowed for certain national integration policies (e.g. mandatory, civic integration programmes as a condition for having access to security of residence and family reunification) to be transferred to the 'common' European framework of cooperation. This concern is most likely to pertain to other potential OMC proposals covering this and related migration areas.

The resulting legal outcomes are therefore minimum standards allowing for a large degree of exceptionalism by national authorities and at times hardly compatible with fundamental rights. This statement especially applies to policy measures aiming at establishing a common European asylum system, but is also pertinent for other AFSJ policies. It is true that this aspect is mainly linked to the present deficiencies affecting the decision-making processes and structures covering AFSJ cooperation. Nevertheless, the European Commission's responsibility as the guarantor of the Treaties and its political ambition to develop Europeanization further should not be blinded by giving predominance to nationalistic preferences and therefore bringing legitimacy at the EU level to some governments' political strategies of a contested nature in terms of fundamental rights and rule of law. The European interest should continue to be the driving focus in all of the European Commission's activities and proposals. This 'common interest' might not be compatible with opportunistic strategies and nationalistic policies practised by some EU member states.

The Commission has in the past five years engaged in a high number of **consultation procedures** with civil society and other relevant stakeholders. It has so far launched no fewer than 27 Green Papers, forums and consultations in the field of JHA.<sup>29</sup> Even so, the level of attention and follow-up attached by the Commission to these contributions is worrying. A deficit here is evidenced for instance in relation to the 2005 policy plan on legal migration, where the sectoral/fragmented approach finally proposed by the European Commission on labour migration policy did not correspond at all to the predominant focus suggested by various contributors to the Green Paper.<sup>30</sup> According to the latter, the added value of European rules in this field would have better consisted of the prior adoption of a horizontal framework offering common rules and rights applying to all employment sectors and not just to specific categories of TCN workers, such as those labelled as 'highly skilled'. Otherwise, a majority of the contributions highlighted, the policy would lead to conflict with the principle of non-discrimination.

Another deficit relates to **fundamental rights and the rule of law**. The fundamental rights and ethical implications of the EU's AFSJ policies should be more carefully examined, institutionalised and developed before moving policy agendas forward. An illustrative example of this fundamental rights/rule of law tension in the Commission's policy processes is that of the

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<sup>29</sup> See the European Commission's website, "The European Commission consults the public on policy papers" (retrieved from [http://ec.europa.eu/justice\\_home/news/consulting\\_public/news\\_consulting\\_public\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm)).

<sup>30</sup> See the European Commission's website, "Contributions on economic migration" (retrieved from [http://ec.europa.eu/justice\\_home/news/consulting\\_public/economic\\_migration/news\\_contributions\\_economic\\_migration\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/economic_migration/news_contributions_economic_migration_en.htm)).

new EU border management tools. The implementation of the integrated border management strategy has been greatly shaped by a security nexus between the irregular form of human mobility and border security, and by an untested belief in security technology as the ultra-solution for any constructed threat that the EU is supposed to be facing. By dealing with border management and irregular migration<sup>31</sup> together, the Commission contributes to conveying a criminalised perspective on migration. Furthermore, the human implications of the use of new security technologies are in this way taken for granted or treated as a secondary issue of concern. The 2008 Commission Communications on a new border package,<sup>32</sup> on the evaluation of FRONTEX<sup>33</sup> and on a proposal for a new external border management system<sup>34</sup> illustrate the dynamism of European policies in the controlling of borders and responding to the phenomenon of irregular immigration. Still, the proposed systems do not appear to stand up to the tests of proportionality and reasonableness that are essential for any new EU legislation in light of the general principles of EU law.<sup>35</sup> Indeed, their huge impact over data protection will fundamentally transform the ways in which border controls take place in Europe. By way of illustration, the Commission's Communication on the evaluation of FRONTEX's activities did not contain any real, balanced qualitative assessment of the agency's activities nor of the added value of a new system.<sup>36</sup> It is of great concern that the surveillance of European borders and cooperation with neighbouring countries on 'pre-border management activities' have not yet been subject to independent evaluations, especially with regard to their impact on fundamental freedoms and human rights.

The dramatic development of electronic technical capabilities in the field of security has given the impression that there is a technical fix for social problems.<sup>37</sup> This is a false idea that leads to the stigmatisation of groups of individuals in communities based on the collection and use of their personal data. The ability to create databases that manipulate large amounts of personal data to search for persons with certain characteristics leads to racial and religious profiling, which violates the non-discrimination obligations contained in the Charter of Fundamental Rights.<sup>38</sup> Nowhere is this more apparent than in the AFSJ, with the development of the Schengen Information System (SIS II), the Visa Information System (VIS), the DNA database

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<sup>31</sup> The Commission continues to label these phenomena 'illegal', thus conveying a climate of suspicion and of criminality (see Balzacq and Carrera, 2006, op. cit.).

<sup>32</sup> European Commission (2008g), op. cit.

<sup>33</sup> The EU's external frontier agency was established through the Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union of 26 October 2004, (EC) No. 2007/2004, OJ L 349/1, 25.11.2004(b). See also European Commission, *Report on the evaluation and future development of the FRONTEX agency*, COM(2008) 67 final, Brussels, 13.2.2008(i).

<sup>34</sup> European Commission, Communication on examining the creation of a European border surveillance system, COM(2008) 68 final, Brussels, 13.2.2008(h).

<sup>35</sup> E. Guild, S. Carrera and F. Geyer, *The Commission's new border package: Does it take us one step closer to a 'cyber-fortress' Europe?*, CEPS Policy Brief No. 154, Centre for European Policy Studies, Brussels, March 2008.

<sup>36</sup> J. Jeandesboz, *Reinforcing the Surveillance of EU Borders: The Future Development of FRONTEX and EUROSUR*, CHALLENGE Research Paper No. 11, Centre for European Policy Studies, Brussels, August 2008.

<sup>37</sup> D. Bigo, S. Carrera and E. Guild, *What Future for the Area of Freedom, Security and Justice? – Recommendations on EU Migration and Border Policies in a Globalising World*, CEPS Policy Brief No. 156, Centre for European Policy Studies, Brussels, March 2008.

<sup>38</sup> Charter of Fundamental Rights of the EU, OJ C 303/01, 14.12.2007.

under the Prüm Treaty and the Council Decision 2008/616/JHA,<sup>39</sup> etc. **The mechanisms put into place to protect the individual from misuse of their personal data are exceedingly weak and operate badly.**<sup>40</sup>

Another fundamental rights-related aspect where more careful attention should be paid by the Commission is **monitoring the national transposition of EU law or member state measures under the scope of EU law having an impact on rights and liberties of Union citizens and TCNs.** For example, the ways in which freedom of movement-related rights are affected by the incorrect transposition of Directives 2004/38 and 2003/109 by member states (mainly at the level of administrative practices) call for immediate and stronger action, and perhaps for a renewed common strategy to ensure more compliance with EU rules across the national authorities.<sup>41</sup> The case of the Italian security package of 2008 provides a perfect illustration of unacceptable national practices (serious and persistent breaches of fundamental rights principles) in relation to the security and liberty of Union citizens and TCNs.<sup>42</sup>

Finally, there is also a **presumption that all EU member states comply with basic rule of law standards in an enlarged EU.** This is certainly not only an issue of concern in the context of enlargement, and especially for cases such as Bulgaria and Romania,<sup>43</sup> but also applies to the entire EU-27. So far, there has been a lack of European peer review/evaluation mechanisms as regards for example the quality of justice and the combating of organised crime (corruption) at the public authority level in the EU-27. These elements, however, have huge repercussions concerning some of the essential AFSJ ingredients, such as the functioning of European cooperation on criminal justice (e.g. the European arrest warrant) as well as the quality of the exchange of information between law enforcement authorities.<sup>44</sup> Also, the gradual uncovering of member states' practices in the 'war against terror' shows that at times of combating acts of political violence labelled as 'terrorism', the commitment to democratic principles can easily become an afterthought. But as stated in Art. 6 TEU, the commitment to fundamental rights and judicial accountability, together with the necessary absence of corruption,<sup>45</sup> are among the founding principles upon which European democracies are constructed. They constitute the basic conditions for the EU legal system to properly function and develop.

In the same vein, the recent European Court of Justice (ECJ) ruling in the case of *Heinrich* (C-345/06)<sup>46</sup> shows that the culture of secrecy in the AFSJ is incompatible with European general

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<sup>39</sup> See European Council (2008d), op. cit.

<sup>40</sup> E. Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System*, Nijmegen: Wolf Legal Publishers, 2008(b).

<sup>41</sup> S. Carrera and A. Faure Atger, *Dilemmas in the implementation of Directive 2004/38 on the right of citizens and their family members to move and reside freely in the EU*, Briefing Paper for the European Parliament, PE 410.669, Directorate-General Internal Policies for the Union, February 2009.

<sup>42</sup> M. Merlino, *The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU*, CHALLENGE Research Paper No. 14, Centre for European Policy Studies, Brussels, March 2009.

<sup>43</sup> See European Commission, *Interim Report on the Progress in Bulgaria under the Cooperation and Verification Mechanism*, COM(2009) 69, Brussels, 12.2.2009(a) and European Commission, *Interim Report on Progress in Romania under the Cooperation and Verification Mechanism*, COM(2009) 70, Brussels, 12.2.2009(b).

<sup>44</sup> F. Geyer, *Fruit of the Poisonous Tree – Member States' Indirect Use of Extraordinary Rendition and the EU Counter-Terrorism Strategy*, CEPS Working Document No. 263, Centre for European Policy Studies, Brussels, April 2007.

<sup>45</sup> European Commission, *An examination of the links between organized crime and corruption*, Staff Working Document, SEC(2008) 196, Brussels, 8.2.2008(j).

<sup>46</sup> Judgment of the Court of Justice in Case C-345/06, *Gottfried Heinrich*.

principles that guarantee transparency and respect for the principle of legal certainty. As the ECJ underlines in this important judgment, an act adopted by a Community institution cannot be enforced against individuals before they have had the opportunity to learn of its existence. The ECJ stated that “[i]n particular, the principle of legal certainty requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.”<sup>47</sup> While this judgment referred to Regulation (EC) No. 2320/2002 on aviation security,<sup>48</sup> it also needs to be taken into account when dealing with the Schengen Borders Code<sup>49</sup> and the Visa Code.<sup>50</sup>

### 3. Future prospects for the EU’s AFSJ: Towards the Stockholm Programme

#### 3.1 Recommendations on evaluation mechanisms

The European Commission is aware of the negative implications emerging from dispersed and minimalist policy outputs and strategies for the overall coherency and long-standing comprehensiveness of the *common* AFSJ. It should therefore use this period to carry out an in-depth evaluation of the current deficits and shortcomings highlighted in section 2.2 above, and not just perform a ‘political’ assessment of the quantitative progress achieved so far in terms of policy convergence (i.e. the scoreboard).<sup>51</sup> This approach would be central for the legitimacy and credibility of the EU’s AFSJ within and outside Europe. The results could serve as the basis for devising **new evaluation tools and monitoring strategies** to be implemented under the mandate of the upcoming multi-annual programme on AFSJ. For this to be achieved, we consider that the DG JFS should pay special attention to at least **three, major horizontal dimensions**:

- 1) First is to **develop an evaluation mechanism at the EU level on policies related to an AFSJ**. As stated in The Hague Programme,

[e]valuation of the implementation as well as of the effects of all measures is, in the European Council’s opinion, *essential to the effectiveness of Union action*. The evaluations undertaken as from 1 July 2005 must be *systematic, objective, impartial and efficient*, while avoiding too heavy an administrative burden on national authorities and the Commission. Their goal should be to address *the*

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<sup>47</sup> See in this respect Case C-158/06, *ROM-projecten* [2007] ECR I-5103, paragraph 25.

<sup>48</sup> European Parliament and European Council, Regulation establishing common rules in the field of civil aviation security of 16 December 2002, (EC) No. 2320/2002, OJ L 355/1, 30.12.2002.

<sup>49</sup> See European Parliament and European Council, Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) of 15 March 2006, (EC) No. 562/2006, OJ L 105/1, 13.4.2006. The Schengen Borders Code sets out the standards and procedures to be followed in controlling the movement of persons across internal and external EU borders.

<sup>50</sup> See European Commission, Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403, Brussels, 19.7.2006(a). This proposal aims at incorporating all legal instruments governing decisions in relation to visas into a single code.

<sup>51</sup> See for example the European Commission’s *Report on the Implementation of The Hague Programme for 2007*, COM(2008) 373 final, Brussels, 2.7.2008(k).

*functioning of the measure and to suggest solutions for problems encountered in its implementation and/or application.*<sup>52</sup> (Emphasis added)

In 2006, the European Commission proposed a 'strategic evaluation mechanism' for EU policies on FSJ, which experienced considerable resistance from the member states and was therefore abandoned.<sup>53</sup> This initiative should be revisited and improved in terms of scope, methodology and actors involved. The latter would need to take into account the new configurations provided by the Lisbon Treaty and especially Art. 70 of the Treaty on the Function of the European Union (Title IV on the Area of Freedom, Security and Justice), which 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. (Emphasis added)

The importance of evaluation has been also confirmed by the High-Level Advisory Group on the Future of European Justice Policy (Future Group on Justice),<sup>54</sup> which concluded that

[o]ne of the main aims must be to develop a *comprehensive evaluation mechanism* – including information on the implementation and on the results and efficiency of measures for the JHA area. The effectiveness of EU level action can only be improved by *taking practical level experiences into account* in the future decision making.<sup>55</sup> (Emphasis added)

With the prospect of the adoption of the Stockholm Programme, the Netherlands has proposed a permanent evaluation system with regard to enhanced rule of law, notably focusing on EU judicial cooperation in criminal matters.<sup>56</sup> The Dutch proposal advocates

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<sup>52</sup> See point 3, entitled "Implementation and Evaluation" under General Orientations.

<sup>53</sup> See European Commission, Communication on the evaluation of EU policies on freedom, security and justice, COM(2006) 332, Brussels, 28.6.2006(b). The evaluation tool proposed by the Commission consisted of a three-step progressive mechanism: first, setting up a system for information gathering and sharing (factsheets); second, a reporting mechanism for this information (evaluation reports); and third, targeted, in-depth strategic evaluations. The evaluation reports of the second phase of this process would be transmitted to the Council and the European Parliament, the European Economic and Social Committee and the Committee of the Regions. They would deal with selected areas and include policy recommendations. Following the evaluation report and 'further consultation', the in-depth strategic evaluations would begin and would focus on selected areas. The Communication states that "[t]hese evaluations will aim at producing useful and timely information as inputs for political decisions in each policy area, as appropriate".

<sup>54</sup> The Future Group on Justice was set up on the initiative of the Portuguese presidency and was co-chaired by the presidency of the Council of the EU and the vice president of the European Commission. The group was allocated the task of "identify[ing] the new challenges ahead and defin[ing] possible solutions for a future EU Justice Programme". The group comprised six justice ministers from the trio presidencies (Germany/Portugal/Slovenia/France/Czech Republic/Sweden) and one representative from another trio presidency (Spain, Hungary and Belgium). Ireland was also invited.

<sup>55</sup> European Council, High-Level Advisory Group on the Future of European Justice Policy – Proposed Solutions for the Future EU Justice Programme, 11549/08, Brussels, 7.7.2008(c).

<sup>56</sup> It has been proposed that the system would also cover corruption in so far as it affects cooperation in criminal matters.

establishing an assessment system going beyond current (fragmented) monitoring instruments of the implementation of particular legal measures (e.g. the European arrest warrant) and addressing more horizontal, institutional and procedural issues characterising the justice systems of the member states. The success of this initiative, which seems to have already been well received by the European Commission, will very much depend on the extent to which the outcome of member states' negotiations at the Council will truly ensure objective, impartial and depoliticised evaluation mechanisms as well as proper follow-up tools. In addition, this sectoral initiative should open the way for a wider debate about the need to establish a horizontal evaluation mechanism applying to all relevant policies falling under the rubric of an AFSJ (e.g. asylum).

**The evaluation mechanism for the AFSJ** should avoid duplication of existing (dispersed) EU evaluation systems<sup>57</sup> as well as those for instance of the Council of Europe.<sup>58</sup> It would be essential that such a system would actively involve not only member states, but also and most importantly, the relevant services at the European Parliament, the Committee of the Regions and the European Economic and Social Committee. In light of the principles of subsidiarity and proportionality, it is also strongly recommended that this be accompanied by formalised roles for specialised committees among national parliaments (e.g. the House of Lords EU Select Committee of the UK Parliament)<sup>59</sup> as well as regional and local authorities with special attention given to European networks of cities.<sup>60</sup> Indeed the **local dimension of the AFSJ** could play a decisive role when monitoring implementation *and* results in the scope of the AFSJ, as well as when examining the added value, social impacts and practical effectiveness of common EU policies.

The EU evaluation/peer review mechanism would need to ensure a **close and formalised partnership with EU agencies/bodies** dealing with FSJ aspects, especially with the Fundamental Rights Agency (FRA), European Data Protection Supervisor and Article 39 Working Group, in the phases preceding the formal adoption of proposals and where their concerns/views would become part of and substantiate EU decision-making processes. The European Commission should actively support and propose the expansion of the FRA's evaluation competences on the fundamental rights and rule of law aspects all across the EU-27. These competences should include policy domains dealing with police and judicial cooperation in criminal matters (the EU third pillar) as well as wider rule of law questions related to corruption and organised crime within law enforcement authorities.

Finally, **transparent, formalised and open consultation mechanisms** with other key stakeholders (such as practitioners at national and local levels, including judges and prosecutors) and civil society organisations should be further improved and promoted in AFSJ policies in order to take on board their views and practical concerns as well as in the follow-up phases of EU policies. The format provided by the European Integration

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<sup>57</sup> European Council, Council Conclusions on Evaluation of EU policies on Freedom, Security and Justice, 10893/1/07, 19.6.2007.

<sup>58</sup> See the Council of Europe website, "Group of States against Corruption (GRECO) publishes report on Sweden" (retrieved from [http://www.coe.int/t/dg1/Greco/Default\\_en.asp](http://www.coe.int/t/dg1/Greco/Default_en.asp)).

<sup>59</sup> See the website of the UK House of Lords European Union Select Committee (retrieved from [http://www.parliament.uk/parliamentary\\_committees/lords\\_eu\\_select\\_committee.cfm](http://www.parliament.uk/parliamentary_committees/lords_eu_select_committee.cfm)).

<sup>60</sup> See for instance, Eurocities and CEMR (Council of European Municipalities and Regions).

Forum<sup>61</sup> or the Justice Forum<sup>62</sup> could perhaps constitute a model for developing similar venues in other AFSJ-related policies. Their mandates could also be expanded and strengthened in light of the EU evaluation mechanism.

- 2) **The 'Europe of Results' must not continue being the guiding logic behind the renewed policy agenda on the AFSJ.** Rapidity and urgency are difficult to reconcile with liberty and respect of the rule of law, which are crucial for guaranteeing the quality of results that individuals expect from the EU over these domains. Also, specific political and social dilemmas should not be reduced to technological solutions. Any new priorities, policies/laws or activities by Community bodies/EU agencies need to be carefully and independently assessed against the **principles of effectiveness and proportionality (necessity, suitability and proportionality *stricto sensu*)**. In addition, the **European Commission should continue serving and promoting the 'European interest'** and not those of powerful member state governments in the processes of European integration over AFSJ. This will require ambition and preparedness to put forward initiatives not necessarily matching the national political priorities/expectations but aiming at building a long-standing, common, post-national policy concerning the liberty and security of individuals where the role of the European Parliament, national parliaments and regional/local authorities are increasingly central.
- 3) **It is urgent to expand and promote the use of existing monitoring tools on fundamental rights and the rule of law.** As we have argued in this contribution, **fundamental rights and the rule of law must never be taken for granted in the EU.** Fundamental rights need to be **at the heart of the future AFSJ** and the European Commission's activities. The impact of any AFSJ policy measure on the liberty and security of individuals should be carefully (and independently) assessed and resolutely taken into account by the relevant Commission services before presenting more 'results' and when assessing member state actions. The EU evaluation/peer review mechanism highlighted above could also contribute positively to this endeavour. Moreover, the

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<sup>61</sup> See European Economic Social Committee, Elements for the Structure, Organization and Functioning of a Platform for the Greater involvement of Civil Society in the EU-level promotion of policies for the integration of third-country nationals, Opinion, SOC/281, Brussels, 9.7.2008. Paragraph 3.6.5 of the Opinion clarifies that

[i]n this way, the forums, platforms, councils and similar institutions that exist in the Member States – especially those involving immigrant organisations – will also be represented in the European Forum. In those Member States where no such organisations exist, the economic and social councils (or similar institutions) could have a place in the Forum.

It continues by saying in paragraph 3.6.6 that “immigrants’ organisations, most of which are organised on national lines and do not have European networks, must be encouraged to become involved in the European Integration Forum; the Member State forums, platforms, councils or ESCs should, therefore, nominate delegates from the most representative immigrants’ organisations”.

<sup>62</sup> See the European Commission's Communication on the creation of a forum for discussing EU justice policies and practice, COM(2008) 38, Brussels, 4.2.2008(1). According to the Communication,

3. The Commission intends to establish a Justice Forum (“the Forum”) providing a permanent mechanism for consulting stakeholders, receiving feedback and reviewing EU justice policies and practice transparently and objectively. The Forum will take account of treaty-based differences in policies in civil and criminal matters. It will have two main spheres of activity, (1) to provide the Commission with specialist views on EU justice policy and legislation, and (2) to promote mutual trust between EU justice systems by improving mutual understanding of them.

Commission should take a stronger political stance and exercise in full its right to further develop and actively apply existing monitoring mechanisms on member states' compliance with common EU principles, such as **Art. 7 TEU**.<sup>63</sup> This provision makes available preventive measures and potential sanctions/penalties against a member state – including the suspension of its voting right in the Council – upon determination of the “existence of a serious and persistent breach” of the principles on which the Union is based, e.g. fundamental rights and the rule of law **within or outside the scope of EU law**.<sup>64</sup> As highlighted in the European Parliament Resolution of 14 January 2009 on the situation of fundamental rights in the EU 2004–08,<sup>65</sup> the EU's procedure envisaged in Art. 7 to make sure that systematic and serious violations of human rights and fundamental freedoms do not take place in the EU has never been used, despite the fact that violations have been ascertained for instance by the Council of Europe in the context of the European Convention on Human Rights.<sup>66</sup> The democratic accountability (by the European Parliament and relevant national parliament) of any eventual political decision taken by the Council in this context should be duly ensured by all means. Moreover, at times examining the existence of a clear “threat or a risk of serious breach” by a member state of the principles mentioned in Art. 6.1, the European Commission should establish institutionalised cooperation and a long-standing formalised partnership with the FRA, the Council of Europe and the UN Commission on Human Rights.<sup>67</sup> This could be

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<sup>63</sup> Art. 7 TEU states that

[o]n a reasoned proposal by one-third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four-fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6.1, and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.

Paragraph 3 continues by saying that

[w]here a determination under paragraph 2 has been made, the Council, acting by qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.

<sup>64</sup> European Commission, Communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15.10.2003. As stated by the Communication, “the scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously”.

<sup>65</sup> European Parliament, Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004–2008, P6\_TA-PROV(2009)0019, Strasbourg, 14.1.2009.

<sup>66</sup> See Council of Europe, “Memorandum”, presented by Thomas Hammarberg, CommDH(2008)18, Strasbourg, 28.7.2008 (retrieved from [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH\(2008\)18](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2008)18)). Refer also to European Union Fundamental Rights Agency (FRA), *Incident Report: Violent attacks against Roma in the Ponticelli district of Naples, Italy*, FRA, Vienna, 2008 (retrieved from [http://fra.europa.eu/fraWebsite/material/pub/ROMA/Incid-Report-Italy-08\\_en.pdf](http://fra.europa.eu/fraWebsite/material/pub/ROMA/Incid-Report-Italy-08_en.pdf)).

<sup>67</sup> At times of determining a ‘persistent breach’, the European Commission's Communication COM(2003) 606 (2003, op. cit.) states that

[t]he fact that a Member State has repeatedly been condemned for the same type of breach over a period of time by an international court such as the European Court of Human Rights or by non-judicial international bodies such as the Parliamentary Assembly of the Council



accompanied by the setting-up of a permanent European network of (interdisciplinary) academics,<sup>68</sup> which in close cooperation with key civil society organisations would provide independent expertise specifically focused on the fundamental rights and rule of law aspects related to the AFSJ.<sup>69</sup>

### 3.2 Recommendations on specific policy themes

In the light of the above, we now move on to address **a number of specific policy themes** that will be important for the European Commission in the years to come and put forward a **set of policy recommendations** in relation to each of them.<sup>70</sup>

#### 3.2.1 Borders

- The European Commission should create a new function of an **EU border monitor**. The latter would have the following competences: to ensure that EU border controls, wherever they take place, are consistent with EU law and the Charter of Fundamental Rights; and to monitor the conditions under which expulsions of irregular immigrants take place under the framework provided by the Directive on common standards and procedures in member states for returning illegally staying TCNs (the Returns Directive).<sup>71</sup>
- FRONTEX's activities must be more thoroughly subject to the **principles of transparency and accountability**. Before advancing the integrated border management strategy, the European Commission should carry out (and follow closely the results of) an in-depth (independent) assessment of the ways in which EU border control takes place in the territory of third countries under the coordination of FRONTEX. It should also examine the effects of this 'preventive' EU border-management practice over human rights obligations with which EU institutions and Community bodies, as well as member state national authorities, must comply within and outside the EU's common territory.
- **No more EU large-scale IT systems** should be agreed or established before the SIS II and VIS are operational. These two systems will also require **an in-depth assessment** as regards not only their 'efficiency' but also concerning their legal and ethical implications. The questions of adequacy and proportionality of the flow of information equally need to be addressed to avoid the idea that maximum technology is by definition the solution for better security. Moreover, the exchange of information has to be specified and channelled carefully through trusted agencies.

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of Europe or the United Nations Commission on Human Rights and has not demonstrated any intention of taking practical remedial action is a factor that could be taken into account.

<sup>68</sup> This could go beyond the wider mandate and legalistic nature of the EU Network of Independent Experts on Fundamental Rights (refer to [http://ec.europa.eu/justice\\_home/cfr\\_cdf/index\\_en.htm](http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm)).

<sup>69</sup> This network could institutionalise the reference made in Art. 7.1 TEU to the possibility to involve 'independent persons'.

<sup>70</sup> This section is based on D. Bigo, E. Brouwer, S. Carrera and E. Guild, *Freedom, Security and Justice in the EU: Recommendations for the Future*, Contribution by the Justice and Home Affairs Section of CEPS to the Open Consultation Procedure by DG JFS of the European Commission, 2008. We have also greatly benefited from the recommendations put forward in E. Guild, K. Groenendijk and S. Carrera, *Issues and Recommendations on Freedom, Security and Justice for the European Parliament Elections*, CEPS Policy Brief No. 173, Centre for European Policy Studies, Brussels, October 2008.

<sup>71</sup> European Council, Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008(e).

### 3.2.2 Asylum

- The common European asylum system must be modified so that **the country in which an asylum seeker makes his or her protection claim is the one responsible** for determining the substance of that claim. The system of sending asylum seekers from one state to another so their applications can be determined elsewhere in the EU is **counterproductive, expensive and inhumane** for the individual. This is best exemplified by the current recognition rates, according to which the common European asylum system as it now stands produces more divergence among member states than four years ago.
- Asylum seekers should be given **the right to work and study** at the very latest **after six months of presence** in the territory of a member state. Exclusion from the mechanisms of social participation for a period that is any longer is not consistent with the right to dignity contained in the Charter of Fundamental Rights.
- Directive 2005/85 on asylum procedures<sup>72</sup> contains an acceptable general asylum procedure for the EU. Yet all the exceptional categories, such as safe third country, European safe third country and safe country of origin, have the effect of diminishing or excluding the general procedure for specific classes of asylum seekers. All asylum seekers should be entitled to a fair and effective procedure. The exceptional categories should all be removed from the Directive.

### 3.2.3 Immigration and integration

- **The right to family reunification is the right of families to live together and for children to be with both of their parents. As such, it forms the basis of society** and is a principle set out in the Universal Declaration of Human Rights, the European Convention of Human Rights and the Charter of Fundamental Rights. The vague and unsatisfactory notion of ‘reception capacities’ must not be used to interfere with the right to family reunification in Europe as provided in these legal instruments as well as in Council Directive 2003/86. The Commission should bring to the attention of member states the need to stop using mandatory integration conditions/programmes within the EU and abroad, based on the transposition of EU immigration law, as this not only goes against the objectives of EU directives, it also contravenes fundamental rights, non-discrimination and the principle of proportionality (suitability, necessity and proportionality *stricto sensu*).
- Integration measures/conditions must not be used as an immigration control mechanism preventing family reunification nor designed to restrict the legal channels that enable families to live together. **Integration should favour the social and economic inclusion** of newly arrived family members **after** the family has been reunited in the EU.
- The ‘exchange of information’ between the member states on national integration policies and programmes in the scope of the EU framework on integration should not leave the door open to transfer to the European level restrictive national immigration policies limiting access to rights and security of residence, and thus leading to the social exclusion of TCNs.
- Mandatory, civic integration programmes on ‘national and European values’ pose serious conflicts with fundamental rights and non-discrimination. Imposing values (and national

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<sup>72</sup> European Council, Directive 2005/85 of 1 December on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13.12.2005(b).

identity) in the context of immigration law on TCNs leads to illiberal practices.<sup>73</sup> Imposing national values (civic integration as an exception or derogation) on immigrants for enabling access to EU rights and freedoms gives rise to various contradictions with fundamental rights and the rule of law. Fundamental rights are there to set the limits on official criteria calling for nationalisation of the immigrant into a conception of national identity that goes beyond any acceptable remit of the rule of law in the EU. As stated by Art. 22 of the Charter (Title III, Equality), “[t]he Union shall respect cultural, religious and linguistic diversity”.

- The European Commission should ensure that **mobility partnerships with third countries comply with a common immigration policy, fostering a rights-based and fair treatment approach**. The wide diversification in terms of member states’ participation (differentiation) and the proposed actions included in the remit of these partnerships make it difficult to guarantee the consistency, commonality and comprehensiveness of a common EU migration policy. Furthermore, these instruments must not end up bringing back the illusion of the 1970s that migration is a temporary phenomenon that can be ‘managed’ *selectively* by the state. The temporary nature of migration policies (circular migration) might conflict with guaranteeing, and further ensuring, the security of (permanent) residence and the social inclusion of TCNs within the Union.
- The European Commission should carefully evaluate the external relations consequences of the message that is being sent abroad by giving an overriding priority to policies on return, readmission and border controls. This securitarian approach engenders multiple negative effects in terms of the EU’s own credibility on human rights and the principle of solidarity in the world.

### 3.2.4 Data protection

- Privacy rules must be built into the programmes that run EU databases and systems of information (**data protection by design**). Technology needs to be used at the service of liberty. These programmes should i) include automatic deletion of data at the end of the permitted period; ii) prevent the copying of data for any purpose other than the original purpose or for data security reasons; iii) prevent all unauthorised access to the system and any duplication of images on computer screens; and iv) prohibit one-too-many searches of databases taking place except by order of a judge. These prohibitions should be built into the programme that runs the database.
- Databases should not be set up without **prior impact assessment studies** to be performed by objective and independent organisations. Any EU strategy on data exchange needs to start with the **evaluation and inventory of current policies**, tools and institutional structures involved in data exchange in the field of security at the EU level. Any new databases should only be set up, and subsequently used, for specific and lawful purposes – preventing vague, open definitions and aimless data collection.
- Data collection systems **must not reveal sensitive data** about ethnic origin, religion or other aspects prohibited in EU non-discrimination law; disguised criteria indicating ethnic or religious distinctions, such as the birthplace of parents or the individual, or former nationality, should be forbidden.

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<sup>73</sup> E. Guild, K. Groenendijk and S. Carrera, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Ashgate Publishing: Hampshire, 2009 (forthcoming).

### **3.2.5 Criminal justice**

- No **further legislation** should be adopted in the field of criminal justice unless it provides for standards for the **rights of defence and of fair trial** that are at least as high as those offered within the context of the Council of Europe. The current EU proposal on the rights of criminal suspects that the Council is considering does not meet the minimum requirements of the European Convention on Human Rights. In terms of the necessity for new measures, the European evidence warrant is shunned by national policing and judicial authorities, which seem to be favouring the traditional, enhanced mutual-assistance mechanisms.

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