



# Turkey in the European Area of Freedom, Security and Justice

Joanna Apap, Sergio Carrera & Kemal Kirişci

## Abstract

This paper assesses issues of border controls, visa regimes, asylum and irregular immigration policies in the context of Turkey's candidacy for accession to the EU. Under present EU policy, Turkey would need to apply all present legislation governing the movement of persons across the external frontiers of the Schengen area by the time of accession, although the frontier between Turkey and the Schengen area would not be eliminated for some years, as is also the case for the new member states which acceded in May 2004. A certain degree of flexibility as regards the application of the EU/Schengen border and visa regimes is advisable taking into consideration the economic and political interests and sensitivities of both Turkey and the EU in relation to their common external neighbourhood. This report therefore evaluates various special regimes such as those adopted by Spain and Portugal, and the European Commission's proposal for facilitating local border traffic – the latter in the light of the recent experience of sharply curtailed movements across the Polish-Ukrainian border. Finally, the Bulgarian experience in the field of justice and home affairs is reviewed as a possible model for Turkey.

*Joanna Apap is Head of Unit and Research Fellow at the Centre for European Policy Studies (CEPS). Sergio Carrera is Researcher on JHA at CEPS. He wishes to express his gratitude to all the experts and officials he interviewed in preparing this report. Kemal Kirişci is Jean Monnet Professor at the Department of Political Science and International Relations, Boğaziçi University. Mr. Kirişci would also like to acknowledge the assistance of Elif Keskiner, Esin Sarac and Cenk Unlu in the research and preparation of this report as well as express gratitude to those officials and experts interviewed in the Ministry of the Interior, the Ministry of Foreign Affairs, the General Directorate for European Affairs, the Gendarmerie, as well as the UNHCR and the IKGV.*

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# Turkey in the European Area of Freedom, Security and Justice

## *EU-Turkey Working Paper No. 3/August 2004*

**Joanna Apap, Sergio Carrera & Kemal Kirişci**

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### **Introduction**

This report explores the challenges posed by Turkey's prospective membership in the EU in the Area of Freedom, Security and Justice. It analyses policy strategies for both Turkey and the EU itself in these areas, focusing in particular on border management and policies on irregular immigration as envisaged for the Schengen area.

While the final decision on opening accession negotiations with Turkey lies with the European Council in December 2004, the Turkish authorities are already working to harmonise Turkish policy and law with the European *acquis* as laid out in the Accession Partnership (AP) strategy for Turkey of March 2003 and the National Programme for the Adoption of the *Acquis* (NPAA) of July 2004.<sup>1</sup> This exercise covers the entire range of EU policies, including one that receives little public attention, but carries high salience both to the EU and Turkey – Justice and Home Affairs (JHA).

JHA cooperation in general and, more specifically, policies on border control and fighting irregular immigration are considered key priorities within the AP for Turkey.<sup>2</sup> The sheer length and diversity of Turkey's frontiers as well as the challenges that these two factors would involve in that country's membership of the EU are indeed fundamental questions under debate throughout the Union. These are sensitive policy issues because of the difficulty of managing such extensive land borders and coastlines,<sup>3</sup> as well as the fears in the EU about having a future external border with countries such as Syria, Iraq, Iran and the Caucasus.

This challenge is further complicated by the fact that public opinion in the EU has in general been lukewarm towards enlargement precisely because they fear massive immigration and a weakening of border controls.<sup>4</sup> This general trend is reflected in many member states by a growth in support of right-wing political parties that advocate anti-immigration agendas, and is also illustrated in the results of the recent European Parliament elections in June 2004. As a result, JHA issues and in particular policies associated with border control have become major political concerns.

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<sup>1</sup> Turkish National Programme for the Adoption of the *Acquis*, *Official Gazette*, 24 July 2003, No. 25178 bis (Decision of the Council of Ministers dated 23 June 2003, No. 2003/5930), PRIORITY 24.2, "Continuation of the Alignment with the EU *acquis* on border management and preparation for the implementation of the Schengen *acquis*". These documents can be retrieved from [www.mfa.gov.tr/grupa/ad/adc/AccessionPartnership2003.pdf](http://www.mfa.gov.tr/grupa/ad/adc/AccessionPartnership2003.pdf) and [www.abgs.gov.tr/up2003/up.htm](http://www.abgs.gov.tr/up2003/up.htm).

<sup>2</sup> See Council Decision on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Turkey, 19 May 2003, 2003/398. Commission Communication on Strengthening the Accession Strategy for Turkey, Brussels, 26.3.2003, COM(2003) 144 final.

<sup>3</sup> Data provided by the Turkish Ministry of National Defence, General Command of Cartography, indicate that the country's land borders run 2,949 kilometres in total. The frontier to the northeast with the Commonwealth of Independent States is 622 kilometres in length; that with Iran, 560 kilometres, and 384 kilometres with Iraq. In the south is the 911 kilometres border with Syria. Turkey's borders on the European continent consist of a 203 kilometres frontier with Greece and a 269 kilometres border with Bulgaria. According to data from the Turkish Navy, Department of Navigation and Oceanography, coastlines (including the islands) run another 8,330 kilometres.

<sup>4</sup> S. Carrera and A. Turmann (2004), "Towards free movement of workers in an enlarged EU?", CEPS Commentary (retrievable from [www.ceps.be](http://www.ceps.be)), April.

However, Turkey has already achieved important results in border management and preparations for the implementation of the Schengen *acquis*. As the European Commission stressed in its Regular Report on Turkey's Progress towards Accession,<sup>5</sup> the country has made significant progress in developing and adopting preliminary strategies. Also, concerning external borders, the adoption of the Border Management Strategy is a crucial step forward. As the Commission points out, however, further legislative and institutional reform and improvement in training and physical infrastructure are all still necessary.

Turkey has committed itself in the NPAA to go further and deeper in the adoption of this European framework. Nevertheless, as the European Parliament recently pointed out in its Report on the 2003 Regular Report of the Commission on Turkey's Progress towards Accession,<sup>6</sup> any legislative reform needs to go hand-in-hand with real implementation in practical terms. While progressively implementing all the strategies envisaged on the area of Justice and Home Affairs, Turkey has to align its legal and institutional framework in everyday practice. Yet this is not an easy task without a parallel transformation in the state of mind of all the actors involved.

This report first provides a general overview of the Schengen *acquis* as it stands at present, looking particularly at the case of readmission agreements. It then examines the issue of border protection as reflected in EU-Turkish relations, focusing firstly on the question of the actual physical control and management of Turkey's land borders with Eastern neighbours as well as its coastline, and secondly, on an analysis of Turkey's policies to combat irregular migration and their implications for asylum law and adoption of the Schengen visa regime. Special emphasis will be equally put on the importance of establishing a better understanding between the two parties and on the need to pay attention to 'confidence-building measures'.

As was the case for the new EU members and current candidate countries, Turkey will need to apply the Schengen *acquis* in full upon a future accession to the EU. However, this does not exclude the adoption of special provisions that would be compatible with Schengen laws. Indeed, a certain degree of flexibility as regards the application of the common borders regime would be advisable in light of the economic, social and geopolitical relations between Turkey and its wide neighbourhood, as well as regional particularities and sensitivities.<sup>7</sup>

The report will examine the experiences of Spain, Portugal and Greece, in search of examples of flexibility that might be relevant for Turkey. The Schengen regime is not as rigid as it may appear and allows some latitude to the participating countries as long as they respect the basic rules. We shall also evaluate to what extent policies such as the one advocated by the European Commission to establish a border traffic visa regime may be feasible options to be applied to Turkey. In this context, we will look at the lessons to be learnt from the current border situation between Poland and Ukraine. Finally, the report will assess Bulgaria's experience on the so-called 'Schengen negative list' and on the readmission agreements, comparing it with the case of Turkey.

## 2. Overview of the Schengen *Acquis*: Some Recent Developments

At its meeting in Tampere in October 1999, the European Council stressed its determination to progressively develop an Area of Freedom, Security and Justice in the European Union, using the call

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<sup>5</sup> European Commission (2003), *2003 Regular Report on Turkey's Progress towards Accession*, 5 November. The European Council in Cardiff in June 1998 noted that the Commission would present a report on Turkey based on Article 28 of the Association Agreement and the conclusions of the Luxembourg European Council of December 1997. The European Commission presented its first Regular Report on Turkey in October 1998.

<sup>6</sup> Report on the 2003 Regular Report of the Commission on Turkey's Progress towards Accession, Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, European Parliament, 19 March 2004.

<sup>7</sup> For an analysis of the notion of trust in an enlarged EU, see M. Anderson (2002), "Trust and Police Cooperation", in M. Anderson and J. Apap, *Police and Justice Co-operation and the New European Borders*, The Hague: Kluwer Law International, pp. 35-46.

for action given by the Amsterdam Treaty.<sup>8</sup> The abolition of border controls on persons crossing the internal frontiers represented one of the paradigms behind the ‘freedom rationale’ in this symbolic triptych.<sup>9</sup>

For the completion of the single market in the European Community, it was judged necessary to abolish all obstacles, barriers or in junctions preventing the movement of persons, i.e. including checks at the borders. Thus, the old internal border controls carried out by the competent national authorities for persons not holding the nationality of the sovereign state concerned needed to be abolished.<sup>10</sup> The legal basis for doing this was provided in Article 14 of the Single European Act, which entered into force in July 1987.<sup>11</sup>

However, the dismantling of border controls as well as the increased permeability of frontiers led to many anxieties about a potential increase in the level of irregular immigration and transnational organised crime, which until nowadays have been very much exploited at times of national elections.<sup>12</sup>

The Schengen agreement of 1985 aimed to establish, through an intergovernmental approach, the application of the principle of the free movement of persons in the European Community. Since the signing of the Schengen Convention in June 1990,<sup>13</sup> most EU members have become part of the Schengen club, except for the United Kingdom and Ireland, which together with Denmark, concluded special protocols giving them the possibility to remain outside particularly sensitive Schengen provisions.<sup>14</sup> The implementing Convention entered into force in September 1993, but it was not applied until March 1995.

The Amsterdam Treaty, which entered into force in May 1999, represented a fundamental step towards introducing part of the Schengen regime into the European Union’s legal framework. The Protocol integrating the Schengen *acquis* into the EU hence communitarised the section dealing with the Schengen borders *acquis* by inserting it within the first pillar or so-called ‘Community method/governance’. The legal basis of the acts adopted under the Schengen umbrella may be found in

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<sup>8</sup> See the Tampere European Council Presidency Conclusions, 15<sup>th</sup> and 16<sup>th</sup> October 1999. See also J. Apap and S. Carrera (2003), *Progress and Obstacles in the Area of Justice and Home Affairs in an Enlarging Europe*, CEPS Working Document No. 194, June.

<sup>9</sup> See paragraph 2 of the Tampere Presidency Conclusions: “The European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. It is a project which responds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives”.

<sup>10</sup> Commission of the European Communities, White Paper from the Commission to the European Council, *Completing the Internal Market*, COM(85) 310 final, Brussels, 14<sup>th</sup> June 1985, Part One: The Removal of Physical Barriers.

<sup>11</sup> Article 14.2 of the EC Treaties provides that “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this treaty”.

<sup>12</sup> See M. Anderson (2004), “The transformation of Border Controls: What is different about Europe?”, in J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Cheltenham: Edward Elgar Publishing.

<sup>13</sup> ‘Schengen’ was supplemented by the Schengen Implementing Agreement 1990 which introduced various measures intended to compensate for the apparent security deficit and uncertainty resulting from the abolition of internal border controls within the EU, such as the application of controls at the common external border of the participating states, provisions on the division of responsibility with respect to asylum and provisions on police and judicial cooperation in criminal matters.

<sup>14</sup> Notwithstanding if we look at Articles 3 and 4 of the Protocol on the Position of the United Kingdom and Ireland, both countries may have the door open to decide participating in some specific measures adopted under the regime. Lately, the European Commission has started negotiations with Switzerland regarding its potential future association.

Title IV of the EC Treaties ‘Visas, Asylum, Immigration and Other Policies related to Free Movement of Persons’ (Articles 61-68).<sup>15</sup> Those Schengen provisions dealing with police and judicial cooperation in criminal matters remained however under Title VI of the Treaty on the European Union or the third pillar,<sup>16</sup> and therefore any cooperation in these fields continued to be based on an intergovernmental method.<sup>17</sup>

The duality in location of Schengen law in the first and third pillars brought about an unfortunate lack of transparency and efficiency in these policies, involving different decision-making procedures, and different roles of the European Parliament and the European Court of Justice (ECJ), depending on the pillar framework<sup>18</sup> (see Appendix 1). However, most of these negative features will change substantially with the entry into force of the EU Constitutional Treaty by 2006, which was finally adopted at the Intergovernmental Conference in June 2004.<sup>19</sup> As a result, the complexity, ambiguity and lack of transparency inherent in the current regime will be enormously improved firstly by the abolition of the pillar division.<sup>20</sup> The European Parliament will also be more directly involved in the decision-making process thanks to the application of the so-called ‘co-decision procedure’ as provided in Article III-302 of the Constitution.<sup>21</sup> Another new feature is that the ECJ has been positively assigned full competence to review and interpret JHA’s legal instruments, including those dealing specifically with judicial cooperation in criminal matters and police. Some fundamental limitations remain, however, such as the stipulation in Article III-283 of the Constitution that the ECJ shall have no jurisdiction to review the validity or proportionality of operations carried out by police or other law-enforcement services, or the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security (see Appendix 1). The challenge remains now in the diverse ratification procedures in an EU of 25.

In brief, the Schengen *acquis* is composed of the following main elements:<sup>22</sup>

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<sup>15</sup> See for instance Article 62 of the EC Treaties: “The Council, acting in accordance with the procedure referred to in Article 67, shall within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: 1. measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders. ...”.

<sup>16</sup> Article 29 TEU provides that “The Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action...” on “...closer cooperation between police forces, customs authorities and other competent authorities in the member states...”.

<sup>17</sup> For an in-depth study of the division of competences between the EU and national levels and the principle of subsidiarity, see P. De Hert (2004), “Division of Competencies between National and European Levels with regard to Justice and Home Affairs”, in J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Cheltenham: Edward Elgar Publishing, pp. 55-102.

<sup>18</sup> E. Guild and S. Peers (2001), “Deference or Defiance? The Court of Justice’s Jurisdiction over Immigration and Asylum”, in E. Guild and C. Harlow (eds), *Implementing Amsterdam; Immigration and Asylum Rights in EC Law*, Oxford: Hart Publishing, pp. 267-87.

<sup>19</sup> See the Provisional consolidated version of the Draft Treaty establishing a Constitution for Europe, CIG 86/04, Brussels 25<sup>th</sup> June 2004. See also A. Townsend (2003), *Can the EU deliver the area of freedom, security and justice?*, EPIN Working Paper No. 9, Centre for European Policy Studies, September and M. Den Boer (2004), “The European Convention and Its Implications for Justice and Home Affairs Cooperation”, in J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Cheltenham: Edward Elgar Publishing.

<sup>20</sup> See Chapter IV of the Provisional consolidated version of the Draft Treaty establishing a Constitution for Europe, titled ‘Area of Freedom, Security and Justice’, Article III-158 until III-178.

<sup>21</sup> Furthermore, Article III-160 also foresees that member states’ national parliaments will ensure the compliance with the principles of subsidiarity and proportionality of the legislative initiatives dealing with judicial cooperation with criminal matters and police. They will also participate in the political monitoring of Europol, and the evaluation of Eurojust’s activities.

<sup>22</sup> The Schengen Acquis as referred to in Article 1(2) of the Council Decision 1999/435/EC, 20 May 1999, *Official Journal* (OJ) EC, 22 September 2000. Council Decision 1999/436/EC, 20 May 1999, which determines the legal basis for each of the provisions or decisions that constitute the *acquis*, OJ L 176, 10 July 1999.

- The agreement between the Benelux countries, Germany and France on the gradual abolition of checks at their common borders, signed in Schengen in June 1985;<sup>23</sup>
- The convention between Belgium, Germany, France, Luxembourg and the Netherlands, signed in Schengen in June 1990, implementing the agreement of 1985, with related Final Act and common declarations;
- All the accession protocols and agreements to the 1985 Agreement and the 1990 Convention, with: Italy (27 November 1990), Spain and Portugal (25 June 1991) and Denmark, Finland and Sweden (19 December 1996), Austria (28 April 1995), Norway and Iceland (18 May 1999), along with related final acts and declarations; and
- The decisions and declarations adopted by the Executive Committee, as well as acts adopted by the organs upon which the Executive Committee has conferred decision-making powers.

The policies included in the Schengen *acquis* include the listing of third countries whose nationals are exempt from or must be in possession of visas,<sup>24</sup> external border controls and cooperation between the border control services, rules on free movement of persons, visa policy, extradition and readmission agreements, security standards for travel documents, anti-drugs policies, judicial cooperation in criminal matters, Schengen Information System (SIS), etc.

The main general principles of the Schengen system are threefold:

- Creation of a common European territory without internal borders along with the establishment of a common external border;<sup>25</sup>
- Entry into the Schengen zone by crossing one of the common external borders constitutes admission into the whole Schengen territory;
- Once admitted inside the common territory, a person is entitled to move freely within the whole Schengen area for a period of three months out of every six without any further checks at the internal borders of any of the participating states.<sup>26</sup>

These three principles apply except in those cases in which special security concerns, such as reasons of public policy, national security and public health (so-called ‘state of emergency’ or ‘exceptionalism’). Thus, no third country national should gain access to the territory of the Schengen states, independently of having been granted a short stay visa, if s/he is considered to constitute a ‘security risk’, pursuant to Article 96 of the Convention implementing Schengen,<sup>27</sup> for any of the

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<sup>23</sup> It is interesting to see how the Schengen system arose first from economic pressures not least from the transport industry to remove obstacles to cross-border trade with the European Union. See D. Bigo, *Polices en Réseaux*, (Paris: Presses de Sciences-Po), 1996.

<sup>24</sup> Council Regulation No 453/2003, 6 March 2003 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

<sup>25</sup> Article 2 of the Schengen Convention and the Decision of the Schengen Executive Committee SCH/Com-ex (95)20. See Commission Communication, *Towards integrated management of the external borders of the member states of the European Union*, COM(2002) 233 final, Brussels, 7.5.2002.

<sup>26</sup> Decision of the Executive Committee on the definitive versions of the Common Manual and the Common Consular Instructions, SCH/Com-ex (99) 13 of 28.4.1999, OJ L 239, 22 September 2000. See also an updated version in OJ C 313, 16 December 2002.

<sup>27</sup> Article 96 of the Convention states that 2. “This situation may arise in particular in the case of: (a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year; (b) an alien in respect of whom there are serious grounds for believing that he has committed serious criminal offences, including those referred to in Article 71, or in respect of whom there is clear evidence of an intention to commit such offences in the territory of a Contracting Party. 3. Decisions may also be based on the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been

states involved. However, the goal of free movement within the Schengen area has been made more difficult by the new security threats (international terrorism), and the use of exceptional security policies as a consequence. There seems to have emerged a sort of permanent state of emergency in the European Union after the events of 11 September 2001 in the United States and 11 March 2004 in Madrid.<sup>28</sup>

As Guild points out,<sup>29</sup> the borders are no longer defined in terms of the territory which they contain but of the people moving across them. With the Schengen regime, the borders are in a legal place. The European border then is designed and determined by the particular characteristics of the individual seeking to cross the line while meeting the laws, although third country nationals may not appreciate what they are going to find at the physical or legal Schengen border.

While respecting and fully meeting the Schengen legal rules, the member states have nevertheless carefully kept a number of ‘escape gates’ or ‘open-door clauses’ to retain national competences (sovereignty) of control over their traditionally external borders whenever they consider this is necessary on grounds of national security and public policy. For example, France still frequently carries out border checks or ‘selective spotchecks’ on persons moving between France and the other Schengen states. Indeed Article 2.2 of the Schengen Convention<sup>30</sup> allows the member states to decide in a rather discretionary manner, reintroducing border checks on individuals on grounds of special security concerns at national level.<sup>31</sup>

The events of September 11<sup>th</sup> and March 11<sup>th</sup> have given a significant boost to the development of a security strategy in the European Union.<sup>32</sup> Some legal acts adopted by the Council within the security package envisaged to deal with the new threats fall directly within the scope of Schengen, e.g. the strengthening of EU border controls, improved customs cooperation, the incorporation of biometric and other new technologies in travel and identification documents. The intention is to use biometric technology to store information on the behavioural and physiological characteristics of an individual, e.g. retina scan, digital fingerprints, etc. directly on the documents issued to third country nationals, such as visa and residence permits, as well as to EU citizens.<sup>33</sup>

Thus, the Schengen *acquis* is not a static compendium of rules. On the contrary, the regime is still ‘in the making’. This ‘evolving factor’ is crucial for any state intending to accede to the EU club over the next few years, such as Turkey. The package of Schengen-related measures that exist at the moment

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rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens.”

<sup>28</sup> See D. Bigo (2004), “Global (in)security: The field of the professionals of unease management and the Ban-opticon”, in Jon Solomon and Naoki Sakai (eds), *Traces: A multilingual series of cultural theory*, No. 4 (Sovereign Police, Global Complicity), Hong Kong: University of Hong Kong.

<sup>29</sup> See E. Guild (2001), “Moving the Borders of Europe”, inaugural lecture delivered at the official ceremony of the assumption of the professorship of the CPO Wisselleerstoel at the University of Nijmegen, 30 May.

<sup>30</sup> See J. Apap and S. Carrera (2003), *Maintaining Security within Borders: Towards a Permanent State of Emergency in the EU?*, CEPS Policy Brief, No. 41, November, pp. 2-6.

<sup>31</sup> In addition to these examples, we need to highlight the settlement of a growing number of joint centres of police and customs cooperation at the traditional external borders of the EU member states, and which involve representatives of the police services of both states. See P. Hobbing (2003), “Management of External EU Borders: Enlargement and the European Border Guard Issue”, paper presented at the Workshop on Managing International and Inter-Agency Cooperation at the Border, organised by the Geneva Centre for the Democratic Control of Armed Forces, 13-15 March.

<sup>32</sup> See *Declaration on Combating Terrorism*, European Council, Brussels, 25 March 2004.

<sup>33</sup> Proposal for a Council Regulation amending regulation (EC) 1683/95 laying down a uniform format for visas and regulation (EC) COM(2003) 0558 final-CNS 2003/0218, and the Proposal for Council Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2003) 0558 final-CNS 2003/0218.



and the significant financial burden to transpose them at national level<sup>34</sup> may vary and further develop in a significant extent until membership of a candidate state will take place.

Another feature is the Schengen Information System (SIS), which was conceived as a first step for the proper implementation of the system. The SIS established a matrix of information capable of identifying (by issuing an alert), and hence excluding, those persons who are considered security risks or threats inside the common territory. The database, which falls at the moment within the third pillar rubric,<sup>35</sup> operates in 13 member states as well as in Norway and Iceland.<sup>36</sup> It allows the national competent authorities to acquire and store a wide range of information regarding individuals and inadmissible foreigners.<sup>37</sup>

In May 2001, the Council confirmed as a priority the development of the second-generation Schengen Information System (SIS II) by 2006.<sup>38</sup> One of the main objectives in developing SIS II would be to establish a system allowing the integration of new member states in the EU. Furthermore, the technology of the present SIS was judged to be outdated and hence insufficiently flexible for easily adding new functionalities and technologies.<sup>39</sup> Hence, in its Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, the European Commission confirmed the importance given at the Laeken and Seville European Councils<sup>40</sup> as well as in the Comprehensive Plan to combat illegal immigration and trafficking of human beings or the so-called 'Santiago Action Plan'<sup>41</sup> to establish a common Visa Information System in the EU (VIS) along with the Second Generation of the Schengen Information System (SIS II) in order to better face the new forms of transnational violence identified

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<sup>34</sup> According to the Commission Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM(2003) 323 final, 3.6.2003, the estimates set out in the feasibility study carried out by the European Commission for the investments costs of the Visa Information System range about €130 million to nearly €200 million. The development and operation of the biometrics module represents a high proportion of these costs. See page 5 of the Communication.

<sup>35</sup> This decision was taken due to the difficulty to achieve a political agreement on its inclusion on the first pillar framework.

<sup>36</sup> Article 6 of the Protocol integrating the Schengen *acquis* into the framework of the European Union provides for the association between the Republic of Iceland and the Kingdom of Norway with the implementation of the Schengen *acquis* and its further development on the basis of the Agreement signed in Luxembourg on 19 December 1996.

<sup>37</sup> For a precise description on how the SIS operates, see *The Schengen Information System: A human rights audit* (London: Justice, 2000).

<sup>38</sup> Commission Communication to the European Parliament and the Council, Development of the Schengen Information System II, COM(2001) 720 final. Council Regulation (EC) No 2424/2001 on the development of the Second generation Schengen Information System (SIS II) based on Articles 66 of the Treaty establishing the European Community. And the Council Decision 2001/866/JHA on the development of the second generation Schengen Information System (SIS II) based on Articles 30(1), 31 and 34 of the Treaty on European.

<sup>39</sup> See Commission Communication on the Development of the Schengen Information System II and possible synergy with a future Visa Information System (VIS), COM(2003) 771 final, Brussels, 11.12.2003, point 1.2.2.

<sup>40</sup> See the Seville European Council Presidency Conclusions, 21 and 22 June 2002, point 30 on Measures to combat illegal immigration, 'The European Council calls on the Council and the Commission, within their respective spheres of responsibility, to attach top priority to the following measures contained in the plan: introduction, as soon as possible, of a common identification system for visa data, in the light of a feasibility study to be submitted in March 2003 and on the basis of guidelines from the Council; a preliminary report will be presented before the end of 2002'. See also the Laeken European Council Presidency Conclusions, 14 and 15 December 2001, point 42.

<sup>41</sup> Comprehensive Plan to combat illegal immigration and trafficking of human beings, 2002/C142/02, 14 June 2002, OJ C142/23.

as ‘international terrorism’. The future developments of a VIS,<sup>42</sup> SIS II, as well as the use of biometrics and other new technologies in documents issued to third country nationals as well as to EU citizens, continue to be a highly controversial topic of discussion in the European arena.<sup>43</sup>

One of the latest developments in Schengen is the Commission Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders,<sup>44</sup> which has been presented as a fundamental part of the consolidation and further development of the legislative side of the EU policy on integrated border management. The Community Code aims to establish a common corpus of Schengen legislation governing the movement of persons across external as well as internal borders.<sup>45</sup>

Finally we need to point out a number of negative or controversial features of the Schengen system.

There is a lack of transparency in the regime, which is mostly due to the dual pillar system. There remain both visible and hidden barriers to this freedom inside the Schengen zone,<sup>46</sup> which are most of the time justified by the member states on grounds of internal security. There is a worrying lack of a framework enabling a legal challenge in search of an effective remedy against a negative decision taken by a national competent authority refusing to ‘move the barriers’, and hence to allow the person involved to enter the territory. There is a low degree of protection for individuals intending to move while the regime is being applied in practice. The legal protection conferred is left completely to the discretion of national authorities, and therefore to each of the national legislations. People, and particularly foreigners, have serious difficulties in learning the reasons why they have been refused entry and how they may challenge this decision.<sup>47</sup> In the new proposal establishing a Community Code on the movement of persons across borders, the procedures for refusing entry are only part of Annex VIII, and not the main corpus of the regulation. The Commission does not even mention the right to present a legal challenge against a negative decision taken for instance by a national border guard.

The whole Schengen *acquis* package must be accepted in full by all states that are candidates for admission in the European Union. This rigid and fundamental condition, which has received so much criticism due to the apparent application of ‘double standards’ in relation to old and new EU member states as well as candidate states, finds its source in Article 8 of the Protocol integrating the Schengen *acquis* into the Framework of the EU, which expressly stipulates that: “For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all States candidate for admission”.

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<sup>42</sup> See Proposal for a Council Decision establishing the Visa Information System (VIS), Brussels, 12.2.2004, COM(2004) 99 final. The legal basis of the proposal is Article 66 TEC.

<sup>43</sup> See J. Apap, D. Bigo, S. Carrera, E. Guittet and R. Walker (2004), *ELISE Declaration: The aftermath of 11<sup>th</sup> March in Madrid*, retrievable from [www.eliseconsortium.org](http://www.eliseconsortium.org).

<sup>44</sup> Commission Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders, Brussels, COM(2004)391. It is also interesting to look at the legal basis: Article 62.1 and 2.a of the EC Treaties.

<sup>45</sup> Title II of the Proposal deals with External Borders (Articles 4-17) and Title III with internal borders (Article 18-28). See particularly Chapter II of Title III, *Safeguard clause (Articles 20-28)*, which provides for the reintroduction of checks at internal borders by a Member State and the procedures in cases of emergency or cross-border terrorist threat.

<sup>46</sup> See for example M. Byrska (2004), *The Unfinished Enlargement; Report on Free Movement of People in EU-25*, European Citizen Action Service, ECAS, June.

<sup>47</sup> See the proposal on a Directive of minimum guarantees for individual freedom, security and justice in relation to decisions regarding movement of persons presented by P. Boeles, E. Bouwer, A. Woltjer and K. Alfenaar (2003), *Border control and movement of persons, Towards effective legal remedies for individuals in Europe*, Standing Committee of Experts in International Immigration, Refugee and Criminal Law, Utrecht, the Netherlands.

This report recommends however that a degree of flexibility and a more liberal regime should be applied in relation to those countries willing to accede to the European Union, such as Turkey, in the interest of the EU itself as well as that of Turkey.

## 2.1 Readmission agreements

Among the package of measures composing the Schengen *acquis*, the ones on irregular migration require detailed examination.<sup>48</sup> The so-called ‘readmission agreements’ are one of the Schengen *acquis*’ major themes and a key part of the conditionality applied to any state pursuing EU candidacy and accession. Turkey is expected to sign readmission agreements with third countries of origin as part of the pre-accession alignment procedure. Turkey has also been asked to start negotiations on a readmission agreement with the EU itself. This is a very sensitive issue indeed.

Following the lifting of internal border controls, the development of a common European repatriation policy was soon considered imperative in order to ensure a swift return of those broadly labelled as ‘illegal migrants’ to the country they came from.

Readmission agreements are one of the oldest instruments used by EU members to carry out migration controls.<sup>49</sup> As early as 1994, the Council agreed on a recommendation that set a harmonised compendium of guidelines with regard to readmission in the form of a ‘specimen bilateral agreement’ between an EU member and a third country.<sup>50</sup> The main goal of this recommendation was to facilitate the readmission of persons staying illegally on the territory of the other Contracting Party. Pursuant to its provisions, a contracting party would readmit the following categories of persons:<sup>51</sup>

- those holding the nationality of the state concerned,
- third country nationals who entered via the external frontier of that state and
- third country nationals who hold a valid visa or residence permit issued by the requested contracting party.

Already at that time, the specimen agreement was highly criticised because it did not provide adequate protection to asylum-seekers whose claims had not yet been heard, nor for the compliance by the contracting parties with any human rights international obligations, such as the European Convention for the Protection of Human Rights and the Geneva Convention Relating to the Status of Refugees.<sup>52</sup> In addition, readmission agreements are usually accompanied by protocols dealing with the technical

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<sup>48</sup> Article 23.1 of the Convention implementing the Schengen Agreement provides that “Aliens who do not fulfil or who no longer fulfil the short-stay conditions applicable to the territory of a Contracting Party shall normally be required to leave the territories of the Contracting Parties immediately’. In paragraph 4 the same Article continues saying that ‘Such aliens may be expelled from the territory of that Party to their country of origin or any other state to which they may be admitted, in particular under the relevant provisions of the readmission agreements concluded by the Contracting Parties’.

<sup>49</sup> See D. Bouteillet-Paquet (2003), “Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States”, *European Journal of Migration and Law* 5: 359-377. Bouteillet-Paquet differentiates between four different generations of readmission agreements. The agreements signed in the 1950s and 1960s between the EC states are the first generation; the second is made up of the agreements with Central and Eastern European countries; the third generation is composed by those agreements concluded after the entry into force of the Amsterdam Treaty; and finally the fourth generation of readmission agreements are based on the emerging external dimension of EU migration law and the so-called ‘integrated method’.

<sup>50</sup> Council Recommendation concerning a specimen bilateral readmission agreement between a member state and a third country, 30 November 1994, OJ C 274/20, 19.09.1996.

<sup>51</sup> See Articles 1-4 of the Council Recommendation C 274/20.

<sup>52</sup> See R. Cholewinski (2001), “The EU *acquis* on Irregular Migration: Reinforcing Security at the Expense of Rights”, *European Journal of Migration and Law*, 2:361-405, Kluwer Law International.

aspects related to their implementation. Therefore, the Council also adopted a series of guiding principles to be used in that concern as a basis for negotiation.<sup>53</sup>

Article 63.3.b of the Amsterdam Treaty conferred upon the EU for the first time the competence over policies on irregular immigration and the repatriation of irregular migrants.<sup>54</sup> The Community's power is not exclusive in this field but is shared with the member states.<sup>55</sup> The Tampere European Council called for the development of a common EU policy on immigration while "taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes".<sup>56</sup> In 1999 the Council adopted a decision on the inclusion of an updated model of 'readmission clauses' in Community agreements as well as in agreements between the European Community, its Member States and third countries.<sup>57</sup> From that time onwards the Council decided on the mandatory introduction of these clauses in every future agreement concluded by the Community with third countries.<sup>58</sup> These standard clauses cannot be considered as readmission agreements themselves. They only impose an obligation to the contracting parties to readmit their own nationals, third country nationals and stateless persons who may be unlawfully present on their territories. Since 1996, readmission clauses have been included in the agreements with Algeria, Armenia, Azerbaijan, Croatia, Egypt, Georgia, Jordan, Lebanon, Macedonia, Uzbekistan, and the Cotonou Agreement between the EU and the ACP countries, etc.<sup>59</sup>

As highlighted above, after the events of September, 11<sup>th</sup>, the fight against terrorism, organised crime and illegal immigration also became a first priority inside the EU. Security-oriented policies on immigration and asylum moved to the very top of the agenda. The previously-mentioned Comprehensive plan to combat illegal immigration represented a core step towards the development of a common EU policy on irregular immigration. It identified the readmission and return policy as an integral and pivotal component in the fight against illegal immigration. The plan also stated that "these agreements should also include an obligation to readmit third-country nationals and stateless persons coming from or having resided in the country concerned". In the same vein, the Green Paper on a

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<sup>53</sup> Council Recommendation on the guiding principles to be followed in drawing up Protocols on the implementation of readmission agreements, 24.7.1995, OJ C 274/25, 19.06.1996.

<sup>54</sup> Article 63.3.b of the EC Treaty provides that "The Council, acting in accordance with the procedure referred to in Article 67, shall adopt: measures on immigration policy within the following areas: b. illegal immigration and illegal residence, including repatriation of illegal residents".

<sup>55</sup> The Council alone or the Member States acting collectively will no longer be able to enter into such agreements. Also, Member States may continue to conclude bilateral readmission agreements as far as the Community has not already done so with a particular third country. Article 63.4 says that "Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements".

<sup>56</sup> Tampere European Council Conclusions, 15<sup>th</sup> and 16<sup>th</sup> October 1999, point 3. Even before the Amsterdam era, the Council had agreed in 1998 on the creation of the so-called 'High-Level Working Group on Asylum and Immigration' to develop an integrated external migration policy, and whose mandate was further expanded in 2002 (Council document, 9433/02, 30.5.2002).

<sup>57</sup> See Adoption of a Council Decision on the Consequences of the Treaty of Amsterdam on readmission clauses in Community agreements and in agreements between the European Community, its Member States and third countries, Council of the European Union, General Secretariat, 13409/99, Brussels, 25.11.1999.

<sup>58</sup> The former standard clauses provided by the Council Conclusions on readmission clauses, Council of the European Union, 11955/1/95, 23 November 1995, used to be inserted in association and cooperation agreements on a case-by-case basis only.

<sup>59</sup> See for instance, the Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Community and their Member States, of the one part, and the Republic of Armenia, of the other part, 1999/602/EC, 31.5.1999, OJ L 239/1. See also Article 13 of the Cotonou Agreement whereby the Members of the African, Caribbean and Pacific group of states (ACP) are obliged to "accept the return and readmission of any of its nationals who are illegally present in the territory of a Member State of the European Union, at that Member State's request and without further formalities".

Community Return Policy on illegal residents presented by the European Commission addressed the need to create common standards and measures on return issues for people residing illegally in the EU and to put forward suggestions for a coordinated and efficient policy based on common principles and standards.<sup>60</sup>

At its meeting in Seville on 21-22 June 2002, the European Council called for speeding up the conclusion of readmission agreements with a number of targeted countries.<sup>61</sup> Also, under the Spanish Presidency, the idea of placing sanctions, such as cutting development aid to those countries failing to cooperate on the control of illegal immigration, was presented by Spain and the UK as a policy option. The direct penalisation and punishment of developing countries was not considered to be ‘practical’, and the idea was not adopted. It was agreed that migration diplomacy and co-development programmes should be actively pursued in order to address migration issues in a more coherent and efficient way.<sup>62</sup> Having that as a basis, the Commission presented a Communication on the integration of migration in relations with third countries in which it further stressed the considerable synergy between migration and development policies.<sup>63</sup> It also addressed how migration issues are being integrated in the Community’s external cooperation programmes and policies (‘integrated approach’), and how to use these policies to efficiently tackle irregular immigration.

The Council has so far given the green light to the European Commission to enter into negotiations on multilateral readmission agreements with Morocco, Sri Lanka, Russia, Pakistan, Hong Kong, Macao, Ukraine, Albania, Algeria, China and Turkey.<sup>64</sup> The five official criteria that justify the inclusion of these countries on the list are:<sup>65</sup>

- The migration pressure exerted by flows of persons from or via third countries, together with the number of persons awaiting return;
- The pressure which illegal immigration flows exert on the European Union’s frontiers;
- The added value for the member states in bilateral negotiations;
- A geographical balance between the various regions of origin and transit of migration flows; *and*
- Countries with which the EU is negotiating accession agreements should not be included. Yet, third countries with which the EU has concluded Association or Cooperation Agreements containing a readmission clause should be included.

There have been serious difficulties in the negotiations process with most of these states. Of the three agreements concluded so far (Hong Kong, Macao,<sup>66</sup> and Albania), only the one with Hong Kong has

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<sup>60</sup> Green Paper on a Community Return Policy on Illegal Residents, COM(2002) 175 final, Brussels, 10.04.2002.

<sup>61</sup> See Presidency Conclusions Seville European Council, 21-22 June 2002, point 30 that deals with measures to combat illegal immigration.

<sup>62</sup> At the recent General Affairs Council Meeting 2552<sup>nd</sup>, Brussels, 8 December 2003 a systematic evaluation mechanism was set, whereby the European Commission will present annually a report on cooperation with third countries. The report will give an overview of the efforts third countries are making in the fight against illegal immigration as well as the technical and financial support provided by the EU side.

<sup>63</sup> Commission Communication on integrating migration issues in the European Union’s relations with third countries, COM(2002) 703 final, Brussels, 3.12.2002.

<sup>64</sup> Article 300 EC Treaty establishes the procedure to be followed where the EC Treaty provides for the conclusion of agreements between the Community and one or more States or international organizations.

<sup>65</sup> See the Criteria for the identification of third countries with which new readmission agreements need to be negotiated – Draft Council Conclusions, Council of the European Union, 7990/02, Brussels, 16.4.2002.

<sup>66</sup> See Report on the Proposal for a Council Decision concerning the signing of the Agreement between the European Community and the Macao Special Administrative Region of the People’s Republic of China on the readmission persons residing without authorization, European Parliament, 24.2.2004.

entered into force.<sup>67</sup> Negotiations with Morocco are starting to move.<sup>68</sup> Moreover, a Memorandum of Understanding between the EU and the National Tourism Administration of China regarding visa and other related issues on tourist groups has been recently concluded.<sup>69</sup>

What are the main features characterising the readmission agreements? They impose the obligation to the contracting parties to readmit, upon application and without any further formality, their nationals if they do not, or no longer, fulfil the conditions for entry to, presence in or residence on the territory of the requesting state. This principle is generally recognised as an obligation in treaties under international law.<sup>70</sup> In addition this covers all third country nationals or stateless persons (or persons of another jurisdiction) if it is proved that they hold (or at the time of the entry held) a valid visa or residence permit issued by the requested state, or that they entered the EU after having stayed on or transited through that state.

The agreements also provide the readmission procedure to be followed (the readmission application, the means of evidence regarding nationality, the time-limits as well as the transfer modalities and modes of transportation). The use and protection of personal data are an important part of the agreements.

Finally, they also include the so-called ‘non-affected clause’, which guarantees that the readmission agreement shall be without prejudice to rights and obligations arising from international law.<sup>71</sup> Much criticism has been expressed about the fact that this provision does not make specific reference to international human rights or refugee standards.<sup>72</sup> Yet, contrary to the readmission agreement concluded with Hong Kong, this human rights reference has been expressly included in the latest version proposed by the European Commission of the agreement negotiated with Albania.<sup>73</sup>

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<sup>67</sup> See Information on the entry into force of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China on the readmission of persons residing without authorization, OJ L64/38, 2.3.2004. Also, Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China on the readmission of persons residing without authorization, OJ L17/25, 24.1.2004.

<sup>68</sup> On February 2003, Morocco agreed to open discussions. Since that date some rounds of negotiations have occurred.

<sup>69</sup> See Council Decision concerning the Conclusion of a Memorandum of Understanding between the European Community and the National Tourism Administration of the People’s Republic of China on visa and related issues concerning tourists groups from the People’s Republic of China, 2004/265/EC, of 8.3.2004, OJ L83/12. The Commission now hopes to begin negotiations on a wider scale that would cover all Chinese nationals or/and persons coming from China.

<sup>70</sup> See K. Hailbronner (2000), *Immigration and Asylum Law and Policy of the European Union*, Kluwer Law International, pp. 483-5. Article 13.2 of the Universal Declaration of Human Rights.

<sup>71</sup> Article 16.1 of the Readmission Agreement with Hong Kong says that “This Agreement shall be without prejudice to rights, obligations and responsibilities arising from International Law applicable to the Community, the Member States and the Hong Kong SAR. 2. Nothing in this Agreement shall prevent the return of a person under other formal or informal arrangements”.

<sup>72</sup> See S. Peers (2003), *Readmission agreements and EC external migration law*, EU: Statewatch analysis No. 17 (retrievable from [www.statewatch.org](http://www.statewatch.org)).

<sup>73</sup> Article 17 of the Agreement between Albania and the European Community on the readmission of persons residing without authorisation, as included in the Commission proposal for a Council Decision concerning the signing and conclusion of the agreement, COM(2004)92 final of 12.2.2004, provides that “This agreement shall be without prejudice to the rights, obligations and responsibilities of the Community, the Member States and Albania arising from International Law and, in particular, from the European Convention of 4 November 1950 for the Protection of Human Rights, the Convention of 28 July 1951 and the Protocol of 31 January 1967 on the Status of Refugees, and International instruments on extradition”.

While the readmission agreements are widely considered to be a paramount instrument in migration management and in the fight against illegal immigration,<sup>74</sup> they have been also highly criticized for several reasons. As Peers highlights, while the targeted countries will face more and more pressure under the new EU ‘integrated approach’, little is done in order to better tackle and prevent the underlying causes of irregular migration as well as the potential human rights violations that these instruments may lead to (such as sending rejected asylum-seekers to ‘safe’ countries of origin which prove as a matter of fact not to be so safe).<sup>75</sup>

The EU is also facing serious difficulties in being able to offer anything ‘sufficiently attractive’ in exchange to those third countries. Since readmission agreements are in the interest of the Community, it has been commonly agreed that a successful conclusion depends on the ‘leverage’ at the Commission’s disposal. One of the main strains within these agreements is the obligation to readmit persons who are not nationals of the requested state but who have transited through its territory on their way to the Union. These transit states will be confronted with very high technical and financial charges. In addition to the technical and financial assistance/incentives that may accompany these agreements,<sup>76</sup> the EU and the member states need first to consider the so-called ‘root causes approach to migration’. The multiple negative effects that these European ‘return policies’ may cause in developing countries should also be taken into account. A right balance needs to be struck while integrating the policies on external relations and migration control.

As stressed by the European Commission in its recent Study on the links between legal and illegal immigration, a different and more flexible approach may be required.<sup>77</sup> Along with a coherent and balanced return policy that fully guarantees a high human rights protection, the use of legal migration measures may be the best solution in order to reduce significantly the much-feared threat of illegal immigration. These measures may include, for example, opening up channels of legal labour migration, developing measures for a better holistic integration of their nationals in the EU member states,<sup>78</sup> facilitating the issue of visas, etc.

### **3. Turkey’s Progress towards the Alignment of the Schengen *Acquis***

#### **3.1 The policy and procedural context**

It is only in the last two years that Turkey has started to focus its attention and energy on JHA issues. Previously, attention was centred on meeting the Copenhagen political criteria. The adoption of the second Action Plan in March 2003 followed by the revised NPAA efforts towards harmonisation in the JHA area started to gather pace. Already in June 2002, the Turkish government formed the Task Force on Asylum, Migration and Border Protection composed of representatives from the Coast Guard, Gendarmerie, Military, Ministry of Interior, Ministry of Foreign Affairs, Undersecretary of Customs and the Secretariat General for European Union Affairs. Working groups within this Task Force were set up to start legislative scrutiny and arrange for studies as well as study visits with

<sup>74</sup> See J. Niessen (2004), *International migration and relations with third countries, The European Union*, Migration Policy Group, May (retrievable from <http://www.migpolgroup.com>).

<sup>75</sup> See S. Peers (2003), *Readmission agreements and EC external migration law*, EU: Statewatch analysis No. 17 (retrievable from [www.statewatch.org](http://www.statewatch.org)).

<sup>76</sup> See for instance the Regulation (EC) No. 491/2004 of the European Parliament and of the Council establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), of 10.3.2004, OJ L80/1, 18.3.2004.

<sup>77</sup> Commission Communication on a Study on the links between legal and illegal migration, COM(2004) 412 final, Brussels, 4.6.2004, Part II on the relationship between legal and illegal migration flows and relations with third countries.

<sup>78</sup> Commission Communication on immigration, integration and employment, COM(2003) 336 final, Brussels 3.6.2003. See also J. Apap and S. Carrera (2003), *Towards a proactive immigration policy for the EU?*, CEPS Working Document No. 198, December.

respect to border protection, irregular migration, the Schengen visa regime and asylum.<sup>79</sup> Since then, the Task Force has produced Strategy Reports in these areas that were in turn negotiated and discussed with the European Commission in Ankara. Subsequently, the government has had a series of proposals for twinning projects prepared dealing with the above wide areas. These projects by and large deal with the preparation of Action Plans for the implementation of the Strategy Reports as well as offer training programmes and resources for administrative capacity building. They are financed from the assistance allocated by the Accession Partnership for Turkey.

A joint EU-Turkey consultative mechanism has also been put into place to oversee the harmonisation process. Subsequent to the Helsinki European Council in December 1999, the EC-Turkey Association Council of 11 April 2000 set up eight subcommittees under the Association Committee.<sup>80</sup> The last of the subcommittees deals with JHA policies. This subcommittee has met five times.<sup>81</sup> The meetings have been forums during which views are exchanged and Commission officials raise questions concerning legislative screening and progress in respect to work on harmonisation.

In general, government and public attention has been mainly focused on the Copenhagen political criteria reform packages and their implementation. Yet, within various bureaucracies an ever-growing number of middle and senior rank officials have become drawn into the tasks associated with the nitty-gritty details of preparing Turkey for the harmonisation of its legislation and practice with that of the EU. Since the formation of the new government in November 2002, officials are also encouraged by a government exhibiting a strong will for getting whatever needs to be done to open the way for Turkey's EU membership prospects. This is putting these officials in contact with their EU counterparts in an unprecedented manner. In this process the Secretariat General for European Union Affairs plays the role of the coordinating body between the different bureaucracies involved in respect to implementing the terms of the NPAA. By and large it can be said that over the last year or so these officials have become increasingly committed to their tasks even if there are occasional moments when doubts about the EU's credibility surfaces in their minds. This becomes particularly evident in respect to controversial and sensitive aspects of the harmonisation process and does indeed influence their performance.

### **3.2 Enhancing Protection of External Border**

Turkey has 2,949 km of land borders and 8,330 km of sea borders. Much of the land borders is characterised by mountainous terrain. Traditionally, the Iranian, Iraqi and Syrian borders were porous and particularly vulnerable to smuggling and banditry well into the 1970s. Subsequently, in the 1980s and 1990s these borders became conduits for PKK terrorists operating out of neighbouring countries. As a result they have been heavily militarised, and a good part of the Syrian border is mined. However, a significant improvement in relations between Syria and Turkey over the last year has culminated in a decision early in 2004 to start removing the mine fields. It is now in particular the Iranian border that is vulnerable to irregular migration. A large proportion of illegal transit migrants usually are smuggled into Turkey across this border. It is also via this border that most of the asylum seekers arrive in Turkey. A large number of asylum applications in Turkey are lodged in the city of Van near the Iranian border. The Iraqi border on the other hand has seen two major mass influxes of refugees. In 1988 subsequent to the Halapja incidents, close to 60,000 Kurdish Iraqis sought refuge in Turkey followed by another almost 450,000 after the end of the first Gulf War. An overwhelming proportion of these refugees eventually returned to Iraq.

<sup>79</sup> The European Commission provided considerable expert assistance to the working groups, through an existing 'unallocated institution building' project: Administrative Cooperation and study visits were organised for Turkish officials to Germany, Poland and Finland as best practice Member States with the assistance of the European Commission.

<sup>80</sup> Decision No 3/2000 of the EC-Turkey Association Council of 11 April 2000 on the establishment of Association Committee subcommittees (2000/378/EC).

<sup>81</sup> These meetings were held on 6-7 March 2001, 2-3 July 2001, 20-21 March 2002, 19 June 2002 and 15 December 2003.



On the other hand, the Soviet border was tightly sealed until the end of the Cold War, with minimal movement of people. Currently, the border with Georgia and Azerbaijan's Nahcivan province is open and lively while the one with Armenia that is separated by a river remains closed. During the Cold War, the Bulgarian border too was tightly controlled and heavily fortified on both sides. However, with the collapse of the communist regime in Bulgaria, relations between the two countries improved very quickly. By the mid-1990s, both countries had reached agreements for the demilitarisation of the border regions accompanied by efforts to de-mine the border. Currently, the Bulgarian border is extremely busy as Bulgaria constitutes the main transit path for a good proportion of Turkey's commercial relations as well as the seasonal movements of Turkish immigrants in Europe. Since the end of the Cold War there has also been a significant increase in regional commercial as well as private traffic. The border with Greece from the early 1960s too had become a tightly controlled and militarised border with no-go zones on both sides as the relations between the two countries deteriorated. The two countries are separated by a river. However, since relations between the two countries entered a period of *rapprochement* in 1999, the border has started to be demilitarised and traffic, both commercial and private, has increased significantly.

Turkey also has an exceptionally long sea border. The Aegean Sea is particularly difficult to control because of the nature of the coast and the large numbers of islands that dot the sea. This provides an ideal environment for illegal migrants trying to make it to Europe. They attempt to use the multitude of little ports and isolated coves along the coast to catch a passage with the help of human smugglers to the Greek islands at short distances from Turkey. The Aegean is also a rough sea which explains why occasionally boats overloaded with illegal migrants sink and tragedies occur.<sup>82</sup> The Mediterranean Sea itself is a major conduit between the Afro-Asian world and the European Union for the movement of illegal migrants. However, compared to the Aegean Sea, the Turkish coast along the Mediterranean Sea is relatively easier to control and incidents of human smuggling and accidents involving boats carrying illegal migrants are much less frequent. The Black Sea coast of Turkey does not appear to be used for human smuggling and illegal migration purposes.

The east and south-eastern land borders of Turkey to a depth of 50 kilometres is controlled by the land forces of the Turkish military except for a short stretch near the city of Van, which is controlled by the Gendarmerie.<sup>83</sup> They are responsible for the actual patrolling and the physical protection of the borders against infringements. The coastal guard on the other hand is responsible for patrolling the sea coast. It is the coastal guard that is responsible for detecting, tracking and interdicting boats carrying illegal migrants.<sup>84</sup> The Interior Ministry's General Directorate of Security is responsible for managing 107 border-crossings while the Undersecretary of Customs processes formalities with customs and goods.

The EU is expecting Turkey to adopt a string of measures to enhance the protection of its borders. Most importantly the EU wants to see the replacement of the current border control and management system with an integrated civilian-professional unit with a capability to detect forged and false documents. The strategy foreseen in the NPAA on external borders needs to be highlighted. The Task Force on Asylum, Immigration and External Borders for the preparation of the overall strategy for alignment with the EU *acquis* on border management finished its work in the year 2003. The outcome hence foresees the creation of a new body wanted by the EU within the Ministry of Interior for all border protection issues, including coast guards, composed of non-military, professional law

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<sup>82</sup> For a detailed study of transit migration and smuggling of migrants with specific coverage of the personal experiences of irregular migrants and the special place of the Aegean Sea see A. İçduygu (2003), *Irregular Migration in Turkey*, IOM International Organization for Migration, Geneva.

<sup>83</sup> The Turkish Ministry of Interior, the General Directorate of Security (police forces) carry out the passport controls as well as the entry-exit checks in the country. According to estimations provided by the Turkish Ministry of Interior, national police at the border gates (land border, sea and airport border gates) number some 10,000 officers.

<sup>84</sup> The Coastal Guard is equipped with 80 coastal guard boats and 341 Contour boats. Turkish authorities with the assistance of the Coastal Guard intercepted between 2000-2003 118 boats carrying illegal migrants. Statistics obtained from the Foreigners Department of the MOI.

enforcement officials. The strategy equally identifies the key legislative and institutional amendments, as well as the infrastructure and training programmes, considered to be the only conditions under which a proper alignment with the Schengen *acquis* would take place.<sup>85</sup>

The European Council at its meetings in Feira<sup>86</sup> and Göteborg<sup>87</sup> stressed the importance of any applicant countries' capacity to implement and enforce the *acquis communautaire*. The Council further emphasized that this goal involves fundamental efforts by every applicant in strengthening and reforming their administrative and judicial systems. In Turkey, as for all the past and present candidate countries, the so-called twinning projects play a fundamental role in that respect towards pre-accession negotiations.<sup>88</sup> The projects commonly named as 'twinning' are highly valuable instruments for targeted administrative cooperation to assist candidate countries to strengthen their administrative and judicial capacity and to implement the EU framework in their national systems. They have been qualified as the cornerstone of the joint effort by the European Union (European Commission and member states) and the candidate countries to foster institution-building, yet in some particular cases may be beset by a number of practical difficulties.<sup>89</sup>

Since May 1998, the date in which the first twinning took place in Turkey, we may see how most of the projects envisaged for this country deal with Justice and Home Affairs policies. This fact reflects Turkey's determination to reinforce its law enforcement capacity in these particular areas as well as the importance given to the issues at stake in the pre-accession period by the European Commission and the member states. By way of example, in the year 2003 alone, five out of a total of 18 twinning projects were prepared dealing with the following JHA issues: strengthening the police forensic capacity, strengthening institutions in the fight against trafficking in human beings, strengthening the struggle against money laundering, financial sources of crime and the financing of terrorism, visa policy and practice, etc. The programme presented for the 2004 period includes three additional projects dealing with asylum, border protection, law enforcement and migration issues.<sup>90</sup>

Regarding border controls, the main purpose of the 'twinning' is to prepare an action plan to implement Turkey's integrated border management strategy with a view to aligning its border management policy with the Schengen *acquis*, and to improve the operational capacity of the agencies in charge of that management inside the country. Among the list of projects for 2004,<sup>91</sup> we stress the

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<sup>85</sup> Looking at the schedule presented in the National Programme for the adoption of the *acquis*, for instance, new amendments in the Law of Foreign Nationals are expected to be adopted by next year (1 March 2005).

<sup>86</sup> See Santa Maria de Feira European Council 19 and 20 June 2000, Presidency Conclusions, point 16: "The European Council recalls that, in addition to finding solutions to the negotiating issues, progress in the negotiations depends on the incorporation by the candidate States of the *acquis* in their national legislation and especially on their capacity to effectively implement and enforce it. While progress has already been made, this calls for important efforts by the candidates to continue their domestic reforms, in particular strengthening their administrative and judicial structures. The Union will closely monitor the performance of the candidates. To this end, the Commission is invited to report to the Council on its findings. The European Council at Nice will review progress on enlargement and consider how to take forward the accession processes".

<sup>87</sup> Göteborg European Council 15 and 16 June 2001, Presidency Conclusions, point 7: "This new momentum must be matched by continued progress in the candidate countries in transposing, implementing and enforcing the *acquis*. They will have to pay particular attention to putting in place adequate administrative structures, to reforming judicial systems and the civil service, as well as to the situation of minorities. Special efforts will be devoted to assisting Bulgaria and Romania".

<sup>88</sup> See European Commission, Enlargement DG, *Twinning in Action*, October 2001, available at [http://europa.eu.int/comm/enlargement/pas/twinning/pdf/twinning\\_en.pdf](http://europa.eu.int/comm/enlargement/pas/twinning/pdf/twinning_en.pdf).

<sup>89</sup> Report on the Assessment of the Twinning Instrument under Phare, by civil servants from the member states, July 2000.

<sup>90</sup> The total budget of JHA projects amounts to €13 million, which represents 5.5% of the total financial aid allocated to Turkey for the year 2004.

<sup>91</sup> Other projects envisaged for 2004 deal with the enhancement of the professionalism of the Turkish Gendarmerie in its law enforcement activities, the development of Probation Services in Turkey, etc.

importance of the one dealing with the development of a training system for border police.<sup>92</sup> This project aims to develop a training strategy in order to progressively achieve the objective envisaged in the border management strategy and the NPAA for the establishment of a specialised border police in Turkey.<sup>93</sup> An additional important measure that the Turkish Ministry of the Interior took in the run up to the NATO summit in Istanbul in June 2004 involved providing photo-cameras to passport police at major airports and land crossings. This project is still in its initial stages, but once fully implemented it will allow photographs taken at border crossings and airports to be matched with photographs of persons thought to pose security risks. Furthermore, a number of land crossings have been equipped, with the help of funding from the World Bank and the British government, with systems to detect the presence of persons being smuggled in land vehicles. These two projects when fully operational should contribute to a major improvement in border protection.

The call by the EU for the establishment of a new integrated civilian organisation had caused considerable consternation in the Turkish bureaucracy and the military. This was caused by an initial misunderstanding of the nature of this new civilian organisation. At the preparation stage of the first NPAA there was the mistaken notion that the EU was requiring that this organisation be outside the state apparatus. Once this misunderstanding was overcome, the Turkish military as well as the government became attuned to the idea. The problem here appears to be more a material one as the reorganisation is expected to be financially and organisationally demanding.

In official circles harmonising Turkey's border management and protection policies with the EU is seen as a development that will benefit most importantly Turkey and its national security. There is a general recognition of the weaknesses and problems associated with the current system as well as a generally shared will to improve it. However, this is also accompanied by a realistic awareness of the immense nature of the task. This explains Turkey's preference to spread the harmonisation task over the pre-accession process. This is also accompanied by an expectation that Turkey will indeed be able to receive substantial material support. The exercise of strengthening Turkey's eastern borders, as much as it may seem to be a gigantic task, could become an exercise in 'mutual confidence-building' for the broader pre-accession process that would serve and benefit the two sides.

### 3.3 Irregular migration

A critical aspect of border protection and control for the EU is the so-called 'fight against illegal migration'. The arrival of large numbers of irregular migrants on the shores of Italy and France especially in the late 1990s along with highly publicised incidents involving irregular migrants in Britain have increased the urgency to act against irregular migration at the EU level. The events of September 11<sup>th</sup> and March 11<sup>th</sup> have also played a fundamental role in that concern. Turkey has attracted considerable attention as a transit country for illegal migrants as a point of departure for boats carrying these smugglers. As mentioned in Section 2.1 of this report, it is striking to see how during the run-up to the Seville European Council summit Tony Blair and José María Aznar went even as far as to threaten countries such as Turkey with sanctions if they did not cooperate with the EU.

Turkey's geographical location between immigrant-producing areas and Europe, accompanied by a relative large informal economy, makes it an attractive country for illegal migrants. Turkey has long been known as a country of emigration. Yet, Turkey has, like the Ottoman Empire, a long history of immigration. Government statistics indicate that from 1923 to 1997, more than 1.6 million persons

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<sup>92</sup> According to information provided by the Turkish Ministry of Interior, this project has been organised in three different modules: 1) support for the preparation of a border police training strategy, 2) development of border police training programmes in line with current EU practices, and 3) development of operational standards and best practices for border police.

<sup>93</sup> To achieve this goal, some accompanying measures will be taken during the transitional period, such as the issuing of a practical handbook for border management.

immigrated to Turkey.<sup>94</sup> The founders of the modern Turkish state were concerned to create a homogenous sense of national identity in an otherwise ethnically and culturally diverse country.<sup>95</sup> Exclusive priority was given to encouraging and accepting immigrants who were either Turkish-speaking Muslims to start with, or who were officially considered to belong to ethnic groups that would easily melt into a Turkish identity such as Albanians, Bosnians, Circassians, Pomaks and Tatars from the Balkans. Only a small number of immigrants came from outside the Balkans and the above ethnic and religious groups. The Gagauz Turks, for example, were not encouraged to immigrate to Turkey, largely due to their being Christian. The period of government-supported major immigration into Turkey lasted until about the early 1970s, after which immigration began to be discouraged on the grounds that Turkey's population had grown enough and that land to distribute to immigrants had become scarce. In fact, the last major wave of immigration occurred, unexpectedly, when close to 310,000 Turks and Pomaks were expelled from Bulgaria in 1989 after refusing to assimilate into a Bulgarian Slav identity as part of a campaign launched by the Communist regime. A third of these refugees returned soon after the regime change in Bulgaria in 1990. The rest acquired Turkish citizenship. With Bulgarian membership in the EU expected by 2007, ever-growing numbers of these refugees are returning to reclaim their Bulgarian citizenship. Since the early 1990s, Turkey has been witnessing new forms of immigration. These include students from a variety of countries as well as nationals of EU countries who have an officially sanctioned presence in Turkey with proper residence and work permits. EU nationals include individuals engaged in professional activities and their families, particularly in Istanbul, as well as European retirees in some of the Mediterranean resorts. They, too, constitute a relatively new phenomenon in terms of immigration into Turkey, and their numbers are estimated at 100,000-120,000.<sup>96</sup>

*Table 1. Breakdown by nationality of illegal immigrants arrested by Turkish security forces, 1995-June 2004*

<b>Country of origin</b>	<b>Number of people</b>
Afghanistan	28,911
Bangladesh	13,418
Pakistan	28,442
Iran	22,199
Iraq	99,402
Syria	5,018
<b>Sub-total</b>	<b>197,390</b>
North Africa	9,397
Former Soviet Republics*	100,018
Central Asian Countries**	6,473
Albania	3,988
Bulgaria	9,111
Romania	19,067
Turkey	24,419
Others	107,986
<b>Total</b>	<b>477,849</b>

\* Russia, Ukraine, Moldova, Georgia, Azerbaijan, Armenia, Belarus, Lithuania, Latvia and Estonia.

\*\* Kyrgyzstan, Kazakhstan, Turkmenistan, Uzbekistan and Tajikistan.

Source: Data obtained from the Foreigners Department of the Turkish Ministry of the Interior (MOI).

<sup>94</sup> K. Kirişci (1996), "Coerced Immigrants: Refugees of Turkish Origins since 1945", *International Migration* Vol. 34, No. 3.

<sup>95</sup> K. Kirişci (2000), "Disaggregating Turkish citizenship and immigration practices", *Middle Eastern Studies*, Vol. 36, No. 3, July.

<sup>96</sup> B. Kaiser (2003), "Life Worlds of EU Immigrants in Turkey", in Emrehan Zeybekoğlu and Bo Johansson (eds), *Migration and Labour in Europe: Views from Turkey and Sweden*, İstanbul: Şefik Matbaası.

There is also a form of irregular immigration involving nationals of neighbouring countries, and transit migrants. Turkey allows nationals of Armenia, Azerbaijan, Georgia, Iran, Moldova, Ukraine, Russia, and the Central Asian republics to enter the country quite freely either without visas or with visas that can easily be obtained at airports and other entry points (see Appendix 2). A large number of these people are involved in small-scale trade.<sup>97</sup> However, some overstay their visas and illegally work as household help, sex workers and labourers, especially on construction sites and in the tourism sector. It is very difficult to estimate the number of such irregular immigrants in Turkey. According to government statistics, there were 477,849 such persons apprehended between 1995 and June 2004, as presented in Table 1. More than 120,000 were nationals of the former Soviet republics and Balkan countries who were apprehended for violating the terms of their visa. Few of these individuals actually attempt to go to Europe via Turkey. If anything, Turkish officials have argued that a liberal Turkish visa policy and the possibility that many nationals of these countries were able in the 1990s to engage in suitcase-trading relieved the pressure on EU countries that once had feared an influx of migrants from these countries. For such persons Turkey itself is the target country. To these groups must be added a small number of trafficked persons, particularly women. These are people who have either been coerced or deceived into travelling to Turkey for commercial sex work, and are forced to remain in Turkey against their will.

Lastly, starting from the mid-1990s, there was a growth in the number of irregular migrants using Turkey as a transit route. These people were mostly nationals of neighbouring countries in the Middle East such as Iraq, Iran and Syria, as well as Afghanistan and Pakistan. The Turkish government came under massive pressure from a number of EU member countries to curb this transit migration. In accordance with the AP, Turkey is expected to introduce a series of measures to combat irregular migration including the construction of reception centres, signing of readmission treaties with countries of origin as well as to start negotiations on a readmission treaty between Turkey and the EU.<sup>98</sup> Furthermore, Turkey in 2001 joined the Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration (CIREFI). Since then it has been sharing data with this Centre and participates in bi-annual meetings of the Centre. It also cooperates with the Early Warning System with respect to sudden surges in illegal migration movements and forged or stolen documents. The High Level Working Group (HLWG) on Turkey completed its Strategy Report to Support the Migration Management Action Plan in December 2003. The Strategy Report lays out in detail the tasks and objectives to be achieved in respect to combating irregular migration including legislative alignment. In this respect two twinning projects, one on asylum and immigration and another on combating trafficking in human beings have been signed involving Austria, Denmark, Germany and the United Kingdom to help to build up institutional capacity and develop training programmes. Furthermore, with the financial support of Germany and Sweden and in coordination with the High Level Working Group of the EU, 10 seminars were organised for Turkish officials on EU practice in these areas. The issue of combating irregular migration is raised through formal channels such as the 8<sup>th</sup> Subcommittee of the Associational Committee as well as during bilateral meetings between European Commission and Turkish government officials at the highest level. The Turkish Foreign Minister and the Commissioner Gunter Verheugen exchanged letters to start to negotiate a readmission agreement during the spring of 2004 (see also Section 2.1).

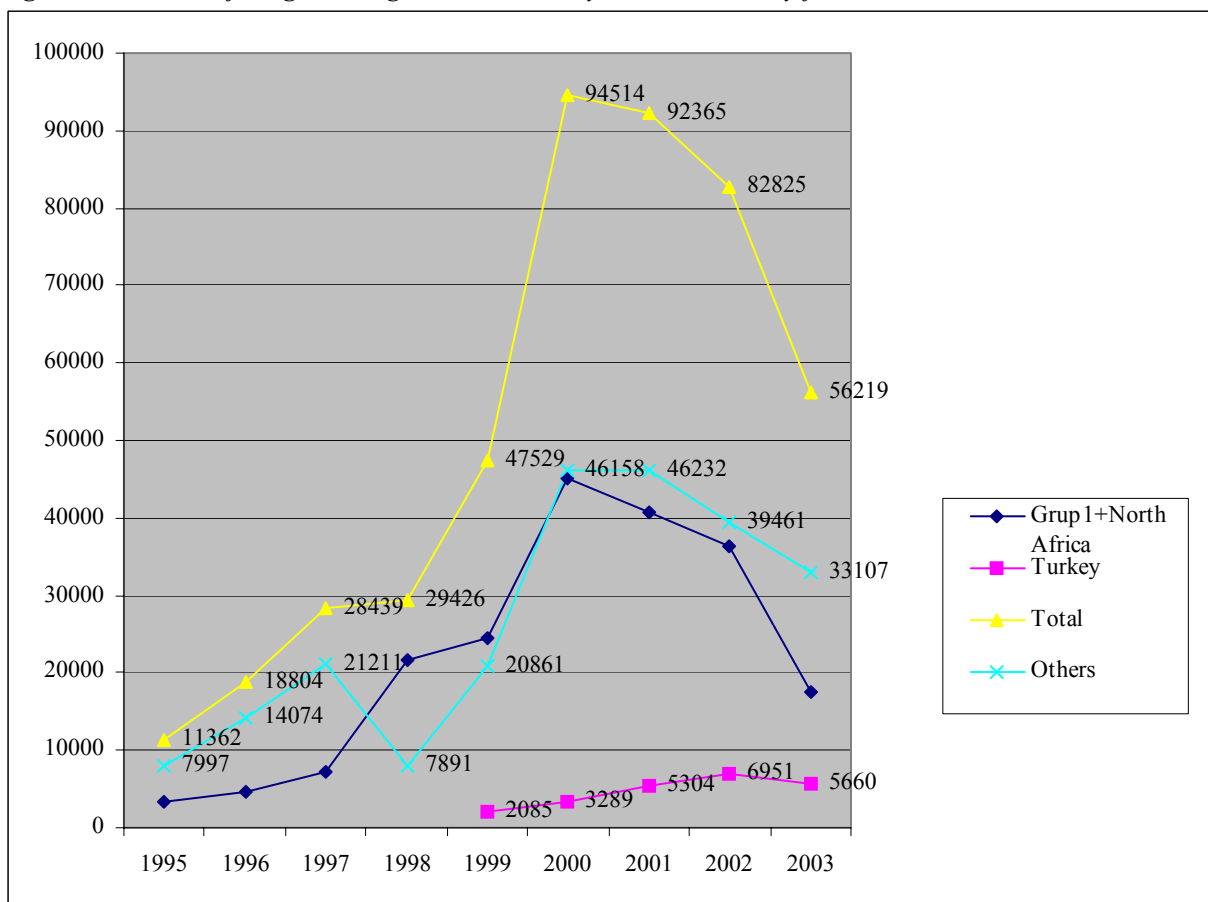
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<sup>97</sup> See İcduygu (2003) as well as S. Erder. (2003), “Global Flows of Huddles: The Case of Turkey”, in Zeybekoğlu and Johansson (eds).

<sup>98</sup> The Accession Strategy for Turkey under Co-operation in the field of Justice and home affairs notes “Continue to strengthen the fight against illegal immigration and negotiate a readmission agreement with the European Community”, p. 17. On the other hand the JHA Council meeting of 21-22 April 2002 that approved the criteria for readmission and new readmission treaties “asked the European Commission to submit separate draft negotiation mandates for readmission agreements with China, Turkey, Algeria and Albania”, see the Criteria for the identification of third countries with which new readmission agreements need to be negotiated – Draft Council Conclusions, Council of the European Union, 7990/02, Brussels, 16 April 2002, approved by the JHA Council on 25-26 April 2002.

There are no reliable figures available to bear out Turkey's success or failure in this regard. Figure 1 shows the trend of the number of nationals from these countries apprehended by the authorities for being illegally present in the country. The bulk of them are constituted by the nationals of the former Soviet republics as well as Balkan countries. It is the illegal migrants from Asian and North African countries that have been a primary concern for the EU. Figure 1 shows how the numbers of such irregular migrants apprehended by the authorities have steadily increased until their numbers peaked in 2000 with almost 95,000 arrests, roughly half of them coming from countries whose nationals traditionally have sought to transit to Europe. Since then the trend has turned steadily downwards. Turkish authorities have argued that this is product of an intensive effort on their part to stem the flow of illegal transit migration. This effort also appears to be borne out by the steady increase in the number of human smugglers apprehended as indicated in Table 2. Furthermore, according to Turkish government sources, the number of irregular migrants apprehended by the Italian authorities and alleged to have reached the Italian coast via Turkey has fallen from 6,093 in 2001 to 2,117 in 2002 and 177 in 2003. These statistics also indicate that between 2000 and 2003, 157 ships were intercepted carrying irregular migrants, 118 of which were stopped by the Turkish authorities. The 2003 Progress Report does indeed acknowledge that the trend in illegal migration via Turkey has shown a decrease and international migration flows have been diverted away from Turkey to other routes.<sup>99</sup>

Figure 1. Number of illegal immigrants arrested by Turkish security forces, 1995-2003



Group 1: Afghanistan, Bangladesh, Pakistan, Iran, Iraq and Syria.

North Africa: Egypt, Libya, Tunisia, Morocco and Algeria.

Source: Data obtained from the Foreigners Department of the Turkish Ministry of the Interior (MOI).

<sup>99</sup> See [http://europa.eu.int/comm/enlargement/report\\_2003/pdf/rr\\_tk\\_final.pdf](http://europa.eu.int/comm/enlargement/report_2003/pdf/rr_tk_final.pdf).

Part of the wider problem of irregular migration in Turkey has also been that of trafficked persons – especially women. Turkey has become both a transit and destination country for prostitution by foreign nationals. Some of the women involved in this trade are actually trafficked.<sup>100</sup> In December 2000, Turkey was among the first group of countries to sign the UN Convention against Transnational Organised Crime and of its two additional Protocols including the Protocol to Prevent, Suppress and Punish Trafficking. The Turkish Parliament ratified these instruments in March 2003.<sup>101</sup> More importantly as part of the August 2002 reform package, the government introduced new articles to the Penal Code criminalising human smuggling and trafficking.<sup>102</sup> The government also instituted stricter controls at borders and ports accompanied by training programmes for the Gendarmerie, Police and Judiciary.<sup>103</sup> The new law has enabled prosecutors to pursue human smugglers more effectively and also seek harsher penalties than had been the case. As of March 2004, there were 42 cases opened for violations under the terms of Article 201, and 21 of these cases were concluded with convictions while the others are pending.<sup>104</sup> Most strikingly the Interior Ministry officials subsequently joined by the Gendarmerie were able to make arrangements in September 2003 with a non-governmental organisation, Human Resources Development Foundation (Insan Kaynaklarını Geliştirme Vakfı-HRDF) and the Directorate General of the Status of Woman to provide social assistance to victims of trafficking until their return to their countries of origin could be arranged. This development in itself is significant of the transformation that Turkey is going through and constitutes an example of the close cooperation that is developing between the bureaucracy and civil society in Turkey.

Table 2. Arrests of human smugglers by Turkish authorities by nationality, 1998-June 2004

Nationality	1998	1999	2000	2001	2002	2003	2004	Total
Turkey	75	139	701	1021	1019	825	236	4,016
South Asia <sup>a</sup>	3	17	35	11	20	30	7	123
Neighbouring Middle East <sup>b</sup>	15	31	72	92	93	50	19	372
Other Middle East <sup>c</sup>	2	0	0	4	0	0	4	10
European Union/Candidate Countries <sup>d</sup>	2	0	15	6	14	8	3	48
Former Soviet Union <sup>e</sup>	1	0	14	8	10	7	6	46
Others (incl. China)	0	0	13	13	1	16	13	57
Total	98	187	850	1,155	1,157	936	288	4,672

<sup>a</sup> Afghanistan, Bangladesh, Pakistan and India.

<sup>b</sup> Iran, Iraq and Syria.

<sup>c</sup> Egypt, Lebanon and Mauritania.

<sup>d</sup> Greece, Romania, Poland and Bulgaria.

<sup>e</sup> Russia, Ukraine, Moldavia, Georgia, Azerbaijan and Armenia.

Source: Data obtained from the Foreigners Department of the Turkish Ministry of the Interior (MOI)

The latter development played a critical role in the US administration's decision in September 2003 to upgrade Turkey from a category of countries threatened with sanctions for inadequate attention paid to

<sup>100</sup> For an extensive and thorough study of this problem, see S. Erder and S. Kaska (2003), *Irregular Migration and Trafficking in Women: The Case of Turkey*, IOM International Organisation for Migration, Geneva.

<sup>101</sup> *Official Gazette*, 29 March 2003, No. 25052.

<sup>102</sup> *Official Gazette*, 9 August 2002, No. 24841

<sup>103</sup> Detailed information available from *Turkey on Trafficking in Human Beings* (last updated 25 June 2004) available at [www.mfa.gov.tr](http://www.mfa.gov.tr).

<sup>104</sup> Data obtained from [www.cte.adalet.gov.tr/istatistik/suc\\_turu.htm](http://www.cte.adalet.gov.tr/istatistik/suc_turu.htm) (on 2 July 2004).

combating against trafficking in human beings and women in particular. Previously, Turkey had been put in this category based on the US State Department's *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Reports*.<sup>105</sup> During the NATO summit in June 2004, a major additional breakthrough was achieved when in the presence of the US Secretary of State Colin Powell, a protocol was signed between the municipality of Istanbul and HRDF. This protocol improves the protection to be offered to women victims of trafficking. The HRDF also instituted a mechanism which enables it to receive instant information about trafficked women apprehended by the police. The police, together with HRDF, cooperate closely with the authorities and non-governmental organisations of the country of origin of trafficked women to ensure a safe repatriation. The HRDF will hold a conference in September 2004 on combating trafficking in women with the participation of officials and representatives of non-governmental organizations from a number of Balkan countries. Furthermore, the Interior Ministry has also instituted the practice of granting humanitarian residence permits up to six months for victims of trafficking. Lastly, in an effort to prevent the abuse of the acquisition of Turkish nationality by marriage, the government amended Article 5 of the Citizenship Law in June 2003 and introduced the requirement of a minimum of three years of probation before Turkish nationality can be obtained. Previously, the law permitted women to acquire Turkish nationality automatically. This had led to considerable abuse.

### 3.4 Irregular Migration and Readmission Agreements<sup>106</sup>

As highlighted in Section 2.1, in the context of fighting against illegal migration, Turkey has also been expected to sign readmission agreements with third countries of origin as well as with neighbouring countries. So far Turkey has been able to sign such agreements only with Syria in September 2001, Kyrgyzstan in May 2003 and Romania in January 2004.<sup>107</sup> In the context of the agreement with Syria, Turkey has returned 854 illegal migrants to Syria and readmitted 18 migrants to Turkey. Turkey has proposed to negotiate readmission agreements with 15 countries, but it has failed to get any response.<sup>108</sup> It is, on the other hand, in the process of negotiating agreements with Byelorussia, Bulgaria, Egypt, Kazakhstan, Libya, Lebanon, Macedonia, Sri Lanka, Russia, Ukraine and Uzbekistan. The negotiation of so many agreements simultaneously is a taxing exercise, particularly considering that progress is often extremely slow and governments often have little incentive to cooperate. The latter explains very much why Turkey has failed to start negotiations with 15 countries. On the other hand, it should be noted that Turkey's performance in terms of number of readmission agreements concluded and being negotiated is much better than the performance of the European Commission (see section 2.1).

Turkey itself has been required to start negotiating a readmission agreement with the EU. Turkey had long resisted the signing of such an agreement and instead expressed a readiness to receive back any third country irregular migrants as long as they were returned to Turkey promptly and without delay. Turkey also argued that constitutionally it was required to accept back its own nationals in any event. In March 2004 Turkey, reluctantly, agreed to start negotiations with the EU on such an agreement. However, officials have expressed resentment with respect to the level of pressure they have come under to start these negotiations. They fear that Turkey will become a dumping ground for unwanted immigrants by the EU. Turkish officials are especially concerned because Turkey is encountering great difficulties in initiating negotiations let alone actually concluding agreements with many of the sending countries of illegal migrants. They fear that this may lead to a situation where the EU would

<sup>105</sup> These reports are available at [www.state.gov/g/tip/rls/tiprpt/](http://www.state.gov/g/tip/rls/tiprpt/).

<sup>106</sup> Analysis in this section is based on interviews with officials from the Ministry of Interior and Ministry of Foreign Affairs and internal documents.

<sup>107</sup> These agreements were published in the *Official Gazette*: Syria, Law 4901, *Official Gazette*, 17 June 2001, No. 25148; Greece, Law 3914, *Official Gazette*, 24 April 2002, No. 25148; and Kyrgyzstan, Law 5097, *Official Gazette*, 17 February 2004, No. 25376. The one with Romania has not yet been ratified and put into force.

<sup>108</sup> For the full list of countries as of August 2004 see Appendix 2a.



be able to send back illegal migrants to Turkey while Turkey will not have the means of ensuring their return to their respective countries of origin.

In the meantime Turkey did sign in November 2001 a bilateral readmission protocol with Greece. This is the longest-standing readmission agreement that Turkey has had with a current EU country. In spite of a dramatic improvement in Greek-Turkish relations in recent years and the presence of a very positive cooperative climate, the implementation of the agreement has encountered difficulties. Since the agreement came into force, Greece has provided Turkey with a list of more than 14,101 illegal migrants that they would have liked to send back to Turkey. Turkey has agreed to admit 2,416 from this list, but Greece was only able to hand over to the Turkish authorities 1,006 persons from this list. These illegal migrants, 270 Iranians and 736 Iraqis, were handed over to the Turkish authorities between October 2002 and January 2004. They were subsequently repatriated to Iran and Iraq.<sup>109</sup> According to the Turkish authorities, an additional 2,816 illegal migrants were forced back to Turkey in violation of the provisions of the agreement. On the other hand, the Turkish side asked 753 illegal migrants of 28 nationalities to be readmitted by Greece. Greece was able to accept back 19 Somalis. The problems encountered are indicative of the practical difficulties associated with readmission agreements even when it involves two neighbouring countries with reasonably good relations.

As we have seen in the beginning of this report, policies on illegal migration continue to be a major source of concern for EU governments. An impressive body of *acquis* has been developed in this area. The new accession countries have had to adjust their policies accordingly.<sup>110</sup> Turkey is under pressure to follow precisely the same route. However, many Turkish officials feel that they are not receiving the recognition they deserve for the energy and resources that are being channelled into combating irregular migration. Furthermore, they also feel that Turkey is being treated differently than the previous candidate states who signed readmission agreements only after accession talks started and then only on a bilateral basis. This difference constitutes a major source of distrust. This distrust is further aggravated by what Turkish officials consider an absence of burden-sharing. They complain that Turkey is basically left to its own devices with respect to combating irregular migration in general and to arranging for the return of the illegal migrants to their countries of origin. The granting to Turkey of EU financial and technical assistance that is typically offered to ‘third countries’ in the areas of migration and asylum (the so-called AENEAS programme),<sup>111</sup> also represents a fundamental factor for the lack of confidence by the Turkish side on its potential candidacy status. In addition, Turkish authorities often pay out of their own personal resources the upkeep of the migrants and encounter great financial and administrative difficulties in ensuring the deportation of such persons. They frequently cite, e.g., a project that Turkey has carried out with Holland, Sweden and Switzerland together with the International Organisation for Migration (IOM) involving the return of rejected asylum seekers to Iraq via Turkey. The project protocol was signed in October 2001 and until its completion in July 2003, ensured the return of 91 migrants. The project was strictly based on voluntarism and was actually carried out by the Anatolian Development Foundation, a Turkish non-governmental organisation with extensive experience dealing with refugees, with the cooperation of Turkish authorities.

### 3.5 Irregular Migration and Asylum

The question of asylum may not immediately be seen as relevant to border control. However, some attention and sensitivity need to be paid to asylum – particularly in the case of Turkey. Contrary to general belief, Turkey, like its predecessor the Ottoman Empire, has long been a country of asylum. It

<sup>109</sup> The readmission and repatriation of Iraqis were suspended between when the war in Iraq started, March 2003 and June 2003.

<sup>110</sup> For a general analysis of this situation see S. Lavenex and E. Uçarer (eds) (2002), *Migration and the Externalities of European Integration*, Lanham, Maryland: Lexington Books.

<sup>111</sup> Regulation (EC) No. 491/2004 of the European Parliament and of the Council establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), of 10.3.2004, OJ L80/1, 18.3.2004

is not the purpose of this section to examine this in any detail.<sup>112</sup> Turkish asylum policy is currently based on the Asylum Regulation of November 1994<sup>113</sup> and the geographical limitation with which it originally signed the 1951 Convention Relating to the Status of Refugees.<sup>114</sup> Accordingly, Turkey grants full refugee status only to asylum seekers fleeing ‘events’ in Europe. However, it does extend temporary protection to asylum seekers coming from elsewhere, mostly Iran and Iraq. Currently, Turkey’s asylum policy is managed in close cooperation with the United Nations High Commissioner for Refugees (UNHCR). There were, according to government statistics and Table 3, almost 35,000 asylum applications between 1995 and May 2004. Close to 17,500 granted refugee status were resettled out of Turkey. In accordance with the Settlement Law of 1934, immigration and refuge to Turkey are reserved for individuals of ‘Turkish descent and culture’.<sup>115</sup> Hence, the practice throughout the Cold War and today is that refugees have to be resettled out of Turkey.

*Table 3. Applications under the 1994 Asylum Regulation, 1995-May 2004*

Country	Applications	Accepted cases	Rejected cases	Pending cases	Cases not assessed
Iraq	12,274	4,541	3,502	3,139	463
Iran	21,601	13,062	1,441	6,030	236
Afghanistan	658	221	180	196	58
Russia	43	15	13	7	3
Uzbekistan	128	36	39	24	22
Azerbaijan	33		18		5
Other Europe*	101	51	28	19	4
Other**	324	59	43	63	140
Total***	35,162	17,985	5,264	9,478	931

\* Includes Albania, Belgium, Bosnia, Bulgaria, Georgia, Greece, Italy, Macedonia, Switzerland, Ukraine and Yugoslavia.

\*\* Includes Algeria, Bangladesh, Birmania (Myanmar), Burma, Burundi, China, Congo, Egypt, Eritrea, Ethiopia, India, Israel, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Morocco, Pakistan, Palestine, Philippines, Rwanda, Sierra Leone, Sri Lanka, Somalia, Sudan, Syria, Tunisia, Turkmenistan, Yemen, Zaire.

\*\*\* Not appearing in the table but included in the total are 1,504 applications that were subsequently withdrawn.

*Source:* Data obtained from the Foreigners Department of MOI.

During the status determination period, asylum seekers and refugees, while awaiting resettlement, are assigned to ‘free’ residences in designated cities rather than to reception centres or refugee camps. Asylum seekers have the right to judicial appeal. A number of such appeals did take place, including one case that was handled by the European Court of Human Rights.<sup>116</sup> The authorities have by and

<sup>112</sup> The following covers extensively the evolution of the Turkish asylum policy: K. Kirişci (2001), “UNHCR and Turkey: Cooperating towards an improved implementation of the 1951 Convention on the Status of Refugees”, *International Journal of Refugee Law*, Vol. 13, No. 1/2, and “The Question of Asylum and Illegal Migration in European Union-Turkish Relations”, *Turkish Studies*, Vol. 4, No. 1 (2003).

<sup>113</sup> “The Regulation on the Procedures and the Principles Related to Mass Influx and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum from a Third Country”, *Official Gazette*, 30 November 1994, No. 22217 and subsequent amendments.

<sup>114</sup> Turkey signed the Convention with a geographical and a time limitation as expressed in Article 1.B(1)(a). Turkey lifted the time limitation with the adoption of the 1967 Protocol. These instruments were published and became part of national law with *Official Gazette*, 5<sup>th</sup> September 1961, No. 10898 and the 1967 Protocol Relating to the Legal Status of Refugees in July 1968 published in *Official Gazette*, 14 October 1968, No. 13026.

<sup>115</sup> *Official Gazette*, 14 June 1934, No. 2733. This law has since been heavily amended and there is currently a new settlement draft law before the Turkish Parliament, but the basic articles that define who can be an immigrant and refugee remain unchanged.

<sup>116</sup> European Human Rights Court (Fourth Section), *Case of Jabari v. Turkey* (Application No. 40035/98), Judgment, Strasbourg, 11 July 2000.

large abided with judicial rulings. A programme of training run in cooperation with the UNHCR for the Police, Gendarmerie and the Judiciary has been in place since 1997 and considerable progress has been achieved in terms of awareness of asylum law and particularly the principle of *non-refoulement*. Although there are various problems it is generally recognised that Turkish asylum policy has come along way since the mid-1990s when it used to receive massive criticism from human rights and refugee advocacy non-governmental organisations, Western governments and inter-governmental organisations such as the UNHCR and the Council of Europe.

Today, however, Turkey faces a number of challenges, as it prepares for pre-accession. Firstly, there is a degree of contradiction between the emphasis put by the EU on combating irregular migration and the protection of the rights of asylum seekers and refugees. Many of the asylum seekers that make it to Turkey come as part and parcel of movements of irregular migrants. They frequently make use of the services of human smugglers and enter the country illegally. At training seminars for officials a great effort is made by non-governmental organisations and the UNHCR to increase sensitivity towards asylum seekers who might be caught up among illegal migrants. This effort is sometimes actually lost, however, against the massive attention paid to combating illegal migration and human smuggling by the European Union. The increasing securitisation of immigration issues in the EU is indeed undermining the almost decade-long effort to move asylum-related issues to a human rights policy agenda in Turkey.<sup>117</sup>

Secondly, the AP requires Turkey to lift the ‘geographical limitation’ to the 1951 Convention. Turkey in the NPAA has undertaken to do so and is working on a draft of a fully fledged asylum law that envisages a national status determination system. Nevertheless, the lifting of the limitation issue is very sensitive. Officials realise that other candidate countries, especially Hungary, had to do the same and that Turkey will need to follow suit. They are also well aware that this is part and parcel of the exercise to harmonise Turkish law and practice with that of the EU. However, the EU suffers from a credibility deficit in the eyes of Turkish officials. The greatest nightmare scenario of officials is one in which they would find themselves lifting the ‘geographical limitation’ without Turkey’s membership being taken seriously by the EU. Many Turkish officials as well as a large proportion of the public in Turkey do not trust the European Union and do not believe that the EU is serious about Turkey’s membership. There is deep concern about giving up a ‘right’ engraved in international law and then ending up facing a huge refugee-generating region all alone.

A third and related issue in this respect is burden sharing. Owing to its geographical location, Turkish officials are concerned that Turkey risks becoming a buffer zone or a dumping ground for the EU’s unwanted asylum seekers and refugees. The current *acquis*, if and when membership occurs, would make Turkey a typical ‘first country of asylum’ responsible for status determination.<sup>118</sup> This raises considerable concerns among officials in terms of the economic, social as well as political implications. Turkish officials will expect to see burden-sharing mechanisms that would go beyond what the current Refugee Fund has to offer.<sup>119</sup> An important confidence-building measure would be that with membership there is a transition period during which EU member countries and leading immigrant-receiving countries continue to accept refugees for resettlement from Turkey. This will be particularly critical at a time when Turkish officials perceive a tendency in Europe in the direction of creating a ‘fortress Europe’ recently reinforced by the Council Proposals on Qualifications and Asylum Procedures Directives adopted on 29 April 2004.<sup>120</sup> The notion of ‘safe third country of asylum’ associated with these directives may leave Turkey with the prospect of having to face rejected

<sup>117</sup> For a discussion of this issue, see Kirişçi (2003).

<sup>118</sup> Council Regulation (EC) No. 343/2003 of 18.2.2003 published in *Official Journal of the European Union*, 25.2.2003, L 50/1.

<sup>119</sup> Commission Proposal for a Council Decision on the European Refugee Fund COM(1999) 686, 14.12.1999. Council Decision 2000/596/EC on 28<sup>th</sup> September 2000 adopting a proposal establishing the European Refugee Fund.

<sup>120</sup> Both the UNHCR and Amnesty International put out reports and statements criticizing these Directive Proposals for undermining the letter and the spirit of the 1951 Convention.

asylum seekers before it has put into place a status determination system that meets international standards. A Europe that tries to complicate if not deny access to asylum seekers to reach the EU is not setting a good example for Turkey in terms of harmonisation and credibility.

The Strategy Report on Asylum lays down what Turkey aims to achieve in terms of aligning its asylum law and practice with that of the EU. A twinning project is already in place to draw up an Action Plan and to determine the steps for institutions-building. Turkey continues to cooperate very closely with the High Level Working Group of the EU, the UNHCR as well as non-governmental organisations such as Amnesty International with respect to training and awareness seminars. Asylum is going to be the Achilles heel of Turkey's efforts to develop enhanced border protection. The balance between protecting Europe from illegal migration and protecting the 'right to asylum'<sup>121</sup> is going to be a critical test of the credibility for the EU in Turkey as well as in Turkey's neighbourhood.

### 3.6 Visa policy

One of the areas that will have to experience drastic change if Turkish law and practice are to be harmonised with the Schengen *acquis* is Turkey's visa policy. The current visa policy of Turkey is a very flexible but also complex system. It is possible to speak of three categories of entry into Turkey. The first one is the category of countries whose nationals can enter and remain in the country for a pre-determined length of time, usually three months, without visas. A second group is a category of countries whose nationals must obtain visas prior to arriving in Turkey. Lastly, and most interestingly, is the practice of issuing visas at the frontier in return for a fee that varies from country to country. This practice is known as 'sticker visa' (*'bandrol'* in Turkish) and is a practice particularly objected to by the EU.

A number of factors have driven Turkey's current visa policy. Reciprocity is a leading factor. Turkey requires visas of nationals of countries that require a visa for Turkish citizens. Turkey is a signatory to the European Agreement on Regulations Governing the Movement of Persons between Member States of the Council of Europe of December 1957. In accordance with this agreement, Turkish nationals and nationals of Council of Europe member countries, in general, enjoyed the possibility to travel freely without visas to each other's countries. However, subsequent to the military intervention in Turkey in September 1980, a number of countries started the practice of demanding visas from Turkish nationals. This coincided with an increase in asylum demands from Turkish citizens. The decision to stop the policy of recruitment of *guest workers* from Turkey in the mid-1970s encouraged illegal migration and subsequently also led to the abuse of asylum.<sup>122</sup> The expectation on the part of the Turkish authorities that members of the Council of Europe would revert to the practice of visa-free travel for Turkish nationals once the military in Turkey returned power to civilian authority in 1983 did not occur. Yet, economic considerations – especially Turkey's dependence on tourism income from Western European countries – prevented Turkey from reciprocating with a visa requirement for a long time. However, by the time the 'sticker visa' policy developed in the early 1990s, Turkey imposed this practice on the nationals of some Western European countries, including the United States. Nevertheless a number of countries such as Germany, France and Switzerland were excluded from this practice partly to facilitate the travel of Turkish bi-nationals.

In the case of Eastern Europe and the Soviet Union, Turkey signed a series of bilateral agreements enabling travel between Turkey and these countries on the basis of visa arrangements in the 1960s. In the case of Bulgaria and Yugoslavia, there were facilitated visa arrangements for transit travel. The exception to this practice was Romania with which Turkey had signed a visa-free travel agreement in 1968, which remained in force until 2004, when Romania was forced to discontinue this practice and

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<sup>121</sup> Tampere Council, *Presidency Conclusions*, 15-16 October 1999 called for an "absolute respect of the right to seek asylum" and agreed that the development of the Common European Asylum System would be based on "the full and inclusive application of the Geneva Convention".

<sup>122</sup> See A. Böcker (1996), "Refugee and Asylum-Seeking Migration from Turkey to Europe", *Boğaziçi Journal* Vol. 10, Nos. 1-2.

impose visa requirements on Turkish nationals as a result of pre-accession obligations to the EU. Similarly, political considerations, such as the tension between Turkey and Pan-Arab regimes in the Middle East, led to restricted visa-based travel between Turkey and Middle Eastern countries, especially with Egypt, Iraq and Syria. In the case of Iran, the two countries reached agreement on visa-free travel in October 1964. This practice was not influenced by the change of regime in Iran and continues to be in place. After the regime change in Iran large numbers of regime opponents throughout the 1980s and 1990s have benefited from this visa-free regime by using Turkey as a staging post to immigrate to third countries or seek asylum. Many Iranians especially in border regions have used this regime for border trade purposes while some became illegal immigrants in Turkey by overstaying the visa-free time limit and seeking employment. In recent years, however, the gradual liberalisation of the regime in Iran has also led to an increase in the number of tourists entering Turkey from Iran. The fact that travel for Iranian nationals to European countries is complicated by visa requirements has made Turkey become an attractive tourism destination for Iranian middle-class.

The current Turkish visa policy is a heavily modified version of the system from the Cold War years and is very much the legacy of the late Turgut Özal, a former Prime Minister and President of Turkey. Özal was not only a leader who left a deep imprint on the liberalisation of Turkey's economy but also on Turkish foreign policy.<sup>123</sup> He was a pragmatic leader who very much believed in the virtues of functionalism and interdependence in international relations. It is against this background that he had the visa requirement for Greek nationals lifted in 1988. On the basis of a treaty from 1930, Greek nationals were able to travel and even reside in Turkey freely until 1964.<sup>124</sup> Subsequent to the conflict over Cyprus, Greek-Turkish relations deteriorated in the early 1960s and the visa-free travel privileges had been rescinded. Özal believed that this would encourage Greeks to travel to Turkey boosting commerce but also improving understanding between the people of the two countries at a time when the countries were locked in stalemate over a wide range of conflicts.

As the Cold War started to come to an end in the late 1980s, he advocated the idea of the Black Sea Economic Cooperation Area (BSEC). The idea was to encourage greater contact among countries on the Black Sea as well as in its immediate vicinity. The Cold War had prevented many of these countries from interacting with each other. His vision of the region was one where these countries would cooperate with each other on a number of issues ranging from commerce to tourism as well as the environment and cultural exchanges. The countries of the region adopted the idea formally in June 1992 and set up a secretariat in Istanbul. The 'sticker visa' practice evolved against this background to facilitate the movement of nationals of countries coming mostly from members of the BSEC into Turkey. With the collapse of the Soviet Union there also emerged a group of new states in the Caucasus and Central Asia with close linguistic and cultural ties to Turkey. This visa practice also would serve the purpose of enabling the nationals of these new Turkic republics as well as Russia to travel to Turkey with greater ease than had been the case during the Cold War. During the Cold War, contacts between Turkey and Central Asia as well as many Turkic communities in distant parts of the Soviet Union were basically non-existent. There were not only major restrictions for Soviet nationals to travel abroad but often people would also have had to travel long distances to obtain visa from Turkish representations in Moscow.

Turgut Özal's foreign policy was also marked by his determination to expand Turkey's relations with the Middle East. He wanted to see a greater role for Turkey and, in line with his functionalist outlook

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<sup>123</sup> For a comparative analysis of Turgut Özal's foreign policy and traditional Turkish foreign policy, see S. Özel (1995), "Of Not Being a Lone Wolf: Geography, Domestic Plays, and Turkish Foreign Policy in the Middle East", in G. Kemp and J.G. Stein (eds), *Powder Keg in the Middle East: The Struggle for Gulf Security*, Lanham, MD: Rowman and Littlefield. See also W. Hale (2000), *Turkish Foreign Policy, 1774-2000*, London: Frank Cass, pp. 164-5 and p. 205.

<sup>124</sup> This was based on a treaty of friendship that the two countries signed on 30 October 1930. The treaty pretty much gave the nationals of both countries the right to 'free movement'. See M. Fırat (2001), "Yunanistan'la İlişkiler", in O. Baskın (ed.), *Türk Dış Politikası (1919-1980) (Volume I)*, Istanbul: İletişim, pp. 347-350 and pp. 720-723 for the abrogation of these rights by Turkey.

on international relations, advocated in 1986 the idea of a ‘peace pipeline’ to carry water from Turkey across the Middle East. He was not particularly successful in seeing through his political ideas, but in the 1980s trade between Turkey and the Middle East expanded and Arab investments in Turkey were encouraged. In an effort to draw tourism and investment, especially from Gulf countries and Saudi Arabia, visa requirements were relaxed. Subsequently, the practice was expanded to include Jordan, Tunisia and Morocco. The nationals of the latter two countries enjoy visa-free travel rights, while Jordanians benefit from the ‘sticker visa’ practice. On the other hand, in July 1995, the Turkish government ratified an agreement of the Economic Cooperation Organisation (ECO) enabling the business people of member countries to obtain facilitated visas.<sup>125</sup>

The gradual ‘liberalisation’ of the Turkish visa system combined with the introduction of especially the ‘sticker visa’ practice have had a number of consequences. During the course of the 1990s, they encouraged the development of an informal import and export activity known as ‘suitcase trade’. This ‘trade’ took the form of large numbers of nationals of mostly Russia but also from the Ukraine, Georgia, Azerbaijan, Romania, Moldova and Central Asian republics to travel to Turkey by chartered planes or ships, sell their ‘suitcase’ full of products and in return purchase a wide range of consumer goods mostly in Istanbul, the Black Sea port city of Trabzon and Van near the border with Iran. It is estimated that this trade amounted to approximately \$4-5 billion a year during the early 1990s. It peaked in 1995 with an estimated trade volume of \$10 billion.<sup>126</sup> The economic recession in Russia in 1998 adversely affected this trade while the trade involving East European countries fell to a trickle with EU pre-accession. Trade involving Ukraine and Russia has begun to revive since 2001, but it has not returned to the levels in the mid-1990s.<sup>127</sup> The volume of suitcase trade has roughly levelled at \$3 billion a year. On the other hand, ‘suitcase’ trade involving Libya and Tunisia has been expanding.

This trade has provided a cushion to a large number of people in Central and Eastern Europe and ex-Soviet countries who suffered economic difficulties subsequent to the collapse of communism. This was a period when there were great concern and speculation in Western Europe that large numbers of East Europeans and Russians were going to migrate to the West for jobs. Turkish officials frequently argue that this visa policy has kept people from having to join the flow of irregular migration to Europe. Clearly, this is very difficult to prove, but there may be an element of truth in this argument. As can be observed from Table 1, there are two types of illegal immigrants apprehended in Turkey. The first category in large part encompasses those coming from former-Soviet republics and Balkan countries. These individuals have been apprehended for over-stays or for violations of Turkish law, especially labour laws. They are deported back to their country of origin. It is very unusual for such persons to try to use Turkey as a point of transit to Europe. The second group of people, more often than not, are individuals who have in the first place entered the country illegally and have the objective of transiting the country on their way to the EU. They are nationals of countries for which Turkey requires visas obtained prior to travel and does not apply the ‘sticker visa’ facility. This explains to a large extent the trend among nationals of Afghanistan, Iraq and Pakistan to resort to the services of human smugglers. It is possible that had Iranian nationals not been exempted from any visa requirement when travelling to Turkey, there would have been a much higher number of Iranians apprehended as illegal migrants than the figure cited in Table 1.

Nevertheless, there has also been a down side to this flexible visa policy. During the 1990s there was an explosion in prostitution involving nationals of the former Soviet Union. The problem continues today even if at a relatively lower level, although in the meantime the problem has become aggravated by the growth in trafficking. This situation has led to calls from the international community as well as from Turkish authorities and the general public for the introduction of stricter rules governing entry

<sup>125</sup> The member countries of ECO are Afghanistan, Azerbaijan, Iran, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkey, Turkmenistan and Uzbekistan.

<sup>126</sup> Figures obtained from M. Eder et al. (2002), *Redefining Contagion: The Political Economy of the Suitcase Trade between Turkey and Russia*, IREX (International Research Exchange, Black and Caspian Sea Research Program, final report, July.

<sup>127</sup> *Radikal*, 17 July 2001.

into Turkey and combating trafficking. The government has indeed introduced new legislation to address both prostitution as well as trafficking. The problem is far from being resolved, however, even if officials have become much more conscious of the need to address the problem and cooperate with non-governmental as well as international organisations. Another questionable aspect of this ‘flexible’ visa policy has been illegal employment. Nationals of Iran, Romania, Moldova, Bulgaria, Georgia and even Armenia have been working in various sectors of the economy, but in particular in the area of household help. This led to complaints from labour unions as well as the Ministry of Labour about the increase in the number of illegal workers in Turkey and the need to prevent this.<sup>128</sup> In an effort to combat this situation, the government introduced legal and administrative measures. The new Law on Working Permits for Foreigners that entered into force in September 2003, has facilitated the conditions and procedures for obtaining work permits while introducing serious fines against illegal employment.<sup>129</sup> Furthermore, there was also an attempt to introduce the practice of demanding evidence of means of subsistence for the intended duration of the stay in Turkey from the nationals of countries where illegal immigrants came from. However, these practices attracted considerable criticism and were subsequently discontinued. One last negative aspect of the ‘flexible’ visa policy has been security. The two deadly terrorist attacks in Istanbul in November 2003 came as a cold reminder of the consequences of flexible border control arrangements. Subsequent police investigations revealed that the perpetrators of these attacks and those providing them with logistical support had frequently travelled to Afghanistan, Iran, Pakistan and the Russian Federation and had also made contact with nationals of these countries in Turkey.

The days of this relatively flexible visa policy are numbered. The Accession Strategy for Turkey requires Turkey to adjust its visa policy to the standards of the Schengen visa regime and adopt the Schengen negative list. The NPAA provides a schedule for the adoption of the relevant EU *acquis* by the end of 2005. In this respect, Turkey aims to abolish visa-free travel for those countries that are on the EU’s negative list by the end of 2004. Turkey started to align its practice with the EU in September 2002 and currently is short of matching the negative list with six countries (Bosnia-Herzegovina, Iran, Kyrgyzstan, Macedonia, Morocco and Tunisia). Turkey is committed to complete the process for all the remaining countries except Bosnia and Macedonia by the end of the year. There is a reluctance to terminate the visa-free arrangements with these two countries because of close historical and cultural ties with these two countries, including the presence of Turkish minorities. Turkey is also expected to end the ‘sticker visa’ practice. Currently, Turkey allows for the nationals of 30 countries to benefit from this practice (See Appendix 2). The EU considers this practice as one that seriously undermines effective border control. Instead the EU requires Turkey either to adopt a visa-free regime for those countries that are not on the negative list of the EU or alternatively introduce the practice of obtaining visas from Turkish representations in the country of origin. Furthermore, Turkey is also expected to introduce airport transit visa practice too. Lastly, Turkey is also expected to renew its passports and introduce features to Turkish passports to prevent them from being forged. Currently, Turkish passports are considered to be particularly easy to forge. The government submitted to the Turkish Parliament a draft law in January 2004 that aims to amend the Passport Law No. 5682 of 15 July 1950 to be able to meet Turkey’s commitments arising from the NPAA and align it with the requirements of the EU *acquis*.

Once these changes are put into place, Turkey will have closely harmonised its legislation and practices with that of the EU. There are many officials who see the introduction of the new measures required by the EU as positive and consider them as measures that will improve border control and

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<sup>128</sup> *Radikal* reports that in Istanbul alone the number of illegal workers was 750,000 (9 February 2001). Under pressure from the unions and the public, the then Minister of Labour Affairs and Social Security, Yaşar Okutan, argued that illegal workers were taking away jobs from Turkish citizens and announced that legislation was being drafted to introduce fines (*Radikal*, 30 December 2001). A year later, *Radikal* reported that a new law was being drafted that would institute fines and put the number of illegal foreign workers close to one million. It should be noted, however, that these figures are purely speculative (21 December 2002).

<sup>129</sup> Law 4817, *Official Gazette*, 6 March 2003, No. 25040. Entered into force on 6 September 2003.

security. In the words of one official, the adoption of the EU negative list and abolishment of the ‘sticker visa’ arrangement will make Turkey a more “serious” state capable of truly regulating the flow of people in and out of the country. However, there are also less positive aspects to the adoption of the Schengen visa regime. Foremost, unless the EU changes its policy, Turkey will become the only country that will be implementing the negative list while being on the list itself. In Turkey there are considerable complaints as well as resentment and discomfort with the Schengen visa regime as implemented vis-à-vis the Turkish nationals.<sup>130</sup>

Turkish officials and politicians recognise that close cooperation with the EU in this area may open the possibility of easing EU visa restrictions on Turkish nationals. It is particularly Turkish business people and students who have bitterly complained about these restrictions that they argue leave them at a disadvantage in relation to their counterparts in the EU or other candidate countries. Students and student organisations complain about the inconsistency in the processing of visa applications among EU consulates and the administrative difficulties and obstacles raised. Business people complain that they feel unfair competition from their EU counterparts who are able to travel to Turkey freely while they face the curious situation of seeing their ‘goods’ circulating freely within the internal market while they face restrictions. Many legal experts and businessmen in Turkey argue that the 1963 Association Agreement as well as the 1970 Additional Protocol signed between Turkey and the European Community does indeed give Turkish businessmen, employers, service providers, etc... the possibility to enjoy the right to free movement.<sup>131</sup> Some of them argue in particular that a recent ruling of the European Court of Justice acknowledges this situation, i.e. the *Abatay* judgement.<sup>132</sup> In the *Abatay* case, the Court was asked whether the new requirement imposed by the German federal labour office (the *Bundesanstalt*) that Turkish drivers must hold a work permit in Germany in order to carry out international road haulage was against the provisions of the Additional Protocol and the Decision 1/80. The ECJ first reiterated the direct effect of the so-called ‘Standstill Clause’ that exists within these two instruments.<sup>133</sup> It also held that these articles preclude the introduction into the national legislation of a member state of a more restrictive requirement (such as a work permit) treating Turkish workers less favourably than they were treated at the time of the entry into force of the Additional Protocol.<sup>134</sup> The Young Businessmen Association of Turkey (TUGIAD) has initiated a study group to examine the case law of the Court and to solicit legal advice in an effort to mobilise support in achieving recognition for businessmen of the possibility to travel visa-free within the EU.<sup>135</sup>

<sup>130</sup> A prominent international judge and professor of international law Rona Aybay reported complaints about a practice by the British and German consulates of stamping the note “visa rejected” in some passports of Turkish nationals and argued that this could constitute a violation of international law and human rights (*Cumhuriyet*, 7 June 2004).

<sup>131</sup> See C. Uzunoğlu (2004), “Vizesiz Avrupa hakkımız, alacağız!”, *iş Yönetim* (Sunday supplement of the Turkish daily *Hürriyet*), 27 June. H. Gümrükçü, “ATP’nin Temel Dayanakları Nedir ve Ne Olmalıdır?”, DEM, No. 31, 1 June 2004, see [www.dem-ajans.de/modules.php?name=Sections&op=viewarticle&artid=376](http://www.dem-ajans.de/modules.php?name=Sections&op=viewarticle&artid=376). H. Gümrükçü, “Türk İşadamlarına AB Üyesi Ülkeler Tarafından Mevcut Haklarına Koruma ve Vize Uygulamasının Avrupa Toplulukları Hukuku Çerçevesinde Analizi”, paper prepared for the Institute for Turkish Studies, Essen.

<sup>132</sup> European Court of Justice Ruling on Eran Abatay and Others (C-317/01) and Nadi Şahin, Joined Cases C-317/01 and C-369/01, 21 October 2003.

<sup>133</sup> The direct effect of Article 41.1 of the Additional Protocol and Article 13 of Decision No. 1/8 has been made clear from previous ECJ’ rulings such as, Joined Cases C-37/98 Savas [2000] ECR I-2927 and Case C-192/89 *Sevince* [1990] ECR I-3461. Article 41.1 of the Additional Protocol provides that “The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services”. In addition to that, Article 13 of the Decision No 1/80 stipulates that “the Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories”.

<sup>134</sup> See *Abatay and Others*, C-317/98, point 117.

<sup>135</sup> Telephone interview with the president of TUGIAD, 2 July 2004. For the study group see [www.tusiad.org.tr](http://www.tusiad.org.tr).



Indeed, the Ankara Agreement as well as the Additional Protocol, the Decision No 1/80 and the Decision No 30/80 on social security need to be studied with respect to possibilities of openness that they could provide to Turkish workers and their families.<sup>136</sup> Urgent analysis is called for in this respect, particularly with regard to the possibilities of such workers after the four-year provision of Decision 1/80 is satisfied.<sup>137</sup>

The EU practice of lifting or easing visa requirements for the nationals of candidate countries that have adopted the EU *acquis* and practice with respect to visas has not gone unnoticed by Turkish officials and politicians. Most striking for them has been the way in which Bulgarian Turks who had fled to Turkey during the mass exodus in 1989 are returning to Bulgaria to reclaim their citizenships. Clearly, the EU decision to lift visa requirements for Bulgarian citizens was a major motive for this behaviour.<sup>138</sup> In turn, the Turkish government had decided to lift the visa requirement for Bulgarian nationals in June 2001. In 1989, more than 310,000 Bulgarian Turks had fled to Turkey. The crisis played an important role in the eventual downfall of the Communist regime in Bulgaria. Subsequently, a more democratic and Western-oriented regime emerged. As a result, thousands of Turks returned to Bulgaria while almost 236,000 of them acquired Turkish citizenship.<sup>139</sup> Many of them became dual citizens. Yet, the economic difficulties in Bulgaria and the severe recession that hit the rural Turkish communities meant that many of the Bulgarian Turks preferred to stay in Turkey. In an effort to stop economically motivated migration of Turks from Bulgaria into Turkey, the Turkish government introduced strict visa requirements. This led to an increase in illegal entries often using smuggling networks. Hence, the decision to end the visa requirement for Bulgarian nationals is a good example of the extent to which EU policies can affect the policies of a third country. This brought the human smuggling business to an immediate halt. It is highly doubtful that the Turkish government would have adopted this new policy if it had not been for the EU decision to remove Bulgaria from the list of countries requiring visas to enter the EU. The lifting of the visa requirement led to an almost tripling of entries from Bulgaria from about 380,000 in 1996 to over a million in 2003.

There are also costs attached with the adoption of the Schengen visa regime. The introduction of visa requirements is going to bring a major administrative and financial burden on Turkey. As can be observed from Tables 4 and 5, approximately 1.3 million Russian and half a million Iranian nationals entered Turkey in the course of 2003 alone. Issuing visas for such a number of people would pose a major burden on Turkey's representations abroad as both countries are currently on the Schengen negative list. However, the greatest consequence of the new visa system would be that it may lead to a significant fall in the number of people coming to Turkey. Hence, it is the economic and trans-societal relations that might be most adversely affected from a strict application of the Schengen visa regime.

The politics of the Cold War had reduced economic and human contacts between Turkey and Eastern bloc countries to a minimum. Furthermore, during the Cold War, Turkey basically had lost contact with communities, especially in the Soviet Union, with which it had close historical and cultural ties, such as Turkish-speaking communities, Tatars, Azeris, Circasians, etc... The infamous Iron Curtain was not simply an ideological one. It separated these countries and communities from each other physically too. Table 4 reveals the manner in which the Soviet world was separated from Turkey. In 1964, there were only 414 entries from the Soviet Union out of a total of almost 230,000 overall entries into Turkey. In 1970, the figure increased to a modest 4,800 and 40,015 in 1970. The

<sup>136</sup> For a brief analysis on these issues see S. Peers (2001), *Aliens, Workers, Citizens or Humans? Models for Community Immigration Law*, in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law*, Hart Publishing.

<sup>137</sup> Article 6.1 of Decision No. 1/80 provides that "The Turkish worker who has been in regular, legal employment in one of the Member States, after four years, can have free access to any paid employment of his choice in that Member State". See the case of *S.Z. Sevince v. Staatssecretaris*, C-192/89, [1990] ECR I-3461 at Para. 4. It would also be interesting to look at the situations that may be consequence of Article 6 for those Turkish workers who have been living permanently in Cyprus before it acceded to the EU.

<sup>138</sup> Reported in *Radikal*, 10 March 2001.

<sup>139</sup> Statistics obtained from the Foreigners Department.

unwinding of the Cold War helped to increase contacts and 1990 saw more than 220,000 entries. After the introduction of the ‘sticker visa’ system in early 1990s, the number of entries from the ex-Soviet world began to increase each year and reached its peak with more than 2.8 million entries out of a total of approximately 8.5 million overall entries. Clearly, the regime change in the Soviet Union played a critical role in this massive change, but it is doubtful whether the figures would have been this high had Turkey put into place a Schengen-like strict visa policy. One of the most fascinating consequences of the end of the Cold War and the subsequent collapse of the Soviet Union is that it opened up a vast world for Turkey from the Adriatic Sea to the Chinese Wall – economically, socially and culturally. The composition of the airlines and passengers arriving to Istanbul’s international airport changed dramatically and became much more culturally diverse. All these people who once had been isolated from each other were able to develop contacts. It would not be wrong to argue that Özal’s policies did actually pay off and relations between the countries, especially for those around the Black Sea, improved significantly.

*Table 4. Entry of persons from the Soviet Union and former Soviet republics between 1964 and 2003*

	1964	1970	1980	1990	1996	2000	2003
Soviet Union	414	4,824	40,015	222,537	-	-	-
Russia	-	-	-	-	1,235,290	677,152	1,285,825
Central Asian Turkic States							
Kazakhstan	-	-	-	-	31,373	38,939	65,748
Kyrgyzstan	-	-	-	-	8,052	8,789	14,185
Tajikistan	-	-	-	-	3,087	952	3,591
Turkmenistan	-	-	-	-	5,035	10,987	16,685
Uzbekistan	-	-	-	-	13,558	21,062	19,527
<b>Subtotal</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>1,296,395</b>	<b>757,881</b>	<b>1,405,561</b>
South Caucasus							
Armenia	-	-	-	-	5,345	17,549	23,596
Azerbaijan	-				100,249	179,878	173,165
Georgia	-				116,709	179,563	158,750
<b>Subtotal</b>	<b>-</b>				<b>222,303</b>	<b>376,990</b>	<b>355,511</b>
Western Newly Independent States (NIS)							
Belarus	-				474	9,622	30,056
Moldova	-				8,290	62,687	54,137
Ukraine	-				93,794	173,551	214,415
Subtotal					102,558	245,860	298,608
<b>TOTAL</b>	<b>414</b>	<b>4,824</b>	<b>40,015</b>	<b>222,537</b>	<b>2,856,546</b>	<b>1,380,731</b>	<b>2,059,680</b>
<b>General TOTAL</b>	<b>229,347</b>	<b>724,754</b>	<b>1,057,364</b>	<b>2,301,250</b>	<b>8,538,864</b>	<b>10,428,153</b>	<b>13,461,420</b>

*Source:* Compiled from data obtained from the Foreigners Department of MOI and State Statistical Institute Annual Reports

*Table 5. Entry of persons from the neighbouring Balkan and Middle Eastern neighbouring states, 1964-2003*

	1964	1970	1980	1990	1996	2000	2003
<b>Middle East</b>							
Iran	12,796	14,247	42,082	219,958	379,003	380,819	484,269

Iraq	3,919	6,518	14,046	13,372	14,137	20,776	29,940
Syria	9,996	13,184	26,384	113,959	92,033	122,417	154,108
Gulf States*	-	-	-	43,088	40,029	19,537	43,503
Pakistan	1,961	7,383	4,800	7,347	12,410	7,908	12,336
Subtotal	28,672	41,332	87,312	397,724	537,612	551,457	724,156
<b>Balkans</b>							
Albania	-	-	-	1,924	20,971	29,748	32,682
Bosnia	-	-	-	-	12,115	28,631	35,119
Bulgaria	693	18,214	26,523	-	139,648	381,545	1,007,535
Greece	3,042	11,313	19,477	203,720	147,553	218,092	368,425
Macedonia	-	-	-	-	41,269	108,928	117,819
Romania	-	-	-	352,034	191,203	265,128	184,182
Serbia-Montenegro	-	-	-	-	44,600	128,383	186,423**
Yugoslavia	5,661	28,352	13,817	296,843	-	-	-
Subtotal	9396	57,879	59,817	854,521	597,359	1,160,455	1,932,185
<b>TOTAL</b>	<b>38,068</b>	<b>99,211</b>	<b>147,129</b>	<b>1,252,245</b>	<b>1,134,971</b>	<b>1,711,912</b>	<b>2,656,341</b>
<b>GENERAL TOTAL</b>	<b>229,347</b>	<b>724,754</b>	<b>1,057,364</b>	<b>2,301,250</b>	<b>8,538,864</b>	<b>10,428,153</b>	<b>13,461,420</b>

\* Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates.

\*\* In the statistics used for preparing this table, Serbia Montenegro is sometimes referred to as the Federal Republic of Yugoslavia.

Source: Compiled from data obtained from the Foreigners Department of MOI and State Statistical Institute Annual Reports

The removal of travel restrictions has also helped to increase contacts between Turkey and the Balkans. Greece's case is very interesting. As Table 5 shows, an important increase occurred after the lifting of the visa requirements for Greece in 1988. Significant increases also took place in the case of Romania and the former Yugoslav republics. In 1980, entries from Balkan countries were at a mere 60,000 compared to almost two million in 2003. All countries in the region benefited from a flexible visa arrangement. The Middle East is the only neighbouring region of Turkey where the implementation of a flexible visa system does not appear to have made a big difference with the exception of Iran. The visa-free regime that was instituted for the Gulf states do not appear to have attracted a great number of entries from these countries. After an initial increase in the early 1990s, numbers steadily fell. The only exception to the rule is the way in which the numbers of Syrian entries have by and large remained relatively high in spite of the requirement to hold a visa for travel to Turkey. However, both countries have long had a policy of allowing nationals from the border region a degree of flexible access to the other's territory. Syrian and Turkish nationals living in the border region are able to travel within a 50-kilometre zone to visit family relatives, attend to family business and pursue judicial issues with just an 'administrative letter' issued by local authorities.

The growth in the movement of people has also had very important economic consequences. The 'suitcase trade' aspect of a flexible visa policy has already been mentioned. An important proportion of these people entering Turkey are tourists and constitute a very important source of income for Turkey. Russians are a particular case in point. Over the last few years, Russians have been the second largest group of tourists entering Turkey. They are also recognised as high-spenders. It is also generally accepted that Turkey's flexible visa policy has encouraged business contacts and reciprocal business investments. The replacement of the 'sticker visa' policy with the Schengen visa regime is likely to have an adverse affect on these positive developments.

Furthermore, citizens of the Russian Federation (Russians as well as individuals belonging to the many different ethnic groups, such as Tatars, Circassians, etc., with close family and cultural affiliations to Turkey) may well be the hardest hit since reaching Turkish representations within Russia will be hindered by the vastness of the country. The same applies to Central Asian countries as well as those in the South Caucasus. These are countries with strong cultural and historical ties to Turkey that were interrupted by the Cold War. The ‘sticker visa’ arrangement vastly and conspicuously increased the contact between Turkey and these countries, as can be seen from Table 3. Furthermore, such a visa arrangement also facilitated movement in the border regions. During the Cold War, the land border between Turkey and Bulgaria and the one with the Soviet Union (Georgia and Armenia today) were not only mined but there were zones into which no unauthorised person could enter. Today, these borders are much more porous, except that the Armenian border remains closed, and important levels of cross-border economic and social interaction take place. Armenians are able to enter Turkey with a ‘sticker visa’ via the Istanbul airport or other border crossings.

Lastly, the adoption by Turkey of the Schengen *acquis* on visa requirements may well aggravate the problem of irregular migration into Turkey as well as through it. Entry into Turkey will become much more difficult and will adversely affect ‘suitcase’ trade that is benefiting both Turks as well as traders from countries of the region who continue to experience economic difficulties. It is possible that some of them could try to make it to Europe by illegal means or try to abuse the asylum system in Europe. This may well be the case for example for Chechens who currently are able to enter Turkey without difficulty but who face economic hardship back at home as well as widespread human rights violations and violence because of the disturbances in their homeland. A similar case could be made for Iranian nationals, who constitute the largest number of asylum applicants in Turkey. Introducing a visa requirement, however, may lead to an increase in these applications. Currently, many Iranians enjoy informal protection in Turkey by the mere fact that they can enter, exit and re-enter the country unhindered. Furthermore, some of the Iranians who were benefiting economically from the visa-free policy may well start to join the ever-increasing number of irregular migrants entering Turkey from the Middle East in an attempt to make it to Europe.

#### 4. What room for flexibility in the Schengen system?

What may be the effects of full implementation of the Schengen *acquis* in the particular case of Turkey? Is a strict application of Schengen going to adversely affect the level of confidence and cooperation in the geopolitical relations between this country and the EU respectively with the wide Turkey’s neighbourhood? Turkey has been asked to fully implement the EU negative visa regime, while at the same time this country belongs to the list of states whose nationals need a visa to get into the ‘Schengen fortress’. If the EU does not modify its current policy, Turkey will become the first state to implement the Schengen negative list while being on the list itself.<sup>140</sup>

The concept of flexibility provides the states with the opportunity to adapt themselves to changing circumstances and conditions while pursuing their very same goals.<sup>141</sup> A degree of flexibility needs to be deliberately introduced into a framework of practices and procedures in order to get the desired aim which justified the introduction and settlement of this framework in the first place.<sup>142</sup> The policy goal

<sup>140</sup> For an analysis of the notion of trust in an enlarged EU, see M. Anderson (2002), op. cit.

<sup>141</sup> See for instance P. Davis and L. Flinch (1993), *Defence Planning in the Post-Cold War Era: Going to Flexibility, Adaptiveness and Robustness of Capability*, Santa Monica, CA: Rand Corporation. See also G. Búrca and J. Scott (eds) (2000), *Constitutional Change in the EU: From Uniformity to Flexibility*, Oxford: Hart Publishers; M. Den Boer (2002), “To what extent can there be flexibility in the application of Schengen in the new member states?”, in M. Anderson and J. Apap (eds), *Police and Justice Cooperation and the New European Borders*, The Hague: Kluwer Law International, European Monographs, pp. 139-150.

<sup>142</sup> A distinction may be drawn, as Anderson and Apap have pointed out, between variation and flexibility. Variations occur without necessarily being noticed or willed. Flexibility may deliberately be introduced to reach the desired outcome. See M. Anderson and J. Apap (2002), *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union*, Centre for European Policy Studies, Brussels.

pursued by full implementation of Schengen seems to be an “improved, efficient and integrated border control” in the European Union in order to effectively fight against terrorism and transnational organised crime, illegal immigration networks, the smuggling and trafficking of human beings, etc.<sup>143</sup>

A ‘better border control’ seems to be accompanied by the political will present in most of the ‘Wider Europe discourses’ to promote good neighbourly relations and to maintain a certain degree of openness in an enlarged Union. Yet the friendly relations between these two policy paradigms seem to be far from easy-going. If we look at the Communication on a “Wider Europe – Neighbourhood”,<sup>144</sup> the European Commission made a positive statement concerning the relations between the EU and its present and future neighbours. Additionally the Commission expressly pointed out that “both the EU and its – present and future – neighbours have a common interest in ensuring that the new external border is not a barrier to trade, social and cultural interchange or regional cooperation”. Is the European Commission going to prepare a similar action plan in light of any future EU accessions, such as the one of Turkey?<sup>145</sup> Indeed, the geopolitical relations between Turkey and its wider neighbourhood need to be taken seriously into account, looking in particular to its South and Northeast borders. The multiple consequences of the alignment with the *acquis* on the European neighbourhood policy (ENP) must be considered. The participation of Southern Caucasus (Armenia, Azerbaijan and Georgia) has been already foreseen within the Strategy Report on European Neighbourhood Policy presented by the European Commission in May 2004.<sup>146</sup> The so-called ‘ring (or circle) of friends’ should become ideally wider for the benefit of all.<sup>147</sup> If, as has been frequently officially stated, enlargement is truly an opportunity to promote stability and prosperity beyond the new borders of the Union at any time, an urgent ‘EU official action’ would certainly be needed in that regard for the particular case of Turkey and its neighbours in order to ensure a win-win situation for all the actors directly or indirectly involved in this historic process.<sup>148</sup>

There seems to be a paradox in the discourse and results of some policies that the EU pursues. We may see two different anachronistic discourses: on the one hand, to further promote good neighbourly

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<sup>143</sup> Laeken European Council, Presidency Conclusions of 14 and 15 December 2001, point 42: “Better management of the Union’s external borders controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created”.

<sup>144</sup> Commission Communication on a Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, Brussels, 11.3.2003, COM(2003) 104 final.

<sup>145</sup> The targeted countries of this particular Commission Communication were namely Russia, the Western NIS (Ukraine, Moldova and Belarus) and the Southern Mediterranean (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria and Tunisia).

<sup>146</sup> Commission Communication, European Neighbourhood Policy, Strategy Paper, COM(2004) 373 final, Brussels, 12.5.2004. In addition, it is foreseen that Belarus and Libya will become potentially members of the ENP in a near future. See M. Emerson (2004), *Two cheers for the European Neighbourhood Policy*, CEPS Commentaries, May (retrievable from [www.ceps.be](http://www.ceps.be)).

<sup>147</sup> For instance within the European Security Strategy, “A Secure Europe in a Better World”, Brussels, 12 December 2003, it was stated that “Our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations”.

<sup>148</sup> European Parliament, Report on Wider Europe Neighbourhood: A new framework for relations with our Eastern and Southern Neighbours, 5 November 2003, Explanatory Statement, point 2: “The approaching ‘big-bang’ EU enlargement will have the strongest direct effects on the eastern European countries sharing borders with the new Member States. Mitigating the negative effects of the creation of Schengen borders, finding ways to enhance cross-border cooperation and making sure that the potential benefits of becoming a direct neighbour to the EU are realised have now become urgent tasks”. See also Council Regulation (EC) No. 453/2003 of 6.3.2003 amending Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. See also the previous version, Council Regulation (EC) No. 539/2001, of 15.3.2001.

relations in an enlarged EU, and on the other, the non-negotiable call for a strict application of the Schengen *acquis* on border controls and visa regimes as a key condition for accession.<sup>149</sup> The underlying reason for such paradoxical positions may be found *inter alia*, in the current merging between internal and external security (the so-called ‘globalisation of security’) that the European Union is also very much dramatically experiencing. This key factor has deeply challenged traditional conceptions and perceptions on issues of liberty and security all around the Union. After the September 11<sup>th</sup> and March 11<sup>th</sup> events, we have seen a substantial increase in the fears towards uncontrolled immigration and criminal activities (mostly those qualified as international terrorism) coming from beyond the EU territory, without realising that these threats may be already inside and that the filter created by the Schengen rules (better border controls and more visas) may not be the only and most efficient solution for fighting them. Hence, more emphasis has been given on the necessity for more transnational cooperation intending to achieve a high level of security at the EU external borders. A good example of the influence of this security trend in the EU-Turkey case is the recently concluded Cooperation Agreement between Europol and Turkey,<sup>150</sup> whose main goals may be summarised as enhancing cooperation in the fight against organised crime including “terrorism, drugs, euro counterfeiting, illegal immigration, trafficking of stolen vehicles and financial crime”.<sup>151</sup>

Turkish officials feel that Turkey is being treated differently from previous candidate states, e.g. on the sensitive issue of readmission agreements. In the case of other candidate states, these agreements were signed on a bilateral basis with EU member states (and not multilaterally – as in the case of third countries) only after accession talks were officially underway. By then these states had only partially completed alignment with the EU negative visa list, which only fully took place at a much later stage, but of course, before their accession to the EU. Turkey feels hence that the EU’s consideration of its status as a candidate state – despite the declaration of such at the Helsinki Summit in 1999 – is still not clear.

The level of reciprocal trust between the European Union and Turkey is very much at stake while trying to find a ‘borders system solution’ for this country on its way towards EU candidacy.<sup>152</sup> A high degree of confidence is a necessary condition to maintain stable relations and for any complex cooperation to move forward.<sup>153</sup>

#### 4.1 Flexibility alongside Schengen rules?

While Article 8 of the Protocol integrating the Schengen *acquis* into the Framework of the EU requires the *acquis* to be adopted in full as a general principle, in practise there are already considerable examples of flexibility in its implementation. The EU and Schengen *acquis* on border controls and management is not as rigid as it may appear at a first sight, or as it is sometimes presented at official levels. The EU has introduced for the 10 new member states a two-step implementation procedure in

<sup>149</sup> See J. Apap (2004), “Requirements for a more effective and enhanced JHA cooperation in an enlarged European Union: Towards closer partnerships” (retrievable from [www.eliseconsortium.org](http://www.eliseconsortium.org)).

<sup>150</sup> The cooperation agreement was signed on 18 May 2004. See the draft agreement between Europol and the Republic of Turkey, Article 36 Committee/COREPER/Council of the European Union, Brussels, 27 November 2003, 15045/03, EUROPOL 59. Article 1 stipulates that “The purpose of the Agreement is to enhance the cooperation of the Member States of the European Union, acting through Europol, and the Republic of Turkey in preventing, detecting, suppressing, and investigating serious forms of international crime within the respective competence of each Party, according to their constitutional acts, in particular through the exchange of strategic and technical information”.

<sup>151</sup> Europol had been officially authorized to conclude this agreement with Turkey on 27 March 2000 by the Council of the EU.

<sup>152</sup> The concept of trust has been widely discussed in social sciences; see for instance R. Wuthnow (1991), *Acts of Compassion: Caring for Others and Helping Ourselves*, Princeton, NJ: Princeton University Press, and A. Wolfe (1989), *Whose Keepers? Social Science and Moral Obligation*, Berkeley, CA: University of California Press. As Anderson (2002) points out, there is considerable conceptual confusion surrounding it.

<sup>153</sup> See N. Luhman (1979), *Trust and Power*, London: John Wiley.

which some provisions of the Schengen *acquis* are binding and applicable from May 1<sup>st</sup>, 2004, while others, mainly those linked to the lifting of internal border controls, are applicable only after a further Council Decision (Article 3 of the Act of Accession).<sup>154</sup> In particular border controls between current and new member states, as well as those in place at the common borders between the new member states (the so-called ‘Temporary external borders’) will be maintained until the entry into force of a new Council decision. This transitional period between accession and lifting of the internal Schengen frontiers will allow for periodic evaluations until the state concerned is considered sufficiently well-prepared for a full Schengen partnership.<sup>155</sup>

This means that the Schengen area will be secured by a double-border control regime, in which the full Schengen member states retain control of their external border. Thus the Ukrainian citizen heading for Germany by road goes through a first visa check at the Ukrainian-Polish frontier, and a second one at the Polish-German frontier.

Spain secured the agreement of its Schengen partners of a further two-step regime for its North African enclaves in Morocco, Ceuta and Melilla. For these two districts it is possible for Moroccans from the neighbouring provinces of Tetuan and Nador<sup>156</sup> to enter visa-free, thus maintaining traditionally open regional movements of people and small trade. However these Moroccan citizens would have to have a regular Schengen visa in order to move on from these two districts into mainland Spain, with frontier controls at the ports or airports.<sup>157</sup>

With the imminent accession of Lithuania and Poland to the EU, Russia raised the issue of another enclave case, that of Kaliningrad. After considerable diplomatic pressure by Russia at the highest level, the EU agreed to several measures to facilitate transit of Russian citizens through Lithuania between Kaliningrad and mainland Russia.

Nonetheless the introduction of Schengen compliant visa rules by the new member states of central Europe has caused a drastic reduction of border crossings, particularly by Ukrainian citizens into Poland and Slovakia (the statistics are suggesting reductions by factors of seven to ten times). This has been the result of the double requirement, not only to have obtained a visa, but to have obtained it at an inland consulate rather than at the frontier.<sup>158</sup>

Ukraine and the EU have nonetheless been trying to deepen cooperation over JHA matters within the framework of the Partnership and Cooperation Agreement of 1998, now extended to the 10 new

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<sup>154</sup> Articles 9-18 (Chapter III, Visas) of the Schengen Convention, the related implementing decisions as well as the Common Consular Instructions.

<sup>155</sup> Articles 3-8 (Chapter II, Crossing External Borders) of the Schengen Convention, the related implementing decisions as well as the Common Manual on checks at external borders as stated in the Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13), OJ L 239, 22.9.2000.

<sup>156</sup> Except Article 5.1.d, which deals with the consultation of the Schengen Information System. It is also striking, however, to read in the Final Act of the Agreement on the Accession of Spain: “Pursuant to its national law and in order to verify whether passengers still satisfy the conditions laid down in Article 5 of the 1990 Convention on the basis which they were authorised to enter national territory upon passport control at the external border, Spain shall maintain checks (on identity and documents) on sea and air connections departing from Ceuta and Melilla and having as their sole destination any other place on Spanish territory...To the same end, Spain shall maintain checks on internal flights and on regular ferry connections departing from the towns of Ceuta and Melilla to a destination in another State party to the convention”.

<sup>157</sup> Final Act of the Agreement on the Accession of the Kingdom of Spain, signed in Bonn on 25 June 1991, Declaration on the towns of Ceuta and Melilla: “The specific arrangements for visa exemptions for local border traffic between Ceuta and Melilla and the Moroccan provinces of Tetuan and Nador shall continue to apply”. “Moroccan nationals who are not resident in the provinces of Tetuan or Nador and who wish to enter the territory of the towns of Ceuta and Melilla exclusively shall remain subject to the visa requirement”.

<sup>158</sup> See G. Gromadzki et al. (ed.) (2004), *More than Neighbours: The Enlarged European Union and Ukraine*, New Relations Final Report, Stefan Batory Foundation, Warsaw.

member states.<sup>159</sup> The EU Action Plan on JHA with Ukraine of December 2001 provides for this and in the Ukraine Country Strategy Report 2002-2006,<sup>160</sup> improved border management and infrastructure were stated as fundamental goals in order to efficiently fight against illegal immigration, trafficking in human beings and smuggling of drugs. So far, however, measures to secure frontiers have prevailed over measures to sustain the free movement of people.

Nevertheless, in its Communication on ‘Towards integrated management of the external borders of the Member States of the European Union’, the European Commission set as a priority the development of the *acquis* as regards the so-called ‘local border traffic’.<sup>161</sup> Furthermore, in the ‘Wider Europe – Neighbourhood’ Communication, it stated that: “An efficient and user-friendly system for small border traffic is an essential part of any regional development policy; The EU is currently looking at ways of facilitating the crossing of external borders for bona fide third-country nationals living in the border areas that have legitimate and valid grounds for regularly crossing the border and do not pose any security threat”.<sup>162</sup>

Reflecting the severe reduction in border movements initially experienced with Ukraine and tensions with Russia, the Commission has presented two proposals for Regulations “on the establishment of a regime of local border traffic at the temporary external land borders between member States’ and ‘on the establishment of a regime of local border traffic at the external land borders of the Member States’”.<sup>163</sup>

The first proposal for temporary external land borders aims to lay down rules on the criteria and conditions for establishing a regime of local border traffic for *bona fide* border residents. Nationals of third countries subject to visas who have been living for at least a year in the border area and who reside in areas within 50 kilometres of the EU border would be eligible for special visas (designated ‘L’, for ‘Local’). This would allow the holder to cross the EU border many times for stays of up to seven consecutive days, but for less than three months every six months. The ‘local visa’ would be valid exclusively in the border area of the state that issued it.<sup>164</sup>

The second proposal for regular external land borders authorises the member states to conclude or maintain bilateral agreements with neighbouring third countries. This is also based on the fact that the new member states are not applying all the provisions of the Schengen rules immediately from May 1<sup>st</sup>, 2004, and that, consequently, checks at the borders with current Schengen states and between the

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<sup>159</sup> Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine – Protocol on mutual assistance between authorities in customs matters – Final Act – Joint Declarations – Exchange of Letters in relation to the establishment of companies – Declaration of the French Government Official Journal L 049 , 19/02/1998 pp. 0003-0046.

<sup>160</sup> Country Strategy Paper 2002-2006, National Indicative Programme 2002-2003, Ukraine, 27 December 2001. See also the National Indicative Programme for Ukraine, adopted by the European Commission on 4 August 2003.

<sup>161</sup> The Commission considered that action should be taken in the short and medium terms on a legal framework and practical procedures regarding local border traffic. See Commission Communication Towards integrated management of the external borders of the member states of the European Union, Brussels, 7.5.2002, COM(2002) 233 final.

<sup>162</sup> The Commission pointed out this statement in its Communication, COM(2003) 104, as a fundamental part of the perspectives for lawful migration and movement of persons. See also the Commission Communication Paving the Way for a New Neighbourhood Instrument, COM(2003) 393 final, 1.7.2003.

<sup>163</sup> COM(2003) 502 final. These two proposals provide for a definition of Local border traffic: the regular crossing of the external border of a member state by persons lawfully resident in the border area (restricted to 50km) of a neighbouring third country, in order to stay in the border area of that member state for a limited period (seven consecutive days maximum, and in any case, for no longer than three months within any half-year period).

<sup>164</sup> Article 7 of the Proposal says, “Border residents not requiring visa may stay in the border area of a neighbouring Member State for up to seven consecutive days. The total duration of their successive visits in that Member State shall not exceed three months within any half-year period”.



new member states themselves will remain in place for a certain period. Currently there is a set of bilateral agreements on local border traffic that various old and new member states have concluded with their neighbouring non-EU countries.<sup>165</sup> These agreements contain numerous differences and a diverse range of ‘flexibilities’ with respect to geographical application, the categories of persons covered and the documents required to cross frontiers.

Yet it is proving difficult to reach an agreement within the Council on these proposals for local border traffic, although there is a partial agreement emerging in the European Parliament. Apart from the fact that the damage is already done on certain new borders, there are controversial issues to be resolved. Both initiatives start from the principle of *bona fide* border residents. However, as the European Parliament has observed, “One might wonder whether the *bona fide* principle is a sufficient guarantee or whether there should be penalties for those who move or make a stay outside the authorised local border traffic area”.<sup>166</sup> The proposal does not contain any provision on the control over authorised stays, which has led to doubts on whether it could lead to abuses in practice. For example Article 16 of the Regulation provides that entry and exit stamps shall not be affixed to the travel documents of those crossing the border.<sup>167</sup> Also, there is no way to check that the people who cross borders will exclusively remain within the 50-km border area to which they would be allowed to have a more flexible access. However, excessive concerns of this kind can be met with the argument that the two-step Schengen border system allows for further security for the full ‘inland’ Schengen states.

Another example is that of Portugal, which provided an assurance to the other Schengen members with respect to its Visa Waiver Agreement with Brazil. A Declaration attached to its Accession Treaty to Schengen provides that Portugal would readmit any Brazilian national entering the territories of the contracting parties via Portugal under the Visa Waiver Agreement between Portugal and Brazil of 9 August 1960, and intercepted after the maximum period of three months provided by Article 20.1 of the Convention Implementing the Schengen Agreement.<sup>168</sup>

The existence of a non-negotiable or rigid conditionality that every candidate country, including potentially Turkey, has to implement the Schengen *acquis* in full upon acceding to the European Union has therefore raised many concerns, such as the double standard being applied between senior and new EU members as well as a lack of vision by the European Union on the multiple negative consequences it may lead to in a variety of sectors. Even if flexibility in the Schengen regime may be politically sensitive, costly, time-consuming and technically awkward, from a perspective of precedent, pragmatism and fairness a flexibility factor may be a viable solution.<sup>169</sup>

## 4.2 The Bulgarian experience

The recent Bulgarian experience is relevant in suggesting ways in which Turkey could secure trust in its progression towards accession to the EU and gain removal from the ‘negative list’ of countries whose nationals need a visa to enter the EU territory.

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<sup>165</sup> Report on the Commission Proposal for adoption of a Council regulation on the establishment of a regime of local border traffic at the temporary external land borders between the member states, European Parliament, Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, 11 March 2004, FINAL A5-0142/2004.

<sup>166</sup> See the Explanatory Statement provided by the European Parliament’s report on the Commission Proposals, of 11 March 2004.

<sup>167</sup> As the Commission explains in the commentary of the articles included in both proposals, Article 16 represents a derogation from the obligation to carry out entry and exit stamps in the travel documents of those people considered as border residents and whose activities fall within the category of local border traffic. The reasoning giving for that derogation to be applied is that such practice would not be feasible in practice, “considering the nature itself of local border traffic entails a very frequent crossing of the border”.

<sup>168</sup> Final Act of the Agreement on the Accession of the Portuguese Republic, Declaration on Brazilian nationals entering Portugal under the Visa Waiver Agreement between Portugal and Brazil of 9 August 1960.

<sup>169</sup> See M. Den Boer (2002), *op. cit.*

Bulgaria was initially included in the Schengen negative list in September 1995. The main official justification was a worrying lack of security measures and the potential risk of illegal immigration originating from, and transiting through, Bulgaria. Since that decision was taken, the Bulgarian government started working on a comprehensive strategy aimed at exempting its nationals from visa requirements when crossing the EU external borders. In March 2001, the Council adopted a new regulation, with Bulgaria finally removed from the negative list.

Paragraph 5 of the Preamble of the Council Regulation 539/2001 explains the grounds for decisions to include or remove a country whose nationals will be subject to the visa when entering the Schengen area.<sup>170</sup> A decision for inclusion is based on a case-by-case assessment of a wide range of criteria, which include matters such as illegal immigration, public policy, security, the European Union's external relations, as well as the implications of regional coherence and reciprocity.

What did Bulgaria do to get off the negative list? The removal of Bulgaria was preceded by a report by the European Commission, which set out the main considerations:<sup>171</sup>

- The legal framework and administrative practice of Bulgarian borders, including visa policy,
- Repatriation of Bulgarian nationals to Bulgaria and
- Additional measures such as technical equipment at borders, cooperation with Greece and including tour operators.

On the legal framework and administrative practice at the Bulgarian borders, the report noted that the following reforms were decisive for the lifting of the visa requirements: the introduction of new passports that meet the EU requirements, the abolition of facilities for issuing visas at the border, the establishment of criminal sanctions for irregular border crossing and forged documents as well as for the facilitation of illegal immigration, etc. Currently, Bulgaria is in the final stages towards the full aligning of its visa policy to that of the Union.<sup>172</sup> It wishes however to maintain, until the date of accession to the EU, a visa-free regime for nationals from Serbia and Montenegro and Macedonia.<sup>173</sup>

On the repatriation of Bulgarian nationals, the Commission noted as a key factor that Bulgaria had bilateral readmission agreements in force with 10 member states and six other states. Indeed, the signing of bilateral readmission agreements with each of the EU member states was of primary importance.

Other additional national reforms that were taken by Bulgaria included better computerised control systems at border posts, an action plan with Greece and more legislation containing penalties on carriers who take persons out of Bulgaria.

In the light of this report, Bulgarian nationals have no longer been required to be in possession of a visa since 2001. Yet, as has been often pointed out, the decision to remove from or include a country in the Schengen negative visa list is not only a technical one (as under the above measures), but also a political one. Political leaders have played an important role through their meetings with EU

<sup>170</sup> Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

<sup>171</sup> Report from the Commission to the Council regarding Bulgaria in the perspective of the adoption of the regulation determining the list of third countries whose nationals must be in a possession of visas when crossing the external borders and those whose nationals are exempt of that requirement COM (2001) 61 final, 02.02.01, Brussels.

<sup>172</sup> See the 2003 Regular Report on Bulgaria's Progress towards Accession, Chapter 24: Cooperation in the field of Justice and Home Affairs, pp. 99-106.

<sup>173</sup> See J. Apap and A. Tchorbadjiyska (2004), "The Nature of Schengen and the Limits of its Flexibility: Implications for Ukraine", in *2004 European Union Accession: Implications for Ukraine's Relations with its Central European Neighbours*, EastWest Institute and Institute for Regional and Euro-Integration Studies "Euroregio Ukraine", 2004.

counterparts by informing the EU about their efforts and in promoting the results achieved by their countries.

### 4.3 The case for flexibility in time and space

Looking ahead to the pre-accession period, as and when Turkey will be negotiating its conditions of accession, there is a strong case for the EU itself to take the initiative to consider what degree of constructive flexibility is to be recommended in the case of Turkey. It is evident that faced with an absolutist and rigid negotiating position on the part of the EU, Turkey has little option but to accept, for risk of otherwise prejudicing its overall priority objective of advancing as fast as possible in closing the various chapters under negotiation.

However the experience of the introduction and development of the Schengen system and the recent enlargement has shown both a) that a rigid EU negotiating position can have seriously negative effects (e.g. what has happened on the Ukrainian border), and b) that there is room for detailed special arrangements for individual bilateral border situations that can alleviate such negative effects. These conclusions are revealed in the evolving policies of the EU itself, which is now trying to become more flexible with respect to local border traffic on the new external frontiers of the EU, but only after a period in the past few years when rigid compliance with Schengen rules decimated some traditional border movements. Moreover, the EU itself has opened the way for certain elements of flexibility by its own insistence on a two-step procedure before the new member states fully accede to Schengen, with the abolition of their borders with the ‘inland’ Schengen states. In addition, it is evident that the Schengen regime is still evolving; for example, it remains to be seen how far the EU progresses with Russia and Ukraine in the ongoing discussion on elements of ‘visa-facilitation’, leading on to questions of a visa-free regime in the longer term.

One obvious recommendation to the EU would be not to press Turkey into full Schengen visa compliance until the EU has advanced its own internal negotiations on local border movements and clarified the prospects for its future visa regime with Russia and Ukraine. The description above of the existing Turkish regime for obtaining visas at the port of entry (‘sticker visa’ system) hints at a possible formula for the next years. Turkey could well align its list of countries requiring visas entirely on the EU/Schengen list in a reasonably short period. However the issuance of such visas could, for a certain period, and for countries with which Turkey wishes to retain maximum openness, remain to be delivered at the port of entry, where nonetheless basic security requirements can be maintained (such as checking of the traveller’s identity against various national and international ‘black lists’). This would avoid destroying some extremely important movement of persons in and out of Turkey for business and tourist reasons, for example from Russia, Ukraine and Iran. The EU should recognise that it has a serious interest in not replicating the Ukraine-Polish experience of recent years on a bigger scale and with the much larger set of Turkey’s neighbours. In due course, some important neighbouring states might succeed in getting onto the EU’s visa-free list, in which case the problem will disappear. The EU’s own emerging ‘European Neighbourhood Policy’ should point the way towards finding the optimal combination of uniformity and flexibility in EU border regimes. With Turkey entering into the process of accession negotiations, Turkey’s neighbourhood also becomes that of the EU.

## 5. Conclusions

It is only in the last two years that Turkey has started to focus on JHA issues, since previously its priority was to secure progress towards meeting the Copenhagen political criteria. However policies on border control and fighting irregular migration have now risen to the top of the agenda, and Turkey is already achieving impressive results towards implementing the Schengen *acquis*.

Looking ahead, there are five key issues that are crucial to Turkey-EU cooperation in JHA.

***The border control and the visa infrastructure.*** Turkey should continue with its efforts to put in place a professional border control administration in close cooperation with the EU. A second generation of

twinning projects could foster the exchange of border guards between Turkey and member states, or in due course with the proposed EU Border Management Agency. Such initiatives would also constitute an important confidence-building measure, besides being vehicles for the exchange of expertise and know-how. Turkey also needs to continue its efforts to build up a capacity to detect and combat passport and document forgery. Further twinning projects could be applicable here too. In the long term, the EU should consider policies that would make it possible for the agents of the new border administration in Turkey to be seconded to spend time on existing EU borders and with the Border Management Agency when it becomes operational. The EU should look more closely into the recent projects that Turkey has put into place to enhance the protection of its borders using computerised cameras.

**Readmission Agreements.** The EU is pushing for a readmission agreement to be concluded without delay. Turkey is concerned about signing such an agreement with the EU before it has readmission agreements in place with those source countries of irregular immigrants who transit through Turkey. Nonetheless, after resisting the signing of readmission agreements with third countries and with the EU for some time, Turkey has now signed agreements with Greece, Syria, Kyrgyzstan and Romania. It is negotiating further agreements with Belarus, Bulgaria, Egypt, Kazakhstan, Libya, Lebanon, Macedonia, Sri Lanka, Russia, Ukraine and Uzbekistan. Since Turkey's leverage on third countries is limited, however, there is a need for active support from the EU in these negotiations as well as an acknowledgement that Turkey's performance in negotiating and signing readmission agreements has been considerably ahead of the EU. This would be a further confidence-building measure between the EU and Turkey, and would facilitate the negotiation and conclusion of their mutual readmission agreement.

The conclusion of a readmission agreement between Turkey and the EU should also be the occasion to clarify the prospects and criteria for easing and eventually lifting visa requirements on Turkish nationals. The EU should devise a facilitated Schengen visa system as soon as possible for priority categories of Turkish nationals, especially Turkish students and business people.

**Irregular migration and asylum.** The legislative basis for a more effective policy to counteract illegal migration has been already put into place within the Turkish legal system, as acknowledged in the 2003 EU Commission's Progress Report on Turkey. However, the rights of asylum seekers in this context are also a concern for EU officials. Turkey is being asked to offer protection to asylum-seekers more universally, since until now it has limited its offers of protection only to asylum-seekers of certain nationalities. Turkey is concerned that the EU, UNHCR and non-governmental organisations should develop a 'burden sharing' mechanism in this context. This would encourage Turkey to then lift the 'geographical limitation'. In the meantime, Turkey should continue with its efforts to train its various forces and bureaucracies dealing with irregular migration, to bring its performance in line with best practice. While developing its asylum law and efforts to mobilise support for 'burden sharing', Turkey needs to consider further measures that would allow the possibility for local integration for some of the recognised refugees. The securitisation of immigration issues in Europe and the pressure put on Turkey to combat illegal transit migration jeopardises the improvements made in Turkish asylum policy. This could otherwise lead inadvertently to a paradoxical situation whereby the EU on the one hand assists a significant improvement in Turkey's asylum practices, but on the other hand undermines those gains as potential asylum seekers risk being deported without having their case fairly heard. Without a mechanism for burden sharing in place, the main EU legislative provisions on asylum, which call for asylum applications to be treated by the first safe country of entry into the EU, may lead to Turkey becoming a 'dumping ground' or 'buffer zone', rather than a member state that shares benefits and responsibilities equitably. With respect to combating illegal migration, the EU should give Turkey more credit for the progress it has achieved than is implied by a mere acknowledgement in the Progress Report. This recognition should extend to an effort directed towards the EU governments and the public to stop portraying Turkey as a major conduit of illegal migration. Particular efforts should be given to stop the citing of figures for the alleged number of migrants transiting through Turkey that are devoid of any empirical basis. The continued use of such figures generates considerable mistrust on the part of Turkish officials towards Europe.

***Schengen rules and neighbourhood policy.*** The standard policy of the EU is to require all acceding states to apply ‘in full’ the Schengen regime upon accession. By the date of its accession to the EU Turkey needs to apply Schengen rules at its external frontier, although in a ‘two-step procedure’ it will become a full Schengen member with removal of internal frontier controls only at a later date following a positive evaluation by the EU Council.

The Schengen *acquis*, however, is not a static compendium of rules. That the policy continues to evolve in a rather dynamic manner is crucial for Turkey. The package of Schengen-related measures that exist at the moment and the financial burden to transpose them at national level will most probably become even more voluminous by the time of Turkey’s accession. At the same time, there is a growing realisation within the EU of the need to make the system more ‘friendly’ and more ‘flexible’, especially for its new neighbour states with which it wishes to develop excellent relations. The new external borders of the EU should not become a barrier or a new wall to social and cultural interchange, regional cooperation and trade. The adverse impact on Ukraine as a result of Poland and Slovakia suddenly becoming compliant with Schengen visa rules, with the number of border crossings of Ukrainians having been literally decimated in the last three years, is not an example the EU should expect Turkey to follow.

In this regard, the specific geographical position and particularities of the Turkish case need to be seriously considered by the EU. There are several examples already of ‘flexible border practice’ designed to meet the specific needs of individual member states, for example in Greek and Portuguese practices for issuing residence permits to Albanian citizens from border areas and to Brazilian nationals, respectively; or in the case of Spain with visa exemptions for local border traffic between Ceuta and Melilla, and the Moroccan provinces of Tetuan and Nador. For Turkey the system should find ways to accommodate the huge tourist and suitcase trade with its neighbours (almost 2.5 million citizens of the former Soviet Union, and Iranians now enter Turkey each year and an absolutely overwhelming majority of them do return to their countries). One way of doing this would be to retain the current Turkish system of issuing visas at the border (the so-called ‘sticker visa’) for the immediate future, given that Turkey’s accession to the EU would in any case be unlikely to occur for another decade, and full membership of Schengen would take an additional number of years. The sticker visa system has brought major benefits both to Turkey as well as to the region, opening up a cultural, economic, social and political hinterland from which it was cut off during the Cold War. This has played an unequivocal role in building valuable political, economic, social and cultural relationships between Turkey and its neighbours. New developments in security technology and in the Schengen system may allow the ‘sticker visa’ to become both ‘friendly and flexible’ while at the same time creating a more secure and safer regime, in line with the EU’s efforts to surround itself with a ‘ring of friends’ under its new European Neighbourhood Policy.

An EU regulation facilitating ‘local border traffic’ (for residents within 50 kilometres of frontiers) should be adopted in the short term, while the EU has begun discussions with Russia and Ukraine with a view to a facilitated visa regime, with the long-term objective of abolishing visas. These important examples of the possible evolution of the Schengen system in the years ahead reinforce the case for the EU to work out a careful sequencing of Turkey’s compliance with the entire range of JHA policies. The policies already described above for improved border management, re-admission and asylum are under way and the pace of Turkey’s modernisation in these areas should be sustained. Full adoption of the EU/Schengen list of countries requiring visas should also happen rapidly. The ‘sticker visa’ system at port of entry could be endowed with enhanced security features, but not precipitously scrapped.

***Promoting mutual trust in EU-Turkey relations.*** Finally, all the above should contribute to the vital general objective of ‘building trust’ between Turkey and the EU, in the place of the considerable apprehension it would mean for the EU to have Turkey’s eastern border as its external border. These concerns are often based on no more than vague fears that Turkey might not meet the same standards in JHA as the rest of the EU. However the transformation that Turkey has gone through in its domestic as well as foreign policy is proof of what the country is capable of achieving once the will is there and once the EU engages Turkey positively. Both sides need to pay attention to ‘confidence building’ to be

able to address some of the more sensitive aspects of border control harmonisation such as asylum policy, combating irregular migration, readmission agreements and Schengen visa rules. The cooperation achieved so far is already impressive, with Turkish officials from a wide range of government branches spending an unprecedented amount of time working with their counterparts from EU member countries and the European Commission. Turkish officials are beginning to see their EU counterparts as partners in addressing what are after all common problems. The change that Turkish membership will bring to the EU's geography will indeed be a fundamental challenge. Like the other candidate countries, however, Turkey is taking the task seriously and is putting into place the administrative mechanisms to take on the challenge and is also demonstrating a strong political will to take the EU *acquis* on board.

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# Appendices

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## 1. Current and Future Legal Provisions for the Schengen *Acquis*<sup>174</sup>

### 1a. The Current Legal Corpus

#### First Pillar

Title IV Treaty Establishing the European Community (TEC), *Visas, Asylum, Immigration and other Policies related to Free Movement of Persons, Articles 61-69*

Schengen-related policies: External border controls, visas, Visa Information System (VIS), free movement of persons, fight against illegal immigration.

Legal basis: **Articles 61, 62, 63, 64 and 66 TEC.**

EU Framework – Community method and EU governance

*Article 67 TEC* provides that the European Parliament needs to be consulted. From 1<sup>st</sup> May 2004 the Council needs to decide whether or not apply the co-decision procedure of *Article 251 TEC*.

*Article 68 TEC* gives a limited control to the European Court of Justice over migration and asylum matters, by saying that *Article 234 TEC* (preliminary rulings) shall apply “*where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law. Also, interesting to see how the European Court of Justice will not have any kind of competence in relation to check and interpret policies relating the maintenance of law and safeguarding internal security*”.

#### Third Pillar

Title VI Treaty on European Union (TEU), *Provisions on Police and Judicial Cooperation in Criminal Matters, Articles 29-42*

Schengen-related policies: Cross border police cooperation, customs cooperation; judicial cooperation in penal matters, the Schengen Information System (SIS and SIS II), *Article 2.2* of the Schengen Convention.

Legal basis: **Articles 29, 30, 31, 32 and 33 TEU.**

Intergovernmental method – national sovereignty and governments.

*Lack of Legitimacy and Democratic deficit.* The European Parliament and national parliaments play a secondary role in the decision making process. *Article 34 TEU*, until now the decision-making is purely intergovernmental and Member States hold the exclusive right of initiative.

*Judicial Deficit.* The role of the European Court of Justice is even more limited. *Article 35.2. TEU* provides that “*By a declaration any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings*”. Also, in point 5. *Article 35* stipulates that “*The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a member state or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security*”.

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<sup>174</sup> This table includes directly applicable provisions to Schengen (in bold) as well as other Schengen-relevant measures.

## 1b. Future Legal Corpus as contained in the EU Constitutional Treaty

### Chapter IV – Area of Freedom, Security and Justice<sup>175</sup>

*Articles III-158 until III-178<sup>176</sup>*

*Schengen-related policies:* External border controls, visas, Visa Information System (VIS), free movement of persons, fight against illegal immigration, cross border police cooperation, customs cooperation, judicial cooperation in criminal matters, the Schengen Information System (SIS and SIS II), etc.<sup>177</sup>

*Legal basis:* Section 2, *Polices on border checks, asylum and immigration, Articles III-166 – III-169.*

Section 4, *Judicial Cooperation in Criminal Matters, Articles III-171, III-172 and III-173.*

Section 5, *Police Cooperation, Articles III-176 and III-178.*

#### EU Framework – Community Method and EU Governance

The European Parliament is more directly involved in the decision making process due to the application of the ‘co-decision procedure’ as provided in *Article III-302 (ex Article 251 TEC)*.

The European Court of Justice has full competence to review and interpret all these legal instruments. Except for some fundamental limitations included in *Article III-283* of the Constitution, which stipulates that “*In exercising its powers regarding the provisions concerning the area of freedom, security and justice, the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security*”.

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<sup>175</sup> Article I-41 of the Provisional Consolidated version of the draft Treaty establishing a Constitution for Europe, titled Specific provisions relating to the area of freedom, security and justice, says that “1. The Union shall constitute an area of freedom, security and justice: (a) by adopting European laws and framework laws intended to approximate national laws in the areas listed in Part III; (b) by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions; (c) by operational cooperation between the competent authorities of the Member States, including the police, customs and other services specialising in the prevention and detection of criminal offences”.

<sup>176</sup> Article III-158 (ex Articles 29 TEU and 61 TEC) of the Provisional Consolidated version of the draft Treaty establishing a Constitution for Europe, says that “1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal traditions and systems of the Member States; 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals”.

<sup>177</sup> Article I-43 of the Provisional Consolidated version of the draft Treaty establishing a Constitution for Europe provides the possibility for enhanced cooperation, and refers to Articles III-324 and III-325 of the same text.

## 2. Background Information on Irregular Migration and Visa Policy

### 2a. Turkey's Readmission Agreements with Third Countries

#### **Group I (signed)**

	<b><u>Date</u></b>
Turkey - Syria	10 October 2001
Turkey - Greece	8 November 2003
Turkey - Kyrgyzstan	6 May 2003
Turkey - Romania	16 January 2004

#### **Group II (on going negotiations)**

Belarus  
Bulgaria  
Egypt  
Kazakhstan  
Libya  
Lebanon  
Macedonia  
Sri Lanka  
Russia  
Ukraine  
Uzbekistan

#### **Group III (awaiting response to start negotiations)**

Algeria  
Bangladesh  
China  
Ethiopia  
Georgia  
India  
Iran  
Israel  
Jordan  
Mongolia  
Morocco  
Nigeria  
Pakistan  
Sudan  
Tunisia

<b>2b. Countries whose Nationals Do Not Require a Visa to Enter Turkey</b>		
<b><u>EU States</u></b>	<b><u>Balkan &amp; Middle Eastern States</u></b>	<b><u>Former Soviet Union</u></b>
Denmark (3 months)	Bosnia-Herzegovina (2 months)	Kazakhstan (1 month)
Finland "	Croatia "	Kyrgyzstan (1 month)
France "	Macedonia "	
Germany "	Israel (3 months)	
Greece "	Iran (3 months)	
Luxembourg "	Morocco "	
Sweden "	Tunisia "	

<b><u>EU Candidate Countries</u></b>		
Bulgaria	(3 months)	
<b><u>Others</u></b>		
Argentina	(3 months)	Japan (3 months)
Bolivia	”	Korea ”
Chile	”	Liechtenstein ”
Costa Rica	(1 month)	Macau-China (1 month)
El Salvador	”	Malaysia (3 months)
Honduras	”	Monaco ”
Iceland	”	Hong-Kong (SAR) ”
		New Zealand (3 months)
		Nicaragua ”
		San Marino ”
		Singapore ”
		Switzerland ”
		Uruguay ”

<b>2c. Countries Whose Nationals Can Enter Turkey with a Visa Issued at the Border – ‘Sticker Type Visa’ (Bandrol)</b>	
<b><u>EU (and other European) states</u></b>	<b><u>EU Candidate Countries</u></b>
Austria (3 months)	Romania (1 month)
Belgium ”	
Cyprus (Greek Cypriot Administration) (1 month)	
Estonia (1 month)	<b><u>Balkan and Middle Eastern States</u></b>
Hungary ”	Albania (2 months)
Ireland (3 months)	Jordan (1 month)
Italy ”	Serbia and Montenegro (1 month)
Latvia (1 month)	
Lithuania ”	
Malta (3 months)	<b><u>Former Soviet Union</u></b>
Netherlands ”	Armenia (1 month)
Poland (1 month)	Azerbaijan (1 month)
Portugal (3 months)	Belarus (2 months)
Slovakia (1 month)	Georgia (15 days)
Spain (3 months)	Moldavia (1 month)
United Kingdom ”	Russia (2 months)
	Tajikistan (1 month)
Norway (1 month)	Turkmenistan (1 month)
	Ukraine (2 months)
<b><u>Others</u></b>	
Australia (3 months)	Hong-Kong - China (3 months)
Brazil (3 months)	Guatemala (15 days)
Canada (3 months)	USA (3 months)

<b>2d. Compliance with the EU Negative List</b>	
<b><u>Middle Eastern States</u></b>	<b><u>Date</u></b>
Bahrain	September 1st, 2002
Kuwait	September 1st, 2002
Oman	September 1st, 2002
Qatar	September 1st, 2002
Saudi Arabia	September 1st, 2002
United Arab Emirates	September 1st, 2002
<b><u>Others</u></b>	
Bahamas	May-July 2003
Barbados	May-July 2003
Belize	May-July 2003
Fiji	May-July 2003
Grenada	May-July 2003
Indonesia	May-July 2003
Jamaica	May-July 2003
Kenya	May-July 2003
Maldives	May-July 2003
Mauritius	May-July 2003
Republic of South Africa	May-July 2003
Santa Lucia	May-July 2003
Seychelles	May-July 2003
<b><u>Inclusion contemplated by end of 2004</u></b>	
Bosnia-Herzegovina	
Iran	
Kyrgyzstan	
Macedonia	
Morocco	
Tunisia	

# About CEPS

Founded in 1983, the Centre for European Policy Studies is an independent policy research institute dedicated to producing sound policy research leading to constructive solutions to the challenges facing Europe today. Funding is obtained from membership fees, contributions from official institutions (European Commission, other international and multilateral institutions, and national bodies), foundation grants, project research, conferences fees and publication sales.

## Goals

- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the European policy process.
- To build collaborative networks of researchers, policy-makers and business across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

## Assets and Achievements

- Complete independence to set its own priorities and freedom from any outside influence.
- Authoritative research by an international staff with a demonstrated capability to analyse policy questions and anticipate trends well before they become topics of general public discussion.
- Formation of seven different research networks, comprising some 140 research institutes from throughout Europe and beyond, to complement and consolidate our research expertise and to greatly extend our reach in a wide range of areas from agricultural and security policy to climate change, JHA and economic analysis.
- An extensive network of external collaborators, including some 35 senior associates with extensive working experience in EU affairs.

## Programme Structure

CEPS is a place where creative and authoritative specialists reflect and comment on the problems and opportunities facing Europe today. This is evidenced by the depth and originality of its publications and the talent and prescience of its expanding research staff. The CEPS research programme is organised under two major headings:

### Economic Policy

Macroeconomic Policy  
European Network of Economic Policy  
Research Institutes (ENEPRI)  
Financial Markets, Company Law & Taxation  
European Credit Research Institute (ECRI)  
Trade Developments & Policy  
Energy, Environment & Climate Change  
Agricultural Policy

### Politics, Institutions and Security

The Future of Europe  
Justice and Home Affairs  
The Wider Europe  
South East Europe  
Caucasus & Black Sea  
EU-Russian/Ukraine Relations  
Mediterranean & Middle East  
CEPS-IISS European Security Forum

In addition to these two sets of research programmes, the Centre organises a variety of activities within the CEPS Policy Forum. These include CEPS task forces, lunchtime membership meetings, network meetings abroad, board-level briefings for CEPS corporate members, conferences, training seminars, major annual events (e.g. the CEPS International Advisory Council) and internet and media relations.