

The Stockholm Programme: A chance to put fundamental rights protection right in the centre of the European Agenda

Introduction

With this paper the European Union Agency for Fundamental Rights (hereinafter 'FRA' or 'the Agency') is commenting on the so called 'Stockholm Programme' as proposed by the European Commission at the beginning of June 2009 and that is expected to be adopted by the European Council in December 2009.¹ The Stockholm Programme will – after the Tampere Programme (1999-2004) and the Programme of The Hague (2004-2009) – build the new multiannual programme defining the priorities of the European Union in the areas of freedom, security and justice. The Commission has grouped the various future challenges and its respective policy proposals under the subheadings "A Europe of rights", "A Europe of Justice", "A Europe that protects" and "A Europe of solidarity". In all these four views on Europe's future, the protection of fundamental rights has an undeniable role to play.

The Agency's comments on the proposed Stockholm Programme are not meant to be exhaustive. Rather they present a selection primarily based on the current thematic priorities of the Agency² and are inspired by the factual evidence the Agency's own research has so far produced.³ Therefore this contribution is just a first step in a long term approach of the Agency to follow and address the issues in the Stockholm Programme. The Agency is committed to follow the implementation of the Programme during its lifespan (2010-2014). During that phase the Agency will – as in the past – remain at full disposal for delivering evidence-based policy advice to the Council⁴, the European Commission⁵, and the European Parliament⁶.

¹ See Communication "An area of freedom, security and justice serving the citizen", COM (2009) 262/4, 10 June 2009.

² The thematic areas the Agency is focusing on are defined by a Multi-annual Framework (MAF) adopted by the Council of the European Union. For the current MAF see Council Decision of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, (2008/203/EC).

³ All the reports of the Agency are available online at its website www.fra.europa.eu.

⁴ See *Opinion of the European Union Agency for Fundamental Rights on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes*, of 28 October 2008 which was produced on the basis of a request by the Presidency of the Council.

1. A Europe of rights

➤ *Promoting awareness of rights in Europe*

The accession of the EU to the European Convention on Human Rights (ECHR), hinging on the entry into force of the Lisbon Treaty, is an important step in fostering a “fundamental rights culture” as proclaimed by the European Commission⁷. The Agency is providing extensive evidence that rights awareness is one of the weaknesses of the current fundamental rights situation in Europe. Even where awareness is most needed, it is lacking. The Agency’s recent EU-MIDIS survey shows that there is a surprisingly low knowledge amongst populations with an ethnic minority or immigrant background when it comes to the legal means in place to defend them against discrimination. The overwhelming majority of the more than 23,500 persons interviewed – ranging from Roma in Greece and Africans in Malta, through to Somalis in Sweden, and Russians in Finland – did not know of any organisation offering support or advice to victims of discrimination.⁸ This shows clearly that prominent legal provisions alone have no impact if the awareness of the respective rights and how rights can be claimed is lacking. More resources need to be invested in awareness raising programmes and in the work of equality bodies and other mechanisms.

➤ *Put Diversity Policies at the top of the European Agenda*

References to diversity are fairly widespread in the ‘EU-speak’ and can partly also be found as a concept in EU-law. But diversity remains a vague notion. The Stockholm Programme should underline that the EU’s motto of “United in Diversity” is not only about the richness resulting from the diversity *between* the Member States, but also about the diversity found *within* the societies of every Member State. This diversity comes all too often under pressure. One in five Roma respondents to the above-mentioned FRA EU-MIDIS survey and one in ten of all Muslims surveyed reported that they were victims of racially motivated crimes, including assaults, threats and serious harassment, at least once in the previous 12 months. In fact, data reported by the Agency indicates that between 2000 to 2007 criminal justice recorded ‘racist crimes’ increased in 11 out of 12 Member States for which data is available. With this background the Agency is of the opinion that the Stockholm Programme should call to invest major political

⁵ See the Agency’s report *Developing indicators for the protection, respect and promotion of the rights of the child in the European Union (Summary report)*, 25 March 2009, prepared upon request by the Commission.

⁶ See the two reports on homophobia by the Agency: *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I - Legal Analysis*, 30 June 2008 and *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation*, 31 March 2009 which were prepared upon request by the European Parliament.

⁷ European Commission, *Compliance with the Charter of Fundamental Rights in Commission legislative*, COM(2005) 172 final, at p. 3.

⁸ See EU Agency for Fundamental Rights, *EU-MIDIS, European Union Minorities and Discrimination Survey, Data in Focus Report, The Roma*, 2009; www.fra.europa.eu/eu-midis.

efforts in underlining that diversity enriches, and that immigrant and ethnic minority groups are not about a social or criminal problem to be 'managed'. Concrete proposals should be added as to how the most vulnerable can be protected. Increased coordination for the sake of exchanging good practices in the area of diversity management should be established. This exchange should emphasise the role fundamental rights ought to play in this context. Where the Stockholm Programme deals with electoral campaigns, reference could be made to the responsibility of Member States to prevent elections from becoming catalysts for xenophobia.

Based on evidence collected by EU-MIDIS from 3,500 Roma respondents in seven Member States, the Agency recognises that there is a pressing need for more active and effective policies concerning Roma inclusion. The Stockholm Programme should call upon Member States to make a concerted effort to integrate the Roma community fully into society by promoting their inclusion in the education system, in the housing and labour markets and by taking action to prevent violence against Roma. These inclusion policies should aim at inserting the Roma community into mainstream society while at the same time allow for the preservation of their identity.⁹ In this regard, there is scope to critically review the success of community funded projects aimed at addressing the situation of the Roma in European societies, including their continued experiences of discrimination.

➤ *Broadening the fight against discrimination in Europe*

The FRA's recent EU-MIDIS study reveals that discrimination is far more widespread than recorded in official statistics. Most of the minority groups surveyed in EU-MIDIS considered that discrimination on the basis of ethnic or immigrant origin was widespread in the Member State where they were interviewed. More than a third of the respondents stated that they had been personally discriminated against in the past 12 months. The recent Eurobarometer survey on Discrimination in the European Union, together with the findings from EU-MIDIS on rights awareness, reveals that the majority of Europeans – from both majority and minority backgrounds – do not know their rights related to discrimination or harassment.¹⁰ Awareness about the legal situation has to be raised. Sanctioning policies and the powers of equality bodies in the Member States have to be substantially developed. The Stockholm Programme should address these issues in a forthright manner. Reference should also be made to the transversal duty of the European Union to combat discrimination based on sex, racial or ethnic origin or belief, disability, age or

⁹ Compare Council of the European Union, Council Conclusions on the Inclusion of Roma, 2947th Employment, Social Policy, Health and Consumer Affairs Council meeting, Luxembourg, 8 June 2009.

¹⁰ European Commission, *Discrimination in the European Union: Perceptions, Experiences and Attitudes*, Special Eurobarometer 296, Discrimination in the EU 2008.

sexual orientation *semper et ubique*, that is wherever and whenever the Union is “defining and implementing its policies and activities”.¹¹

The Agency welcomes the proposed Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in areas outside of employment. The Stockholm Programme should send a clear signal in favour of the early adoption of this important Directive. There is also the need to address institutional discrimination on the grounds of race and ethnic origin by the justice system and law enforcement officials in particular ethnic profiling which is prevalent according to an FRA-study.¹² Moreover, two studies carried out by FRA in 2008 demonstrate great differences between Member States in policies concerning discrimination on grounds of sexual orientation, and highlighted the complete absence of relevant legislation in some Member States.¹³ Appropriate steps should be taken to extend the right of EU citizens and their family members to move and reside freely within the Union to also cover same-sex couples recognised by any Member State.¹⁴ Also the need for enhanced data collection at national level should be underlined in order to provide effective means of identifying, monitoring and reviewing policies and practices to combat racial and other forms of discrimination and promote overall equality in Europe.¹⁵ Finally, the Agency would welcome if the upcoming Stockholm Programme made reference to equality between men and women¹⁶, and referred to the new Gender Institute which will launch its first activities during the lifespan of the Programme.

➤ *Protecting all children without discrimination*

The Agency would also like to see a more coordinated effort to protect children against any form of abuse and to uphold their rights. When consulted on the Commission Communication towards an EU Strategy on the Rights of the Child, children themselves highlighted violence, discrimination, social exclusion and racism, child labour, prostitution and trafficking as some of the main concerns that the EU should tackle more forcefully. The FRA therefore welcomes the Commission’s proposals for a Council Framework Decision on combating sexual abuse of children. The UN Convention on the Rights of the Child (CRC), which

¹¹ Compare Art. 10 of the Treaty on the Functioning of the European Union, in OJ C 115, 9 May 2009 (Treaty of Lisbon, consolidated version).

¹² See in this regard the quoted EU-MIDIS study but also the currently ongoing FRA research on ethnic profiling.

¹³ See footnote 6.

¹⁴ European Parliament, Resolution of 2 April 2009 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2008/2184(INI)).

¹⁵ Compare for instance European Parliament, Resolution of 8 June 2005, “*Protection of minorities and anti-discrimination policies in an enlarged Europe*” (2005/2008(INI)), Paras 12 and 53.

¹⁶ The challenges ahead have been identified by the Commission in a report delivered on 27 February 2009, see COM (2009) 77 final.

applies to all children without discrimination on the basis of their status, should guide EU action and serve as a basis for amending existing legislation.

The protection of unaccompanied and separated children, and in particular those who are outside their country of origin, is critical given the high risks to which they are exposed. The 1997 Council Resolution on Unaccompanied Minors who are nationals of third countries, for instance, has no built-in mechanism to give a primary consideration to the best interests of the child when deciding on admission of undocumented unaccompanied children. Gaps in the enjoyment of rights laid down in the CRC are currently being identified through the Agency's research. The European Union should promote the principles and rights of the CRC across the board of its policies.¹⁷ In order to facilitate the implementation of the civil, economic, social and cultural rights of children, indicators such as those developed by FRA¹⁸ can facilitate the application of the rights laid down in the CRC in practice and assist in evaluating the impact of EU law and policy on children.

➤ *Enabling minorities to move freely*

The Stockholm Programme should underline the fundamental rights dimension of free movement. The Commission has noted with disappointment that the transposition of the directive on free movement of persons is lagging behind and remains suboptimal in all of the Member States.¹⁹ The Commission underlines in its recently released guidelines on the application of this directive that the latter must be interpreted and applied in accordance with fundamental rights, in particular the right to respect for private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy.²⁰ What should be addressed in this context are those vulnerable groups whose right to free movement is most at risk such as Roma, and homosexual couples²¹.

2. A Europe of law and justice

➤ *Recognising the rule of law as the key to mutual recognition*

A "Europe of law and justice" should be more than a Europe built on efficient

¹⁷ Compare Art. 3 para. 3 of the Treaty on the European Union, in OJ C 115, 9 May 2009 (Treaty of Lisbon, consolidated version), which establishes a transversal duty for the Union to promote the protection of the rights of the child.

¹⁸ See above footnote 5.

¹⁹ European Commission, *Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM(2008) 840 final, 10 December 2008.

²⁰ European Commission, *Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM (2009) 313/4, July 2009.

²¹ See on this the Agency's legal report on homophobia (see footnote 6).

transnational procedures. The Agency agrees with the Commission that more harmonisation and more mutual recognition is necessary when it comes to cooperation in the area of criminal matters. At the same time it is of utmost importance to underline that there can be no Europe of law if not based on and nurtured by the rule of law. Only a strong common reading of fundamental rights protection, especially in the area of procedural safeguards in criminal law, will allow for a sustainable level of sufficient mutual trust between the different national systems, and indeed trust in the Union. Harmonisation in the area of procedural safeguards might not be easily achieved in a short term perspective and could therefore take place in various steps but it should in any event aim at a level of protection that shows a clear commitment to fundamental rights.

➤ *Developing a “joined up” approach to victims’ rights*

The Stockholm Programme makes various references to victims of crime, but there is scope within the programme to develop a ‘joined up’ response to victims. Herein, a consistent and strengthened response to the needs and rights of seemingly diverse victim groups should be promoted in the Programme; a response that encompasses all victims of crime alongside the current focus to address the specific vulnerabilities of trafficking victims and child victims of sexual exploitation, which are often framed within responses to organised crime.

As the Union continues to enhance its responses to illegal activities in the cross-cutting areas of immigration, crime and security, so the needs of victims, both citizens and non-citizens, must be embedded within this as part of an integrated rights-based approach. Implementation on the ground of existing legislative and policy responses to illegal activities in the areas of immigration-crime-security must ensure that victims are responded to as victims, rather than as criminals. The FRA’s report on Child Trafficking in the EU illustrates clearly that a victim-centred approach is essential if the needs and rights of victims are to be addressed; an approach that should extend to all victims.

A more coordinated approach to victims’ rights can serve to reinvigorate existing legislation for ‘ordinary’ victims, such as the 2001 Framework Decision on the Standing of Victims in Criminal Proceedings and the 2004 Directive relating to Compensation to Crime Victims, and can provide an added stimulus to current proposals in the field of trafficking and child sexual exploitation.

3. A Europe that protects

➤ *Fighting discriminatory ethnic profiling and enhancing Police ethics*

The creation of an area of freedom, security and justice is dependent on the quality of policing activities, as these impact on the protection of citizens. Law enforcement’s enjoyment of public confidence and trust is dependent on the

attitude and behaviour the police displays towards the public, and, in particular, on the police's respect for human dignity and fundamental rights.

The recent EU-MIDIS survey carried out by the Agency revealed the massive extent of underreporting to the police of assaults, threats or serious harassments against people belonging to minorities.²² The findings indicate that the main reason for not reporting is a suboptimal degree of confidence in the police. The Agency therefore welcomes the suggestion by the Commission²³ to intensify exchange of experiences focusing in particular on ethical issues. Similar efforts have to be concentrated in addressing discriminatory ethnic profiling. The FRA survey, referred to above, also asked 23,500 respondents with an ethnic minority or immigrant background how often they were stopped by the police in the last 12 months, and whether they considered their stop to be the result of discriminatory ethnic profiling. The findings reveal high levels of perceived discriminatory ethnic profiling among some minority groups in some Member States. As the police are reliant on the public to report the mainstay of crime to them, there is an incentive to have the public's trust in policing as a 'public service'. Policing in Europe's multi-cultural societies requires strong ethical codes, strict adherence to non-discrimination principles, and a well grounded and practical 'know-how' in the application of fundamental rights to diverse communities. The Stockholm Programme has to call for major investment in fundamental rights training modules with the police at local, national and European level.

➤ *Secure that access to EU territory is dealt with under the rule of law*

Absolute respect for fundamental rights and international protection must accompany any measure of border surveillance and control. Fundamental rights safeguards contained in the Schengen Borders Code, such as respect for the principles of *non-refoulement*, non-discrimination and the duty to fully respect human dignity must be upheld in practice.

A significant tool in this regard is fundamental rights training for border guards, including learning methodologies which also address the need to change attitudes where this is required. Existing and future core curriculums should be developed in a manner that gives sufficient space to fundamental rights issues and how these impact on the everyday work of border officials. The Agency stands ready to provide its expertise to support efforts in this direction.

Measures to control access to the territory of Member States increasingly take place before third country nationals reach the territory of the European Union; for example, through the deployment of immigration advisors at points of embarkation or transit, or by penalising carriers for transporting passengers without valid entry documents. It should be recalled that according to international law and, more specifically, Article 1 ECHR, State responsibility

²² See above footnote 8.

²³ COM(2009)262/4 at 4.1.1.

deriving from human rights obligations may be engaged outside the national territory of the State concerned. Therefore, the EU and its Member States have to dedicate attention as to what effects the extra-territorialisation of its immigration policies has on potential immigrants and their rights as human beings. This is in particular the case for potential mechanisms to process asylum applications outside the European Union. Such mechanisms should be guided by the rule of law principles. They should be set up in a manner that does not limit access to fair and efficient procedures in Member States for those who will continue to arrive in Europe spontaneously.

Particularly acute is the situation at sea, where the lives of thousands of people remain at risk. Border control and surveillance measures have to be designed with the necessary safeguards to ensure full respect of fundamental rights as well as search and rescue obligations deriving from international maritime law. More specifically, best use should be made of the life-saving potential of the planned Eurosur system which is likely to provide information on vessels or persons threatened by grave and imminent danger requiring immediate assistance. The Stockholm Programme should show utmost commitment in this regard.

The principle of *non-refoulement* remains applicable on the high seas, thus barring the direct or indirect return of individuals to countries where they are at risk of persecution, torture, inhuman or degrading treatment or punishment. Operational tools, such as the guidelines for FRONTEX operations at sea proposed by the Commission early this year, should be adopted quickly with a view to providing practical guidance on how to act in full respect of fundamental rights.²⁴ Such guidance should pay due attention to the special needs of vulnerable people, including, among others, victims of trafficking, unaccompanied and separated children and persons seeking asylum.

➤ *Guaranteeing the right to privacy in the modern information society*

The protection of data is a fundamental issue in any democratic society – therefore the Stockholm Programme should underline the fundamental rights dimension of data protection and the right to privacy in all of the Union’s policies. In 2008, the Council adopted Council Framework Decision 2008/977/JHA concerning data protection, but this instrument has a limited scope as it only covers transborder flows of data between law enforcement authorities of the Member States and contains no minimum standards regarding data protection in surveillance activities or related to data bases of law enforcement agencies within the Member States.

²⁴ See on this already European Commission, “*Study on the International Law Instruments in Relation to Illegal Immigration by Sea*”, SEC(2007) 691, 15 May 2007. Compare also UNHCR/IMO, “*Rescue at Sea – A Guide to Principles and Practice As Applied to Migrants and Refugees*”, 2006, where it is stated clearly at page 8 that if people rescued at sea make known a claim for asylum, “key principles as defined in international refugee law need to be upheld”.

FRA research indicates a need to address minimum standards of effective data protection and protection of privacy with regard to video surveillance.²⁵ In addition, as the Future Group recalled, information should not be used for purposes other than those for which it was collected.²⁶ This is particularly critical with regard to access for law enforcement purposes. In light of the plan to bring the three major European databases EURODAC, VIS, and SIS under one institutional roof, the Stockholm Programme should be more outspoken on measures and mechanisms guaranteeing that all European databases stick to the highest European standards of data protection.²⁷

➤ *Combating organised crime without undermining human dignity*

The Agency welcomes the strong commitment to fight international organised crime, but appeals not to forget the victim's perspective. As regards the crime of human trafficking specifically, a recent study on child trafficking published by the Agency identified a number of measures that could enhance respect for the dignity of victims.²⁸ Findings from the FRA study range from the need to develop guidelines for the identification of victims of child trafficking, and to take measures to exclude the detention of trafficked children and guaranteeing them protection and access to social rights in particular.

Terrorism is equally an area where human beings are instrumentalised. Fighting terrorism will remain a particularly sensitive issue with an apparent risk of conflicting with international human rights standards. The Agency would therefore recommend adding an explicit reference for the need to ensure absolute respect of fundamental rights to any measures envisaged in this domain.

4. A Europe of Solidarity

➤ *Guaranteeing fair and efficient procedures for family reunification*

As regards family reunification, building on the European Pact on Immigration and Asylum, measures should be taken in order to guarantee full compliance with fundamental rights and Article 8 ECHR more specifically. Efforts in this area should aim at addressing the practical obstacles affecting the right to family

²⁵ EU Agency for Fundamental Rights, *Comparative Legal Study on assessment of data protection measures and relevant institutions*, to be published at the end of 2009.

²⁶ High-Level Advisory Group on the Future of European Justice Policy, *Proposed Solutions for the Future EU Justice Programme*, June 2008 at 1.3.

²⁷ Compare European Commission, *Proposal for a regulation establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice*, COM (2009) 293 final, June 2009.

²⁸ EU Agency for Fundamental Rights, *Child Trafficking in the European Union: Challenges, perspectives and good practices*, July 2009.

reunification by third country nationals residing lawfully in EU Member States, as identified by the Commission²⁹.

- *Allowing for fair return procedures and caring for those who cannot be returned*

Implemented in a manner which fully respects fundamental rights, the Return Directive can be a useful instrument to tackle some of the existing concerns for the standard of treatment of third country nationals in return proceedings. As a current FRA study indicates³⁰, a step in this direction is the creation of independent return monitoring mechanisms as required by Article 8.6 of the Directive. In addition, a best interests determination which facilitates adequate child participation and where decision makers with relevant areas of expertise are involved should precede return decisions for unaccompanied and separated children. Safeguards to be accorded on the basis of Article 14 of the Directive should take due account of applicable international obligations deriving in particular from the CRC and the 1966 International Covenant on Economic, Social and Cultural Rights. Similarly, provisions allowing for extended pre-removal detention should not be applied expansively.

The FRA finds that the treatment of irregular migrants who for technical or similar reasons cannot be removed from the EU territory should be further examined in full respect of the non-*refoulement* principle. Research currently undertaken by FRA³¹ indicates that these persons face serious difficulties in enjoying basic fundamental rights, such as access to health care, education and justice.

- *Curbing irregular migration in a fundamental rights oriented spirit*

In their effort to curb irregular migration, some Member States have put in place practices to detect irregular immigrants which have the indirect effect of discouraging irregular migrants from enjoying basic rights applicable to any person, such as for instance access to education and health care facilities. Such measures include: a duty for service providers to record the personal details of irregular immigrants and make these available to police authorities; the criminalisation of a wide range of support measures by private individuals, such as sheltering irregular migrants, even when this is done purely on a humanitarian basis. The FRA is of the opinion that an evaluation of the impact of the Facilitation Directive³² could be a first important step to determine whether the

²⁹ See Report from the Commission to the European Parliament and the Council on the application of the directive 2003/86/EC on the right to family reunification, COM(2008) 610 final.

³⁰ Study under preparation on *Protecting, respecting and promoting the rights of irregular immigrants in voluntary and involuntary return procedures*.

³¹ As indicated in its 2009 work programme, www.fra.europa.eu/fraWebsite/attachments/wp09_en.pdf, at page 8, the Agency is undertaking a study on the situation of irregular immigrants in the EU, focusing particularly on the areas of health, education, housing and employment.

³² Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, in *OJ L 328, 5 December 2002, p. 17–18*.

humanitarian clause contained in Article 1.2 of the Directive should be made compulsory.

Moreover attention should be paid to ensure that implementation of the Employers' Sanctions Directive does not result in cumbersome procedures discouraging employers from considering job applications submitted by migrants. The recent survey carried out by the FRA revealed that 22 % of Sub-Saharan African respondents and 18 % of North African respondents experienced discrimination when looking for work or at work in the past 12 months.³³

➤ *Continuing the legislative work towards the establishment of a Common European Asylum System*

Wide disparities still exist between EU Member States concerning the granting of refugee status and subsidiary protection. For example, in 2008, asylum-seekers from Afghanistan were denied protection in 100% of cases in Greece, whereas in the U.K. in 50% of cases Afghan applicants were granted protection.³⁴ Substantial differences also persist as regards reception conditions for persons seeking international protection or the rights of persons granted subsidiary forms of protection (for instance as regards family reunification)³⁵.

While it is extremely important to promote the implementation of the existing common minimum standards at a national level, current gaps in the enjoyment of the fundamental right to asylum enshrined in Article 18 of the Charter cannot be removed without further legislative work. The FRA therefore supports the proposal by the Commission on the need to adopt swiftly the legislative proposals of the second phase of harmonisation in full compliance with the 1951 Convention relating to the Status of Refugees as required by the Treaty on the Functioning of the European Union.³⁶

The creation of national asylum procedures with comparable standards of fairness is not realistically achievable without reducing substantially the possibility to depart from procedural safeguards currently included in the Asylum Procedures Directive, such as, for instance, the considerable discretion to decide whether a remedy shall have the effect of allowing applicants to remain in the country pending the outcome of an appeal, or strengthened safeguards to ensure

³³ EU MIDIS, data available with FRA.

³⁴ See UNHCR, *2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, 16 June 2009, Annexes, Table 12: Total recognition rates for Afghans in Greece was 0 % as compared to 55 % in the U.K. Similar differences can be noted also as regards other nationalities: 36 % of Somalis received protection in Spain as compared to 88% in Germany or 97 % in Finland; recognition rates also vary considerably for Iraqis: UK 32 %; Ireland 52 %; 83 % in France and 99% in Cyprus.

³⁵ See Report from the Commission to the European Parliament and the Council on the application of the directive 2003/86/EC on the right to family reunification, COM(2008) 610 final at 3.2 according to which nine EUMS apply the directive to subsidiary protection beneficiaries.

³⁶ See Art. 63 para. 1 of the Treaty Establishing the European Community, in OJ C 321 E, 29 December 2006.

access to asylum procedures. Similarly, the existing disparity between refugees and persons granted subsidiary protection as regards access to employment³⁷ and the right to family reunification³⁸ do not appear to be justified in light of the Charter of Fundamental Rights, given that the protection needs of both categories are rather similar. Other areas which require further legislative action at the European level include the mutual recognition of positive asylum decisions and the freedom of movement of persons granted international protection within the EU, as well as safeguards to prevent the disproportionate use of deprivation of liberty for people who may have entered a Member States irregularly, but have not committed any crime.

- *Developing the concept of solidarity and intensifying practical co-operation between the Member States*

A satisfactory solution to refugee situations cannot be achieved without international cooperation. This is also the case within the Union. Certain EU Member States are disproportionately affected by migration movements whereas others hardly face challenges directly related to migration. Abstract concepts like European solidarity and loyal cooperation between the Member States call for concrete responsibility sharing measures. There are obvious fundamental rights concerns at stake when it comes to European solidarity: burden sharing mechanisms are urgently needed in order to avoid that the fundamental rights of the most vulnerable groups are ignored in Europe. Policy responses are often still ad hoc, uncoordinated, and piecemeal. Hundreds of unaccompanied asylum seeking children arrive every year at the European borders – only a European policy approach will guarantee that they are offered an existence that comes up to a modern ‘child rights’ standard.

Once established, the European Asylum Support Office (EASO) could help bridge the gap between EU policies and those practical realities on the ground which prevents asylum seekers and refugees from fully enjoying their rights. To do this effectively, the FRA believes that the EASO should be transparent and have institutional collaboration with relevant European agencies, including the FRA. The proposal to provide UNHCR a non-voting seat in the Management Board of the EASO deserves support³⁹. The FRA’s Fundamental Rights

³⁷ See Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in OJ L 304, 30 September 2004, at Article 26.

³⁸ The need to ensure respect for the principle of family unity has been recognised by the Commission. See Policy Plan on Asylum adopted on 17 June 2008, COM(2008) 360 at 3.3 as well as Report from the Commission to the European Parliament and the Council on the application of the directive 2003/86/EC on the right to family reunification, COM(2008) 610 final at 3.2.

³⁹ See proposal for a regulation of the European Parliament and of the Council establishing a European Asylum Support Office, SEC(2009) 153, SEC(2009) 154 at Article 23.4. Based on Article 35 of the 1951 Convention relating to the Status of Refugees and on Article II of the 1967 Protocol relating to the Status of Refugees, State Parties are under a duty to cooperate with UNHCR.

Platform⁴⁰ could be used as a model for the EASO to establish a structured collaboration with civil society.

➤ *Protection statuses which are not harmonised*

Finally, FRA would like to draw the attention to the need to address gaps in the enjoyment of fundamental rights for those persons who, though not being granted refugee or subsidiary protection status, cannot be removed for humanitarian reasons due to the situation in their country of origin and are thus in practice accorded some form of national protection status falling short of the standards of treatment foreseen in the Qualification Directive.⁴¹

Conclusions

Since the upcoming Stockholm Programme is going to define the priorities of the EU in the areas of freedom, security and justice for the next five years, it will also function as a lighthouse in the area of fundamental rights protection. In that perspective the Agency is of the opinion that the current draft of the Stockholm Programme is not fully meeting its responsibility as fundamental rights could be better mainstreamed throughout the whole Programme.

The Treaty of Lisbon foresees that Member States, in collaboration with the Commission, conduct “objective and impartial evaluation of the implementation” of the EU’s policies in the area of freedom, security and justice.⁴² This sort of evaluation is crucial. The adoption of the Stockholm Programme late 2009 can only be a first step in guaranteeing that the so called third pillar of the EU is leak-proof with regard to fundamental rights. What will be even more important for Europe’s fundamental rights culture is the implementation and evaluation of the Programme in the years to come. Independently from the destiny of the Treaty of Lisbon a “comprehensive evaluation mechanism” will have to be established.⁴³ The Agency has no preference as to how EU legislation should be assessed, monitored, and evaluated. It does however have a strong stance as regards the overall performance of these mechanisms: They have to put special emphasis on the respect, the protection, and the promotion of fundamental rights in Europe. They should be efficient and transparent. And last but not least they should provide for solid input of external expert bodies specialised in the area of human rights protection.

⁴⁰ See Council Regulation No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, in OJ L 53, 22 February 2007, Article 10.

⁴¹ See Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in OJ L 304, 30 September 2004.

⁴² See Art. 70 of the Treaty on the European Union, in OJ C 115, 9 May 2009 (Treaty of Lisbon, consolidated version).

⁴³ See High-Level Advisory Group on the Future of European Justice Policy, *Proposed Solutions for the Future EU Justice Programme*, June 2008, at p. 10.

Next to *ex post* evaluations it will be equally important to guarantee efficient *ex ante* assessments in order to allow at an early point of time to identify the (possibly negative) fundamental rights implications of new EU legislation. In this context the Agency welcomes the Commission plans to invite the Agency to participate in future consultations on new initiatives like communications and Green papers.⁴⁴ It also takes notice of the postulations of the Parliament in this regard and expresses its readiness to provide its expertise to the EU institutions.⁴⁵ The Agency considers its role as one of evidence-based policy advice. This was also the spirit in which these comments on the Stockholm Programme were drafted. Fundamental rights have no political purpose other than addressing human entitlements. The protection of fundamental rights is an area – as confirmed e.g. by several Eurobarometer surveys – that is increasingly perceived as a matter that should form a priority of the European Union.⁴⁶ In this sense the Stockholm Programme is a real opportunity to meet the expectations of the people living within the EU.

Vienna, 14 July 2009

⁴⁴ European Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights*, COM(2009) 205 final, 29 March 2009, at p. 8.

⁴⁵ European Parliament resolution of 15 March 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring (2005/2169(INI)), Paras. 14 and 18.

⁴⁶ In the eyes of the citizens the three top priorities for the EU should be “Fight against terrorism”, “Fight against organised crime and trafficking” and “Promoting and protecting fundamental rights, including children’s rights”. Interestingly the first two policy areas are loosing in sustain whereas the last one is gaining in importance. See *The role of the European Union in Justice, Freedom and Security policy areas*, Report published in June 2008 (fieldwork November 2007 – January 2008).