Visa policies of the European Union and the United States – challenges for Transatlantic partners

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1. Introduction

The terrorist attacks in the USA of 9/11 as well as later bombings in Madrid in 2003 and London in 2005 significantly changed the security landscape on both sides of the Atlantic. Stricter and more effective measures to fight the ongoing terrorist activities in Europe and in the US have been adopted. This has also had an impact on ensuring that those who enter the territory of the United States and the European Union are more thoroughly checked before they are admitted to enter the territories of both entities. Thus, the counter-terrorist policies have had a significant impact on one policy that is crucial in this respect – the visa policy.

However, the changes in visa policy motivated by the need to ensure increased security of borders pose enormous challenges for both the US and the EU.

The first challenge concerns the internal security aspects of visa issuance. In the post-9/11 environment this has become such a dominant imperative of visa policy that both the US and the EU have often embarked on new projects without sufficiently thinking through other aspects, such as data protection or more generally

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the human rights issues involved. Both entities launched programmes that entail collection of sensitive personal data (including biometric data) concerning travellers to the US and the EU, such as US VISIT programme or Visa Information System (VIS) in the EU. However the security of these systems as well as the rights of persons subject to data retention, including possible abuse, has not been sufficiently examined. This poses serious questions about the adequacy of these moves and the balance between concerns over internal security and the legitimate rights of visa applicants.

The second main challenge of visa policy on both sides of the Atlantic relates to the visa policies as a foreign policy tool. As the main changes adopted in the recent years have been so much driven by the internal security considerations, the external dimension of visa policy has often been all but forgotten. The fact that the US and the EU do not often pay sufficient attention to the impact of visa policy on their relations with third countries could seriously damage the ability of both of them to engage the governments of these countries to work with them on certain goals, including the fight against terrorism, the control of illegal migration flows, organized crime, or even on issues that are not ultimately linked to internal security agenda.

The third main challenge is the effectiveness of visa policy in its current form. More stringent visa policies have led to the introduction of new, costly technologies, deployment and training of additional staff and reorganisation of consular services in both the US and the EU. Still, it is not sure whether these costly measures will actually meet the objectives for which they were introduced, i.e. identifying and eliminating those who pose a threat for the US or the EU and should not be admitted, whilst not deterring or causing indignation to legitimate travellers. The human dimension should certainly not be forgotten – the visa procedure often causes enormous frustration to applicants, can act as a further deterrent to legitimate free movement and hinder intellectual exchange, business and tourism. Therefore, the impact of visa policies on individual applicants, particularly certain categories that can be most beneficial for the US and the EU needs to be re-examined and reconsidered.

This paper will try to examine the three challenges identified, by looking at the recent developments in both the US and the EU, and strive to analyse them as well as to provide some ideas and guidance for the future development of visa policies on both sides of the Atlantic.

2. General framework of visa policy in the USA and the EU

Before examining more precisely the recent changes in the visa policies of the US and the EU, it is necessary to mention briefly the general framework in which the visa policy is decided and implemented. Important differences to bear in mind arise from the structural differences between the USA and the EU. While the USA is a federal state, and visa policymaking is concentrated at a federal level (although implemented through various bodies and agencies), in the EU the situation is more complicated, due to the shared responsibility for visa policies between the EU and its member states. Furthermore EU visa policy is one of so-called “variable geometry”, meaning that not all the EU member states participate in the measures adopted under the common visa policy or apply it uniformly. Moreover, this paper will be dealing only with the policies relating to the issuance of short-term visas, i.e. for stays of up to 90 days. This is because only short-term visa policies are harmonized at EU level. Secondly, the policies of long-term visas are of a substantially different nature and scope, as they are much more associated with immigration policies of individual countries, and as such are obviously framed by different legal and policy instruments.

In the US, the visa policy is an exclusive competence of the federal bodies. Congress enacts legislation relating to visas and gives the executive branch the power to implement it. The main stakeholders in the executive implementing the visa policy are the Department of State, namely its Bureau of Consular Affairs, which runs approximately 211 consulates or consular sections of embassies around the world. The legislation enacted after 9/11, however, changed significantly the competences in visa policy. Firstly, the Homeland Security Act of 2002, which set up the Department of Homeland Security (DHS), ascribed important competences to this body. On basis of this act, the responsibility of implementing visa policy is shared between the Department of Homeland Security and the Department of State. While the former has the right to promulgate regulations governing visa issuance and take over responsibility for training of consular officers, the actual issuing of visas is done through the aforementioned network of over 200 US consular posts that fall under Bureau of Consular affairs at the State Department. Moreover, the DHS has taken over additional responsibilities concerning travel to the United States. For instance the Homeland Security Act abolished the Immigration and Naturalisation Service and

created the new Bureau of Citizenship and Immigration Services (BCIS) within the DHS. The Bureau of Customs and Border Protection within the DHS has taken over the responsibility for running and monitoring the U.S. points of entry, including customs.

To some extent, the Department of Justice also plays a role in the visa policy, especially in determining which countries are eligible for the so-called "visa waiver programme", an assessment which is undertaken jointly with State Department and DHS.

In the European Union, visa policy falls within the scope of Title IV of Treaty establishing European Community entitled Common Visa, Asylum and Immigration Policy. It is a relatively new EU policy which was only incorporated into the EU framework by virtue of the Treaty of Amsterdam. However, the origins of this policy go back to the Schengen Agreement of 1985 and the Schengen Convention of 1990 which started as the intergovernmental co-operation of five countries outside the EU framework[2]. The call for this common policy is precipitated by the removal of internal borders among the contracting states and the creation of an external Schengen border, which requires not only common standards for its protection but also common criteria of admitting third-country nationals to the Schengen zone. There are, however, certain aspects which make the EU visa policy more complex than other community policies.

Firstly, as has already been mentioned, the common visa policy does not apply to all EU member states. The United Kingdom and Ireland, on basis their opt-out from Schengen *acquis*, do not participate at the adoption of measures under Title IV of TEC which includes visa issues, and these measures are thus not binding on them (we refer to this as variable geometry) unless they notify in advance that they want to participate at the adoption of certain measures (*ad hoc* opt-in)[3]. A similar system applies to Denmark, apart from the positive and negative lists of countries requiring visas (see further) and uniform format of visas, which are indispensable for the implementation of Schengen *acquis* in which Denmark participates. As to the other measures adopted under Title IV TEC, Denmark can, however, unilaterally decide to

[2] The original signatories of the Schengen Agreement (1985) and the Schengen Convention (1990) were Germany, France, Belgium, the Netherlands and Luxembourg

[3] Protocol on the position of UK and Ireland to the Amsterdam Treaty

transpose the relevant measures to its domestic legislation which thus becomes binding[4]. On the contrary, two countries that are not members of the EU, namely Norway and Iceland[5], apply the Schengen *acquis* although they have not signed the Schengen convention, but have concluded a separate agreement with the Council[6]. Thus they do not participate in measures adopted under common visa policy, but can participate at the drafting and formulation of new proposals (through the so-called mixed committee). Once adopted, such measures are binding for both of them. A similar agreement has recently been concluded with Switzerland, which approved it in a referendum on 5 June 2005.

Secondly, the EU enlargement that took place on 1 May 2004 brought in ten more countries who are not part of the Schengen zone (i.e. they still have not lifted the borders vis-à-vis the other member states); however they already participate in the adoption of measures related to the common visa policy. However, most of these measures will apply to these countries only once they will become part of the Schengen area, which has to be decided unanimously by the Council. To give an example, the new member states do not issue Schengen visas but instead their own national visas. This means they do not have to charge the standard fee applicable to Schengen visas, or they do not have to follow the same procedures for visa issuance set forth in the so-called Common Consular Instructions. However, they are already bound by some measures of common visa policy, such as e.g. on which third countries they must impose visas and on which third countries they may not.

An important difference in EU visa policy relates to the link between the EU-level regulation and implementation of visa policy. The legislation relating to common visa policy is today exercised either by the Council (e.g. the "positive" and "negative" visa lists of third countries or uniform format of visas) or jointly by the Council and European Parliament in the so-called "co-decision procedure" (Article 251 TEC) concerning the procedures and conditions for issuing visas and rules on uniform

[4] Protocol on the position of Denmark to the Amsterdam Treaty
[5] Article 6 of the Protocol integrating the Schengen *acquis* into the framework of the European Union
[6] Agreement between the Council and Norway and Iceland of 19 December 2006 on their association with the implementation of the Schengen *acquis*

visas[7]. Most of the legislation which is adopted this way is in the form of regulations or Council decisions, meaning that it is directly applicable and binding on the EU member states and their authorities or on the individual addressees and does not have to be transposed into the domestic legislation. However, as far as the implementation is concerned, it is carried out by the consular representations of the individual member states as there is no diplomatic or consular representation of the EU so far. Despite the fact that they are bound by some jointly agreed measures, such as the Common Consular Instructions (CCI) and Common Manual (CM), the visa issuing practices still differ significantly among different countries. This poses serious problems in the implementation of the common visa policy, as will be shown in the final part of this study, and leads us back to the fundamental question of the effectiveness and purpose of the EU common visa policy.

3. Visa policy as a tool of improving the internal security

Most of the immediate changes relating to visa policy in the US after 9/11 were introduced as a response to terrorist attacks, aiming at eliminating the possibility of future perpetration. The fact that the 19 terrorists behind the 9/11 attacks acquired altogether 23 non-immigrant visas from five different US consulates led the US administration to rethink the conditions for issuing visas. A number of legislative and executive acts that were subsequently adopted focused on improving the visa issuance process and tackling what can be viewed as the main shortfalls in the existing system.

It might seem that in the European Union the motives for improving the security aspects of visa policies were less motivated by the threats of terrorism. Unlike the 9/11 attacks, the Madrid and London bombings were plotted not by foreigners who got into the EU on basis of short-term visas but by EU nationals or residents. To some extent, it might also seem that the EU measures adopted with the aim of enhancing certain aspects of the common visa policy were a mere reaction to the

[7] Co-decision in these areas applies after the expiration of five years transitional period since the entry in force of the Treaty of Amsterdam, i.e. since 2004

measures adopted or under discussion in the US[8]. This conclusion would perhaps be too simplistic. Although the EU policy was to some extent a response to the US one, the EU had it own motives and reasons to modify its visa policy. However, there seems to be a growing convergence in the EU with the developments in the US, albeit the means still remain different. But the internal security aspects of visa policy seem to be more and more interlinked with other aspects of EU activities – namely police and judicial co-operation under the current third pillar, the fight against illegal migration and the ever more closely aligning asylum policy of EU member states.

3.1. Impact of 9/11 on US visa issuance – tightened clearance procedures and deployment of biometrics

The concerns over the security of visa issuing procedures marked some important changes in the US regulation and practice of US consulates abroad. A more thorough process of examining the visa application could be encountered in the post 9/11 environment, with the introduction of compulsory interviews, collection of additional data on certain categories of visa applicants and tighter conditions for clearing the applications, especially through additional checks with different federal agencies and their databases. The need to tighten the system was primarily justified by the investigations leading to the 9/11 attacks. The Government Accounting Office found out that at least 13 out of 15 hijackers from Saudi Arabia never filled in their visa application properly, were never interviewed by US consular officials and three of them received the visa under the "Visa Express" programme which has since been abandoned[9].

As a response, the State Department introduced compulsory interviews by a regulation issued in July 2003 which is estimated to concern about 90% of all visa

[8] As an example we can cite the US Enhanced Border Security and Visa Entry Reform Act of 2002, introducing certain technical requirements for travel documents issues by countries in the so-called "Visa Waiver Programme" (VWP), most of which are EU member states, as a condition for continued participation in the programme (also see further).
[9] Stanley Mailman, Stephen Yale-Loehr: Visa Worries, Visa Delays. New York Law Journal, 2003

applicants, particularly in the Middle East, Asia and Latin America[10]. The consular staff now performs name checks through the so-called "CLASS database" (Consular Lookout Support System). The amount of data contained in CLASS has increased significantly over the past years – while in 2000, CLASS contained about 6.1 million sets of data collected from different agencies, after 9/11 the State Department has added over 7.3 million new sets of data into the system, most of it information taken from other agencies, especially FBI[11]. Most of this additional data was entered from NCIC (National Crime Information Center) which is a computerised criminal justice database maintained by FBI, containing records of persons, and which the State Department and immigration authorities are authorised to access on basis of the US Patriot Act. Similarly, 73,000 new records were entered from the TIPOFF[12] database containing records of suspected terrorist, significantly more than the 48,000 records prior to 9/11[13]. Apart from this, the consular officers are entitled to further security checks and consultations with federal law enforcement and intelligence agencies, known as security advisory opinions (SAO).

Further US administration concerns over the visa issuing process are demonstrated by the introduction of supplementary forms (the so-called DS-157) form which has to be compiled by all male applicants for US-visas aged between 16 and 45 and in the case of some countries (the so-called "T-7 countries"[14]) by all the applicants. Based on the information provided in this form, further extensive name security checks may be performed, known as the "Visa Condor" check. This check is based on classified criteria which are not disclosed. However, it is assumed that they are performed for nationals of the high-risk countries (i.e. countries designated as states sponsoring terrorism or in other ways posing a threat to US security)[15] or on basis of other criteria revealed in DS-157 form, such as performance of military service in certain

[10] Ibid
[11] Testimony of Janice L. Jacobs, Deputy Assistant Secretary for Visa Services, Department of State, before the House Committee on Small Business, June 4, 2003.
[12] TIPOFF is a database established in 1987 and run by the Bureau of Intelligence and Research at the State Department and used as a clearing centre for sensitive information obtained from different federal agencies, especially on terrorist. J. Carafano and H. Nguyen: Better Intelligence Sharing for Visa Issuance and Monitoring: An Imperative for Homeland Security. Heritage Foundation Backgrounder, 27 October 2003
[13] Ibid Testimony of Janice L. Jacobs
[14] These countries are Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria and they are designated as states sponsoring terrorism

countries, or unexplained travel to predominantly Muslim countries over past 10 years. As a result of this, the clearance of the whole application process takes substantially longer than a standard application procedure[16]. Previously, the consular authorities were entitled to assume that if there were no objections raised within 30 days, the visa could be issued. The system now has to work on the basis of affirmative clearance from the agencies that are consulted on the application. An additional scrutiny was introduced for applicants from Saudi Arabia, as part of the so-called "Visa Security Program", which requires each application to be reviewed by a Homeland Security official.

Additional clearance procedures involve VISA Mantis covering individuals who engage in business or research in one of the fields identified in the State Department's Technology Alert List (TAL). This list is very comprehensive and includes areas such as biochemistry, immunology, pharmacology, chemical engineering etc., i.e. technologies which are suspected of potential "dual use" or which can be used in military industry. Although this is not a new procedure, having been originally set-up mainly with the view of protecting intellectual property rights, after 9/11 it has been expanded so that any researcher or academic involved in any of the fields placed on TAL is likely to be required to undergo this check[17] with the aim of preventing possible leaks of sensitive technologies from the United States.

However, arguably the most important shift in the US visa policy after 9/11 consists in the enrolment of biometric data taken from the visa applicants upon submission of visa application. The US Patriot Act, adopted almost immediately after the 9/11 attacks, authorized the Secretary of State and Attorney General to develop a system of identification of visa applicants through the use of biometric identifiers[18]. This trend is further reiterated in the Enhanced Border Security and Visa Entry Reform Act, where Congress mandated the administration to deploy biometrics in US issued visas. Therefore, two digitalised images of fingerprints and a digital photograph from

[15] T-7 countries plus Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Jordan, Kuwait, Lebanon, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Tunisia, Turkey, the United Arab Emirates, and Yemen.
[16] According to State Department, 80% of the Visa Condor checks are cleared within 30 days
[17] Peng and Weber: Security Checks for Non-Immigrant Visa Processing
[18] System enabling identification of a person through biological characteristics, such as facial features, fingerprints, iris etc.

each visa applicant are taken by consular officials upon the receipt of a visa application at US consulates all around the world before the visa application is processed. The purpose is to enable the data to be transmitted to the Department of Homeland Security to check the biometric data against the so-called IDENT[19] database. When a "hit" on the data is performed, it means that the consular office cannot issue a visa until a further check is performed and the application finally cleared by consular official. The biometric information on visa applicants, however, is not contained on the visa as such (for instance, in a form of chip). It is only entered into the database which is then made available to the immigration officials at US ports of entry when it is checked again. However, as the biometric information is not contained in the visa itself, it has to be taken again by the immigration authorities upon arrival in the United States who compare it with the information entered in the database by the respective consular officials at the US consulates which issued the visas.

The collection of biometric identifiers gained particular salience not only in connection with the aforesaid enrolment of biometric data at US consulates abroad but with the creation of an integrated entry-exit system tracking all the arrivals and departures in the United States, known as US-VISIT program.[20] The introduction of this programme was envisaged already in the Homeland Security Act of 2002 but further developed by the Enhanced Border Security and Visa Entry Reform Act. On basis of this programme, the biometric identifiers are collected from all the non-immigrant third country nationals entering the United States, including those who do not need the short-term (up to 90-day) visas[21] under the so-called "Visa Waiver Program" (VWP) although for the nationals of these countries the obligation to enrol in the US-VISIT programme was extended only at a later stage. This biometric data, including other data available on the visitors (such as alphanumeric data detectable from the passports) is then compared with various databases to which the ports of entry to US

[19] Automated Biometric Identification System. It contains biometric data of number of individuals wanted for investigation, apprehension, detention etc. for the breach of US immigration rules, persons wanted by other law enforcement agencies, citizens of countries that wage war against the US etc. For details see DHS/ICE-CBP-CIS-001. Federal Register, Vol. 68, No. 239

[20] Abbreviated version of U.S. Visitor and Immigrant Status Technology Programme

[21] Applicable to citizens of 27 countries of the Visa Waiver Programme. Nationals of these countries can enter the US for up to 90 days for business or leisure without a valid visa

are connected and which enable them to check whether someone should be admitted to the territory of United States[22].

3.2. European Union – different motives but moving in the same direction?

The European Union visa procedures did not seem to be affected by the 9/11 events to such an extent. No immediate tightening of visa issuance procedures as a response to terrorist attacks was introduced, and the efforts seemed to concentrate more on the improvement of co-operation among the law enforcement authorities and courts of the member states. However, the fact that measures relating to EU common visa policy had already been shifted to the first pillar of the EU by virtue of Treaty of Amsterdam, making this policy less intergovernmental than other internal security measures, seems to suggest that we will see more EU regulation in this area in the future.

In one respect it might seem that the EU has embarked on a similar boat, because like the USA it took the first steps towards creating a central database of visa applicants for the EU, known as the Visa Information System (VIS). However, the motives for the EU to take this step were rather different. In the US the information collected from visa applicants is, in a long run, associated with stricter border control, admissibility and immigration in the United States, through processing the data collected from visa applicants in the US-VISIT programme. No such programme of entry-exit registration of third-country nationals arriving in the European Union (or more precisely in the Schengen area) exists, nor has one been proposed, although it has been recently surfaced again in the Commission Communication on interoperability of databases in the area of Justice and Home Affairs. The reason why it was ruled out was fear of excessive encroachment on data privacy rights, which is something to be discussed later.

The primary reason for creating the aforesaid database of visa applicants and data pertinent to them is to improve the exchange of information between the consular

[22] The data collected under the US-VISIT programme are cleared e.g. with IDENT (Automated Biometric

offices of individual EU member states which are responsible for issuing short-term visas (Schengen visas). This proved a clear necessity because the short-term Schengen visas entitle their bearer to move freely within the whole Schengen area. Thus, the member state issuing the Schengen visa bears the primary responsibility for admitting a person to the EU. However, the explanation given by the European Commission[23] in the explanatory memorandum to the proposal for regulation of VIS currently doing through the legislative process would suggest that the scope of the proposed system would go beyond mere exchange of information among the member states´ consular offices. According to the Commission, the aim of VIS is to "...improve administration of common visa policy, the consular co-operation and ... in order to prevent threats to internal security and visa shopping, to facilitate the fight against fraud and checks at external borders checkpoints..., to assist in the identification and return of illegal immigrants and to facilitate the application of the Dublin II Regulation...". The contribution to internal security of member states and combating terrorism is also highlighted in the Council Conclusions of 19 February 2004. This would suggest that the motives behind creating VIS go far beyond a mere improvement in the sharing of data among member states consular offices but that VIS is really designed to be a multi-purpose tool. Given the very dynamic developments in the area of Justice and Home Affairs in recent years and due to many initiatives currently considered or on the table, the Visa Information System will become one of the tools used for other policies such as enhanced police and judicial co-operation, examination of asylum applications or identification and return of illegal migrants. This can have some repercussions which will be further considered in the third section of this chapter.

The data to be stored in the VIS contain alphanumeric data obtained from current visa applications as well as biometric data, namely the digital photographs and fingerprints (all ten). This would make the VIS potentially the largest database containing biometric data in the world[24]. However, unlike in the US, where the US VISIT programme has been running already since 2003, the Visa Information System

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Identification System) or TECS (Treasury Enforcement Communications System)

[23] See the Explanatory Memorandum to the Proposal of Regulation on the Visa Information System (VIS) and the Exchange of Data Among Member States on Short-Stay Visas

[24] EU data protection working party estimates that the VIS central database would contain 70 million examples of fingerprint data within five years from the start of its operation

is still only in the making. Although it has already been set up by the aforementioned Council Decision, the implementing measures such as the Regulation covering its operation are still in the legislative process, as well as other measures needed to enable the operation of VIS, such as the amendment of the Common Consular Instructions, where the proposal was tabled by the European Commission only at the end of May 2006.

There are several practical problems which at the moment raise serious doubts about the concept of enrolment of data in VIS, particularly connected to the collection of biometrics. Obviously it would be extremely costly if every single EU member state were to have the necessary technical equipment in each consular location, because of their large number. Exactly for this reason the Commission proposed in the amendments to Common Consular Instructions new models of organising co-operation among EU consulates by using one of the following models:

- Co-location: meaning that one EU member state representation provides technical equipment to staff of other EU member state(s) in its premises. The actual receipt of application, including the biometric data of applicants, is thus undertaken by different member states officials in one location, using the equipment of the host member state.
- Common Application Centres mean joint pooling of staff from different EU member state representations who jointly work and accept applications, including the collection of biometric data
- Co-operation with External Service Providers, which includes the possibility of outsourcing the receipt of visa applications, including the capturing of biometrics, to an external agency.

Although this initiative was long awaited and is to be welcome, the question remains whether it goes far enough. It will be useful in terms of sharing costs relating to technical equipment, as well as making things easier for many applicants in different locations. But it would not be saving enough in terms of human resources, as the member states will be still responsible for accepting and handling “their” applications. For this matter, the only long-term solution would be to have genuine EU/Schengen visa application centres. They would be handled by EU officials who will examine the applications for short-term Schengen visas under the same, firmly-set conditions and

would enable a uniform application of the visa issuance process. However, such ideas are still a long way from reality as visa issuance is still regarded as one of the ultimate expressions of national sovereignty and member states like to keep control over it. What could, however, be considered by some member states is using the framework of enhanced co-operation in the existing EU treaties to set up joint application centres where uniform visas will be processed by consular officials pooled from the diplomatic representations of closely co-operating EU members. For instance the Nordic countries´ representations work closely in many locations and even share premises. Where there is a long-standing and established good relationship and a high level of trust in the work of the other representations, this model might offer extensive economies of scale as well as making the procedure much easier for applicants, but the political feasibility of such move would still have to be examined and worked on.

As concerns the biometric data collected on visa applications, the EU decided to go even further than the United States. As has been mentioned, in the US visa issuing process the biometric information is solely entered into the database made later available to the US immigration authorities who can access it in order to verify the authenticity of the visa presented by the bearer. The EU intended to increase the security of visas by incorporating the biometric data right on the visa sticker. However, the solution tabled by the Commission in 2003 and examined by the Visa Working Party proved not to be technically feasible. One possibility suggested by the Commission would have entailed inserting contactless chips on the visa sticker. However, the insertion of more chips in one passport (e.g. subsequent visas issued by different EU states, or other states that might want to insert biometrics into visa sticker) could lead to the so-called “collision” problems, with the reading device unable to identify the valid chip. Similar problems can occur if the passport itself already contains biometric information (ePassport)[25], due to the negative interaction of the passport and the visa chips. There seem to be only two other solutions to this

[25] The EU member states will introduce passport containing biometric information of passport bearers on basis of Council Regulation 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States. The US also introduced a programme for ePassports by the end of 2005 according to State Department.

problem at the moment[26]. One would be to store the biometric data on a separate "Visa smart card". But this could lead to problems if the smart card is lost or forgotten by the passport bearer. Secondly, it would be difficult to verify that the holder of the passport carrying the visa sticker and the holder of the smart card are identical, if the passport does not contain the biometric data itself. Thirdly, the cost of devising a new system of issuing smart cards in all the EU consular locations (even if the Common Application Centres are put in place) would surely be very costly and could not be implemented within a short period of time. Therefore, the only solution would be to store the biometric information on the visa bearer in the VIS and re-take it from the applicants at the ports of entry of the EU, which is very similar to the way US-VISIT programme works at the moment. But no doubt this would equally be very costly and, in fact, the Commission has not provided any calculations as to the possible costs entailed. It is doubtful whether the EU member states are able to equip all the ports of entry with necessary tools to take biometrics and to train a sufficient number of staff. And if this is currently the only feasible solution and it cannot be implemented, the question arises whether the enrolment of biometrics in visa issuing process is necessary at all, especially given the fact that the consular officials already have access to other JHA databases, particularly the Schengen Information System (SIS). It can certainly be argued that this data could also be used for other purposes, but this poses serious problems concerning the purpose limitation of setting up a new database. Assuring a high degree of security in visa issuance was undoubtedly the driving force behind the development of VIS. However, if the state of technology or the lack of resources makes it impossible to deploy this process, then it might seem that the EU has gone ahead in the mistaken belief that feasible solutions would be available to problems.. It would seem disproportionate to store such sensitive information in a huge database without being able to process it further and exploit it for the purposes for which it was intended.

3.3. Interoperability with other databases in visa issuance process – implications for data protection issues

[26] One more option discussed by the Visa working group included having biometric data of the visa bearer stored on a 2-D-bar code right on the visa sticker. This option was generally ruled out as too complex and time consuming

Although the motives behind the measures introduced are supposed to lead to increased security of visa issuing and verification processes, the fact that they create huge databases with a lot of sensitive information contained therein poses serious questions relating to the security of data kept this way, and the right of those data subjects to their protection. This involves access by other authorities which might use this data for other purposes, sharing the data with other bodies and agencies (what is referred to as "interoperability"), with the possibility of misuse of this data, which could range from go processing this data, breach of the permitted period of retention or even "identity" theft etc. Also, as the databases grow in size, the probability of misuse of the data increases, as the feasibility study on VIS suggests.[27] The system therefore has to pay a particular attention to ensure that all the relevant data protection regulations are fully respected, and perhaps even enhanced.

The data protection of visa applicants highlights some different approaches and even controversies between the EU and US. As the recent disagreement on the obligation of air carriers to communicate passenger data has shown[28], these two entities might adopt a somewhat different approach to the balance between the use of data stored for internal security purposes and the rights of subjects whose data is being collected and processed.

It has already been mentioned that VIS will potentially become the largest database containing as much as 70 million set of alphanumeric and biometric data in a five year period, with the capacity of as many as 100 million sets of data. As with all other community regulations, the proposed legislation will have to comply with the applicable data protection legal instruments, namely Article 8 of European Convention on Human Rights as interpreted by the European Court of Human Rights and European Court of Justice, and Directive 95/46/EC. Some concerns particularly regarding the access of other law enforcement authorities to VIS, its interoperability with other European databases, the nature of information stored and the security of this information can be raised in relation to the proposed system.

[27] Visa Information System (VIS), Final Report, April 2003,Trasys for the European Commission.

[28] The agreement struck in 2004 between the EU and US obliges the carriers operating flights from the EU to the US to communicate the personal data on passengers to US authorities. The deal was annulled by the European

The proposal for VIS regulation currently in the legislative process assumes that access to the database will be given for multiple purposes (i.e. the improvement of the common visa policy) and to other authorities than consular offices issuing visas. This raises questions whether the access to database will fulfil the criteria set out in the EU Data Protection Directive 95/46/EC, which declares the purpose limitation as one of the basic principles of collecting and processing data in the EU framework. It can be assumed that the aim of creating it is to improve the administration of the common visa policy, consular co-operation and consultation between central consular authorities. However, it is proposed that VIS could be accessed, for example, by authorities processing asylum applications in order to help them in determining whether an asylum seeker has previously received a Schengen visa (one of the criteria for determining the member state responsible for processing the application) or to get supplementary information that could help in assessing the credibility of the applicant's claim. It will also be necessary to grant access to VIS to authorities responsible for the control of the external Schengen border which is envisaged in the Commission proposal[29]. As has been suggested, checking the biometric information at the EU ports of entry with the information entered in VIS at the time of issuing the visas is probably the only technically feasible solution of deploying the data contained in VIS, as the biometric data cannot be currently contained in visa itself. In this respect, the access of border protection authorities would satisfy the purpose limitation principle because it is inherent in the purpose of the common visa policy. The same would apply to the checks performed within the territory of the Schengen member states once the third country national has entered, as this might make it possible to identify breach of visa regime (e.g. overstay), which is also inherent to the purpose of the common visa policy.

However, concerns might arise with the possibility of access to VIS by other law enforcement authorities or even intelligence services. The Council called on the Commission to prepare an *ad hoc* proposal under Title VI of TEU to grant such access for the purpose of prevention, detection and investigation of criminal offences

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Court of Justice on May 30, 2006, whilst keeping the transitional period of 4 months to prevent the disruption of air travel across the Atlantic. For details see e.g. http://www.nytimes.com/iht/2006/05/30/world/30cnd-air.html

[29] Article 16 of the Proposal for Regulation COM(2004) 835

and terrorist acts[30]. The Commission itself argued, in its communication on interoperability of databases in the field of Justice and Home Affairs[31], for the need for other law enforcement authorities to have access to the database. The requirement of a specific legal instrument arises from the fact that the co-operation of law enforcement and intelligence services in fighting terrorism or serious criminality currently falls under the third pillar, while VIS is a community database created on basis of Title IV TEC (common visa policy). The purpose limitation principle inscribed in the EU Directive on the Protection of Personal Data (95/46/EC) requires that data be collected and processed only for a specific purpose, which in this case is the improvement of the common visa policy. Therefore granting *en bloc* access by law enforcement authorities to VIS would seem a clear violation of the purpose limitation principle. Such is the opinion of the EU Data Protection Working Party[32], as well as European Data Protection Supervisor (EDPS)[33], who hold that such unlimited access would go beyond what may be considered as a "necessary measure in a democratic society"[34]. According to both Working Party and EDPS, access by other authorities, such as law enforcement bodies, can only be legitimate on an *ad hoc* basis, in specific circumstances and subject to appropriate safeguards. The conditions under which the authorities responsible for internal security can have access to VIS therefore have to be very precisely defined[35].

The picture would look quite different if we considered the access to data collected from US visa applicants and US visitors generally (as the biometric data is collected from all the non-immigrant visitors to the US, including the citizens of visa waiver

[30] Council Conclusions of 7 March 2005

[31] COM(2005) 597. In this communication, the Commission explores the possibility of interoperability of the three systems currently existing or under development in the area of Justice and Home Affairs. These databases are Visa Information System (VIS), SIS II (second generation Schengen Information System), containing information on "alerted persons" and stolen/missing vehicles, and EURODAC (biometric database of asylum seekers aimed at determining the member state responsible for asylum application processing and identifying illegal migrants)

[32] This working party was set up under Article 29 of Directive 95/46/EC and is an independent European advisory body on data protection and privacy (for this reason it is sometimes referred to as Article 29 Data Protection Party)

[33] See the Opinion of European Data Protection Supervisor on access of law enforcement authorities and EUROPOL to VIS

[34] Opinion on the Proposal for a Regulation concerning the Visa Information System by Article 29 Data Protection Working Party, 1022/05/EN, WP 110

[35] In the Proposal for the Council decision (COM(2005) 600 final of 24 November 2005) concerning access for consultation of the VIS it is suggested that the access is given by authorities only for the purpose of preventing, detecting or investigating serious crimes and terrorist offences, must be substantiated in every case and there must be serious grounds to believe that access to the database will actually help these goals

countries). This is because the purpose limitation of the US VISIT database (which interlinks data contained in different databases maintained by different agencies) is not covered by such strict data protection rules as in the EU. Firstly, there is no overarching US legislation ensuring the data protection except for the Privacy Act of 1974 which, however, applies only to US citizens. The different approach of the US and the EU to data protection has been demonstrated on many different occasions, including the recent row over the condition to communicate passenger data of EU flights to US authorities or the fact that the US has not been recognized by the Commission as a country with sufficient data protection. However, the non-immigrant foreigners have very little leverage over the personal information concerning them, in terms of access to information and possible remedies.

Although US VISIT was originally created for the purpose of verification of visas that include biometrics[36] (thus, one might think, for a similar purpose as VIS), the data is used for a variety of other purposes. The range of subjects and agencies having routine access to the data contained in databases integrating data collected on US-VISIT (such as ADIS, TECS and IDENT) is very wide and not clear-cut and specific[37]. Moreover, it is estimated that gradual implementation of US VISIT will make it possible to interface the existing 19 databases. Information available on estimated 20 million US visa applicants has already been made available to different law enforcement agencies and investigators across the country[38].

The purpose for which this information can be used is defined so widely that it would be almost impossible to determine what the original reason for collecting the data was – these include national security, law enforcement, immigration control and other "mission-relating functions". Certainly, if one is to assume that the original motive was to help to identify likely terrorist perpetrators or persons who could otherwise pose

[36] Privacy International: The Enhanced US Border Surveillance System – An Assessment of the Implications of US-VISIT, pg. 7

[37] The personal information collected and maintained by US-VISIT Increment 1 will be accessed principally by employees of DHS components—Customs and Border Protection, Immigration and Customs Enforcement, Citizenship and Immigration Services, and the Transportation Security Administration–and by consular officers of the Department of State. Additionally, the information may be shared with other law enforcement agencies at the federal, state, local, foreign, or tribal level, who, in accordance with their responsibilities, are lawfully engaged in collecting law enforcement intelligence information (whether civil or criminal) and/or investigating, prosecuting, enforcing, or implementing civil and/or criminal laws, related rules, regulations, or orders. US-VISIT Privacy Impact Assessment, Increment 1, Department of Homeland Security

[38] Privacy International: The Enhanced US Border Surveillance System – An Assessment of the Implications of US-VISIT

threat to US security, today the system is used for a much wider purpose, nothing less than the comprehensive surveillance of immigration law and status of foreigners in the United States.

Another concern arising out of the creation of enormous databases, such as VIS or US VISIT, is connected to the security of data, particularly biometric identifiers. For instance, the amendment of Common Consular Instructions as mentioned gives the member state representations a possibility to outsource the collection of biometrics to external service provider. Thus the risk of data being misused is rapidly increasing, including the possibility of "identity theft". Although the proposal sets quite strict criteria for the external service provider to fulfil, it begs a question whether the member state representations will be able to exercise sufficient control over the way such sensitive data is collected, if this process is outsourced. As regards the processing of the data enrolled, Article 29 WP also recommended that the date be encrypted, in order to prevent misuse by unauthorised persons during transmission through the VIS or when stored on a chip. But technology is so advanced that it is impossible to eliminate the risk of biometric data being misused, as demonstrated by some recent studies[39]. At the same time, it is doubtful whether the technology is advanced enough to represent a 100% accurate tool of identification, especially as the problem will grow bigger as the databases containing biometric information increase in size, and the probability of mismatches will increase. This could lead to more cases of third country nationals being wrongly identified and unlawfully returned or refused admittance. What is even more alarming is that by interconnecting different databases, innocent individuals might be – because of wrong identification – suspected of criminal activities and to that end arrested, searched or interrogated. This poses challenges particularly for the US, as the absence of purpose limitation gives grounds for wide-ranging access of law enforcement agencies to access different interoperable databases.

The right of the data subjects, (i.e. persons about whom the data is collected, stored, and processed) to rectify this data, by demanding its correction or deletion, seems

[39] See e.g. the Statement of Barry Steinhardt of American Civil Liberties Union at the Congressional Hearing before the House of Representatives Subcommittee on Energy and Commerce, 14 July 2004 (available at http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-60594)

therefore an important element in ensuring the accuracy of the information contained in the databases. In the case of the VIS all data subjects are guaranteed this kind of access, and it extends not only to the visa applicants themselves, but also to persons providing invitations or offering guarantees for visa applicants in the form of invitation, accommodation or sponsorship letters. However, due to the lack of harmonisation at EU level, the potential remedies including possibility of administrative appeal or judicial review are still regulated by national legislation which may vary from country to country. In this respect, the authorities of the member state responsible to which the complaints are addressed are obliged to instruct the data subjects on available remedies, including access to courts. However, in terms of ensuring that the rights of visa applicants are duly taken into account, it would be desirable for member states to agree at least on some minimum standards for visa applicants giving them a right to redress in respect of information which is then shared between different authorities in different EU countries.

4. External dimension of visa policy – helping to accomplish foreign policy objectives or *ad hoc* decisions based on pragmatic choices and trade offs?

Much of what has been discussed so far relates to the internal security aspects of visa policies. As has been explained, the concerns over increased security of visa issuance and better use of information provided by visa applicants has been the driving force behind most of the changes recently introduced. However, one point that certainly should not be forgotten is that visa policy still bears an important implication for the foreign policies of both the EU and the US, if not an increasing one. All in all, one must not forget that visa policy, both in the EU and US, is primarily implemented through their foreign and diplomatic services, either the State Department or the EU foreign ministries which direct and manage their diplomatic representations in third countries.

The concept underlying the foreign dimension of visa policy both in the US and in the EU is the differentiation principle. Both the EU and the US have developed systems by virtue of which citizens of certain countries are exempt from visa requirement for

short-stay visas, in both cases up to 3 months. Countries exempt from visa requirement receive privileged treatment, sending a signal that beneficiary countries are considered to be more trustworthy than others and this may have a significant impact on bilateral relations. However, even for the countries whose citizens do require visas for both the EU and the US, the differentiation goes further as different clearance procedures are often introduced, either formally or informally, depending on the country concerned, as has been demonstrated in the application of the Visa Condor procedure for granting US visas to citizens from certain countries. In this sense, much depends on the internal regulations within the State Department or the foreign service of EU countries, as well as on an established practice in each consular location.

4.1. Visa Waiver Programme of the United States – balancing internal security considerations with foreign policy objectives

In the United States, differentiation is based on the so-called "Visa Waiver Programme" (VWP). This was firstly launched in 1986 as a pilot programme lifting the short-term (or the so-called "non-immigrant") visa obligation for certain countries, considered as allies, to facilitate travel and business links. The primary motive behind this initiative was thus to improve relations of the United States with certain countries, and to certain extent to "reward" them for close relations with the US (the first countries placed on the VWP were the UK and Japan). There are other motives and explanations, however – for instance eliminating the visa procedures for what is considered to be low risk countries, resources can be reallocated to other consular posts where the visa issuance requires the application of a higher threshold. In 2000 the VWP was enacted as a permanent programme by Congressional legislation[40].

This enactment also sets out the conditions that a country must meet in order to qualify for inclusion in the programme, as well as the procedures how a country can be nominated to be enrolled on it. These conditions are a mix of criteria set by the

[40] Visa Waiver Permanent Programme Act, 2000. Currently there are 27 countries participating in the Visa Waiver Programme: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Lichtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland and the UK

State, Justice and Homeland Security Departments and are also jointly evaluated by them. The basic criteria include a non-immigrant refusal rate for visa applicants of less than 3% for the previous two years, issuing machine-readable passports (recently also requiring a programme to include biometric identifiers) and offering reciprocal privileges for US citizens. Furthermore, the Justice and Homeland Security Departments evaluate additional considerations, such as the security of issuing passports and visas (including reports of stolen blank passports to US authorities), the effectiveness of the country's law enforcement and immigration practices, co-operation with the US authorities on law enforcement, extradition and readmission issues, and anti-terrorist practices. The in-depth investigation includes the evaluation of the overall political and economic stability of a given country and the security of its border controls. Enrolment of a certain country in VWP, however, is not guaranteed for an indefinite period. Its participation is regularly reviewed (every two years)[41], taking into consideration developments in each country, implications for US security (e.g. rate of admittance refusal at US ports of entry), law enforcement and citizenship issues and security of issuing passports. For instance the participation of Belgium has been under particular scrutiny because of the reported very high rate of stolen blank passports[42]. The Attorney-General can remove a country from the programme immediately (i.e. without previous review) in case of an overthrow of a democratically elected government, civil war, or sudden economic collapse. Such was the case of Argentina, which was removed from VWP in February 2002 due to the severe economic crisis in the country leading to indications that a substantial number of Argentine nationals would breach the 90-days visa waiver period[43].

The Visa Waiver Programme was also influenced by 9/11 developments, when especially some members of Congress called for its total elimination, pointing to potential threats to national security when certain terrorists could use this loophole and enter the United States without visas. This possibility could lead to very negative consequences for tourism and trade – before 9/11, short-term visitors to the United States from VWP countries, on average more than 15 million people a year,

[41] The frequency of evaluation was brought down to 2 years by Enhanced Border Security Act; when enacted in 2000 the programme provided for regular review every five years
[42] General Accounting Office: Border Security. Implications of Eliminating the Visa Waiver Programme, November 2002, GAO-03-38, pg.
[43] Ibid

accounted for about 35% of all arrivals, and not counting arrivals from Canada and Mexico, as much as 68% of all overseas arrivals[44]. Also, the visitors from VWP countries tend to spend more than other visitors, and thus the consequences for US tourist industry could have be of an even greater order than the percentages would suggest. Last but not least, it was also underlined, not only by the General Accounting Office but also be the State Department, that re-introducing the visas could severely affect US relations with participating countries. It was reiterated that the countries on the programme contribute substantially to US efforts in fighting terrorism globally, e.g. by co-operating on anti-terrorist operations in Afghanistan and Iraq or by freezing terrorist assets. Last but not least, one also has to take into account the additional burden on US consular offices should the VWP be abolished. Given the high volume of arrivals to the US particularly from the visa waiver countries, the consular officers would have to process some extra 14 million visa applications annually, which would cause an initial increase of consular expenses ranging between 739 million USD to 1.28 billion USD depending on the percentage of visa applicants interviewed[45], and the recurrent annual costs would be likely to range from 522 million to 810 million USD. It remains doubtful whether the State Department would have sufficient personal resources to cover the additional workload associated with the elimination of the programme. The additional burden associated with processing the applications would most likely lead to a diminished efficiency of visa clearing process, diminishing the time that can be spent on interviewing the applicants and drawing the attention of consular officers away from complicated cases that need more thorough review. Apart from this, the consular premises in many locations would have to be upgraded and expanded, which can also be a costly and time-consuming process.

The other choice was to keep the programme in place but to insist on eliminating the loopholes that could enable terrorist and other suspects to enter the US through the programme. This basically led the US administration to insist on improved security of passports and travel documents issued by the participating countries. The US administration thus introduced deadlines for incorporation of certain security features of VWP countries, namely the incorporation of machine readable zones and biometric

[44] Ibid, pg. 21
[45] Ibid, pg. 25

identifiers[46]. The deadlines were extended several times by the State Department as only a few countries in the Visa Waiver Program were able to meet the original deadlines set by the US administration, and there was a strong pressure to avoid negative consequences such as the disruption in international travel and business between the US and the EU and other visa waiver countries. One of the reasons why it was difficult to implement the introduction of biometrically enabled passports (or the so-called ePassports) was that there were not international technical standards agreed by the International Civil Aviation Organization (ICAO), to which the relevant US legislation was referring, and which would ensure interoperability of data carried on the storage media and of formats in which biometrics were contained. For this reason, the representatives of the US, EU and other visa waiver countries met to agree on the minimum standards for biometric identifiers[47]. Eventually, the EU as a reaction to US requirements, in the view of enhancing the security features of its own travel documents and in the light of previously adopted measures[48] decided to adopt a community legislation paving way for EU ePassports in December 2004[49].

4.2. The European Union and its regulation of visa exemption – necessary consequence of the common visa policy

Understandably, the need to commonly agree on a joint list of those countries whose nationals require visas and those who do not derives from the very nature of the common visa policy and from the Schengen *acquis*. If the policy of visa waivers were not applied uniformly among the member states, and still the EU wanted to achieve a system where the internal borders were lifted and persons moved among member

[46] The deadline for issuing the passports with machine-readable zones was set to 26 June 2005. The deadline for passports to contain digital photographs was set at 26 October 2005. The deadline for introducing the biometric passports (also the so-called ePassports) was set at 26 October 2006.
[47] See US General Accounting Office report on the implications of eliminating Visa Waiver Programme, GAO-03-38, www.gao.gov/cgi-bin/GAO-03-38, pg. 14
[48] See for instance Council Recommendation 98/C 140/02 of 28 May 1998 on the provision of forgery detection equipment at ports of entry to the European Union, Council Recommendation 99/C 140/01 of 29 April 1999 on the provision for the detection of false or falsified documents in the visa departments of representations abroad and in the offices of domestic authorities dealing with the issue of extension of visas, Joint Action 98/700/JHA of 3 December 1998 adopted on the basis of Article K.3 of the Treaty of European Union, concerning the setting up of a European Image Archiving System (FADO)
[49] Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States

states without being subject to border checks, it would be very easy to bypass the visa requirement simply by entering through a country not imposing visas.

The list of countries to which the visa requirement will be applied is adopted as a Community act in the form of a Council Regulation.[50] Generally, as well as in case of the US legislation, the decision whether the country is listed for visa waiver or not is determined on case by case basis and subject to joint agreement of the member states acting by qualified majority voting. The criteria determining whether the country will be placed on the visa waiver list (Annex II of the aforesaid regulation, commonly referred to as the "positive" or "white" list) or in Annex I listing countries requiring visas (the so-called "negative" or "black" list), are set in recital 5 of this regulation. Unlike in the United States, these criteria are defined much more vaguely as criteria relating to..."illegal immigration, public policy and security and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity". This reflects the complexity of the community decision making on visa issues where the due concerns of internal security of member states have to be balanced with the privileged treatment of certain countries based on historical, societal and cultural considerations of certain EU member states towards certain third countries or regions. The fact that a member state might be forced to apply visas to certain countries from which it did not require visas previously thus might seem as a necessary sacrifice to the facilitation of free movement of third country nationals across the EU, as the fellow member states might not share the same links and trust with the country at stake. These two lists are exhaustive, i.e. there is no "grey zone" which would enable the member states to decide whether they want to impose visas on certain countries or not.

A significant difference from the United States is an explicit recognition of the role of the EU´s external relations with third countries. In the US there is at the moment no legislative recognition of the geo-strategic or foreign policy importance of countries being placed on the VWP, although in the ongoing discussions it is gaining some currency. On the contrary, in the EU there is no need to justify the designation of a

[50] Council Regulation n. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of the member states and those whose nationals are exempt from that requirement

certain country by reference to objective criteria (e.g. by measuring the visa refusal rate as in the US) or to perform a detailed examination or review of its law enforcement and passport issuing practices, although these criteria are implicitly included in the "public policy" and "security" criteria.

Generally the countries placed in the "positive" list are developed countries (mainly European Economic Area and OECD members, Japan, South Korea, Singapore etc.), further countries that are at the verge of accession to the EU (Bulgaria, Romania, Croatia) and most of the countries of Latin America. The overlap with the US Visa Waiver Programme is thus very partial – in fact only a few countries (Australia, Brunei, Japan, New Zealand, Singapore, Switzerland and the European microstates such as Andorra, San Marino and Monaco) feature on both the US and the EU "positive lists" (most of the countries on the US VWP are EU or Schengen members). The EU list is therefore wider and involves countries such as Israel or Mexico who for insurmountable security or immigration concerns in the US cannot be currently placed on the visa waver.

Also, the EU lists are subject to periodical reviews of the justification of being placed in one of the annexes. The obvious, more technical reshuffling occurs with the EU enlargements, whereby the new member states are removed from Annex II, as the regulation does not apply to them any more (EU member states obviously must not apply visas to each other as this would be breach of freedom of movement and non-discrimination in the EU embedded in the founding treaties). However, the Council periodically reviews[51] these lists, which recently resulted e.g. in moving Ecuador[52] from the positive list to the negative one, or the most recent Commission proposal for another amendment, intending to impose a visa requirement on Bolivia and proposing a visa exemption for certain small island states, such as Bermuda, the Bahamas, Mauritius or the Seychelles[53].

A very important element in the EU visa waiver decision is the consideration of reciprocity. This draws on the assumption that once the EU places a country on a

[51] Periodical review of both annexes was agreed at the Seville European Council in June 2002
[52] Regulation (EC) no. 453/2003

visa waiver list, that country is expected to lift the visas for all the EU members as well. The problem with this system is primarily that the EU is not always perceived by the third countries as a common area without internal borders, and the member states are thus, for visa purposes, treated separately. Originally, the EU Visa List Regulation required member states to notify the Commission and other member states whenever a third country introduced visas against it, enabling them to establish provisional visas for citizens of the third country, and subsequently for the Council to move this third country from the positive to the negative list. However, these situations were quite rare, and were more targeted at a possible future introduction of visa requirements vis-à-vis certain member states (such as if the US decided to abolish the VWP). The situation became more complicated with the accession of ten Central and Eastern European countries in May 2004, as these countries did not originally participate in the adoption of the visa regulation. Nevertheless they had to align their visa policy with the existing regulation, including lifting visas on certain countries or introducing visas on others[54]. The Hague programme of November 2004[55] mandated the Commission and the member states to work towards the removal of all non-reciprocity mechanisms in existence after accession. The new reciprocity mechanism, adopted by Council Regulation (EC) No 851/2005 established an obligation for member states to notify all the existing non-reciprocity situations to the Commission, which subsequently published them in a report[56]. The report reveals substantial progress in respect of most countries for which the non-reciprocity was notified, with concrete steps being taken to establish full reciprocity, which in many cases has been achieved. However, the report also spells out that in respect to three countries, there was no substantive progress in this respect – namely the United States, Canada and Australia.

4.3. The US – EU visa non-reciprocity – central to the attention of the new member states

[53] See the explanatory memorandum to the Commission proposal for the amendment to Regulation 539/2001, COM (2006) 84 of 13 July 2006
[54] On 1 May 2004, there were 112 cases of non-reciprocity reported towards the EU new member states
[55] A comprehensive five year EU programme for the policy of Freedom, Security and Justice (originally Justice and Home Affairs) adopted by the EU summit in the Hague, 4 – 5 November 2006
[56] COM (2006) 3 final of 10 January 2006

The non-reciprocity of the visa regime between the USA and certain EU member states has been one of the central points of the external dimension of EU visa policy and certainly one of the focal points in countries most affected by this asymmetry, i.e. the new member states of the EU. At the moment, the requirement of obtaining US non-immigrant visas applies to all the newly acceded countries apart from Slovenia (which was enrolled in the VWP in 1997). On the one hand, the new members could have expected EU accession to have been taken as a sign of their maturity and stability convincing the US administration of the futility of keeping existing visa requirements in place. Moreover, the new EU member states turned out to be very staunch supporters of some US policies, such as the global fight against terrorism, and they have contributed substantially to US-led efforts especially in Afghanistan and Iraq, often to a much larger degree than some of the countries currently on the visa waiver programme. However, as has been mentioned, geo-strategic or foreign policy considerations do not constitute formal criteria to determine whether a country should be eligible for the US visa waiver.

The need to address this issue at a bilateral level as well as in the EU-US format has come up on various occasions. Whenever George W. Bush has made a visit to the region in recent years, the issue was raised by prime ministers or presidents - such was the case during the Bush-Putin summit hosted in Slovakia in February 2005 or during the visit to Hungary in June 2006 where the Hungarian President László Sólyom allegedly declined an invitation for an official visit to the US pending the lifting of US visas for Hungarians.

The consequences of this controversy should not be underestimated for various reasons. Firstly, the US has in recent years been brought to kind of international isolation and for this reason the new member states are important for the US, politically and strategically. Secondly, regarding the visa issue, there is a robust consensus among the elites of CEE countries, including firm Atlanticists, that the current system is unjustified and discriminatory. With a little bit of licence, it may be referred to as the only substantial controversial issue in bilateral relations. Taking into account the US position, the arguments usually deployed are that the criteria for the admittance to the programme are strictly set by Congress and at the moment there is no will to relax them because of national security concerns. Although President Bush announced in February 2005 that the State Department will negotiate “roadmaps”

with nine countries to work out a way to the VWP, so far has been little to no progress. In fact, the road maps lack specificity, target dates and concrete benchmarks to measure the progress. This has even been recognized by the Commission, and at the EU-US summit in Vienna in June 2006 the Commission President Barroso addressed the issue again, suggesting that the lack of process could lead to retaliatory measures on part of the EU (such as the introduction of visas for certain categories of US citizens).

In the US, however, these developments as well as diplomatic lobby of the new member states has precipitated a debate on the current criteria for the Visa Waver Programme. Some members of Congress as well as think-tanks[57] argue that the criteria have to be modified, in order to take into account US foreign policy interests while reconciling the internal security concerns. The only proposal currently on the table, however, does not seem to be the best solution. In May 2006, senator Santorum (Republican, Pennsylvania) tabled a proposal as part of the Comprehensive Immigration Reform (CIR) Act that would provisionally expand the Visa Waver Programme to countries on condition that they are members of the EU, do not pose threat to US national security (according to the avis of the Department of Homeland Security) and contribute at least a battalion (i.e. at least 300 troops) to US led operations in Iraq or in Afghanistan. Although it can be considered as a step in the right direction, it will certainly not solve the problem. Firstly, it is only Poland that would currently fulfil all the three criteria. Most of the other countries would probably not qualify, depending on the interpretation –although the Czech Republic deploys about 96 troops in Iraq and 220 in Afghanistan but about 100 of those in Afghanistan are part of the UN-led mission, not the US-led operation. If the visa is waived only for Poland, this would certainly not contribute to the objective of appeasing the other governments – as they would still view this as discrimination. One could for instance question whether by quantifying the extent of military support to the US smaller countries like Latvia or Lithuania are being discriminated against, as it is arguable more difficult for them to deploy the kind of forces that a large country like Poland can.. However, the amendment has not even been enacted, as it failed to win the

[57] See for instance "Road Maps for Visa Waver Programme Lead Nowhere" or "With a Little Help from Our Friends: Enhancing Security by Expanding Visa Waver Programme" by James J. Carafano, the Heritage Foundation

approval of the House of Representatives and to be signed by the President. Another consideration which has often been raised in the region recently is a possible link with the US intention to ask one of the new member states (probably Poland or the Czech Republic) to locate the third US anti-missile base on their territory. In this respect, the political elites of countries under consideration would see the visa waiver as a necessary concession on part of the US, if creation of such a base were to be agreed. But as in the case of the Senate proposal mentioned, this would address the issue of visa waiver only for one or two countries and could lead to further frustration and deterioration of relations with other governments in Central and Eastern Europe.

The expansion of the VWP thus requires more thorough examination of the conditions of enrolment. Without question, none of the new EU member states poses a significant risk to US security in terms of terrorism, and certainly no more than some countries currently in the programme. Illegal immigration might be cause for more concern, but still not enough to justify the retention of visas. Firstly, much better mechanisms for tracking illegal residents through the US VISIT programme are now in place which apply to visa waiver countries, too. Secondly the migration flows from these countries are negligible compared to immigration pressures the US is facing from Mexico and other developing countries. Thirdly, further EU countries (such as Finland, Spain and Portugal) opened their labour markets in 2006 to the workers from new member states which would further diminish the incentive to work illegally in the US. In terms of the security of travel documents, all the new member states are bound by EU legislation, by virtue of which they are introducing ePassports, and due to the increased Community regulation of issues such as migration or border control they have to follow the EU-set standards as well as other countries on the VWP. There are sufficient guarantees in the Visa Waver Programme to terminate a country's participation immediately should sudden problems (such as an increased number of illegal overstays) occur. The only criterion that the new member states currently do not meet, i.e. 3% refusal rate criterion, is a very subjective one and based on a discretionary judgement of consular officers and whether it is justified for further application is highly dubious.

Therefore there does not seem to be a serious justification for not including the new EU member states as well as other countries (South Korea is often spelled out as a

prime example) in the VWP. The foreign policy impact of this move would be enormously beneficial both for the US and the EU and would comfortably supersede virtually unfounded internal security concerns in relation to the new EU member states.

4.4. European Union – easier access to citizens of neighbouring countries a top priority?

Although it has been argued that the foreign policy aspect is somewhat neglected in the current US thinking on visa policy, the same could apply to the European Union. As has been mentioned, the EU when deciding to which countries it should apply visa restriction should *inter alia* take into consideration the EU external relations, including the implications for regional coherence and reciprocity. However, there is a certain discrepancy between the rhetoric and reality.

The most striking example is the Union's attitude to its neighbours. Without question, one of the aims of the European Neighbourhood Policy (ENP) was to give the EU´s neighbours, currently without the prospect of becoming members, a privileged status in EU external relations. Although the whole framework of this relatively new policy is still being created, the EU will not have the same kind of incentives available to exert its "soft" power over its neighbours as in the case of enlargement policy. One of the few tangible benefits that the EU can offer to citizens of neighbouring countries is an easier way to travel to the EU. This is not something to be underestimated – if the Union is to be taken by those citizens as a model, then it has to give them the possibility to experience the way EU works, especially for business and education purposes. Visa facilitation could thus be an extremely powerful tool in this respect.

Another problem in EU visa policy towards neighbours stems from the effects of the 2004 enlargement. Many neighbouring states such as Ukraine or Moldova enjoyed a privileged relationship with the new EU entrants, including visa free travel, which was important to maintaining existing close cultural, societal and also economic links. As a consequence of EU accession the new EU member states had to introduce visa restrictions for their Eastern neighbours because of the necessity to harmonise their

visa requirements with EU legislation, namely the “positive” and “negative” visa lists. However, due to the fact that the new EU members do not fully apply the common visa policy because they are not part of the Schengen zone, they still offer some privileges to citizens of neighbouring countries, including simplified visa clearance process or granting of visas for free[58]. For some countries, namely Poland (due to close links with Ukraine) and Hungary (close links with some of the Western Balkan countries, particularly Serbia, with a significant Hungarian minority) the visa policy constitutes an important element of their foreign policy leading to balanced and friendly relations with neighbouring countries. This advantage will disappear when the new member states join Schengen, (originally envisaged for the end of 2007 but now likely to be delayed by at least a year), when these countries will have to fully apply the existing *acquis* including standard Schengen visa fees and procedures. Given the high volume of travel between the EU Eastern neighbours and the new member states[59], the disappearance of the existing privileges might make it even more difficult for the citizens of these countries to travel to the new member states.

The short-term perspective of lifting the visas completely for EU neighbours seems to be unrealistic for the moment, because countries such as Ukraine, Moldova or the Western Balkan countries still have quite a high migration potential into the Union, and visa restrictions remain the way of controlling this process. Another reason why it is not possible to lift visas is the insufficient implementation of migration, border management and visa policies in the EU neighbouring countries themselves. The high rate of counterfeit travel document or identity card use remains a serious problem, despite the fact that the EU is pouring a lot of money (such as the CARDS programme for Western Balkan countries or TACIS for former Soviet Union) to improve the practices of issuing identity documents, as well as to improve border management. Trafficking in human beings and poor border control also pose serious problems for the EU´s immediate neighbours, and strengthening both technical and human resources at the borders, including technical equipment and training and deployment of additional staff in order to bring the neighbouring countries closer to

[58] Poland and Hungary did not introduce visa fees for citizens of Ukraine and Moldova even after EU accession. The Czech Republic, Slovakia and the Baltic States lifted visa fees for citizens of Ukraine as a response to unilateral visa waiver of Ukraine to the citizens of all the EU member states in August 2005. Similarly, the Czech Republic and Slovakia do not charge the visa fees to applicants of most countries of Western Balkans

EU standard, is a prerequisite for the eventual lifting of visas. However, many experts doubt that strict visa regimes can actually prevent the organized crime, trafficking in human beings etc. while they do make it extremely difficult for others to travel to the EU legally.

But even without lifting the visa obligation for certain countries completely, it is still possible to make travel to the EU easier through the so-called "visa facilitation process". This involves some categories of "wanted" travellers, such as students, researchers, school kids, journalists or businessmen by for example lifting visa fees, processing applications more quickly, simplifying the documents to be presented or exempting them from visa requirements completely. In contrast, the EU insists on concluding readmission agreements with countries to be considered for visa facilitation, enabling a swift repatriation of illegal immigrants, regardless of their nationality, who enter the EU (Schengen area) through the territory of neighbouring countries.

There is still some inconsistency in the EU´s approach to visa facilitation. The first country to benefit from visa facilitation was Russia (October 2005), despite the fact that it does not fall under the framework of the European Neighbourhood Policy. Ukraine started visa facilitation talks in November 2005. In contrast, the countries of Western Balkans (who are not part of the ENP, either but have been repeatedly recognized as candidates for EU membership)[60] have not started visa facilitation talks at all, and they do not even have a roadmap, despite certain moves in the Commission to prepare the strategy[61]. The Commission, which can negotiate readmission agreements, has also not taken any steps to do so with Western Balkan countries except for Albania. A recent report of the International Crisis Group points to the fact that about 70% of university students in Serbia have never travelled outside the country[62]. This certainly does not contribute to the positive image of the EU in the region, and substantially limits the EU´s impact on developments there. The very stringent conditions imposed on visa applicants lead to a sense of isolation

[59] For instance in 2004 Polish consulates in Ukraine issued about 575,000 visas whilst German consulates only about 123,000 visas
[60] See for example European Council Conclusions of Santa Maria da Feira (2000) or Thessaloniki (2003)
[61] Commission decided in May 2006 to propose to the Council to authorise the start of visa facilitation agreement with Macedonia

generally felt in EU-neighbouring countries, and the idea of a new "paper" curtain emerging across Europe, dividing the EU from the rest of the continent, seriously undermines the effectiveness of the EU-policy of soft power and inclusion.

Another way of mitigating the enlargement effect on EU visa policy is the Commission proposal for the regulation of local border traffic at the future EU external border.[63] Some of the member states have local border traffic systems in place; however, no EU-wide measure has been adopted so far. The intention is to give easier access to the residents of regions outside the EU, but situated on its external border[64] to adjacent border regions in the EU, by issuing a special type of visa (the so-called "L" visa) with limited territorial validity which will be free of charge or less costly, will be issued for a period of one to five years and will entitle its bearer to multiple crossings to the issuing country for a maximum period of seven days for up to three months altogether within each half a year of the visa validity.[65] Additionally, the applicants would not have to prove adequate financial subsistence for obtaining this kind of visa. Undoubtedly this is another positive step in the right direction which should make it easier for certain categories of regular visitors ("commuters") to travel to the EU. But the question remains whether the regulation of local border traffic regime is going to make much difference. Firstly, it applies only to the residents of the border regions as defined in the proposal, and enables them to travel only to the same border regions on part of the EU territory. For instance in the case of Ukraine, the only large town a sufficient distance from the border is Uzhorod, so the number of people who could benefit from this regime remains rather limited.[66] Secondly, the proposal is still in the legislative process and is moving forward slowly, so there is a risk that it will not even be adopted before the new member states join Schengen. There is also no guarantee that the visas will be free or available at a reduced cost – this is left at the discretion of member states. All in all, the relaxation of travel restrictions for local border traffic will not solve the problems of citizens of neighbouring countries hoping to travel to the EU without hindrance. .

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[62] International Crisis Group: EU Visas and Western Balkans. Europe Report No 168, 29 November 2005
[63] COM(2003) 202 of 14 August 2003
[64] Border areas are defined in the proposal as areas extending up to 50 km from the external border
[65] Ibid

5. Effectiveness of current US and EU visa policies – do not forget about the applicants

Visa policy is a traditional way of maintaining control over the internal security of a country by regulating its contact with the citizens of foreign countries. Both the US and the EU are aware that the visa process should not, in theory, hinder the legitimate rights of third country nationals wishing to enter their territories for lawful and legitimate purposes, such as business, education, cultural relations or tourism. However, the practice shows that this is not always the case. US or EU citizens as well as the policymakers, who generally do not have to undergo visa procedures as most of them can travel freely around the world, can hardly imagine the obstacles that visa applicants – most of them law abiding citizens posing no security threat – have to undergo whenever they want to travel to the EU or the US. The internal security concerns and foreign policy considerations have overshadowed the human dimension of visa policy and its impact on people for whom the visa process determines the first impression on the country they are intending to visit.

5.1. Visa and related costs

The first non-negligible obstacle relating to *acquis*ition of visas are the costs incurred. This does not relate only to cost of the visas themselves but to costs of travel to the consular location (sometimes required several times), salary lost, and costs of all the supporting documentation which normally has to be translated to the official language of the visa issuing country.

The harmonised cost of the basic US non-immigrant (visitor) visa (B-type)[67] around the world is 100 USD. This seems to be quite a high amount but the State Department officials argue that it is a multiple-entry visa with a long validity, issued for most countries for a period of five to ten years[68] which enables repeated travel to the US for up to three months over this period. It is also argued that the visa fee helps to maintain a dense network of US consulates, and a huge increase in the

[66] Boratyński J., Gromadzki G., Sushko O.: How to Make a Difference? EU-Ukrainian Negotiations on Facilitation of Visa Regime. Stefan Batory Foundation, October 2005

[67] For more detailed classification of the US non-immigrant visas, refer to US Citizenship and Immigration Services in the Department of Homeland Security

demand for US visas has forced the administration to open representations in new locations, especially in India[69]. On the other hand, the fact that visa restrictions apply mostly to citizens of developing countries makes it much more difficult for these individuals to travel to the US as this amount is still comparable to or exceeds average monthly salary, and moreover is non-refundable. If one adds the necessity of enclosing a bank statement proving that the applicant has sufficient funds on the account, in many cases obtaining the visas becomes virtually impossible.

The cost of a short-term Schengen visa is currently 35 €. However, a recent political decision of the Council decided to raise the standard fee charged to Schengen visas to 60 €[70] as of 1 January 2007. This decision is a reaction to the French proposal arguing that the cost of visa processing will increase due to the creation of Visa Information System and the obligation of consular offices to collect and process biometric identifiers. But a number of member states would be opposed to an *en bloc* increase of Schengen visas, which would clearly run counter to the external policy objectives of the EU, if no compensatory measures were agreed. Thus, the political agreement also involves an extended scope of granting visa fee waivers[71]. Also the increased fee will not apply to countries that have concluded or are in process of negotiating visa facilitation agreements. This still would not apply to many EU neighbouring countries who would be most affected by the increased visa fee (currently only Russia and Ukraine are negotiating or have concluded such agreements). The Council has therefore invited the Commission to bring forward the mandate to start negotiating such agreements with the countries of Western Balkans. This would still leave the poorest countries of the continent, i.e. Moldova[72] or the South Caucasus countries (Georgia, Armenia, Azerbaijan) subject to this increased visa fee if no decision to start visa facilitation talks is taken by 1 January 2007.

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[68] "Breaking the Visa Backlog" Interview with Tony Edson, Deputy Assistant Secretary for visa services at the State Department, Business Week Online, 24 April 2006

[69] Ibid

[70] Council of the EU, Press Release, 27-28 April 2006, 8402/06 (Presse 106)

[71] Ibid. The visa fee waivers would include children under 6 years, school pupils and students on school excursions, researchers and *ad hoc* waivers that can be granted by individual member states for the purposes of promoting cultural, foreign policy, development policy interests or for humanitarian reasons

[72] In relation to Moldova, Commission was mandated to undertake preliminary consultations with member states on the feasibility of visa facilitation. The Commission will present its report prior to the October 2006 meeting of Justice and Home Affairs Council

Both the US and the EU do not generally apply visas to rich or developed countries while they do so in respect to most of the developing, and therefore much poorer countries. Although visa fees might not seem too high by Western standards and which might reflect the costs incurred by consular offices, it begs the question whether the system as it stands is fundamentally unjust. The recent EU decision referred to goes exactly in the direction of shifting the burden for increased visa issuance costs, introduced primarily because of the West's own concerns of its internal security, towards poor third world countries, creating further deterrents to legitimate travel and making it more difficult for many citizens of developing countries to interact with liberal developed western societies. Some studies demonstrate the absurdity of this system. For instance the Macedonian citizens are estimated to spend as much as 10 million € a year on EU visas which accounts to as much as one third of the overall assistance the EU has pledged to Macedonia under the CARDS programme for 2005. Thus, this assistance money can, therefore, basically be seen as reverting to the pockets of EU governments[73].

5.2. Additional costs, absence of firm rules and complicated procedures

For US visas, the visa fee itself is one of the few direct costs incurred by applicants because consular officials require very little other official documentation. The process of applying for visas is available on the websites of the State Department[74], Department of Homeland Security, on a special website devoted to travel to the US[75] and on the websites of the embassies and consular representations in most locations. So finding the necessary information is quite easy, as it is also often available in the local language. The main challenge that the US consulates had to tackle in the post 9/11 period was the introduction of compulsory interviewing of all the visa applicants, tougher screening process for Mantis and Condor visa checks as well as tougher inter-agency review of applicants (which has been described in more detail above) and taking biometric identifiers which has led to significant delays in some locations. While the administration managed to significantly speed up the inter-agency review process and the average clearance of Visa Mantis is now even

[73] http://www.worldpress.org/print_article.cfm?article_id=2339&dont=yes
[74] www.UnitedStatesVisas.gov
[75] Destination USA: Secure Borders, Open Doors

quicker than before 9/11[76], the interviews still remain the main problem in some places where there is a huge demand for visas. While normally it takes only a few days to set up an interview with US consular officials in most places in Europe, for example in India an applicant has to wait for an average of 189 days in Chennai and 170 days in Mumbai[77]. In Havana, the official reported time for setting up an interview is 538 days. But it seems that the State Department is making an effort to react to this situation quickly, e.g. by extending the premises in certain highly exposed posts (Mumbai) or opening the consulates in new locations (Hyderabad).

It is still not such an easy job to obtain a visa for the EU countries, even for the Schengen area. Firstly, the consular practices of different member states differ significantly. There are some minimum requirements on the documentation supporting the application, but some consulates might require other supporting documents such as those proving the purpose of a journey (letter of invitation, organised trip voucher etc.), travel arrangements (plane ticket, car documents), means of subsistence, proof of accommodation, proof of residence and links to the country of residence (such as real estate certificates) or proof of professional and social status[78]. Very much is left to the discretion of consular officers and established practice in each consular location and the overall number of supporting documents can be huge. Despite the fact that all these documents are intended for the consular officials to make a judgement whether an applicant constitutes a risk of breaching immigration laws, national interest or security, it is highly doubtful whether such an extensive list is necessary to determine the admissibility of applicants to the EU. The cost of having the documents translated further increases the cost of application. Moreover, the list of required supporting documents is often not firmly established and not readily available as the recent report of the Batory Foundation points out[79], so it often leads to applicants being asked to supply additional documents which might lead to repeated trips to the consular offices. Unlike in the US, there is no Commission-run portal serving as a gateway for the applicants to learn about the process of applying for Schengen and other EU visas. The information available at

[76] "Breaking the Visa Backlog" Interview with Tony Edson, Deputy Assistant Secretary for visa services at the State Department, Business Week Online, 24 April 2006
[77] www.state.gov
[78] See Common Consular Instructions, Chapter V: Examination of Applications and Decisions Taken

the Commission website is far from being user-friendly and is often not even updated. The interactive portal MediaVisa.net is a private initiative, and one would certainly assume that such information should be made available at the official websites of European institutions, with possible links to the relevant national consular representations.

Needless to say, complicated, non-transparent procedures required by certain consulates leading the applicants to frustration over the whole process become a feeding ground for corruption and emergence of all kinds of suspicious "service providers" who collect additional fees from the applicants to manage the visas for them. These services might relate to the assistance with filling the visa application, translating additional documents or avoiding the queues, or placing on a waiting list with a place guaranteed. Obviously all this is provided for an additional fee the cost of which can go up to 100 €[80], and creates an extra burden, as many of the applicants prefer to pay this extra amount to make sure that they will get the application right. The presence of these intermediaries often gives ground to doubts about the attitude of consular staff and their inclination to bribery. Such was the case of the widely publicised scandal at the German embassy in Kyiv which enabled many applicants to get the visas without sufficient review[81]. Other cases involve the French Consulate in Sofia selling an estimated 20,000 to 25,000 visas to Bulgarian prostitutes[82] or the Belgian Embassy in the same location accepting bribes or using front companies making fictitious requests for visas.[83] These revelations lead to serious questions about the credibility of the EU policy in the neighbouring countries – while the EU is striving to promote transparency and good governance in the neighbouring countries, its own officials are implicated in corruption in the visa issuance process.

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[79] Visa Policies of European Union Member States. Monitoring Report, Stefan Batory Foundation. Warsaw, June 2006

[80] The report of the Batory Foundation points to the cases of the waiting list "manager" at the French consulate in Minsk, charging between 30 to 100 € for placing people on the top of the waiting list, or a Polish consulate in Kyiv charging 30 € for a swift, three-hour visa procedure

[81] This was enabled on the basis of the so-called "Volmer" decree. This internal instruction was issued as a reaction to complaints that visa issuance at German embassies was too strict, and so the consular officials were supposed to decide in favour of applicants when in doubt. This has led to a huge number of visas issued particularly in Kyiv where many visas were issued to prostitutes, human traffickers and members of criminal networks. For more info see for example http://www.dw-world.de/dw/article/0,1564,1495078,00.html

[82] International Crisis Group: EU Visas and Western Balkans. Europe Report No 168, 29 November 2005, pg. 12

[83] Scandal Hangs over Belgium's EU Presidency, Telegraph, 27 June 2001

5.3. Accessibility of consulates

An important element to bear in mind is that applicants often have to travel a long way to lodge their application. Particularly for geographically large countries such as Ukraine, Russia or Turkey, this can be an additional hindrance especially if more visits to the embassy are required. The situation should generally be made easier with the Schengen visas which enables applicants to lodge their applications at a designated representation of another member state where the destination country does not have a consulate in the relevant location[84] which can then in principle issue visas on behalf of the destination state (the principle of representation). However, the principle of representation is not automatic in the current system (apart from the Benelux countries) and is subject to prior arrangements among them[85]. If an agreement on representation is not made, applicants have to travel to another country which has the appropriate consular facilities of the country of destination. Where that country itself imposes visa restrictions against the applicant, this means, quite apart from the other expenses attendant on travel, having to get a visa to apply for a visa. Moreover, the fact that not all the EU members are in Schengen yet make things even worse as those outside the system have not made arrangements on mutual representation on accepting visa applications like in the Schengen system. If we take for instance the example of Moldova, only a very few member states have representation there. For instance, if a Moldovan citizen wants to travel to Slovenia or Cyprus, he or she has to travel to the consulate with territorial jurisdiction in Budapest which is about 1000 km from Chisinau, and moreover an applicant has to acquire Hungarian visas first. For other destinations they have to travel either to Bucharest (Austria, Belgium, Denmark, Finland, Ireland, Italy, Portugal, Slovakia, Spain and Sweden), Kyiv (Latvia, Lithuania, Greece and the Netherlands) or even Moscow (Malta)[86]. A Georgian applicant to travel to Hungary, has first to travel to Kyiv, or a Macedonian or Bosnian applicant for a Czech or Slovak visa has to travel to Sofia and Belgrade respectively (despite the fact that he or she then gets the visas for free). Many other examples like this could be identified in Europe due to the continued existence of the two-step approach to Schengen. Thus a swift expansion

[84] For the list of representing countries, see Annex 18 to Common Consular Instructions
[85] See the Common Consular Instructions, Point II.1.2
[86] Ibid, pg. 19

of Schengen to include the new member states would surely make things easier for many applicants from Eastern Europe and the ex-USSR wishing to travel to some of the EU member states, despite the fact that they might lose some privileges (such as free visas for some new EU member states). One of the tangible results that should make things easier for travellers to the Schengen countries is the recent decision to allow transit through the non-Schengen countries (i.e. the new member states of the EU) for holders of valid Schengen visas for up to 5 days.

A further complication that might arise is the necessity to appear in person for the first time at the consulate because of need to capture biometric data. Until now, the Common Consular Instructions provided for the possibility of submitting the application through a travel agency or a commercial intermediary (in case of an organized trip for instance) which is used to a varying degree in different countries. But now all the applicants will have to appear in person at the consulate at least for the first time for the officials to capture their biometric data[87] which might cause further pressure on the capacities of consular premises, longer waiting times and less comfortable conditions. This can be particularly difficult for large countries where travelling to a consular location might prove extremely difficult for applicants. In this respect, the provision in the Common Consular Instructions relating to the possibility of outsourcing the capture of biometric might provide the right solution.

6. Key points as a conclusion

The visa policy requires the United States and the EU to balance delicately between the internal security considerations, foreign policy goals and issues concerning human rights of the visa applicants. Striking the right balance between the three priorities that the visa policy should ideally meet, however, turned out to be increasingly difficult in post 9/11 environment, when the internal security

[87] According to the current proposal amending the CCI, the biometric identifiers will be retained for five years, so it will not be necessary to make repeated visits to the consulate during a 4-year period from the first submission of the application if the local consular practice provides for the possibility of submitting visa applications through travel agencies or commercial intermediaries

considerations tend to prevail, often without sufficient justification or adjustment concerning the other priorities.

Increased concerns over security of visa issuing have led to complicated and more costly procedures being introduced in both the US and the EU. Although they can help to meet the legitimate security concerns of both parties, they can make lives more complicated for the visa applicants, and can result in more alienation of the citizens of the countries to whom the visas restrictions apply. They can also have significant impact on tourism and trade. For this reason, both the EU and the US should work towards a more balanced approach to the visa issuing process which would satisfy the internal security concerns and the legitimate right to travel, be it for tourism and business, as well as foreign policy goals of both the EU and the US.

Also, it has to be taken into consideration that visa policy is still closely interlinked with the foreign policy objectives of both the EU and the US and can have a significant impact on their relations with third countries. Lifting or facilitating the visa requirements does not necessarily have to mean diminished control of these entities concerning migration flows or preventing illegal perpetrations by terrorist or others who pose a threat to national security. Those countries should adjust the visa policy to the challenges of the 21st century by excluding some absurd cases that have appeared in the visa procedures. This would help greatly to approving the relations with countries who can be considered as important partners, work towards improving of the image of both the US and the EU in these countries, and sending a gesture of goodwill to those of their citizens who wish to travel there for legitimate and lawful purposes.

Key recommendations:

- The enrolment of new biometric identifiers of the visa applicants should be made subject to strict data privacy rules in order to limit possible abuse as much as possible, especially with regard to the fact that the biometric technology is relatively new, and new ways of abusing it can emerge. The visa applicants should have sufficient remedies to rectify information which is incorrect.

- Interoperability of databases containing data of visa applicants with other law enforcement databases in both the US and the EU is important for internal security reasons, especially for tracking illegal and criminal activities. However, the access of other law enforcement agencies to information on visa applicants should be granted only in justified cases and not routinely.

- The visa applicants should not bear the costs of technology which is required in connection with the enrolment of biometric identifiers. Therefore, the increase in visa fees should not be justified by the use of new technologies. If so, the costs should be borne by the rich countries.

- The EU should look for ways of making the visa issuance process more effective. The possibility of setting up Common Application Centres is a good way forward, but still more could be done in terms of more effective use of human resources by setting up genuine EU consulates where the applicants could apply for any EU (or at least a Schengen) visa. This could prevent the cost of Schengen visas going up and simplify the work of the Visa Information System. Those countries who would be willing to issue joint visas could explore the mechanism of enhanced co-operation in the existing treaties to move ahead with joint consular facilities.

- The US Visa Waiver Programme should be expanded to those countries that recently joined the European Union, and other countries that do not pose any national security threat to the United States, such as South Korea. In the event that the swift expansion of the VWP is not feasible, an intermediate measure such as visa facilitation, opening up an easier way for citizens of these countries to travel to the US, should be considered.

- The EU visa facilitation process must take into account the external dimension of EU activities. Facilitating the travel between the EU and the neighbouring countries, either with a European perspective (Western Balkans) or where the EU is involved in the framework of the European Neighbourhood Policy should be a top priority, providing that the countries at stake improve their conditions

of border management, passport security and visa issuance. EU technical assistance in these respects should be a key component of European Neighbourhood Action Plans in the area of Justice and Home Affairs and in the Stabilisation and Association Agreements.