

Terrorism, Borders and Migration

The Commission's 2008 Policy Strategy in the Area of Freedom, Security and Justice

Sergio Carrera and Florian Geyer

Early in 2007, the European Commission published its Annual Policy Strategy for 2008 in which it presents the Commission's proposals for key initiatives to be taken forward in the next year.¹ The Commission's document highlights its priority actions for 2008 and assesses financial and human resource implications. Along with the four strategic objectives of prosperity, solidarity, security and freedom, and a stronger Europe in the world, the Commission identifies three cross-cutting priorities: tackling climate change, pressing ahead with the Lisbon Strategy and managing migration flows to the EU. On the basis of this more general document, later in the year the Commission will present its concise Legislative and Work Programme for 2008. Given the long-term impact that the document thus will have, especially in the Area of Freedom, Security and Justice in the EU (AFSJ), we consider it necessary to address some of the implications inherent in the articulated priorities and envisaged key actions.

This Policy Brief is based on the contribution that the Justice and Home Affairs Unit of CEPS has submitted as written evidence to the inquiry of the European Union Select Committee of the UK House of Lords into the European Commission's Annual Policy Strategy for 2008. The paper addresses two main areas covered by the Policy Strategy which are intrinsically related to our work in the AFSJ: 1. "Fighting Organised Crime and Terrorism"; and 2. "Freedom of Movement and Managing the EU's External Borders".

¹ Commission of the European Communities, *Communication from the Commission – Annual Policy Strategy for 2008*, COM(2007) 65 final, 21.2.2007.

1. Fighting Organised Crime and Terrorism: Security vs Liberty in the EU?

One hears and reads with growing frequency the observation that the European Area of Freedom, Security and Justice is becoming increasingly centred on security to the detriment of freedom and justice. A growing number of court decisions at national, supranational and international level that have annulled or restricted new security-related legislation or executive acts provide extensive empirical evidence to support the assumption. And, in our view, the European Commission's Annual Policy Strategy for 2008 is yet another good example.

Already the formulation of the 'Strategic Objectives' hints at the underlying notion behind the Commission's agenda. When formulated in 2004 – at the beginning of the Barroso Commission's mandate – these had been set as 'Prosperity, Solidarity, Security', a triad that left no apparent place for 'Freedom'.² In the Policy Strategy for 2008, at least the term reappears, albeit squeezed next to security and without being thought important enough to merit a chapter of its own. Freedom, in our view, should actually be mentioned in the first place, given the fact that the EU treaties define a common Area of *Freedom, Security and Justice* (AFSJ) and not the other way round. Furthermore, the freedom dimension needs to constitute the premise upon which an AFSJ is constructed, developed and further promoted.

² J.M. Barroso, "Building a partnership for Europe: Prosperity, solidarity, security", Speech/04/375, 21 July 2004.

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But it is not a question of mere word order that gives rise to concern, but rather some of the envisaged key actions that stand behind these words. Presenting the 2008 Policy Strategy in the European Parliament plenary, Vice President Margot Wallström stated:

To promote security and freedom, we plan to propose new measures for managing our external borders and to set up a European surveillance system to help Member States to deal with growing flows of illegal migrants. To support the fight against crime and terrorism, we expect to see a centralised database of fingerprints becoming operational, and the Commission will also launch a policy to tackle violent radicalisation.³

A centralised database of fingerprints

It is astonishing to see freedom promoted by a ‘surveillance system’ and a ‘centralised database of fingerprints’. In particular, it is this last proposal – the **centralised database of fingerprints** – that has already sparked widespread concern.⁴ This concern is triggered not only by its content, but also by the fact that such a remarkable policy aim has been simply listed as one bullet point (out of three) on page 12 of the Policy Strategy without being further elaborated in the descriptive part of the text. As MEP Baroness Sarah Ludford commented:

We are bombarded with proposals for police or intelligence services’ access to EU immigration or border control databases, as well as transatlantic insistence on access to passenger name records and bank account data. But an EU fingerprint database is so mind-blowing that it will create an unholy alliance of Europhobes and civil libertarians.⁵

Having only mentioned the envisaged database without any further explanation, it remains entirely obscure whose fingerprints the Commission is planning to store in it: those of convicted criminals, of mere suspects, of those who have allegedly threatened the public safety or of every EU citizen who has provided his fingerprint in applying for a passport? For which purposes shall the data be used and shared and among which authorities? Which entity shall exercise oversight? For how long shall the data be stored? And also: which data protection rule shall govern the database? The fact that none of these crucial questions is further addressed should arouse all kinds of

³ M. Wallström, *Statement on the Commission’s Annual Policy Strategy*, Speech/07/141, 13 March 2007.

⁴ “Central fingerprint database plan draws fire from all over EU”, Timesonline, 16.3.2007 (retrieved from www.timesonline.co.uk on 11.4.2007); “Fingerprint database creates storm”, *The Australian*, 16.3.2007, (retrieved from www.theaustralian.news.com.au on 11.4.2007).

⁵ S. Ludford, *EU fingerprint database – Euro big brother?* (retrieved from www.sarahludford.libdems.org.uk on 11.4.2007).

suspicious. Although some of the fears might be exaggerated, the inability of the EU member states to agree on third pillar data protection rules that do not trigger stark warnings from their very own data protection authorities⁶ gives rise to serious concern. Until a strong EU data protection framework is in place, new data-sensitive activities should not be contemplated. In addition, given the fact that the idea of a centralised database of fingerprints of all citizens is already extremely controversial at the national level,⁷ it remains unlikely that the JHA ministers of the EU-27 will be able to find common ground on the matter.

Strengthening EUROJUST

Another key action envisaged for 2008 and mentioned under the headline “Fighting organised crime and terrorism” is the Commission’s aim to strengthen cooperation between member states through **EUROJUST** in investigating and prosecuting cross-border and organised crime. After being established by a Council decision in 2002, EUROJUST has in fact slowly but steadily established its crucial role as the practical contact point for European cooperation of national prosecutors and judges with a growing number of cases and a tangible added value.⁸ In the fifth year of its existence, i.e. 2007, the Commission plans to launch a consultation process on the future of EUROJUST.⁹ There are three aspects that in our opinion should be subject to further scrutiny during this process and beyond.

First, there is the issue of ‘forum-shopping’. One of EUROJUST’s tasks is to suggest to national authorities which jurisdiction is ‘in a better position’ to undertake an investigation or to prosecute specific acts.¹⁰ ‘Better position’, however, is not further defined and might imply that a jurisdiction is in fact ‘better’ where legal obstacles such as admissibility of evidence or other procedural rights are lower, therefore making a conviction more likely. It is encouraging to observe that EUROJUST has addressed this issue internally and has drawn up “Guidelines for deciding which prosecution should prosecute”.¹¹ These guidelines provide inter alia that “prosecutors must not decide to prosecute in one jurisdiction rather than another simply

⁶ Cf. e.g. “Third Pillar Data Protection: EDPS strongly advises Council not to adopt current proposal without significant improvements”, European Data Protection Supervisor, Press Release, 30.4.2007.

⁷ Cf. e.g. in Germany: “Kluft zwischen Schäuble und Zypriens wird grösser”, *Süddeutsche Zeitung*, 16.4.2007, p. 6.

⁸ See Council of the European Union, EUROJUST Annual Report 2006, Council doc. 7550/07, 21.3.2007.

⁹ Council of the European Union, EUROJUST Annual Report 2006, Council doc. 7550/07, 21.3.2007, p. 74.

¹⁰ Articles 6 (a) (ii) and 7 (a) (ii) EUROJUST Council decision, OJ L 63, 6.3.2002, p. 1.

¹¹ Annex to EUROJUST Annual Report (2003).

to avoid complying with the legal obligations that apply in one jurisdiction but not in another". However, these rules are merely internal and without binding legal force. EUROJUST's existing legal base does not explicitly forbid the practice of 'forum-shopping'. It cannot be excluded therefore that under specific circumstances, e.g. political pressure to achieve results in high-profile cases but also in the course of day-to-day work, distinctions between 'law-enforcement friendly' and 'defence-friendly' jurisdictions might be drawn and national authorities accordingly advised.

Second, the relationship between EUROJUST and EUROPOL seems not yet to have been definitely set. While there are working agreements between the two, the more general questions of which body serves the other and which body controls the other are (intentionally?) left open. We consider it necessary that a clear allocation of tasks is foreseen reflecting the distinction made in many member states – with some exceptions, notably the UK and Ireland – between the judiciary and the police, in which the prosecutor controls and leads the criminal investigation and the police force renders practical assistance.

Third, regarding the principle of 'equality of arms' in criminal procedures, we consider it a considerable setback that there is thus far no legal framework envisaged that would facilitate effective cross-border cooperation of defence lawyers. Existing structures are based on private initiatives that are not institutionalised and do not guarantee that every suspect who faces international investigations is able to enjoy the benefits of an international defence team. To address this shortcoming, the Council of Bars and Law Societies of Europe (CCBE) has proposed establishing a European Criminal Law Ombudsman whose task not only would be to safeguard the rights of defence but also to provide help assembling international defence teams.¹² While this proposal is still under discussion in professional circles and may not be the final answer,¹³ it nevertheless illustrates that there is a need to create a European legal framework and European structures that would allow for an equality of arms.

Addressing the issue of radicalisation as counter-terrorism measure

With respect to the last key action foreseen for 2008 in the field of 'organised crime and terrorism', we welcome the Commission's plan to address the issue of **radicalisation**. Several studies on this matter have already been released or are currently being carried out. To prevent people from turning to 'terrorism' is in fact one of the four pillars of the EU's Counter-

Terrorism Strategy of 2005.¹⁴ Also in 2005, the Commission released a Communication addressing violent radicalisation and recruitment of terrorists and in 2006, set up an expert group on violent radicalisation.¹⁵ The issue is of utmost importance and it is to be hoped that the Commission – while developing its policy on 'radicalisation' – will not only be inspired by the 2008 European Year of Intercultural Dialogue but will also take account of as many findings as possible to get a coherent picture, including e.g. the most recent study of the Oxford Research Group of April 2007 addressing inter alia the impact of the 'war against terrorism' on radicalisation.¹⁶ The Commission's policy scheduled for 2008 on tackling violent radicalisation will require close scrutiny once concrete proposals have been made public.

In addition, careful attention needs to be paid while considering the 'lack of integration' as a cause of 'radicalisation' and consequent acts of political violence qualified as 'terrorism'. This *continuum* may endanger human rights and liberty in general, and put 'the immigrant' into a highly vulnerable position vis-à-vis the State and the receiving society. Various studies have shown that this often leads to a situation in which 'the non-national' is encapsulated into a category of suspect, criminal or even terrorist.¹⁷ The securitisation of integration of immigrants needs to be condemned by stating that an immigrant, or the citizen who is still considered as such because of his or her particular ethnic origin, is not a criminal, a threat or a security issue, and by acknowledging the multiplicity of factors that take part in any social conflict, instability and acts of political violence at national and transnational

¹⁴ Council of the European Union, *The European Union counter-terrorism strategy: Prevent, protect, pursue, respond – The European Union's strategic commitment to combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice*, Council doc. 14469/4/05, 30.11.2005, pp. 7-9.

¹⁵ Commission of the European Communities, *Communication from the Commission to the European Parliament and the Council concerning Terrorist recruitment: Addressing the factors contributing to violent radicalization*, COM(2005) 313 final, 21.9.2005; Commission decision of 19 April 2006 setting up a group of experts to provide policy advice to the Commission on fighting violent radicalisation, OJ L 111, 24.4.2006, pp. 9-11; see also P. Burgess, *Critical assessment of Commission of the European Communities, Communication from the Commission to the European Parliament and the Council concerning Terrorist recruitment: Addressing the factors contributing to violent radicalisation*, COM(2005) 313 final, (retrieved from www.libertysecurity.org on 11.4.2007).

¹⁶ C. Abbot, P. Rogers and J. Slobodan (2007), *Beyond Terror: The Truth About the Real Threats to Our World*, New York: Random House.

¹⁷ E. Brouwer, P. Catz and E. Guild (2003), *Immigration, Asylum and Terrorism: A Changing Dynamic in European Law*, University of Nijmegen, Nijmegen.

¹² Proposal by the CCBE for the establishment of a European Criminal Law Ombudsman, December 2004.

¹³ Cf. H. Jahae, "The European Criminal Law Ombudsman", speech delivered at the ERA Seminar held 7 April 2006 in Trier (www.ecba.org/cms).

level.¹⁸ In this way, the EU should rethink its discourse and overall approach towards groups of its citizens (and non-citizens) who, independently of their nationality, are still considered and treated as different because of their racial and religious backgrounds.¹⁹ In addition, European cooperation as regards the evolving EU framework on the integration of immigrants should continue strengthening the exchange of information and experiences among the Member States. Yet, the national arena needs to constitute the main venue for the development and practical implementation of these policies.

To conclude, the chapter on “Security and Freedom” in the Annual Policy Strategy for 2008 gives the impression that there seems to exist a certain perception within the Commission that freedom is a natural by-product of security: implement security and freedom will automatically tune in. Such a perception, however, would in fact be rather new. Up until now, a notion has persisted that freedom and security are antithetical values requiring a balancing between the two. In our view, however, neither notion represents a correct approach. Instead, we consider the EU to be rooted in the principle of freedom. Security – as important as it is – eventually is merely a tool in support of freedom and not an objective for its own sake.²⁰

2. Freedom of Movement and Managing the EU's External Borders: A Cross-Cutting Priority

The Annual Policy Strategy identifies the **management of migration** and the EU's common **external borders** as cross-cutting priorities for the year 2008. The EU's current strategy in these areas generally consists of strengthening the security rationale at the common EU external territorial borders through an integrated border management (IBM) policy combined with a global approach to migration. The European Commission calls for a multifaceted approach aimed at a ‘global’ and ‘comprehensive’ response to migration, and which is primarily based on the reinvigoration of a transnational policy intended to *prevent irregular immigration, counter human trafficking and protect its external borders*. It is our view that the real nature, impact and actual effects of

¹⁸ S. Carrera (2006), “Integration of Immigrants versus Social Inclusion: A Typology of Integration Programmes in the EU”, in T. Balzacq and S. Carrera (eds), *Security versus Freedom? A Challenge for Europe's Future*, Ashgate: Hampshire, pp. 87-114.

¹⁹ T. Balzacq and S. Carrera (2005), *The EU's Fight against International Terrorism: Security Problems, Insecure Solutions*, CEPS Policy Brief No. 80, Centre for European Policy Studies, Brussels, July.

²⁰ See D. Bigo, S. Carrera, E. Guild and R. Walker (2007), *The Changing Landscape of European Liberty and Security: Mid-Term Report on the Results of the CHALLENGE Project*, CHALLENGE Paper No. 4, February, pp. 14-15.

the intersection between migration and borders need to be further explored and assessed from a human rights and rule of law perspective. In fact, both the integrated and the global approaches appear to constitute a new political strategy whose real purpose is to present in a more innovative manner the vision according to which more security measures at the common external borders are the appropriate solution to the challenges facing the EU in the areas of borders and migration. This policy strategy fosters the securitisation of the common external borders through operational cooperation, risk analysis, exchange of information and the use of modern technologies,²¹ as the preferable response for tackling the phenomenon of irregular immigration.

FRONTEX, the new European Agency responsible for managing operational cooperation at the EU's external borders, is presented as the key institutional actor in charge of implementing the global and integrated policies on borders and migration. The European Commission foresees in 2008 the expansion of its capacities and functions by improving the networking of sea border controls and the implementation of a European surveillance system aimed at helping member states to deal with growing flows of irregular immigrants. Moreover, the Communication also envisages increasing the financial resources to FRONTEX by €10.9 million in 2008. Before expanding further the competences, capacities and financial resources of FRONTEX, the joint operations, risk analysis and feasibility studies carried out by this Community body should be subject to close scrutiny, review and regular independent monitoring.²² A majority of its functions and their implementation in the national arena are characterised by a high level of secrecy and lack of transparency. This raises a series of concerns for the sake of the rule of law and compliance with the principles of European Community (EC) law, such as proportionality and legality. One way to solve some of these weaknesses would be to more directly involve the European Parliament in order to ensure that the rule of law and the principle of proportionality are duly guaranteed. The well-established democratic checks and balances founding the very nature of Community governance would need to come into active play. Further, the Agency would need to ensure that EC law (more particularly the Schengen Borders Code), and the legal guarantees provided therein, guide every single action related to the management of the common EU external borders that it coordinates.

Indeed, one of the main tasks of FRONTEX is to coordinate operational cooperation between the member states in the management of the external

²¹ *Ibid.*, pp. 7-9.

²² S. Carrera (2007), *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Document No. 261, March.

borders.²³ In this regard, FRONTEX still remains vulnerable in terms of its independence from the highly politicised agenda in the field of borders and migration. This is partly due to its dependence on member states' solidarity for it to be able to operate, and its sensitivity to emergency-driven situations politically constructed in the national arena. In the light of this, there is a need for FRONTEX to become fully immune and independent from the political struggles, priorities and 'solidarity' actions of the member states. Furthermore, while FRONTEX's mandate would be significantly enhanced with the adoption of the Proposal for a Regulation establishing Rapid Border Intervention Teams, the establishment of these teams still raises a number of questions as regards the way in which some of their tasks and functions would work in practice.²⁴

In parallel, the European Commission aims at deepening the 'external dimension' based on a migration-development agenda, taking the case of Africa in particular into consideration. In fact, current practices of 'border control' rely heavily on the extra-territorialisation of control and prevention of human mobility to the common European area. This action is often carried out via partnerships and agreements with third countries of origin and transit allowing for the expansion of control to their territory as well as in terms of readmission and return of those labelled as 'irregular immigrants'. These actions, however, raise a number of serious concerns, among others, as described below.

First, they may lead to human rights violations in relation to the status of refugees.²⁵ The process of prevention that underlines this kind of pre-border control presupposes a practice of labelling an individual as an 'irregular immigrant' even before s/he

leaves the country and enters EU territory. This preventive action ignores the fact that the targeted individual may not be in fact an 'illegal' but a potential asylum-seeker or refugee. The presupposition of 'illegality' and the preventive border may contravene the full respect of human rights and the facilitation of due access to a determination procedure and a case-by-case assessment for refugee status as stipulated by the 1951 Geneva Convention relating to the Status of Refugees.

Second, the resort to pre-border surveillance prevents the application of European Community law and the rule of law. Because the border checks do not fall within the realm of Community governance, nor under the scope of European Community law, the protection and guarantees thereby provided do not apply. By externalising the border, the actual consequences and effects of the joint operations coordinated by FRONTEX are framed outside the well-established democratic checks and balances inherent to the European Community.

The external dimension of migration needs to be strictly guided by the principles of freedom, security and justice upon which the Union is built. The rule of law provided by the regulatory setting that has been constructed so far inside the European Community should be the rationale followed by every aspect related to the external dimension inherent to the current concept and implementation of Integrated Border Management and the global approach to migration.

²³ H. Jorry (2007), *Construction of a European Institutional Model for the Management of Operational Cooperation at the EU External Borders: Does the FRONTEX Agency take a decisive step forward?*, CHALLENGE Research Paper No. 6, March.

²⁴ Standing Committee of Experts on International Immigration, Refugee and Criminal Law, Comment on Proposal for a Regulation establishing a Mechanism for the Creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism (COM(2006) 401, 24 October 2006. Proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism COM(2006) 401, final, Brussels, 19.7.2006.

²⁵ See for instance Federación de Asociaciones de SOS Racismo del Estado Español (2006), Informe Frontera Sur, 1995-2006: 10 años de violación de los derechos humanos, (retrievable from: www.sosracismo.org); Amnesty International (2006), "Addressing Irregular Migration with full respect of Human Rights", Letter by Dick Oosting and Frank Johansson, 2 October 2006; Amnesty International (2005), "Immigration Cooperation with Libya: The Human Rights Perspective", 12 April 2005.

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