

Policy paper

"Implementation of the external dimension of the area of freedom, security and justice"

**Second meeting of the Future Group,
Brussels, 25 June 2007**

1) State of play

Further to a Communication from the Commission, the Council adopted a **Strategy for the External Dimension of the area of freedom, security and justice** in December 2005. The Strategy identifies key thematic priorities, principles, delivery mechanisms and tools for the external dimension of the area of freedom, security and justice.

The purpose of the external dimension strategy is two-pronged: (1) to contribute to the successful building of the internal area of freedom, security and justice and (2) to advance the EU's external relations objectives by promoting the rule of law, respect for fundamental rights and international obligations.

Relations with third countries should be based on partnership to tackle common problems and meet shared policy objectives. A differentiated and flexible approach to individual third countries and regions is warranted which recognises the importance of working with the EU's neighbours given their proximity. The broad range of instruments at the EU's disposal should be coordinated across the pillars. Moreover, EU Member States should mobilise their significant political, financial and operational resources, where appropriate, alongside the Community and Union to work towards common objectives. In addition to the ongoing work on geographic and thematic issues, the EU should take forward action on specific priority issues by means of Action Oriented Papers.

Finally, the Strategy provides for the Commission and Council Secretariat General to monitor progress and report to the Council. The first report was issued in December 2006; the next is due in June 2008.

2) Thematic and geographical challenges

Thematic challenges

Terrorist attacks have led to an increased international commitment to combat terrorism, as exemplified by the EU Action Plan on Combating Terrorism. The EU is reaching out to third countries, regional and international organisations to develop and deepen cooperation to combat terrorism.



The ever-growing sophistication in organised crime, including money laundering and other financial crimes, and cross-border trafficking in drugs, persons and arms can only be countered through improved law enforcement and judicial cooperation, both within the EU and externally, and through support for capacity-building in third countries.

Global migration, including the problem of illegal immigration, is set to continue. The EU has adopted a comprehensive approach to migration, addressing not only issues such as admission and reception, but also the root causes of immigration and its impact on countries of origin and transit. We have a blue print but much remains to be done to meet the identified objectives.

The failure of institutions, such as the judiciary and law enforcement bodies, in weak states and trouble spots throughout the world creates a vacuum which can be exploited by organised crime. The EU is supporting the transformation of weak or non-existent law enforcement institutions in certain third countries into properly-functioning bodies.

Legal certainty and predictability in relation to cross-border transactions is needed in an increasingly global economy. The ongoing negotiations with the U.S. on the transfer of passenger name records are an illustration of the difficult reconciliation of two legal systems with the potential of causing considerable economic damage to air carriers if we fail to find a solution.

Another requirement and policy priority is the protection of fundamental rights when thinking and working on security. We need to promote human rights in third countries and ensure that human rights are placed at the heart of law enforcement policies. As to the latter, developments in information technology and enhanced use of databases within the EU (SIS II, Visa Information System, possibly an entry-exit control system) will raise inter-alia the question of increased data exchanges also with third countries with implications for our data protection regime that need to be considered.

These challenges require a **comprehensive approach** in our relations with third countries. They cannot be addressed in isolation but need to be put into perspective with each other and with the policies and tools of other external relation actors so as to provide a coherent EU external relations policy, making best use of all leverages available.

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Geographic challenges

The main tenets of the external dimension of the EU's policy on freedom, security and justice are largely in place, notably as regards neighbouring countries which are the first natural partners for close cooperation.

This is a reflection of the indispensable geographic prioritisation in external relations. Comprehensive policies encompassing all aspects of justice, freedom and security are being developed with priority countries, such as candidate or neighbourhood countries, while with other countries cooperation will focus on specific issues.



Enlargement

Enlargement means the transposition of the *acquis*, as well as the transformation of institutions, in the candidate and potential candidate countries. The strengthening of institutions such as the judiciary and the police makes a decisive contribution to consolidating the rule of law and respect for human rights in the candidate countries.

Croatia may join in the next few years, followed by FYROM, and the other Western Balkan countries may have the status of candidate countries in the medium term. Turkey may also be closer to accession by 2014. The challenges of these possible enlargements will have to be embraced, notably with regard to securing the EU's external borders which will then be with Iraq and Iran.

These medium-term enlargement perspectives will also redirect the focus of the EU's external relations policy to the east and south-east of the EU. The recent adoption of the Black Sea

Synergy Communication, the Communication on applying the Global Approach on migration to the east and south-eastern regions neighbouring the EU and the Communication on a Strategy for Central Asia [to be adopted by the GAERC of 18-19 June] mirror this already. As regards the field of justice, freedom and security, the fight against organised crime (drugs trafficking, trafficking in human beings, smuggling of migrants) and migration are the most salient topics with these countries.

Western Balkans

Cooperation with the Western Balkan countries is intensive with the aim of strengthening stability and prosperity in the region in the light of the countries' European perspective.

Within the Stabilisation and Association Process, the EU is supporting the Western Balkan countries to develop their performance in the four priority areas of police and organised crime, integrated border management, judicial reform, and asylum and migration. The Action Oriented Paper on the Western Balkans of 2006 set out a number of recommendations to further this process. The pace of reform in the Western Balkan countries is uneven therefore we need to continue using the European perspective to drive the reform process in the four priority areas forward.

Many also non-European countries are actively supporting the reform process in the Western Balkan countries. Donor coordination is one of the challenges resulting from that situation. More effective coordination of assistance efforts of EU Member States, the European Community and the Council Secretariat General (CFSP) is a persistent challenge to which we have not yet found a satisfactory response.

Another challenge with the Western Balkan countries is increasing operational cooperation in particular in the areas of trafficking in human beings, drugs and arms trafficking. This has also been highlighted by the 2006 Action Oriented Paper on the Western Balkans. Since the



Commission has no operational capacities, this is a task that falls on the EU Member States. Europol could also play a useful role by providing targeted threat assessments.

European Neighbourhood Policy countries

The European Neighbourhood Policy (ENP) provides the political framework for our cooperation with the “near abroad”, i.e. our Mediterranean partners and the countries further to the East and Southeast. Our self-interest in upgrading policies in these countries is self-evident – they are at the doorsteps of the EU.

The ENP builds upon existing agreements between the EU and the partner in question (Partnership and Cooperation Agreements or Association Agreements). The central element of the ENP is the bilateral ENP Action Plan agreed between the EU and each partner. The ENP action plan sets out an agenda of political and economic reforms with short and medium-term priorities and has a chapter on justice, freedom and security policy. Implementation is being discussed in relevant subcommittees.

The European Neighbourhood Policy includes countries as diverse as Ukraine and Algeria. The intensity and depth of the cooperation depend largely on the commitment of the third country concerned. Therefore even within a common policy framework differentiation is indispensable. A tailored approach is required to respond to the particular situation of individual countries and regions. There can be no “one size fits all” strategy.

The EU's proximity policy towards the Mediterranean region is governed by the comprehensive Euro-Mediterranean Partnership. The Mediterranean has a **strategic importance** for the EU's stability and security. The regional dimension of the MEDA programme has proven particularly successful in the area of justice, freedom and security, spreading a message of developing more confidence in cooperation among the countries concerned on such sensitive issues as migration, justice and police. This should be developed further and could serve as a model also for other ENP countries.

The Association Agreements and the ENP Action Plans provide a good basis for the bilateral dimension, also in the area of justice, freedom and security. However, cooperation is at quite different levels. Migration management (including readmission), and combating terrorism and illicit trafficking are the likely key areas also in the future, complemented by cooperation on institution building of police and the judiciary which are instrumental to achieve progress in the former areas.

Strategic partners: Russia, the U.S. and beyond

Russia is, together with the U.S., our main strategic partner in the field of justice, freedom and security.

The framework for our cooperation with Russia is the EU-Russia Common Space of Freedom, Security and Justice which is very comprehensive, ranging from counter-terrorism



to the fight against drugs trafficking, from migration and asylum to judicial cooperation in criminal and civil matters. It is widely acknowledged that this is the best-functioning of the four Common Spaces with Russia.

Assuming that the overall situation remains unchanged there does not seem to be a need in the near future to change the framework of our cooperation with Russia.

The transatlantic partnership with the U.S. is essential for the EU; it is a security partnership that has considerably gained in strength after the terrorist attacks of September 11, 2001. Six ground-breaking agreements were concluded subsequently which supplement the bilateral law enforcement and judicial cooperation of EU Member States with the U.S.

Differences over data protection issues are currently a stumbling block in our relations [Swift, PNR]. Our common goals are clear: to protect our citizens' security by making sure law enforcement authorities have the right information they need to do their work and to protect our citizens' fundamental rights and privacy. These goals are neither mutually inconsistent nor impossible to reach. It is time to start thinking what we have in common rather than the differences between our respective systems. This is the purpose of the high level Contact Group that has been set up to identify and develop EU and US commonalities in the protection of personal data.

Moreover, facilitated trade, travel and investment are the backbone of our economies and a reflection of our open, democratic societies. At the same time we must protect our citizens from terrorist and serious criminal threats. Balancing these elements in our border security policy is the challenge that the EU and the U.S. face. The EU and the U.S. should cooperate bilaterally and in relevant international fora in order to create an environment where travel is safe, secure, and expedited for bona fide travellers. Modern technology will play a key role in delivering targeted and more secure controls and allow us to focus our border control resources on identified risks.

Therefore, consideration could be given to common transatlantic space with more sharing of relevant information and at the same time more protection of personal data, expedited travel for bona fide passengers and more secure borders.

In a 10 year perspective we would also need to consider more comprehensive relations with other strategic partners like **India** and **China**, with whom relations have so far been limited but are of growing importance.

The EU-**India** Strategic Partnership and its Action Plan contain substantial elements regarding terrorism, organised crime, migration and consular issues. As a result a comprehensive high-level dialogue on migration with India was launched in 2006. An upgraded cooperation agreement is under discussion and would contain a whole range of issues which would aim at further developing cooperation in the above mentioned areas as well as adding issues such as protection of personal data and legal cooperation.



With **China**, cooperation on issues has been more narrowly focussed on migration and visa issues. We have annual High Level Consultations on fighting illegal migration and trafficking in human beings. The Commission also has a mandate for an EC readmission agreement, but it has proven difficult to launch the negotiations. Negotiations for a new Framework agreement between the EU and China have been launched which will widen the scope of cooperation with China substantially.

In the longer term perspective cooperation to facilitate people-to-people exchanges, also in view of meeting increasing labour demands, and combating illegal migration needs to be further developed with both partners. In this context the need for a readmission agreement with India could be reflected upon. Cooperation on migration, the fight against organised crime, corruption and drugs trafficking could be developed with China. Finally, a strategic cooperation agreement with Europol could be considered with both India and China.

Africa

The EU has intensified its dialogue on migration issues with African institutions and countries in 2006 on the basis of the Global Approach to Migration and the Strategy for Africa. The Global Approach to Migration marked a decisive step since it formulates coherent policies and action, addressing a vast array of migration issues and bringing together the various relevant policy areas including external relations, development, employment and justice, freedom and security. Migration issues are integrated into the regular political dialogue with African countries, based on Article 13 of the Cotonou Agreement, and are, where appropriate, further enhanced through specific Commission missions to key African countries. Mobility partnerships should be considered with African countries willing and committed to cooperate actively with the EU on the management of migration flows, including by fighting illegal migration and cooperating with the EU in the area of readmission and return.

Other countries / regions

In the context of the Global Approach to Migration as well as in the context of our drugs policy we have to look at countries of origin and transit further a field. This means that we need to engage in a dialogue also with countries in Central Asia, Iran and Iraq, Asian countries (China, India, Pakistan, and Afghanistan), some Latin American and Caribbean countries. We should use the institutional framework in place within which political and economic dialogue and cooperation relations have been established. It is important that such cooperation continues to be highlighted and given visibility.

A specific challenge: exchange of personal data with third countries

First pillar context

The EC Data Protection Directive¹ provides the framework for the exchange of personal data with third countries in the course of an activity within the scope of Community law except

¹ Directive 95/46/EC of 24 October 1995, OJ L 281, p. 31

where the processing operation concerns public security, defence, state security and criminal law. Although activities referred to in Titles V and VI of the Treaty on European Union fall outside the scope of the Directive, Member States apply the general data protection principles to law enforcement activities.

Under the Directive 95/46/EC, Member States may transfer personal data to countries outside the EU/EEA when there is an adequate level of personal data protection in the third country. A transfer of personal data from a Member State to a country *without* an adequate level of personal data protection is prohibited, subject to a limited list of specific derogations or unless adequate safeguards with respect to the protection of the privacy and fundamental rights of individuals are used. Following the criteria laid down in the Data Protection Directive, the adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations.

Therefore even if general rules could be agreed, these would only be one additional element to take into account during the adequacy findings by the Member State or the Commission. In no way this could substitute a finding of adequacy.

Third pillar context

The discussion of the proposal for a framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters is ongoing. The proposal contains a provision regulating the onward transfer of personal data received from another Member State to a third country. The proposal is not concerned with the direct transfer from a Member State to a third country since Member States are free to do so, unless there is an agreement on the same issue between the EU and a third country like for example in the case of transfers of passenger name record (PNR) data.

The Commission had originally proposed an adequacy decision at EU level for the transfer of personal data to third countries or international bodies. This approach has not been retained further to discussion in the Council with a view to objections raised by several Member States to a detailed provision governing the transfer of data to third states.

The current draft text does not lay down specific criteria governing the adequacy of data protection in a third state or international body, or define a procedure for establishing whether the data protection level is adequate.

However, the Commission would very much welcome at least the inclusion in the Framework Decision of guidelines to assess the level of data protection in the third state or international body allowing taking account of the data protection situation in the third country or the international body. This will facilitate the work of law enforcement authorities which otherwise may be reluctant to share data, which is the main aim of the Framework decision. Moreover, Member States have given the Council Presidency and the Commission a clear mandate to seek data protection guarantees in the case of PNR. The EU has a strong political interest in presenting a coherent policy in this sensitive matter by signalling to third countries



that data transfers can take place provided that certain guarantees are in place, whether regulated by separate agreements or within the framework of an overall instrument like the Framework Decision.

In the medium-term, and also in light of the development of the overall legal framework of an area of freedom, security and justice, it would be desirable to reconsider an adequacy decision at EU level since fixing an EU standard in such a procedure is a requirement for achieving harmonisation in Europe.

More generally speaking, the EU should promote the adoption of legal instruments of data protection and privacy and the EU and its Member States should be encouraged in their bilateral agreements with third countries to include meaningful and enforceable data protection clauses.

3) Questions:

- Does a comprehensive approach in the area of freedom, security and justice require conditionality in respect of development aid and other aspects of external relations?
- What financial resources are needed to support the implementation of the external dimension of justice, freedom and security that is constantly expanding?
- Besides joint visa application centres, which other fields are apt for Member States' pooling of resources in third countries?
- Would Member States support the creation of genuine European consulates?
- How can we raise public awareness of the EU's broad-ranging institution and capacity building activities in the areas of rule of law, judiciary, law enforcement and migration that could counterbalance the image of an EU only focussed on security?
- How to develop operational channels to exchange data with law enforcement authorities of third countries in full respect of data protection?
- Would Member States support the creation of an EU clearing house for the exchange of law enforcement data in key areas with third countries? What role for Europol in this regard?
- Would Member States be willing to strengthen the Immigration Liaison Officers Network? Would Member States support the creation of a Police Liaison Officers Network in third countries, reporting also to Europol?