

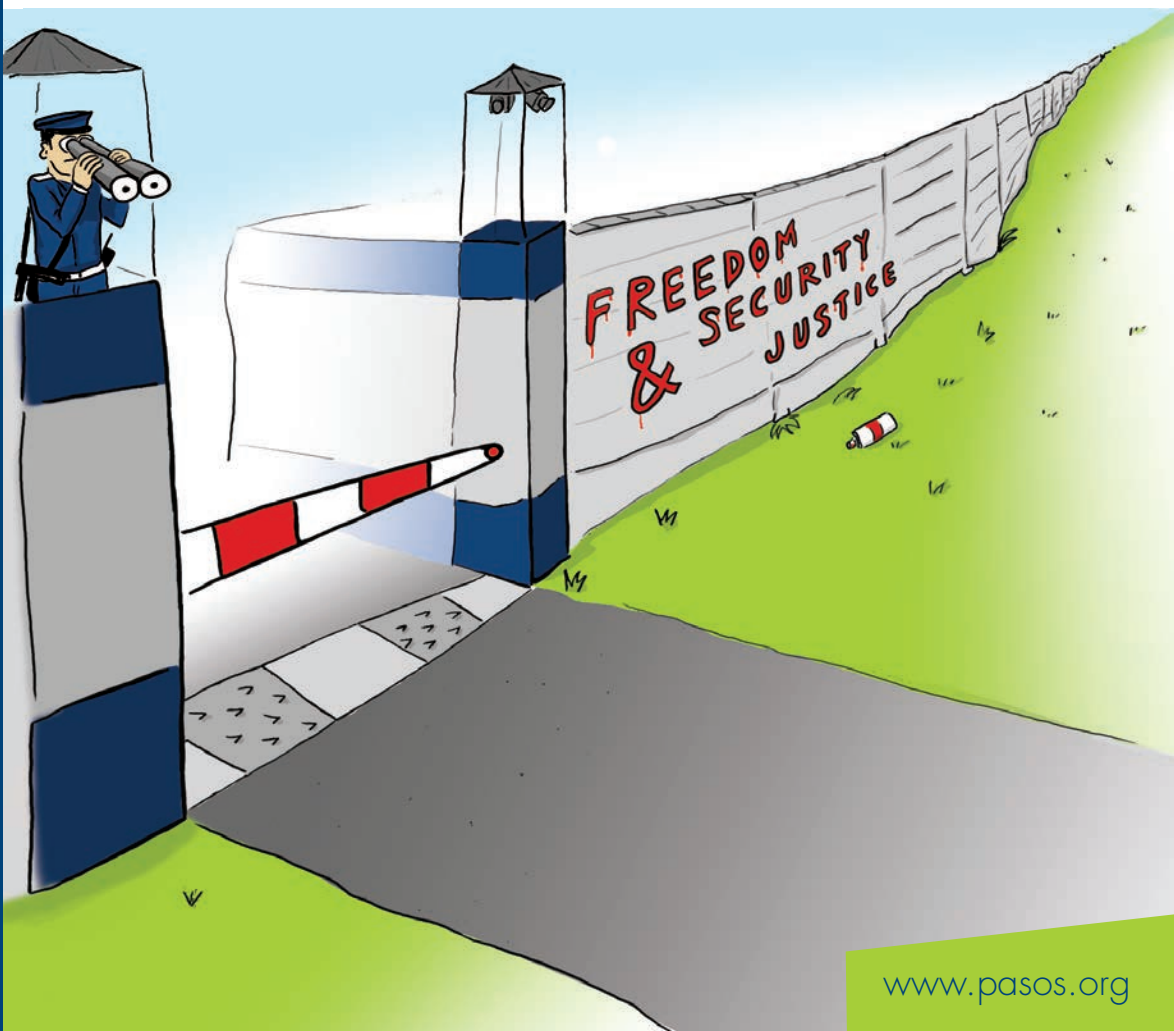
THE ROAD TO AN OPEN EUROPE

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Policy Association for an Open Society

*An Advocacy Handbook for Civil Society:
Understanding and Influencing EU Policymaking
in the Area of Migration and Visa Policies*

by Piotr Kaźmierkiewicz



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in the Area of Migration and Visa Policies**

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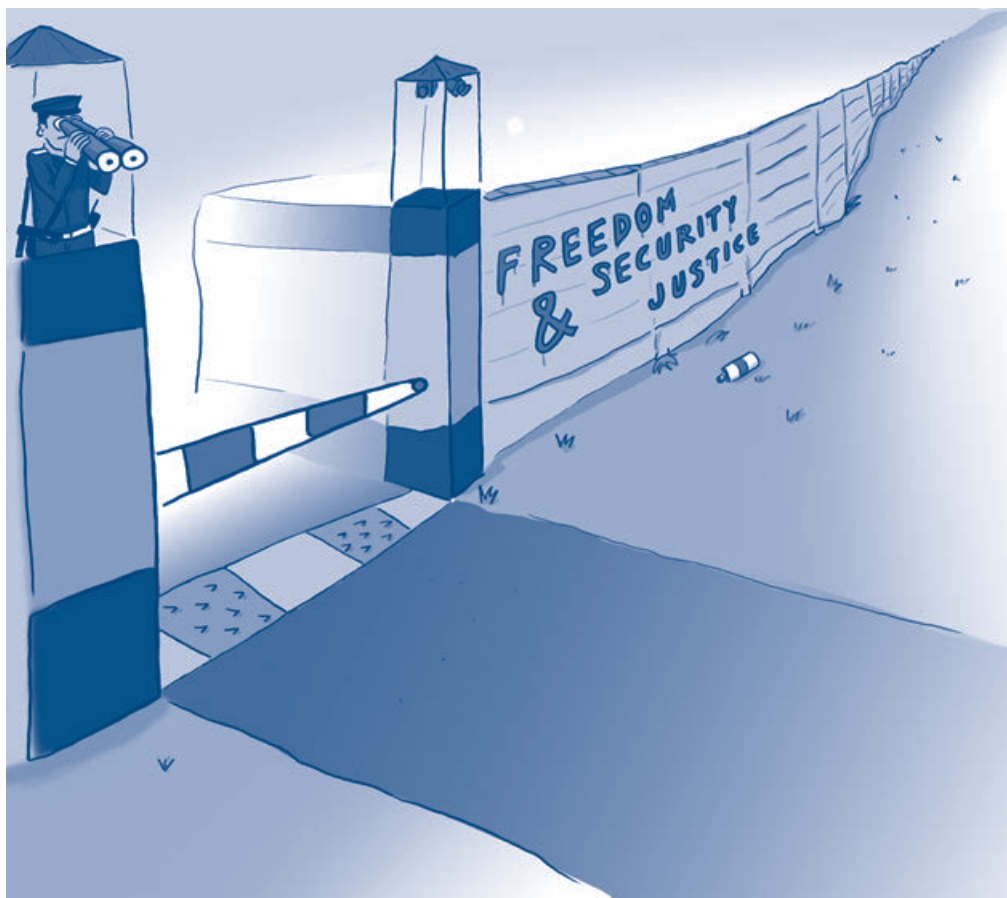
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Introduction:

Speaking Up for the Dream of 'Open Europe'

Freedom, security, justice ... the attainment and preservation of these in as comprehensive and effective manner as possible binds together the states of the European Union (EU) in their search for a balance between greater freedom and mobility, and the need to protect the EU's citizens through effective security co-operation and an independent justice system. They also serve as core concepts guiding the policies and procedures that touch the everyday lives of both EU citizens and the citizens of third countries.

In order to be able to interact with the policymaking process in the EU, an appreciation of both the synergies and tensions between these concepts must be combined with an understanding of the decision-making procedures and the actors involved. Faced with the dynamic and multi-level nature of governance in the EU, it is by no means an easy task to correctly identify and then target EU officials, and to influence the decision-makers and the public in EU member states.

As more and more policy issues and national legislation have become subject to EU rules, civil-society advocates have found themselves in greater and greater need of developing the set of skills and competences that will make their voices heard amid the noise of pan-EU debates. This is essential to enable them to prepare timely inputs into the formulation of emerging regulations governing issues of critical importance for securing civil and human rights. The challenge is particularly daunting for non-governmental organisations from outside the EU, which need to establish effective entry points to reach EU policymakers and societies and prove their credibility to various audiences, including their own governments.

To be effective in influencing the EU on any issue of social significance, it is essential to understand the complexity of the issue itself. But it is not enough to view it from the perspective of the represented interest or target group alone. The EU provides an arena for the interplay of various conflicting perspectives on each issue, and an understanding of the logic of opposing views can prove crucial to effective engagement in the debate. At the same time, as the EU is active in policy areas where different values and entrenched interests clash, it is sometimes astute to acknowledge, and seek to address, concerns that might not be grounded in facts, but rather express broader sentiments in society.

Freedom of movement for third-country nationals has become an issue of growing interest to the EU, as the member states have sought to realise this fundamental liberty, balancing it against concerns over security and the burden on their respective social welfare and asylum systems. However, despite significant achievements made since the fall of the Berlin wall – the enlargement of the Schengen area,¹ the elaboration of rules for issuing visas, and the lifting of visa requirement for nationals of the majority of countries of Central and South-Eastern Europe - Europe still remains divided by barriers to free movement. The obligation to apply for Schengen visas, the burden of the associated costs and the undignified conditions involved in the procedure, are still a problem faced by 75 million citizens of the Eastern Partnership states (Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova, and Ukraine) as well as by citizens of Russia, Turkey, Kosovo, and the countries of the Southern Mediterranean.

Advocates of visa-free movement for nationals of the EU's Eastern Partners and other countries in the EU's neighbourhood would be well advised to take note of some of the lessons from the experience of candidates and prospective candidates for EU accession in Central and South-Eastern Europe. The road towards equal treatment of travellers from these states has been paved with many obstacles, not least of which has been the vulnerability of the visa liberalisation process to shifts in public opinion within the EU, triggered by the impact or perceived impact on domestic labour markets and social welfare systems of the regular and irregular influx of migrants.

¹ The Schengen Agreement, initially signed in 1985, led to Europe's Schengen Area, which has external border controls, but no permanent internal border controls. In mid-2012, the Schengen Area consisted of 22 EU member states plus Iceland, Norway, Switzerland, and Liechtenstein.

Although demographers and economists point to the EU's growing need for immigrants to rejuvenate the labour force, many politicians and journalists choose to stress the negative aspects of opening up to newcomers. The tendency to look at migration from a populist perspective shapes the entire discourse on the subject. Furthermore, the public does not distinguish between on the one hand visitors who enter the EU under a visa-free regime and are allowed to stay for 90 days within a 180-day period, but are not entitled to work or to reside for longer in the EU, and on the other hand migrants who live in the EU with or without authorisation on a more permanent basis or asylum-seekers. In advocacy efforts, it is important to emphasize that these are different categories of migrant, and the problems faced by them, or potentially caused by them, are also different.

Advocacy of EU policies promoting freedom of movement is pursued by civil society organisations located both within and outside the EU. The task consists not only in responding to proposals that are already on the table, but also in addressing wider concerns related to migration, anticipating and tackling opposing positions, drawing attention to the impact of current policies, anticipating potential demographic and political developments, and raising new points in the debate. While their primary credibility stems from articulating the position of certain groups (visa applicants, migrants, separated families, asylum seekers), non-governmental organisations (NGOs) must strive to make their message heard loud and clear. To achieve this, they must be aware of the way in which visa policies and entry conditions are handled in EU legislation and the migration regimes of the member states.

This publication seeks to provide think-tanks, NGOs, and policy-oriented civil society organisations with an overview of the legal foundations and policy framework concerning migration and visa issues (Part I). This overview is followed by an account of the role and decision-making power of each of the EU institutions involved, as well as of the member states and governments of the EU's Eastern Partners (Part II). Finally, lessons are offered, on the basis of the experience of earlier advocacy efforts, about the most suitable entry points for civil society organisations to approach the various stakeholders and influence public debates. The aim is to involve not only state and EU institutions, but also the media and the public (Part III).

This publication complements ***The Right Approach to Europe. An Advocacy Handbook for Civil Society: Understanding and Influencing EU Policymaking***,¹ another PASOS publication which provides a bird's eye view of EU policy-making processes and offers general guidelines for effective advocacy at the EU level. ***The Road to an Open Europe*** – by addressing a specific policy area – is designed to serve as a guide into the complexity of EU governance in the field of visa and migration policy, making engagement in this policy area more fruitful, focused, and targeted, if no less challenging.

¹ T. Hořejšová, P. Kaźmierkiewicz, J. Lovitt, V. Řiháčková. ***The Right Approach to Europe. An Advocacy Handbook for Civil Society: Understanding and Influencing EU Policymaking***, PASOS, Prague, Czech Republic, 2012, ISBN 978-80-905105-3-1, pp. 61-63.

PART I

OVERVIEW OF MIGRATION AND VISA POLICY: WHAT IS AT STAKE?



(i) The Building Blocks of Migration and Visa Policy

Co-operation among EU member states in the area of Justice and Home Affairs started as an intergovernmental process in the mid-1970s in response to terrorist attacks in several member states. Meetings of interior and justice ministers led to the formation of the TREVI group,¹ which existed at several levels - from the ministerial down to the expert level. The discussions had a closed character; neither the European Commission nor the European Parliament were involved.

While the initial focus was on counter-terrorism measures, new topics of collaboration were added in the 1980s in response to emerging security threats: public-order violations (such as hooliganism in football stadiums), organised crime, drug- and arms-smuggling as well as nuclear safety.

An important parallel development was the evolution of "the freedom of movement for workers". This was one of the four basic freedoms (free movement of goods, services, capital, and labour) envisioned in the Treaty of Rome of 1957, which founded the European Economic Community, the EU's predecessor. Under Article 45, the Community would secure "freedom of movement for workers" for all its nationals, banning all forms of discrimination based on nationality.

The scope of this freedom was clarified and widened by subsequent decisions of the European Court of Justice as well as in several EU directives and regulations. It led to the freedom for all EU citizens to travel to another member state, and to reside and work there.

The Maastricht Treaty, or Treaty on European Union, of 1992 established the notion of citizenship of the EU, which was accompanied by the right to move and

¹ The TREVI group – named after the Trevi Fountain in Rome, the location of the European Council Summit on 1-2 December 1975 when it was created - was a network of officials from interior and justice ministries created. When the Treaty of Maastricht came into force in 1993, it was integrated into the Justice and Home Affairs (JHA) pillar of the EU.

reside freely in the EU territory. In addition, EU citizens gained the right to consular protection by diplomatic authorities of other EU member states outside the EU.

The right to move freely and reside and work in the EU is defined in detail in the EU Directive 2004/38/EC.¹ This also covers citizens of three non-EU European states (Iceland, Liechtenstein and Norway). Under this directive, all citizens of the European Economic Area (EU and the three mentioned states) and their close family members (spouses, registered partners or dependants who are not citizens of the EEA) are entitled to unencumbered entry and residence in another EEA member state. Unless they are workers, self-employed, students or accompanying family members, the condition they need to meet is that they are financially self-sufficient, have health insurance, and do not present an undue burden on the country of residence. EU legislation allows only limited restrictions to this right.

To realise the vision of a single market, it was necessary to remove a number of obstacles to the free movement of goods, services, capital and people. In 1984, France and the Federal Republic of Germany agreed to abolish controls at their borders, and three other member states (Belgium, Luxembourg and Netherlands) joined a year later in the city of Schengen (Luxembourg) by agreeing to gradually do away with frontier checks. In 1990, the five states concluded the Schengen Convention, which established rules on visas, police, and judicial co-operation.

Initially, Schengen co-operation was developed outside the EU framework as an intergovernmental initiative. In 1999, when the Treaty of Amsterdam came into force, all the Schengen regulations became EU legislation. As of mid-2012, the Schengen Area comprised 22 EU member states as well as four non-EU countries (Iceland, Norway, Switzerland and Liechtenstein), enabling over 400 million residents to travel freely within an area of over 4.3 million square kilometres.²

Three further EU member states are expected to become part of the Schengen Area

¹ Directive 2004/38/EC of the European Parliament and of the Council, 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>

² Three European micro-states (Monaco, San Marino and the Vatican City) have open borders with the Schengen states while controls are maintained on Andorra's borders. Certain territories of the Member States, mostly outside Europe, are not part of the Schengen Area.

(Bulgaria and Romania not earlier than in September 2012 pending ratification by the European Council,¹ and the Republic of Cyprus upon resolution of the Cyprus dispute²) while two members (Ireland and the UK) have opted out of the borderless Schengen zone, maintaining their border controls and separate visa policies.³

The most visible change for travellers in the Schengen Area is the removal of border posts and the abolition of identity checks by border guards when the traveller crosses by land from one to another member state. The only controls that are permitted are security checks at sea ports and airports; however, they are not considered formal border controls.

However, the removal of checks at the internal frontiers has been accompanied by strengthened controls at the external borders of the Schengen Area. In line with the Schengen Borders Code,⁴ checks are not carried out in a uniform manner - while persons enjoying the right of free movement within the Schengen zone (EU and EEA nationals and their family members) are subject to a less extensive "minimum check", others have to go through a "thorough check" procedure. The minimum procedure is typically limited to "rapid" and "straightforward" visual check of travel documents and only in exceptional cases involves consulting databases for persons representing threats to internal security, public health, or public order.

In contrast, the thorough check involves not one, but nine obligatory elements upon entry and six elements upon exit from the Schengen Area. When implementing this extended procedure, border guards must verify that the travel documents are valid, that the third-country national has a visa if required, can justify the

¹ Not to be confused with the Council of the European Union (or "Council"), the European Council comprises summits of heads of member states (prime ministers or presidents), assisted by ministers of foreign affairs

² The ongoing division of Cyprus between the Republic of Cyprus and the Turkish Republic of Northern Cyprus (TRNC), a self-governing entity which lacks international recognition - with the exception of Turkey.

³ The two non-participating states are free to take part in some areas of co-operation upon approval of their request by the Council of the European Union. Under this arrangement, the UK has been engaged in police and judicial co-operation (Title III) since 2005, while Ireland's request was approved by the Council and remains to be put into effect.

⁴ Regulation No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (OJ L 105, 13 April 2008). See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0001:0032:EN:PDF>

purpose of the intended stay and has sufficient means of subsistence. They must also examine whether the travel documents are not forgeries, and establish that no alert for the person has been issued in the Schengen Information System (SIS).

Since the 1990s, EU member states have co-ordinated their visa policies. The original Council Regulation only listed the countries whose nationals needed a visa to cross the EU's external borders. It was replaced by Council Regulation 539/2001, which introduced the concept of a "black list" (Annex I) and a "white list" (Annex II).¹ The regulation forms the basis of the EU's uniform visa policy so that any change is subject to a decision by the Council of the European Union and, since the entry into force of the Treaty of Lisbon² in December 2009, the European Parliament.

Currently, Annex I lists 125 states and territories whose citizens must possess a short-stay visa to enter the EU. They include the nationals of Russia, the six Eastern Partnership states (Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova, and Ukraine), and the former Soviet states of Central Asia (Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan), the holders of Kosovar and Northern Cypriot passports, and the citizens of all African states (except Mauritius), the majority of states and territories of Asia (with the exception of Brunei, Malaysia, Republic of Korea, Japan, Taiwan, Macau, and Hong Kong) and Latin America (except Argentina, Brazil, Chile, Paraguay, Uruguay and Venezuela, as well as selected Central American states).³

¹ Council Regulation No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from this requirement (OJ L 81, 21 March 2001). See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0539:20070119:EN:PDF>

² The Treaty of Lisbon, signed by EU member states on 13 December 2007, came into force on 1 December 2009, and amends the two treaties that form the constitutional basis of the EU - the Maastricht Treaty (or Treaty on European Union) and the Treaty of Rome (or Treaty establishing the European Community). Changes included the move from unanimity to qualified majority voting in several policy areas in the Council of the European Union, and more powers for the European Parliament under the ordinary legislative procedure. See: http://europa.eu/lisbon_treaty/full_text/

³ Annex II to the Council Regulation No. 539/2001.

In turn, Annex II, the “white list”, features 42 states and territories, whose nationals are exempt from the requirement to possess a short-stay visa to enter the EU. Recent additions to the white list have been the inclusion of the Former Yugoslav Republic of Macedonia, Montenegro, and Serbia in December 2009, Albania, and Bosnia and Herzegovina, a year later, and Taiwan in January 2011.

The Schengen visa regime covers several types of visa, such as type A (airport transit), type B (transit in general) and type D (long-term visa). The most frequently issued visa is type C: it is a short-stay visa entitling third-country nationals to enter the EU and stay there for up to 90 days in an 180-day period.¹ Nationals subject to the visa requirement need to follow standard rules to obtain visas, which demand that an application along with a set of supporting documents be submitted to an embassy or consulate of the state of main destination or, if such cannot be determined, to that of first entry. A uniform visa application form is used.

The Schengen Visa Code of 2009² contains several procedural guarantees for applicants. Article 23 limits the time of processing the application to 15 days as a standard, and exceptionally to 60 days in case “additional documentation is needed”. Article 32 states that in case of refusal, reasons for denying the visa should be provided to the applicant who in turn “shall have the right to appeal”.

It is notable that the Code mandates non-discrimination on the grounds of race, sex, ethnic origin, religion, belief, age, or sexual orientation. Moreover, it stipulates that “the reception arrangements for applicants should be made with due respect for human dignity” while the processing of applications should be carried out in a “professional and respectful manner”, following “good administrative practices”.³

¹ Stays of three to 12 months require long-term visas subject to the national procedures of each member state. To stay in a member state for more than 12 months, a third-country national must apply for a residence permit.

² Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [OJ L 243/1, 15 September 2009]. See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:243:0001:0058:EN:PDF>

³ Preamble to the Visa Code.

(ii) The Broader Policy Context

Since visa policy is linked to other policies of EU member states and touches upon various sets of values, it is not easy to bring about changes in the conditions of entry and stay of third-country nationals. As the history of Schengen co-operation shows, a dominant view among the founding member states in the 1980s and 1990s was that any relaxation of intra-EU controls had to be “compensated” by strengthening external controls, collecting information on persons deemed to pose security threats, and intensifying police measures throughout the territory of the EU.

Following the integration of Schengen co-operation into the EU framework, the Council of the European Union has tended to reaffirm this position, calling for several “compensatory measures” as necessary safeguards of state security following the removal of controls at the internal frontiers.

This security paradigm of the EU’s approach to freedom of movement is reflected in the placement of visa policy within Justice and Home Affairs (later renamed Freedom, Security and Justice). This follows the practice in EU member states where interior ministries are usually in the lead, while foreign ministries provide input.

At the EU level, the question of the conditions under which non-EU nationals may enter and reside in the EU has been considered primarily not to be part of the EU’s foreign policy, but has been closely tied to a catalogue of threats to internal security, such as lack of border security, organised crime, trafficking in human beings, and abuse of asylum systems. This perspective also informs the Visa Code, which places on the visa-issuing authorities the primary obligation to verify that an applicant will not abuse the system and stay on beyond the period of the visa’s validity or undertake unauthorised employment.

The “securitisation” of visa policy has been reinforced by domestic debates in several EU member states which experienced problems in the integration of various immigrant groups already residing on their territories or which saw a sudden rise in asylum applications.

Calls for more restrictive entry policies were also made in the wake of events that shocked the public, such as the murder of film-maker Theo Van Gogh in the Netherlands in 2004,¹ the riots in France in 2005,² and cases of visa fraud committed by organised networks in Germany and the United Kingdom.³ Restrictive visa policies are presented time and time again by anti-immigration politicians as an essential response to such security threats.

Despite the headlines, experts deny any link between the shortcomings of integration policies and entry management, or between cases of abuse of visa systems by organised crime groups and the ease or difficulty with which general applicants obtain visas.

Contrary to popular belief, visas are not an effective tool to prevent the arrival of irregular migrants, who overwhelmingly “overstay” - remaining after the expiry of the validity of a legally obtained visa or residence permit. Vital pull factors for migrants include economic opportunities, linguistic and cultural ties (e.g. between former colonial powers and their colonies), the existence of supportive ethnic diaspora, and the conditions of the asylum procedure.

¹ Van Gogh was shot dead in Amsterdam on 2 November 2004. The murderer attached a five-page note to his dead body, threatening Western countries, Jews, and Ayaan Hirsi Ali, Somali-Dutch author of a script from which Van Gogh had created the film *Submission*, dealing with violence against women in some Islamic societies. The murder prompted anti-immigration protests in the Netherlands, and the then-independent Dutch Member of Parliament, Geert Wilders, advocated a five-year halt to non-Western immigration. (Wilders subsequently established the Party for Freedom, which on an anti-immigration platform became the third-largest party in the Netherlands House of Representatives in the 2010 elections.)

² Civil unrest broke out in France on the night of 27 October 2005, continuing into November, when mostly French youths of North African origin rioted in the suburbs of Paris and other French cities, burning cars and public buildings. A state of emergency was declared by the French authorities on 8 November 2005.

³ In January 2010, UK authorities suspended student visas from Bangladesh, India and Nepal following an eightfold increase in student visa applications in the last quarter of 2009. See: J. Lamont, “UK suspends student visas to curb fraud”, *Financial Times*, 31 January 2010. In turn, the German government set up a visa abuse database on 25 May 2011 following reports of visa fraud and corruption at several consulates in 2010. See: “Germany to create a visa abuse database”, *CE Weekly*, 1 June 2011, Centre for Eastern Studies: Warsaw, available at: <http://www.osw.waw.pl/en/publikacje/ceweekly/2011-06-01/germany-to-create-a-visa-abuse-database>

Moreover, EU visa policies are far from being fully harmonised, reflecting the disparate interests of the member states. This is evident from an examination of visa approval and rejection rates. In 2011, Italy rejected 5 per cent of all the applications for short-stay visas by Georgians; Germany rejected 11 per cent of Georgian applications, and the Netherlands rejected 27 per cent.¹ Member states have clearly different approaches toward the nationals of the various countries, and also run the visa application procedures differently.

Traditionally, EU countries have maintained facilitated tracks for entry and residence of the citizens of states with which they have historical links. EU legislation leaves in their competence the terms of access to the domestic labour market, stipend programmes for students and the conditions of obtaining residence status, which at times reward proficiency in the local language or familiarity with the national culture.

Systems of labour quotas, the introduction of cards for foreigners of certain ethnic backgrounds, and opportunities for residents of border areas to obtain long-term visas have exempted significant groups of third-country nationals from the requirement to apply for Schengen visas through ordinary procedures. As a result, a significant number of travellers rely on national solutions for entry and residence in EU member states.

Another piece of evidence of the distinctions made by member states is their uneven coverage of the territories of non-EU states with consulates and application-processing centres. Larger EU states may choose to open consulates in the provinces in countries that are a source of migrants: a good example is Poland, which maintains as many as seven consulates in neighbouring Ukraine and is, in addition, opening a number of consular agencies throughout the country. Such policies aim to make visas more accessible to residents in more remote locations, reducing transportation costs - which can exceed the fee for a short-stay visa itself. The fee is generally €60, and €35 for countries with which the EU has visa facilitation agreements such as Georgia, Moldova, Ukraine, and Russia.

¹ Directorate-General - Home Affairs, European Commission, Visa Statistics 2011. See: http://ec.europa.eu/home-affairs/policies/borders/borders_visa_en.htm.



On-site evaluations carried out by civil society organisations have demonstrated that conditions for obtaining Schengen visas vary among consulates of the member states, attracting applicants to target those that present fewer practical barriers.

The best practices include: short processing times, online registration for consular interviews, provision of exhaustive information in the applicant's own language and consistent requirements to justify the purpose of the intended trip and demonstrate the existence of sufficient funds. Effective management of the application flow enables

some consulates to receive high numbers of applications and maintain short processing times. These “applicant-friendly” practices often reflect the national policies of member states that place as much emphasis on security as on other priorities: people-to-people contacts, promotion of democratic values, economic exchange, as well as openness and a friendly image.

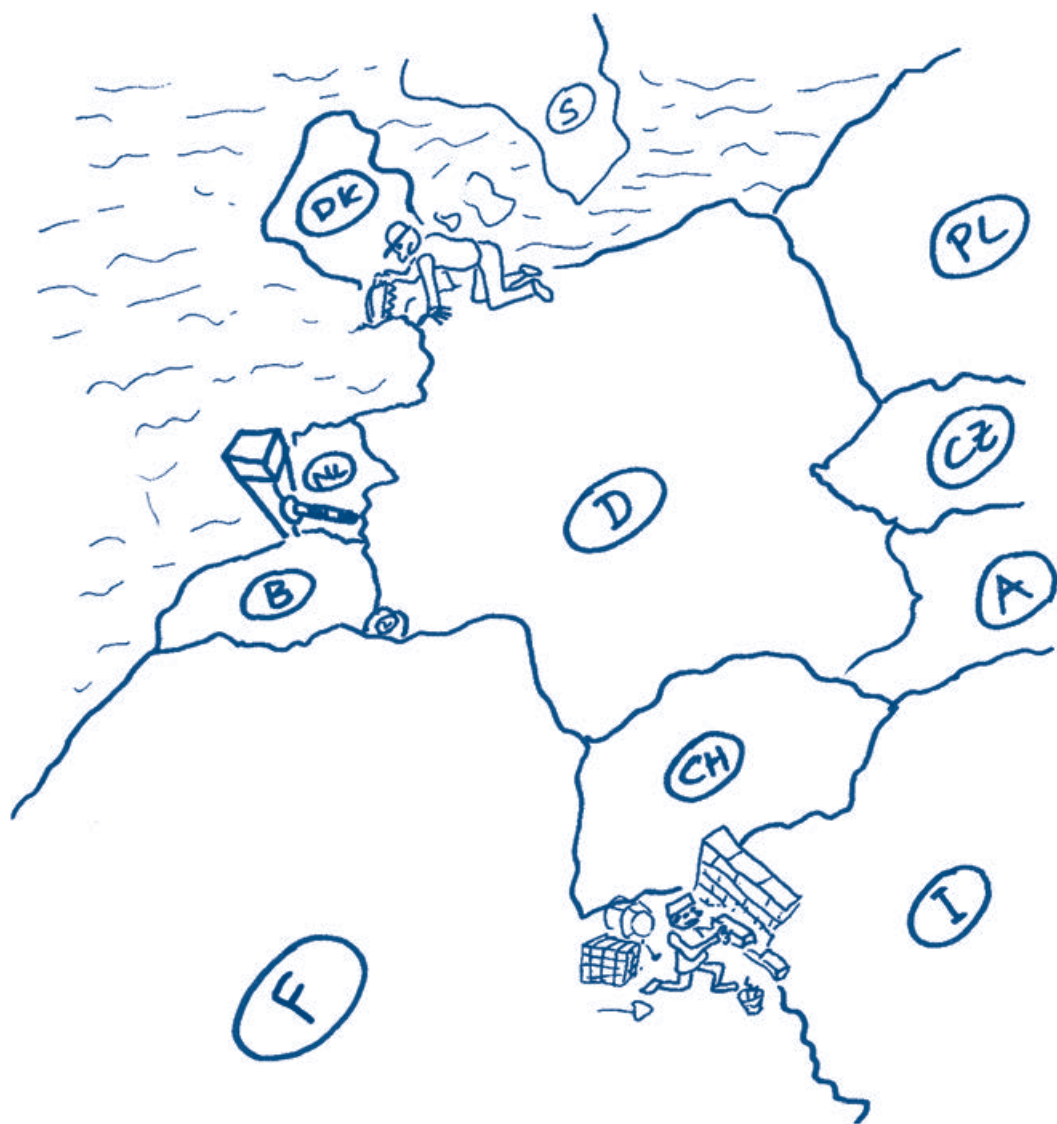
The more liberal approach to issuing visas is characteristic of a group of EU member states that acceded to the EU in 2004 and 2007. New members, such as the Baltic states, Poland, Hungary, and Romania are also proponents of relaxing the visa requirement for EU neighbours. They are among the supporters of the Eastern Partnership’s objective of visa-free travel with all six countries participating in the initiative.

Although the accession of new EU member states has helped counterbalance the dominant security paradigm of visa policy, advocates of visa-free movement are likely to continue to face strong opposition to their pleas for a liberalisation of the current regime. In fact, domestic immigration debates in key member states continue to place an emphasis on the need to maintain restrictive policies. The pressure is so high that even supporters of an eventual lifting of visas have applied a stricter approach in issuing visas and applying border controls, as the rise in rejections of visa applications and denials of entry testifies. For instance, refusals at Poland’s borders rose by 60 per cent between 2008 and 2009 (while they fell at the EU/EEA frontiers as a whole by 21 per cent in the same period).¹

¹ Source: Eurostat.

PART II

GOVERNANCE OF MIGRATION AND VISA POLICY: WHO DECIDES?



(i) Member States

The Treaty of Lisbon, which entered into force on 1 December 2009, has brought sweeping changes to the area of Justice and Home Affairs (JHA). Most importantly, the decision-making procedure has changed for many issues. While the dominant procedure was a unanimous vote in the Council of the European Union (also known as "Council") after mere consultation of the European Parliament, now the Council takes decisions based on qualified majority voting (QMV) and the "ordinary legislative procedure" applies. Under this procedure, the Council and the European Parliament are co-decision makers on an equal footing. Visa policy was decided by QMV before the Treaty of Lisbon, too, but the Parliament had only to be consulted, while now it decides together with the Council. This makes a significant difference since the Parliament generally supports visa liberalisation with third countries.

Notwithstanding these changes, EU member states continue to play a central role in determining the course of JHA policies. Decisions on the conditions of entry and residence are among the issues central to state sovereignty, and they are jealously guarded by EU member states. The administrative and operational services of the national governments play a central role in implementing the common visa policy as well as in deciding on conditions of entry into their territory under procedures other than Schengen.

This is clear in several aspects:

- The administrative work of receiving applications, conducting interviews, and issuing Schengen visas is carried out by the consular staff of individual EU member states. Whenever joint consular facilities were established, it was done upon the initiative and with the consent of the host governments in the states concerned. Significant differences can be observed between member states in the interpretation of the Visa Code requirements placed upon visa applicants (in particular, the need for additional documentation) and there are different visa-refusal rates among EU member-state consulates;

- *EU external frontiers are guarded by national services. It is at the discretion of their officials to deny entry even to holders of valid Schengen visas if they are deemed to fail to meet all the entry and residence conditions;*
- *EU member states retain the sole competence to issue visas with a duration exceeding three months as well as to set, and to enforce, the conditions under which third-country nationals may study, take up employment, or start a business on their territory;*
- *Finally, procedures for granting asylum and other forms of protection, as well as the scope and forms of integration assistance, are determined and run by the national and local authorities of the member states. Different policies produce different outcomes for migrants, resulting in different levels of socio-economic security and providing different environments for the participation of migrants in the life of local communities.*

In the areas where national and local authorities are competent, the EU has sought to establish minimum standards so that the states must not put burdens on persons beyond those specified in EU acts nor can they reduce the scope or contents of guarantees contained in EU law. Examples of such laws are the EU Visa and Border Codes as well as a spate of directives, defining norms in procedures applied by member states toward third-country nationals, thus guaranteeing their access to fundamental freedoms, including freedom of movement.

Member states exercise authority on a number of levels. Firstly, heads of states or government comprise the European Council. At meetings of the European Council, they approve the broad directions of EU policy and agree upon priorities for action. These summit meetings involve the presidents or prime ministers of the 27 EU member countries, the President of the European Council (in 2012, this position was held by Herman Van Rompuy), the Commission President (José Manuel Barroso) and the High Representative for Foreign and Security Policy (Catherine Ashton). They provide a setting to discuss national positions and work out a consensus on the many issues confronting the EU, and on shaping the agenda of the EU institutions (the Commission and the Council of the European Union).

When it comes to Justice and Home Affairs, the Treaty on the Functioning of the EU¹ specifically mentions the role of the European Council: "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice."²

While the summits of EU leaders are closed to the public, their outcomes are publicised. They are of significant interest to a variety of stakeholders, including civil society inside the EU and in the EU's neighbours and partners. While the member states do not adopt any laws in the European Council setting, it provides an essential link between the EU apparatus and the policies and concerns of the individual members. EU institutions may be requested by the member states to launch new initiatives or to step up legislative activities in response to new issues.

¹ Consolidated version of the Treaty establishing the European Community, drawing on all EU treaties to date.

² Article 68. See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

(ii) Council of the European Union (EU Council, Council)

The Council of the European Union (also known as “the Council”) is the decision-making body that represents the 27 national governments. It brings together officials of the respective ministries at various levels. Among around 200 working groups gathering together the representatives of national administrations, 19 deal with Justice and Home Affairs issues. These include integration and migration, visas, asylum, frontiers, terrorism, customs co-operation, civil law matters, co-operation in criminal matters, civil protection, fundamental rights, information exchange and data protection, law enforcement, Schengen matters and JHA financial instruments.

The most important is the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). The Committee is a preparatory body, responsible for border control, asylum systems, and migration policy. It prepares on a monthly basis the agenda of the Council of Ministers for Justice and Home Affairs (JHA Council). SCIFA meetings are not public and all delegates require security clearance, which means that external actors find it difficult, if not impossible, to become acquainted with the proceedings of these meetings.

The more accessible body is the one to which SCIFA submits agenda proposals - COREPER (Committee of Permanent Representatives in the EU) - where all agenda items (legislative initiatives, relations with third countries) are discussed and approved. COREPER brings together the heads or deputy heads of the member states' Permanent Representations in Brussels. The Justice and Home Affairs Council meets around six times a year. It is one of ten Council configurations and brings together the interior and justice ministers.

Any visa issue, from visa facilitation to visa liberalisation,¹ is first dealt with by the Working Party on Visa. Usually, the corresponding working party from the field of external relations is also involved.

These working parties are geographically defined: COEST (Working Party on Eastern Europe and Central Asia) covers, among other countries, the Eastern Partner countries and Russia; COELA (Working Party on Enlargement and Countries Negotiating Accession to the EU) covers Turkey; and COWEB (Working Party on the Western Balkan Region) covers, as the name implies, all Western Balkans countries, including Kosovo.

For advocacy groups, it is advisable to establish contacts with members of the working parties, particularly from those EU member states that share the group's aims. They can provide civil society organisations with information and alert them to new developments pertinent to their interests.

Following the entry into force of the Treaty of Lisbon, the majority of issues within the JHA field are decided by qualified majority voting in the Council. For policies that are binding on all member states, 255 votes are needed out of the total of 345. However, depending on the issue, not all the member states vote.

Since the UK and Ireland have their own visa policies, they do not vote on EU visa policies. This means that for a visa policy proposal to pass, 228 out of 309 votes are needed. In addition, QMV by all 27 member states requires that the positive votes come from at least 14 countries (more than 50 per cent) and that they represent at least 311

¹ Visa facilitation agreements (combined with readmission agreements) are generally required before talks begin on reaching an agreement on visa liberalisation (visa-free travel). Visa facilitation agreements focus on providing visas more easily for certain categories of applicants - e.g. students, academics, non-governmental organisations - and for a lower visa fee. The accompanying readmission agreements oblige the signatory states to readmit to their territory nationals of their own state who have been apprehended, e.g. without a valid visa, by national authorities in another state, and also to readmit nationals of other countries who had travelled through their territory to reach the other signatory state. Visa liberalisation with the EU normally follows later after strict criteria have been met concerning a range of technical areas, such as document security, border controls, migration policy, human rights, and measures against corruption and organised crime. For more details, see the section in this chapter: **Third Countries**.

million people (62 per cent of the EU's population). Usually, the latter two conditions are achieved when there are 255 positive votes. For visa issues, it is accordingly 13 countries and 261 million citizens.¹

From the perspective of civil society advocates, an important change was the move into QMV in several JHA policy areas where unanimity had earlier been required. This means that a single member state can no longer block decisions in these areas. Unanimous decisions are now reserved only for matters of passports and identity cards, family law, and operational questions of police co-operation.

¹ Effective from 1 November 2014, the Treaty of Lisbon rules will be in force so that under Article 16 of the Treaty, a qualified majority will require the support of 55 per cent of member states if acting on a Commission proposal (otherwise 72 per cent of member states), representing at least 65 per cent of the EU's population.

(iii) European Commission

Previously, Justice and Home Affairs issues were dealt with by a single Commissioner and a single Directorate-General of the European Commission called Justice, Liberty and Security. Since the start of the second Barroso Commission, which took office in early 2010, two Commissioners have shared the workload: Cecilia Malmström from Sweden was put in charge of home affairs, and Viviane Reding from Luxembourg in charge of justice, fundamental rights, and citizenship. This reflected the division of responsibilities in most member states where there are interior and justice ministers.

In July 2010, the Directorate-General for Justice, Liberty and Security was also split into two: the Directorate-General for Home Affairs and Directorate-General for Justice. DG Home focuses on migration and asylum policy, visas, border security, internal security, police co-operation, terrorism, the fight against organised crime and trafficking in human beings. DG Home also co-ordinates EU activities aimed at forging partnerships and strengthening the capacity of third countries to manage migratory flows. DG Justice deals with civil and criminal justice, fundamental rights, and citizenship.

The Commission serves in four main capacities: initiating and overseeing the development of legislative proposals, monitoring the compliance of EU member states with the **acquis communautaire**, implementing EU-funded activities, and maintaining relations with third countries. In all these areas, the Commission builds on its recognisable assets, such as the ability to collect and analyse cross-EU data, extensive experience in drafting laws and in international negotiations, and reliance on tested frameworks and formats.

These advantages have turned the Commission into a formidable bargaining partner, able to articulate and set the terms, to structure the harmonisation process, and to employ effective means of verifying compliance with the adopted norms.

As outlined above, since the Treaty of Lisbon came into force, most JHA issues are decided on the basis of the “ordinary legislative procedure”, which means qualified

majority voting (QMV) in the Council and full co-legislative powers of the European Parliament. This includes visa policy where the European Parliament now plays a role, legal immigration, judicial co-operation in criminal matters, Eurojust and Europol,¹ non-operational police co-operation, and civil protection.

The European Commission starts the legislative process by submitting a proposal, which has usually been discussed in advance with relevant stakeholders. The proposal is drafted by the responsible Directorate-General such as DG Home and sent for internal consultations: other Directorates-Generals can propose changes. After these “intra-service consultations”, the proposal is “adopted” (endorsed) by the entire Commission. This can be done in writing or, when the proposal is contentious or high profile, during the weekly meetings of the Commission. While the Commissioners usually try to reach agreement, they can also take a vote and decide with a simple majority.

The Commission sometimes collects non-binding opinions from two EU bodies: the Committee of the Regions and the European Economic and Social Committee.² However, they have almost no say in the Justice and Home Affairs area (an exception is civil protection), so the Commission sends its proposal straight to the Council, the European Parliament, and the national parliaments in EU member states. The latter are tasked to ensure compliance with the principle of subsidiarity and have eight weeks to react.

The subsidiarity principle means that “in areas which do not fall within exclusive EU competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at

¹ Eurojust is the EU’s agency co-ordinating judicial co-operation among member states in criminal matters, primarily investigations and prosecutions concerning serious cross-border and organised crime. Europol is the EU’s criminal intelligence agency. Both are located in the Hague, Netherlands.

² The Committee of the Regions (CoR) is the political assembly that provides local and regional authorities with a voice at the heart of the European Union. See: www.cor.europa.eu. The European Economic and Social Committee (EESC) is a consultative body that gives representatives of the EU’s socio-occupational interest groups, and others, a formal platform to express their points of views on EU issues. See: www.eesc.europa.eu

regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”¹ (For more on the role of the national parliaments, see the next section: **European Parliament and National Parliaments.**)

In the meantime, the European Parliament can begin to discuss, amend and adopt the proposal, after which it goes to the Council also for discussion, amendment, and adoption. Negotiations take place between all three actors (Council, European Parliament, Commission) throughout the decision-making procedure and, if they can accept each other’s positions and amendments, the proposal can be adopted in first reading. If they disagree, then the proposal goes to a second reading.

Throughout the process, the Commission can comment on the positions and amendments of the two other legislating bodies and even incorporate them into the proposal. This changes the number of votes that the proposal needs to receive in its second reading.² If there is no agreement at the second reading, then the proposal goes to conciliation. A Conciliation Committee with representatives from the member states, the Parliament and the respective Commissioner is formed to work out the differences. At the end, the new proposal must be adopted by the Council and the Parliament, or it fails.

With a few exceptions, the Commission has the right of initiative, which means that it is up to the Commission to propose new legislative acts. However, following the Treaty of Lisbon, one-quarter of the member states can initiate a proposal in the areas of judicial co-operation in criminal matters, police co-operation, and administrative co-operation.

The Commission’s proposals have a high rate of success. Over two-thirds of EU legislation is adopted at the first reading. This can be explained by the fact that the Directorate-Generals have access to the necessary technical information and specialised expertise. Furthermore, their proposals are then submitted for expert and societal consultations,

¹ Article 5.3 of the Treaty on the EU

² If the Commission issues a negative opinion on the Parliament’s amendments, the Council must be unanimous to uphold its position amending the proposal, while only qualified majority is needed in the Council in case of the Commission’s positive evaluation of the amendments.

so in their final form stand a good chance of being approved. The Commission also sounds out positions in the European Parliament and in the Council, and rarely proposes something that is bound to fail.

For civil society activists to be effective in providing input into legislative proposals, they must properly identify the unit responsible for drafting a proposal, and influence its scope, direction and wording at an early stage.

However, the Commission is still struggling to expand its mandate and gain additional competences in areas held as vital to the sovereignty of the member states. For instance,



in 2011 the Commission experienced a setback when it failed to gain support for a proposed set of new rules to govern the circumstances under which national governments could reintroduce checks at internal frontiers within the Schengen Area. If passed, the rules would have required a decision at the EU level – a proposal by the Commission backed by a qualified majority in the Council - for the re-establishment of border controls by a member state for any period longer than five days.

The Commission proposal was a response to attempts by some governments (France, Italy and Denmark) to backtrack from the Schengen rules that ensure freedom of internal movement. The Commission's proposal was met with fierce opposition from several powerful member states. The reaction to this proposal demonstrates the limits of initiatives seeking a wider use of supranational co-ordination and control mechanisms if they clash with the prevailing political sentiments or interests of key member states.

(iv) European Parliament and National Parliaments

The European Parliament and national legislatures serve two major functions:

- (1) setting and defining norms and standards by making and amending laws (**legislative** function);
- (2) verifying the implementation of these norms and compliance with the obligations undertaken by EU institutions and the member states (**controlling** function).

However, the European Parliament's power is limited by the fact that it cannot launch legislative proposals, but only amend the Commission's initiatives. National parliaments' freedom to introduce laws is limited to areas where the EU does not have exclusive competence or where it shares it with the member states. In these areas, legislators must ensure that their bills are not in conflict with the **acquis communautaire**.¹

The controlling function of the European Parliament is also limited: its approval is required for the EU budget (its refusal to approve the budget would force the Commission to resign, which has not happened to date), and national parliaments may halt an EU legislative procedure by returning the bill to the Commission, or even forcing a vote on it in the European Parliament or the Council, if it does not conform with the principle of subsidiarity.

Nonetheless, parliamentary bodies are a major entry point for advocacy for civil society organisations as they enjoy legitimacy thanks to direct elections (first held for the European Parliament in 1979) and represent the citizens of the EU member states. In comparison with other EU institutions, the European Parliament, but also national parliaments, are also more transparent and open to a variety of inputs from external actors.

¹ The general principle of the priority of EU legislation over national regulations applies, although its implementation varies from country to country, depending on the constitutional norms in force and on the role of the Constitutional Court in a given member state.

As noted before, the Treaty of Lisbon has expanded the role of the European Parliament in the development of EU legislation in the Justice and Home Affairs area. Almost the entire policy area is now subject to the ordinary legislative procedure, under which each Commission proposal goes before the Parliament. The proposals and possible amendments are first discussed and voted on in the relevant parliamentary committees: the relevant ones for migration and visa policy are in particular the Committee on Civil Liberties, Justice and Home Affairs (LIBE), the Committee on Foreign Affairs (AFET), and its Subcommittee on Human Rights (DROI).

The central role is played by LIBE, which covers a range of home-affairs issues. Visa policy is also always discussed by AFET since it concerns third countries. If there are human rights issues in these countries, DROI can play a role, too. In the course of hearings and public debates on issues of concern around the world, the subcommittee adopts resolutions on such issues as the death penalty, torture, protection of minorities, and promotion of democratic values in third countries.

European Parliament committees represent a natural entry point for advocacy efforts as they shape amendments to the Commission's proposals, which are then subject to a plenary vote. Committee discussions deal with the substance of proposals and, unless a given issue is particularly sensitive politically, MEPs are able to act freely within these bodies as political groups do not impose strict voting disciplines. Plenary debates are much more politicised, involving bargaining and formation of informal voting coalitions.

For advocacy groups, the first person to approach in a committee is the rapporteur of the proposal of interest, who is appointed after the proposal is transmitted to the Parliament. It is also useful to contact the members of the political parties that share, or are at least close to, the opinions and aims of the advocacy group. MEPs are generally very open to co-operation with civil society organisations.

The Treaty of Lisbon has expanded the role of national parliaments of the member states in the EU decision-making process. Their role is to ensure that any proposal from an EU institution respects the principle of subsidiarity. According to this principle, the EU

should act in policy areas where it does not have exclusive competence only if the aims of the action cannot be achieved by the member states (central, regional, or local authorities) alone. The national parliaments have eight weeks to react to a proposal with a “reasoned opinion”.

In the Justice and Home Affairs area, a negative opinion of at least one-quarter of the national parliaments is sufficient to return the proposal to the Commission for review. While the national parliaments cannot veto the Commission proposal outright, by applying this “yellow card” they give a warning to the Commission who can amend or withdraw the proposal, or leave it as it is.

National parliaments play an even stronger role when the majority of them oppose a measure, thus giving an “orange card” to a Commission proposal. If the Commission decides to continue with the proposal in such a situation, it is sent directly to the European Parliament and the Council, which then vote on whether to proceed with, or abort, the legislative process.¹ Between December 2009 and early September 2011, national parliaments had submitted 69 reasoned opinions.

The most frequently questioned drafts were the proposal for a Council Directive on a Common Consolidated Corporate Tax Base and the proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment. Both were questioned by nine parliaments, although this was still not sufficient to draw the orange card.²

In addition, since 2006 the Commission gathers the opinions of national parliaments and relies on them in order to improve the decision-making process and to bring the EU

¹ In such a case, the proposal is blocked by a simple majority in the European Parliament or by 55 per cent of member states in the Council of the European Union.

² Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), Sixteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, October 2011, at <http://cosac.eu/en/documents/biannual/>.

closer to its citizens. This is termed the “political dialogue” between the Commission and national parliaments, and here the parliaments are much more active: between January and November 2011 alone, they sent more than 500 opinions.¹

The eight-week period of review of EU legislation by national parliaments offers a window of opportunity for civil society advocates. Review usually rests in the competence of the respective parliamentary committee responsible for EU affairs; therefore, members of this committee (especially those with a record of interest in JHA issues) are a natural advocacy target. In the case of pan-EU campaigns, it is worth considering the level of activity of the various national parliaments, and targeting in the first place the most active parliaments.²

Civil society organisations located in a member state have an advantage as they can rely on the ties developed with members of the relevant committee or with the political parties to which they belong. At the same time, multinational coalitions can gain an edge by tracking the Commission proposal at an early stage and giving their partners in a certain member state an “early warning” on the initiative, enabling them to work out a position that can then be communicated to the members of the relevant parliamentary committee.

Advocacy coalitions can also make use of the formal and informal links between the European Parliament and national legislatures to make their voice heard better. Members of national parliaments are regular guests at sessions of the various committees of the European Parliament, which gives them an opportunity to express their opinions on the

¹ T. Hořejšová, P. Kaźmierkiewicz, J. Lovitt, V. Řiháčková. **The Right Approach to Europe. An Advocacy Handbook for Civil Society: Understanding and Influencing EU Policymaking**, PASOS, Prague, Czech Republic, 2012, ISBN 978-80-905105-3-1, pp. 61-63.

² Between January and November 2011, over 80 per cent of all opinions (422 out of 521) were issued by nine out of 39 houses of parliaments. The most active were the lower house of the Portuguese parliament, both chambers of the Italian and Romanian parliaments, and the upper chambers of the Czech, German, and British parliaments. A majority of parliaments issued fewer than five opinions. Source: T. Hořejšová, P. Kaźmierkiewicz, J. Lovitt, V. Řiháčková. **The Right Approach to Europe. An Advocacy Handbook for Civil Society: Understanding and Influencing EU Policymaking**, PASOS, Prague, Czech Republic, 2012, ISBN 978-80-905105-3-1, p. 63.

Commission's proposals. Such contacts have become institutionalised in the case of members of the committees responsible for EU affairs, who meet MEPs and Commission officials in the format of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU.¹

Other ties, which can be used for advocacy, include the links between the political groups in the European Parliament and the parliamentary parties in the member states. Many MEPs hold positions in their parties at home and maintain contacts with their party colleagues who sit in the national parliaments. While formally they are not bound to follow the home party's programme, and while their positions may be influenced by the interplay of interests within the European Parliament, a number of MEPs continue to play an active part in the national debates on EU issues.

¹ <http://www.cosac.eu/>

(v) Third Countries

The EU has elaborated a standard format for talks with third-country governments seeking a lifting of the short-term visa requirement for their citizens. This involves a process through which the interested state progressively aligns its legislation on certain relevant issues and builds up the capacity of its central administrative bodies and operational services.

The relevant issues are divided into four areas:

1. **Document security** (biometric passports, safe civil registry systems, use of Interpol's Lost and Stolen Passports' database);
2. **Illegal migration** including readmission (integrated border management, fully equipped borders, a functioning asylum system, migration monitoring and management, fight against illegal migration, readmission and reintegration strategies for the returnees, co-operation with Frontex¹);
3. **Public order and security** (various measures improving the effectiveness of the fight against all forms of organised crime and corruption, co-operation with Eurojust, Europol, and agencies and authorities in the member states, adoption and implementation of all relevant international conventions, personal data protection);
4. **External relations and fundamental rights** (freedom of movement and access to travel and identity documents for all citizens, anti-discrimination legislation, and minority policies).

The standard format engages the government of the third country in a structured "visa liberalisation dialogue" with the EU that covers all the issues. They are enumerated in "an

¹ Frontex (the European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union) was set up in 2004 to reinforce and streamline co-operation between national border authorities. See: www.frontex.europa.eu

action plan for visa liberalisation" (in the case of Moldova and Ukraine - to be followed by the remaining Eastern partners interested in the process), "a visa liberalisation roadmap" (for the five Western Balkans countries that have been granted visa-free travel and for Kosovo's trajectory towards visa-free travel), and "common steps" (agreed with Russia).

The process is meant to deepen the third countries' co-operation with the EU, building on the foundations laid in visa facilitation and readmission agreements (whose conclusion and successful implementation is a precondition for launching the visa liberalisation process). It involves a review of the partner state's legislation, institutional arrangements (including mechanisms for inter-agency co-operation), and operational practices.

Meeting certain benchmarks, defined in the action plans or roadmaps, is meant to eliminate gaps between national legislation and relevant norms of the **acquis communautaire** as well as to bring the country's administration and field services up to the required standards of border and migration control and an effective fight against organised crime and corruption.

Nevertheless, there are differences between the current visa liberalisation process with the Eastern Partner countries – to date launched with Ukraine and Moldova, although an action plan was expected to be presented to Georgia by the Council of the European Union by the end of 2012) - and previous rounds of visa liberalisation.

Unlike the Western Balkans states, the countries of the Eastern Partnership (EaP) have not received any EU accession perspective, which means that a powerful political anchor is missing. At the same time, the process of meeting the conditions has been divided into two phases for the EaP countries, while the Western Balkans states could work on all of them at the same time.

The action plans are made up of a legislative phase during which the countries are due to adopt all relevant laws, strategies and plans, while during the second phase they are expected to implement them. The governments of the Eastern Partnership states need to report regularly to the European Commission, which monitors progress, organises on-site

assessment missions, including member-states' experts, and issues progress reports. The successful transition from the first set of benchmarks to the second set is dependent on a positive recommendation by the Commission to the Council and a Council decision to that effect.

To be successful in the first phase of the evaluation, the governments of the third countries need to maintain a receptive attitude to the European Commission's queries related to areas specifically identified as areas in need of attention. This is essential as the Commission reports to the member states, and has to demonstrate that the eventual removal of the citizens of the country in question from the list of nationals subject to visa obligations is not going to result in a rise in irregular migration or other undesirable outcomes.

The second phase of the exercise is concerned with the actual capacity of the central-level agencies and field migration and border services of the country in question, and involves even closer oversight by EU member states. The on-site inspections by experts from the Commission and the member states serve to validate the information provided by the governments, paying particular attention to the effectiveness of the adopted mechanisms.

The two phases require adequate organisation of state institutions, and a certain shift of emphasis is needed. The first stage is meant to verify the ability of the government to draft and adopt the relevant legislation, muster the necessary resources, and plan strategically. The establishment of a co-ordination centre is highly recommendable. The co-ordinating body needs, on the one hand, to have ready access to statistics and information on progress supplied by the line ministries and operational agencies and, on the other hand, to be vested with sufficient authority to ensure compliance of the government units with the assigned tasks. The experience from Central European and Western Balkans states suggests that the responsibility needs to be placed either in a central ministry (e.g. interior ministry, European affairs ministry) or a unit placed close to the prime minister and the cabinet of ministers.

In turn, the second stage will highlight operational capacity, requiring a central-level co-ordinating body co-ordinate all the activities of the field services (border, migration, customs, police). If this is the ministry of the interior, it will have to be capable of performing this function. In most cases, this means that the ministry will have to undergo restructuring that will turn it into a civilian structure with extensive analytical and managerial capacities.

PART III

WORKING WITH ADVOCACY TARGETS

This section provides a set of general guidelines on the design and implementation of advocacy strategies that target various categories of stakeholders in the process of visa liberalisation between the EU and third countries. Following an overview of the parameters of an effective advocacy strategy, highlighting the types of questions that need to be asked to tailor it to the specific audiences and objectives of the campaign, there are four subsequent sections covering the different types of audience:

- EU institutions,
- governments of EU member states,
- Brussels-based and national media and publics,
- governments and societies of the states undertaking the process that leads them to visa liberalisation with the EU.

These guidelines are not meant to provide tailored solutions but rather as a rough survey of the terrain that needs to be traversed in order to carry the message to the right audiences in an effective manner.



(i) Elements of a Successful Advocacy Strategy: How to Influence?

Advocacy seeks to reach out to stakeholders with an interest in public policy to effect a change of course. Civil society advocates are interested in a variety of outcomes: from raising public attention to a social problem, through alerting decision-makers to the impact of their current or planned policy, all the way to proposing comprehensive solutions to the identified problem.

Unlike private-sector or interest-group lobbying, which is content with representing a specific interest group and achieving an end result that benefits this group, civil society advocacy more often revolves around an issue or a cause that is built on a set of values. Advocates are thus interested in the continued improvement of policies so that they correspond to the pre-defined objectives. Moreover, they often seek to make the very mechanisms of policy-making and policy implementation more transparent and accessible to a variety of social groups.

To be successful, advocacy efforts must be carried out with a view to the specific environment of a given issue. This policy environment includes, among other aspects, the legal and institutional status quo, the process by which changes can be introduced, and the context in which the issue is viewed. The first indispensable element of planning a strategy aimed at bringing about a certain policy outcome is the proper identification of the current state of play in a given policy area. The task starts with the determination of how the problem is viewed by the decision-makers.

It is important for newcomers to the field to familiarise themselves with the current context, answering some of the following questions:

- Which policy field does the issue of interest fall under?
- Which legislation at which level regulates this issue? How binding is the law?

- Which institutions are responsible for initiating legal change, verifying implementation, and evaluating results in this policy field?

The answers to these questions should provide a snapshot of the issue at a given moment. The next step involves an analysis of issue dynamics, necessary for gauging the strength of consensus around the current set of solutions and assessing the likelihood of change.

Advocacy in the field of public policy considers the stakeholders rather broadly, paying attention to several indicators of the attitudes towards the policy adopted in response to a certain problem. To assess openness to a new solution, it is useful to first consider the effectiveness of the measures that are in place now.

Policy-makers (governments, national parliaments and EU institutions) are preoccupied in the first place with the question as to whether the adopted measures fulfil their expectations with regard to impact (do they do what they are supposed to do?) and efficiency (are they the most cost-effective way to achieve the desired result?). It is therefore important to identify the original objectives that the policy-makers believed would be met by carrying out these measures.

However, advocates representing civil society are likely to challenge the understanding of the policy problem, which is often the justification for the current policy. They may point to the following considerations, which need to inform every good policy in an open and democratic system of governance.

Firstly, it is essential to check if all of the assumptions regarding the problem to be solved still hold true or, in other words, whether the “situation on the ground” has not changed to an extent that calls for a revision of these assumptions. Secondly, policy-makers may be shown that the original policy has had unforeseen consequences. Finally, the policy in force may be no longer desirable as it runs counter to important societal values or interests in new economic circumstances or in view of a changing public discourse on a broader policy issue.

Good advocacy involves more than proper analysis of the situation and assessment of the need for a policy change. It is a delicate balancing act. On the one hand, it requires consistency of values and clarity of message so that it maintains credibility with all the stakeholders. On the other hand, however, to be effective, it must be communicated in a way that best responds to the changing needs of the represented groups, an evolving definition of the problem itself, and emerging opportunities for policy reform. Hence the need for a comprehensive strategy for advancing a clear cause in changing circumstances in a way that maximises impact while ensuring the long-term sustainability of the proposed solutions.

(ii) Adapting the Advocacy Strategy to Facilitate Visa Liberalisation at the EU Level

Civil society advocates of extending opportunities for unencumbered access to EU territory to new categories of third-country nationals are treading relatively new ground. Therefore, they must make sure that they adopt the most appropriate techniques for communicating their message, and at the same time avoid making fundamental errors of judgment.

Visa policies in the EU were until recently decided by member states alone, and EU decisions in this field are still influenced by the positions that the member states take on the issue. This policy area is also closely linked to other issues that are deemed quite sensitive not only by governments, but also by the public in many EU states. These issues range from countering the illegal entry and residence of foreigners through policies on the integration of migrants to general internal security matters.

Finally, unlike some other issues rooted in a set of strong human-rights norms (asylum, non-discrimination), decisions on allowing entry have an administrative and partially discretionary character and are less susceptible to challenge by rights' advocates.

All these particular characteristics of visa policy should be taken into account when an effective advocacy strategy is designed.

The following guidelines can help advocates stay clear of potential pitfalls and reach the right target audiences:

- **Establish and maintain your position, basing it on a set of values or representing a specific group in need**

A major barrier to effective engagement in the debate on migration and visas confronts new entrants, such as think-tanks from outside the EU: insufficient credibility. It takes time to establish a position in the discussion. First impressions matter a lot, and defining **what values you stand for**, and **which group needs assistance**, are essential to the proper positioning of the newcomer in the debate. Such positioning needs to be grounded in an honest **stakeholder analysis**, i.e. understanding positions taken by various decision-makers, as well as segments of the concerned public, and the rationale or justification they provide for their stance.

Another type of analysis that needs to be undertaken is the identification of possible links or parallels that can be drawn between the case that is currently being argued and arguments that have been successfully raised in earlier debates. For instance, it might be wise to appeal to the value of **fair treatment** of a certain group by showing that it deserves to be dealt with in the same non-discriminatory way in which a comparable category was treated.

- **Acknowledge the concerns of the opponents of your cause, and where possible establish common ground**

An important element of an advocacy strategy must be defusing or minimising the impact of the opposing arguments, especially if they relate to some fundamental social values or reflect certain deep-seated public sentiments. Putting your issue in the proper context can help avoid fruitless and often irreconcilable head-on clashes over fundamental values, and instead move the discussion to a more concrete, action-oriented level where compromise is more likely.

For example, what approach might be useful towards opposition to visa liberalisation rooted in the argument that visa-free travel could result in an increased influx of organised crime?

Rather than trying to challenge the argument that security is a valid concern in designing migration policies (in fact, it underlies much of the national and EU policy framework), proponents of liberalisation could use this opportunity to recognise the value of security and argue that the proposed move – that would come about in conjunction with agreements between the EU and third countries on border security and police co-operation – would in fact increase the level of security, thus addressing the opponents' concern directly and defusing it.

- **Relate to existing initiatives and direct your recommendations at the right stakeholders**

Effective advocacy must always have a policy change as its prime objective; thus, it must engage those institutions that are directly responsible for the policy area. Once they have been identified, their recent activity in the field ought to be examined and acknowledged in the advocacy message. Without understanding what steps the responsible institution has undertaken, and what plans it has for the immediate future, a civil society advocate risks proposing solutions that have already been implemented or are being planned, ignoring partly or completely the position of the relevant institution.

Even if the solutions advocated by the civil society organisation coincide only partly with the measures planned or adopted by a decision-making body, acknowledging them helps establish the advocates' position as experts and could potentially win the support of a vital stakeholder. Civil society proposals are more readily accepted if they are shown to be extensions or enhancements of the existing policies or planned policy revisions, addressing issues that the decision-makers recognise themselves, while offering a correction or improvement.

On the contrary, failure to recognise existing initiatives weakens the advocates' impact as it gives the impression that the civil society side is disregarding the work done so far, that it is not giving adequate thought to the complexity of the matter, or simply has not done the basic research expected of a credible advocacy group. While proper consideration of the background of the matter is needed to demonstrate professionalism and expertise, it has particular value when it comes to the legal aspects of an issue since all solutions must be based on the pertinent norms of international and EU law.

• Choose the right entry point and get the timing right

For the EU's Eastern Partner countries, visa liberalisation is a process divided into stages, which are in turn marked by clear mid-term objectives that need to be met in order to ensure continued progress toward the final goal. The publication of reports by the Commission, the issuance of resolutions by the European Parliament, and statements made by EU officials and member states' diplomats, all provide opportunities for civil society actors to react, comment, and highlight certain points.

Such "milestones" are natural entry points for organisations monitoring the progress of the third-country governments, as well as that of individual ministries and agencies, to issue their position papers and assessments. This can serve at least two purposes: to provide a fuller picture of the situation for the EU, not only reflecting the views of concerned groups, but also providing empirical data through original research on the ground; and to make the third-country government accountable to the public by spurring it into more intensive action in a specific area criticised in a European Commission assessment or official statement.

The civil society organisation needs to carefully plan its entry into the debate and make two decisions: Firstly, who should be targeted? Secondly, when is the best time for the intervention?

When the entry point is being selected, the openness of the various EU institutions and other actors to input from civil society needs to be weighed against the respective actors' capacity to shape the agenda.

Members of the European Parliament are relatively accessible, and often willing to raise at committee and plenary meetings points of concern to civil society. However, the Parliament's voice is heard most strongly when questions of values and norms are at stake. The intervention of the rapporteur (if already appointed), individual MEPs, or a political group is useful at an early stage of the process, or when the process runs into problems or is even stalled.

However, throughout the negotiations, it is the Commission and the Council that are directly involved, monitoring and assessing the progress of the third country/countries, and they may be the more appropriate targets if the objective is, for example, to alert to the need for technical assistance in a given area.

(iii) Working with Member-State Governments

Governments of EU member states are among the most important players in the field of EU visa policy, but they do not make for easy targets for direct advocacy around visa liberalisation. The difficulty comes from the combination of the governments' "back-seat" role in the process, the fact that the governments might have to win support for the policy from their own publics, and the scarcity of channels for communications between the advocates (especially from outside the EU) and the EU member governments.

Firstly, in the processes in which the European Commission has the mandate to negotiate with third-country governments (readmission and visa facilitation agreements, visa liberalisation process), the member states are provided with information on progress by the Commission and act upon Commission recommendations. This means that member states might reveal their positions on the issue only when the Commission and the Council discuss whether to offer a third country a "visa liberalisation dialogue", and even then they do not have to explain or justify their positions.

Other stages when discussions take place are when the catalogue of conditions (action plan or roadmap for visa liberalisation) is handed over, when the process moves from one to another stage and, ultimately, when the decision to lift the visa requirement is due. The problem that this format poses to civil society advocates is that the member states need not disclose the arguments underlying their collective decisions, thus limiting opportunities for dealing with opposition to liberalisation in the public arena, and increasing the need for identifying key, or "swing" member states whose position is important, but not predictable, establishing direct links with the ministries of such member states, or their representatives attending the Council meetings.

Secondly, unlike the technical and law-centred approach taken in the negotiations by the Commission, the stance of each member state is the result of a complex interplay of the positions of key ministries, the weight attached to the issue in the national government's agenda, as well as the attention the public is paying to the matter.

Whereas the states that oppose visa liberalisation might view the visa requirement as an instrument reducing threats to internal security (usually the position held by the Interior Ministry), this view might be challenged in "swing states" by other considerations, put forward not only by human rights advocates, but also by business representatives and various state institutions.

The security argument can be countered by such priorities as:

- good-neighbourly relations (invoked often by the Foreign Ministry as well as by a regional development body and by local governments, which are, for example, interested in the welfare of the population of borderland areas);*
- the economic benefits of unfettered cross-border movement (Ministry of Labour, of Economic Affairs, of Trade);*
- reduction of criminality, corruption and improvement of the "image" of the receiving state (law enforcement agencies, anti-discrimination bodies, and local stakeholders concerned with corruption and organised crime may support this argument).*

Finally, targeting the member states' governments directly is made difficult by the absence in many countries of established communications channels at the national level that provide civil society advocates with opportunities to reach the competent ministry officials. This is a particularly acute problem in those countries where the agenda is dominated by security-related concerns, usually articulated by the Interior Ministry. This

institution will not be easily reached through advocacy efforts by non-governmental actors, and the policy dialogue is likely to involve relevant counterpart state institutions from the third countries.

While opportunities should be sought, and taken up, to counter opposing arguments through other ministries and state bodies, or by changing the tone of the public debate, it can sometimes be more effective, or complementary, to address the opposition of the “skeptical” countries - where the agenda is dominated by security concerns - by providing credible, up-to-date information on the performance of the third-country governments to the EU institutions and the EU government(s) in question, by identifying opportunities for enhanced technical co-operation between the respective governments, and by teaming up with sympathetic local civil society organisations in the sceptical countries concerned.

More opportunities for direct communications with member states’ governments exist in the states where the security concerns are at least partly outweighed by foreign-policy priorities, or where national visa policy and practice is a matter of public debate. The role that the Foreign Ministry plays in the process of elaborating the national position on matters of visas and immigration is particularly important. A good opportunity for engaging in a dialogue with the Foreign Ministry usually arises when it publishes reports on its consular and visa practices, revealing trends and outlining the current and future directions of its policies.

Many member states, however, are reluctant to disclose such information, and civil society advocates must rely on more indirect forms of advocacy - highlighting the impact that national visa practices have on the lives of individual migrants, sounding the alarm when abuse of procedures takes place or when informal practices result in actual discrimination. Publicising such cases in the media, and organising public events with the participation of experts and the persons in need alike, can galvanise public interest in the issue and be an incentive for reluctant government agencies to engage in a dialogue.

Civil society actors face a particularly difficult task when trying to enter into a dialogue with a national government at a bad moment, for example ahead of a Council meeting

when positions are still being worked out. However, the experience of previous visa liberalisation processes suggests that efforts must be made to provide especially the skeptical ministries with a different perspective before a decision is due, building up pressure to make the issue more transparent and countering simplistic or populist arguments. While, in general, domestic debates on matters of such sensitivity as entry and integration policies are not easily influenced from abroad, appeals to European solidarity and the demonstration of the benefits of visa liberalisation have been effective at times when dealing with security-driven arguments for more restrictive national policies.

(iv) Handling Public Opinion in the EU and Making Use of the Media

Public opinion in the EU has become a strong force in shaping migration policy, primarily at the national level, which in turn influences positions taken by member-state governments on visa policy, which is set at the EU level. Mass media both reflect and influence the public mood on the issue.

On the one hand, the influence of tabloid-like sensationalist journalism, aimed at stirring up emotions, opens the way for populist calls for more restrictive immigration policies. On the other hand, new media such as social networks, blogs, and email newsletters and distribution lists can work to the advantage of civil society actors who can target their message to specific audiences across national boundaries and instantaneously react to new trends or initiatives. In fact, the dynamic growth of communications technologies has opened the door to so many voices and perspectives that the recipients of information can face a real challenge in evaluating the quality of the information they receive, and in treating each piece of information with the right perspective.

The difficulty of using the media in an advocacy campaign consists in matching the message to the level of awareness, interests, and needs of the audience. In the case of a complex issue, such as visa policy, where positions are shaped and debated at both the EU and national levels, the challenge is even greater, calling for parallel activities targeting the Brussels audience and the media in the member states. Each target needs to be approached on its own terms, primarily through the choice of the right method of communication and the most appropriate arguments and rhetorical techniques.

*A primary distinction needs to be made between two types of **discourse**: a Brussels-centred expert discussion of EU proposals and policies versus outreach to the public focusing on national interests and sentiments.*



This influences in turn the choice of the **form of communication** that will be most suitable to meet the specific needs of the audience. If an intervention in a Brussels-based discussion is being considered, not only will different arguments (more technical and legal) have to be put forward, but different formats will be used to reach the different target audiences, such as EU officials, representatives of member states, experts, and the EU-interested public.

The work with Brussels media will have several aspects: one aim will be to engage the political level of governance (the Commission, the Council, the European Parliament) through the use of letters to the editor or open letters written on behalf of a pan-European coalition; another one will be to tackle more specific points and to point to the social significance of the issue through the use of such instruments as interviews, opinion pieces, debate shows, and press releases.

Civil society organisations without a Brussels base need to overcome the disadvantage that comes from being outside the circle of experts and activists that Brussels-based journalists have come to consult and rely on. They need to decide whether they want to “go it alone” and seek to build their position slowly by underlining their specific competence or representation of a significant affected group, or if they are willing to enter the Brussels debate as part of a coalition.

Of course, working out a statement agreeable to a coalition runs the risk of diluting some of its impact and takes away much of the control over the distribution of the message, but the coalition approach can be a useful entry strategy in order to achieve recognition for a new civil society organisation’s own efforts. Likewise, the introduction of a hitherto little-known civil society organisation at a large coalition event might generate additional benefits, such as the interest of other civil society organisations in co-operation and the creation of more lasting partnerships.

However, once an organisation becomes recognisable in Brussels, it must continue to maintain its standing so that it becomes a permanent participant in the policy debate, consulted and included by other stakeholders and decision-makers in their deliberations.

In the case of an organisation from, for instance, one of the Eastern Partner countries, a certain redefinition of the organisation’s communications strategy might be necessary - where once a local perspective dominated, it now needs to adapt to the rhythm of EU-level policy-making, staying up to date with EU proposals and developments, which is easier with a Brussels base or at least representative.

At the same time, the fact that the organisation has a “fresh” perspective from a non-EU country increases its value to experts and officials. As outlined in the guidelines for working with EU institutions (see **(ii) Adapting the Advocacy Strategy to Facilitate Visa Liberalisation at the EU Level**), adherence to a consistent line of argumentation should be complemented by acknowledging and convincingly refuting the counter-arguments of other stakeholders.

A particular form of communication that is welcomed by the EU audience is an analytical piece, usually in the form of a concise policy brief. Such a piece should offer a succinct definition of the problem, refer to recent proposals, and identify actions that need to be taken in the short- and mid-term by specified stakeholders. The recommendations must be closely related to specific EU policies, and show how acceptance of the recommended measures is going to help the EU realise its objectives or respond to emerging threats, opportunities, or changing circumstances. Such arguments must be backed up with reliable evidence from trusted sources (official EU or national statistics, strategic documents, public statements).

Opportunities for using the media in the various member states are more limited for foreign organisations and might require the support, if not actual involvement, of partners located in the EU country in question. Co-operation with local actors can be helpful in order to deal with populist arguments that require quick and powerful reactions from persons and organisations that know the background and context, and already enjoy the general trust of the public. The role of the advocates from other countries is to provide the necessary information from the field and, if this strengthens the message, act as a secondary contributor.

Local activists enjoy a definite advantage when it comes to neutralising a populist discourse and grounding the debate in facts.

Several techniques can be used for this purpose:

- (1) attacking false premises;
- (2) uncovering dishonest forms of argument (rooted in prejudices);
- (3) referring to authority and international reputation (the position of the national government, shared social values, public opinion polls);
- (4) presenting the “human face” of the story by using real-life examples.

Of course, these techniques can be used in combination - however, as a general rule, it is recommended that the response to counter-arguments be proportional and focused.

When a civil society organisation engages in the domestic discourse, it is important to avoid falling into the trap of mixing issues, which is typical of populist discourse. For instance, the public might not fully distinguish between the different categories of visas, or be aware that mere possession of a visa might not be sufficient to enter the EU (since it is still necessary to be able to describe and justify the trip and have sufficient funds). A description of what the current visa procedure actually entails, and what would change in the future, might help to undercut the basis for simplistic slogans such as “the folly of a liberal visa policy”, or claims that liberalisation will lead to wage-dumping and unemployment (a short-stay visa does not entitle its holder to work).

Since the choice of arguments and forms of communication needs to take into account existing popular beliefs and stereotypes in order to counter them, the design of the communications strategy that seeks to reach the public in an EU member state is better left to partner organisations based in that member state.

(v) Working with Third-Country Governments and Societies Interested in Visa Liberalisation

Civil society organisations based in countries aiming to undertake reforms in order to come in line with EU standards (as is the case in the visa liberalisation process) are uniquely positioned to facilitate the harmonisation process, whose success crucially depends on the government's political will, its capacity, and its ability to sustain popular support for the reforms.

Civil society advocacy efforts need to target three types of audience: the EU institutions and member states, the government implementing reforms to qualify for visa liberalisation, and the public in the applicant country. The first step involves establishing one's own position vis-à-vis the EU and the government so that they recognise the **added value** of civil society's involvement in a process that would otherwise remain a strictly bilateral affair.

Establishing credibility in this triangle (EU-government-civil society) depends on the ability of the civil society organisation to demonstrate that it commands three qualities: technical expertise on the subject, a record of independent policy analysis, and a record of successful advocacy campaigns. It is evident that such credibility must be built over time. Another precondition is a high degree of institutional stability, stemming from the organisation's history, a clear delineation of competences, and the availability of qualified staff. Institutional stability is necessary if a permanent partnership is to be set up for the period of the visa-liberalisation process.

The involvement of civil society organisations is valuable to the governments undertaking the reforms in three major ways. Firstly, civil society actors can help interpret the positions that the European Commission and the national government take during the process,

clarifying misunderstandings, adding background information, and framing matters in the right perspective. Although they are not party to the talks, they may be invoked as reference by either side, helping overcome stalemates.

Secondly, they are useful to both the EU and the national government when they educate the public concerning the benefits of the process, which include not only the reward in the form of visa-free movement but also the transformation of certain services that will benefit citizens (passport issuance, more effective fight against corruption and organised crime, personal data protection).

The third function is probably the least conspicuous, and yet it is one for which civil society organisations are indispensable. Reform-minded governments are at risk of losing the momentum of reform, which is particularly true at times of budgetary discipline and in the absence of the anchor of a clear prospect of EU accession. Civil society organisations can, on the one hand, provide encouragement by referring to foreign experience and demonstrating that “this can be done” and, on the other hand, help avoid costly mistakes by supplying a more independent, long-term view of issues that might otherwise be absent amid internal fragmentation of a given government and inter-agency competition for resources.

Think-tanks and research institutes, in particular, can support the Cabinet of Ministers or the prime minister or president (depending on the political system) in an analytical capacity - working in parallel with the government’s analysts. In this way, civil society groups can provide parallel public policy analysis of resources available and activity-planning.

While an advisory function to the executive branch (the government, the head of state) can be viewed as a win-win situation for both sides, civil society organisations must tread carefully when working with line ministries so as not to be identified with these institutions and thus lose their reputation for impartial judgment.

Good channels of communication and co-operation, however, can be complemented by working to help establish contacts between, for instance, the Ministry of Interior and its counterpart in an EU member state, or to facilitate access to the Interior Ministry for civil

society organisations from the EU. In all such cases, prudence is advised, and care must be taken to ensure that the relationship with specific officials or government units remains transparent and non-committal, so that the civil society organisation retains its scope for taking a critical public stance towards the ministry or government.

Probably the biggest challenge for a civil society organisation in one of the Eastern Partner countries in the event that it decides to advise the government is to redefine its role from that of a guardian of societal interests and universal values to that of a trustworthy, but impartial adviser. It is quite a challenge to display at the same time independent, critical judgment, and an understanding and empathy for the position in which the government finds itself while trying to implement the requirements laid out by the European Commission.

However, this burden of this approach may be lessened if the organisation recognises at the outset the ways in which the process of “Europeanisation” of domestic migration policy help further civil society’s own agenda by reinforcing the guarantees to special groups in need: to asylum seekers and minority groups, as well as by introducing mechanisms to combat discrimination and violence against migrants.

In short, to change policies and to influence the implementation of reforms, it is necessary to engage the stakeholders. An independent civil society actor must state clearly its values and objectives, and engage openly and transparently in pursuit of those objectives, armed with empirical evidence and thorough analysis of the context and implications of policy reform.

The road to an open Europe might be a long one, and the road will not be uniform, but different actors have different roles in paving the road. Civil society can bring the expertise, the values, and the force of argument, to help reach the tipping-point that opens the way.





Policy Association for an Open Society

How to become a PASOS member

To be eligible for PASOS membership, an organisation should accept the PASOS mission and goals, share and promote open society values, and not be related to any political party or political movement. The organisation must have been in existence for at least two years and have established a credible reputation in public policy as determined by the Board of PASOS.

To apply, the applicant should submit to the Board (via the Executive Director):

- 1. An application supported by the written recommendation of at least two members (as listed at www.pasos.org), demonstrating the reputation and the credible track record in public policy of the applicant.*
- 2. A copy of the applicant organisation's charter in the original language, and a translation into English of the Charter or a summary of the Charter.*
- 3. The mission of the policy centre, and an account of its main areas of research and activities.*

There is an annual membership fee of EUR 500.

For more information, contact PASOS Executive Director Jeff Lovitt at jefflovitt@pasos.org

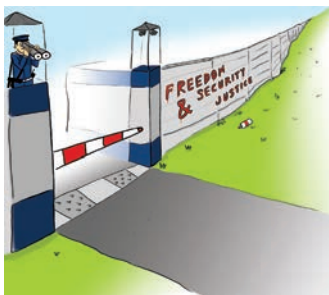
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