

# **MIGRATION, BORDERS AND ASYLUM**

## **TRENDS AND VULNERABILITIES IN EU POLICY**



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BRUSSELS**

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# **Migration, Borders and Asylum**

## **Trends and Vulnerabilities in EU Policy**

### **Thierry Balzacq & Sergio Carrera**

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#### **Introduction: Policy Convergence in Migration, Borders and Asylum**

In the last six years the European Union has striven to build a strong area of freedom, security and justice (AFSJ). The results are mixed. Some specific achievements are remarkable and need to be acknowledged. Yet, expectations about the level of policy convergence in substantial aspects of migration and asylum are still unmet. Indeed, harmonisation towards a truly Community-wide policy remains unsatisfactory. It appears that national sovereignty imperatives are pitted against communitarisation factors. Some member states are struggling to keep a monopoly of competence and decision-making in the fields of immigration, borders and asylum. Further, a closer scrutiny of some of the provisions included in the EU's legislative instruments reveals low minimum standards, wide discretion for application by member states and restrictive exceptions even to the core elements and rights. The result is a blurred Community policy.

The second multi-annual programme on these policies, the Hague Programme, was agreed by the European Council in November 2004. This programme, which replaces the former scoreboard agreed at the Tampere European Council,<sup>1</sup> sets the new policy agenda and specific objectives for the next five years for developing the AFSJ. In addition, the European Commission has recently published an Action Plan implementing the Hague Programme, with ten key policy priorities (and deadlines for their accomplishment) on matters concerning freedom, security and justice for the next five years (see annex 2). Therefore, this is a good time to examine how these policies are taking shape and the challenges that lie ahead.

The guiding question is: What is the level of policy convergence that has been attained on immigration, border and asylum policies since 2002? While critically examining the most recent and relevant legal developments, this study explores persistent barriers and offers suggestions as to how the EU may achieve policy optimisation in these domains, which have profound consequences on the everyday lives of individuals and the nature of the EU.

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

The starting point for our analysis is to take into account the current level of policy convergence. By policy convergence we refer not only to the degree of harmonisation or level of ‘Europeanisation’ based on the number of legal instruments that have been adopted at the EU level, but also to the discretion left to member states in the application of a wide range of provisions incorporated in the EU laws examined. In other words, convergence is achieved when member states agree to abide by the rules they have enacted. By contrast, there is a lack of convergence when a set of provisions contained in the rules agreed grant wide powers to the member states.

In this context, our analysis does not attempt to present an exhaustive list of all the measures that have been adopted, but instead offers an in-depth and critical overview of the main and most recent legal steps towards a common EU policy. We look at the legislative acts completed on migration, borders and asylum policies,<sup>2</sup> especially during the period from 2002 to the present.

Our analysis is mainly addressed to researchers and practitioners, including policy analysts and policy-makers at national and EU levels. It primarily intends to provide an accessible assessment of the main policies and legal measures adopted so far, as well as those being proposed or anticipated to come on the agenda within the next five years. While doing so, the concerns expressed by non-governmental organisations (NGOs), civil society and human rights organisations are also identified and considered.

The book proceeds in seven sections. The first of these presents a brief overview on the state of affairs in EU immigration, borders and asylum policies since their transfer to EU competence in 1999. Special attention is given to the justice and home affairs (JHA) agenda, which has been framed by two successive multi-annual programmes agreed by the Council and elaborated by the European Commission: the Tampere scoreboard arising from the Tampere European Council Conclusions (1999) and the Hague Programme (2004).

We then move on to evaluate the track record of policies dealing with ‘regular’ and ‘irregular migration’, in terms of their direct and indirect effects. In this particular regard, as we later show, a vast majority of the Council directives in the field of regular immigration have introduced

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<sup>2</sup> It is worth noting that Denmark, Ireland and the UK have negotiated special protocols (‘opt out clauses’) attached to the Amsterdam Treaty that allow them to remain outside the measures adopted under the umbrella of Title IV of the EC Treaty. Ireland and the UK may, however, opt into any legal instrument dealing with these matters on a case-by-case basis. As discussed in this analysis, these countries tend to adopt most proposals concerning asylum and irregular migration, but opt out on matters dealing with regular migration.

negative conditionalities with reference to a secure status and full access to freedoms by third-country nationals. As a result, a migrant will have to comply with a series of restrictive requirements, such as integration into the receiving state, in order to access the rights attached to the secure status and to be included into the different sectors of the receiving state (societal, political and economic). This situation creates difficulties for the EU, as the Tampere programme has stipulated that the EU should seek to grant rights and obligations to migrants that are comparable to EU citizens.<sup>3</sup> Further, the lack of a common agreement and understanding concerning labour/economic migration or admission procedures attests to the sorry level of convergence in key policy areas relevant for the establishment of a cohesive EU.

Section 3 considers borders and the policy implications of the evolving nature of the Schengen *acquis*. It focuses on the most recent policy measures and new initiatives falling within the Schengen regime, as established by the Schengen Agreement of 1985 and the Convention of 1990 that implemented it. Instead of replacing Schengen-related measures with truly Community-wide measures taken under prescribed procedures, the Council has continued to develop the Schengen *acquis* under the old intergovernmental machinery, leading to opaque and complex legal results. Specifically, the ‘fight against illegal migration’ and the professed need to track the movement of third-country nationals within the EU has resulted in a variety of databases and the use of new technologies (e.g. biometrics). The use of these systems raises controversial questions concerning, for instance, the principle of proportionality and the protection of human rights. These new, innovative technological dimensions have accelerated the de-territorialisation and virtualisation of traditional border controls.

Section 4 addresses the level of EU legislative harmonisation achieved on asylum. Here we detect and highlight one important problem: the legal corpus enacted in this domain is open to various juridical and human rights challenges. Indeed, most of legal acts are characterised by a set of minimum standards that fall far below common international and European human rights commitments, such as the seminal Geneva Convention on Refugees of 1951.

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<sup>3</sup> See para. 18, Presidency Conclusions of the Tampere European Council (op. cit.), which states that “The European Union must ensure fair treatment of third-country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.”

The main trends and philosophies underpinning immigration, borders and asylum policies are discussed in section 5. In addition to the continuing EU struggle between the intergovernmental and communitarian method of governing, there are a series of obstacles that impact the quality of EU policies and the success of their implementation. Three barriers are noteworthy: a lack of political courage and commitment; poor agreements on a legal framework recognising and facilitating human mobility and diversity; and, the absence of a credible Communitarian borders regime and effective protection of asylum seekers. Taken together, these factors are detrimental to a common policy that promotes freedom, justice and stability.

Finally, this study puts forward a set of policy recommendations that seek to overcome current barriers to policy approximation and achieve an optimal level of action that would facilitate and strengthen equal treatment and social cohesion inside the EU. We argue that legitimacy, efficiency, equality and solidarity need to be taken as the *leitmotiv* of any single policy measure dealing with immigration, borders and asylum.

## **1. The State of Affairs in EU Immigration, Borders and Asylum Policy**

Immigration, borders and asylum are not, as some may claim, comparable to any other EU policies; instead they are among the most dynamic and contested issues of policy-making. Indeed, the three fields are fraught with national fears, rival ideologies and competing political sensitivities. These sensitivities partly explain why comprehensive and effective responses are hard to achieve and maintain. This difficulty is also compounded by the fact that decisions in these areas have, until very recently, been governed by a strict unanimity rule. That is notwithstanding the fact that since the Maastricht Treaty was signed in 1992, member states have pledged to progressively depart from a purely intergovernmental method to deal commonly with these challenges.

By virtue of the Treaty of Amsterdam, the area of visas, asylum, immigration and other policies related to the free movement of persons was moved to the realm of Community competence – the EC first pillar (i.e. Title IV of the EC Treaty, “Visas, asylum, immigration and other policies related to free movement of persons”).<sup>4</sup> In addition to the firm commitment to abandon the unanimity rule within a period of five years after the entry into force of the

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<sup>4</sup> The Treaty of Amsterdam entered into force in May 1999. “Visas, asylum, immigration and other policies related to the free movement of persons” came under the EC’s first pillar (i.e. Community governance); see Arts 61-69.

Treaty of Amsterdam,<sup>5</sup> the Council was required to adopt, *inter alia*, “measures on immigration policy within the following areas: a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion; b) illegal immigration and illegal residence, including repatriation of illegal residents”.<sup>6</sup> This has not been an easy task.

The Tampere European Council of 15 and 16 October 1999 (hereafter the Tampere Conclusions) provided the political impetus for the programme. The Council Conclusions of the Finnish presidency sought to lay down a roadmap leading to the establishment of a common immigration and asylum policy.<sup>7</sup> This was set in the framework of a five-year programme that aimed at crystallising a proper balance between freedom, security and justice. It also presented a timetable (the Tampere scoreboard), which specified deadlines and gave structure to the agenda in these areas. The Council organised immigration, borders and asylum around four axes: a) partnership with countries of origin; b) a common European asylum system; c) fair treatment of third-country nationals; and d) management of migration flows. The ambitious character of the Tampere Conclusions was often and rightly undermined by substantial criticisms regarding the slow and unsatisfactory implementation process and for failing to meet the deadlines originally agreed.

The Hague Programme agreed by the European Council on 4-5 November 2004 sets a new agenda for the next five years.<sup>8</sup> By and large, it deals with the same important issues. It outlines the objectives of a second multi-annual work programme towards the development of an AFSJ. The Hague Programme reiterates the need and structures the priorities for developing a “comprehensive approach, involving all stages of immigration, with respect

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<sup>5</sup> Art. 67.1 EC Treaty provides that “During a transitional period of five years following the entry into force of the Amsterdam Treaty, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament”. Moreover, in para. 2, Art. 67.1 holds that “After this period of five years the Council shall take a decision with a view to providing for immigration and asylum to be governed by the co-decision procedure established in Art. 251 EC Treaty and qualified majority vote”.

<sup>6</sup> See Art. 63.3 EC Treaty, which has become the main legal basis for all the acts dealing with regular migration.

<sup>7</sup> See the Presidency Conclusions of the Tampere European Council (op. cit.), paras. 10-27.

<sup>8</sup> European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C53/01, OJ C53/1, 3.3.2005.

to the root causes of migration, entry and admission policies and integration and return policies”.<sup>9</sup> Nevertheless, the programme seems to recast the balance between freedom and security in a critical way. The organisation of the text appears to sideline freedom and justice. Indeed, substantial sections of the programme place too much emphasis on provisions related to the security rationale, that is: the fight against terrorism, organised crime or the so-called ‘exceptional migratory pressures’. By contrast, the protection of fundamental rights, the role and powers of the proposed new Fundamental Rights Agency and the role of the European Court of Justice (ECJ) are presented in parsimonious if not ambiguous terms.<sup>10</sup>

The European Commission agreed on an Action Plan implementing the Hague Programme on 10 May 2005,<sup>11</sup> which identifies ten specific priority areas for intervention upon which the Commission considers efforts should be particularly concentrated (see annex 2). The ten policy priorities that will prevail in the AFSJ for the next five years are encapsulated under the following headings:

- 1) fundamental rights and citizenship – creating fully-fledged policies;
- 2) the fight against terrorism – working towards a global response;
- 3) a common asylum area – establishing an effective harmonised procedure in accordance with the Union’s values and humanitarian tradition;
- 4) migration management – defining a balanced approach;
- 5) integration – maximising the positive impact of migration on our society and economy;
- 6) internal borders, external borders and visas – developing an integrated management of external borders for a safer Union;
- 7) privacy and security in sharing information – striking the right balance;
- 8) organised crime – developing a strategic concept;

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<sup>9</sup> See Annex I, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, point 1.5 of the Presidency Conclusions of the Brussels European Council, 4-5 November 2004, 14292/04, Brussels.

<sup>10</sup> UK Parliament, House of Lords Select Committee on the European Union, *The Hague Programme: A Five-year Agenda for EU Justice and Home Affairs, Report with Evidence, 10<sup>th</sup> Report*, HL Paper 84, Session 2004-05, London, 23 March 2005, pp. 11-13 and p. 34.

<sup>11</sup> European Commission, Communication on the Hague Programme: Ten priorities for the next five years – The partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final, Brussels, 10.5.2005.

- 9) civil and criminal justice – guaranteeing an effective European area of justice for all; and
- 10) freedom, security and justice – sharing responsibility and solidarity.

The actual translation of the Hague Programme's milestones into concrete legal instruments is located in the annex of the Action Plan, which specifically lists the key actions and measures to be taken over the next five years, as well as the deadlines for them to be adopted. Finally, according to the Action Plan, the first issue of the new yearly scoreboard (annual report) on the progress of implementation carried out by the European Commission is to be presented by December 2005.

The Treaty establishing a Constitution for Europe signed in Rome on 29 October 2004 would introduce a major change.<sup>12</sup> Following Art. III-396, qualified majority voting (QMV) would become the major rule governing all policies in relation to EC immigration and asylum law, including regular migration. In addition, the European Parliament would become more directly involved in the decision-making process thanks to the application of the co-decision procedure as provided in Art. III-396. Taken together, these measures would consolidate the whole system.

In the next sections we look at the level of policy convergence reached on immigration, borders and asylum since 2002, as well as those policies being proposed or expected to come on the agenda during the next five years.

## 2. Immigration

International mobility is an essential part of our modern times. Human mobility across borders will not only continue, but will certainly become more manifest and dynamic in the future. The integration processes fostered by the EU machinery have indeed direct consequences on what has been denominated as 'migration' and the perception of 'the other'. The future of the European migration space is directly linked with the process of EU policy integration and the continuous re-definition of the EU's external borders and identity along with the enlargement processes.<sup>13</sup>

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<sup>12</sup> See the Treaty establishing a Constitution for Europe as signed in Rome on 29 October 2004 and published in the Official Journal of the European Union on 16 December 2004 (C Series, No. 310).

<sup>13</sup> A. Górný and P. Ruspini (eds), *Migration in the New Europe: East-West Revisited*, Basingstoke: Palgrave, 2004.

Further, the historical achievement of an EU internal market<sup>14</sup> as set out in the Single European Act – comprising a space without internal frontiers where the principle of free movement of persons is guaranteed<sup>15</sup> – has brought a deep reconsideration and re-conceptualisation of the traditional visions and division between the national and the supranational. The power to control borders, which until recently used to reside exclusively within the realm of national sovereignty, has mutated into a supranational structure. The dismantling of border controls as well as the increased permeability of frontiers has also led to doubts as regards the self-sufficiency of national policies on freedom and security. The national attitudes, philosophies and approaches to human mobility advocated by one EU member state could potentially have positive or negative effects on the other members of the club.

Migration has profound and challenging effects in the social, economic, political and cultural dimensions of the receiving societies. It also positively increases diversity and brings different perceptions and ways of life into our traditional image of ‘us’. This is becoming more inherent to the European sphere, which is growing more inter-cultural, inter-ethnic, inter-religious and inter-lingual. This development is not only acknowledged in the EC Treaty but also positively promoted. Art. 151.4 EC Treaty requires the European Community to respect and “promote the diversity of its cultures”.<sup>16</sup>

At present, there seems to be a shared understanding that a common and efficient response facing the multidimensional challenges that these phenomena pose is urgently needed. The development of a common EU immigration policy is indeed a clear priority for the sake of Europe’s future. Failure to provide long-term planning and a comprehensive legislative framework that facilitates inclusion, equality, fair treatment and social cohesion (liberty), and that directly fights against social exclusion, discrimination, racism and xenophobia, may lead to an unsustainable and serious situation.

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<sup>14</sup> See Art. 3 EC Treaty, which provides that “For the purposes set out in Art. 2, the activities of the Community shall include...(c) an internal market characterized by the abolition, as between member states, of obstacles to the free movement of goods, persons, services and capital”.

<sup>15</sup> Art. 14.2 EC Treaty provides that “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty”.

<sup>16</sup> Art. 151.4 EC Treaty states that “The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures”.

In this section we look at the most relevant policy measures and legal instruments that have been adopted as regards migration. Controversially, we also consider the new Directive on free movement of citizens of the Union and their family members in this review. The migration or mobility rights included in this Directive do not, of course, arise from the competences on migration-related issues as inserted into European Community law by the Amsterdam Treaty in 1999 (Title IV on “Visas, asylum, immigration and other policies related to free movement of persons”). Rather they find their legal basis in the changes brought by the Maastricht Treaty or Treaty on the European Union (TEU) in 1993.<sup>17</sup>

By virtue of the TEU, citizenship of the Union was created. This new transnational citizenship includes the right to move and reside anywhere inside the Union (Art. 18 EC Treaty). This status is, however, subject to the member states’ right to expel a non-national on grounds of public policy, public security or public health.<sup>18</sup> In our view, any right of movement across the borders of sovereignty that is subject to the possibility of derogation or expulsion cannot be considered as a true citizenship right under international law. In accordance with the European Convention of Human Rights and Fundamental Freedoms, Fourth Protocol, Art. 3.1, “no one shall be expelled, by means of either of an individual or of a collective measure, from the territory of the State of which he is a national”. Thus, as long as the right of free movement of Union citizens remains subject to the possibility that a receiving member state may expel ‘the citizen’ on grounds of public policy, public security or public health (the so-called ‘legitimate’ exceptions or derogations of the right of entry and residence), this right must be classified as a ‘migration-related right’ and not as a citizenship right.<sup>19</sup>

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<sup>17</sup> See Arts 12, 18, 40, 44 and 52 of the EC Treaty.

<sup>18</sup> Art. 18 TEU states that “Every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect”.

<sup>19</sup> See Chapter IV of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which deals with the “restriction on the right of entry and the right of residence on grounds of public policy, public security or public health”. (Note that this Directive is styled as both 2004/38/EC and 2004/58/EC, depending on the language used in the Official Journal of the European Union.) See also Art. 39.3 EC Treaty, which provides that the freedom of movement of workers shall entail a number of specific rights, subject to limitations justified on grounds of public policy, public security or public health. Art. 46.1 EC Treaty, which deals with the right of establishment, states that “the provisions of this chapter and measures taken in pursuance thereof shall not

This section is then divided following the lines in which the different forms of human mobility have been institutionalised and rationalised under the Community legal dimension – i.e. Art. 63.3 EC Treaty. This key provision shifted a substantial part of migration-related policies to supranational governance by stating that the Council shall adopt measures within the following fields:

- a) “the conditions of entry and residence, and standards on procedures for the issue by member states of long-term visas and residence permits, including those for the purpose of family reunification”, which may be qualified as ‘regular migration’; and
- b) “tackling issues on illegal immigration and illegal residence, including repatriation of illegal residents”, which correspond with the concept of ‘irregular migration’. As we point out later in section 2.2, the legal basis of some of the acts adopted under this heading are still located between the EC first pillar and the EU third pillar. The latter corresponds with Title VI of the TEU, “Provisions on Police and Judicial Cooperation in Criminal Matters”, Arts 29-42.

## 2.1 Regular migration

What are the most relevant policy measures and legal instruments dealing with regular migration to have been adopted? The following could be considered as the most pertinent:

- Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states;<sup>20</sup>
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents;<sup>21</sup>

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prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health”.

<sup>20</sup> Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77, 30.4.2004.

<sup>21</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service;<sup>22</sup>
- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification;<sup>23</sup>
- Council Directive 2000/43/EC of 19 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;<sup>24</sup> and
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.<sup>25</sup>

The measures discussed below outline the current state of the framework of minimum standards for admission and conditions of stay of EU and non EU-nationals.

### 2.1.1 *Citizens of the Union*

The Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (2004/38/EC), establishes the conditions and rules for the exercise of the right of free movement and residence (for up to and more than three months) within the EU by Union citizens and their family members of any nationality, including third-country nationals.<sup>26</sup> It creates, for the very first time, a right of permanent residence in the territory of the member states for Union citizens and their families. Yet it also clarifies the restrictions that may be applicable to this freedom on grounds of public policy, public security or

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<sup>22</sup> Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004.

<sup>23</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.

<sup>24</sup> Council Directive 2000/43/EC of 19 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000.

<sup>25</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

<sup>26</sup> Art. 3 of the Directive, entitled “Beneficiaries”, states that “1. This Directive shall apply to all Union citizens who move to or reside in a member state other than that of which they are a national, and to their family members as defined in point 2 of Art. 2 who accompany or join them”.

public health.<sup>27</sup> In contrast to the rest of the legislative instruments presented in this study, Directive 2004/38/EC applies primarily to that privileged group of persons holding the nationality of an EU member state – EU citizens.

This Directive represents an important legislative step forward as it replaces, integrates and supplements the existing set of secondary legislation dealing separately with the freedom of movement of workers, self-employed persons, students and other economically inactive groups.<sup>28</sup> Further, it codifies the main principles recognised and developed by the proactive and positive jurisprudence of the European Court of Justice. In comparison with the traditional legal system, this Directive allows more flexible conditions of mobility, offering the possibility of acquiring a new right of permanent residence in the receiving member state.<sup>29</sup> The Directive must be implemented by the member states by 30 April 2006. The efficient transposition of Directive 2004/38/EC would represent a positive step towards the achievement of a full right to move within the EU. The much-criticised economic aspect of EU citizenship, i.e. the requirement to provide proof of adequate means of subsistence and health insurance,<sup>30</sup> will however

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<sup>27</sup> See S. Carrera, *What does Free Movement Mean in Theory and Practice in an Enlarged EU?*, CEPS Working Document No. 208, CEPS, Brussels, October 2004.

<sup>28</sup> The new Directive amends the Council Regulation on freedom of movement for workers within the Community, 1612/68/EEC of 15 October 1968, and repeals among others the following laws: the Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of member states and their families; the Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of member states with regard to establishment and the provision of services; the Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a member state to remain in the territory of another member state after having pursued therein an activity in a self-employed capacity; the Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupation activity; the Council Directive 90/364/EEC of 28 June 1990 on the right of residence; and the Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.

<sup>29</sup> Art. 1 of the Directive states that “This Directive lays down... (b) the right of permanent residence in the territory of the member states for Union citizens and their family members”.

<sup>30</sup> Art. 7 of the Directive provides that “1. All Union citizens shall have the right of residence on the territory of another member state for a period of longer than three months if they:... (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the

remain untouched. The European Commission is to issue a report on the application of this Directive and proposals for any potential amendment by 2008.

The enlargement of the Union that took place on 1 May 2004 has created a 'variable geometry' for the citizens of the Union as regards the freedom to move. While nationals of Cyprus and Malta immediately had full free movement rights across and inside the traditional borders of the 'old member states' (EU-15) since the date of accession, the nationals of the other eight member states did not.<sup>31</sup> Nationals from the Central and Eastern European countries (CEECs) – the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia – are entitled to all the free movement rights (i.e. as citizens of the Union, self-employed persons, services providers and recipients)<sup>32</sup> except the free movement of workers. The majority of the EU-15 member states, with the exceptions of Ireland, the UK and Sweden, are using 'transitional arrangements' limiting the rights of workers and services providers from the CEECs to move and reside in EU-15 countries.<sup>33</sup> For a period of up to seven years (in what has been referred to as the '2+3+2 formula'), which may potentially last until 2011, the national migration laws of the member states will continue to apply to workers from these countries, who will still be considered as 'migrants' and not as equal EU citizens. Yet, all citizens should, as citizens, be equal. Indeed, in addition to the uncertain economic justification of these restrictive arrangements in view of the expected migration flows from these countries, these periods represent a real and unnecessary obstacle to the principles of free movement of persons, solidarity and non-discrimination on grounds of nationality as recognised by Art. 12 EC Treaty.<sup>34</sup>

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host member state during their period of residence and have comprehensive sickness insurance cover in the host member state”.

<sup>31</sup> See the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Act of Accession, Part Four: Temporary Provisions, Title 1: Transitional Measures, signed in Athens on 16 April 2003.

<sup>32</sup> According to para. 13 of the Accession Treaty, however, Austria and Germany are allowed to apply throughout their territory national measures restricting the provisions of certain services listed in the annexes attached to the Act of Accession.

<sup>33</sup> S. Carrera and A. Turmann, *Towards the Free Movement of Workers in an Enlarged EU?*, CEPS Commentary, CEPS, Brussels, April 2004.

<sup>34</sup> Art. 12 EC Treaty states that “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”; see also the

The inclusion of transitional arrangements in the last enlargement processes does not represent an ‘exception’. In the Brussels European Council Conclusions of December 2004, the opening negotiations with Turkey have been conditioned on the possibility of introducing “long transitional periods, derogations, specific arrangements or permanent safeguard clauses...for areas such as freedom of movement or persons”.<sup>35</sup> Moreover, the Accession Treaties signed with Bulgaria and Romania also provide for the possibility to apply transitional measures and substantially restrict the free movement of workers and services providers.<sup>36</sup>

### 2.1.2 *Third-country nationals*

#### *Long-term resident status*

Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents,<sup>37</sup> was first proposed by the European Commission as early as March 2001.<sup>38</sup> After years of long discussions in the Council of Ministers,<sup>39</sup> it was adopted in November 2003 after being significantly watered down from the Commission’s initial proposal as regards the rights granted to migrants. The Directive seeks to confer free movement and residence rights to migrants (who are lawfully or regularly long-term

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Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

<sup>35</sup> See para. 23, Presidency Conclusions of the Brussels European Council, 16-17 December 2004, 16238/1/04, Brussels, 1 February 2005; see also the Communication on Recommendation of the European Commission on Turkey’s Progress towards accession, COM(2004) 656 final, Brussels, 6.10.2004.

<sup>36</sup> Accession of the Republic of Bulgaria and Romania to the European Union – Act of Accession and its Annexes, Council of the European Union, 7411/05, Brussels, 29.4.2005.

<sup>37</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

<sup>38</sup> See the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001) 0127 final, CNS 2001/0074.

<sup>39</sup> The Council first politically agreed on the text of the initiative at the 2514th Justice and Home Affairs Council Meeting, Luxembourg, 5-6 June 2003, 9845/03 (Press 150). See the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, 10501/1/03, REV 1, MIGR 48, Interinstitutional File: 2001/0074 (CNS), Brussels, 24 July 2003; see also the previous version of the proposal of 7 July 2003, Brussels, Council of the European Union, Doc. 2001/0074, MIGR 48.

residents) inside the EU that are comparable, yet not equal, to those of EU citizens. The measure's objective is to grant an EC status of long-term resident to those migrants who have legally resided for five years in the territory of a member state.<sup>40</sup> Art. 1 provides that the Directive determines "the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto". It also lays down the terms of residence for those migrants enjoying the status of long-term resident in member states other than the one that conferred this status. The UK and Ireland have not participated in the adoption of this Directive and are therefore not bound by or subject to its application.

According to Art. 4,<sup>41</sup> member states must grant this status to those migrants who have resided legally for a period of five years immediately prior to the submission of the application. Migrants meeting all the requirements in the Directive will hold a right to move and reside, subject to a number of conditions, in the territory of member states other than the one that granted the status in the first instance. They will also enjoy comparable treatment, subject to a number of grounds of exclusion, with the nationals of the receiving state in a number of areas specified by Art. 11, such as access to employment, education, vocational training, social security and protection.<sup>42</sup>

Art. 5 of the Directive offers the member states wide discretion to ask migrants to comply with mandatory integration requirements. A state may oblige 'the other' to pass a forced integration test, and cover the financial costs of it, before having secure access to the benefits and rights conferred by

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<sup>40</sup> For a detailed comparative study on the situation of third-country nationals lawfully resident in EU member states, see K. Groenendijk, E. Guild and R. Bazilay, *The Legal Status of Third-country Nationals who are Long-Term Residents in a Member State of the European Union*, Centre for Migration Law, University of Nijmegen, 2000.

<sup>41</sup> Concerning the duration of residence, Art. 4, states that "Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously for five years immediately prior to the submission of the relevant application".

<sup>42</sup> These areas are: access to employment and self-employment activities, education and training (including study grants), recognition of diplomas and other qualifications, social security, social assistance and social protection as defined by national law, tax benefits, access to goods and services, freedom of association and free access to the entire territory of the member state.

the EC status of long-term resident. Member states are obliged to bring into force the national laws necessary to comply with the Directive by 23 January 2006.<sup>43</sup>

### *Family reunification*

Council Directive 2003/86/EC provides the possibility for non-EU nationals residing lawfully in the territory of member states to be reunited with their family members who do not hold the nationality of an EU member state.<sup>44</sup> The Directive, based on Art. 63.2.a EC Treaty, aims at creating the circumstances for the integration of third-country nationals, and promoting social and economic cohesion in member states. The member states are called upon to transpose the Directive into national law by 3 October 2005.<sup>45</sup> The UK and Ireland have opted out, and thus are not bound by or subject to this measure.

The right of family reunification depends upon one simple prerequisite: the sponsor should hold a residence permit issued by a member state valid for at least one year or should have a 'reasonable' prospect of obtaining one.<sup>46</sup> It excludes third-country nationals applying for refugee status, seeking or holding a temporary status, or those who can avail themselves of a subsidiary form of protection.<sup>47</sup> The Directive applies to married partners and minor children of the sponsor and of the married partner. Other categories of family members are unaccounted for – their admission remains a prerogative of the member states. The Directive leaves the responsibility of deciding whether to admit first-degree relatives dependent on the sponsor or the married partner with the member states.

The European Parliament has challenged three provisions of the Directive on family reunification, the ground that they do not conform to Art. 8 of the

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<sup>43</sup> See S. Carrera, *Integration as a Process of Inclusion for Migrants? The Case of Long-term Residents in the EU*, CEPS Working Document No. 219, CEPS, Brussels, March 2005.

<sup>44</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.

<sup>45</sup> The assessment and monitoring of the transposition and implementation of first-phase directives on legal migration will take place between 2005 and 2011.

<sup>46</sup> See Art. 3 of Directive 2003/86/EC (op. cit.).

<sup>47</sup> The Council Directive 2004/83/EC of 29 April 2004 on the minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection, OJ L 304/21, 29.4.2004.

European Convention on Human Rights (ECHR), which guarantees the right of family life. The specific provisions being contested are:

- a) Member states are permitted under the Directive to exclude children over 12 if they have not complied with an integration requirement.
- b) Children over 15 may be excluded altogether from family reunification.
- c) Member states may restrict or exclude family reunification where the sponsor has been living less than two years in its territory.<sup>48</sup>

### *Students, pupils, unremunerated training and voluntary service*

In 2004, the EU adopted a Council Directive on the conditions of admission of non-nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.<sup>49</sup> There are three fundamental elements put forward by this Directive: the scope, the conditions of admission and the right granted.

Under the terms of Art. 3, the Directive applies to third-country nationals who seek admission to the territory of a member state for the purposes outlined above. To be applicable, the third-country national has to fulfil general conditions: e.g. present valid travel documents and have sickness insurance. More specific conditions apply to students: acceptance by a higher education institution for the purposes of following a course of study and provision of evidence of sufficient subsistence resources for the duration of the studies. In addition to these requirements, member states may also demand that third-country nationals meet supplementary conditions such as knowledge of the language of education and the payment of fees before the student residence permit is issued. When these are met, provided that the conditions set out in Art. 8 are also satisfied, the student can move to another member state in order to complement or pursue the course of studies started in the host member state. Moreover, students are normally entitled to work in the host member state.

This benefit has been watered down, however, by the vague if malleable provision that “The situation of [the] labour market in the Host Member State may be taken into account”.<sup>50</sup> Further, the EU permits two substantial exclusions to member states. First, access to the job market may not be allowed for third-country national students in the first year of their studies.

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<sup>48</sup> See Arts 4.1, 4.6 and 8 of Directive 2003/86/EC (op. cit.).

<sup>49</sup> Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004.

<sup>50</sup> See Art. 17.1 of Directive 2003/86/EC (op. cit.).

Second, the number of hours a third-country student is employed may be kept within bounds by member states. In order to comply with the provisions of this Directive, member states should adopt all the legal and administrative rules by 12 January 2007. The UK and Ireland have decided to opt out of this Directive.

### 2.1.3 *Anti-discrimination*

Discrimination, racism and unequal treatment may deeply undermine the achievement of the EU's overall goals, such as social cohesion, solidarity, a high level of employment and social protection, quality of life and a rise in the standards of living.<sup>51</sup> With the legal bases of Arts 12 and 13 of the EC Treaty<sup>52</sup> and following the demand for quick action given by the Tampere Conclusions,<sup>53</sup> in 2000 the Commission presented two proposals dealing with these sensitive issues:<sup>54</sup>

- 1) Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Race Equality Directive) aims at establishing a framework for combating

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<sup>51</sup> J. Niessen, "Making the Law Work – The Enforcement and Implementation of Anti-Discrimination Legislation", *European Journal of Migration and Law*, Vol. 5, No. 2, February 2003, pp. 249-57.

<sup>52</sup> Art. 13 EC Treaty states that "Without prejudice to the other provisions of the Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

<sup>53</sup> Para. 19 of the Tampere European Council Presidency Conclusions (op. cit.) provides that "Building on the Commission Communication on an Action Plan against Racism, the European Council calls for the fight against racism and xenophobia to be stepped up. The Member States will draw on best practices and experiences. Co-operation with the European Monitoring Centre on Racism and Xenophobia and the Council of Europe will be further strengthened. Moreover, the Commission is invited to come forward as soon as possible with proposals implementing Art. 13 EC Treaty on the fight against racism and xenophobia. To fight against discrimination more generally the Member States are encouraged to draw up national programmes."

<sup>54</sup> It should be noted that there is no possible 'opt out' for the UK and Ireland from these two provisions. Also, while these two measures date back to 2002, we believe that they deserve special consideration because of their particular importance as regards the equal treatment paradigm of third-country nationals, as highlighted in the Tampere Conclusions.

direct and indirect discrimination on the grounds of racial or ethnic origin.<sup>55</sup> According to Art. 2 of the Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial and ethnic origin. Concerning the personal scope, it applies to all persons in relation to access to employment, self-employment and occupation, vocational guidance and training, social protection and advantages (including social security and health care), education, membership and involvement in workers'/employers' organisations, and access to and supply of goods and services that are available to the public, including housing. The Directive allows, however, for a difference in treatment by reason of the nature of the particular occupational activities or of the context in which they are carried out. The implementation date ended on 19 July 2003.

- 2) Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive)<sup>56</sup> seeks to lay down a general framework for combating direct or indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards the fields of employment and occupation. The deadline for the member states to transpose the Directive into their national legislations was 2 December 2003.<sup>57</sup>

Both Directives contain similar provisions as regards defence of rights and burden of proof. According to Art. 3.2, neither of them covers differences of treatment based on nationality and is without prejudice to provisions and conditions relating to entry into and residence of third-country nationals and stateless persons in the territory of member states, and to any treatment that arises from their legal status.

Member states were reassured about the exclusion of nationality discrimination not only by the limitation of Art. 12 EC Treaty to member states' nationals, but also by the omission of nationality as a prohibited

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<sup>55</sup> The Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000.

<sup>56</sup> The Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

<sup>57</sup> For a selection of country reports on the transposition of European anti-discrimination law, see the Migration Policy Group website (<http://www.migpolgroup.com/>).

ground of discrimination in Art. 13 EC Treaty.<sup>58</sup> In fact, the real benefits that these two Directives will bring will be seen not only after efficient national transposition by each of the member states,<sup>59</sup> but also with regard to the practical implementation of national policies that tackle discrimination and promote social inclusion.

#### 2.1.4 *What are the next steps in EU policy as regards regular immigration?*

##### *Economic/labour migration*

The launch of the Lisbon strategy in March 2000 identified as a goal for the next decade that the EU “becomes the most competitive and dynamic knowledge-based economy in the world; capable of sustainable economic growth with more and better jobs and greater social cohesion, a Union where the economic and social aspects of the ageing population become more evident and where the labour market for immigrants and refugees represents a crucial component of the integration process”.<sup>60</sup> There seems to be a general consensus that solid policy responses are needed at the transnational level to frame human mobility (i.e. migration and asylum) in the common EU territory. An agreement at EU level regarding conditions and rules for the admission of migrants for economic purposes represents a key element for facilitating the actual processes of inclusion of migrants into the labour markets of the member states. Yet to date, there has been an unacceptable

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<sup>58</sup> E. Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, European Law Library, The Hague: Kluwer Law International, 2004, pp. 222-33.

<sup>59</sup> Those states that have not fully transposed the directives have been referred to the ECJ. The ECJ ruled on 4 May 2005 that Austria had failed to fully transpose the Race Discrimination Directive (2000/43/EC). Previously, on 29 April 2004, the ECJ had also held that Germany had breached EU law by failing to fully transpose the same Directive. See the Europa Rapid Press Releases, “Austria failed to implement EU race anti-discrimination law” (IP/05/543) of 4.5.2005 and “Germany has failed to implement EU race anti-discrimination law” (IP/05/502) of 29.4.2005.

<sup>60</sup> See the Presidency Conclusions of the Lisbon European Council, 23-24 March 2000, Brussels; see also the Commission’s Communication to the European Council in Barcelona, The Lisbon Strategy – Making change happen, COM(2002) 14 final, Brussels, 15.1.2002.

official reluctance concerning the liberalisation and adjustment of immigration policies in order to reflect these realities and needs.<sup>61</sup>

A first proposal for a directive laying down the basic conditions and rules of admission of migrants for employment purposes was presented by the Commission in 2001.<sup>62</sup> This initiative did not have much success in the Council and political agreement among the member states was regrettably not possible.<sup>63</sup> Taking into account the necessity to develop an economic migration strategy establishing a common approach to labour migration in the EU, on 11 January 2005 the European Commission presented a Green Paper involving the EU institutions, member states and civil society. The Green Paper aims at fostering the debate about the most appropriate form of Community rules for admitting economic migrants and on the added value of adopting such a common framework, taking into account the demographic and labour market situations in the EU. The Green Paper is primarily based on the current difficulties the EU is facing as regards dramatic economic and social changes, characterised by labour shortages in some fields alongside high unemployment in others and accelerating demographic change brought on by population ageing in the EU.

A public hearing is to take place in July 2005, organised by the European Commission with the intention of discussing the Green Paper among all the main stakeholders involved. This event will facilitate the preparation of a policy plan on regular migration, including admission procedures, to be presented at the end of 2005.<sup>64</sup>

### *Integration of migrants*

The integration of migrants has been placed at the top of the AFSJ agenda by the Hague Programme, where the Council reconfirmed the need for greater

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<sup>61</sup> H. Schneider, "Towards a European Migration Policy: From Maastricht to Amsterdam, from Tampere to The Hague" in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe's Future*, Volume II, Forum Maastricht, University of Maastricht, 2005.

<sup>62</sup> Proposal for Council Directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities COM(2001) 0386 final, Brussels 11.07.2001. For a detailed analysis of the proposal, see J. Apap and S. Carrera, *Towards a Proactive Immigration Policy for the EU?*, CEPS Working Document No. 198, CEPS, Brussels, December 2003.

<sup>63</sup> Following Art. 1 of the proposal, the main goal of the measure was to establish the common definitions, conditions and a single national application procedure leading to one combined title for both residence and work permits.

<sup>64</sup> See the Green Paper on an EU Approach to Managing Economic Migration, COM(2004) 811 final, Brussels, 11.1.2005.

coordination of national integration policies and EU initiatives in this field. Under the auspices of the Greek presidency in 2003,<sup>65</sup> the European Commission presented an important Communication on immigration, integration and employment, advocating a proactive EU immigration policy paralleled by a holistic approach to the integration of immigrants into the receiving state.<sup>66</sup> Recently, a set of common basic principles underlying a coherent EU framework on integration has also been agreed by the Council.<sup>67</sup> These principles aim at assisting member states in formulating integration policies for third-country nationals by offering a simple, non-binding guide against which they can judge their own national policies.

There has been much discussion about the inclusion of mandatory integration requirements in order to have full access to the package of rights and benefits that the member states confer on non-EU nationals. Yet this idea is open to substantial criticism not least on the grounds of fundamental rights.<sup>68</sup> Making rights conditional on a concept as vague as 'integration' might lead to cases of unlawful discrimination. The dividing line between an efficient integration policy and the respect of cultural, ethnic as well as religious diversity and heterogeneity (interculturalism) may become dangerously thin. The European Commission is currently preparing a communication on the next steps towards an overall EU framework for the integration of migrants, which is anticipated during the summer of 2005.<sup>69</sup>

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<sup>65</sup> See the Presidency Conclusions of the Thessaloniki European Council, 19-20 June 2003, 11638/03, Brussels, 1 October, paras. 28-35, under the heading "The development of a policy at European Union level on the integration of third-country nationals legally residing in the territory of the European Union".

<sup>66</sup> European Commission, Communication on immigration, integration and employment, COM(2003) 336 final, Brussels, 3.6.2003.

<sup>67</sup> See the Justice and Home Affairs Council Meeting 2618, 14615/04, Brussels, 19 November 2004. The common basic principles are articulated around different key ideas, such as: integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of member states; integration implies respect for the basic values of the EU; access for immigrants to institutions, as well as to public goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration; and, the participation of immigrants in the democratic process and in the formulation of integration policies and measures should be encouraged.

<sup>68</sup> See footnote 34.

<sup>69</sup> In addition, the establishment of an integration fund, which will be complementary to the European Social Fund, is foreseen by 2007.

*External development assistance and immigration*

In the EU context, the link between immigration and development is relatively new.<sup>70</sup> At the European Council of Seville in June 2002, heads of states and governments requested that concerns related to migration be integrated into the full spectrum of the external relations of the Community.<sup>71</sup> The EU's institutions appear to have accepted the 'push' theory of immigration – that is to say there are push factors in the country of origin that cause people to leave (such as poverty) and 'pull' factors in the host state (such as available jobs), which encourage immigration. Acceptance of this theory is somehow surprising as our experience of the free movement of persons in the EU indicates that it is deeply flawed. EU nationals do not respond to push and pull factors, usually preferring to remain unemployed in economically depressed areas rather than to move to member states with low unemployment and many job vacancies.

Be that as it may, the strategy adopted is to root out the push factors, that is, the circumstances that drive people out of their country of origin. The rationale of this policy is set out thus: "closer economic cooperation, trade expansion, development assistance and conflict prevention are all means of promoting economic prosperity in the countries concerned and thereby reducing the underlying causes of migration flows".<sup>72</sup> In that context, the Commission Communication on integrating migration issues in the EU's relations with third countries of December 2002 aims at providing guidelines for a more effective management of migratory flows through the instruments of the EU's external relations.<sup>73</sup> To do this, the EU weaves together three sets of policies:

- a) The first set entails actions that fall under cooperation agreements with third countries and which directly address the issue of migration, for instance, the TACIS Regional Justice and Home Affairs Programme for

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<sup>70</sup> Nevertheless, see the Commission's earlier Communication on immigration and asylum policies, COM(1994) 23 final, Brussels, 23.02.1994.

<sup>71</sup> The Presidency Conclusions of the Seville European Council state: "Any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration" (Presidency Conclusions of the Seville European Council, 21-22 June 2002, 13463/02, Brussels, 24 October.)

<sup>72</sup> Ibid.

<sup>73</sup> European Commission, Communication on integrating migration issues in the European Union's relations with third countries, COM(2002) 703 final, Brussels, 12.2.2002.

Eastern Europe and Central Asia and the framework for the justice and home affairs regional programme in the Mediterranean Region (MEDA).

- b) The second set of policies is built around relief and rehabilitation schemes. It frames the link between relief, rehabilitation and development as set out by the Commission's Communication on this subject of 23 April 2004 (COM(2001) 153 final). The objectives are to ensure the long-term development of countries that have been affected by political, economic or natural hardship.
- c) The last set of policies comprise general EU instruments geared at developing cooperation and programmes, sustainable growth, conflict prevention, regional integration and cooperation, institutional capacity-building, good governance, food security and sustainable rural development.

To enable the EU to better assess the state of progress and achievements of partner countries or regions, migration topics are firmly incorporated into Country & Regional Strategy Papers, the aim of which is to review, periodically, which issues in relation to migration should be given prime concern in future programmes.

The Hague Programme establishes that "Policies which link migration, development cooperation and humanitarian assistance should be coherent and be developed in partnership and dialogue with countries and regions of origin". It also urges the European Commission "to present concrete and carefully worked proposals by the spring of 2005".<sup>74</sup> A communication on migration and development is to be presented by the Commission before the end of 2005.

#### *A European Research Area and third-country researchers*

The Proposal for a Council Directive setting out special rules for admission of third-country national researchers is part of the EU's scientific policy.<sup>75</sup> It aims at setting up a European Research Area (ERA) that attracts and retains

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<sup>74</sup> See the Hague Programme, point 1.6.3 Partnership with countries and regions of origin, in the Presidency Conclusions of the Brussels European Council, 4-5 November 2004 (op. cit).

<sup>75</sup> European Commission, Proposal for Council Directive setting out special rules for admission of researchers, COM(2004) 178, Brussels, 16.03.2004. See also the Commission's Communication, Towards a European Research Area, COM(2000) 6 final, Brussels, 18.01.2000.

high-calibre scientists in the EU in order to promote the establishment of a competitive, knowledge-based society and economy.<sup>76</sup> As regards entry, there are four conditions, involving:

- a) a valid travel document;
- b) a host agreement signed with a research institution recognised as such by a member state;
- c) sufficient resources for the duration of the stay; and
- d) a determination that the person's reasons for entry are bona fide, i.e. the person poses no threat to the receiving member state.

These rules and conditions for admission are clouded, however, by provisions related to the mobility of researchers within the EU. Indeed, the free movement of a specific category of third-country national researchers residing lawfully within a member state is subject to an arbitrary requirement of sorts. Art. 13(2) holds that member states may “require a short-term visa for third-country nationals not covered by the mutual recognition arrangements laid down in the Art. 21 of Convention Implementing the Schengen Agreement”. The application of the ‘Schengen visa’ has been much criticised.<sup>77</sup> The opacity of the rules permits almost unlimited discretion to decision-makers. The lack of legal remedy to the individual against the refusal of a visa fosters a sense of impunity among deciding officials. Thus the visa requirement undermines the transparency of the right of movement for researchers. It weakens the EU's policy ambitions for the advancement of knowledge, as third-country researchers residing in member states do not enjoy equality as regards mobility with national researchers (i.e. EU citizens). The free movement of some is curtailed. Mobility is a constitutive aspect of research activities (e.g. to collect data, attend conferences, visit another laboratory or research unit to complement or pursue own investigations). Restrictions on the movement of researchers affect the nature and credibility of results, as well as the length of research. In other words, a rigid implementation of this derogation is likely to affect both the quality and the duration of the work carried out by third-country

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<sup>76</sup> These goals are also sketched out in the Presidency Conclusions of the Lisbon European Council of 23-24 March 2000 (op. cit.); see also the Commission's Communication on building the ERA of knowledge for growth COM(2005) 118 final, Brussels, 6.4.2005.

<sup>77</sup> D. Bigo and E. Guild, “Contrôler à Distance et tenir à l'écart: le visa Schengen”, *Cultures et Conflits*, Paris: L'Harmattan, 2002.

nationals. After the Directive on the ERA is adopted, member states are expected to comply with its provisions by 31 December 2006.<sup>78</sup>

## 2.2 Irregular migration

As yet, there is no common definition of illegal immigration. Indeed, there are serious conceptual problems inherent to the framing of this category of migration. Before a person can be an illegal immigrant s/he must find him/herself within a state that provides the legislation defining her/his presence as 'illegal'.<sup>79</sup> An individual cannot be an illegal migrant before even entering the country involved. Further, once 'security' has been defined by reference to a protean threat attached even vaguely to a group of persons who do not fall under a precise legal definition, the erosion of 'liberty' by consideration of security becomes likely.<sup>80</sup> The negative brand of 'illegal migrant' might ascribe to the person involved a social status that entails suspicion (leading to the person becoming a 'suspect'). The disapproving connotations that accompany use of this term, alongside the 'fight against illegal immigration' (which together create a dangerous link between this status and an act of criminality) could be easily overcome by instead using a rather neutral term such as 'irregular' for this type of migrant or migration.

It is important to highlight that the field of irregular migration currently falls between the EC first pillar and the EU third pillar – respectively Title IV EC Treaty and Title VI TEU (see annex 1). The negative effects that the current pillar division create have often been pointed out. In addition to the lack of transparency, efficacy and democratic/judicial accountability, there is also a high degree of inefficiency owing to the duality in the legal dimension (framework decisions are being used to develop third pillar measures, and Council directives are used to develop first pillar ones),<sup>81</sup> which hampers any vision as regards their precise legal effects and scope.

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<sup>78</sup> Nevertheless, Denmark has opted out.

<sup>79</sup> See the "Memorandum of Written Evidence" by E. Guild in *The Hague Programme: A Five-year Agenda for EU Justice and Home Affairs, Report with Evidence, 10<sup>th</sup> Report*, UK Parliament House of Lords Select Committee on the European Union, HL Paper 84, Session 2004-05, London, 23 March 2005.

<sup>80</sup> J. Crowley, "Differential free movement and the sociology of the 'internal borders'" in E. Guild and C. Harlow (eds), *Implementing Amsterdam; Immigration and Asylum Rights in EC Law*, Oxford: Hart Publishing, 2001, pp. 13-32.

<sup>81</sup> According to Art. 34 of the TEU, "Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct

Among the most relevant policy measures and instruments that have been adopted since 2002 concerning irregular migration, we especially highlight the following:

- Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings;<sup>82</sup>
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities;<sup>83</sup>
- Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence;<sup>84</sup>
- Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence;<sup>85</sup>
- Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air;<sup>86</sup> and,

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effect.” On the other hand, Art. 249 EC Treaty establishes that “A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. Directives may be addressed to any one member state and do not have to be addressed to all. Even though this article implies that the provisions contained in a directive are not directly applicable, the ECJ has ruled otherwise: an individual can rely on the provisions of a directive against a defaulting state after the time limit for implementation has expired. For an in-depth study of the legal instruments that are being used to develop EU policy, see P. Craig and G. de Búrca, *EU Law: Text, cases and materials*, Oxford: Oxford University Press, 2000.

<sup>82</sup> Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking of human beings, OJ L 203/1, 1.8.2002.

<sup>83</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261/19, 6.8.2004.

<sup>84</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17, 5.12.2002.

<sup>85</sup> Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328/1, 5.12.2002.

- Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more member states, of third-country nationals who are the subjects of individual removal orders.<sup>87</sup>

### 2.2.1 *Trafficking and smuggling of human beings*

In the field of human trafficking and smuggling, the EU has developed preventive, dissuasive and punitive instruments. Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings singles out the acts punishable and related penalties.<sup>88</sup> It also clarifies the jurisdiction for prosecution. Thus, the conditions of responsibility for a member state are activated when:

- a) the offence is committed in the whole or within part of its territory;
- b) the offender is one of its nationals; or
- c) the offence is committed for the benefit of a legal person established in the territory of that member state.<sup>89</sup>

It is important to stress that neither investigations into, nor prosecution of offences covered by the Framework Decision are dependent upon a formal complaint filed by the victim of human trafficking. The deadline to comply with the measures laid down in the Framework Decision was set at 1 August 2004.<sup>90</sup>

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<sup>86</sup> Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L 321, 6.12.2003

<sup>87</sup> Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more member states, of third-country nationals who are the subjects of individual removal orders, OJ L 261/28, 6.8.2004.

<sup>88</sup> Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking of human beings, OJ L 203/1, 1.8.2002.

<sup>89</sup> Art. 1 of the Council Framework Decision 2002/629/JHA of 19 July 2002 (ibid.).

<sup>90</sup> A Proposal for the conclusion and signature of the Council of Europe Convention on action against trafficking in human beings (COM(2005) 32 final Addendum 1 final of 3 May 2005), is expected before the end of 2005. The aim of the convention is primarily the prevention and fight against human trafficking in all its forms, namely at national and international levels, whether or not it is linked with organised crime.

The legal basis of this Framework Decision can be found primarily in Art. 29 TEU, which forms part of the EU third pillar (Title VI, “Provisions on police and judicial cooperation in criminal matters”).<sup>91</sup> The UK, Ireland and Denmark have therefore taken part in the adoption and application of this measure, because, as previously noted, these three countries only apply the ‘opt-out’ clause on instruments adopted under the first pillar (i.e. Title IV EC Treaty).

Council Directive 2004/81/EC on residence permits issued to migrants who are victims of human trafficking or who have been the subjects of an action to facilitate illegal immigration grows out of the Framework Decision 2002/629/JHA.<sup>92</sup> Member states must transpose its provisions before 6 August 2006. The UK and Ireland have not taken part in this Directive. The Directive takes a lenient approach towards third-country nationals who are victims of human trafficking or who have been the subject of an action to facilitate illegal immigration and who cooperate with the competent authorities. This is one of the few instruments that the EU has enacted to curb criminal networks. Third-country nationals falling within the personal scope of the Directive are entitled, after a reflection period, to a temporary residence permit, the aim of which is to protect them from the perpetrators of the offences and, as a result, help them recover a normal social life. Nevertheless, the short period of the residence permit together with the prospect in the longer term of expulsion make the measure rather unattractive for victims, who may fear reprisals from the trafficking networks in their home country should they return.

### 2.2.2 *Unauthorised entry, transit and residence*

The Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence<sup>93</sup> and the Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and

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<sup>91</sup> Art. 29 (formerly Art. k.1) stipulates that the Union’s objective is to provide a “high level of safety” to citizens and “that [this] objective shall be achieved by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children”.

<sup>92</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261/19, 6.8.2004.

<sup>93</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17, 5.12.2002.

residence were adopted to address these issues.<sup>94</sup> With regard to implementing the Directive, the member states are asked to apply “effective, proportionate and dissuasive sanctions” to any person who intentionally assists the irregular or unauthorised entry, transit or residence of a national from a non-EU member state. The deadline for implementation was 5 December 2004. The UK and Ireland are taking part in the application of this Directive. Framework Decision 2002/946/JHA complements the latter by providing the specific sanctions (criminal penalties or other measures) to be applied in such cases.

### 2.2.3 *Return and readmission policy*

The Council Decision 2004/573/EC of 29 April 2004 coordinates joint removals by air, from two or more member states, of migrants who are the subjects of individual removal orders.<sup>95</sup> The different tasks that need to be undertaken by the member states organising and participating in a joint flight for the removal of third-country nationals are also stated in the body of the Decision (see respectively Arts 4 and 5). Of special interest is the annex of the Decision, which establishes a list of common guidelines on security provisions for the different phases in which joint removals by air take place (i.e. pre-return, pre-departure in departure or stopover airports, in-flight procedure, transit, arrival or failure of the removal operation).<sup>96</sup> The UK and Ireland have given notice of their decision to take part in the adoption and application of this Decision.

As regards the so-called ‘readmission agreements’, these are among the major themes of the Schengen *acquis* and a key part of the conditionality applied to any state pursuing EU candidacy and accession. In addition, these agreements are among the oldest instruments used by EU member states to carry out migration controls.<sup>97</sup> The agreements impose the rigid obligation to

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<sup>94</sup> Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328/1, 5.12.2002.

<sup>95</sup> Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more member states, of third-country nationals who are subjects of individual removal orders, OJ L 261/28, 6.8.2004.

<sup>96</sup> In the case of the transit phase, Council Directive 2003/110/EC of 25 November 2003 will apply, which concerns assistance in cases of transit for the purposes of removal by air, OJ L 321, 6.12.2003.

<sup>97</sup> D. Bouteillet-Paquet, “Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and its Member

the contracting parties to readmit, upon application and without any further formality, their nationals if they do not (or no longer) fulfil the conditions for entry to, presence or residence in the territory of the requesting state.

The meeting of the European Council in Seville called for speeding up the conclusion of readmission agreements with a number of targeted countries.<sup>98</sup> The comprehensive plan to combat illegal immigration identified the readmission and return policy as an integral and pivotal component in the fight against illegal immigration.<sup>99</sup> The Council has so far given the green light to the European Commission to enter into negotiations on multilateral readmission agreements with Morocco, Sri Lanka, Russia, Pakistan, Hong Kong, Macao, Ukraine, Algeria, China and Turkey. The negotiations of these agreements have been far from easy. Only three agreements have been concluded so far, with Hong Kong, Macao and Algeria. A Memorandum of Understanding between the EU and the National Tourism Administration of China regarding visa and other related issues on tourist groups has been also concluded.<sup>100</sup> The Commission is willing to begin negotiations on a wider scale that would cover all Chinese nationals or persons coming from China. Finally, a Council Decision concerning the signing of the Agreement with the Republic of Albania was adopted in February 2005.<sup>101</sup>

These instruments have been subject to various criticisms. Potential human rights violations may arise from their application, for example in the case that a rejected asylum seeker is sent back to a ‘safe’ country that in fact might not be as safe as one may think (see section 4.5). In addition, while the

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States”, *European Journal of Migration and Law*, Vol. 5, No. 3, 2003, pp. 359-77.

<sup>98</sup> Presidency Conclusions of the Seville European Council, 21-22 June 2002 (op. cit.), point 30.

<sup>99</sup> See the comprehensive plan to combat illegal immigration and trafficking of human beings (2002/C142/02) of 14 June 2002, OJ C142/23, which stated that “these agreements should also include an obligation to readmit third-country nationals and stateless persons coming from or having resided in the country concerned”.

<sup>100</sup> Council Decision 2004/265/EC of 8 March 2004 concerning the Conclusion of a Memorandum of Understanding between the European Community and the National Tourism Administration of the People’s Republic of China on visa and related issues concerning tourists groups from the People’s Republic of China, OJ L 83/12.

<sup>101</sup> Council Decision concerning the signing of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation, 2004/0033 (CNS), 5614/05, Brussels, 15.2.2005.

targeted countries will face an increasing degree of pressure under the new integrated approach, little is done in order to better tackle and prevent the underlying causes of irregular migration.<sup>102</sup>

On the issue of return and readmission policy, the Hague Programme called for the “timely conclusion of Community readmission agreements and the prompt appointment by the Commission of a Special Representative for a common readmission policy”.<sup>103</sup>

#### 2.2.4 *What are the next steps in EU policy as regards irregular immigration?*

The Hague Programme calls for an integrated approach towards return and repatriation procedures. The instruments adopted should cohere with other external policies of the Community that include migration aspects (e.g. partnerships with the countries of origin or readmission agreements). In light of this, the so-called ‘external dimension of asylum and immigration’ has become a principal focus within the programme. For the European Council, the implementation of an effective return policy requires a prompt decision on closer cooperation and mutual technical assistance and common, integrated, country- and region-specific programmes.<sup>104</sup> Further, according to the Action Plan published by the European Commission implementing the Hague Programme<sup>105</sup> (among other instruments), a new legislative proposal on return procedures is expected to be presented by the Commission before the end of 2005. Finally, the actual establishment of a European Return Fund is foreseen by 2007.

### 3. Borders

The Schengen Agreement of 1985 sought to establish, through an intergovernmental approach, the application of the principle of the free

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<sup>102</sup> S. Peers, *Readmission agreements and EC external migration law*, Statewatch Analysis No. 17, Statewatch, London, 2003 (retrieved from [www.statewatch.org](http://www.statewatch.org)).

<sup>103</sup> See the Presidency Conclusions of the Brussels European Council, 4-5 November 2004 (op. cit), The Hague Programme, point 1.6.4 on Return and Readmission Policy.

<sup>104</sup> Ibid, p. 13.

<sup>105</sup> See the comprehensive plan to combat illegal immigration and trafficking of human beings (2002/C142/02) of 14 June 2002 (op. cit.).

movement of persons throughout the European Community.<sup>106</sup> The main tenets of the Schengen Agreement are threefold, outlined below:

- 1) creation of a common EU territory without the existence of the traditional internal borders and a common external border;
- 2) entry into the Schengen zone by crossing one of the common external borders constitutes admission into the whole territory; and
- 3) once a person is admitted inside the EU's territory, s/he will be entitled to move freely within the whole Schengen area for a period of three months out of every six without further checks at the internal borders of any of the participating states.<sup>107</sup>

These three principles apply except in those situations where special security concerns might exist, such as reasons of public policy, national security or public health. Further, no third-country national should gain access to the 'Schengenland' independent of having been granted a short stay-visa, if s/he is considered to constitute a 'security risk' pursuant to Art. 96 of the Convention implementing Schengen.<sup>108</sup>

In 1999, a Protocol attached to the Amsterdam Treaty integrated part of the Schengen *acquis* into the EU legal framework. Art. 62 EC Treaty was

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<sup>106</sup> 'Schengen' was supplemented by the Schengen Implementing Agreement 1990, which introduced various measures intended to compensate for the apparent security deficit and uncertainty resulting from the abolition of internal border controls within the EU. These included the application of controls at the common external border of the participating states, provisions on the division of responsibility with respect to asylum and police and judicial cooperation in criminal matters.

<sup>107</sup> J. Apap, S. Carrera and K. Kirişçi, *Turkey in the European Area of Freedom, Security and Justice*, CEPS EU-Turkey Working Paper No. 3, CEPS, Brussels, August 2004.

<sup>108</sup> Art. 96 of the Convention states that "2. This situation may arise in particular in the case of: (a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year; (b) an alien in respect of whom there are serious grounds for believing that he has committed serious criminal offences, including those referred to in Art. 71, or in respect of whom there is clear evidence of an intention to commit such offences in the territory of a Contracting Party. 3. Decisions may also be based on the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens."

designated as the legal base of any measure dealing with visas and borders. This provision asks the Council to adopt instruments “with a view to ensuring the absence of any controls on persons when crossing internal borders... [or] on the crossing of the external borders of the Member States” along with “setting out the conditions under which nationals of third countries shall have the freedom to travel in the territory of the Member States during a period of no more than three months”.<sup>109</sup>

The Schengen *acquis* is not a static compendium of rules, but is on progressive development. Taking into account the evolving nature inherent to Schengen-related measures, in this section we look at the most relevant instruments that have been adopted in the last three years and those being proposed for the next five.

### 3.1 The Border Management Agency

Council Regulation (EC) No. 2004/2007/EC establishes the Border Management Agency, to oversee operational cooperation along the EU’s external borders.<sup>110</sup> The agency, which is based in Warsaw, will coordinate and assist member states’ various actions in managing (controlling) the common EU frontier.<sup>111</sup> In particular, Art. 1 of the Regulation provides that while the main responsibility for managing the external borders will remain in hands of the member states,

The Agency shall facilitate and render more effective the application of existing and future Community measures relating to the management of external borders. It shall do so by ensuring the coordination of Member State’s actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States.

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<sup>109</sup> On the practical problems raised by the Schengen language, see D. Bigo, “Frontier control in the European Union: Who is in control?” in D. Bigo and E. Guild (eds), *Controlling frontiers: Free movement into and within Europe*, Aldershot: Ashgate, 2005, pp. 49-99.

<sup>110</sup> 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. 2004/2007, OJ L 349/1, 25.11.2004.

<sup>111</sup> The director of international affairs for Finland’s border police, Colonel Ilkka Laitinen, has been named head of the Border Management Agency – see “Finnish colonel named head of EU border agency”, 25.05.2005 (retrieved from <http://www.eubusiness.com>).

The precise list of ambitious tasks allocated to the EU's new Border Management Agency can be summarised as the following:<sup>112</sup>

- coordinating the operational cooperation between the member states as regards the management of the external borders;
- training national border guards;
- carrying out risk analyses;
- following up research on control and surveillance of the external borders;
- supporting member states in circumstances wherein they request increased technical and operation assistance at external borders; and
- supporting member states in organising joint return operations.<sup>113</sup>

As this Regulation constitutes a legislative instrument building upon the Schengen *acquis*,<sup>114</sup> the UK and Ireland, who were interested in taking part in its adoption and application, were prevented from doing so. In February 2005, both of these countries presented an action against the Council of the

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<sup>112</sup> See Art. 2 of the Regulation. These tasks substantially differentiate the agency from the former 'External Borders Practitioners' Common Unit', the establishment of which was agreed by the Council on 13 June 2002 based on a Commission Communication, Towards integrated management of the external borders of the Member States of the European Union, COM(2002) 233 final, Brussels, 7.5.2002.

<sup>113</sup> According to Art. 9 of the Regulation, the agency will also identify best practices on the acquisition of travel documents and the removal of illegally present third-country nationals. It is striking to see that there is no reference to the safety and/or rights of those persons being deported.

<sup>114</sup> Following Art. 5 of the Protocol Integrating the Schengen *acquis* into the Framework of the European Union added by the Treaty of Amsterdam (1999), "Proposals and initiatives to build upon the Schengen *acquis* shall be subject to the relevant provisions of the Treaties. In this context, where either Ireland or the United Kingdom or both have not notified the President of the Council in writing within a reasonable period that they wish to take part, the authorisation referred to in Art. 5a of the Treaty establishing the European Community or Art. K.2 of the Treaty on European Union shall be deemed to have been granted to the Member States referred to in Art. 1 and to Ireland and the United Kingdom where either of them wishes to take part in the areas of cooperation in question."

European Union before the ECJ, challenging the validity of the legal basis used to frame the agency, which is primarily Art. 62.2.a EC Treaty.<sup>115</sup>

Finally, an evaluation report on the external Border Management Agency,<sup>116</sup> which will include a review of its tasks and an assessment of whether these should be broadened with other aspects of border management, is foreseen by 2007.<sup>117</sup>

### 3.2 Communication of data by carriers

Council Directive 2004/82/EC on the obligations of carriers to communicate passenger data was first proposed by the Spanish government and finally agreed at the Justice and Home Affairs Council meeting of 30 March 2004.<sup>118</sup> The Directive seeks to improve border controls and tackle irregular migration by the transmission of advance passenger data by carriers to the competent national authorities. The UK and Ireland took part in its adoption and are bound to apply it.

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<sup>115</sup> See the Action brought on 17 February 2005 by the United Kingdom of Great Britain and Northern Ireland against the Council of the European Union, Case C-77/05, 2005/C82/50, OJ C 82/25, 2.4.2005. Along with this element, the special terms of involvement of Iceland and Norway and the sensitive appointment of the executive director have not eased the first weeks in the life of the agency, which took up its responsibilities from 1 May 2005. See “EU’s border watchdog in pre-launch disarray”, *European Voice*, Vol. 11, No. 18, 12-18 May 2005.

<sup>116</sup> As explained by the European Commission in the Action Plan implementing the Hague Programme (see footnote 9), other aspects of border management could include the evaluation of the functioning of the teams of national experts and the feasibility of a system of European border guards.

<sup>117</sup> Further, as stated in the Joint Declaration following the meeting of the Ministers of the Interior of France, Germany, Italy, Spain and the UK (G5), “the European Border Agency must above all be an operational tool that enables in particular the initiation of intensified joint operations at the EU’s external borders...We are studying the idea of a ‘European Border Intervention Police Force’ which would allow deployment, in times of crisis, of specialized national pre-identified resources in our countries so as to intervene on the European external border”, 16 May 2005, Embassy of France in the United States (retrieved from <http://www.ambafrance-us.org>).

<sup>118</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30.9.2004.

Art. 3 stipulates the kind of information concerning passengers that is to be transmitted, which will include: number and type of travel document used, nationality, full names, date of birth, the border crossing point-of-entry into the territory of the member states, code of transport, the initial point of embarkation, total number of passengers carried on that transport as well as its departure and arrival times. This data needs to be handed over by the end of check-in or before the flight takes off. Each passenger will then be checked before boarding the plane using the Advance Passenger Information System. The text foresees the possibility to apply sanctions to those carriers that have not duly transmitted data or that have transmitted it in an incomplete or false manner.

Further, Art. 6 foresees that after all the passengers have entered, the authorities responsible for carrying out border checks shall delete the data within 24 hours after transmission “unless the data are needed later for the purposes of exercising the statutory functions of the authorities responsible for carrying out checks on persons at external borders in accordance with national law”. This last phrase was introduced after being proposed by the UK following the 11 March 2004 events in Madrid. Member states need to comply with the Directive no later than 5 September 2006.

### **3.3 What are the next steps in EU policy as regards borders?**

#### *New technologies and biometrics*

The key concern, in the post-9/11 and post-3/11 political environment, is to secure both visas and resident permits issued to third-country nationals admitted into the EU territory. To do this, a revision of two legislative initiatives was undertaken: first, a Proposal for a Council Regulation amending Regulation (EC) No. 1683/95 laying down a uniform format for visas; second, a Proposal for a Council Regulation amending Regulation (EC) No. 1030/2002 laying down a uniform format for residence permits for third-country nationals.<sup>119</sup> What are the main changes introduced in the new proposals? Member states made it clear that they will include biometric identifiers into the uniform format of both documents. By biometric

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<sup>119</sup> Proposal for a Council Regulation amending Regulation (EC) No. 1683/95 laying down a uniform format for visas and Regulation (EC) COM(2003) 0558 final-CNS 2003/0218, and the Proposal for Council Regulation (EC) No. 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2003) 0558 final-CNS 2003/0218, 24.9.2003.

identifiers the proposal specifically means: a facial image and fingerprints.<sup>120</sup> It should, however, be highlighted that mandatory biometric identifiers are not restricted to the travel documents of third-country nationals. Indeed, under pressure from the US, the EU will need to incorporate biometric technologies in all EU citizens' passports by October 2006.<sup>121</sup>

### *The Visa Information System*

The European Council of Thessaloniki on 19 and 20 June 2003 held that “a coherent approach is needed in the EU on biometric identifiers or biometric data which would result in harmonised solutions for documents for third-country nationals, EU citizens' passports and information systems (Visa Information System – VIS and the second generation of the Schengen Information System – SIS II)”. The project of setting up a VIS was decided upon by the Council in June 2002 following recommendations by both the Laeken and Seville European Councils. It is a system for the exchange of visa data among member states.

The main objectives of the VIS are to: facilitate the fight against the use of fraudulent documents; ameliorate visa consultation; improve identifications for the application of provisions in relation to Dublin II and the return procedure; enhance the administration of the common visa policy; prevent ‘visa shopping’ by ensuring the ‘traceability’ of every individual applying for a visa and strengthen EU internal security.

The VIS will comprise two interfaces: a central Visa Information System (C-VIS) and a national Visa Information System (N-VIS). Unfortunately, nothing is said about the functioning and interaction between these two systems. Logically, it may be foreseen that the C-VIS will be maintained centrally by the Commission. The N-VIS will be operated by the member states. The member states may be obliged through the N-VIS to send all specified information regarding any application for a short-stay visa (including biometric information) to the C-VIS, where it is stored. All participating member states will be entitled to consult the C-VIS (through their N-VIS) when considering a visa application to ensure that the information given by the individual is correct and consistent with that previously provided.

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<sup>120</sup> Art. 4.a of the proposal states that “The uniform format for [the] visa shall contain a facial image, which shall function as interoperable biometric identifier and two fingerprint images of the holder. The fingerprints shall be taken from flat fingers”.

<sup>121</sup> Initially, the deadline set by the US was 26 October 2005.

In conjunction with this, the European Justice and Home Affairs Council of 19 February 2004 adopted conclusions on the architecture, functionalities and biometric identifiers to be included in the future European visa system. All visas and residence permits issued to third-country nationals by member states will contain biometric data about them that can be checked against the C-VIS. The latest element in this evolution is Council Regulation (EC) No. 2252/2004 of 13 December 2004, which lays down the standards for security features and biometrics in travel documents issued by member states.<sup>122</sup>

### *The Schengen Information System II*

In its Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings,<sup>123</sup> the Commission reconfirmed the need to develop the second generation of the SIS to better fight against terrorism and transitional crime.<sup>124</sup> One of the main original objectives in developing the SIS II was to establish a system allowing the integration of the new EU member states in the EU's network (SIS was only designed for a maximum of 18 member states). Nevertheless, the exact content (in particular the new categories of alerts on property and persons) as well as the real limits on the functions and the users that will be incorporated into SIS II have not been openly decided by the Council.<sup>125</sup> It is presently uncertain what shape the system will finally take in the long-term. Yet the schedule to implement it has already been set for early 2007. As Statewatch

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<sup>122</sup> According to the Annex of the Commission Communication on the Hague Programme, COM(2005) 184 final, 10.5.2005 (op. cit.), the technical implementation of the VIS, starting with the functionalities for processing alphanumeric data and photographs and adding the functionalities for biometric data is expected by 2006. The provisions laid down by this proposal are applicable to the UK, Ireland and Denmark.

<sup>123</sup> See the Commission's Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM(2003) 323 final, Brussels, 3.6.2003; see also the Commission Staff Working Paper, *Annual report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents*, SEC(2004) 1349, European Commission, Brussels, 25.10.2004.

<sup>124</sup> The UK and Ireland are not yet part of the SIS, yet it is expected that the UK will become a member by the end of 2005 and Ireland will join shortly afterwards.

<sup>125</sup> A proposal by the European Commission on SIS II legal instruments is expected before the end of 2005 – see the European Parliament's recommendation to the Council on the second-generation Schengen Information System (SIS II), A5-0398-2003, 7.11.2003.

has recently expressed, the question now is whether there is any possibility at all for democratic input or whether the system is already a *fait accompli*.<sup>126</sup> The Council has recently defined a rather flexible set of functional requirements as well as the scope and architecture that the system could have at a preliminary stage.<sup>127</sup> A communication on enhanced synergies between the SIS II, VIS and EURODAC is to be presented by the European Commission by 2006.<sup>128</sup>

#### 4. Asylum

According to the Tampere Conclusions, a common European asylum system should include in the short term ('first phase instruments'): a determination of the state responsible for the examination of an asylum application; common standards for fair and efficient asylum procedures; common minimum conditions for the reception of asylum seekers; and the approximation of rules concerning the recognition and content of refugee status (i.e. what it confers). This should be completed with 'second-phase measures' on subsidiary forms of protection offering an appropriate status to any person in need of such protection.<sup>129</sup> Member states have now agreed upon the foundations required by the Tampere Conclusions to accomplish in the first phase for the progressive establishment of a common asylum policy. The Hague Programme calls for the final evaluation of the transposition and implementation of the first-phase legal instruments by 2007.

Compliance with the 1951 Geneva Convention on Refugees and the 1967 Protocol relating to the Status of Refugees, the prohibition of expulsion or 'principle of *non-refoulement*'<sup>130</sup> as well as other relevant international

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<sup>126</sup> B. Hayes, *SIS: Fait accompli? Construction of EU's Big Brother Database Underway*, Statewatch Analysis, Statewatch, London, May 2005.

<sup>127</sup> See European Council, SIS II functions, 10125/04, Brussels, 3.6.2004; see also Council of the European Union, Plan of approach for the discussion and approval of the SIS II functions SISI/SIRENE WG, 5117/04, Brussels, 7.1.2004.

<sup>128</sup> See the annex of the Commission's Communication on the Hague Programme, COM(2005) 184 final, Brussels, 10.5.2005 (op. cit.); see also the Commission's Communication on the development of the Schengen Information System II and possible synergy with a future Visa Information System (VIS), COM(2003) 771 final, Brussels, 11.12.2003, point 1.2.2.

<sup>129</sup> Adoption of the second-phase instruments and measures is expected before the end of 2010.

<sup>130</sup> Art. 33 of the Convention relating to the status of refugees, entitled "Prohibition of expulsion or return (*'refoulement'*)", stipulates that "No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

human rights treaties should have represented the point of departure and main philosophy underlying any policy measure dealing with asylum.<sup>131</sup> As many NGOs, civil society organisations and academics have worryingly expressed,<sup>132</sup> it seems however that so far the set of EU legislation agreed is characterised by low standards and common denominators that may leave too much room for discretion in hands of the member states.

Asylum is a human rights issue. Thus, any common measure should have at its roots the prevention of watering down the current standards and commitments of international protection. For example, adequate reception conditions should be provided to asylum seekers until the final stage of the asylum application and not only at the very beginning.

Since the Amsterdam Treaty (1999), the EU has adopted nine policy instruments dealing with asylum:

- Council Decision 2000/596/EC of 20 September 2000 establishing a European Refugee Fund;<sup>133</sup>
- Council Regulation (EC) No. 2000/2725 of 11 December 2000 concerning the establishment of ‘EURODAC’;<sup>134</sup>
- Council Directive 2001/55/EC of 20 July 2001 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;<sup>135</sup>

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threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

<sup>131</sup> For instance, Art. 14.1 of the Universal Declaration of Human Rights (1948) provides that “Everyone has the right to seek and to enjoy in other countries asylum from prosecution”.

<sup>132</sup> See the Press Release by the European Council on Refugees and Exiles (ECRE), Amnesty International and Human Rights Watch, “Refugee and Human Rights Organizations across Europe express their deep concern at the expected agreement on asylum measures in breach of international law”, 28 April 2004.

<sup>133</sup> Council Decision 2000/596/EC of 20 September 2000 establishing a European Refugee Fund, OJ L 252/12, 6.10.2000.

<sup>134</sup> Council Regulation concerning the establishment of ‘EURODAC’ for the comparison of fingerprints for the effective application of the Dublin Convention of 11 December 2000, (EC) No. 2725/2000, OJ L 316, 15/12/2000.

<sup>135</sup> Council Directive 2001/55/EC of 20 July 2001 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

- Council Regulation (EC) No. 2002/407 of 28 February 2002 concerning certain rules for the implementation of the EURODAC Regulation;<sup>136</sup>
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers;<sup>137</sup>
- Council Regulation (EC) No. 2003/343 of 18 February 2003 (the Dublin II Regulation) – establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states;<sup>138</sup>
- Council Regulation (EC) No. 2003/1560 of 2 September 2003 laying down rules for the application of the Dublin II Regulation;<sup>139</sup>
- Council Decision 2004/904/EC of 2 December 2004 establishing the Second European Refugee Fund for the period 2005-2010;<sup>140</sup> and,
- Council Directive 2004/83/EC of 29 April 2004 (the Asylum Qualification Directive) on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection.<sup>141</sup>

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receiving such persons and bearing the consequences thereof, OJ L 212/12, 7.8.2001.

<sup>136</sup> Council Regulation laying down certain rules to implement Regulation (EC) No. 2725/2000 concerning the establishment of ‘EURODAC’ for the comparison of fingerprints for the effective application of the Dublin Convention of 28 February 2002, (EC) No. 407/2002, OJ L 62/1, 5.3.2002.

<sup>137</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6.2.2003.

<sup>138</sup> Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national of 18 February 2003, (EC) No. 343/2003, OJ L 50/1, 25.2.2003.

<sup>139</sup> Council Regulation laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national of 2 September 2003, (EC) No. 1560/2003, OJ L 222/3, 5.9.2003.

<sup>140</sup> Council Decision 2004/904/EC of 2 December 2004 establishing the Second European Refugee Fund for the period 2005-2010, OJ L 381/52, 28.12.2004.

<sup>141</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, OJ L 304/12, 30.9.2004.

Among them, following the same timeframe as that used in the previous sections dealing with migration-related policies (from 2002 to date), we present the five most important measures being adopted by the Council. Here too the thrust is to give a broad account of the legislative progress reached at the EU level in the field of asylum.

#### **4.1 Common minimum standards for the reception of asylum seekers**

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers sets out basic parameters for member states. Following Art. 3, it applies to all migrants and stateless persons who make an application for asylum at the border or in the territory of a member state as long as they are allowed to remain in the territory as asylum seekers and to family members if they are covered by such an application according to the national law.

The scope of the Directive covers those applying for status under the 1951 Geneva Convention, including those on appeal. Member states may apply it to persons asking for subsidiary forms of protection or those under the Dublin Convention. Therefore, anyone who applies for temporary protection can be excluded from reception conditions in EC law. The set of rights conferred to asylum seekers are to: receive information about any established benefits and the obligations with which they must comply relating to reception conditions, as well as about organisations or groups of persons that are provided with specific legal assistance; be provided with a document certifying his/her status; move freely within the territory of the receiving member state; maintain family unity; receive medical screening on public health grounds; obtain schooling and education for minor children; and, have conditional access to employment and vocational training. Art. 16 notes the cases in which the reduction or withdrawal of reception conditions may be justified. Member states needed to transpose it into their national legislations by 6 February 2005. As regards the position of the UK and Ireland on this particular Directive, only the former is subject to its application.

#### **4.2 Dublin II and EURODAC**

The Council Regulation establishing the criteria and mechanisms for determining the member state responsible for examining an asylum

application lodged in one of the member states by a third-country national 343/2003 (the Dublin II Regulation) was adopted on 18 February 2003.<sup>142</sup>

The Regulation replaces the previous Dublin Convention of 15 June 1990 determining the state responsible for examining asylum applications lodged in one of the member states of the European Community. The 1990 Dublin Convention did not really work because it probably imposed a disproportionate burden on the receiving states located at the periphery of the EU and it did not have EU-wide consequences.<sup>143</sup> The main modifications that have been introduced relate to the time limits relevant to identifying the member state responsible for examining the asylum application in the case of ‘irregular entry’.<sup>144</sup> Among the core principles of Dublin II, which primarily intend to allocate responsibility, we underline the following:

- 1) The responsibility for the examination of an asylum application lies with the member state where a link with the asylum seeker was first established. An asylum seeker will have only one chance to make an asylum application and thus the feared ‘asylum shopping’ will be avoided.
- 2) Any member state that has admitted an asylum seeker to the territory of the EU must determine the asylum application. A state will be responsible if, for example, it issued a valid visa to the person involved.
- 3) If an asylum seeker from a third country has irregularly crossed the border into a member state by land, sea or air, that member state will be ‘penalised’ and shall then examine the asylum application.

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<sup>142</sup> Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national of 18 February 2003, (EC) No. 343/2003, OJ L 50/1, 25.2.2003.

<sup>143</sup> For an analysis of the inadequacies the system suffered, see N. Blake, “The Dublin Convention and Rights of Asylum Seekers in the EU” in E. Guild and C. Harlow (eds), *Implementing Amsterdam; Immigration and Asylum Rights in EC Law*, Oxford: Hart Publishing, 2001, pp. 13-32.

<sup>144</sup> Where it has been proven that an asylum seeker has crossed the border into a member state irregularly, that member state will be the one responsible for examining the asylum claim for up to 12 months after the date when the border was crossed. After this period expires, the responsibility for examining the claim will rest with member state in which the asylum seeker was living for a period of at least five months. See K. Hailbronner, “Asylum Law in the Context of a European Migration Policy” in N. Walker (ed.), *Europe’s Area of Freedom, Security and Justice*, Oxford: Oxford University Press, 2004, pp. 41-89.

- 4) A negative recognition of decisions prevails – once an asylum application has been considered by one member state, the case will not be examined by any other member state. Yet there is not a mutual recognition of those applications that have been declared ‘positive’.

Adversely, this system may bring a number of negative consequences to those states accepting persons in need of international protection (i.e. who exercise their human right to seek asylum). These consequences are becoming more problematic with the EU enlargement process. A large number of asylum seekers’ claims are being presented in the new member states as in many cases they now define the new external EU border or the point of entry where the asylum applications need to be examined according to the Dublin II Regulation. Hence there is a shift of the ‘burden’ of EU asylum policy onto these countries.

The Council Regulation concerning the establishment of EURODAC was the first measure adopted under Title IV of the EC Treaties and it was conceived as an instrument supplementing the regime installed by the Dublin II Regulation.<sup>145</sup> Both the UK and Ireland have taken part in the adoption and application of the Dublin II Regulation and EURODAC. Its main objective is to assist in the determination of the state responsible for examining an asylum application according to the Dublin II Regulation.<sup>146</sup> EURODAC is a computerised database including information (such as fingerprints) about any individual applying for asylum in a Dublin II country, any person who might be found irregularly crossing the Dublin II borders (and who were not turned back) and data relating to foreigners with an irregular immigration status in a member state.<sup>147</sup> Every member state is under the obligation to fingerprint these three different categories of persons and send the data to the EURODAC Central Unit, which is managed by the European Commission

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<sup>145</sup> Council Regulation concerning the establishment of ‘EURODAC’ for the comparison of fingerprints for the effective application of the Dublin Convention of 11 December 2000, (EC) No. 2725/2000, OJ L 316, 15/12/2000, p. 0001-0010.

<sup>146</sup> E. Brouwer (2002), “EURODAC: Its Limits and Temptations”, *European Journal of Migration and Law*, Vol. 4, pp. 231-47.

<sup>147</sup> See Arts 5.1, 8.2 and 11.2 of the Regulation. In particular, according to Art. 5.1 concerning the recording of data, it is provided that the following shall be noted in the central database: a) member state of origin, place and date of the application for asylum; b) fingerprint data; c) gender; d) reference number used by the member state of origin; e) date on which the data were transmitted to the Central Unit; f) date on which the data were entered in the central database; and g) details concerning the recipient(s) of the data transmitted and the date(s) of transmission(s).

(Directorate-General for Justice, Freedom and Security). This central database contains an Automated Fingerprint Identification System (AFIS) that will receive the data and transmit ‘hit/no hit’ replies to national units (national access points) located in each of the member states. The Commission published the second annual report on the activities of the EURODAC Central Unit on 20 June 2005.<sup>148</sup>

Compulsory fingerprinting and registration are likely to mean that asylum-seekers and irregular migrants can more easily be identified and monitored if they seek to move from one EU country to another. Yet, the current official call for an enhanced interoperability and accessibility of databases at the EU level,<sup>149</sup> and the possibility to link up with the SIS II (see section 2.2.5), could raise serious questions as to the boundaries and proportionality of such databases, the potential interference with the right of privacy/data protection and Art. 8.2 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950.<sup>150</sup> It seems that member states at times apply lower standards for respecting the individual’s private life and data protection when they are persons not holding their nationality.

### 4.3 The European Refugee Fund

The second European Refugee Fund was adopted at the 2 December 2004 meeting of the Justice and Home Affairs Council.<sup>151</sup> Contrary to the rest of the legal instruments analysed in this section, the European Refugee Fund

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<sup>148</sup> See the European Commission Staff Working Paper, *Second Annual Report to the Council and the European Parliament on the activities of the EURODAC Central Unit*, SEC(2005) 839, Brussels, 20.6.2005; see also European Commission Staff Working Paper, *First Annual Report to the Council and the European Parliament on the Activities of the EURODAC Central Unit*, SEC(2004)557, Brussels, 5.5.2004, point 3, which provides information on the figures and findings between 15 January 2003 and 15 January 2004.

<sup>149</sup> European Commission, Communication, *Towards enhancing access to information by law enforcement agencies*, COM(2004) 429 final, Brussels, 16.6.2004.

<sup>150</sup> Art. 8 of the ECHR, entitled “Right to respect for family and private life”, stipulates “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

<sup>151</sup> Council Decision 2004/904/EC of 2 December 2004 establishing the second European Refugee Fund for the period 2005-2010, OJ L 381/52, 28.12.2004.

(ERF) provides funds for projects for refugees and asylum seekers. The first generation of the ERF, established by the Council Decision of 28 September 2000, ended in 2004. To build on its achievements, the second generation (ERF II) is set to run from 2005 to 2010. The rationale of the ERF is to promote collective action and solidarity among member states in the area of asylum and displaced persons. The UK and Ireland are taking part in the application of this Decision. The relevant groups of persons to whom the scope of the Decision applies are those who:

- a) have the status of refugee and are residing lawfully in the territory of a member state;
- b) are “authorised to reside in one of the member states on the basis that [they] require international protection within the framework of a resettlement scheme”;<sup>152</sup>
- c) are receiving subsidiary protection granted by a member state;
- d) have lodged an application for protection under one of the aforementioned categories; and
- e) are permitted to reside in a member state on the basis of temporary protection as laid down in Council Directive 2001/55/EC.

After the groups are defined, the Decision goes on to outline specific activities eligible for ERF support. These fall under three headings:

- reception conditions and asylum procedures;
- integration of the target groups mentioned above; and
- voluntary return of the beneficiaries of the protections mentioned above.

The ERF II will be implemented in two multi-annual programmes extending for a period of three years each, 2005-07 and 2008-10.

#### **4.4 The Asylum Qualification Directive**

The creation of a comprehensive approach to the *problématique* of asylum in the European Union involves three parameters that are equally important and cross-linked: the approximation of rules, the recognition of refugees and the content of refugee status. These parameters and their implications are what

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<sup>152</sup> European Commission, Proposal for a Council Decision establishing the European Refugee Fund for the period 2005-2010, Art. 3, COM(2004) final, Brussels, 12.02.2004.

the Qualification Directive sets out.<sup>153</sup> The Directive also highlights the grounds for which non-nationals may qualify for subsidiary protection.<sup>154</sup>

To clarify the distinction between a refugee and a “person eligible for subsidiary protection”, the Directive provides definitions of both concepts. First, the category of refugee is applicable to:

a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it.<sup>155</sup>

Second, a person eligible for subsidiary protection is, under the terms of the Directive, “a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of stateless person, to his or her country of former habitual residence, would face real risk of suffering serious harm”.<sup>156</sup>

The definition of a refugee is, as it appears, a faithful rendition of Art.1A of the Geneva Convention. In examining the application for this status, member states carefully assess the substance and credibility of the claims made by the applicant. Two elements are investigated: the acts of and the reasons for persecution. It is the connection between these two factors that determine whether an application for a refugee status is well grounded or not.<sup>157</sup> The necessity to establish this link before the status is granted mirrors the distinction drawn by the Directive between qualification as a refugee and the qualification for subsidiary protection. Indeed, it seems as though for subsidiary protection the key point is not the link between the act of and the

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<sup>153</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, OJ L 304/12, 30.9.2004.

<sup>154</sup> In contrast to Denmark, the UK and Ireland have decided to take part in the application of the Directive.

<sup>155</sup> Art. 2 of Council Directive 2004/83/EC of 29 April 2004 (op. cit.).

<sup>156</sup> Art. 2.e, *ibid.*

<sup>157</sup> Art. 9.3, *ibid.*

reasons for suffering “serious harm” but the very nature of the acts. In this light, what matters is whether the applicant would face serious harm if returned to the country of origin.<sup>158</sup>

In terms of the rights granted, refugees and beneficiaries of subsidiary protection are not treated equally. In other words, some rights accorded to persons granted subsidiary protection are diminished in relation to refugees without any attempt to explain why. Of course, beneficiaries of both refugee status and subsidiary protection have equal access to education, accommodation and integration facilities. Moreover, they both enjoy freedom of movement within the host member state. Yet, on matters bearing on employment (Art. 26.4), social welfare (Art. 28.2) and health care (Art. 29.2), states are permitted to deviate from the general rule, that is, “equal access under equal conditions as nationals”. A clear example of this is in respect to access to employment-related education. The Directive provides that “Member States shall ensure that beneficiaries of subsidiary protection status have access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience, *under equivalent conditions as nationals*”.<sup>159</sup> In contrast, beneficiaries of subsidiary protection, may enjoy the same rights, but “*under conditions to be decided by the Member States*”.<sup>160</sup> This generates concern as to how the rights attached to the different statuses discussed are determined. How is this double-standard policy consistent with the general philosophy of equality of treatment for people in need of and who qualify for international protection?

Concerning refugee status, its cessation, revocation or the refusal to renew it may be justified if the circumstances that led to the acquisition of the status cease to exist, if the refugee acquires a new nationality or becomes a threat to public order or security in the host state. By the same token, an applicant will cease to be eligible for subsidiary protection as soon as the conditions that justified the acquisition of subsidiary protection terminate. In order to comply with the rules laid down, member states shall bring into force all the necessary laws, regulations and administrative instruments before 10 October 2006.

#### **4.5 What are the next steps in EU policy as regards asylum?**

The Hague Programme reinforces the idea of the ‘external dimension of asylum’, i.e. integrating asylum into the EU’s external relations with third

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<sup>158</sup> Art. 15, *ibid.*; this is consistent with Art. 3 of the ECHR.

<sup>159</sup> Art. 26.2, *ibid.*; emphasis added.

<sup>160</sup> *Ibid.*; emphasis added.

countries. The programme invites the Commission “to develop EU-Regional Protection Programmes (RPP) in partnership with the third countries concerned and in close consultation and cooperation with UNHCR”.

Upcoming proposals may be a programme for protection in the regions of origin, as well as a communication on cooperation between asylum authorities.<sup>161</sup> According to the Action Plan implementing the Hague Programme,<sup>162</sup> the Commission is to present a proposal before the end of 2005 extending the so-called ‘EC long-term resident status’ to refugees.

### *The Asylum Procedures Directive*

On 9 November 2004, the Council agreed on a Council Directive on minimum standards for procedures in member states for granting and withdrawing refugee status – the Asylum Procedures Directive.<sup>163</sup> The minimum standards established by the Directive are as those provided in the 1951 Geneva Convention. The Directive represents an important step towards the achievement of the goal highlighted in the Tampere Conclusions to achieve a common asylum policy and a uniform status for those granted asylum that is valid throughout the Union. The Directive presents a rather contentious system for dealing with asylum applications and lays down common requirements for inadmissible and manifestly unfounded cases.

The Commission first presented its proposal for the Directive in September 2000.<sup>164</sup> The Laeken European Council of 14 and 15 December 2001 asked the Commission to submit an amended version, which was ready by June 2002. After agreeing on a ‘general approach’ in April 2004, the Council finally reached political agreement in November 2004. The UK and Ireland gave notice of their intention to take part in the adoption and application of this Directive.

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<sup>161</sup> S. Peers, “Key Legislative Developments on Migration in the European Union”, *European Journal of Migration and Law*, Vol. 6, No. 2, May 2004, pp. 243-76.

<sup>162</sup> See footnote 20.

<sup>163</sup> See the Amended Proposal for a Council Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status, Council of the European Union, 2000/0238 (CNS), 14203/04 Asile 64, Brussels, 9.11.2004; see also the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 326 final, Brussels, 3.7.2002.

<sup>164</sup> See the first version of the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 578 final, Brussels, 20.9.2000.

The UNHCR, NGOs and civil society organisations across Europe have raised serious concerns about the incompatibility of this Directive with international obligations, the legal dimension of human rights and the lack of procedural guarantees for accurate assessments and fair treatment of asylum seekers.<sup>165</sup> They have stressed the urgent need to amend or delete some of its provisions in order to comply with the obligation of *non-refoulement* as enshrined by the Geneva Convention on Refugees.

The Directive does not appear to provide for the possibility that the person involved may remain in the territory of the receiving state until the final appeal against the denial of asylum. In view of this, the measure seems to confer too much room for discretion to the member states to derogate “minimum provisions” and apply the exception. The introduction in Art. 27 of the “safe third country” concept is also a very critical element, as it absolves the state where the claim is being presented from the obligation to provide actual protection and not *refouler*. Finally, the possibility that the asylum seeker may be sent to a ‘safe country’ that may have not ratified the Geneva Convention on Refugees or any other international human right instrument is most critical.

The Directive has at last been adopted without including the principles with respect to the designation of safe third countries that was originally provided in Annex I of the document. There was an apparent lack of agreement about the ‘safety’ of some of the countries listed.<sup>166</sup> The ten countries in question were Benin, Botswana, Cap Verde, Ghana, Senegal, Mali, Mauritius, Costa

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<sup>165</sup> The UN High Commissioner for Refugees (UNHCR), the European Union, Asylum and the International Refugee Protection Regime, *UNHCR’s recommendation for the new multi-annual programme in the area of freedom, security and justice*, September 2004. See also the UNHCR’s Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, Council Document 14203/04, Asile 64, Brussels, 19.11.2004; and also UNHCR Press Release on 30 April 2004, “UNHCR regrets missed opportunity to adopt high EU Asylum standards”; and the European Council on Refugees and Exiles (ECRE), *Comments on the Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, ECRE, Brussels, March 2005.

<sup>166</sup> Following Point I of Annex I of the Proposal for Directive COM(2002) 326 final, Brussels, 03.07.2002, the requirements for designating a country as ‘safe’ are the following two: first, the country consistently observes the standards laid down in international law for the protection of refugees; and second, it consistently observes basic standards laid down in international human rights law from which there may be no derogation in time of war or other public emergency threatening the life of the nation.

Rica, Chile and Uruguay.<sup>167</sup> This contentious list will be presented separately in a proposal by the Commission to be adopted by QMV in the Council, after consulting the European Parliament. Nevertheless, Parliament will consider, as it previously did with the Directive on the right to family reunification (see section 2.1.2), whether to bring a legal challenge before the ECJ in Luxembourg because of serious doubts as regards the compliance of this Directive with the ‘freedom dimension’ in general and the potential human rights violations that are quite likely to arise at times of national implementation.<sup>168</sup>

### *A single procedure*

The Thessaloniki European Council Conclusions of June 2003 (point 26) called on the Commission to deliver on two objectives. The first of these is to “explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection”; the second is to “examine ways and means to enhance the protection capacity of regions of origin”.<sup>169</sup> Moreover, point 27 of the Conclusions urges the Commission to frame this new approach, which aims at reinforcing the asylum procedures to make them more efficient and accelerate the processing of applications that are not related to international protection.

Two integrated Communications have ensued, concerning:

- the external aspects of asylum and a single procedure (COM(2004) 410 final, 4 June 2004); and
- the external aspects of asylum processing concerning a more efficient common European asylum system and the single procedure as the next step (COM(2004) 503 final, 15 July 2004).

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<sup>167</sup> See the Immigration Law Practitioners’ Association (ILPA), *Analysis and Critique of the Council Directive on minimum standards for granting and withdrawing refugee status*, ILPA, London, July 2004 (retrieved from <http://www.ilpa.org.uk/>). In its critique, the ILPA points out the fact that at present some member states do not currently operate safe country-of-origin systems and consequently, if that list is adopted, they will have to water down their standards of protection.

<sup>168</sup> See European Parliament, *Working Document on Asylum Minimum Standards on Procedures for Granting and Withdrawing Refugee Status*, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Wolfgang Kreissl-Dörfler, 2 March 2005.

<sup>169</sup> Presidency Conclusions of the Thessaloniki European Council (op. cit.).

Both Communications advocate taking steps towards a single procedure in order to increase speed and efficiency.<sup>170</sup> Further, the rationale behind the single procedure initiative results from the discrepancy that arises from the different personal scope foreseen by the Asylum Qualification Directive (which includes refugee status, subsidiary protection and other forms of international protection) and the Asylum Procedures Directive (which is only applicable to refugee status).

Specifically, the first of the Communications (COM(2004) 410 final) discusses and advances targeted suggestions on how to meet the objectives set by the Thessaloniki Conclusions. It owes much to the seminar organised in Rome under the aegis of the Italian presidency in October 2003. On that occasion, participating member states examined two main ways of processing asylum applications external to the EU, that is: the resettlement scheme and protected entry procedure. The former aims at processing requests for protection essentially in the region of origin. The latter, by contrast, is meant to “allow a non-national to approach the potential host state outside its territory with a claim for asylum or other forms of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final”.<sup>171</sup> Yet, at the conclusion of the seminar, it became clear that participating member states leaned heavily towards a wider application of the resettlement scheme.

On the operational side, this Communication proposes that the objectives of the Thessaloniki Conclusions (point 26) are inserted into EU regional protection programmes. Actually, the programmes are part of the external aspects of EU asylum and migration policies. They run in parallel with the Country & Regional Strategy Papers (see section 2.1.4 on the link between migration and development).

A single procedure could play a key role in avoiding abuse of the asylum system for entry into the EU. Thus the second Communication (COM(2004) 503 final) defines the grounds for a single, inclusive procedure for persons in

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<sup>170</sup> For an analysis of the reasons why a single procedure would be the most efficient system for the EU member states to develop, see K. Hailbronner and J. van Selm, *Single Procedure: “The One-Stop Shop”*, Migration Policy Institute (MPI), Policy Brief presented at the Presidency Conference organised by the Netherlands Ministry of Justice on Future European Union Cooperation in the Field of Asylum, Migration and Frontiers, Amsterdam, 31 August - 3 September 2004.

<sup>171</sup> European Commission, Communication on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin, COM(2004) 410 final, Brussels, 4.6.2004, point 14.

need of international protection in order to speed up the process and reinforce its overall efficiency. The end goal is to reach a genuinely single procedure, that is, a procedure with a single authority, making a single decision. Additionally, these efforts seek to ensure that the basic principles and guarantees of the Asylum Procedures Directive cover applications for subsidiary protection. Indeed, applications for asylum and subsidiary protection should be governed by standards, including access to the procedure, examination requirements, interviews, rules on legal assistance and principles for withdrawal and the right to remain in the member state pending examination.<sup>172</sup> These standards are guidelines that would inform the construction of a single EU procedure under Community law. It is expected that after the preparatory phase has been completed the Commission will bring forward a proposal for Community legislation.

## **5. Main Causes of the Low Level of Convergence: Tendencies, Approaches and Vulnerabilities**

What has been the degree of convergence as regards migration, borders and asylum? A truly Community-wide policy remains under construction. If we look at the latest semi-annual scoreboard published by the European Commission in the first half of 2004, which reviews the progress to date towards the development of an AFSJ,<sup>173</sup> the expected level of policy convergence in some key fields has certainly not been reached. The lack of agreement concerning labour/economic migration and admission procedures is a very good example of the poor level of convergence in important policy areas. Further, an in-depth examination of some provisions included in the EU's legislative instruments reveals surprisingly low minimum standards (which might put international and European human rights commitments at risk), wide discretion for member states' application and substantial exceptions even to core elements (rights and freedoms), which permit wide practical divergence in the national arena.

Indeed, serious difficulties have been encountered in seeking a consensus inside the Council on some of these legislative steps. A CEPS Working

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<sup>172</sup> European Commission, Communication on external aspects of asylum processing: A more efficient common European asylum system – The single procedure as the next step, COM(2004) 503 final, Brussels, 15.07.2004.

<sup>173</sup> European Commission, *The Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations – List of the most important instruments adopted*, Commission Staff Working Paper, COM(2004) 401 final, Brussels, 2.6.2004.

Document published in 2003<sup>174</sup> identified a series of reasons for the persistence of frictions and strains in the JHA arena, which have negative effects primarily on efficiency. To summarise, the paper underlined:

- 1) a lack of political resolve in European cooperation – the EU suffers from weak legitimacy in these areas. Member states are at times ambivalent, pushing for some policy instruments and then failing to implement them correctly in their national legislation;
- 2) divergent operations and approaches of the national legal systems and lack of trust; differences between the traditional legal systems of the member states could lead to deep points of conflict and cause tensions between them;
- 3) inconsistency as a result of the rotating EU presidency – political priorities change (policy shifts) and evolve in a different manner under each presidency; and
- 4) the unsatisfactory and unclear situation stemming from the development of policy under both the EC first pillar and the EU third pillar.

Unfortunately, most of these obstacles to policy approximation are still valid; further, we can add four more fundamental reasons that could explain the deficiencies, resistances and controversies that beset this policy domain in an enlarging EU.

First, the dividing line between national sovereignty (intergovernmental cooperation) and EU competences (the Community method) is very much at stake. The whole field used to reside exclusively in hands of states, forming essential parts of the traditional concept of national sovereignty and the power to exercise control. In this context, ‘security’ was the *domaine réservé* of member states.<sup>175</sup> It appears that some member states are still struggling to keep the monopoly of control over their national competences and decisions on immigration and asylum against the ‘communitarisation process’. Indeed, the power to select entrants or include non-nationals (*jus includendi*) along

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<sup>174</sup> See J. Apap and S. Carrera, *Progress and Obstacles in the Area of Justice and Home Affairs in an Enlarging Europe*, CEPS Working Document No. 194, CEPS, Brussels, June 2003, pp. 9-11.

<sup>175</sup> On the transformation of the security relations between the states see T. Balzacq, “Qu’est-ce que la sécurité nationale?”, *La Revue Internationale et Stratégique*, Vol. 52, Hiver 2003-04, pp. 33-50; see also B. Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, second edition, Boulder, CO: Lynne Rienner and Hemel Hempstead: Harvester Wheatsheaf, 1991; and also D.A. Baldwin, “The Concept of Security”, *Review of International Studies*, Vol. 23, No. 1, 1997, pp. 5-26.

with the power expel or exclude unwanted migrants (*jus excludendi*) still remains a fundamental ingredient of state sovereignty.<sup>176</sup>

Second, immigration and asylum policies reveal sensitive attitudes towards the treatment of ‘the other’, which are directly related to questions of nationality and citizenship, perceptions of statehood and nationhood as well as national and EU identities. All these issues are indeed very sensitive for populations across Europe, and they have often been dangerously misused and questioned at times of national elections as well as before and during every EU enlargement process. The current hesitation and lack of political courage professed by some member states’ authorities to face reality and agree with their EU counterparts on a coherent legal framework, which recognises and facilitates a *de facto* human mobility, a multidimensional diversity and effective protection of asylum seekers is still the main obstacle to a genuinely common policy that promotes social cohesion, stability and liberty.

Third, a weakness common to previous EU initiatives is that the decision-making process on regular migration remains outside the scope of QMV by the Council and the co-decision procedure as provided by Art. 251 of the EC Treaties.<sup>177</sup> By a decision taken on 22 December 2004, the Council agreed to act by QMV as regards measures under Arts 62.1.2a and 3 EC Treaty – which include abolishing internal border controls on persons, standards on checks on persons at the internal borders and freedom to travel within the EU for three months for third-country nationals. In addition, it applies QMV to Arts 63.2.b and 3.b, burden-sharing regarding asylum seekers and illegal immigration, along with the residence and repatriation of illegal residents. None of the other EU fields of immigration and asylum, such as regular migration issues, are included. They remain subject to the unanimity

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<sup>176</sup> F. Pastore, “Visas, Borders, Immigration: Formation, Structure and Current Evolution of the EU Entry Control System” in N. Walker (ed.), *Europe’s Area of Freedom, Security and Justice, Academy of European Law*, European University Institute, Oxford: Oxford University Press, 2004.

<sup>177</sup> This applies with the exception of some visa-related policies, such as the Schengen negative visa list and the common visa format. The Presidency Conclusions of the Brussels European Council, 4-5 November 2004 (op. cit.) state that “The European Council asks the Council to adopt a decision based on Art. 67.2 TEC immediately after formal consultation of the European Parliament and no later than 1 April 2005 to apply the procedure provided for in Art. 251 TEC to all Title IV measures to strengthen freedom, subject to the Nice Treaty, except for legal migration”.

requirement.<sup>178</sup> Nevertheless, the efficiency that QMV could bring to the decision-making process would not solve the wider problem of a lack of legitimacy and quality from which most of these policies suffer.

Finally, the integration of the Schengen borders *acquis* into the EU legal and institutional framework by the Amsterdam Treaty has not truly materialised. The legal basis of the acts adopted under the Schengen umbrella can be found in Title IV of the EC Treaty (Art. 62).<sup>179</sup> Yet, all the Schengen instruments dealing with police and judicial cooperation in criminal matters still remain under Title VI of the TEU (the EU third pillar).<sup>180</sup> Therefore, any cooperation in these fields continues to be based on a purely intergovernmental method. This duality in the location of Schengen policies between the first and third pillars results in a lack of transparency and efficiency in these policies, involving different decision-making procedures and different roles of the European Parliament and the ECJ, depending on the pillar framework in which the policies fall. Thus, while much of the Schengen *acquis* dealing with the crossing of the EU's common external borders has Art. 62 EC Treaty as its legal base, instead of replacing Schengen-related measures with Community measures, the Council of Ministers has chosen to continue developing most of these instruments under the Schengen/third pillar regime, with dubious legal consequences and democratic legitimacy (for instance, the European Commission and European Parliament are excluded from the decision-making process).<sup>181</sup>

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<sup>178</sup> Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure set out in Art. 251 of that Treaty, OJ L 396/45.

<sup>179</sup> For example, Art. 62 EC Treaty states, "The Council, acting in accordance with the procedure referred to in Art. 67, shall within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: 1. measures with a view to ensuring, in compliance with Art. 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders".

<sup>180</sup> Art. 29 TEU provides that "The Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action [for]...closer cooperation between police forces, customs authorities and other competent authorities in the member states".

<sup>181</sup> See para. 70 of the European Court of Justice Judgment *Commission v. Council*, Case C-257/01 of 18 January 2005. In para. 70 the ECJ states that,

In that quite specific and transitional situation, prior to the evolution of the Schengen *acquis* within the legal and institutional framework of the European Union, no objection can be made to the Council having established a procedure for the transmission by the Member States of

This blurred situation has given rise to incoherence, particularly as regards border practices and methods, as well as to uncertainty in the eye of the individual.

## 6. Conclusions: The Way Forward for Immigration, Borders and Asylum Policy

At this point, we move from a critical discussion of the legislative instruments in the fields of immigration, borders and asylum to considering the possibility of achieving policy optimisation in these areas. This step in the discussion goes some way towards putting forward policy recommendations that emerge from our analysis and examining why the operational side of these policies (which is what the conclusions are partly about) seems unsatisfactory. Our policy recommendations mainly intend to promote legitimacy, efficiency, equality and solidarity as the core principles guiding policy harmonisation in the EU.

In general terms, most of the policy developments concerning immigration, borders and asylum can be qualified as of considerable importance and as remarkable steps towards a closer Union. Yet the overall legislative convergence achieved since the Amsterdam Treaty has been rather low, and at times, poorly developed. Further, the main *problématique* in relation to a majority of the legal measures analysed here resides in their actual impact, and lack of full compatibility with the principles of legitimacy, efficiency, equality and solidarity.

In particular, as regards the field of regular migration, the final output from the Council Directives on long-term resident status and the right to family reunification have been rather disappointing. Both Directives negatively link access to the set of rights they confer (for inclusion) to compliance by migrants with a series of restrictive conditions left in the hands of the member states (i.e. exclusion). For example, the requirement to comply with mandatory integration conditions in order to have access to rights (or be included in the receiving society) is most worrying. The very values of an intercultural society (diversity/heterogeneity) and social cohesion may be gravely endangered. This trend could set the fair and equal treatment paradigm highlighted in the Tampere Conclusions as a rather utopian milestone. Further, potential annulment by the ECJ (the judicial

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amendments which they are authorized to make, unilaterally or in collaboration with the other Member States, to certain provisions of the CCI or the CM, the contents of which depend exclusively on information which they alone possess. Such complaint could succeed only if it were established that the procedure thereby put into practice was such as to prejudice the effective or correct implementation of the CCI or the CM.

accountability aspect) of some of the contested provisions inserted in the Council Directive on the right to family reunification will profoundly influence the very nature of all other existing and future migration-related instruments.

Particularly problematic is the continuing failure to reach a political agreement on issues surrounding economic/labour migration, as well as admission procedures. A consensus among the member states on this important matter needs to be achieved urgently for the sake of the EU's future, social cohesion and the prosperity of all.

The texts adopted in the area of irregular migration provide a gamut of instruments to fight against unauthorised entry, transit and residence in the territory of the EU. Human trafficking and smuggling is now severely sanctioned. Further, the penal framework to curb the facilitation of illegal migration is up and running. To some extent, these punitive instruments reflect an order of preference in the focus of policy action. In contrast, the EU has been less imaginative in designing effective policies to tackle the root causes of illegal migration.

The EU's policies towards immigration are suborned by a technical understanding of border control. The legal basis of instruments adopted in relation to borders is the Schengen *acquis*, which has been moved to Title IV of the EC Treaty. As discussed earlier, instead of replacing Schengen-related instruments with fully communitarian measures taken under proper procedures, the Council has chosen to continue developing the Schengen *acquis* under the intergovernmental framework, leading to mixed results. Specifically, the fight against illegal migration and the political need to track the movement of third-country nationals within the EU has produced a variety of databases, the operation of which raises controversial questions. Yet, it is important to recognise that what is at stake is not the utility of these databases per se, but their proportionality *vis-à-vis* their use. It is unclear how the EU intends to address the risk of 'function creep' (the use of data for purposes other than those for which they were gathered) associated with the use of databases. Little reference is made to the users of the Visa Information System or the manner (if at all) individuals whose data are stored will be informed. Finally, the EU has not yet attempted to respond to concerns about how long the data collected will be stored.

On asylum, the current legislative harmonisation is characterised by a set of minimum standards that fall below international and European human rights commitments. This situation is completely unacceptable. As advocated here, full compliance with the 1951 Geneva Convention on Refugees, the 1967 Protocol Relating to the Status of Refugees and the prohibition of expulsion (the principle of *non-refoulement*) should have represented the point of

departure and main philosophy underlying any policy dealing with asylum, particularly the external dimension of asylum. There is a pressing need to revisit and amend some of the provisions agreed under the first-phase instruments. As will be seen during the monitoring of the transposition and implementation of these legal measures, it is quite likely that some directives, such as the one dealing with asylum procedures, will lead to fundamental rights violations.

## 7. Policy Recommendations

The establishment of a common EU policy in the areas of immigration, borders and asylum consists not simply of enacting more EU legislation or tightening up border controls. It entails the creation and consolidation of a system that places legitimacy, efficiency, equality and solidarity at the heart of its development, as elaborated below.

**Legitimacy.** Any legislative measure dealing with immigration, borders and asylum needs to respect the human rights instruments and international/EU commitments that all EU member states are party to and hence bound by. Respect for the fundamental rights and freedoms of every human being (liberty) and the rule of law (justice) needs to be taken as the guiding star in every security measure being developed. Although at first glance this idea may sound obvious, as we have shown in this analysis, it has not always been applied. ‘Security’ only comes from the respect and protection of human rights and fundamental freedoms through the rule of law.

**Efficiency.**<sup>182</sup> The ongoing struggle between national and EU competences (i.e. the communitarian vs. intergovernmental method) as regards immigration, borders and asylum policies should be resolved on the side of EU competence. A proactive EU policy would avoid narrow, nationally oriented and nation-state views of the politics and philosophies concerning these areas. Also, the obscure and ambiguous situation in which policies that deal with these matters reside in both the EC first pillar and the EU third pillar needs to be resolved as a matter of priority for the sake of efficiency, efficacy, transparency and democratic/judicial accountability. The entry into force of the EU Constitutional Treaty would have greatly helped to achieve this key goal and tackle the majority of the current deficiencies, vulnerabilities and obstacles.

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<sup>182</sup> For an analysis of the concept of efficiency in relation to Justice and Home Affairs policies, see M. Anderson and J. Apap, *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union*, CEPS, Brussels, 2002, pp. 25-28.

**Equality.** Fair and equal treatment between EU citizens and third-country nationals should be the real goal pursued in any immigration and asylum-related measure. A higher level of policy convergence that recognises and facilitates this paramount goal is urgently needed. Following the Tampere European Council Conclusions, it is necessary to establish a common EU framework by which legally resident, third-country nationals would have a status as near as possible to that of the nationals of EU member states. Indeed, facilitating equality of treatment and full access to economic, social, cultural, religious and political rights and freedoms should be the focus of efforts. Along these lines, specific recommendations include:

- The set of mandatory integration conditions (the lack of integration as a ground for refusal of the secure status) that have been included in the Council Directives on the right to family reunification and long-term resident status should be revisited.
- The transitional arrangements applied to workers coming from eight of the ten new EU member states should be abolished in conformity with the right of equal treatment and non-discrimination on grounds of nationality, as enshrined by the EC legal framework and the proactive case law of the European Court of Justice.
- A constructive agreement on labour/economic migration as well as on admission conditions needs to be given a priority status. The full inclusion of third-country nationals into the receiving labour markets is important for the sake of social cohesion and the future of the EU.
- Finally, the present lack of an EU framework on access to judicial redress by third-country nationals needs to be addressed as soon as possible. A legislative proposal on minimum judicial guarantees for individuals in relation to decisions regarding the removal of persons (and of third-country nationals in particular) should be put in place to ensure proper juridical protections and access to effective legal and judicial remedies.

**Solidarity.** Migration will increase in the EU. Common policies and strategies that recognise this phenomenon and the *de facto* intercultural European Union, and that directly tackle the negative consequences that these trends may provoke in the receiving societies (i.e. exclusion, racism and xenophobia) are therefore essential. Effective and comprehensive policies that combat racism, xenophobia and discrimination are needed to protect and guarantee a cohesive society. A close scrutiny of the adequate and timely implementation of the EU framework on equal treatment, i.e. the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC), as well as the

Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC), must be carried out.

In summary, strengthening the EU area of freedom, security and justice has been identified as a strategic objective for the period 2005-09.<sup>183</sup> The policies developed in this field are sources and expressions of the kind of identity and image that the EU wants to promote about itself. Because perceptions of identity and image evolve, policies on immigration, borders and asylum are bound to change. Whatever transformations they may undergo, these policies must not become divorced from principles that make the EU a distinctive area of freedom, security and justice. All this calls for a reinvigoration of serious concerns about liberty within a democratic tradition that has always had at its core the emancipation of individuals.

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<sup>183</sup> European Commission, Communication from the President in agreement with Vice-President Wallström, Strategic Objectives 2005-2009, Europe 2010: A partnership for European renewal, prosperity, solidarity and security, COM(2005) 12 final, Brussels, 26.1.2005.

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## Annex 1

### Division of Competences and Institutional Settings for Policy between the First and Third Pillars

<b>EC FIRST PILLAR</b>	<b>EU THIRD PILLAR</b>
<p>Title IV Treaty Establishing the European Community (TEC), <i>Visas, Asylum, Immigration and other Policies related to Free Movement of Persons</i> Arts 61-69</p>	<p>Title VI Treaty on European Union (TEU), <i>Provisions on Police and Judicial Cooperation in Criminal Matters</i> Arts 29-43</p>
<p><i>Community method</i> – the entry into force of the Amsterdam Treaty on 1 May 1999 brought these matters into the European Community Frame-work</p>	<p><i>Intergovernmental method (national sovereignty)</i> – the core objective in these areas is to provide citizens with a high level of safety by developing common action in the fields of police and judicial cooperation in criminal matters.</p>
<p><i>Legal Instruments</i></p> <p>Art. 249 EC Treaty – Regulations, Directives, Decisions, Recommendations and Opinions</p>	<p><i>Legal Instruments</i></p> <p>Art. 34 TEU – Framework Decisions, Common Positions, International Conventions, etc.</p>
<p><i>Institutional Arrangements and Decision-making Process</i></p> <p>The main competence for decision-making in this area lies in the hands of the European Union institutions (the European Commission, European Parliament and the Council).</p>	<p><i>Institutional Arrangements and Decision-making Process</i></p> <p>The main competence for decision-making lies with the national ministries of justice and interior. The European Commission, European Parliament and national parliaments play a secondary role in the decision-making process (Art. 34 TEU).</p>

\* Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure set out in Art. 251 of that Treaty, OJ L 396/45.

<p>Art. 67 TEC provides that the Council shall act unanimously on a proposal from the Commission or on the initiative of a member state, after consulting the European Parliament. On 22 December 2004, the Council adopted a decision* applying as of 1 January 2005 the co-decision procedure (Art. 251 EC Treaty) and qualified majority voting to all Title IV-related legal instruments, except those dealing with “regular migration”.</p>	<p>To date the decision-making has been purely intergovernmental and member states hold the exclusive right of initiative. All these factors bring a lack of legitimacy, transparency and a worrying democratic and judicial deficit.</p>
<p style="text-align: center;"><i>Main JHA Policies</i></p> <ul style="list-style-type: none"> <li>• Crossing external borders</li> <li>• Asylum</li> <li>• Regular and irregular immigration</li> </ul>	<p style="text-align: center;"><i>Main JHA Policies</i></p> <ul style="list-style-type: none"> <li>• Police cooperation</li> <li>• Judicial cooperation in criminal matters</li> <li>• The fight against organised crime and terrorism</li> <li>• Irregular immigration and the fight against trafficking and smuggling of human beings</li> </ul>
<p style="text-align: center;"><i>Judicial Supervision</i></p> <p>The European Court of Justice (ECJ) may receive preliminary questions from courts against whose decisions there is no judicial remedy under national law (Art. 68 EC Treaty).</p>	<p style="text-align: center;"><i>Judicial Supervision</i></p> <p>The member states may declare that they accept the jurisdiction of the ECJ to give preliminary rulings and may specify which national courts may do so (Art. 35 TEU).</p>

## Annex 2

### The Ten Policy Priorities for Freedom, Security and Justice over the Next Five Years\*

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- *Fundamental rights and citizenship: Creating fully-fledged policies*  
Ensure the full development of policies monitoring and promoting respect for fundamental rights for all people and of policies enhancing citizenship.
- *The fight against terrorism: Working towards a global response*  
Focus on different aspects of prevention, preparedness and response in order to further enhance, and where necessary complement, the capabilities of member states to fight terrorism, in relevant areas such as recruitment, financing, risk analysis, protection of critical infrastructures and consequence management.
- *A common asylum area: Establishing an effective harmonised procedure in accordance with the Union's values and humanitarian tradition*  
Work towards the establishment of a common asylum area, taking into account the humanitarian tradition and respect of international obligations of the Union and the effectiveness of a harmonised procedure.
- *Migration management: Defining a balanced approach*  
Define a balanced approach to migration management by developing a common immigration policy that addresses legal migration at Union level, while further strengthening the fight against illegal migration, smuggling and trafficking in human beings, in particular women and children.
- *Internal borders, external borders and visas: Developing an integrated management of external borders for a safer Union*  
Further develop an integrated management of external borders and a common visa policy, while ensuring the free movement of persons.

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\* Based on the European Commission's Communication on the Hague Programme, COM(2005) 184 final, Brussels 10.5.2005 (op. cit.); see also the website information dossier prepared by the Commission, "Strengthening the European Union as an area of freedom, security and justice" (retrieved from [http://europa.eu.int/comm/justice\\_home/news/intro/news\\_intro\\_en.htm](http://europa.eu.int/comm/justice_home/news/intro/news_intro_en.htm)).

- *Integration: Maximising the positive impact of migration on our society and economy*

Develop supportive measures to help member states and deliver better policies on integration so as to maximise the positive impact of migration on our society and economy and to prevent the isolation and social exclusion of immigrant communities. This will contribute to understanding and dialogue between religions and cultures, based on the fundamental values of the Union.

- *Privacy and security in sharing information: Striking the right balance*

Strike the right balance between privacy and security in the sharing of information among law enforcement and judicial authorities, by supporting and encouraging a constructive dialogue between all parties concerned to identify balanced solutions, while fully respecting fundamental rights of privacy and data protection, as well as the principle of availability of information as laid down in the Hague Programme.

- *Organised crime: Developing a strategic concept*

Develop and implement a strategic concept on tackling organised crime at the EU level. Make full use of and further develop Europol and Eurojust.

- *Civil and criminal justice: Guaranteeing an effective European area of justice for all*

Guarantee a European area of justice by ensuring an effective access to justice for all and the enforcement of judgments. Approximation will be pursued, in particular through the adoption of rules ensuring a high degree of protection of persons, with a view to building mutual trust and strengthening mutual recognition, which remains the cornerstone of judicial cooperation. Improve the EU substantive contract law.

- *Freedom, Security and Justice: Sharing responsibility and solidarity*

Give practical meaning to notions of shared responsibility and solidarity between member states by providing adequate financial resources that can meet the objectives of freedom, security and justice in the most efficient way.

### Annex 3

## A Selection of ECJ Case Law on Immigration, Borders and Asylum

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- Case 26/62, *Van Gend & Loos* [1963] ECR 3
- Case 167/73, *Commission v. French Republic* [1974] ECR 359
- Case 181-73, *Haegeman* [1974] ECR 449
- Case 36/74, *Walrave and Koch* [1974] ECR 1405, [1975] 1 CMLR 320
- Case 40/76, *Kermaschek* [1976] ECR 1669
- Case 149/79, *Commission v. Belgium* [1980] ECR 3881
- Case C-243/91, *Taghavi* [1992] ECR I-4401
- Case C-30/77, *Bouchereau* [1977] ECR 1999
- Case 222/84, *Johnston* [1986] ECR I-1651
- Case 53/81, *Levin* [1982] ECR 1035
- Case 104/81, *Kupferberg* [1982] ECR 3641
- Case 59/85, *Reed* [1987] ECR 1283
- Case 316/85, *Lebon* [1987] ECR 2811
- Case 12/86, *Demirel* [1987] ECR 3719
- Case 222/86, *Heylens* [1987] ECR 4097
- Case 9/88, *Lopes da Veiga* [1989] ECR 2989
- Case C-192/89, *Sevince* [1990] ECR I-3461
- Case 292/89, *Antonissen* [1991] ECR I-745
- Case C-18/90, *Kziber* [1991] ECR I-199
- Case C-213/90, *Association de soutien aux Travailleurs Immigrés (ASTI)*  
[1991] ECR I-3507
- Case C-369/90, *Micheletti* [1992] ECR I-4239
- Case C-370/90, *Singh* [1992] ECR I-4265
- Joined Cases C-92/92 and C-326/92, *Collins* [1993] ECR I-5145
- Case 434/93, *Bozkurt* [1994] ECR I-1475
- Case C-171/95, *Tetik* [1997] ECR I-329

- Case C-285/95, *Kol* [1997] ECR I-3069
- Case C-36/96, *Günaydin* [1997] ECR I-5179
- Case C-85/96, *Martinez Sala* [1998] ECR I-2691
- Case C-98/96, *Ertanir* [1997] ECR I-5179
- Case C-149/96, *Portugal v Council* [1999] ECR I-8395
- Case C-162/96, *Racke* [1998] ECR I-3655
- Case C-262/96, *Sürül* [1999] ECR I-2685
- Case C-314/96, *Djabali* [1998] ECR I-1149
- Case C-336/96 *Gilly* [1998] ECR I-2793
- Case C-348/96, *Calfa* [1999] ECR I-11
- Case C-416/96, *El Yassini* [1999] ECR I-1209
- Case C-1/97, *Birden* [1998] ECR I-7747
- Case C-113/97, *Babahenini* [1998] ECR I-183
- Case C-340/97, *Nazli* [2000] ECR I-957
- Case C-37/98, *Savas* [2000] ECR I-2927
- Case C-224/98, *D'Hoop* [2002] ECR I-06191
- Case C-281/98, *Angonese* [2000] ECR I-4139
- Case C-33/99, *Fahmi and Cerdeiro-Pinedo Amado* [2001] ECR I-2415
- Case C-63/99, *Gloszczuk* [2001] ECR I-06369
- Case C-95/99, *Khalil* [2001] ECR I-7413
- Case 184/99, *Grzelczyk* [2001] ECR I-6193
- Case C-192/99, *Kaur* [2001] ECR I-1237
- Case C-235/99, *Kondova* [2002] ECR I-6427
- Case C-257/99, *Barkoci & Malik* [2002] ECR I-6557
- Case C-268/99, *Jany* [2001] ECR I-8625
- Case C-413/99, *Baumbast* [2002] ECR I-6591
- Case C-459/99, *MRAX* [2002] ECR I-6591
- Case C-60/00, *Carpenter* [2002] ECR I-6279
- Case C-162/00, *Pokrzepowicz-Meyer* [2002] ECR I-01049

- Case C-188/00, *Kurz, né Yüce* [2000] ECR I-10691
- Case C-438/00, *Kolpak* [2003] ECR I-4135
- Case C-100/01, *Olazabal* [2002] ECR I-10981
- Case C-109/01, *Akrich* [2003] ECR I-9607
- Case C-171/01, *Wählergruppe Gemeinsam Zajedno/Birlikte Alternative Grüne GewerkschafterInnen/UG* [2003] ECR I-4301
- Case C-224/01, *Köbler* [2003] ECR I-10239
- Case C-23/02, *Alami* [2003] ECR I-1399
- Joined Cases C-317/01 and C-369/01, *Abatay*, 21 October 2003
- Case C-465/01, *Commission v. Austria*, 16 September 2004
- Joined Cases C-502/01 and C-31/02, *Silke Gaumain-Cerri*, 8 July 2004
- Case C-148/02, *Garcia Avello*, 2 October 2003
- Case C-200/02, *Zhu and Chen*, 19 October 2004
- Case C-467/02, *Inan Cetinkaya*, 11 November 2004
- Case C-456/02, *Michel Trojani*, 7 September 2004
- Case C-145/03, *Keller*, 12 April 2005
- Case C-341/02, *Commission v. Germany*, 14 April 2005
- Case C-209/03, *Bidar*, 15 March 2005
- Case C-265/03, *Simutenkov*, 12 April 2005
- Case C-540/03, *European Parliament v. Council*, case pending
- Case C-77/05, *United Kingdom and Ireland v. Council*, case pending

## Annex 4

# List of the Main EU Legislation and Initiatives on Immigration, Borders and Asylum

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### Legally Binding Instruments

#### *Regulations*

- 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. 2004/2007, OJ L 349/1, 25.11.2004.
- Council Regulation laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national of 2 September 2003, (EC) No. 1560/2003, OJ L 222/3, 5.9.2003.
- Council Regulation extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the grounds of their nationality of 14 May 2003, (EC) No. 859/2003, OJ L 124, 20.5.2003.
- Council Regulation amending 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 of 6 March 2003, (EC) No. 453/2003, OJ L 69/10, 13.3.2003.
- Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ('Dublin II') of 18 February 2003, (EC) No. 343/2003, OJ L 50/1, 25.2.2003.
- Council Regulation laying down certain rules to implement Regulation (EC) No. 2725/2000 concerning the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of the Dublin Convention of 28 February 2002, (EC) No. 407/2002, OJ L 62/1, 5.3.2002.

Council Regulation laying down a uniform format for residence permits of third-country nationals of 13 June 2002, (EC) No. 1030/2002, OJ L 157, 15.6.2002.

Council Regulation concerning the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of the Dublin Convention of 11 December 2000, (EC) No. 2725/2000, OJ L 316, 15.12.2000.

### *Directives*

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, OJ L 304/12, 30.9.2004.

Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77, 30.4.2004.

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L 321, 6.12.2003.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6.2.2003.

Council Directive 2001/55/EC of 20 July 2001 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, OJ L 212/12, 7.8.2001.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

Council Directive 2000/43/EC of 19 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000.

### *Decisions*

Council Decision 2004/904/EC of 2 December 2004 establishing the Second European Refugee Fund for the period 2005-2010, OJ L 381/52, 28.12.2004.

Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, OJ L 261/28, 6.8.2004.

Council Decision 2000/596/EC of 20 September 2000 establishing a European Refugee Fund, OJ L 252/12, 6.10.2000.

Council Decision 1999/436/EC of 20 May 1999 determining the legal basis for each of the provisions or decisions that constitute the *acquis*, OJ L 176, 10.7.1999.

### **Some Legislative Initiatives**

Proposal for a Regulation on the establishment, operation and use of the second generation Schengen information system (SIS II), COM(2005) 236 final, 2005/0106 (COD), Brussels, 31.5.2005.

Proposal for a Council Decision on the establishment, operation and use of second generation Schengen information system (SIS II), COM(2005) 230 final, Brussels, 31.5.2005.

Proposal for a Regulation regarding the access to the Second Generation Schengen System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates, COM(2005) 237 final, 31.05.2005.

Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders, COM(2004) 391 final, Brussels, 26.5.2004.

Amended Proposal for a Council Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status, Council of the European Union, 2000/0238 (CNS), 14203/04 Asile 64, Brussels, 9.11.2004.

Proposal for a Council Directive setting out special rules for admission of researchers, COM(2004) 178 final, Brussels, 16.03.2004.

Proposal for a Council Regulation amending Regulation (EC) No. 1683/95 laying down a uniform format for visas and Regulation (EC) COM(2003) 0558 final-CNS 2003/0218, and the Proposal for Council Regulation (EC) No. 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2003) 0558 final-CNS 2003/0218, 24.9.2003.

Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employment economic activities, COM(2001) 386 final, 11.7.2001.

### **Non-legally Binding Instruments**

Communication on the Hague Programme: Ten priorities for the next five years – The partnership for European renewal in the field of freedom, security and justice, COM(2005) 184 final, Brussels, 10.5.2005.

Communication on the draft joint employment report 2004/2005, COM(2005) 13 final, Brussels, 27.1.2005.

Communication from the President in agreement with Vice-President Wallström, Strategic Objectives 2005-2009, Europe 2010: A partnership for European renewal, prosperity, solidarity and security, COM(2005) 12 final, Brussels, 26.1.2005.

Green Paper on an EU approach to managing economic migration, COM(2004) 811 final, Brussels, 11.1.2005.

Communication on the first Annual Report on Migration and Integration, COM(2004) 508 final, Brussels, 16.7.2004.

Communication on the study on the links between legal and illegal immigration, COM(2004) 412 final, Brussels, 4.6.2004.

Communication, Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future orientations, COM(2004) 4002 final, Brussels, 2.6.2004.

Commission Staff Working Paper, *The Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations – List of the Most Important Instruments Adopted*, COM(2004) 401 final, Brussels, 2.6.2004.

Communication on strengthening the implementation of the European employment strategy, COM(2004) 339 final, Brussels, 7.4.2004.

- Communication on external aspects of asylum processing: A more efficient common European asylum system – The single procedure as the next step, COM(2004) 503 final, Brussels, 15.7.2004
- Communication on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin, COM(2004) 410 final, Brussels, 4.6.2004.
- Communication on the development of the Schengen Information System II and possible synergy with a future Visa Information System (VIS), COM(2003) 771 final, Brussels, 11.12.2003.
- Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM(2003) 323 final, Brussels, 3.6.2003.
- Communication on immigration, integration and employment, COM(2003) 336 final, Brussels, 3.6.2003.
- Communication to the Council and the European Parliament to present an action plan for the collection and analysis of community statistics in the field of immigration, COM(2003) 179 final, Brussels, 15.4.2003.
- Commission Staff Working Paper, *Choosing to grow: Knowledge, Innovation and Jobs in a Cohesive Society, Report to the Spring European Council, on the Lisbon Strategy of Economic, Social and Environmental Renewal*, SEC(2003) 25, Brussels, 21.3.2003.
- Communication on the future of the European employment strategy (EES), a strategy for full employment and better jobs for all, COM(2003) 6 final, Brussels, 14.1.2003.
- Opinion of the European Economic and Social Committee on immigration, integration and the role of civil society organisations, SOC/075, Brussels, 21.3.2002.
- Communication on integrating migration issues in the European Union's relations with third countries, COM(2002) 703 final, Brussels, 12.2.2002.
- Communication to the spring European Council in Barcelona, the Lisbon Strategy – Making change happen, COM(2002) 14 final, Brussels, 15.1.2002.
- Communication on an open method of coordination for the Community immigration policy, COM(2001) 387 final, Brussels, 11.7.2001.

- Communication on a common policy on illegal immigration, COM(2001) 0672 final, Brussels, 15.11.2001.
- Council Resolution on limitations on admission of third-country nationals to the territory of the member states for the purpose of pursuing activities as self-employed persons of 30 November 1994.
- Council Resolution on limitations on admission of third-country nationals to the territory of the member states for employment of 20 June 1994.
- Council Resolution on the harmonisation of national policies on family reunification, adopted by the European immigration ministers in Copenhagen on 1 and 2 June 1993.
- Commission of the European Communities (1985), White Paper from the Commission to the European Council, Completing the Internal Market, COM(85) 310 final, Brussels, 14.6.1985, Part One: The Removal of Physical Barriers.

### **Council Presidency Conclusions**

- Presidency Conclusions of the Brussels European Council, Annex I: The Hague Programme – Strengthening Freedom, Security and Justice in the European Union, 4 and 5 November 2004, 14292/04, Brussels, 8 December 2004.
- Presidency Conclusions of the Thessaloniki European Council, 19-20 June 2003, 11638/03, Brussels, 1 October 2003.
- Presidency Conclusions of the Seville European Council, 21-22 June 2002, SN 13463/02, Brussels, 24 October 2002.
- Presidency Conclusions of the Laeken European Council, 14-15 December 2001, SN 00300/01, Brussels.
- Presidency Conclusions of the Lisbon European Council, 23-24 March 2000, Brussels.
- Presidency Conclusions of the Tampere European Council, 15-16 October 1999, SN 200/99, Brussels.

## About CHALLENGE

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The familiar world of secure communities living within well-defined territories and enjoying all the celebrated liberties of civil societies is now seriously in conflict with a profound restructuring of political identities and transnational practices of securitisation. CHALLENGE (the Changing Landscape of European Liberty and Security), is a European Commission-funded project that seeks to facilitate a more responsive and responsible assessment of the rules and practices of security. It examines the implications of these practices for civil liberties, human rights and social cohesion in an enlarged EU. The project analyses the illiberal practices of liberal regimes and challenges their justification on the grounds of emergency and necessity.

The objectives of the CHALLENGE project are to:

- understand the convergence of internal and external security and evaluate the changing character of the relationship between liberty and security in Europe;
- analyse the role of different institutions in charge of security and their current transformations;
- facilitate and enhance a new interdisciplinary network of scholars who have been influential in the re-conceptualising and analysis of many of the theoretical, political, sociological, legal and policy implications of new forms of violence and political identity; and
- bring together a new interdisciplinary network of scholars in an integrated project, focusing on the state of exception as enacted through illiberal practices and forms of resistance to it.

The CHALLENGE network is composed of 21 universities and research institutes selected from across the EU. Their collective efforts are organised under four work headings:

- *Conceptual* – investigating the ways in which the contemporary re-articulation and disaggregation of borders imply a dispersal of practices of exceptionalism; analysing the changing relationship between new forms of war and defence, new procedures for policing and governance, and new threats to civil liberties and social cohesion.
- *Empirical* – mapping the convergence of internal and external security and transnational relations in these areas with regard to national life;

assessing new vulnerabilities (e.g. the 'others' targeted and critical infrastructures) and lack of social cohesion (e.g. the perception of other religious groups).

- *Governance/polity/legality* – examining the dangers to liberty in conditions of violence, when the state no longer has the last word on the monopoly of the legitimate use of force.
- *Policy* – studying the implications of the dispersal of exceptionalism for the changing relationship among government departments concerned with security, justice and home affairs, along with the securing of state borders and the policing of foreign interventions.

### **The CHALLENGE Observatory**

The purpose of the CHALLENGE Observatory is to track changes in the concept of security and monitor the tension between danger and freedom. Its authoritative website maps the different missions and activities of the main institutions charged with the role of protection. By following developments in the relations between these institutions, it explores the convergence of internal and external security as well as policing and military functions. The resulting database is fully accessible to all actors involved in the area of freedom, security and justice. For further information or an update on the network's activities, please visit [www.liberstysecurity.org](http://www.liberstysecurity.org).

