

DISCUSSION PAPER

Yves Pascouau

**The future of the
area of freedom, security and justice**

**Addressing mobility, protection and
effectiveness in the long run**

Acknowledgements and Task Force Members

The European Policy Centre would like to thank the King Baudouin Foundation for supporting this project on the future of Justice and Home Affairs policy in the Post-Stockholm Programme landscape.

This report has been written on the basis of the Post-Stockholm Programme Task Force set up by the EPC in December 2012 to inform the discussions taking place in the run-up to 2014.

The EPC gathered a core group of relevant stakeholders and experts to discuss all the thematic areas in Justice and Home affairs. While the responsibility for the content of this paper lies with the author, the latter would like to thank all those listed below who attended and contributed to the Task Force through the series of workshops throughout 2013. He would in particular like to thank those who accepted to comment on earlier drafts of this paper.

In addition, the author would like to thank Alexander Lazarowicz for his involvement all along the project and Andreia Ghimis for her help during the drafting of this discussion paper.

Stephan Auer	European External Action Service
Rosa Balfour	European Policy Centre
Luigi Berlinguer	Member of European Parliament
Pierre Berthelet	Researcher
Therese Blanchet	Council Legal Service
Jakub Boratynski	European Commission
Hugo Brady	Centre for European Reform
Israel Butler	Open Society European Institute
Gennaro Capo	Permanent Representation of Italy to the EU
Åsa Carlander	Permanent Representation of Sweden to the EU
Mugurel Chivu	Permanent Representation of Romania to the EU
Liz Collett	Migration Policy Institute - Europe
Oronzo Console	Permanent Representation of Italy to the EU
Raquel Correia	Permanent Representation of Portugal to the EU
Jean-Louis De Brouwer	European Commission
Mieneke De Ruyter	Permanent Representation of the Netherlands to the EU
Marianne Dony	Université Libre de Bruxelles
Leila El-Fahimi	European Commission
Lut Fabert-Goossens	European External Action Service
Carlo Ferrari	Permanent Representation of Italy to the EU
Bruno Frans	Police Judiciaire Fédérale of Belgium
Janusz Gaciarz	Permanent Representation of Poland to the EU
Madeline Garlick	United Nations High Commissioner for Refugees, Brussels Office
Roland Genson	Council Secretariat
Evelina Gudzinskaitė	Permanent Representation of Lithuania to the EU
Peter Hustinx	European Data Protection Supervisor
Alex Lazarowicz	European Policy Centre
Richárd Leyrer	Permanent Representation of Hungary to the EU
Filip Jasinski	Polish Ministry of Foreign Affairs
Jean Lambert	Member of European Parliament
Maciej Lewandowski	Permanent Representation of Poland to the EU
Tautginas Mickevicius	Permanent Representation of Lithuania to the EU
Etienne Pataut	Université de Paris I Panthéon-Sorbonne
Steve Peers	University of Essex
Philippe Percier	European External Action Service
Kris Pollet	European Council on Refugees and Exiles
Annabelle Roig Granjon	United Nations High Commissioner for Refugees, Brussels Office
Richard Szostak	European Commission
Raoul Ueberecken	Permanent Representation of Luxembourg to the EU
Constança Urbano de Sousa	Universidade Autónoma de Lisboa
Karen Vandekerckove	European Commission
Ann Vanhout	European External Action Service
Wouter Van de Rijt	Council Secretariat
Anne Weyembergh	Université Libre de Bruxelles

Executive Summary

The area of freedom, security and justice has been for the last 15 years one of the most dynamic of EU policy fields. Subject to significant Treaty changes, aiming to strengthen the incorporation of justice and home affairs at EU level, it has also been accompanied with three successive multiannual programmes – Tampere (1999); The Hague (2004) and Stockholm (2009) – setting for a five year period of time the agenda of actions.

With the Stockholm Programme coming to an end in 2014, the “Brussels Community” is increasingly agitated with a recurring question: what will replace the Stockholm Programme? Paradoxically, this uncertainty is fuelled by the existence of a new and clear Treaty provision – Article 68 TFEU – which states “The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice”.

Clear in its wording, this provision may lead to different understandings and unclear implications in practice. In order to provide more clarity, the European Policy Centre (EPC) set up a Task Force to reflect on the impact of this provision and more generally the future of the area of freedom, security and justice after 2014. Results of this process are reflected in this issue paper which addresses the process and content regarding the definition of future strategic guidelines.

Outcome and distributions of tasks

Drawing from Article 68 TFEU, past experiences and Task Force discussions, this paper comes to the conclusion that strategic guidelines for the legislative and operational planning should;

- set **policy orientations** in the field of justice and home affairs **for the next 10 to 20 years taking into account significant demographical, economic, political, social and technological changes** which have an impact over these policy fields;
- be **highly political, concise and avoid technical/technocratic language** so that citizens can be aware of and understand the objectives defined in the strategic guidelines;
- **reorganise the distribution of tasks between the European Council** – for the definition of strategic guidelines – **and the European Commission** – for the adoption of a detailed legislative and operational multiannual programme to achieve the strategic guidelines’ objectives.



Timing

Policies on border checks; asylum and immigration; as well as judicial cooperation in civil and criminal matters impact citizens and businesses on a daily basis. Defining strategic guidelines in these fields whilst taking into account a fast and ever changing world, is crucial and should be subject to a **large and well informed debate engaging relevant EU and national stakeholders and civil society**.

However, given that the tight schedule for the definition of the strategic guidelines is June 2014, where the process stands today, **this debate is not about to emerge**. While this paper fully respects the exclusive competence of the European Council to define strategic guidelines, it recommends the European Council to **postpone the adoption of the strategic guidelines to June 2015**. This would allow all relevant stakeholders – newly appointed EU institutions,

national authorities, civil society – to contribute to the debate and the European Council to define political guidelines on the basis of a large and informed debate. This would give a high level of accountability to the guidelines and provide for wider political and public support.

Challenges

The driving idea of the Task Force was to identify current shortcomings and appropriate policy measures and orientations to move ahead. While the paper addresses a series of concrete policy actions to be developed, the following general orientations concerning specific policy fields came across in the discussions.

Immigration, asylum and integration: given the reality of demographics and labour shortages, and taking into account the integration of national and European labour markets, the EU needs to plan and organise mobility to and within the EU. With respect to asylum, EU's policy regarding international protection inside and more particularly outside its territory is key. Protecting borders and saving peoples lives are two sides of the same coin and require the development of a broad, coherent and balanced immigration policy.

Internal security: protection of citizens living in the EU against internal and external threats will remain high on the political agenda. Future orientations should strike a better balance between security and freedom/justice concerns. Moreover, the development of new forms of criminality and threats, in particular due to technological progress, require the EU and Member States to be able to forecast new phenomenon, address the appropriate needs, and develop suitable solutions involving all relevant EU and national players.

Justice: citizens and businesses will not stop moving to and within the EU. Increasing their mobility for the sake of economic efficiency or to lift up legal and practical problems deriving from ever increasing cross border situations should drive the EU's policy in the short and long run. The effectiveness of judicial systems, as a source of protection and economic growth, should be a central target alongside with the right to access justice. In order to make the EU a real area of justice, common judicial culture among national authorities should be strengthened.

Finally, cross-cutting issues such as **external action; human rights; data protection and evaluation** are crucial crosscutting themes which have to be addressed in the field of justice and home affairs.

Three strategic pillars

Making the strategic guidelines understandable for all citizens requires the European Council to include policy orientations under affordable concepts. For the sake of understanding and in order to cover all the policy areas and challenges at stake, the paper proposes the strategic guidelines to be established on three pillars: **mobility, protection and effectiveness**.

Mobility: movement of people worldwide will remain a strong trend in the years to come and a highly debated issue. The mobility pillar would allow the EU to address a broad range of issues covering the management of people coming to and moving within the EU. Less negative than "immigration", the theme of mobility is also one which citizens could easily identify with and understand as a value rather than a burden.

Protection: this pillar could encapsulate three policy fields: internal security policies which aim at protecting citizens in the EU against threats; international protection policies which aim at granting protection to people fearing to be persecuted and justice policies which aim at protecting citizens in cross border situations and ensure economic efficiency. Such an approach would portray the complexity but also complementarity of EU actions and invite policy-makers to think in a more transversal manner

Effectiveness: citizens are requesting policy-makers to develop effective policies. Within the framework of the area of freedom, security and justice, effectiveness should cover the proper implementation of policies and measures in the Member States and their evaluation (*ex ante* and *ex post*) to assess their policy relevance.

Table of Content

Introduction	7
I. Programming in the area of freedom, security and justice: a “marque de fabrique”	8
A. From Tampere to Stockholm: three phases, three different outcomes	8
B “Post-Stockholm”: a new phase in a new environment	9
1. No treaty change	9
2. A new “normal mode”: the increasing role of new or previously side-lined institutions	9
3. The overarching impact of Article 68 TFEU	10
II. The process	11
A. The adoption of strategic guidelines	11
1. Not a programme but guidelines	11
2. Not a “Christmas tree” but policy orientations	12
3. Not necessarily a five-year document	12
B. A process led by the European Council	13
1. The European Council in the driving seat	13
2. The European Commission is invited	14
3. The European Parliament and EU agencies are side-lined	14
C. Timing as a central issue	15
1. The undesired scenario: June 2014	15
2. Preferable scenarios: December 2014 or June 2015	16
III. The content	17
A. Overarching themes	18
1. The impact of the economic crisis	18
2. Forthcoming challenges	19
3. Implementing mode vs strategic guidelines	20
B. Asylum, immigration and integration	21
1. Asylum	21
2. Immigration	24
3. Integration	26
C. Internal security	27
1. Better defining policy perspectives	27
2. Overcoming complexity and competition	28
3. Strengthening training	29
4. Balancing the content of the policy: approximation and/or implementation?	30
D. Justice	30
1. EU justice policy: the unknown policy	31
2. Simplifying rules	32
3. Options for the future	33
E. Transversal issues	34
1. External dimension	34
2. Data protection	36
3. Human rights	38
4. Evaluation	39
Conclusions	40

INTRODUCTION

For the last couple of months, all stakeholders dealing with justice and home affairs issues in Brussels – institutions, organisations, NGOs, trade unions, think tanks... – repeat the same question: “what will replace the Stockholm programme?” Whilst difficult for the everyday man to understand, this question is nonetheless a crucial one and should urgently leave the “Brussels arena” and be known to a wider public.

Indeed, what is lagging behind this weird jargon of “post-Stockholm programme” may well have a tremendous effect on citizens' everyday life. More precisely, the “Stockholm programme” is the multiannual programme which sets the EU legislative and operational agenda in a number of issues which concern citizens living in and moving within the EU: divorce, child custody, data protection, immigration, asylum, cross border crime, counter terrorism, criminal law, civil and criminal justice, etc.

As the Stockholm programme is coming to an end in December 2014, the question which is now becoming the centre of discussions relates to the document which is going to replace it. Answering that question is all but easy. It comes at a time when different parameters should be taken into account, which blurs the picture for a large number of players.

This discussion paper, based on a series of meetings organised within a Task Force set up by the European Policy Centre (EPC), intends to present some responses addressed not only to the usual “Brussels' stakeholders” but also to a greater number of people dealing with justice and home affairs issues in the EU Member States.

To do so, this discussion paper will set the scene and expose the basis and role of a multiannual programming exercise which took place in the area of freedom, security and justice over the last 15 years (I).

It will then address the main question related to the future of programming in this policy field. Firstly, and on the basis of changes that have occurred in the area of freedom, security and justice, **the discussion paper will demonstrate that the next phase, and the process of establishing it, will not resemble the previous ones.** In this regard the discussion paper aims to highlight two main elements. It will first take as a basis the **new provisions of the Lisbon Treaty** and explain the major changes deriving from it in terms of content and process. Secondly, it will consider the **timeframe within which the future strategic guidelines should be defined** and discuss the political dangers related to the definition of an agenda which does not enable relevant stakeholders to properly take part in the debate (II).

The discussion paper will then address issues of content. More specifically, it will try to identify which are the **main strategic options to be discussed** in each of the specific policy fields covered by the area of freedom, security and justice (immigration and asylum, internal security, justice and various transversal issues). This part of the discussion paper is mainly based on discussions which have taken place within the framework of the EPC Task Force and aims to provide for some ideas and proposals which could be part of the debate regarding the definition of further strategic guidelines in the area of freedom, security and justice (III).

Finally, the discussion paper will be concluded with some recommendations addressed to EU stakeholders who will be in charge of defining the future strategic guidelines in the area of freedom, security and justice (IV).

While developed within the framework of regular meetings which took place in 2013 in Brussels, this discussion paper aims to bring these debates related to the future of the area of freedom, security and justice outside the circle of national and Brussels-based experts.

This paper considers that challenges which are at stake today regarding the definition of future developments in the area of freedom, security and justice should not only be discussed between a limited number of specialists but should also be debated with a wider audience.

The paper recognises that future strategic guidelines in justice and home affairs should be defined, as enshrined into the Lisbon Treaty, by the European Council. Indeed, defining the strategic orientations for the Union and its Member States in such sensitive and crucial fields is a political commitment which should be endorsed at the EU's highest political level. However, this paper is also of the persuasion that such a political decision should be taken on the basis of a well-informed debate involving a wide range of international, European and national players and stakeholders, including citizens and their representatives.

I. Programming in the area of freedom, security and justice: a “marque de fabrique”

A. From Tampere to Stockholm: three phases, three different outcomes

The incorporation of justice and home affairs issues within the ambit of the European Union has been a long process, in particular because the transfer of sovereign powers to the European Union in these specific policy fields is difficult. As a consequence, the 'communitarisation' of national policies has not followed the usual method and has been accompanied with many derogations to the normal Community method.

Alongside Treaty derogations, the field of justice and home affairs has also been combined with the development of a specific process of **multiannual programming**. Such a process has three main functions: **defining the orientations of the policy, identifying the timeframe of steps to be taken and assessing whether the measures have been adopted.**

Starting with the Vienna programme in 1998, the real programming phase began in 1999 with the Tampere European Council conclusions. Adopted a few months after the entry into force of the Amsterdam Treaty, the Tampere conclusions have initiated the process leading to the adoption of multiannual programmes every 5 years.

The three successive programmes – Tampere (1999), The Hague (2004) and Stockholm (2009) – share some similarities. All the programmes adopted since 1999 were linked with a major or potentiality major Treaty change. The Tampere programme followed the entry into force of the Amsterdam Treaty. The Hague programme was adopted in parallel to the negotiation of the Constitutional Treaty. The Stockholm programme was adopted just after the entry into force of the Lisbon Treaty. Hence, these programmes are all linked with substantial institutional and material modifications.

On the other hand, all of the multiannual programmes mentioned have been adopted for a period of 5 years corresponding more or less with the EU policy cycle, i.e. the parliamentary and Commission legislature. It should nevertheless be underlined that this timeframe results principally from the Treaty provisions which have encapsulated some institutional and policy developments within this five-year period.

In the content however, the respective programmes are nevertheless quite different. As the first forward looking document adopted by the European Council in the field of justice and home affairs, the **Tampere conclusions** remains a specific document in its content and to a certain extent the cornerstone of this policy field. Adopted just after the transfer of some key justice and home affairs issues within the framework of Community law, this programme was adopted in a specific general context. The policy field was brand new and created huge expectations. The economic situation was fairly good and the majority of governments in the EU were quite open to liberal policies, in particular regarding immigration. Finally, the newly appointed Commissioner in this field, Antonio Vitorino, played a crucial and visionary role. In a positive context, where “all lights were green”, **the Tampere European Council adopted short, truly political oriented, forward looking and inspiring conclusions in the area of freedom, security and justice.** Although all the objectives set by the Tampere conclusions have not been achieved so far and remain relevant today, and some of which have been constitutionalised by the Treaty of Lisbon, these conclusions have not been repeated in neither format nor content.

The Hague programme was adopted in 2004. Following in parallel to the negotiations of the Constitutional Treaty this programme was different to the previous one in two main respects. The transformation of the political environment, due to the terrorist attacks in the US and on EU territory and the election of a growing number of conservative's governments, shifted the debate towards security concerns. Also of crucial importance was that, The Hague programme was established with the significant 2004 enlargement in mind. Furthermore, the development of a series of legal instruments over the five previous years changed the landscape and moved the priorities towards the implementation side of policies. **The Hague programme was the result of these dynamics which ended with the central aim of strengthening the area of freedom, security and justice.**

The Stockholm programme was adopted a few days after the entry into force of the Lisbon Treaty. The latter, in making a major step regarding the 'communitarisation' of justice and home affairs policies, was a strong basis for the European Council and policy orientations. Prepared a long time in advance and after a large consultation process, the Stockholm programme did not reach the level of expectations. Instead of taking advantage of a brand new Treaty to define the political lines justice and home affairs policies would follow in the subsequent years, the Stockholm programme acted as a magnet for all sorts of proposals and priorities of individual Member States. At the end of the process, the Stockholm programme comprised an enormous series of detailed objectives and measures compiled in a lengthy and hardly readable document. Moreover, instead of focusing on justice and home affairs issues, the Stockholm programme addressed issues not specific to this field, such as human rights or transparency, but also themes falling outside of the

scope of the area of freedom, security and justice, like freedom of movement of EU citizens. **At the end of the day, the Stockholm programme resembles more a “Christmas tree”, than a political document of orientation.**

Despite the differences between the programmes and the political environment surrounding their adoption, it is clear that the adoption of multiannual programmes has become a “marque de fabrique”. While these programmes have not always been able to set the strategic guidelines regarding the area of freedom, security and justice, they have nevertheless given ground to a strong culture where progress is evaluated against the background of a, sometimes overly, detailed programme. In this view, the adoption of the three successive programmes has put this large and crucial policy field under strain and left it with a certain duty to deliver.

B. “Post-Stockholm”: a new phase in a new environment

At the close of 2014, the Stockholm programme will come to an end. It is therefore assumed that a new programming phase will start. Whether this assumption will become a reality or not is unclear, but what is sure is that the context within which the next programming phase will take place is vastly different from the previous ones in many respects. This will have a significant impact on the so-called “Post-Stockholm phase”.

Such modifications have to be highlighted in order to understand the specific landscape within which the Post-Stockholm phase will be designed. First, there will be no Treaty change surrounding the programming phase (1). Second, the overall context will be more “normal” and will have a serious influence on the outcome and content of the process (2). Third, one Treaty provision – Article 68 Treaty on the functioning of the EU (hereinafter TFEU) – will definitely frame the whole process (3).

1. No treaty change

For the first time since the entry into force of the Amsterdam treaty in 1999, the programming phase taking place in the field of freedom, security and justice is not linked to a Treaty change. In this view, the forthcoming programming phase does not take place in a new political environment, with potential consequences for the process.

As a principle, the entry into force of a new Treaty opens new avenues for taking action and therefore creates a new and strong political impetus. This can be considered as a positive element. However, it is most often the case that new Treaties are accompanied by new legal and institutional frameworks which creates some sort of uncertainty as to how players act and interact and how new procedures interplay with old ones. This can make the process a bit more ambiguous.

The Post-Stockholm phase will not be surrounded by such a major political, institutional and legal modification. Therefore, to some degree this phase could be considered as the first one taking place in a new “normal mode”, i.e. on the basis of a stable “constitutional” framework.

2. A new “normal mode”: the increasing role of new or previously side-lined institutions

This new “normal mode” has first to be considered against the background of the considerable – not to say “impressive” – *acquis* the Union has adopted in the field of freedom, security and justice over the last 15 years. In this regard, defining further actions and orientations in these fields requires taking stock of what has been achieved, what remains to be implemented and what should be further developed.

The extensive amount of legislation in the field of immigration, asylum, criminal and justice cooperation requires relevant EU stakeholders involved in the process to act differently. Further action needs an in-depth evaluation of what has been achieved in terms of legislation and in particular in terms of implementation. On the basis of this thorough assessment, the post-Stockholm phase should identify the missing elements and further needs in each of the individual policy fields. It should then combine them in order to enhance coordination and coherence.

Secondly, the new “normal mode” implies taking a closer look at the legal and institutional context. After the entry into force of the Lisbon Treaty, the co-decision procedure was extended to almost all policies falling within the scope of the area of freedom, security and justice. The period from 2009 to 2014 may have been considered as a probation period for the European Parliament where it has experienced – both internally and in its relationship with the Council and the Commission – the role of legislator in this highly sensitive area. It is obvious now that it has acquired enough experience over the last 5 years to be considered a central player. Hence, **defining future steps in this specific field should continue this new “normal mode”, in particular with respect to legislative acts and involvement of the European Parliament.**

A similar approach may also be applied to two other players: the President of the European Council and the High Representative. The activity of Herman Van Rompuy's successor will depend on two main factors. Firstly, will Van Rompuy be willing to take part in the process and content of the next phase? Despite little commitment from the current President regarding justice and home affairs issues during his mandate, the October 2013 European Council conclusions showed that the European Council has decided to take some important steps regarding strategic guidelines as early as June 2014. While this may highlight Van Rompuy's willingness to be more active in this field, adopting strategic guidelines before he leaves will also have the effect of binding the next President and his cabinet. They will inherit the guidelines irrespective of their "appetite" for such issues, or their willingness to be more active in this field.

With respect to the High Representative, two elements should be underlined. Whether or not the next High Representative will take an interest in justice and home affairs issues will have a crucial impact on how these issues will be integrated or mainstreamed into the EU's external action. This is closely linked to the second element which is the increasing power of the European External Action Service (EEAS). Established after the entry into force of the Lisbon Treaty, it has taken a while for the EEAS to find its feet.¹ However, the bedding in phase is now completed and the EEAS is fully operational. It is now in a stronger position and better placed to play a crucial role in EU's external policy and actions.

Henceforth, the way justice and home affairs issues will be considered by the future High Representative will be crucial. This will have a considerable impact on the way the EU will be able to deal with these issues with third countries. This is of major importance when considering the absolute need to involve third countries in the EU's immigration, asylum and security policies.

Five years after the entry into force of the Lisbon Treaty, the European Parliament, the President of the European Council and the High Representative have – to some extent – found their places within the EU's institutional structure and EU policies. This can now be considered a "new" normal way of functioning.

This situation from now on should be taken into account in the framing of the strategic guidelines. If their adoption remains scheduled for June 2014, as already announced, the European Council will have to think about the possible impact of the guidelines on the incoming teams and perhaps frame them in a manner that will not bind them. If the definition of guidelines is postponed, a coordination or cooperation process between the new "heads" would be welcomed in the definition process of strategic guidelines.

3. The overarching impact of Article 68 TFEU

Article 68 of TFEU is a key provision and will be the one from which the whole process of the post-Stockholm phase will derive. Already existing at the time of adopting the Treaty establishing a Constitution for Europe (Article III-159), Article 68 TFEU states "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice".

With this provision, signatories of the Lisbon Treaty, i.e. the Member States, have announced their willingness to ensure "the perpetuation of the practice of the five-year programme"² but also, for these issues to be dealt with at the highest political level: the European Council. In doing so, they have once again demonstrated their reluctance to transfer sovereign powers into "normal" community law. Article 68 TFEU constitutes the continuation of a trend or history whereby justice and home affairs issues have been kept under specific procedures to allow Member States to keep control over these policies.

Such movement is a long process which had already started with the Maastricht Treaty and the creation of the Justice and Home Affairs "pillar". Under this "pillar", justice and home affairs were considered as "issues of common interest" to be dealt with in an intergovernmental framework. With the Amsterdam Treaty this step towards EU integration was accomplished but not completed. Immigration and civil cooperation issues were included in the "First pillar", i.e. Community pillar, with significant derogations. Criminal cooperation remained in the third pillar.³ The Lisbon Treaty constituted a step forward. While the distinction between pillars is abolished with the effect of transferring all policies related to the area of freedom, security and justice into the TFEU, some significant exemptions remain.

Alongside technical exemptions – related to judicial control, remaining unanimity of voting procedure or keeping the right of initiative of the Member States⁴ – Article 68, with Article 70 TFEU⁵, illustrates the difficulties for Member States in accepting what they see as a depriving of their sovereign power in a crucial field.

Article 68 follows two objectives. As already underlined, it continues the existing "spirit" and practice of programming. This provision aims also to frame a field which now falls – with some exceptions – under qualified majority voting.

Therefore, the action of the European Council under this provision would help to define ex-ante “the priorities and a general framework of the Union's action, in particular regarding criminal law policies”.⁶

To sum up, Article 68 is one of the various elements which constitutes a counterpart to the “communitarisation” of JHA policies. In order to keep control over those policies Member States have kept the power to define further orientations within the remit of the European Council. In this regard, Article 68 should not be underestimated and will play a central role in, and have a tremendous impact on, the post-Stockholm phase especially in terms of the process.

II. The process

Article 68 TFEU should thus be considered as a major basis for understanding the process which may take place regarding the post-Stockholm phase. It should be underlined here that the reference to Article 68 that already exists in the Stockholm Programme, is not sufficient to conclude that this provision has played a role in its drafting. This reference was introduced at the very end of the process due to the entry into force of the Lisbon Treaty. Hence the Stockholm programme has not been negotiated on the basis of Article 68 TFEU.

However, for the Post-Stockholm phase, this provision provides information regarding the type of outcomes this process should lead to (A) as well as for those responsible for it (B). Nevertheless, Article 68 TFEU does not contain any clue about the timeframe which is obviously crucial as it may trigger some very important political complications (C).

A. The adoption of strategic guidelines

The Treaty provision looks quite clear in relation to the outcome of the process which should lead to the definition of “strategic guidelines for legislative and operational planning”. While this enables the drawing of some preliminary conclusions, the provision does not answer all questions and leaves some room for different options and interpretations.

1. Not a programme but guidelines

Referring to Jean-Claude Piris, Article 68 is “the perpetuation of the practice of the five-year programme”.⁷ While this makes sense as all the relevant programmes have been adopted by the European Council, none of them have used the wording “strategic guidelines for legislative and operational planning”.

The first European Council devoted to the area of freedom, security and justice, held in Tampere in October 1999, defined “milestones” representing the agreement of the European Council on “a number of policy orientations and priorities” in the considered area of freedom, security and justice. Following Tampere, the European Council adopted two “programmes” in 2004 (The Hague Programme) and 2009 (Stockholm Programme) which both aimed at setting up “a new agenda” to enable the Union to build on previous achievements and meet future challenges.

It is difficult at first sight to conclude that the action referred to in Article 68 TFEU encapsulates one of these types of document. **While the Tampere milestones do comply with the idea of “strategic guidelines”, further “programmes” have been more in line with the idea of defining legislative and operational “planning”.**

However, a three-pronged approach may help define more precisely the type of document the European Council will adopt. Firstly, the Treaty does not use the word “programme” but “strategic guidelines” which is more orientation-driven and allows for strategic thinking. In this view, the European Council's “mission” under Article 68 TFEU is more similar to the one that has been developed in 1999 in Tampere than in The Hague and even more specifically in Stockholm. Secondly, strategic guidelines should be adopted for the legislative and operational planning. In other words, the programming part should take place after the guidelines have been adopted. Finally, programming is – at EU level – more of a task for the European Commission. According to Article 17 Treaty on European Union (hereinafter TEU), the Commission “shall initiate the Union's annual and multiannual programming with a view to achieving inter-institutional agreements”. On its side, and according to Article 15 TEU, the European Council “shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof”.

It derives from the combination of the Treaties' provisions that the European Council is entrusted with the mission to define the policy objectives and orientations that will frame further developments to be included into a more detailed and precise programme adopted by the European Commission.

This division of tasks may also be considered as an illustration of the European integration process. Indeed, more than 20 years after the Maastricht Treaty which initiated cooperation between EU Member States regarding policies currently related to the area of freedom, security and justice, much has been achieved. The EU has adopted an impressive amount of legislation and developed important operational actions. As a consequence, the EU integration process has reached a level whereby the Commission is today entrusted with tasks previously exercised by the European Council.

In concrete terms, detailed programmes covering a five years period, such as The Hague and Stockholm, would now fall within the competence of the Commission. In this context, the European Council embraces a new high level political role where it defines the broad and long term strategic orientations which frame the Commission's programming action in this specific field.

2. Not a “Christmas tree” but policy orientations

On the basis of the previous point, it is then possible to define the shape of future strategic guidelines. Indeed, and as agreed during the EPC's Task Force discussions, the type of strategic guidelines that should be adopted for the next phase should avoid lengthy and detailed lists of actions, as was particularly the case in the Stockholm programme which was referred to as a “Christmas tree”. On the contrary, it was acknowledged that **future guidelines should resemble the Tampere milestones**. Tampere's strength was in defining **short, forward looking and political orientations and steps** in a concise document.

While Tampere conclusions should remain a strong basis and example to follow for the future strategic guidelines, **these guidelines should avoid being adopted only for the “Brussels Community”**. Put differently, previous “milestones” and “programmes” have not been able to reach citizens to the extent expected. They have been drafted, used and commented on by a small group of people interested in or who deal with EU issues – mainly national and EU decision-makers, people working for and around the “Brussels bubble” and some select academics and researchers.

At a time where the EU is lacking in support of the citizens, **it should be of primary concern to reach out to citizens**. This is all the more necessary as issues covered by the area of freedom, security and justice are either very sensitive – like immigration and criminal justice – or which impact the everyday life of citizens, like civil justice. **On this basis, future strategic guidelines should be able to square the circle in defining policy orientations for decision-makers and citizens. Guidelines should be political and avoid getting bogged down in minutiae.**

This exercise will be a difficult one for the drafters of the guidelines who will have to avoid providing for a technical document that is only readable by people who know the EU political and technocratic language. If EU leaders want to avoid the “failure” of the Stockholm Programme – which was devoted to citizens but never embraced by them – this is a crucial challenge they will have to win.

In order to help people identify with the guidelines and the project, the EU has to accept that it must **embark on a kind of “marketing exercise”**. This implies doing at least three things: First and foremost, the EU has to restore citizens' trust in the European project and in the field of freedom, security and justice in particular. Secondly, to do so, the EU has to explain to citizens in layman's terms that the huge amount of work already done over the last 15 years has made citizens' lives better and more secure. Objectives of civil justice cooperation have been very helpful in this regard. Finally, the EU has the duty of coming up with strategic guidelines in a language that is understandable.

The EU should use policy orientations and concepts people are able to identify with and comprehend. Hence, and we will come back on this in detail later on, all issues that fall within the scope of the area of freedom, security and justice must be covered by the following strategic guidelines: promoting mobility, providing protection, and ensuring effectiveness.

3. Not necessarily a five-year document

Another question is related to the period for which such strategic guidelines should be adopted. Indeed, Article 68 TFEU remains silent on this point which leaves at least three sorts of scenarios open.

The first scenario would be to continue the five year period. This length was initiated after the Tampere summit because the Amsterdam Treaty had introduced a transitional period of five years after which some significant rules would be modified. This period was repeated later on for The Hague and the Stockholm programmes. Regarding the latter programme, this defined period of time derived from the fact that the Lisbon Treaty contains some provisions that make a direct reference to a five years period before the occurrence of significant change.

However, after 2014 five year transitional periods will cease to exist in the Treaty's provisions. Therefore, the legal reasons and constraints which grounded such a timeframe will also disappear. **As a consequence, a scenario based on that period of time is no longer motivated by a specific sequence organised by the Treaty. Opting for another five years period will then be considered as a repetition of previous cycles and be more related to habit.**

Another possibility would be to go for a period of 7 years. Such a scenario would link the strategic guidelines with the EU's budget, which goes from 2014 to 2020, and the EU 2020 strategy.⁸ This solution would be a “pragmatic” one as it may help to make better use of ongoing instruments and to achieve already defined objectives.

However, such an option would also have some negative effects. It could diminish the political impact of strong policy orientations, as they would be based on already adopted financial decisions. Conversely, linking guidelines to the EU 2020 strategy may also dilute the specificity of justice and home affairs policies into a wider policy field. Finally, it should be underlined that in practice, the financial framework may have a greater impact on the Commission's implementing programme rather than on guidelines.

The third option would rely on an open approach which would not encapsulate the strategic guidelines in any precise timeframe. This scenario is based on two elements: the Treaty does not contain any timeframe and some of the orientations agreed upon in 1999 in Tampere are still relevant almost 15 years later. This is for instance the case for the policy objectives of developing a common immigration policy, which has been repeated in the Lisbon Treaty, and is yet to be completed. Therefore, framing policy objectives with a specific time limit is not an obligation.

However, **the definition of forward looking objectives without any calendar requires setting up regular “review mechanisms”** in order to evaluate progress and – if necessary – redesign objectives. It might be necessary to redefine objectives due to unexpected events which may have a tremendous impact on justice and home affairs policies. The 9/11 events, the economic crisis or the Arab Spring are topical examples of unexpected events which have had an influence on policies in the field of freedom, security and justice.

In the past, two types of instruments have been experimented with. At the beginning of the policy, the Tampere European Council invited the European Commission to publish a scoreboard every six months to identify steps taken. Although very helpful, the use of the scoreboard was abandoned before being used recently again but only by DG Justice. Under the Stockholm Programme, a mid-term review was expected from the Commission side. It was not delivered. Instead, the Cypriot presidency published a letter without creating much of a debate.⁹

Alongside these evaluation tools already used, a third option was discussed in the Task Force, based on the idea that an evaluation of the steps achieved under the guidelines could be performed every 18 months after three presidencies or on the basis of each trio presidency cycle.

To sum up the discussions that took place within the framework of the Task Force, the majority of participants announced their preferences for “Tampere-like guidelines” which would not necessarily be adopted for the same fixed period of time.

While treaty provisions give some clues about the format of future guidelines, not all answers can be found in them and most should derive from political decisions. These decisions will fall within the remit of the European Council, but not exclusively.

B. A process led by the European Council

1. The European Council in the driving seat

According to Article 68 TFEU, it is crystal clear that the guidelines for the legislative and operational planning will be adopted by the European Council. This is not only a legal question but also a political one. **Given the sensitivity of issues falling within the scope of the justice and home affairs field, it is obvious that Member States will not give up this “constitutional” power and will thus do their utmost to maintain this exercise at the level of the European Council.** As already underlined, the growing importance of the Community method regarding these topics is counterbalanced with specific mechanisms allowing Member States – through the European Council – to keep the control or to keep “ownership” over the area.

While the Treaty looks very straight forward and simple in its wording, Article 68 nevertheless calls for further consideration on the process it triggers in practice. In other words, the issue is not about who is going to adopt the strategic guidelines as such, but rather who is going to prepare and elaborate the strategic guidelines.

Since the entry into force of the Lisbon Treaty, the answer can be found in Article 15, paragraph 6 TEU devoted to newly established President of European Council. In charge of chairing and driving forward the European Council, the President must also prepare the work of the institution.¹⁰ Hence the duty to define the strategic guidelines will be the task of the current President, Herman Van Rompuy, or his successor after the 30 November 2014. It should be added that in practice, the drafting of the next strategic guidelines will be the main mission of the European Council Cabinet.

In the end, the process regarding the drafting and adoption of strategic guidelines will stay at the level of the European Council, i.e. the Member States, through its President and his Cabinet.

2. The European Commission is invited

Through such a method, the role of the President of the European Commission remains unclear. It should be recalled that the President of the European Commission is a full member of the European Council, with a say in the process. It will therefore be the responsibility of the President of the Commission and relevant Commissioners to organise an internal consultation process to collaborate in an effective manner with the European Council. In this view, and while indicating the guidelines will be discussed in June 2014, the June 2013 European Council has invited the European Commission “to present appropriate contributions to this process”.

In practice, this has taken the form of various consultation processes launched by the Commission's relevant Directorate Generals for Justice and Home affairs.¹¹ In doing so, the Commission hopes to present the different elements and orientations it deems necessary to include in the guidelines. This contribution from the European Commission should take the form of the presentation of two communications, one from each Directorate General, in March 2014.

While this may in theory help avoiding further divergences between the European Council and the Commission regarding the content of future strategic guidelines, there are some doubts about the effectiveness of the process. Indeed, the decision to define strategic guidelines in June 2014 has put high pressure on the Commission's consultation process. **This process has in practice been organised in a somewhat “speedy manner” with the involvement of some selected stakeholders and organisations but without properly setting the framework of the exercise, i.e. defining strategic guidelines for the next 10 to 20 years in a sensitive field subject to significant changes at the global level.** As a consequence of such a process, it might well be the case that contributions from a large variety of stakeholders would be too specific and therefore hardly compatible with the definition of political strategic guidelines.

3. The European Parliament and EU agencies are side-lined

While the European Commission is legally represented at the level of the European Council and invited to contribute to the process, nothing of that kind is planned for the European Parliament. The willingness of the Member States to keep control over policy orientations in the field of justice and home affairs leads to a situation where the co-legislator in charge of representing the people and protecting the public on civil liberties – is out of the process in almost all of the areas concerned.

Overcoming this situation requires two types of actions. The European Council may invite the European Parliament to collaborate in the process of defining guidelines. This would require a political gesture in this regard from the European Council and the definition of a scheme allowing for the Parliament to provide for some input to the discussions. However, and from now on, such an option has not been set in motion. Therefore the European Parliament will have to “raise its voice” in order to be heard in the process via resolutions, reports or the organisation of meetings. Nevertheless, and regarding the timing set by the European Council, the European Parliament will have to take steps rapidly.

Lastly, the involvement of EU Agencies in the debate seems underdeveloped. Regarding the ever growing action of the EU at operational level – which is explicitly recognised by Article 68 of the Treaty addressing the “operational planning” – the participation of the Frontex Agency, the European Asylum Support Office, Europol or Eurojust, inter alia, may also be helpful. These agencies have not been formally involved into the process despite their increasing role in the implementation of policies in the area of freedom, security and justice. They have however been invited to participate in different meetings, but their input in terms of the long term perspective has not emerged as yet.

While it may be too early to draw some conclusions about the participation, or lack thereof, of these players, it is obvious that **the timing will have a tremendous impact on the ability of relevant EU players and stakeholders to take part in – or contribute to – the process leading to the definition of strategic guidelines.**

C. Timing as a central issue

Alongside the content of the guidelines, the question of timing is clearly the most sensitive to deal with, especially in present times. The Treaty does not set any timing for the adoption of the strategic guidelines which leaves large margins of manoeuvre. However – and as a result – **the calendar chosen for defining the guidelines will have an effect on the ability of institutions and civil society to adequately take part in the process.** The decision remains that of the European Council but it can have significant political consequences. Hence the European Council has the choice of two scenarios: an undesirable one (1) and a preferable one (2).

1. *The undesired scenario: June 2014*

This scenario is currently most likely the one that will be applied. It plans the adoption of the strategic guidelines as early as June 2014. This schedule was agreed by the European Council in its October 2013 conclusions. Dealing with migration issues in the aftermath of the Lampedusa tragedy, the conclusions stated “The European Council will return to asylum and migration issues in a broader and longer term policy perspective in June 2014, when strategic guidelines for further legislative and operational planning in the area of freedom, security and justice will be defined”.¹² This has been repeated in the conclusions of the December 2013 European Council.

It is obvious that the October and December conclusions took a major step towards the adoption of the strategic guidelines in June 2014. Indeed, the May 2013 European Council was less affirmative on this point. According to these conclusions, the European Council agreed to “hold a discussion (...) to define”¹³ the guidelines in June 2014. There has therefore clearly been an acceleration in the process which should now be completed in a short timeframe.

Several reasons may explain why the guidelines should be adopted so quickly. Firstly, the situation regarding migration and security related issues at the EU's external borders in particular, makes it necessary to react rapidly and at the highest EU level. This option is not very convincing as the October 2013 European Council could have called for strong and immediate commitment in this field¹⁴ and it obviously did not.¹⁵ Moreover, migration covers only one part of the broad field of freedom, security and justice.

A second argument is based on the idea that current President of the European Council, Herman Van Rompuy, has some interest in this policy field, alongside his robust and consistent involvement in dealing with the financial and economic crises, and wants to push the issue. Although possible, this option does not convince much as he didn't show great commitment in the area of freedom, security and justice over the past years.¹⁶

A third and final reason would be simply for the Member States – through the European Council – to demonstrate that they are not willing to, under any circumstances, abandon the “constitutional power” to define the guidelines in this sensitive field.

In speeding up the process, the European Council demonstrates it wants to take the lead, and more precisely that it wants to go it alone, i.e. without any other key EU player fully involved. **June 2014 will then be a political “no man's land” where the European Council; where the Council of the European Union will be the only stable political institution.** The European Commission and the European Parliament will be in a transitional period which will not allow any of them to properly influence the content of the guidelines. While the Commission will be in an “outgoing mode” and mainly dealing with the “affaires courantes”, the European Parliament will just have been elected and its President not even nominated. **In other words, none of the institutions taking part in the further legislative process that will derive from the legislative and operational planning framed by the strategic guidelines will have the capacity to participate, or even provide for a contribution.**

Some would argue that the Commission and the Parliament could participate in the process before the definition of the guidelines in June 2014. Others would add that these institutions have taken their steps and contributed on the basis of large scale consultations, resolutions, reports, communications or even as a full member of the European Council, as is the case for the Commission President. While this is true, this is far from satisfactory.

Firstly, the contribution of the Commission and the Parliament before the large 2014 renewal will be delivered under huge time pressure and will only commit the outgoing politicians. In other words, will the newly elected Parliament and the newly appointed Commission be bound by their predecessors? Nothing can be sure in this regard.

Secondly, the new European Parliament and European Commission will not have any possibility to provide input regarding the content of the guidelines, which they will be invited to put into effect regarding their right of initiative and legislative power. While it remains clear that under the Treaty the European Council is the sole institution in charge

of defining the strategic guidelines, “imposing” such orientations may carry a political risk and create the conditions of mistrust and conflict between the European Council and other institutions. The field of justice and home affairs is sometimes a theatre for such political opposition. It has already been the case between the European Council and the Commission after the adoption of the Stockholm programme where the Commission published a communication which did not fully follow the Stockholm programme and led the Council of the EU to adopt strong conclusions against this Communication. Recently, quarrels between the Parliament and the Council of the EU over the revision of Schengen rules has shown that when side-lined the European Parliament may take retaliatory actions.¹⁷

More generally, adopting the strategic guidelines without involving the European Parliament in a consultative way, raises some further questions of principles. Indeed, in European states all of the issues related to the area of freedom, security and justice fall within the legislative and political competences of national Parliaments, in particular because they address public and individual liberty issues. In the present situation, the European Council, although composed of democratically elected or nominated Heads of state and government, will decide on future policy orientations without the European Parliament being heard or consulted.

Furthermore, maintaining these issues at the unique level of the Heads of State and government leaves the door open to all anti-EU parties to demonstrate how anti-democratic the EU is. However overestimated¹⁸ the fears are that the European Parliament will be composed of a large number of “populist” parties, one appropriate manner to combat anti-EU rhetoric is to invite these parties to the discussion.

Last but not least, it should be underlined that alongside a long list of national events which will have an impact on the discussions (Belgian elections, referendum for independence in Scotland and maybe Catalonia, British “block opt-out”, etc.) the June 2014 European Council may well be centred on a unique theme: the nomination of the new Presidents. Hence, the future of the area of freedom, security and justice may well be overshadowed by this issue.

In the end, adopting the strategic guidelines in June 2014 does not seem to be the best solution. It would in any case be preferable to postpone this process until later.

2. Preferable scenarios: December 2014 or June 2015

As already mentioned, the Treaty does not contain any obligation to adopt the strategic guidelines at a specific moment in time. Hence, the guidelines may be defined later on, i.e. in December 2014 or June 2015.

The first solution, **December 2014**, would link the definition of strategic guidelines to the end date of the Stockholm programme. As a matter of fact, it would also leave some time for the newly elected Parliament and appointed Commission to contribute to the process and, to legitimise it to a certain extent.

While this solution is possible, it is perhaps not the most preferable. Although the European Parliament will be elected and its President nominated, there is no certainty that the different Committees will be up and running and if so, how? Will the current Committees remain as they are or will they be organised differently? How will the different Committees coordinate their work in order to provide for a sound and comprehensive contribution? Finally, it might be the case that new MEPs will be nominated in these Committees. Will they have enough time to get acquainted with the issues? Will they have enough time to contact relevant civil society organisations to better understand the challenges the post-Stockholm phase represents?

Similar concerns are applicable to the European Commission. Will the new Commission maintain the existing division between DG Home Affairs and DG Justice? Will the newly appointed Commissioners follow the paths opened by their predecessors or will they be willing to contribute differently to the process? In this case, and bearing in mind that the new Commission will be appointed somewhere in autumn 2014, will the new Commission really have the time to contribute to the process?

Taking into account the questions above, delaying the process from June to December 2014 would not make a major difference in terms of contribution from the new entrants. As a consequence, and in order to allow any relevant stakeholder to contribute to the discussion, one remaining solution would be to **postpone the process until June 2015**. Such an option is desirable for several reasons:

- First – and as already underlined – there is no obligation deriving from the Treaty to adopt the guidelines at a specific point in time.
- Second, there is no urgency to adopt these guidelines even if the Stockholm Programme comes to an end in December 2014. This deadline is imaginary and there are many actions listed in the Stockholm Programme which will not be

- completed by that time. Thus, giving 6 more months to further complete the Stockholm Programme is entirely feasible.
- Third, delaying the process will allow all relevant stakeholders, institutions, agencies, civil society organisations, etc, to contribute to the debate in a structured and valuable manner.
- Fourth, the European Council will be able to define strategic guidelines on the basis of a significant amount of input and a well-informed debate. Whether or not they take on board all or some of the most relevant ideas, it would be very difficult to criticize the European Council for not having taken the time to listen and perhaps collaborate with such a large number of stakeholders. In such a scenario, the European Council would have taken a real political position and therefore reinforced its political leadership.

It should be added that given the “fears” regarding the composition of the future European Parliament, which may comprise more anti-EU/anti-migrant/anti-establishment parties, opening discussions with the new assembly on these “burning” issues could be an effective manner of curbing such rhetoric and their electoral prospects, as well as strengthening the political basis of the guidelines.

Conclusions on the process

- Article 68 TFEU is of significant importance in framing the process and further debate.
- This provision invites to distinguish between strategic guidelines and multiannual programme and calls also for a distribution of tasks between institutions.
- It is the responsibility of the European Council to adopt Strategic guidelines.
- It is the task of the European Commission to adopt a multiannual programme aimed at reaching the orientations and objectives set by the strategic guidelines.
- This division of labour reflects the integration process taking place in the field of justice and home affairs over the last 15 years.
- While the European Council is, according to the Treaty, the sole institution entrusted with the competence to define strategic guidelines, these guidelines should be adopted on the basis of a large and well-informed debate.
- The debate should involve a wide range of EU and national stakeholders and avoid being bogged down in minutiae. In this view, discussions about the future of the area of freedom, security and justice should be based on the following question: what should be the main policy orientations in the field of justice and home affairs for the next 10 to 20 years according to existing *acquis* and in the perspective of a fast changing European and global social and economic landscape?
- In order to organise a sound and well-informed debate involving all relevant national and European institutions and stakeholders, the European Council should postpone its decision to define the strategic guidelines from June 2014 to June 2015.
- On the basis of this large and well informed debate, the European Council will have all the elements to take high level orientations regarding the future of EU justice and home affairs policies.
- Although highly political, strategic guidelines should be short, forward looking and understandable for all citizens.

III. The content

After establishing the process, the content of forthcoming guidelines is the most crucial question that needs to be addressed. Dealing with the content may seem simple but what lies within is an outstandingly complex question.

Firstly, these policy fields are by their nature sensitive and complex. As a consequence, it is necessary to deal with each policy area as an autonomous entity and to identify the main policy objectives applicable to them. Indeed, priorities for the next 10 to 20 years regarding civil justice and immigration may differ greatly and require different approaches.

Secondly, these policy fields are interlinked and should be articulated in tandem to form a coherent approach. For instance, access to justice and justice cooperation in civil and criminal matters cannot be conceptualised

independently from each other. The same applies to irregular migration which cannot be addressed without having regard to actions developed in the field of organised crime. In addition, some transversal elements such as consistent external action, human rights or data protection should be taken into account which could make the coordination process between policies easier, or on the contrary, more difficult.

Finally, defining strategic guidelines in the area of freedom, security and justice cannot be disconnected from the outside world, and in particular overarching themes, or megatrends, which will have a great impact on justice and home affairs policies in the next 10 to 20 years.

This part of the paper seeks to address all of these issues, for the purpose of the debate which will take place for the content of future strategic guidelines. However, it is necessary to underline that this part of the paper will follow a specific method. On the one hand, it is based on the belief that strategic guidelines should set short political orientations and avoid a lengthy detailed approach. On the other hand, this report represents the outcome of discussions held in a series of meetings organised within the framework of an EPC Task Force. As a consequence, **the report does not seek to be detailed and exhaustive but to bring to the debate issues which have been discussed and which could constitute a basis of discussion in the perspective of high level political strategic guidelines.**

A. Overarching themes

As a matter of principle, policy orientations are grounded in the existing *acquis* and framed at a certain point in time within a specific political environment. In this view, the definition of strategic guidelines in the area of freedom, security and justice will be influenced by a series of external parameters which may affect the essence or ambitions of the guidelines. Amongst several parameters, the economic situation (1), forthcoming challenges (2) and the discussion over the implementation of existing rules (3) will definitely weigh on the content of strategic guidelines.

1. The impact of the economic crisis

In times of crisis a feeling of instability and fear is shared by a large part of the population. Policies developed within this climate often take a restrictive turn. This form of “political and economic contraction” is detrimental to more progressive policies and plays in favour of the development of a security-driven agenda to overcome citizens' fears. In this regard, and given the magnitude of the economic crisis, the political agenda of the area of freedom, security and justice has been seriously affected at least in two respects.

The economic crisis has put a stop to the possibility of developing ambitious policies in the field of legal immigration. Indeed, the possibility to plan the adoption of EU rules regarding the admission of third country nationals, in particular for the purpose of employment, has been frozen since 2008. Addressing labour migration issues has become very difficult due to the violent impact of the crisis on employment in several Member States.¹⁹ As a consequence, discussions regarding labour migration issues have been systematically neglected or ignored.

Nevertheless, austerity measures which have been developed to cope with the crisis have put national budgets under severe strain. This has had an effect on several issues related to the area of freedom, security and justice. In particular, public expenditures regarding justice have sometimes been cut, in particular regarding free legal aid. Decreasing or even cutting down free legal aid is worrying in terms of legal protection and with respect to the establishment of an area of justice. Security related policies have also been targeted. In Greece for instance, the need to decrease public expenditure, but to simultaneously increase the action of the state regarding the control of the Greek-Turkish external border has led to a tricky situation which was underlined by the Frontex agency.²⁰

Although profound reforms adopted at EU level and in the Member States have paved the way towards economic recovery, there are still some goals and efforts that need to be accomplished in order to fully escape the crisis. Hence, and despite the “ambitious” climate currently taking place, the crisis is not over yet. The recipe adopted to cope with the crisis will produce its effects over time. With this in mind, the calendar for the definition of the strategic guidelines becomes even more important.

While the content of the strategic guidelines may vary greatly according to the economic situation, the timing regarding their definition matters. In this context, it may certainly be the case that Member States and EU economies will be “healthier” in 2015 than in 2014. Therefore, the ambitions of the strategic guidelines may be different from one year to another.

Defining the strategic guidelines as early as June 2014 may lead to orientations where the scars of the crisis may remain strong. This could be translated through restrictive policy orientations in terms of immigration or even justice. On the

contrary, and according to economic forecasts, growth will increase in 2014 and continue in 2015. This could create the political and economic conditions for the definition of broader and more ambitious strategic guidelines in the area of freedom, security and justice.

In the end, whether the Union will still be “muddling through” the crisis or getting out of it, it will seriously weigh on the ambitions of the strategic guidelines. This is in particular true regarding discourse and measures in the field of immigration which have for the time being been brushed under the carpet. Addressing these issues in a favourable economic and social climate makes a huge difference. Conversely, pleading for the implementation of costly measures in security and justice fields is also easier. All in all – and here again the timing is crucial – it leads to the conclusion that **adopting strategic guidelines in June 2015 would help regarding the content of ambitious and forward looking policy orientations.**

2. Forthcoming challenges

Defining policy orientations for the medium or long term is an exercise which must take into account forthcoming expected – as well as unexpected – challenges. Despite being tricky, this exercise should be based on a two-pronged approach. Firstly, identifying the main challenges the EU and its Member States will have to deal with or even overcome. Secondly, put into place appropriate mechanisms to adapt the strategic guidelines where necessary given the magnitude of some unexpected events.

Preparing forthcoming challenges

Tomorrow's world will be different, and in some respects fundamentally so compared to today's. Many changes that will occur in the short, medium and long run may have a significant impact on each of the relevant fields of the area of freedom, security and justice.

It is now relatively well known, understood and accepted that the EU – in particular some of its Member States – will face strong **demographic shrinking**.²¹ This phenomenon will be accompanied with an ever **ageing European society**. This future trend, which is going to start in 2015, will have a **tremendous impact on the movement of people, and in particular regarding future needs to fill in labour and skills shortages** in several sectors of activity covering all sorts of qualifications, high, medium and low. In other words, European Member States will in the short run have to increasingly recourse to workforce coming from outside the EU. This phenomenon will have a strong impact on the definition of forthcoming immigration policies. EU decision makers and Member States will also have to combine this phenomenon with the expected **explosion of the middle class worldwide** and the increasing urbanisation of societies, both of which will have a **major impact on people's mobility**.²²

On the security side, two key challenges will have to be addressed amongst the EU Member States. Since the 9/11 bombings, **terrorism** is high on the Union's agenda. This issue will remain sensitive to attacks that might occur in the EU and which could be perpetuated by people already living in the EU, thus remaining on the internal affairs agenda. The external side of the issue will also be addressed given the political instability in some regions of the world, potentially fostering the emergence of **radical groups** which may be considered as a threat for Europe's security. This would require a better definition of common answers to be found in terms of peace-making and **stability in regions outside the EU**. Another key issue to deal with concerns **cyber criminality**. This topic of ever-growing importance, will certainly have to be included in the mind-set of strategic guidelines.

The need to appropriately address justice related issues is another overarching challenge the EU and its Member States will have to tackle. This goes from the continuous work on **transnational crime**, which should not benefit from remaining national borders, to the acknowledgement that national rules are not able to cope anymore with a series of individual situations going far beyond the national sphere. In this view, **civil and commercial disputes are even more transnational and require transnational or EU responses**. In summary, the overall discussion about strategic guidelines should be framed by conceptualising the EU as an area of justice where national laws are no longer able to address citizens' and companies' every day challenges.

In addition, over the last half-century technological progress has had a major impact on our societies and individuals. This pace will not stop and is on the contrary more likely to become faster and stronger. In this picture, **computing and access to the Internet will be a major challenge for policy makers**. They will have to **anticipate** trends and changes and also be able to manage and even organise these changes.

The development of technologies and the fast digitalisation of the world is a double-edged sword. On the one hand, they have increased individuals empowerment. The development of social media and e-tools have allowed **citizens to**

participate in the political debate and transformations, as it was the case for the Arab Spring for instance. It has also allowed citizens to **get easier access to information and public services** online through e-governance. On the other hand, technological progress is also a threat to societies. Information technology may endanger society through **cybercrime, terrorism, the diffusion of hate speech and xenophobia, or even the challenges new forms of participations are providing democracy.**

These challenges and opportunities cannot be left aside when thinking about and dealing with the future of the area of freedom, security and justice. While defining strategic guidelines, EU leaders should have this big picture in mind.

Finally, addressing issues related to movement of people, security and justice cannot be delinked from the changing face of the global balance of power. The EU project has started and been developed at a time where Europe was a strong and key international player. Today's reality is fundamentally different and tomorrow will be even more. In terms of demography, economy and political leadership, Europe will have to face a complete redistribution of power, where Asia and Latin America and even Africa will become central players. This will have a tremendous impact regarding the issue of values. Up until now, the EU has been able to portray and also export its values. It is difficult to predict whether or not the EU will be able to maintain EU core values at their current level in its relationships with the external world. Looking at justice and home affairs this question is of major importance since they are clearly linked with the respect of the rule of law, human rights and equality. This could also be extended to issues related to the European social model and secularism, etc.

Coping with unexpected challenges

It should nevertheless be acknowledged that some unexpected challenges or events may occur after the adoption of the strategic guidelines and have an impact on the definition of related policies. The New-York, London and Madrid bombings have heavily impacted on the EU's agenda in the field of freedom, security and justice. In the same vein, the "Arab Spring" has also had an impact on how to reconsider – positively or restrictively – the EU's migration policy towards its immediate neighbours. Conflicts occurring in many places of the world, such as in the EU's backyard in Syria, also play a central role in shaping policies and orientations.

All of these events were largely unexpected and have modified the political landscape at EU level and in the Member States. Other known events may happen but without any certainty regarding their timing and magnitude. This is for instance the case regarding the effects of climate change which may be significant on the movement of people and protection needs, or not.

While unexpected challenges are always... unexpected, the EU and Member States should be able to organise mechanisms to review policy orientations where necessary. This could be done **immediately** in case of serious reorientations of policies due to the modification of the global landscape. In this view, the adoption of European Council conclusions is a first immediate answer. However, some mid-term policy reorientations may also be needed at some stages. Here, and in the context of strategic guidelines adopted for an undefined period of time, the European Council may decide to organise every 18 months at the end of trio presidencies, a review of policy objectives and where necessary adapt the strategic guidelines to an ever evolving global environment.

3. Implementing mode vs strategic guidelines

The debate over the primary need to favour the implementation of existing policies developed in the area of freedom, security and justice was quickly raised in the debate surrounding the post-Stockholm phase. Indeed, almost 15 years after the adoption of the Treaty of Amsterdam and the Tampere conclusions, strong doubts about the need to adopt another set of orientations or multiannual programme have been put forward. Some observers have also answered clearly to this question by stating "the time for big new policy initiatives and multiannual programmes on AFSJ has past. The railway lines have already been built and it is time to consolidate these same lines and get the trains moving. Just like the policy on the internal market in its time, once a major policy objective and agenda have been set, the next step is faithful implementation, not an over-ambitious or radical change of policy direction and tactics every five years. Coherence and consistency with the previously agreed parameters of European cooperation and their founding Treaty-based principles should be seen as the indispensable driving forces for the next phases of European integration on freedom, security and justice policies at Union levels".²³

While we understand the position, we would suggest at least **four reasons for which the need to define strategic guidelines remains important.** Although it is true that the correct implementation of policies is crucial, the **"implementation mode" does not apply to all policy areas.** Asylum policy is for instance the perfect example of a policy field where focus on implementation is a prerequisite before adopting any new legislative instruments. Indeed two subsequent sets of legislation have been adopted between 2003 and 2013 and it is time now to leave space for

implementation. Otherwise, practitioners, lawyers and judges alike, will get lost in a complex legal tangle and not be able to properly implement the rules. On the contrary, **in some policy fields there is a need to further develop EU legislative norms**. This is in particular the case with respect to legal migration, which has been treated as the “poor child of the policy”. Here, the objective to set up a “common immigration policy” enshrined in the Treaty may not be sufficient. Hence there is a need for a strong political impetus to move ahead within the context of existing and forthcoming demographic challenges.

Secondly, the implementation argument is based on the fact that all policy objectives are set by the Treaty and other relevant instruments – such as the Charter of Fundamental Rights – and there is therefore no need for “policy orientations”. In such a context, the Commission will have wide margins of manoeuvre to define the programme in order to meet the Treaty objectives. While we do agree that the post-Stockholm phase should illustrate a further step in the integration process, **we do not believe that Member States will abandon the “constitutional” power to adopt strategic guidelines** under Article 68 TFEU. Hence, and as previously stated, the European Council will exercise its power to define guidelines and – as a sign of EU integration – the Commission will adopt a programme within this framework and in order to reach the guidelines objectives.

Thirdly, it is worth remembering that **the specific policy field of freedom, security and justice needs a political agenda**. It is necessary to define orientations in a sensitive field, subject to global changes and which addresses people's everyday lives. **Avoiding tackling those issues at the highest EU political level would leave an empty space for extremist and anti-parties**. At the end of the day, this will weaken the EU's action in the eyes of the citizens.

Finally, **defining guidelines and adopting a programme to meet the objectives will help to evaluate progress made in this policy field**. One should remember that the culture of evaluation is key in this field. The use of 'scoreboards', in the immediate aftermath of the Tampere conclusion or in the field of justice, and the adoption of a brand new Schengen evaluation mechanism illustrate, amongst others, how central assessing progress is.

The debate over implementation therefore deserves to be nuanced. **It is indeed necessary to ensure proper implementation of EU rules in the Member States, and if necessary through infringement procedures. However, it is also essential to define policy objectives in strategic guidelines to pave the way for further actions.**

B. Asylum, immigration and integration

Among the issues dealt with within the framework of the area of freedom, security and justice, migration related topics are certainly those which are the most familiar to citizens. Immigration and asylum, without any clear distinction, are regularly on the front pages of newspapers and over-used in political rhetoric in particular during electoral campaigns. Hence, topics like “Fortress Europe”, Schengen, Lampedusa, crises in asylum systems, Frontex, multiculturalism, etc. have become key elements in political and societal debates and decisions.

Since 1999, the EU has extensively exercised its competences in the fields of asylum and immigration and also regarding integration issues. Despite, the impressive amount of rules adopted at EU level²⁴, the role of the EU in this policy field is not always well understood, even though regularly criticised.

In the wake of the European Parliament elections where immigration will be at the forefront of the campaign and in the context of creeping anti-immigrants rhetoric in the Member States, the task of the European Council appears rather complicated. However, it will not escape the difficulty as it will have to draw policy orientations regarding asylum (1), immigration (2) and integration issues (3).

1. Asylum

Granting protection to persons who have a well-founded fear of being persecuted is rooted in EU Member States heritage.²⁵ It was therefore a natural move to entrust the EU with competence in the field of asylum when it acquired the power to adopt rules in migration related issues with the treaty of Amsterdam. The heritage was enshrined into primary law since EU asylum policy should be adopted in conformity with the 1951 Geneva Convention. The Treaty of Lisbon, while recognising the objective to develop a “common policy on asylum”, went a step further with the European Charter of Fundamental Rights which recognises, according to Article 18, “the right to asylum”.

The Tampere conclusions of October 1999 defined the objective of developing a “Common European Asylum System” based on the adoption of community rules which should “lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union”. Following the same path, the Stockholm programme added that “the objective should be that similar cases should be treated alike and result in the same outcome”.

After almost one decade and two waves of legislation, the EU has completed the legislative phase of the Common European Asylum System. While this achievement is significant, the objective has not been reached. Indeed, there are still important discrepancies between the Member States regarding asylum procedures and protection recognition rates. To sum up, and as underlined during Task Force discussions, **the legislative cycle has been completed but the Common European Asylum System has not been established.**

In this context, Task Force participants have pointed out shortcomings and possible ways of further developing asylum policy in the framework of the European Council's strategic guidelines.

Implementation rather than legislation

Asylum is, more than any other topic in the area of freedom, security and justice, the field which requires little legislative proposals. More precisely, two sets of legislation composed of directives and regulations have been adopted between 2003 and 2013. While these successive legislative processes have not been able to reach the objectives, the idea of engaging in a third round of negotiations was not addressed during Task Force discussions.

This general (silent) consensus is explained by a series of reasons. Firstly, the adoption of the last asylum package has been difficult. All EU legislative **players do not want to start another long, time-consuming and uncertain process.** It is worth adding that the development of further legislation should be based on the evaluation of previous legislation. In the present case, rules adopted in 2013 have not even been transposed which makes the evaluation process quite cumbersome.

Secondly, there is a widespread acknowledgement that the legislative process should now be followed by an implementation phase. This concerns actions taken by Member States to transpose and put these rules in motion. It also relates to practitioners – mainly lawyers and judges – who will have to get acquainted with the new rules to apply them to the individual situations they will have to cope with. **Adopting new rules every five years would have the effect to “lose” practitioners in a patchwork of rules, and increase the risk of EU rules and rights being disregarded.** In addition, the role of the Court of Justice will be significant in particular regarding the interpretation of rules

Thirdly, **the implementation phase will be supported by the growing role played in this field by the European Asylum Support Office.** This Office supports the implementation of EU rules by national authorities in order to ensure that individual asylum cases are dealt with in a coherent way by all Member States. In this view, the Office will provide a significant assistance to national administrations in their duty to properly implement EU rules.

In summary, the implementation of existing rules is by far the main priority. Although adopting a third set of legislation is not the way forward, asylum policy should not remain static as some legislative additions may improve the system.

Improving the asylum system

Discussions within the Task Force meetings were also an opportunity to raise some points on how current EU asylum rules could be improved. The suggestion was to make progress on a crucial question: **the transfer of protection between Member States**, i.e. the possibility for a refugee or a beneficiary of subsidiary protection to go to another Member State and keep their status in the second state. Such recognition of positive decisions – instead of negative decisions as it is currently the case – would constitute a major leap forwards to the creation of a Common system.

Solidarity between Member States, in particular towards States facing significant pressure regarding asylum seekers, was also an issue raised during discussions. Here, several options have been put forward, including the **revision of the Dublin regulation** – which is unlikely to happen in the short run due to political reluctance – to the development of **relocation procedures** and **joint processing** schemes. The two last options are the ones which are likely to emerge in concrete terms. A strong impetus in the development of such practices in the European Council guidelines would be a great incentive to make headway in these areas.

A third point discussed concerned the possibility to **grant a status to third country nationals who do not need international protection but who nonetheless cannot be returned** to their countries of origin. While this could trigger EU legislative action – on a legal basis to be defined, this proposal encounters two main obstacles. It is not sure Member States would show any willingness to act. However, there is a risk of creating a third weaker status, after the refugee and the subsidiary protection statuses.

Finally, and as with the Stockholm programme, the issue of **climate change** and its impact on protection duties was discussed. While this is an intricate legal question to be resolved, some doubts were raised about the relevance of such

a protection status in the EU. Indeed, the EU and its neighbourhood will not be – at least in the short run – the principle area of the world facing protection needs as a result of climate change. In the end, this question **should be dealt with in the framework of EU's external action rather than in its internal system.**

Institutional changes

Given the existence of a significant EU legal framework in the field of asylum, the idea of **setting up a Common European Asylum Appeal Court** is starting to be shared by a number of stakeholders. This question was also debated within the Task Force meeting. The aim of such a Court would be to reduce to a minimum the divergences in Member States' interpretation of EU legislation and the Geneva Convention.

While this idea appears very interesting, and has received some support from Task Force participants, there is no unanimity over this issue. Others consider this process too early. The amount of current case law before the Court of Justice does not suggest a specific need in this domain. Furthermore, reducing divergences between Member States' interpretations will be one of the European Asylum Support Office's tasks. In this view, some time is needed to determine whether a future move towards the creation of a dedicated Court for asylum issues is needed.

Others raised their concerns about the idea of “isolating” asylum related issues from the general jurisprudence of the Court of Justice. More precisely, there are “risks” of over-specifying the jurisprudence and disconnecting asylum issues from the logic of the rulings of the Court of Justice regarding general principles, human rights protection, dynamics deriving from the internal market, etc.

While **discussions about the creation of an EU Asylum Appeal Court deserve to be further explored, such an objective appears difficult to set up in the short run.** However, nothing prevents the European Council from identifying such a possibility as a long term option in the strategic guidelines.

External dimension: from asylum policy to protection policy

The major part of EU action developed in the field of asylum has concerned what could be called “asylum policy”, i.e. the rules applicable once the asylum seeker has reached EU territory. The other side of the policy which has not been developed as much so far concerns “**protection policy**”, i.e. **the ability of the EU to provide for protection to asylum seekers and refugees outside of the EU territory. This external side of EU's action should be one of the main priorities developed in the years to come.**

The share of refugee and asylum seekers the EU is receiving is minimal compared to the numbers of people fleeing for their lives and seeking protection worldwide. The example of Syria is very telling: In December 2013, almost 2 300 000 Syrians fled to different countries. Among those who fled, 97 % sought protection in five Syrian neighbouring countries (namely Lebanon, Jordan, Turkey, Iraq and Egypt) with only 55 000 in the EU.²⁶

These figures show that **the challenge of international protection is outside of the EU. Hence, if the EU wants to play a greater role regarding the protection of refugees in the years to come, it should further elaborate ways to improve its input outside of its territory.** Several paths can be explored and form a basis for discussions about the definition of strategic guidelines.

While the EU is very active in providing technical and financial assistance to third countries and international organisations (UNHCR and IOM) helping refugees in Europe's neighbourhood, the level of the EU's commitment in this context should be discussed at the highest EU level. It would then be the task of the European Council to define the EU's strategy in this regard. In other words, it would determine whether the EU is willing to provide for unconditional technical and financial support and whether this support should be subordinated to the fulfilment of conditions.

This aspect of the policy should also be accompanied with a strong reflection and clear orientations regarding several crucial points which are: **the development and/or improvement of Regional Protection Programmes²⁷, increasing the number of persons resettled in the EU** – on a voluntary or binding manner – and determining the means and procedures to enable asylum seekers to **lodge an application outside the Union** through national embassies or consulates or EU delegations.

While the protection of people fleeing for their lives is part of the EU's heritage, it is a duty for the EU and its Member States to decide whether they want to limit the protection regime to asylum issues, i.e. internal protection, or whether they want to become a greater player in the global protection policy outside of EU's territory.

Improving EU's capacity in this regard would require to put into motion the abovementioned measures but also to improve two additional aspects. The EU, with its Member States, should be able to **develop scenarios for the future 10 to 20 years determining possible regions of tensions or conflicts**. These scenarios should be accompanied with an analysis of the economic and social development of neighbouring countries and regions to identify possible protection zone to provide for immediate protection. The other aspect concerns EU's ability to act as a peacemaker, i.e. **develop a proper common European security and defence policy to stabilise unstable regions** and limit refugee flows.

2. Immigration

Over the last 15 years, immigration policy at EU level has been addressed in quite an unbalanced way. Issues related to border management, visa policy and irregular migration have been subject to extensive action on the EU's side. Conversely, legal and labour migration has not benefited from the same level of commitment and has been addressed in a somehow piecemeal manner. As a result, one side of the policy now falls within the EU's competence – sometimes EU exclusive competence – and the other side remains entrenched at national level.

The main future challenges regarding immigration are threefold and complementary. Firstly, **restore the right balance between policy fields** in order to reach the Treaty objectives to establish a common immigration policy. Secondly, **address legal and labour migration issues with global challenges in mind**. Thirdly, **ensure implementation of existing rules** in the fields related to security.

Moving ahead on legal migration

Compared to results achieved in the field of irregular migration, admission policies should be considered as the “poor child” of EU policy. While it has been difficult for Member States to give up their sovereign powers, it is now time to overcome this reluctance.

It was frequently repeated during the Task Force discussions that legal and labour migration policy must be addressed with major challenges in mind. This concerns, firstly changes occurring worldwide which are going to have a great impact on movement of individuals in the medium term and therefore on EU's capacity as a whole to manage legal migration. Hence, **the urbanisation of societies, the rise of a global middle class and the ever facilitated means to travel around the globe are all elements of ever increasing movements of people worldwide**.

Moreover, EU Member States are exposed to a key challenge which will impact on their needs regarding migrant workers: **Europe's demographic trends**, which will result in a shrinking workforce and the ageing of Europe's societies. While the shrinking of the work force will impact on labour and skills shortages, taking care of an ever increasing number of “elderlies” will also create additional labour demand. In addition, if a sustained economic recovery can be achieved it will intensify the need for a bigger part of the workforce coming from outside the Union. **In essence, existing shortages experienced in some sectors in the EU Member States are likely to increase and will require the EU to attract a foreign workforce because the existing labour force will not suffice**. This phenomenon will concern low, medium and highly skilled workers and will intensify when the economic downturn ends.

Finally, the **economic crisis has pushed Eurozone Member States to significantly enhance the coordination of their economic policies**. From this perspective, the situation in Member States' labour markets, including the question of labour migration, will increasingly be relevant to the EU level. As a consequence, **Member States' labour migration will also have to be coordinated and to a certain extent harmonised**. Thinking about national labour market in isolation is no longer a long term perspective. **Addressing management of labour and legal migration flows should be based on an EU approach according to which, in future, national labour markets and policies will increasingly be interconnected and embedded in a single European labour market**.

All of these elements should drive the EU's future action. Establishing a single European labour market requires the EU to develop first coordinated and then common **admission policies**, defining **common conditions to enter and reside** in the EU Member States **for work purposes**. In addition, the single market should act as a strong incentive to **increase intra-EU mobility** for already legally residing third country nationals. The ability for third country national workers to move within the EU, in particular for work related purposes, should be a key driver of future thoughts about legal and labour migration. Finally, and given the fact that the EU is not the only region in the world in need of additional workforce, the EU will have to **consider its attractiveness**. While this implies developing common conditions for admission and genuine intra-EU mobility, further thinking should also envisage **strengthening or developing integration related rights**, such as family reunification, social rights and anti-discrimination policies, as well as providing a 'package' for migrants the EU wants to attract, including, for example, consideration of spouses' employment opportunities and education provision for their children.

All of the abovementioned elements should also be put into perspective regarding the external dimension of the EU in this particular field. Thinking strategically calls for the development of open external policies with third countries. Neighbouring countries are of course a priority but not only. **The EU should forecast and develop relationships/partnerships with specific third and emerging countries** to use the full potential of labour and legal migration to and within the EU.

The ability of the EU to become a region of destination for the workers will increasingly depend on the European Council capacity to consider the EU, and in the first place the Eurozone, as **a single area implying the development of common admission rules and the improvement of intra-EU mobility capacities**. The future guidelines should consider **opening legal channels of migration as a priority to fill in shortages, attract needed workforce and revive growth**. Labour immigration should be portrayed positively as **an opportunity rather than a burden**. Finally, future guidelines should remain within their scope, i.e. the area of freedom, security and justice, and not address others themes. More precisely, the **strategic guidelines should not tackle issues related to freedom of movement of EU citizens** which fall within a different chapter of the Treaty.

Implementing existing rules in the field of irregular migration

This area of action has been largely addressed to the extent that border management policy is one of the most integrated policies at EU level. As a consequence, Task Force participants have emphasised that the **priority is to implement existing rules** regarding border management, visa policy and irregular migration, including the proper implementation of the return directive.

This priority has not constituted an obstacle for some speakers to propose ideas worth exploring in the medium to long run. Regarding **visa policy**, the idea of **setting up an EU consular agency** linked to the European External Action Service to enhance local consular cooperation was proposed. There were some strong reservations expressed regarding such a project. They noted that current local consular cooperation is good enough and visa policy is also a “business” for Member States and they will not give up that source of income.

In the long run, however, one should have a look to the trend according to which the list of states whose nationals are subject to short term visa requirement is decreasing, in particular with EU's neighbouring countries. This raises the question as to whether visa policy as it stands today will last forever. **In an ever increasing mobile and digitalised world, should visa policy remain the same or should it be revised** towards an **individualised-based** rather than nation-based system? Or should it be replaced by another system on the basis of which **visas as such would disappear**?

Another possible option is to revive the idea of creating a **European Border Guard Unit** to ensure uniform control of EU's external borders. While always interesting to think about in the long run, Member States would currently be reluctant to accept such a move considering the link border management has with national sovereignty. In addition, missions performed by the Frontex Agency and the Rapid Border Intervention Teams are satisfactory enough for Member States, meaning a step forward is not seen as necessary for the time being. As a medium-term solution, the creation of **EU inspectorate teams** could be envisaged as an extension of the current Schengen evaluation mechanism.

In any case, the implementation of EU policy aiming at reducing irregular migration at the external borders, in particular sea borders, should be combine with the objective to eradicate people dying at sea.

External action

EU's external action in the field of immigration reflects an internal policy: it is heavily security based. Hence, and as a consequence of general ideas already developed, a **better balance between security and mobility issues** should be struck.

It has been widely acknowledged that the global approach to migration and mobility is a good framework for the establishment of a sound dialogue with third countries. However, **legal migration possibilities should be enhanced**. In this regard, and according to further developments regarding EU legislation on legal and labour migration, some speakers proposed to **transform mobility partnership into binding instruments**.

From a geographical point of view, **the immediate neighbourhood of the EU should be a priority** in terms of migration management, including irregular and legal migration. Turkey, the Balkans as well as the southern shores of the Mediterranean Sea should constitute key priorities, but not exclusively. Partnerships with other countries or regions should also be explored, in particular when linking the fight against irregular migration with the fight against organised crime.

In any case, many Task Force participants have made clear that dialogues, agreements, partnerships and initiatives with third countries regarding legal, and more especially irregular immigration, should have **due regard to human rights**. In this view, strategic guidelines should in particular emphasise the obligation to ensure the right to have access to an asylum procedure where Member States are confronted with mixed flows. The safeguarding of human rights is a duty enshrined in the Treaty and a prerequisite in the development of relationships with third countries.

In any case, demography, labour shortages, political and social development of third countries, increasing use of electronic systems to manage migration, and growing mobility are elements that should be included in the future definition of migration management with third countries. Rising migration of EU citizens to third countries should also be taken into account in the whole process and be part of discussions with third country partners.

3. Integration

In 1999, the Tampere European Council proclaimed “a more vigorous integration policy should aim at granting them [third country nationals] rights and obligations comparable to those of EU citizens”. Hence, the heads of state and government, added to immigration and asylum policy the objective to promote migrant's integration in particular on the basis of a rights based approach and with the support of anti-discrimination rules.

The specificity of integration in EU policy resides in the fact that **Article 79 TFEU confers limited competence to the EU** in this field. Indeed, the EU has no harmonising power and may only adopt measures for the coordination of national policies. While this derives from the fact that the EU has no or little competence in a series of fields related to integration (access to the labour market, health care, housing, social systems, schooling, culture, etc), the reality is different as the EU has adopted a number of rules directly or indirectly linked to integration like the family reunification directive, the long term residence directive or a number of provisions granting access to the labour market, health care or education. In this regard, the development of EU law has followed the orientations defined by the Tampere European Council.

As a matter of fact, no immigration or asylum policy may be developed without addressing integration related issues. EU immigration and asylum policy does not escape this rule. However, the main problem at EU level is to identify the appropriate way to tackle integration in a manner that respects the division of powers between the EU and Member States. So far, the development of a series of integration coordination tools and bodies at EU level has safeguarded this balance.

Task Force discussions did not specifically focus on integration issues. However, some elements were highlighted which are linked to integration and could therefore be taken into account in the framework of future strategic guidelines. The **“rights based approach”** was underlined as a crucial element to be kept high on EU's action in the field. In other words, granting rights to migrants is a key element to ensure their sound integration into the society. This includes ensuring the implementation of existing rights, such as **family reunification**, to the creation of new additional rights, like **mobility rights** which **promote social inclusion** of migrants into the receiving society and in Europe. In this regard, it was emphasised that **integration should always seek to improve social inclusion and never be used for the purpose of social exclusion**, i.e. to impose integration conditions on migrants in order to benefit from a right or a more secured legal status.

Alongside the “rights based approach”, thinking about the future of integration policies at EU level should address at least two additional themes. The **link between immigration and integration policies** is, up until now, not fully addressed. The effect of immigration policies and practices over further integration capacities of third country nationals in the receiving society should constitute one line of further reasoning. In concrete terms, EU rules have organised the possibility to detain migrants and asylum seekers under specific circumstances. While this portrays a trend in Member States to use detention of migrants as a migration tool, this is implemented without consideration regarding effects of detention on further integration capacities of migrants. In this view, and regarding other fields of immigration and asylum policies, a stronger linkage between these policies with integration should constitute an axis of reflection.

Another theme concerns the question of values. EU values, political, social, philosophical, etc are not universally shared. Although the majority of migrants will be a cultural boon – will bring benefits in terms of cultural richness and values, the Member States should not be shy in upholding EU values in the face of extremism. **Striking the right balance between maintaining EU values and embracing diversity** will be a major challenge for EU society and decision-makers.

Given the variety of forms and topics falling within the scope of integration, the EU should identify the right targets to address and ensure that all players dealing with integration issues coordinate their actions in order to ensure coherence.

C. Internal security

Security issues have been located at the top of EU's agenda, in particular since the 9/11 attacks and Madrid and London bombings. While security concerns are political priorities for decision makers and citizens living in the EU's territory, the fields covered under the Treaty are impressively wide and therefore sometimes difficult to encompass and articulate. They concern chapter 4 related to "Judicial cooperation in criminal matters" and chapter 5 on "Police cooperation".

The width of the field is for instance portrayed by Article 83 of the Treaty. This provision entrusts the EU with the competence to adopt Directives establishing minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. The provision then lists the areas of crimes targeted which are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. However the list of crimes is not exhaustive as Article 83 indicates that "on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph".

While members of the Task Force have underlined the specificities of this policy field, in terms of content and institutional characteristics, they have also highlighted some serious problems and provided for some ideas to overcome these complications in the short and long run. The main issues discussed have dealt with difficulties related to defining policy perspectives (1), overcoming complexity and competition (2), strengthening training activities (3) and finally balancing the content of the policy (4).

1. Better defining policy perspectives

In the framework of the post-Stockholm phase, defining clear policy orientations and perspectives is, as already outlined, crucial. Relating to internal security issues, Task Force discussions underlined some shortcomings in this regard. However, some elements have been identified in order to better define forthcoming policy orientations.

Which policy orientations?

Article 2 of the Treaty of the European Union states "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". With the exception of this generic provision, the Treaty does not tell us much about which orientation internal security policy and rules should aim for; **should the policy be only security-oriented or, on the contrary, only justice/protection-based or, should this policy field try to strike the right balance by identifying a sound complementarity between these orientations?**

It is true that terrorist attacks and potential threats inside and outside the EU as well as cross-border security challenges have put a strain on this policy area and pushed players to act. The adoption in a short period of time of the European Arrest Warrant remains an example on how leaders can act quickly in sensitive dossiers. Furthermore, the expansion of institutions, bodies and strategies at EU level have created the conditions for development of several actions. More generally, the field of criminal justice and criminal law has been actively developed. However, for some stakeholders, a security driven approach has taken over a policy more inclined to protect victims. Such a trend has even driven some observers to underline that next steps in **this policy field should not lead to over-criminalisation**.

These criticisms illustrate the difficult balance the EU and Member States have to find between the prevention and repression of organised crime, and at the same time providing for a true judicial dimension, i.e. a justice-based policy.

Nevertheless, this position is not fully shared by all stakeholders. Representatives of nationals' agents active in the field of security have raised their concern regarding the protection of policemen, border guards etc. in their duty to protect citizens' security. In other words, agents performing security tasks on the ground consider that EU policies have been developed in a way that secures procedures and protects, more than they help police and justice cooperation.²⁸

The difference between the two approaches demonstrates the divergences of perceptions which exist today in the field of internal security between the EU level and the national level. Without entering this discussion now, as we will come back on this later on, it should nevertheless be underlined that the broad picture shows that the steps taken in the field of internal security have indeed shown some imbalances but rather to the benefit of security related issues, as shown in some reports.²⁹ Hence, issues like judicial protection, i.e. access to justice, or data protection have not been

addressed to the extent expected and need consequently to be improved. The latest reports on the PRISM scandal show the imperative need to protect data in a wide range of fields, in particular in security issues.

In this context, it looks evident that strategic guidelines should contain clear policy orientations regarding criminal justice and police cooperation. In concrete terms, it should be EU leaders' responsibility to design the political framework within which future actions will take place. One of the messages portrayed during the Task Force discussions was to avoid over-criminalisation and **strike the right balance between security and justice, security and freedom**. In this regard, and alongside actions adopted to strengthen security on the territory, existing initiatives launched to enhance procedural guarantees should also be further supported and highlighted.

How to better define the policy?

Policy orientations should set the general frame within which policies will be developed. However, the content of policies should also be defined in an appropriate way, i.e. what does EU criminal policy want to address?

Concerning this element, a general consensus was reached during Task Force discussions: **the lack of statistical data** does not allow the EU and its Member States to define a genuine policy. Some participants have made it clear that from their point of view, **the EU has not developed any criminal policy and does not have therefore any long term vision**.

As already underlined by the European Commission; “statistics on crime and criminal justice are indispensable tools for developing evidence-based policy at EU level”.³⁰ Despite the development of an Action plan aimed at improving the collection of statistics regarding crime and criminal justice, it looks like progress is slow.³¹ It should be underlined that gathering statistics in criminal matters is at a cross roads between an operational need and a political problem as sharing such sensitive information requires strong and shared political will. However, once established, the existence of common data in the criminal field will provide for sound information and help in defining the right policies to address.

It should be added that according to the discussions held within the Task Force, and alongside Commission's statements³², this data collection process should also be combined with a **stronger evaluation exercise** to assess to which extent policies developed and rules adopted at EU level have been implemented and helped to address transnational crime. In this view, the possibility to develop a **scoreboard** has frequently been identified as one way forward.

Furthermore, **impact assessments** – in other words *ex ante* mechanisms – should be improved. During discussions, one concern regarding the transparency of procedures and methods used was raised. More precisely, some doubts concern the independence and impartiality of consultancy organisations involved in impact assessments launched by the European Commission. Hence, greater transparency in this process was mentioned as an area to look at. In addition, impact assessments should be maintained as they are necessary to assess whether future policies are well suited to answer to current and forthcoming challenges.

Finally, it should be underlined that sound evaluation mechanisms are of added value when it comes to address security issues through budgetary concerns. Indeed, Member States pay attention to evaluation when weighing the cost of a policy and also base their opinion on the results of the evaluation.

In the end, criminal justice and police cooperation policies call for the development of a framework of exchange of information helping to design future EU criminal policy in the best way possible in order to address security threats and challenges in the most efficient way.

Better definition of policy perspectives, in general and concrete terms, will only be achieved if institutional obstacles existing in this field are overcome.

2. Overcoming complexity and competition

The process of addressing security related issues at EU level has over the last 15 years been accelerated and gave birth to a very **complex institutional framework**. Indeed, and as outlined during the meetings, internal security issues are discussed at several levels which create coherence problems. The different levels may be summarised as follows:

- At political level with the European Council and the Council of the EU for the definition of the Internal Security Strategy.
- At strategic level with the Commission in charge of adopting the Internal Security Strategy Action plan.

- At operational level with the Comité permanent de Sécurité Intérieure (COSI) for the management of the policy cycle.
- At tactical level with all EU agencies involved in security related issues.

This extremely complex approach presents two major **weaknesses** which were highlighted during the Task Force discussions. Firstly, the **division of tasks** allocated to different players does not always match the material scope of policies. For instance, the internal security strategy underlines the need to “strengthen security through border management”. However, the development of this action brings together several players which do not always have the same mission and way of working like Europol, Frontex or customs authorities. While this could create unnecessary complexity, this could also give ground to **competitive strategies between players** with power grabs, or fiercely marking their territory without having regard to the whole policy objective.

Secondly, and more worryingly, the complexity of the way internal security issues are dealt with at EU level may cause further problems when national authorities have to implement actions “on the ground”. It has been highlighted that there is sometimes a **large gap between EU decisions** – considered too abstract – **and what is actually happening in the Member States**. Furthermore, it might be difficult to understand the logic behind actions encapsulated in different documents – the Stockholm programme, the Internal Security Strategy and the EU policy Cycle – which overlap with one another. Finally, priorities identified in EU documents may not be the same as the ones highlighted at national level. Here again, there is a risk of misunderstanding, discrepancies between actions and to a certain extent competition between objectives and stakeholders.

All of these difficulties should nevertheless be put into perspective. They have not been an obstacle to the adoption of an enormous amount of legislations and documents which have over the last 15 years given shape to a so-called EU criminal “policy”. It is true that the process has been empirical and gave rise to some “ownership” competition between institutional players. However, these difficulties may also be overcome with some clear policy objectives enshrined in the strategic guidelines and **enhanced coordination and cooperation mechanisms**.

Such mechanisms should concern **cooperation between EU bodies and national authorities**. For example, the action of the Directorate General for Enlargement in the Balkans is developed without any coordination with Italy, which plays a strong role in the region, and the EU policy cycle regarding security issues. These mechanisms should also address better **coordination between the EU and Member States**. This may happen for instance regarding the identification of priorities which may be different at national and European level. Hence, increased cooperation may be based on better exchange of information between stakeholders. Such a process should nevertheless have due regard to protection of privacy and data protection standards.

To sum up, enhanced cooperation and coordination regarding security issues is a field to be further exploited. In this regard, the potentialities of Article 71 of the Treaty may help a lot.

3. Strengthening training

In order to ensure proper implementation of EU actions and policies, **training is a key issue**. As is the case regarding justice issues, national authorities working in the field of security share one common strong belief: within the 28 national systems, their system is the best. While certainly true, national systems, institutions and bodies nevertheless have to cooperate and collaborate within an EU framework.

This means that national institutions and bodies have to properly implement EU rules. On the other hand, the Europeanization of criminal policy and justice brings national and European institutions and bodies together. In both areas, training is necessary to help **overcoming misunderstandings and create a common “law enforcement culture”**. It also helps to overcome complexities and ensure better implementation of common rules. Combining common culture and implementing reflexes is a strong asset to **increase mutual trust**, the cornerstone of the entire area of freedom security and justice.

Two ways may be further analysed in order to strengthen training. A **better evaluation process, based on Article 70** for instance, could bring some added information about shortcomings, their reasons and solutions to put in place to adapt national practices to EU actions. In this regard, it has also been highlighted that the evaluation process should also involve practitioners to ensure a more pragmatic approach.

The second way could be to create, alongside the proposal to create a “European Judicial Institute” as mentioned in the section justice of this report, a **“Collège of Europe for Police”**. Such a common training structure would infuse a European culture in dealing with transnational crime and criminal justice. It would also enable “students” to learn the

same rules, practice the same language and get to learn from each other. Personal contact has always been a key factor to facilitate concrete and operational cooperation, especially in this particular field.

Through evaluation and a common learning structure, a strengthened common understanding of challenges and ways to address them in theoretical and operational terms should emerge and also create the condition of the emergence of a "common culture".

4. Balancing the content of the policy: approximation and/or implementation?

This is perhaps the oldest debate that takes place in the field of EU internal security developments and has pitted those supporting the development of mutual recognition against those in favour of approximation of national rules. The debate remains active almost 15 years later. It is now accompanied with another argument related to implementation. In other words, the need to implement existing rules first before launching other legislative proposals.

Here, like in the others policies relating to the area of freedom, security and justice, the system is not perfect and requires **finding a good balance between developing new tools and making sure that the ones already adopted and in motion are correctly implemented.**

In any case, discussions held during the Task Force meeting made clear that in several fields, there is a **need "to finish the job"**. This concerns **mutual recognition** in the field of judicial cooperation. This concerns **approximation** in the field of criminal procedural and substantive law. Moreover, recent events have shown that the specific question of data protection should be one of the main concerns addressed in the next phase of action. Finally, EU decision makers will have to take some decisions as to whether they want to set up new bodies like the **European Public Prosecutor** and strengthen the power of existing bodies like Europol and Eurojust. This said, the correct implementation of existing rules and mechanisms should also be a priority to identify shortcomings and define further steps.

Last but not least, the **external dimension** of the policy will of course be crucial. Not only because threats to European security also come from outside the EU but also because the coordination of this policy field with the European External Action Service will create a strong asset in terms of information, coordination and also cooperation with external partners.

Securing the everyday lives of people living in the area of freedom, security and justice is a hard task which is no more than the sole responsibility of individual Member States. Cross border criminality is evolving and using new technologies. While the transnational dimension is sufficient to justify EU action, the complexity of criminal behaviour calls for enhanced cooperation between EU states to better address the issue. The approach adopted over the last 15 years has brought some results but needs to be further elaborated.

In this view, the new phase should continue and improve the work already done. According to exchanges developed within the Task Force discussions, one participant presented the five following elements as possible further steps towards an EU criminal policy:

- Strengthening an evidence based policy on the basis of reliable statistics and multidisciplinary consultations involving practitioners.
- Ensuring correct implementation and consolidation of existing rules and develop training.
- Developing new rules respecting balances between mutual recognition in criminal matters and approximation in criminal procedures, exchange of information and data protection.
- Improving coordination between policies and relevant players.
- Develop transparency on EU criminal Policy through scoreboards.

D. Justice

In the opening speech at the « Assises de la Justice », organised at the end of November 2013 by DG Justice, former French Justice Minister Robert Badinter explained in a simple, elegant and highly accomplished manner **why the wind of history is blowing towards an ever more unified justice system in Europe.** Regarding transnational crime, he indicated that remaining national legal borders may offer a refuge to criminals. Regarding trade, the European Union is first and foremost a single market where disputes and contracts are by their very nature transnational. In line with Mr Badinter's view, it should be recalled that the Single Market has abolished the distinction between international and domestic contracts. Finally, he added that families are even more mixed because people are even more mobile. He concluded that all of these circumstances do not fit within the sole remit of national laws because national legislation is too limited and incapable of solving transnational situations on their own. As a consequence, the world we are living in leads us to think of justice issues in European rather than in national terms.

Discussions held within the Task Force meeting followed a similar line. They nevertheless pointed out some shortcomings regarding results achieved and proposed improvements to be put into motion in the future. These enhancements concern the need to let people know about the EU's actions in the field of justice (1), the necessity to simplify existing and forthcoming rules (2) and finally areas where making progress should be a priority (3).

1. EU justice policy: the unknown policy

It is considered as a matter of fact that the EU's track record in the field of civil, commercial and family areas is significant. Successions and wills, divorce, child custody, contract law, consumer protection, data protection, access to justice, etc. are – amongst others – domains in which the EU has acted and is still working on. During the Task Force, one of the participants underlined that **the EU should be “proud” of the legislative work performed so far** and mentioned as an example the fact that the EU has achieved **the most advanced system of mutual recognition in the world**.

However, **the enormous amount of work accomplished at EU level is barely known or misunderstood**. Indeed, citizens are not well aware of the issues dealt with at EU level which address numerous situations they are confronted with in their everyday lives, in particular when they are moving from one Member State to another. Put differently, citizens residing in the EU do not know that the EU as a whole is working on a daily basis to make their lives across borders ever more easy and secure. A similar reasoning may apply to small and medium size companies which do not always have great knowledge about the EU's action.

While citizens do often identify work performed at EU level in immigration and security related fields – using regularly themes such as “Fortress Europe” or the “EU's security deficit” – but they are unable to identify EU action in areas of civil, commercial and family justice. On this basis, it was highlighted within the Task Force that **the EU should be made more visible for citizens and companies**.

EU institutions should therefore start a **“marketing process”** underlining what has been achieved so far, concrete results and what should be completed in the next phase. In a period where the EU is lacking support from its citizens, underlining that it is trying to break down legal barriers in order to make mobile citizens' lives less complex is highly necessary. Furthermore, the EU should also highlight that some **rules are not only adopted for a “mobile EU pan-European elite” but also for all citizens**, as is the case for instance regarding the common European sales law.

This “marketing exercise” should of course be undertaken primarily by the European Commission. While the “2013 EU citizens' year”, conducted by DG Justice, was an opportunity for people throughout Europe to learn about the rights and opportunities open to them through EU citizenship – particularly their right to live and work anywhere in the EU – the work should be further continued regarding the specific fields of civil, commercial and family law.³³ However, the European Commission should not be the only institution to uphold this task.

The European Council should take the opportunity of the strategic guidelines to push forward a clear **message about the EU's commitment towards mobility and protection of people's lives across the EU's borders**. Delivering this message is crucial for at least three reasons: It should continue to recall that **freedom of movement is a pillar** of EU integration. It should then **strengthen mobility of EU citizens** at a time where freedom of movement of people is under severe attack, especially from the British government. The European Council should finally **help citizens to understand in simple terms how the EU has been able to address the situations** that an ever increasing number of mobile people are facing throughout the EU.

In any case, forthcoming strategic guidelines should **avoid putting down a series of detailed measures to be adopted**, as was the case in the Stockholm programme. The Stockholm “Christmas tree approach” was a double failure; policy orientations were lost in a long series of measures and the Stockholm programme did not reach the citizens. In practice the Stockholm Programme was a genuine EU product, i.e. adopted for EU stakeholders and not for EU citizens. Therefore it is necessary for future strategic guidelines to address citizens and companies in showing what the EU has done in this crucial policy fields and what is to be accomplished in the next long term phase.

The European Parliament should also take its part in making EU civil justice more easily understandable for citizens living in the European Union. Concrete examples of how the EU has been able to simplify cross border disputes is something that talks to people and should therefore be used by the European Parliament to legitimate EU actions.

In this context, EU and national institutions should develop strategies **using e-tools** to better communicate. This communication exercise should primarily concern business and young people. These two categories are the ones that benefit from the EU's action in the fields of civil, commercial and family justice and are also increasingly connected

to the digital world. It is a duty for the EU and national bodies to take up this challenge and be able to portray positive messages to the widest audience possible, in particular to the young generation and businesses.

Finally, it should be recalled that effective justice is a strong factor of trust among citizens but also in the business sector. In this view, "Justice" as a whole – including criminal justice – should also be addressed as a strong factor for growth. Indeed, companies invest in secure environments for business and consumers. In this regard, and in times of crisis, shedding light on this potential positive aspect may also help in portraying a positive and welcome message.

2. Simplifying rules

In being extremely active in the different domains related to justice, **the EU has not been able to avoid a pitfall: complexity.** The EPC Task Force participants underlined this problem.

The complexity concerns firstly the **significant amount of legislation adopted**, and in particular in some specific sectors, which does not help people to easily identify whether EU law is applicable or not and how. For example, several Regulations have been adopted that might have an impact on international divorce procedures, leading to ever increasing complexity. It is obvious that the multiplication of texts does not help understanding how a person's personal situation is covered by EU law.

The second source of complexity is related to **competence problems**. More precisely, some fields sometimes overlap and it is not entirely clear whether these issues should fall within one policy area or another. An example in this regard is the question of family names. While this issue is dealt with within the remit of citizenship, i.e. Article 21 TFEU, it might be worth addressing it within the remit of civil justice. But in this case there is a problem because the procedure applicable under Article 81.2 TFEU is based on a unanimity procedure whereas Article 21 TFEU is based on co-decision.

To sum up, the EU has adopted a significant amount of legislation in this crucial field, and a lot of instruments are still in the pipeline, but it is subject to two types of inconsistencies. **A lack of consistency between rules**, which brings uncertainty regarding their implementation. There is also a **lack of consistency between policy areas** which may diminish the relevance of decisions taken. As a consequence, further developments regarding civil justice, commercial and family law should also be accompanied by some strong clarifications and coordination.

Adopting better legislation was underlined by Task Force members as one key priority. While this is a recurrent concern expressed over a long period of time at EU level, it is obvious that developing better legislation in an area where rules govern people's lives and companies operations of importance. In this view, making EU law and objectives understandable for people and businesses should be a strong driving force for the future.

While adopting clearer rules would represent a strong short term action to be put into motion, another long term aim should also be targeted: **codification**. Having regard to the development of numerous legal instruments in the same domains, as the example of divorce has shown, this kind of exercise should be welcomed. However, taking action towards achieving this is difficult. Alongside mere rationalisation of existing texts, it will require the assessing of current instruments and addressing remaining gaps existing between them. In the end, this may not be a simple task and may also lead to difficult policy choices and negotiations between the EU and Member states and between EU institutions. Codification could therefore be a mid or long term perspective.

However, adopting better legislation does not only mean adopting clearer rules or instruments of codification. It is also linked to two different types of actions which have been highlighted by several participants. One important element to reach better legislation would be to **engage practitioners in the law making process**. In addition, there is sometimes a significant gap between EU rules and their implementation in practice. Hence, involving practitioners would help better address concrete problems and improve the implementation of EU rules in practice.

Another important element would be to **include EU legislation regarding justice policies within the framework of budgetary constraints and levers**. Bringing coherence and simplification in this "legal tangle" would be cost efficient. Indeed, adopting several sets of piecemeal legislation is time consuming and also costly. Addressing issues in a broad manner, codifying existing legislation and developing the use of e-tools may therefore be prioritised for budgetary reasons. This perspective may also be emphasised by the European Semester where well-functioning justice systems are considered as having a positive impact on growth and people's lives.

Finally, bringing clarity and consistency requires the development of appropriate coordination processes regarding

rules and between stakeholders. It will be the task of decision makers to enhance existing coordination mechanisms and to design new ones which would enable the EU to take stock of the results achieved, to define actions to be undertaken and to identify the right players to put them into motion. In this regard, Eurojust and other relevant EU bodies, as well as the European Judicial Network in civil and commercial matters, could play central roles and help to better coordinate relevant policy fields.

3. Options for the future

The EU will not stop moving ahead in a field of crucial importance for citizens and companies. However, some strategic options should be defined in order to make EU action more efficient.

Defining priorities and timelines

One first step should be to **set the priorities** in the different fields falling within the vast remit of “Justice Policies” and to adopt the appropriate measures according to the needs, the efficiency of existing instruments and legal parameters. In concrete terms, **developing the abolition of exequatur in other areas, extending mutual recognition instruments, adopting minimum standards in procedure law and harmonising substantive law** are policy options EU stakeholders will have to think about and discuss.

While every action will have to be set into motion in the next 10 to 20 years, EU decision makers will have to decide on priorities and timing. The options chosen and the timeline defined will be crucial as they will be strong drivers for people's understanding of and support for the common project. They will also enhance mutual trust between all of the players involved in this policy area, from decision makers to businesses, and be a source of economic growth.

Improving implementation

The second step would be to address the issue of the implementation of EU rules. On the one hand, it is the responsibility of the European Commission to **check how EU rules are implemented** in the Member States and to pay attention to national rules which have an impact on or are an obstacle to the implementation of EU rules.

On the other hand, different tools could be developed or further developed to ensure correct implementation in the Member States. The use of a **scoreboard** was presented as an option by several members of the Task Force without always receiving positive feedback. Indeed, these tools may have a “naming and shaming” nature which could have a negative impact on mutual trust.

An alternative was mentioned through the creation of evaluation mechanisms on the basis of **Article 70 TFEU**. Such a mechanism could allow the evaluation of the efficiency of policies within the Member States and could function like the Group of States against Corruption (GRECO) established by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards.

Finally, the implementation of EU rules and policies could also be better assessed through the **use of new electronic tools**.

Developing a common judicial culture through training

A third step would be to **develop and deepen a common judicial culture**. This concerns in particular the training of judges. While this training should improve the implementation of rules and policies in the Member States, it should also create the **conditions of growing mutual trust between judges**. In this field, like in many others, judges and practitioners believe their national system is the best. Enhancing and improving mutual training could be a serious way to get judges' confidence in and knowledge about common rules and tools, expand common cooperation between national judges and finally further develop a common judicial language.

In this view, Robert Badinter proposed in its opening address at the “Assises de la justice” to create, alongside the European Court of Justice, a **European Judicial Institute** where national judges would be invited to train for several months. Here again, the development of e-tools could support this process.

Better use of the potential of the external dimension

Taking into account the external dimension of policies undertaken at EU level is a fourth priority step. More precisely, it was underlined during the Task Force meeting that EU decision makers should pay attention to the **EU's exclusive competence** in several domains and consider its development in the external dimension.

The ability of the EU to conclude international agreements with some specific countries in particular areas was mentioned as a key element. As an example, concluding agreements regarding surrogacy with targeted countries, like Ukraine or India, should clearly help in defining clear and commonly agreed upon rules.

Moreover, **better cooperation at international level with other key stakeholders** – like the Hague Conference on private international law or the Commission Internationale de l'Etat Civil (CIEC) – would clearly improve the EU's strategy and collaboration with its external partners.

Human rights and access to justice as a framework

Finally, the next steps should bear in mind that EU rules in the field of justice should always be placed under the framework of human rights. While human rights form the basis of the European Union, **access to justice should remain a Union and Member State' priority**. Access to justice is a prerequisite to the protection of individual and company rights, to strengthening the EU's attractiveness and to ensuring EU's development and prosperity.

E. Transversal issues

Thinking about the future of the area of freedom, security and justice requires not only addressing specific topics in immigration, security and justice policies but also identifying themes which are common to all of these policy fields and have a crucial impact on the current and forthcoming decision making process. Among different possible themes, Task Force members have identified four main ones: external dimension (1); data protection (2); human rights (3) and evaluation (4).

1. External dimension

Freedom, security and justice is not purely an internal concept and project – it has an external dimension and needs to be linked to it in order to be fully achieved. Dealing with migration related issues requires the involvement of third countries when shaping and implementing policy. Otherwise EU migration policy would be “one-sided” and unable to properly tackle immigration, asylum and integration related challenges.

The same reasoning applies to the vast majority of issues that fall within the scope of the area of freedom, security and justice. Fighting against terrorism, drugs or trafficking in human beings, identifying common threats, developing data protection rules and strategies, ensuring human rights protection – none of these would be possible to the level expected without the participation and the contribution of third countries at different stages.

While the EU has developed important collaborations with third countries in the field of justice and home affairs, **future strategic guidelines should emphasise the need to maximise the EU's external potential**. During the Task Force meetings, different ideas were highlighted, some of which could contribute to the debate.

From a reactive to a proactive policy

Several internal and external developments in the field of justice and home affairs' policy have been achieved in reaction to unexpected events which have pushed EU stakeholders to act. The 9/11 attacks in New-York boosted the adoption of the European Arrest Warrant; the Madrid and London bombings accelerated EU counter-terrorism cooperation; the discovery of 58 dead Chinese migrants in a truck in Dover has reoriented immigration policies in particular regarding the fight against criminal network channelling irregular migrants within the EU; etc.

While it would be unfair to judge the EU's external policy as merely a reactive policy – especially given the important set of agreements it has signed with third countries in different fields – some improvements would nevertheless be welcomed. Such developments should be based on the **principle of differentiation**, which enables the EU to negotiate differently according to the State it is dealing with, and take into account forthcoming challenges and threats.

At first glance, the development of relations with neighbouring countries is a key component of the EU's external action in the field of justice and home affairs. Nevertheless two different groups of states should be distinguished. The **Balkan states** which have accession prospects to the EU and for which requirements will be high as they will be requested to “swallow” the entire EU *acquis*, including EU rules adopted in the field of justice and home affairs.

Relations with southern neighbouring states, i.e. **Tunisia, Morocco and Algeria**, are somewhat different. Here, the nature and content of the relationship is tailored according to the state concerned. In this group, Morocco is a “frontrunner”. It is already engaged in a free trade agreement and has also signed a mobility partnership.³⁴ Tunisia

stands just behind Morocco as it has recently also concluded a mobility partnership with the EU and Member States. Finally, negotiations with Algeria are still difficult but have recently started. This lengthy process with Algeria is a problem alongside the importance of developing a mobility dialogue, as this country is a key player when discussing terrorism given its geographical position regarding Libya and Mali.

In addition to these specific countries, the EU should also continue working with **Turkey, Libya, Egypt and Syria** regarding justice and home affairs issues. However, according to the geographical position, the political structure, and progress regarding specific topics and in particular democracy and human rights, the state of advancement with each of these countries is different. This is in concrete terms the application of the so called principle of differentiation. Hence, the cooperation the EU will set up with Turkey will be different from the one it will develop with Libya.

However, the principle of differentiation which is principally based on a country by country approach should ensure coherence between the different relationships developed, i.e. **make sure that the relationship with one country is coherent with relationships developed with other ones in the same region**. Furthermore, the external side of the policies should also encompass a transnational perspective. This means that closer cooperation between countries should be enhanced. In addition, the effect of cooperation on other countries should also be considered. In this regard, solutions such as the “Sahel strategy” set up by the European External Action Service³⁵ should be further developed.

Furthermore, the discussions underlined that the EU should be **more strategic and proactive with emerging countries**. So far, and with the exception of Russia, EU's cooperation in the field of justice and home affairs with those countries can be qualified as being “poor”. Therefore, there are some opportunities to develop new partnerships in these specific fields with countries which have an increasing influence and power at global level.

Finally, and on a more thematic level, the EU should target specific countries regarding drug trafficking. Indeed, the cocaine route should force the EU to negotiate with western African states and the heroine route should lead the EU to deal with Afghanistan.

In the end, more than reacting to unexpected events the EU and Member States should further **develop a long term strategic and proactive vision of crucial challenges directly and indirectly linked to justice and home affairs**. Dealing with specific countries regarding migration management, data protection, terrorism and or counter-terrorism, should not prevent the EU to develop broader strategies including regional and transnational thinking, foreign policy issues and also specific issues which have regional impact like foreign fighters for instance. In this regards the EU and Member States should use all available tools to better understand and address forthcoming key challenges in the field of justice and home affairs.

In any case, the ability of the Union to develop relationships with an ever increasing number of third countries in the field of justice and home affairs, but not only, constitutes also a strong tool to share EU's rules and values, especially when based on agreements.

Thinking pragmatically and innovatively

Thinking pragmatically means that the EU and its Member States should acknowledge that they will not be able to impose their views and rules on some specific third countries. The best example is that of data protection. It is unlikely that the EU will be able to force the United States or Russia to fully apply EU standards in this field. And the same will apply in a series of other fields.

Realistically, the EU will have the power to impose its rules on “small” states but not on “big” ones. Hence, the principles of differentiation will here again play a central role. In this view, negotiating with the US or Russia should be a priority, but not the only one. Therefore, developing agreements with a series of other states, including neighbouring and emerging states, should also be part of a pragmatic and long term strategy. Such a differentiated approach should nevertheless not be detrimental to EU's credibility and ensure to the largest extent possible coherence.

In addition, the EU should develop innovative instruments to make its external policy **more attractive to third countries and third country nationals**. This need can be witnessed in the field of mobility rather than in the field of security issues. As mentioned during the discussions, the traditional visa policy based on “nationalities” – i.e. citizens requested to be in possession of a visa and those who are prevented from this obligation – should evolve and be based on individuals, i.e. the use of biometric database to identify bona fide persons and grant them easier access to the EU. Without further elaborating as to whether this proposal could be feasible and even desirable, it illustrates that this field may also be a source of innovative proposals.

Improving coherence and transparency

Coherence has to be combined with differentiation which is not an easy task. However, it is not impossible. While the EU must identify the fields which have to be primarily addressed with different partners, increased coherence would be beneficial. This would imply thinking in geographical and material terms, and considering which are the best partners to deal with specific issues having in mind the regional (positive or negative) impact such a cooperation could have.

On the other hand, in order to achieve coherence one must **take into account the inconsistencies in the Treaty and the level or lack of policy integration** of some policy fields. In other words, does the Treaty grant external competence to the EU and are policy areas developed enough internally to grant the EU external competence? Answering these questions may make the EU's external action more difficult, as is the case for instance regarding labour and legal migration. Here the EU's internal activity is not sufficiently developed to allow external action.

Finally, **improving transparency between the EU and Member States** would be an important step to enhance coherence. Put differently, it is necessary for the EU to know what kind of cooperation Member States are undertaking with third countries and *vice versa*. EU institutions and Member States should consider themselves as partners and inform each other to make sure that external actions are consistent. This can be neatly summed up by the following phrase: more cooperation for more coherence.

Maximising the asset of EU delegations

The 139 EU delegations that currently exist all around the world in states and international organisations are one of **EU's major assets regarding the external dimension**. The participation of EU delegations at different levels of the policy should nevertheless be strengthened.

In functional terms, EU delegations are composed of national diplomats and EU officials from the Commission and the EEAS, which creates the conditions for a good complementarity of competences. This diversity should be safeguarded and improved to maintain a crucial "policy mix" in the field of external relations.

In practical terms, **EU delegations could work as information providers and also be involved in policy shaping**. Therefore, the role of EU delegations should be enhanced and developed, and their participation in external policy at different levels promoted. Regarding justice and home affairs, the appointment of EU officials in EU delegations with appropriate background could be suggested, in particular regarding some specific or key countries.

In order to maximise the potential of EU delegations, Task Force participants have also underlined the need to **decrease tensions between the European External Action Service and some Commission's Directorate Generals in Brussels**, in particular with DG Development and Cooperation regarding the politicisation of Development Aid. To decrease the tensions, one option could be to work on horizontal issues involving a mix of different people. This approach based on personal relationships between different institutions has sometimes proven to be very efficient. It would also enable the broadening of the scope of issues and avoid focusing only on justice and home affairs issues. Thus, in practice, migration or security related issues would be dealt with through different lenses than the "home affairs" ones usually used at EU level. This could therefore help achieve a broader view on specific issues and to consider different ways of addressing them.

Enhancing the role of EU delegations worldwide to get the information about what is happening "on the ground" and to contribute to the policy shaping should be considered as one of the major tools the EU could have. While some resistance or obstacles remain strong regarding the variety of players involved including institutions and agencies, such a move could definitely give the EU's external action in the field of justice and home affairs a brand new, attractive and fruitful dimension to address mobility, security and justice challenges. It will be up to the European Council to decide whether it wants to make this step forward or whether it remains stuck to the old recipe.

2. Data protection

The exchange of information and the development of electronic databases and IT systems in the area of freedom, security and justice have been very dynamic over the last 15 years regarding law enforcement, judicial cooperation, border management and public protection.

In this perspective, the Treaty of Lisbon has developed a legal framework to protect individuals with regard to the processing of personal data on the basis of the Charter of Fundamental Rights and Article 16 TFEU. The Stockholm programme has emphasised this priority. It stated in particular "the right to privacy and the right to the protection of

personal data are set out in the Charter of Fundamental Rights. The Union must therefore respond to the challenge posed by the increasing exchange of personal data and the need to ensure the protection of privacy".³⁶

EU law and the Charter have precisely developed two related but different concepts concerning, on the one hand, the right to private life, as a negative right, and, on the other hand, the right to be protected. The right to be protected does not forbid data collection but frames the legal conditions within which data can be collected. Hence, Article 8 of the Charter indicates that data should be processed fairly, for specified purposes, on legitimate basis laid down by law, opening the right to correction and under the control of a supervision authority.

Given the increasing development of exchange of information and electronic instruments to make this exchange more rapid and efficient in all the fields related to the area of freedom, security and justice, issues related to data protection are increasingly becoming a widespread concern throughout all justice and home affairs issues. As was commonly acknowledged during Task Force discussions, this point has also been put into the perspective of forthcoming strategic guidelines where some specific elements have been pointed out.

A difficult scope to define

According to Article 16 TFEU, the legal framework regarding data protection is applicable to all EU institutions. But the main difficulty arising in the field of justice and home affairs resides in the fact that exchange of information and the use of EU ICT infrastructures aim – in an overwhelming number of cases – to support national cooperation in the field of national security. According to EU rules, data collection for national security purposes does not fall within the scope of EU law but national law. Hence, the protection framework available in this case is not EU law but rather the European Convention on Human rights.

One of the major challenges the EU and Member States will face within the next couple of years will be to define **whether exchanges of information and data fall within the scope of national security or whether these actions may be included within the scope of EU law**. In this view, it has been highlighted that the role of the Court of Justice will be of major importance as it will have to decide whether data are collected for the purpose of security, and fall within the remit of national competence, or fall within a wider category which can be subject to EU law and ECJ scrutiny.

While the protection of individuals against data processing will become increasingly sensitive, the role of the ECJ and of its jurisprudence will have a tremendous impact on rules applicable and the protection granted to individuals. In this view **the right to have access to data and correct them, the organisation of supervision bodies, and access to judicial redress should be central**.

External action: "adequate" rather than "identical" protection

The EU and its agencies have developed a series of cooperation agreements with third countries regarding the exchange of information. However, the development of agreements with external partners allowing the exchange of information and data storage is always a source of preoccupation in particular in a field where exchanging personal data may have a tremendous impact on people's freedoms. The "PRISM scandal" has reinvigorated these concerns.

However, in a globalised world, the need to exchange information and personal data in particular for security concerns will remain high on the political agenda. At the same time, the importance of ensuring data protection and individual rights will also be increasingly raised. The most delicate issue will be to define how and **to which extent the EU will be able to impose its rules on data protection and the right to private life on third countries**. As already outlined, the imposition of EU rules on some third country partners, like the United States or Russia, will be a difficult task, not to say an impossible one.

In such circumstances, further cooperation should not be abandoned. Using the United States as an example, cooperation does not only mean the development and the adoption of "identical" rules between partners. It may also be the case that according to the development of rules and policies in other parts of the world **the negotiation may be based on an agreement on "adequate" systems of data processing and protection**.

In this regard, the need to offer sound data protection for the largest possible amount of citizens requires additional flexibility in the negotiation process with some specific but strategic partners. Nevertheless, this movement would necessitate an important exercise of supervision from the EU, and in particular the European Commission and the Court of Justice, to ensure that data and information are collected and stored by third country partners in an adequate manner and for a legitimate purpose.

Steps forward for guidelines

With the entry into force of the Lisbon Treaty, the adoption of specific EU rules and European human rights instruments, general principles regarding data protection already exist. Hence, some Task Force participants underlined that the development and adoption of new principles is not necessary. However, they outlined that the correct implementation of existing principles and rules would be one of the biggest challenges the EU and its Member States will have to cope with in the field of freedom, security and justice.

While the world is becoming ever more digitalised, particularly in terms of exchange of information, data protection will be even more linked to the processing, use and storage of data in the EU and international IT systems. In such circumstances, data protection is not only a technical matter but also a question of which rules are applicable to properly ensure that personal data will be used according to “adequate” safeguards. If this question is covered by EU law regarding data collected by EU institutions within the framework of EU law, some difficulties will appear in two situations. This will concern firstly national actions performed on the basis of EU infrastructure for the purpose of national security. Here, the European Convention on Human Rights remains an important safety net but further challenges would be to define when EU rules are applicable to those situations, and when not. The second situation concerns the organisation of data protection where data is processed by third countries with which the EU has an agreement. While the agreements would contain the rules applicable, their correct implementation may prove difficult in practice and the protection of individual rights will be endangered.

Issues related to data protection in all of the fields covered by the area of freedom, security and justice will remain extremely important to deal with. This will increase even further given the importance and willingness to develop electronic tools to facilitate the exchange of information between national authorities. The implementation of existing rules and the role of EU institutions, the Commission and the Court of Justice, will be crucial in this specific field and should be considered as one of the EU's next big challenges regarding EU society as a whole and the safeguarding of citizens' rights.

3. Human rights

Human rights are not specific to justice and home affairs issues. Indeed, Article 6 and 21 of the TEU illustrate the importance of human rights in the EU's internal and external actions. Moreover, the entry into force of the Lisbon Treaty, making the EU Charter of Fundamental Rights binding, has increased the importance of respecting human rights in the field of EU law.

Without being dealt with specifically, this paper has consistently underlined how human rights protection is crucial in the area of freedom, security and justice. If the EU is trying to maintain a high level of protection in its legislation and external relations, it happens that **the implementation side does not always match the expectations**.

More precisely, some policy fields like migration and asylum illustrate situations where states do not deliver on human rights. This has been the case with Greece and its failing asylum system which has enabled the European Court of Human Rights to condemn Belgium for sending back asylum seekers to Greece. This case law is an example of the fact that the European Commission does not play its role, through refusing to launch infringement procedures against failing states. Among the Task Force participants, it was recalled that the EU should do its utmost to respect human rights in the fields where the EU has competence. This includes during the law making process and the implementation phase.

Keeping in mind the importance and the impact of the Charter of Fundamental Rights which acts as a magnet across all EU policies, some participants have also emphasised its new potential. Encompassing classical human rights, which generally establishing prohibition to act; **the Charter also addresses new socioeconomic rights which could be granted to citizens**. For instance, these rights may be call upon by citizens to limit the impact of austerity policies imposed by the EU due to the economic crisis. Hence, elderly people may be entitled to claim that the drastic reduction of their pensions runs counter to Article 25 of the Charter.³⁷ The socioeconomic impact of human rights may help to develop positive policies and participate in the legitimation of EU action in public opinion.

Amongst other issues discussed during Task Force meetings on human rights, two points deserve to be highlighted. Some speakers have asked for the EU to **ensure consistency with and to mainstream human rights in its external action**. While this covers a wide range of issues falling under this umbrella the perspective of signing a readmission agreement with Belarus has been identified as a source of concern.

Secondly, discussions have also touched upon one sensitive issue when it comes to **“sanctioning” one Member State which deliberately violates fundamental rights**. It has been recognised that once admitted to the EU, there are very

little means for EU institutions and Member States to force a partner to fulfil its requirements regarding human rights. Indeed, Article 7 TEU has been compared to a “nuclear bomb” which would require a long political process, going far beyond justice and home affairs issues, to be put in motion. Hence, the EU should be able to limit deliberate violations of human rights, in particular in the area of freedom, security and justice, without the use of Article 7.

Given the importance of human rights in the field of freedom, security and justice, it was acknowledged that this transversal theme should consistently be upheld and should **continue to form an integral part of EU's internal and external policy now and for the future**. As Robert Badinter rightly pointed out in its opening address at the “Assises de la justice”, Europe has been able to establish an area where human rights are the most protected in the world. This has been attained through a democratic process and the level of protection achieved should be maintained. This should constitute an overarching principle guiding future strategic guidelines in the area of freedom, security and justice.

4. Evaluation

The question of evaluating policies has been addressed several times in this report. As a consequence, this last paragraph will try to outline some of the main elements discussed during the last meeting. Evaluation is classically divided into two main phases: *ex ante* and *ex post* evaluation.

Ex ante evaluation

Ex ante evaluation is principally the task of the European Commission on the basis of impact assessments performed in the perspective of tabling legislative initiatives. While this action is important in all policy fields, it is not assessed by any other EU body. Hence, some have put forward the idea of **granting another EU institution or body the power to evaluate ex ante evaluations** conducted by the Commission.

Ex post evaluation

Ex post evaluation is of a different nature as it aims at defining whether EU rules are correctly implemented. This type of evaluation is in general considered to encompass two main forms: the Commission's assessment of whether Member States have transposed EU legislation in due time and the Court's evaluation of the correct interpretation of EU rules by national transposition instruments. Regarding this second form of evaluation, and given the bad quality of EU legislation in the field of justice and home affairs, **the role of the Court of Justice will most probably be very important in the next couple of years**, in particular if the trend of preliminary rulings increases.

However, Task Force discussions also broadened out the scope of evaluation and put forward some **other types of processes** that may be further used in the field of justice and home affairs. The development of a **scoreboard** to check whether rules have been adopted at EU level and implemented in the Member State was again deliberated. While this tool is considered interesting to evaluate who is properly performing in the field, its impact is limited to formal action and does not really address the content of the rules.

Also proposed was the development of **impact indicators** which would have the effect of assessing the effectiveness in the legislation. This type of evaluation could cover several issues such as the effectiveness of rules in practice, the changes introduced by EU rules and policies, the impact of the changing environment, etc. While based on a qualitative assessment, such an evaluation process would also require developing it over a long period of time and perhaps on the basis of a policy cycle.

A third type of evaluation exists in the possibility offered by **Article 70 TFEU** regarding implementation in the Member States. This exercise is interesting for two main reasons. It helps to properly implement EU rules at operational level. It ensures a *de facto* harmonisation process of policies and practices. In this regard the Schengen evaluation mechanism has proven to be fairly efficient.

Finally, all of these options should be put into motion by taking into account the importance of **distinguishing between legal and political evaluation**. Some of the above mentioned examples may fulfil both objectives. However, new or innovative evaluation mechanisms may also be considered. Hence, the role of the **Court of Auditors** could be taken into account in the whole evaluation process regarding the effectiveness of EU policies. Furthermore, strategic guidelines may also decide to set a **review system based on the trio presidency** which would evaluate every 18 months how the strategic guidelines are put into motion and whether there is a need to propose and agree on a reorientation of part or all of the strategic guidelines.

It is obvious that the evaluation process will be one key component of the future of the policy in the area of freedom, security and justice. Addressing the right level of evaluation and defining the appropriate tools will certainly be an interesting part of the negotiation process preceding the formal definition of strategic guidelines. As the EU is evolving in a fast changing environment it should have the tools to be able to evaluate the implementation and impact of its policies and to modify the orientation whenever needed.

CONCLUSIONS

Almost 15 years after the adoption of the Tampere conclusions, the area of freedom, security and justice has significantly developed. With entry into force of the Lisbon Treaty, the final leap towards full recognition of the European, and community's nature of justice and home affairs policies have been enacted. With this in mind, the phase which is going to follow the three successive programmes adopted from Tampere in 1999 to Stockholm in 2009 will be of different kind.

Based on Article 68 TFEU, this new phase will be characterised by the adoption of a specific political document leading to a division of roles among EU institutions. The European Council will adopt strategic guidelines for legislative and operational planning which will set the framework for a future implementing programme adopted by the European Commission. More precisely, and in line with Article 17 TEU, the European Commission will be entrusted with the task to define a detailed action plan to attain the orientations and objectives set by the European Council in the area of freedom, security and justice.

As a new process, strategic guidelines should also provide for a completely new document. According to the discussions held during task Force meetings, these guidelines for the legislative and operational planning should:

Focus on justice and home affairs issues, i.e. be limited to relevant provisions of the Treaty regarding justice and home affairs and exclude all other issues which do not fall within the scope of these provisions, such as freedom of movement of EU citizens (encapsulated in Article 21 and following of the Treaty).

Be forward looking and conceptualise the area of freedom, security and justice for the next 10 to 20 years: this approach should not only address forthcoming needs and developments in this specific area but also take into account global changes which will in the medium and long term affect the area of freedom, security and justice. Demographic, economic, political, social, technological changes in Europe, and worldwide will continuously change and modify Europe's relationships with the world. These various phenomena will have a tremendous impact on the area of freedom, security and justice and the strategic guidelines can therefore not disregard them.

Highly political, concise and understandable for all citizens: lengthy and detailed documents like the Stockholm programme should be abandoned. The European Council should talk to the citizens and explain in simple terms where the EU should aim at in policy fields that have a crucial impact on citizens' everyday lives.

The series of Task Force meetings organised by the EPC over 2013 have also discussed the content of each of the policy fields falling with the area of freedom, security and justice. While discussions have repeatedly heralded that implementation of existing rules is an overarching priority, further developments should also be considered either "to finish the job" or to adapt the EU to forthcoming challenges.

Meeting discussions have therefore outlined the short term and long term needs of each of the policy fields covered by the area of freedom, security and justice: **Immigration, asylum and integration, internal security and justice**. Transversal themes like external dimension, human rights, data protection and evaluation of policies have also been included into the framework of discussions.

Without entering into the details of the discussions which are reported in this paper, the central idea was to identify current shortcomings and appropriate measures to overcome them but also to think about these policies within the framework of a fast changing world. Against this background, some key orientations came across during the debate.

Immigration, asylum and integration: given the reality of demographics and labour shortages and taking into account the integration of national and European labour markets, the EU needs to plan and manage mobility to and within the EU. On the asylum side, the EU's policy regarding international protection inside and more particularly outside its territory is key. Protecting borders and saving people lives are two sides of the same coin and require the development of a broad, coherent and balanced immigration policy.

Internal security: protection of citizens living in the EU against internal and external threats will remain high on the political agenda. Future orientations should strike a better balance between security and freedom/justice concerns. Moreover, the developments of new forms of criminality and threats, in particular due to technological progress, require the EU and Member States to be able to forecast new phenomena, address the appropriate needs, and develop suitable solutions involving all relevant EU and national players.

Justice: citizens and businesses will not stop moving to, and within the EU. Increasing their mobility for the sake of economic efficiency or by lifting legal and practical problems deriving from ever increasing cross border situations should drive EU's policy in the short and long run. Effectiveness of justice, as a source of protection and economic growth, should be a central target alongside the right to have access to justice. In order to make the EU a real area of justice, common judicial culture among national authorities should be strengthened.

While it will remain the sole responsibility of the European Council to define the strategic guidelines for the legislative and operational planning within the area of freedom, security and justice, the paper would nevertheless like to highlight the following recommendations:

RECOMMENDATIONS

Postponing the process

Given the fact that strategic guidelines will frame the legislative and operational agenda of the EU in a series of fields which have an impact on citizens' daily life, like immigration, criminal and civil justice, the fight against terrorism and organised crime etc, the paper underlines that the timeframe decided by the European Council for the definition of strategic guidelines is inappropriate.

Defining strategic guidelines in **June 2014 will not enable the emergence of an open and coordinated debate involving relevant European and national stakeholders** about the content and focus of strategic guidelines.

Moreover, June 2014 will be a **"transitional period"** with an outgoing Commission and an incoming European Parliament. Defining the strategic guidelines at that point in time will commit new institutions which did not have the possibility to contribute to the debate. There are political risks of confrontations which may have an impact on the achievement of strategic guidelines.

Finally, it is highly probable that the June 2014 European Council will focus one single question: the **nomination of "Presidents"** (European Council, the European Commission, and Foreign Affairs Council). In this situation, the definition of strategic guidelines will be overshadowed.

With this in mind, the paper recommends to **postpone the adoption of strategic guidelines until June 2015**. This would allow for the organisation of a large consultation process involving relevant European and national stakeholders. Institutions, authorities and civil society organisations at EU level and in the Member States should take part in a debate about key policies which are going to have an impact on citizens' everyday lives.

This new timing should allow for the framing of the debate around one question: considering a context where the world is rapidly changing, **which policy orientations should the European Council define in the area of freedom, security and justice for the next 10 to 20 years?** Delaying the process should then allow participants to prepare sound and valuable contributions to the debate.

In June 2015, **the European Council will be able to define high level political guidelines on the basis of a large and well informed debate**. In defining strategic guidelines after such a process, the European Council will avoid criticisms about the procedure followed and further confrontations with EU institutions in charge of achieving the policy goals set by the strategic guidelines.

Making the content affordable for citizens

In an ever changing and increasingly interconnected and complex world, where current balances in terms of political, economic, cultural and technological leadership would most likely be deeply modified, the EU and its Member States will face extraordinary challenges in the next 10 to 20 years. These challenges may affect justice and home affairs policies to a possibly unprecedented magnitude.

While the EU is requested to evaluate the existing *acquis*, to identify shortcomings and to define the appropriate policies and measures to develop to cope with the general redistribution of powers and cards, it will also have to

communicate about the future of justice and home affairs policies in understandable way to all citizens. **Language and format used will be as important as the content of the guidelines.** Hence, for the sake of understanding forthcoming challenges and in order to cover all the policy areas and challenges at stake, the paper proposes the strategic guidelines to be established on three pillars: **mobility, protection and effectiveness.**

- **Mobility:** movement of people worldwide will remain a strong trend in the years to come and a highly debated issue. The mobility pillar would allow the EU to address a broad range of issues covering the management of people coming to the EU but also the possibility for legally residing third country nationals to move within the EU. Less negative than “immigration”, the theme of mobility is also one which citizens could easily identify with and understand as a value rather than a burden.
- **Protection:** this pillar would encapsulate three policy fields dealt with at EU level in the area of freedom, security and justice: internal security policies which aim at protecting citizens in the EU against threats; international protection policies which aim at granting protection to people fearing to be persecuted and finally justice-oriented policies which aim at protecting citizens in cross border situations and ensure economic efficiency. Putting these policy fields under the same umbrella would portray the complexity but also complementarity of EU actions and invite policy-makers to approach the issues in a cross-cutting and positive manner.
- **Effectiveness:** citizens are requesting policy-makers to develop effective policies. Within the framework of the area of freedom, security and justice, effectiveness should cover the proper implementation of policies and measures in the Member States and their evaluation (*ex ante* and *ex post*) to assess their policy relevance.

Endnotes

- 1 R. Balfour and K. Raik “Equipping the European Union for the 21st century”, The Finnish Institute of International Affairs, Report 36, FILA Occasional Report 1, 2013; R. Balfour “In Search of a Role: Three Years of the European External Action Service”, The Polish Quarterly of International Affairs, n° 3/2013.
- 2 J.-C. Piris “The Lisbon Treaty. A Legal and Political Analysis”, Cambridge University Press, 2010, sp. 188.
- 3 On this point see for instance M. Poelemans, Y. Pascouau et T. Jouno “L'Europe de la sécurité et de la justice” in T. Jouno (sous la dir. de) “Questions européennes. Le droit et les politiques de l'Union”, Presses Universitaires de France, 2009.
- 4 On this see, J.-C. Piris “The Lisbon Treaty. A Legal and Political Analysis”, Cambridge University Press, 2010, sp. 188-192.
- 5 Article 70 on “mutual evaluation mechanisms” has been included in the Lisbon Treaty to counterbalance the introduction of infringement procedures, i.e. the community method, with the specificity of JHA policies. More precisely, and as explained, “while the infringement procedure as a classical instrument of enforcing legal obligations of Member States is essential, an evaluation of the of the practical efficiency and quality of the Member state action in this area is equally indispensable, and that mutual evaluation amongst the Member States, if conducted properly, can usefully apply beyond the inherent limits of a judicial enforcement of strictly legal duties”. C. Ladenburger & S. Verwilghen “Policies relating the toe Area of Freedom, Security and Justice” in G. Amato, H. Bribosia et B. De Witte (ed.) “Genèse et destinée de la Constitution européenne/Genesis and Destiny of the European Constitution”, Bruylant, 2007.
- 6 C. Ladenburger & S. Verwilghen “Policies relating the toe Area of Freedom, Security and Justice” in G. Amato, H. Bribosia et B. De Witte (ed.) “Genèse et destinée de la Constitution européenne/Genesis and Destiny of the European Constitution”, Bruylant, 2007.
- 7 J.-C. Piris “The Lisbon Treaty. A Legal and Political Analysis”, Cambridge University Press, 2010, sp. 188.
- 8 Communication from the Commission “Europe 2020. A strategy for smart, sustainable and inclusive growth”, COM(2010) 2020 final, 03.03.2010.
- 9 Doc. 15921/12.
- 10 Article 15 paragraph 6 TEU.
- 11 Les “Assises de la Justice” for DG Justice, 21-22 novembre 2013. And for DG Home, Seminar on security-related issues (Rome, November 2013), Hearing on the future of migration and asylum (Brussels, December 2013), 2nd Seminar on security-related issues (Berlin, January 2014), High level Conference on the future of home affairs (Brussels, January 2014) to which should be included a consultation process opened on the DG Home website (which closed on 21 January 2014).
- 12 Council conclusions, Doc. EUCO 169/13.
- 13 “The European Council will hold a discussion at its June 2014 meeting to define strategic guidelines for legislative and operational planning in the area of freedom, security and justice (pursuant to Article 68 TFEU). In preparation for that meeting, the incoming Presidencies are invited to begin a process of reflection within the Council. The Commission is invited to present appropriate contributions to this process”, Doc. EUCO 104/2/13.
- 14 See for instance, European Parliament resolution of 23 October 2013 on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa (2013/2827(RSP)); Amnesty International, Letter to President Herman van Rompuy, Ref. B 1487, 17 October 2013; Human Rights Watch “EU: Improve Migrant Rescue, Offer Refuge”, online article , 23 October 2013; Y. Pascouau “People dying at the EU's external borders : cant the Summit find the right answer ?”, EPC, Commentary, 22 October 2013.
- 15 Y. Pascouau “Le Conseil européen au lendemain de Lampedusa : bonjour tristesse”, La Revue Nouvelle, Janvier 2014 ; Y. Pascouau “Immigration: Aller au-delà de Lampedusa”, Fondation Jean Jaurès, Note n° 4, Observatoire Droit, Justice, Institution, 2 janvier 2014, available at www.jean-jaures.org/Publications/Notes/Immigration-aller-au-dela-du-drame-de-Lampedusa

- 16 The same assessment should also apply to his counterpart from the European Commission, Jose Manuel Barroso.
- 17 During the negotiations of the Schengen package, the European Parliament has been excluded from the co-decision procedure regarding one instrument under discussion. As a matter of retaliation, it has blocked the negotiations regarding five critical dossiers in the field of justice and home affairs. On this issue, see Y. Pascouau "Schengen and Solidarity: the fragile balance between Mutual Trust and Mistrust", EPC, Policy Paper, July 2012.
- 18 See for instance Y. Bertoncini "European Elections: less abstention, more populism?", Tribune, Notre Europe - Institut Jacques Delors, November 2013.
- 19 See, DG Employment and Social Affairs, Quarterly Review, "Special Edition: Annual Overview" September 2013. See also, OECD International Migration Outlook 2013.
- 20 See for instance Frontex "Programme of work 2013".
- 21 J. Peschner & C. Fotakis "Growth potential of EU human resources and policy implications for future economic growth", Working Paper 3/2013.
- 22 For an interesting outlook, see amongst other reports, "Now for the Long Term. The Report from the Oxford Martin Commission for Future Generations", Oxford Martin School, University of Oxford, October 2013; "Global Trends 2030: Alternative Worlds. A publication of the National Intelligence Council", December 2012.
- 23 S. Carrera and E. Guild, "Does the Stockholm Programme matter? The Struggles over ownership of AFSJ Multiannual Programming", CEPS Paper, n° 51, December 2012.
- 24 See, S. Peers, E. Guild, D. Acosta Arcarazo, K. Groenendijk and V. Moreno-Lax "EU immigration and Asylum Law (Text and Commentary), Vol. 1 & 2, second revised version, EU Immigration and Asylum Law", Martinus Nijhoff Publishers, 2012; Y. Pascouau "La politique migratoire de l'Union européenne: de Schengen à Lisbonne", LGDJ 2010; C. Balleix "La politique migratoire de l'Union européenne", La documentation française, 2013.
- 25 Austria; Belgium; Denmark; France; Germany; Greece; Italy; Luxembourg; Netherlands; Sweden and the United Kingdom of Great Britain and Northern Ireland were among the signatories of the Geneva Convention in 1951.
- 26 "An International Failure: The Syrian Refugee Crisis", Amnesty International Briefing, ACT: 34/001/2013, 13 December 2013.
- 27 As explained by the European Commission, EU Regional Protection Programmes are designed to enhance the capacity of non-EU countries in the regions from which many refugees originate, or through which they pass in transit. They improve refugee protection through durable solutions, namely return, local integration and resettlement. They involve practical actions supported through EU financing, delivering real benefits both in terms of protection offered to refugees and arrangements with non-EU countries in support of refugees.
- 28 See for instance, Resolution by the European Confederation of Independent Trade Unions (CESI) "Putting the worker back at the heart of strategic guidelines in terms of freedom, security and justice", 18 September 2013.
- 29 In this regard, see H. Labayle and P. de Bruycker "Towards the Negotiation and adoption of the Stockholm Programme's successor for the period 2015-2019", European Parliament, Policy Department Citizens Rights and Constitutional Affairs, 2013.
- 30 Communication from the Commission to the European Parliament and the Council "Measuring crime in the EU: Statistics Action Plan 2011-2015", COM(2011) 713 final, 18.01.2012.
- 31 See for instance P. Berthelet "Quel avenir pour le Comité de sécurité Intérieure (COSI)?", www.gdr-elsj.eu/2013/11/26/cooperation-policiere/quel-avenir-pour-le-comite-de-securite-interieure-europeenne-cosi/
- 32 "Impact assessments, evaluations of the implementation of EU legislation from the Member States and assessment of the effectiveness of new laws are only some examples of the use of statistical information", Communication from the Commission to the European Parliament and the Council "Measuring crime in the EU: Statistics Action Plan 2011-2015", COM(2011) 713 final, 18.01.2012.
- 33 In line with this, see also Commission's Communication "EU Citizens Report 2013. EU Citizens: your rights, your future", COM(2013) 269 final, 08.05.2013.
- 34 Mobility Partnerships allow to identify more channels for regular migration and to help third countries developing their capacities to offer protection in the region and to respect human rights in their territory. At the same time they allow to increase cooperation in fighting smugglers and traffickers who exploit migrants.
- 35 www.eeas.europa.eu/africa/docs/sahel_strategy_en.pdf
- 36 Stockholm Programme, point 2.5 "Protecting Citizen's Rights in the Information Society".
- 37 Article 25 - The Rights of the Elderly « The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life".

**European Policy Centre
Résidence Palace
155 rue de la Loi, 1040 Brussels,
Belgium
Tel: +32 (0)2 231 03 40
Fax: +32 (0)2 231 07 04
email: info@epc.eu
twitter: [@epc_eu](https://twitter.com/epc_eu)

www.epc.eu**



**Europe for Citizens
Programme**

**With the support of the Europe for Citizens
Programme of the European Union.**