

CEPS Policy brief

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On 5 January 2007, Elspeth Guild was invited by the European Commission Select Committee of the UK House of Lords to submit written evidence to assist that body in its scrutiny of the European Commission's annual legislative and work programme. This Policy Brief reproduces her submission in full.

Making the EU Citizens' Agenda Work

Elsbeth Guild *

Introductory remarks

It is both an honour and a pleasure to submit comments to this inquiry into the Commission's Communication on the legislative and work programme 2007. It is vital that the work of the Commission is subject to oversight by the European Parliament and national parliaments in order to ensure proper democratic participation in the priorities and legislative programme of the Commission. In our view, the inquiries carried out by the House of Lords Committee on these issues are of fundamental importance to the operation of the EU. We would encourage other national parliaments to take the same active interest in carrying out scrutiny of activity by the Commission and other EU level actors to ensure that democratic voices from across the Union are heard.

This submission addresses six areas of the Work Programme 2007 which are related to our work in the area of freedom, security and justice: 1) the 'big agendas', 2) strategic objectives regarding security, 3) the EU's voice in the world, 4) managing migration flows, 5) managing the *acquis* and 6) connecting Europe to its citizens. We will not comment on proposals in fields beyond this sphere except to the extent that they have consequences for the Area of Freedom, Security and Justice (AFSJ).

1. The big agendas: Globalisation and the citizen's agenda

There are two important strategic policy agendas set out in the Commission's Legislative and Work Programme: the EU's response and participation in globalisation and the citizen's agenda. We would take this opportunity to make some preliminary comments on how action in the AFSJ should complement and not hinder these two objectives.

First, regarding *globalisation*, if we take this term to mean the integration of economies at the international level in pursuit of prosperity and development, regard should be had to how the EU has successfully managed the integration of economies. Concerning the AFSJ, key to the success of the EU's internal market has been the steadfast commitment to free movement of goods, persons, services and capital. The engagement of people in the success of economic development and market integration was recognised from the start of the European integration project and the principle of free movement of persons was maintained, not without resistance from some interior ministries, as a core objective until it has become a reality. It is not realistic to seek the benefits of globalisation if people are excluded from the overall European project. If people cannot travel to find new markets for their goods or challenging job opportunities, provide services or source their product needs, globalisation cannot and will not fully benefit the society. People make globalisation happen whether they are entrepreneurs, employees, students, tourists or family members. Without contact between people, economic activities will not grow across borders.

Thus, in order to participate in and benefit from globalisation, the EU must pursue policies and regulations regarding border management, economic migration and access to the EU for third-country nationals which enhance rather than hinder movement of persons. Closed EU borders for persons sit uneasily with the globalisation objectives, which seek to maximise the benefits of movement of goods, services and capital. If the citizen's agenda is aimed at providing employment and stability within the Union through participation in globalisation creating new markets for goods and

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services, citizens must be able to move freely to third countries to seek markets and not be hindered by reciprocal restrictions in third countries which governments often impose because the EU regulatory framework excludes or creates substantial obstacles for their nationals to have access to the EU territory.

For the effective delivery of a *citizen's agenda*, 'more Europe' through the expansion of 'the Community method' to all the AFSJ areas is highly desirable. Without a substantial change in the current institutional mechanisms characterising European cooperation within the context of an AFSJ and the abolition of the current pillar structure, the AFSJ is not going to succeed in the eyes of the people. The European project in this dimension needs to move from the deficiencies inherent to the intergovernmental method of European cooperation, inside or outside the legal structures provided by the Third Pillar (Treaty on European Union) to a rooted Community method. This will be the only way to duly offer a solid democratic framing of a European Space where liberty, security and justice of the individual are fully guaranteed.¹

2. Strategic objectives as regards security

Based on the foundations provided by the Amsterdam Treaty, the Tampere European Council of October 1999 gave political direction for the gradual development of an Area of Freedom, Security and Justice.² The Tampere Programme identified the creation of an AFSJ as a fundamental priority for the future of the European Union and set out the objectives for its first five years ending in 2004. The 'Hague Programme' agreed by the Council on November 2004 adopted a new five-year policy agenda in these areas.³ So far, the level of policy convergence⁴ reached in the dimensions of

¹ S. Carrera and E. Guild, *The Hague Programme and the EU's Agenda on Freedom, Security and Justice: Delivering Results for Europe's Citizens?*, CEPS Commentary, 10 July 2006 (retrievable from www.ceps.be).

² Presidency Conclusions of the Tampere European Council, 15-16 October 1999, SN 200/99, Brussels.

³ European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 2005/C53/01, OJ C53/1, 3.3.2005.

⁴ By policy convergence we mean not only the degree of harmonisation or level of 'Europeanisation' based on the number of legal instruments that have been adopted at the EU level, but also to the discretion left to member states in the application of a wide range of provisions incorporated in the EU laws examined.

'Freedom, Security and Justice' is incomplete.⁵ In general terms, the expected level of harmonisation, or Europeanisation, in some fields has not been successfully reached. Further, an in-depth examination of the provisions included in the EU's legislative instruments reveals surprisingly low minimum standards, which may endanger international and European human rights commitments. They also offer a wide discretion for member states to apply national law and substantial exceptions to the common rules which permit both wide practical divergence and dispersion in the national arena.⁶

A major deficit of the Hague Programme is the way in which 'freedom' and 'security' are presented as antithetical values, and therefore requiring a balanced approach between the two. This balancing metaphor mainly consists of the need to find the right equilibrium between freedom and security in the EU. In fact, its predecessor, the Tampere Programme, rejected this understanding of the relationship between freedom and security by advocating a "shared commitment to freedom based on human rights, democratic institutions and the rule of law" as the starting paradigm.⁷ Securing the rule of law needs to reside at the heart of the European integration project. The Hague Programme appears to marginalise the protection of fundamental rights and freedoms (liberty), the principle of equality and of democratic accountability and judicial control. The overall priority guiding the Programme remains clear: strengthening security understood as coercion.⁸ The direct result is that the EU policy and regulatory framework do not offer the necessary mechanisms and venues for the creation of an AFSJ based on the liberty and equality.

3. The EU's voice in the world

One of the key objectives of the Work Programme is to promote the voice of the EU in the world to match its economic weight. This is a very laudable

⁵ T. Balzacq and S. Carrera (2006), *Security versus Freedom? A Challenge for Europe's Future*, Ashgate: Hampshire.

⁶ T. Balzacq and S. Carrera (2005), *Migration, Borders and Asylum: Trends and Vulnerabilities in the EU*, Centre for European Policy Studies, Brussels.

⁷ A Response to the Hague Programme: Protecting the Rule of Law and Fundamental Rights in the Next Five Years of an EU Area of Freedom, Security and Justice, CHALLENGE Paper (retrievable from www.libertysecurity.org).

⁸ D. Bigo, "Liberty, Whose Liberty? The Hague Programme and the Concept of Freedom", in T. Balzacq and S. Carrera, *Security versus Freedom: A Challenge for Europe's Future?*, Hampshire: Ashgate, 2006.

objective, but again we would note that policies that have been adopted in the AFSJ field are already having a negative impact on the ability of the world to hear the EU's voice. There have been numerous occasions when, over the past twelve months, we have spoken with colleagues organising conferences on economic and other relevant policy issues both at the level of experts, decision-makers, academics and researchers who have expressed extreme frustration at the refusal of various EU consulates to issue visas to experts, academics, policy-makers, representatives of NGOs and others so that they could come to the EU to participate in discussions. Among the most irritating of results is when an EU consulate appears, deliberately, to delay issuing the visa until the conference or other event has already taken place thus rendering impossible the arrival of the guest to participate while at the same time avoiding the accusation of having refused the visa.

The EU's voice cannot be heard under such circumstances except by EU citizens and nationals of countries on the EU visa white list. But most of the new markets for the EU and the potential new sources of energy are in countries on the visa black list. If their nationals are negatively treated by the current visa processing system of some EU member states and effectively prevented (in practice because of delayed visas rather than in law by refused visas) from coming to the EU to participate in discussions, the EU's voice will not be heard – or if it is, then by people who are already ill-disposed to the EU. A radical shake-up of the EU visa black list would be the most desirable development to remove countries from this list. Alternatively or additionally, a massive extension of visa exemption schemes for researchers, academics, policy-makers and NGO representatives irrespective of their country of nationality, would be most desirable and highly efficient. The extension of the visa facilitation agreements already in place with Russia and Moldova are also a weaker but still desirable option.

4. Managing migration flows

One of the objectives of the work programme is to better manage migration flows. It proposes the development of schemes for economic immigrants with particular focus on highly skilled migrants. These are laudable aims, but it will be critical to ensure that, in their pursuit, other policy objectives are not frustrated. The first fact to be recognised is that the more complex economic migration laws become (and there has been a tendency in many member states to adopt new rules on economic migration with a bewildering frequency), the more people will pass from a regular status to one of irregularity. The more documents one must provide and the more quickly the rules are changed, the fewer people will be able to provide everything required or to react within the limited time scales

and so their status on the territory passes from legal to illegal without any substantive change in their activities or lives.

Among the more pernicious of policies that have the effect of transforming a person lawfully present into an 'illegal immigrant' is the prohibition on switching from one immigration category to another without leaving the country, going back to the country of origin and obtaining a visa for the new purpose in the country of origin. So, for instance, where a foreign student marries an EU permanent resident, Directive 86/2003 requires that the student return to the country of origin and wait for what may be years, to obtain a visa to return as a spouse. If the student just continues to remain in the state as a student, he or she may later have obstacles placed in the way of changing status because of the delay in applying. These kinds of rules foster irregularity and impede regularity. Any new rules at the EU level in this area must avoid such pitfalls.

Furthermore, a 'secure legal status' needs to be granted not only to those immigrant workers labelled by the national law at hand as 'highly skilled' or 'talented'. The establishment of a European legal framework offering juridical protection to those third-country nationals falling within the category of high-skilled economic immigrants involves the emergence of discrimination towards all 'the others' not falling within this privileged status. Legal security must be offered also to all the rest of immigrant workers in order to avoid exploitation, discrimination and insecurity in the dimension of labour immigration in the EU. In addition, the Commission proposes legislation on penalties for employers of persons irregularly on the territory. In light of the above comments, it may not be sensible to introduce penalties in this field before there is clarity for employers on legality of residence and employment of third-country nationals in the EU.

As highlighted by the Policy Plan on Legal Migration COM(2005)669 of December 2005, The Commission needs to promote the establishment of a European framework providing transnational European protection of the rights of immigrants who are in legal employment and have already been admitted to EU territory. Additionally, the rights and liberties contained in the Charter of Fundamental Rights and Freedoms need to be applied fully to all persons residing inside the EU's territory. Residence, and not nationality, is the linking factor for having access to the EU's set of freedoms.

We have noted with increasing unease the lack of support which the UNHCR has given to EU measures on asylum. Clearly there is something wrong with the Common European Asylum System (CEAS), if the international institution created to be the guardian of the Refugee Convention finds EU

measures inadequate to fulfil the minimum obligations of the member states to the protection of refugees. In our opinion, the EU institutions (Commission, Council and the European Parliament) should defer to UNHCR regarding the correct interpretation of the Geneva Convention and ensure that all legislation adopted at the EU level complies with the internationally accepted interpretation of member states' obligations to protect those fleeing persecution. It is a very bad example to the rest of the world that 27 of the world's richest and most powerful countries refuse to comply with the internationally negotiated and accepted standards of refugee protection (in the negotiation of which they, themselves, have been highly present and vocal). The second phase of the CEAS should provide an opportunity to correct this error.⁹

5. Managing the EU *acquis*

The Commission states that it is preparing an announcement on better regulation to ensure the correct application of EC law in the member states. We would take this opportunity to note that while the application of EC law is of great importance, there is an even more pressing problem about application of EU measures adopted in the Third Pillar. The European Arrest Warrant provides only one particularly stark example where one member state is now completely outside the system (Poland as a result of the decision of its constitutional court at the beginning of the year and the failure of the government to take the measures proposed to resolve the problem) and highly problematic implementation in a number of other member states whose deficiencies have been charted by the Commission. The Commission's lack of power to ensure correct implementation of Third Pillar measures needs to be resolved quickly before the whole field falls into disrepute as an area of non-approximation in which any practices preferred at the national level, irrespective of how problematic for the coherence of the EU measure adopted, are tolerated.

6. Connecting Europe to its citizens

The Commission states that one of its fundamental objectives is to make EU policies understandable and relevant to the citizens. In particular, it wants to foster dialogue and debate with citizens, particularly including women and young people. Communication is one of the strategic objectives. We consider this to be a most laudable objective – communication with citizens is central to the legitimacy of the EU project. We are concerned, however, about the impact of some developments in the AFSJ on fostering this communication. A battery of measures have been announced in the First and Third Pillars, related to the Schengen Information System and other measures, which are aimed at a substantial increase in surveillance of the citizen, his or her movements, statements, actions and activities. At the same time, the protection of the citizen from wrongful use of his or her personal data has lagged very substantially behind – for instance, the continuing blockage of the Third Pillar Framework Decision on data protection.

Without confidence regarding how data and communication will be used, it is useless to ask the citizen to engage in dialogue with the EU. Too often in the recent history of many member states, criticism of state policies or actions has been passed to security services and resulted in the blighting of the lives of citizens. If the Commission wants to communicate with the citizen and for the citizen honestly to engage with EU law and policy, it must convince the citizen that his or her data, opinions, activities and positions are protected against improper use.

A reassessment of all EU policies on the creation, maintenance, access, distribution, correction and deletion of personal data is urgently needed. Priority should be given to the pressing need to foster confidence among citizens that their data are well and fully protected and are not being stored and passed to intelligence services and the like for subsequent use against them on the basis of the expression of their opinions and views.

⁹ See M. Garlick (2006), "Asylum Legislation in the European Community and the 1951 Convention: Key Concerns regarding Asylum Instruments Adopted in the 'First Phase' of Harmonisation", in T. Balzacq and S. Carrera (eds), *Security versus Freedom: A Challenge for Europe's Future?*, Hampshire: Ashgate.

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