Commission Communication on migration:
Adapting the Schengen Border Code

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On 4th May 2011, the European Commission published a new Communication on Migration [1]. In light of the on-going political turmoil in North Africa and the subsequent impact on southern EU member states – notably Italy and Malta – the Communication outlines current and future proposals with regard to migration issues. However, it is not limited to policy areas affected by the situation in North Africa, and is in fact a vehicle for demanding a range of political and institutional changes at both EU and Member State level. The Communication is split into five sections:

- Introduction
- Crossing the borders ('Coping with the crisis: short-term measures', 'External border controls', 'Schengen governance', 'Preventing irregular immigration')
- Moving and living in an area without internal borders ('Organised mobility', 'A consistent policy on mobility for third country nationals, including visas', 'A properly managed legal migration', 'Building an inclusive society by integrating immigrants')
- Providing international protection to persons in need
- Migration in external relations beyond the crisis ('A global approach to migration', 'Beyond the crisis: the EU and the Southern Mediterranean in partnership')

The Commission's Communication follows the European Council Conclusions of the 11th [2] and 25th [3] March, a European Parliament Resolution of the 5th April [4], and the Joint Communication [5] of the Commission and the High Representative [of the Union for Foreign Affairs and Security Policy] of 8th March. The 11th April Council Conclusions on the management of migration from the Southern Neighbourhood [6] and the Final Report of Project Group "Measure 6" on 29 measures for reinforcing the protection of external borders and combating illegal immigration [7] are not mentioned. The Communication lays the groundwork for 'a package of proposals' due on 24th May intended to 'ensure a coherent EU approach

in the area of migration, mobility and security with the Southern Mediterranean countries'. It is stated that the purpose of the current Communication:

> *Is to set recent and future policy proposals in a framework that takes account of all relevant aspects and allow the EU and its Member States to manage asylum, migration and mobility of third-country nationals in a secure environment.* (p.3)

Crossing the borders

The second section of the Communication deals with the massive population movements that have occurred since the outbreak of revolt and conflict in Tunisia, Libya and Egypt. It is noted that the EU and Member States have taken a number of measures to try and deal with the situation, something that has confirmed 'the need for increased solidarity at the European level and better sharing of responsibility' (p.6). The proposed method to achieve these goals is for greater financial and institutional power to be developed at the EU level: the Commission urges the Parliament and Council to support its proposal 'to enable the EU to create its own trust funds'. Support is expressed for extending a pilot project relocating migrants from Malta to elsewhere in the EU, and it is noted that the Commission may decide, 'if the relevant conditions are met, to trigger the Temporary Protection Directive' [8] in order to provide immediate and temporary protection for displaced persons unable to return home.

2011 will see further proposals 'on delivering solidarity in a holistic manner'. There are a number of legal and practical bases for these. Two articles of the Lisbon Treaty – 78(3) and 80 will be complemented by 'lessons learned from the situation on the Greek-Turkish land border, and the more general 'crisis in the Southern Mediterranean'. Article 78(3) allows the Council to adopt 'provisional measures for the benefit of the Member State(s) concerned' if faced with 'an emergency situation characterised by a sudden inflow of [third country nationals]'; Article 80 states that policies and their implementation will be 'governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. The Greek-Turkish border is of course where the first ever FRONTEX Rapid Border Intervention Team (RABIT) was deployed towards the end of 2010. The Bulgarian news agency Novinite last month reported that this mission has now been made permanent, and is to be expanded to the Bulgarian-Turkish border.

It is also noted that it is important for Member States to accept the resettlement of some persons currently in North African countries who are 'in need of international protection who cannot be returned to their countries of origin' (p.7). This is in order to maintain 'protection space' in those countries. The idea behind this may be that by permitting resettlement now, Member States will be able to have some degree of control over who enters their territory, as well as freeing up a migratory 'buffer zone' in countries hosting a large number of displaced people, decreasing the likelihood of uncontrolled or uncontrollable migration.

This leads into a section that deals directly controls at the EU's external borders. It is noted that 'control of the EU's external border must be continuously improved'.

References are made to the need to combat human trafficking, for which organised crime, rather than people's desire to migrate, is blamed. It is made clear that there is likely to be significantly increased cooperation between the border guards of different Member States in the future – 'the feasibility of creating a European system of border guards should be considered', based not on a centralised administration but rather 'the creation of a common culture, shared capacities and standards, supported by practical cooperation. It is easy to see FRONTEX as an embryo of such a system, particularly in light of its Greek-Turkish mission being extended to the Bulgarian border.

The importance of developing the European Border Surveillance System (EUROSUR) – intended to allow border authorities to have total awareness of the situation at the external borders - is also noted, and the Commission is to present a proposal during 2011 'to allow Member States' authorities carrying out border surveillance activities to share operational information and to cooperate with each other and with FRONTEX' (p.8). The Commission also states that it is 'urgent' that the Council and the Parliament approve the recent proposal seeking to amend the legal basis for FRONTEX [10]. The most recent controversy between the three institutions has been over a Parliament proposal to create an Advisory Board on Fundamental Rights positioned 'above' the agency, thus having a degree of independence; no delegation in the Council could accept the proposal [11]. Given the divergent positions of the Parliament and Council in particular, it remains to be seen whether the Commission's desired urgency will gain a foothold.

The Commission is also seeking greater power for EU bodies and institutions in order to deal with the governance of Schengen:

> *a clear system for Schengen governance is needed [which] should be based on a Community approach with participation of experts from Member States, FRONTEX and lead [sic] by the Commission.*

The Commission also suggests establishing a mechanism that would allow

> *The Union to handle situations where either a Member State is not fulfilling its obligations to control its section of the external border, or where a particular portion of the external border comes under unexpected and heavy pressure.*

It is possible to imagine an attempt to establish a legal basis for the EU to order FRONTEX missions to particular Member States, rather than the current situation in which a Member State requests assistance from FRONTEX. In light of the recent spat between France and Italy over the issuing of Tunisian migrants with visas allowing them to travel freely in the Schengen area [12], another mechanism is suggested that would allow 'for a decision at the European level defining which Member States would exceptionally reintroduce border control and for how long'. At the beginning of the section dealing with external border controls, it is noted that 'controlling access to its territory is one of the core functions of a state or area without internal borders' (p.7). It seems that the Commission may be seeking to privilege EU governance of the Schengen zone - an area without internal borders - over the governance of the states of which that zone consists.

Irregular immigration also receives attention, with the Commission stating that 'the fully and timely transposition by Member States of the 2009 Employer Sanctions Directive [13] is essential' (p.9), and that the 'low level of implementation' of the 2008 Returns Directive [14] 'is a source of serious concern'. It seems there will also be a significant rethinking of EU readmissions policy:

> [I]t no longer makes sense to seek stand alone mandates for readmission negotiations. Readmission agreements should moreover be looked at from a broader perspective of the overall relations of the EU with the particular partner country. To this end, the incorporation of enhanced readmission obligations into the framework agreements concluded with third countries is to be favoured. (p.10)

This may allow for the increasing use by the EU of readmission agreements as bargaining tools in negotiations with third countries. This would also tie in with the statement in the introduction that 'cooperation should also build on the principle of conditionality applied to migration issues' (p.3).

Moving and living in an area without internal borders

The third section deals first of all with 'organised mobility'. This boils down to increasing the ability of Member State and EU authorities to monitor and track movement across the external borders of the EU, for example through a European entry-exit system (allowing border control and immigration authorities to access data on third country nationals crossing borders), and an EU registered traveller programme, which 'would allow third country nationals to use automated border control making access to the EU easier for frequent travellers'. Consultation with the Parliament, the Council, and others will ensue before any specific proposals are made. The proposed Passenger Name Record system for flights coming into the EU (and now flights within the EU) – is not mentioned here, but should be taken into account when considering projects intended to allow the monitoring, regulation and control of mobility [15]. There will also be greater 'interagency cooperation' – e.g. between FRONTEX, EUROPOL and Member State customs and police authorities – in order to achieve the goals of 'securing' the external borders.

The lifting of visa obligations for nationals of certain third countries is described as 'largely positive', demonstrating that 'it is possible to ensure a well managed mobility in a secure environment' (p.11). A 'secure environment' here consists of one without irregular migration and in which public security is maintained – note the conflation between the two. This enthusiasm for visas is likely related to the proposal for an EU entry-exit system, which would allow immigration authorities to work out which individuals have overstayed their visa, and would 'complete' the Visa Information System (VIS) scheme. Indeed, it is noted that the main source of irregular immigration to the EU is individuals overstaying their visa. This may be why despite hailing visa waivers as a success, the Commission also intends to propose a modification to the Visa Regulation, so that under certain conditions 'the temporary re-introduction of the visa requirement for citizens of a third country' would be possible. Later in 2011 there will also be a Communication on

regional consular cooperation programmes, as well as examining 'how the setting up of common visa application centres could be facilitated'.

The next subsection, entitled 'a properly managed legal migration', seems to indicate that overall EU migration policy will be further subjected to an economic logic. Significant discussion is devoted to the need for managing legal migration in a way that will allow gaps in the labour market to be filled, if necessary permitting greater freedom of movement within the EU for third country nationals legally resident for employment purposes. 2012 may see a 'Green Paper on addressing labour shortages through migration in the EU Member States', while in 2011 reports will be issued on the Directives dealing with third-country long-term residents, students and researchers. The Commission also announces its intention to discuss the issue of family reunification with 'the Member States, the European Parliament and stakeholders', because 'as opposed to labour migration, Member States cannot pre-define the volume of such persons to be admitted' (p.13), and rights to admission for family reunification are enshrined through international law. There is a slightly ominous tone to this statement: there will be a Green Paper on this issue by the end of 2011, which may provide some clarity as to the Commission's intentions.

2011 will also see a 'Communication on a European Agenda for the Integration of third-country nationals', which will focus on 'migrants' participation in receiving countries, action at the local level and the involvement of countries of origin in the integration process'. In light of recent comments on integration and multiculturalism by the British Prime Minister and the German Chancellor, it will be interesting to see the Commission's contribution to the debate. Indeed, across Europe there is a significant trend developing amongst politicians of all stripes that seeks to demonise multiculturalism and migrants [16] and praises the benefits of a one-sided process of integration and establishment of a monoculture.

Providing international protection to persons in need

Significant discussion is given in this section to the proposals for a Common European Asylum System. The Commission announces its intention to put forward 'modified proposals on the Reception Conditions [17] and the Asylum Procedures Directives' [18] (p.14), as well as stating that 'a balanced agreement on the revision of the Dublin Regulation must be reached'. A list of five principles for a Common European Asylum System is provided, including perhaps most notably:

> *A EURODAC database which continues to support the efficiency of the Dublin Regulation, whilst also meeting other needs of law enforcement authorities but under very strict conditions.*

As reported by Statewatch in November 2010 [19], ten EU governments were then pushing for law enforcement access to the EU-wide EURODAC database, which holds the fingerprints of asylum seekers. A Commission proposal in October 2010 dropped the idea, but it appears it will now seek to reintroduce it.

The Commission also calls for strengthened practical cooperation between Member States, as well as the continuation of Regional Protection Programmes and an increase in the use of resettlement:

> *Resettlement must become an integral part of the EU asylum policy. It represents a life-saving measure for genuine refugees who might otherwise be obliged to a dangerous journey to a place of genuine refuge. It is also an important responsibility-sharing gesture towards countries of first asylum, most of which are developing countries.* (p.15)

The importance of maintaining 'protection space' and 'dialogue and cooperation on other issues of migration and border management' is again mentioned, and the Council and the Parliament are urged to adopt the Commission's proposed joint resettlement scheme. The insistence on 'genuine refugees' is notable. As stated in the introduction in reference to migrants who have recently arrived from North Africa, 'most of these are economic migrants and should be returned to their countries of origin'. The proposals in the Communication for harsher measures of deterrence and control are seeking to ensure that only those who can prove political persecution or 'economic validity' will gain entry to the EU.

Migration in external relations beyond the crisis

In order to try and better integrate migration issues into the EU's external relations 'to promote EU's interest and needs', a Communication on the Global Approach to Migration will be published later this year:

> *This policy framework needs to better reflect the strategic objectives of the Union, both external and internal and to translate them into concrete proposals for the development of our key partnerships (notably EU-Africa, Eastern Partnership, EuroMed Partnership and the enlargement countries).*

Again there is a significant focus on the perceived labour needs of the European Union, but it is also stated that:

> *The work on migration and development needs to be deepened and refined. The EU should step up its efforts to address the drivers of migration with a special focus on employment issues, governance and demographic developments.* (p.16)

There is also an outline of likely EU policy towards countries in North Africa, a topic on which the Joint Communication of 8th March provides more detail. Increased mobility of people is proposed as a way to enhance democratising processes in Southern Mediterranean countries, although provisions allowing this will of course come with 'appropriate conditionality… helping partner countries to reinforce capacity building in the areas of management of migration flows' (p.16-17). The EU's and Member States' willingness to institutionalise human rights abuses in their dealings with North Africa's dictatorial regimes [20] show that policy-makers can demonstrate a severe lack of principles. Whether they will manage to chart a new path with the proposals that are forthcoming this year and next remains to be seen.

There is no doubt a crisis in North Africa, but it is arguable whether the number of people that have reached the shores of Europe can be considered as constituting a crisis. At the beginning of April, 20,000 people had entered the territory of Italy, a country of 60 million people. In contrast, 150,000 migrants had by that time arrived in Tunisia, which has a population of nearly 11 million. This equates to Tunisia receiving 'almost 43 times as many people per capita relative to Italy.' [21] Indeed, in a speech that accompanied the release of the Communication, EU home affairs commissioner Cecilia Malmstrom stated that Italy is "not under extreme migratory pressure." [22] There are statements in the Communication that should be applauded, in particular those that call for greater attention to dealing with social issues in Southern Mediterranean countries. However, they are also problematic in that they are just statements, with – as yet – no substantive plans to back them up. Through defining recent events in terms of crisis, the Commission has taken the opportunity to try and push for more and greater powers for EU institutions when it comes to the control and monitoring of the EU's borders and the people who cross them. Any developments in these fields should be watched with great scrutiny.

There are two annexes to the Communication. The first provides a chart detailing all the legislative and policy initiatives related to the issues discussed; the second contains statistics on visa issuances, irregular immigration, non-EU population in member states, residence permits, and asylum applications.

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Footnotes

[1] European Commission, *Communication on Migration*, COM(2011) 248 final, http://www.statewatch.org/news/2011/may/eu-com-migration-com-248-11.pdf

[2] European Council, *Extraordinary European Council Declaration*, EUCO 7/11, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119780.pdf

[3] European Council, European Council Conclusions, EUCO 10/11, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf

[4] European Parliament, *Migration flows arising from instability: scope and role of the EU foreign policy*, 2010/2269(INI), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0121+0+DOC+XML+V0//EN&language=EN

[5] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *A Partnership for Democracy and Shared Prosperity in the Southern Mediterranean,* COM(2011) 200 final, http://eeas.europa.eu/euromed/docs/com2011_200_en.pdf

[6] Council of the European Union, *Council Conclusions on the management of migration from the Southern Neighbourhood,* 8909/1/11 REV 1, http://register.consilium.europa.eu/pdf/en/11/st08/st08909-re01.en11.pdf

[7] Council of the European Union, *Final Report of Project Group "Measure 6"*, 7942/11
http://www.statewatch.org/news/2011/mar/eu-council-29-meaures-frontex-info-exchange-7942-11.pdf

[8] Council Directive 2001/55/EC of July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:017:0022:0029:EN:PDF

[9] Novinite, *Frontex Mission in Greece Turns Permanent, Expanded to Bulgaria-Turkey Border*, http://www.thebulgariannews.com/view_news.php?id=125859

[10] Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)*, 7961/11, http://www.statewatch.org/news/2011/mar/eu-council-summary-of-positions-on-frontex-regulation-7961-11.pdf

[11] Council of the European Union, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)*, 9342/11, http://www.statewatch.org/news/2011/may/eu-council-frontex-9342-11.pdf

[12] EU Observer, *France and Italy propose reform of EU border rules*, http://euobserver.com/9/32232

[13] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0024:0032:EN:PDF

[14] Directive 2008/115/EC of the European Parliament and of the Council of 18 June 2009 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF

[15] Marie Hynes, *Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, http://www.statewatch.org/analyses/no-126-eu-pnr.pdf

[16] Liz Fekete, *Understanding the European-wide assault on multiculturalism*, http://www.irr.org.uk/2011/april/ha000021.html

[17] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF

[18] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF

[19] Statewatch News Online, *EURODAC: Ten EU governments want law enforcement agencies to have access to the EURODAC database (which holds the fingerprints of asylum-seekers)*, http://database.statewatch.org/article.asp?aid=30116

[20] Migreurop, *European borders: Controls, detention and deportations*, p.33-44 http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en_-_2-121110.pdf

[21] Migrants at Sea, *Tunisian Migrant Crisis vs. Italian Migrant Crisis – Comparing the Number*, http://migrantsatsea.wordpress.com/2011/04/03/tunisian-migrant-crisis-vs-italian-migrant-crisis---comparing-the-numbers/

[22] EU Observer, *Border checks to be allowed only under strict EU criteria*, http://euobserver.com/9/32268