

EU Visa Policy: What kind of Solidarity?

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Abstract

In the absence of a clear indication in the Treaties as to what solidarity entails, three visions of solidarity have emerged: a supranational/functional, an intergovernmental/voluntary, and an individual-focused/constructivist vision. Following *X and X v Belgium* and the link between visa policy and the EU's questionable strategy of externalisation of international protection, it can be concluded that visa policy is characterised by the absence of individual-focused solidarity, and does not offer any expression of the central place that human rights protection has in the EU's identity as enshrined in the Treaties. This may be partly reconnected to the unclear scope of the fundamental rights protection framework applicable to visas under international law. Visa policy tends to be characterised by inter-state and state-centred solidarity which takes a supranational form in the field of policy formulation vis-à-vis third countries and an intergovernmental form in the field of implementation on the ground. Supranational solidarity has not proven to be necessarily effective in overcoming the lack of convergence of interests between the Member States in areas which are sovereign sensitive, or to be capable of doing so in a way that upholds EU principles. Intergovernmental solidarity in the implementation of the policy is functionally driven and progressively characterised by EU norms and procedures, but it is unlikely that the search for effectiveness will lead to the supranationalisation of this sovereign sensitive field.

KEYWORDS:

EU visa policy; solidarity; humanitarian visas; reciprocity; consular cooperation

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INTRODUCTION

Visa policy has been left largely untouched by the refugee and Schengen crises, although it can be seen as one of the causes of irregular border crossings by migrants which, by virtue of the Dublin III Regulation,² disproportionately affect frontline Member States and result in a significant loss of human life. This isolation has recently been reinforced by the judgement of the Court of Justice in *X and X v Belgium*.³ In that case, the Court established that limited territorial validity visas issued by the Member States to third country nationals on humanitarian grounds for the purpose of applying for asylum once in the issuing Member State are outside the scope of the Visa Code, since the Code covers only visas for intended stays not exceeding three months.⁴ Accordingly, the Charter of Fundamental Rights is not applicable, and does not create any obligations for the Member States in relation to issuing such visas.

Notwithstanding the EU visa policy's insulation from the refugee and Schengen crises, the issue of solidarity has been long-standing in relation to visa policy too. This article analyses solidarity in the context of visa policy. It considers the different forms that solidarity takes within the policy, and the links between these forms and the state-centred and security-oriented nature of visas.

Unlike several other contributions in this collection, this contribution favours an analytical approach over a normative one, as this allows a broader perspective on the policy

² Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31 (hereafter Dublin III Regulation).

³ Case C-638/16 PPU, *X and X v Belgium*, EC:C:2017:292.

⁴ Article 1(1) of 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), [2009] OJ L 243/1 (hereafter Visa Code).

and as a normative approach, in the light of *X and X v Belgium*,⁵ may bear little practical fruitfulness at this stage. Nevertheless, the article highlights the shortcomings of the various forms of solidarity in relation to visa policy in terms of achieving policy effectiveness and reflecting the EU's identity as enshrined in the Treaties.

1. THREE DIFFERENT VISIONS OF SOLIDARITY

In a context where the Treaties envisage an undefined concept of solidarity as the foundation of EU immigration policies, three visions of solidarity have emerged which are entangled with the issue of EU competence, and the limits of the supranational method.⁶

One is a supranational/functional vision of solidarity, according to which solidarity must necessarily be part of certain 'common' policies if these are to be effective in meeting their objectives.⁷ Solidarity here is seen as an instrument to overcome heterogeneity among the Member States in pursuance of a high degree of supranational integration.⁸ It is part of a dynamic that deepens supranational integration and falls within the responsibility of the EU.⁹ Solidarity is therefore linked to the issue of effectiveness, and a matter of EU competence. Under this vision, solidarity as solely a crisis management tool is discounted in favour of systematic responsibility sharing.¹⁰ On the other hand, it is doubtful whether solidarity could go as far as requiring a shift of responsibility from the Member States to the EU in relation to the implementation of common rules, as was partly envisaged by the Commission proposed

⁵ Case C-638/16 PPU, *X and X v Belgium*.

⁶ Articles 67(2) and 80 TFEU. On the limits of the supranational method, see D. Thym, 'The "refugee crisis" as a challenge of legal design and institutional legitimacy', 53 *Common Market Law Review* (2016), p. 1545-1574.

⁷ J. Bast, 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law', 22 *European Public Law* (2016), p. 289-304, p. 296-297.

⁸ *Ibid.*, p. 289.

⁹ *Ibid.*, p. 302.

¹⁰ On the choice between prevention and remedial action, see D. Vanhelule, J. van Selm and C. Boswell, The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration, Study for the European Parliament PE453.167 (2011).

EBCG Agency's 'right of initiative',¹¹ in the light of such Treaty provisions as Articles 72 TFEU, 4(2) and 5 TEU on the principles of respect for Member States' responsibilities with regard to the maintenance of law and order and the safeguarding of internal security, conferral of power, subsidiarity and proportionality.¹² Furthermore, it is doubtful that the supranational method as it stands could deliver such an integrationist version of solidarity in the absence of full political support from the Member States.¹³

This supranational vision competes with an intergovernmental/voluntary cooperation notion of solidarity which, on its part, is criticised as undermining the very existence of common immigration policies, particularly the CEAS.¹⁴ This notion of solidarity is now referred to as 'flexible' or 'effective' solidarity, following a Joint Statement by the four Visegrad countries at an informal meeting of the 27 Member States on 16 September 2016 in Bratislava. The Joint Statement enounces that a common migration policy should be based on flexible solidarity enabling 'Member States to decide on specific forms of contribution taking into account their experience and potential'.¹⁵ The Commission itself, in a somewhat volte-face, has distanced itself from a supranational notion of solidarity, and embraced the intergovernmental notion as Commission President Juncker declared in his 2016 State of the Union Speech, that 'solidarity must be given voluntary. It must come from the heart. It cannot be forced'.¹⁶ Such an understanding of solidarity, in the current political climate, translates into

¹¹ Draft Article 18(5) Commission Proposal on a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM(2015) 671 final.

¹² P. De Bruycker, 'Solidarity as a sovereignty-reducing penalty for failing to meet responsibility in the European Border and Coast Guard' *Searching for Solidarity in EU Asylum and Border Policies* (2015), <http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf>; S. Peers, 'The Reform of Frontex: Saving Schengen at Refugees' expenses' *EU Law Analysis* (2015), <http://eulawanalysis.blogspot.co.uk/2015/12/the-reform-of-frontex-saving-schengen.html>; H. Rosenfeldt, 'The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFEU' in V. Mitsilegas, V. Moreno-Lax V and N. Vavoula (eds.), *Securitising Asylum: Extraterritoriality and Human Rights Challenges* (Brill, 2017, forthcoming).

¹³ D. Thym, 53 *CMLR* (2016) p. 1545, p. 1555 et seq.

¹⁴ On the incentives for Member States to agree solidarity measures see D. Vanhelule, J. van Selm and C. Boswell, Study for the European Parliament, PE453.167 (2011).

¹⁵ <http://www.visegradgroup.eu/calendar/2016/joint-statement-of-the-160919>

¹⁶ https://ec.europa.eu/commission/state-union-2016_en

focusing the EU's strategy in response to the refugee crisis on strengthening EU external border controls and externalizing refugee protection and migration management through cooperation with third countries.

A third, more identity-driven, notion of solidarity has also emerged. This notion advocates a less state-centred, less securitised and less exclusionary understanding of solidarity by requiring greater focus on the individual.¹⁷ The inclusion of a rights-based approach dimension into solidarity is seen as required by the EU fundamental rights protection framework.¹⁸ This understanding of solidarity advocates, for example, the introduction of secondary free movement rights for refugees in the EU.¹⁹ It has also found expression in calls by the European Parliament for a more holistic response to the refugee crisis which should include elements of 'external' solidarity in the form for example of humanitarian visas.²⁰

2. INDIVIDUAL-FOCUSED SOLIDARITY IN VISA POLICY

Visa policy is a field where individual-focused solidarity, in the form, for example, of a system of EU humanitarian visas, is entirely absent. This is a consequence of the division of competence on visas between the EU and the Member States, the unclear scope of the fundamental rights protection framework applicable to visas in general, and the lack of political readiness.

¹⁷ V. Mitzilegas, 'Solidarity and Trust in the Common European Asylum System', 2 *Comparative Migration Studies* (2014) p. 181-202, p. 186. See also the contribution of V. Mitsilegas in this issue.

¹⁸ M. Bell, 'Irregular Migrants: Beyond the Limits of Solidarity' in M. Ross and Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (Oxford University Press, 2010), p. 151-165; F. Maiani, 'Hotspots and Relocation Schemes: The right therapy for the Common European Asylum System?' *EU Immigration and Asylum Law and Policy* (2016), <http://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>.

¹⁹ V. Mitzilegas, 'Solidarity and Mutual Recognition: Lessons from European Criminal Justice Cooperation' *Odysseus Network's First Annual Policy Conference*, 26-27 February 2016; F. Maiani, 'The Reform of the Dublin III Regulation', Study for the European Parliament PE571.360 (2016), p. 56; J. Bast, 22 *EPL* (2016), p. 289, p. 301-302.

²⁰ European Parliament non-binding Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, 2015/2095 (INI).

Indeed, while it is widely recognised that state discretion to control entry into state territory is limited by human rights obligations, as clearly reflected in provisions of EU external border control instruments, the applicability of such obligations to extra-territorial settings, such as visa issuing in third countries, is highly contested, although certainly not excluded altogether.²¹ In particular, it is generally submitted by commentators that Article 3 ECHR requires Contracting States to grant visas through their diplomatic representations to applicants in specific circumstances, particularly as the ECtHR has identified as instances of extra-territorial jurisdiction by a Contracting State covered by the ECHR ‘cases involving the activities of its diplomatic and consular agents abroad’.²² However, the question remains ultimately unanswered and may be further complicated in practice by trends such as extensive reliance by states on external service providers in the visa issuing process.

In *X and X v Belgium* the Court of Justice had the opportunity to clarify the scope of the common visa policy and the consequent application of the Charter of Fundamental Rights, whose implementation, unlike Article 3 ECHR, does not depend on the exercise of jurisdiction but indeed on the application of EU law.²³ The Court, departing from the opinion of the Advocate General, held that the Charter of Fundamental Rights, with particular reference to

²¹ Articles 4 and 14(1) Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L 77/1 (hereafter Schengen Borders Code); G. Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’ 17 *International Journal of Refugee Law* (2005) p. 542-573; G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, (3rd edition, Oxford University Press, 2007), p. 244-252; E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-refoulement’ in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge University Press, 2003), p. 89-177, p. 109-128; J. C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), p. 160-171; M. den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012), p. 120-141; V. Moreno-Lax, ‘Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection’ 10 *European Journal of Migration and Law* (2008), p. 315-364.

²² ECtHR, *Bankovich v Belgium*, Judgement of 12 December 2001, Application No. 52207/99, para. 73; ECHR, *WM v Denmark*, Decision of 14 October 1992, Application No. 17392/90, para 1; ECtHR, *Al-Skeini v UK*, Judgement of 7 July 2011, Application No. 55721/07, para. 134; ECtHR, *Hirsi Jamaa v Italy*, Judgement of 23 February 2012, Application No. 27765/09, para 75; ECtHR, *Medvedyev v France*, Judgement of 29 March 2010, Application No. 3394/03, para 65. Disagreement exists in relation to the applicability of Article 33(1) 1951 Convention Relating to the Status of Refugees, 25 July 1951, 189 UNTS 150, amended by the 1967 Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (hereafter 1951 Refugee Convention), *ibid.*

²³ Case C-638/16 PPU, *X and X v Belgium*; Article 51 Charter of Fundamental Rights; Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, para. 19.

Articles 4 and 18, is inapplicable in relation to applications submitted to the Member States' representations for humanitarian visas with a view to seeking asylum in a Member State. According to the Court, although such applications are formally submitted under Article 25 of the Visa Code on limited territorial validity visas, which are visas that can be issued by the Member States when the conditions for issuing uniform visas are not satisfied, and are valid solely for their individual territories, they are outside the scope of the Visa Code.²⁴ That is the case since the Code, in accordance with its legal basis, is solely concerned with visas issued for 'intended stays ... not exceeding 90 days in any 180-day period'.²⁵

Furthermore, the Court pointed out that a contrary conclusion would undermine the system established by the Dublin III Regulation by allowing third country nationals to choose the Member State in which to submit their asylum application, and would contradict the Asylum Procedures Directive and the Dublin III Regulation by requiring Member States *de facto* to allow third country nationals to submit applications for international protection to the representations of the Member States in third countries.²⁶ These supplementing arguments have been criticised as unsound and revealing of the existence of political considerations behind the judgement.²⁷ The Court's central argument, on the other hand, appears technically convincing, but not necessarily unavoidable. In particular, the Court skilfully highlighted the distinction between the purpose of a visa application, which may take it outside the scope of the Visa Code, and the implementation of the grounds for refusing a uniform visa (including the existence of doubts as to the applicant's intention to leave the relevant Member State before the expiry of the visa) which does not have that effect.²⁸

²⁴ Ibid., para 43-45; Article 1(1).

²⁵ Ibid.

²⁶ Ibid., para 48-49; Directive 2013/32/EU on Common Procedures for Granting and Withdrawing International Protection (Recast), [2013] OJ L 180/60 (hereafter Asylum Procedures Directive).

²⁷ F. Spinelli, 'Humanitarian visas, still an open question', *Osservatorio Balcani & Caucaso Transeuropa* (2017), <https://www.balcanicaucaso.org/eng/Areas/Europe/Humanitarian-Visas-still-an-open-question-178723>.

²⁸ Case C-638/16 PPU, *X and X v Belgium*, para. 46-47.

Nevertheless, the position that limited territorial validity visas under the Visa Code can be issued only for intended stays of 90 days in any 180-day period could have possibly been avoided by emphasising their nature of derogation. The Visa Code does indeed contain rules whereby visas can be exceptionally issued or modified in certain circumstances with the effect of extending the holder's stay beyond 90 days in a 180-day period.²⁹ The effect of the Court's judgment is to leave the issue of humanitarian visas to the Member State, and the question of the applicability of Article 3 ECHR ultimately to the ECtHR. The judgement has therefore also repercussions on the negotiations between the European Parliament and the Council on the proposal for a recast Visa Code, which have been suspended following disagreement between the two institutions on the very issue of humanitarian visas.³⁰

The European Parliament has pushed for the inclusion in the recast Visa Code of provisions on humanitarian visas as part of a holistic approach to the refugee crisis which includes the creation of legal pathways to Europe and elements of 'external' solidarity. On the other hand, the Commission and the Council have consistently excluded the possibility of introducing such provisions in the Code.³¹ On the contrary, the proposal for a recast Visa Code contains provisions which would make it more difficult in practice for third country nationals to lodge limited territorial validity visa applications with the Member States on humanitarian grounds when they do not fulfil the common conditions for obtaining uniform visas.³² *X and X*

²⁹ Articles 25(1)(b) and 33 Visa Code. Cf. Commission Explanatory Memorandum on Proposal for a Regulation of the European Parliament and of the Council establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 562/2006 and (EC) No 767/2008, COM(2014) 163 final, p. 4-5.

³⁰ Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast), COM(2014) 164 final (hereafter proposal for a recast Visa Code); Presidency, Proposal for a regulation of the European Parliament and of the Council on the Union Code on visas (Visa Code) (recast) (first reading), 14213/16.

³¹ D. Neville and A. Rigon, 'Towards an EU humanitarian visa scheme?', European Parliament Briefing PE556.950 (2016), p. 3-4.

³² These provisions relate to the use of external service providers and the deletion of the obligation for the Member States to grant the possibility to visa applicants to lodge their application directly with the consulate. See U. I. Jensen, Humanitarian Visas: Option or Obligation, Study for the European Parliament PE509.986 (2014).

v Belgium identifies Article 79(2)(a) TFEU as the appropriate legal basis for EU legislation in this field.³³ It is unlikely that any EU system will be established. Although some Member States have been granting humanitarian visas (in the very form of limited territorial validity visas), on a strictly discretionary basis, and as a result of privately driven initiatives, it is evident that there is little appetite for the establishment of EU humanitarian corridors.³⁴ The judgement therefore, by sealing off visa policy from the issue of humanitarian visas, is not conducive to strengthening human rights protection at EU level and recalibrating the EU response to the refugee crisis towards a more human-rights oriented approach.

While individual-centred solidarity seems consequently absent from visa policy, it remains true that the policy, since communitarisation, has been increasingly characterised by a rights-based approach, in the form of a right of appeal for visa refusal, exhaustive grounds for visa refusal, and increasingly clearer and less discretionary rules.³⁵ However, visa policy remains primarily a security and foreign policy instrument, characterized by weaker human rights constraints than the CEAS and the EU external border control policy.³⁶ In the context of inter-state solidarity, the ‘burden’ attached to visa policy is of a different and perhaps less onerous nature than that which characterizes the CEAS, given the resources involved in the reception and integration of refugees, or the EU external border control policy, given its operational aspects often involving the rescuing and reception of irregular migrants. On its part, visa policy, as a policy which straddles the sovereignty sensitive areas of internal security and

³³ Case C-638/16 PPU, *X and X v Belgium*, para. 44.

³⁴ Vatican Insider Staff, ‘Sant’Egidio: Humanitarian corridors open for one thousand people’, *La Stampa* (2015); Commission Ninth Report on Relocation and Resettlement, COM(2017) 74 final. For progress on the proposal for a Regulation establishing a Union resettlement Framework, see Presidency, Reform of the Common European Asylum System and Resettlement, Council doc. 6851/17.

³⁵ A. Meloni, ‘Visa Code Regulation (EC) N. 810/2009’, in K. Hailbronner and D. Thym (eds.), *EU immigration and Asylum Law – A Commentary* (2nd edition, CH Beck, Hart, Nomos, 2016); Case C-84/12, *Koushkaki*, EU:C:2013:862; Case C-403/16 *El-Hassani*, pending, on whether the right of appeal in the Visa Code requires appeals to be heard by a court of law; proposal for a recast Visa Code; draft compromise text for trialogue negotiations, Council doc. 7714/16.

³⁶ Cf. Article 32 Visa Code with Articles 4 and 14 Schengen Borders Code. See also Article 3 Asylum Procedures Directive; Article 3(1) Dublin III Regulation.

foreign policy, is characterised by specific difficulties and particularities. Solidarity between the Member States has proved key in two fields in particular: legal harmonization which has required political solidarity between the Member State vis-à-vis third countries, and on-the-ground implementation, where solidarity has been necessary to ensure burden-sharing, consistency and effectiveness.³⁷

3. SUPRANATIONAL SOLIDARITY VIS-À-VIS THIRD COUNTRIES

The common visa policy necessarily involves the harmonization of the Member States positions vis-à-vis third countries. This is most evident in relation to the establishment of common ‘black’ and ‘white’ lists of, respectively, third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, and third countries whose nationals are exempt from that requirement, which are contained in the Visa Regulation.³⁸ Harmonization has been a long and difficult process: firstly because of the wide divergences in the Member States’ original national visa policies due to their different links with third countries, and secondly because of the need to ensure reciprocity, i.e. that the Member States are reciprocated from third countries to which they grant visa-free treatment as a result of EU harmonization. The Member States’ political commitment to the project of European integration, and the application of the Community method in the field of visas, including the requirement of qualified majority voting, have facilitated the harmonization process. It has nevertheless been necessary to introduce a number of mechanisms to overcome cases where there is little convergence of interests among the Member States, particularly given

³⁷ M. Wesseling and J. Boniface, ‘New Trends in European Consular Services: Visa Policy in the EU Neighbourhood’ in J. Melissen and A. M. Fernández (eds.), *Consular Affairs and Diplomacy* (Martinus Nijhoff, 2011), p. 115-141, p. 121.

³⁸ Council Regulation (EC) 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 that requirement [2001] OJ L 81/1, as amended (hereafter the Visa Regulation).

the sovereignty sensitive nature of visas. These mechanisms have taken various forms, such as visa facilitation agreements between the EU and third countries, arrangements for local border traffic between individual Member States and third countries, the process of conditional visa liberalisation adopted for certain third countries together with the safeguard clause in the Visa Regulation, and the reciprocity clause in the same Regulation.

3.1 HARMONIZATION AND CONDITIONALITY

The criteria for the establishment of the ‘black’ and ‘white’ visa lists in the Visa Regulation have driven the process of harmonization and solidarity. These criteria have undergone significant development over time. The original Visa Regulation adopted under the Treaty of Amsterdam in 2001 provided in its Recital 5 that:

determination of the [black and white] lists is governed by a considered, case-by-case assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and the EU’s external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity.

Furthermore, a Declaration on former Article 62(2)(c)EC attached to the EC Treaty provided that the Council could take into account the ‘foreign policy consideration of the Union and the Member States’ when adopted rules on short-term visas’.

The Visa Regulation was amended in 2014 whereby it now provides in its Article 1:

[t]he purpose of this Regulation is to determine the third countries whose nationals are subject to, or exempt from, the visa requirement, on the basis of a case-by-case assessment of a variety of criteria relating, inter alia, to illegal immigration, public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the Union’s external relations with the relevant third countries, including, in

particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.³⁹

With regard to their pre-2014 version in particular, the criteria for establishing the common ‘black’ and ‘white’ lists tended to lead harmonization and solidarity towards an exclusionary focus by giving priority to mutual recognition of national restrictive positions in the harmonization process, particularly, but not exclusively those based on irregular immigration and internal security concerns. The negative effects of the resulting restrictiveness upon some Member States were gradually and partially addressed through EU visa facilitation agreements, local border traffic regimes between the relevant Member States and third countries, and the establishment of common visa application centres in third countries.⁴⁰ Although prioritising national restrictive positions, particularly if based on immigration and security risks, can be seen as a consequence of the compensatory nature of visa policy, the policy can at least be criticised for not providing a definition of the criteria of ‘illegal immigration’ and ‘security’. This may be contrasted with the approach taken by countries such as the US and Canada which rely more extensively on numerical benchmarks, although the criteria applied by these countries and their measurement can be challenged.⁴¹ EU visa liberalisation roadmaps and action plans, ‘visa dialogues’ and reports by the Commission on the fulfilment by third countries of the criteria in the Visa Regulation clarify the meaning of these criteria, although some of these instruments have been criticised as characterised by contradictory requirements,

³⁹ Regulation (EU) No 509/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, [2014] OJ L 149/67.

⁴⁰ For visa facilitation agreements see http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm; Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, [2006] OJ L 405/1; Article 41(2) Visa Code; Press Release, *The first EU ‘Common Visa Application Centre’ opens in Moldova*, 25 April 2007, IP/07/561.

⁴¹ Alison Siskin, ‘Visa Waiver Programme’, Congressional Research Service (2015).

in terms of the specific measures that third countries are expected to adopt, whose implementation is inconsistently and unevenly monitored by the Commission.⁴²

The 2014 changes to the criteria for establishing the common visa lists reflect how visa policy has evolved from a policy which amounted to mutual recognition of national visa restrictions, to a common policy reflecting EU interests and objectives, and a continuous process of balancing tendencies towards exclusion dictated by internal security objectives, with tendencies towards openness. The new reference to human rights and fundamental freedoms is, however, controversial. While the EU is required by the Treaties to foster human rights protection in third countries, and visa policy can be seen as a carrot and stick in this context, the application of the criterion has the practical effect of further penalising third country nationals that are subject to oppressive regimes, and supports the imposition of visas on nationals of refugee-producing countries. In this context, a system of ‘target’, or ‘intelligent’ visa sanctions against identified individuals under the Common Foreign and Security Policy could be preferred as more in line with the EU’s proclaimed identity. Furthermore, it can be argued that the objective of fostering human rights protection in third countries through the use of visa policy has also served the EU’s agenda of externalizing asylum protection.

Generally, the exclusionary focus of the common visa policy has gradually lessened.⁴³

From 2006 to 2017, 33 countries have gained visa free treatment from the EU.⁴⁴ There are

⁴² See for example the Action Plans and Progress Reports for Moldova, Ukraine and Georgia, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/visa-liberalisation-moldova-ukraine-and-georgia/index_en.htm; the Roadmap and Progress Reports for Turkey, http://ec.europa.eu/enlargement/countries/detailed-country-information/turkey/index_en.htm; the EU-Russia Common Steps, https://ec.europa.eu/home-affairs/what-is-new/news/news/2013/20130311_02_en; the Commission Report on the fulfilment by Colombia of the relevant criteria in view of the negotiation of a visa waiver agreement between the European Union and Colombia, COM(2014) 665 final; S. Kacarska, ‘Europeanisation through mobility: visa liberalisation and citizenship regimes in the Western Balkans’, *CITSEE Working Paper* 21 (2012).

⁴³ See for example S. Mananashvili, ‘Access to Europe in a Globalised World: Assessing the EU’s Common Visa Policy in the Light of the Stockholm Guidelines’ *EUI Working Paper RSCAS* 74 (2013), p. 1.

⁴⁴ These are Bolivia, 22 ACP states, Macedonia, Montenegro, Serbia, Albania, Bosnia and Herzegovina, Moldova, Colombia, Peru, the United Arab Emirates, Georgia and Ukraine, Annex II Visa Regulation. For visa facilitation agreements see http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm.

proposals for extending such treatment to Kosovo and eventually Turkey, in the context of the EU-Turkey Statement, and informal talks have been opened with South Africa.⁴⁵ This change has been facilitated, with regard to candidate and Eastern Partnership countries, by the application of a conditional visa liberalisation process implemented through the visa liberalisation roadmaps and action plans mentioned above. Under this process, in order to obtain visa free treatment from the EU the relevant third countries had/have to meet EU's demands including on: readmission, security of travel documents, reduction in irregular border crossings, alignment of border control and visa policies to those of the EU, and protection of fundamental rights, including the introduction of an effective national asylum system in line with the 1951 Refugee Convention, protection of minority rights and protection of freedom of expression.

This conditionality process, overseen by the Commission, is ultimately enforced through the 'safeguard' clause/'visa waiver suspension' mechanism which was originally inserted in the Visa Regulation in 2013. The safeguard clause was recently amended, to make recourse to its use by the Member States easier, with a view to achieving Member States' agreement on visa liberalization towards Georgia and Ukraine.⁴⁶ In this context, the visa liberalisation process and the safeguard clause have been instrumental in achieving greater political solidarity between the Member States towards openness and fulfilling the EU's objective of close association with the third countries concerned through enhanced mobility. At the same time, the visa liberalisation process has been an expression of the EU's wider strategy to externalise international protection and migration management through cooperation

⁴⁵ Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Kosovo), COM(2016) 277 final; Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Turkey), COM(2016) 279 final.

⁴⁶ Article 1a Visa Regulation.

with neighbouring countries of origin and transit of migrants, which is secured through EU concessions. This strategy is questionable from the point of view of human rights compliance by the EU, given that serious doubts exist as to capacities of certain third countries to offer adequate reception and protection.

The extent to which the visa liberalisation process applied to candidate and Eastern Partnership countries will be replicated in relation to third countries of origin and transit of migrants included in the Partnership Framework on Migration launched by the Commission remains, however, doubtful.⁴⁷ The Commission has expressed the position that the credibility and effectiveness of the Partnership depends on EU policies, such as visa policy, offering other sources of leverage and support alongside financial assistance, and has identified visa policy in particular as a very powerful element in the discussion with third countries about cooperation on migration.⁴⁸ However, for the moment the Partnership envisages only a visa facilitation agreement (accompanied by a readmission agreement) with Jordan.⁴⁹ This may be seen as a reflection of the fact that, unlike for candidate and Eastern Partnership countries, an EU commitment to close association with the countries of the Partnership is inexistent, or very tenuous. On a cost-benefit assessment, the Member States may be prepared to grant visa facilitation at the most, which has proven not to be a strong enough incentive in some cases.⁵⁰

⁴⁷ Commission Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration COM(2016) 385 final.

⁴⁸ Commission Second Progress Report: First deliverables on the Partnership Framework with third countries under the European Agenda on Migration COM(2016) 360 final, para 3.3, p. 13; Commission Third Progress Report on the Partnership Framework with third countries under the European Agenda on Migration COM(2017) 205 final, para. 4, p. 16; Commission Communication, COM(2016) 385 final, p. 8.

⁴⁹ Commission Second Progress Report, COM(2016) 360 final, p. 9.

⁵⁰ Council Conclusions on enhancing return and readmission of illegally staying third country nationals, Council doc. 10112/17; S. Carrera et al., 'EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?' *CEPS Paper* 87 (2016), p. 5-7. Amendments by the Council to the proposal for a recast Visa Code envisage the introduction of a list of third countries which cooperate with the EU on readmission and whose nationals accordingly benefit from a set of visa facilitations when they meet specific requirements relating to their 'bona fide' traveller status, draft Article 13(2a) Compromise text for trilogue negotiations, Council doc. 7714/16.

3.2 THE RECIPROCITY CLAUSE

The reciprocity criterion and clause in the Visa Regulation, according to which a third country whose nationals are visa exempt by the EU is required to reciprocate such a treatment to nationals of all EU Member States, rest on solidarity between the Member States based on reciprocity, their self-interest in the EU's ability to present a unified front and exert leverage externally, and the EU principle of equal treatment of EU nationals.⁵¹ Notwithstanding the reciprocity criterion and clause, full reciprocity between the third countries in the 'white' list, and the Member States, has not been fully achieved. The number of cases of non-reciprocity rose sharply with the accession of new Member States following the 2004, and 2007 EU enlargements. Since then, the situation has improved significantly, and currently non-reciprocity is limited to Canada, in relation to nationals of Bulgaria and Romania, and the US, in relation to nationals of Bulgaria, Romania, Poland, Cyprus and Croatia.⁵² The EU has also been active in concluding visa waiver agreements with the third countries in the 'white' list which replace agreements by the Member States.

Cases of non-reciprocity between the Member States and third countries, particularly the US and Canada, have proved a test for EU solidarity. The US and Canada, whose visa policies are interrelated, impose (or used to, in some cases) visa requirements on nationals of some Member States. They justify this primarily on the ground that these Member States do not meet the visa refusal threshold laid down in US legislation and Canadian policy, as well as other requirements relating to reporting to the Interpol Stolen and Lost Travel Documents Database, and to the signature and implementation of the Preventing and Combating Serious

⁵¹ Article 1(4) Visa Regulation.

⁵² Commission Communication, State of play and the possible ways forward as regards the situation of non-reciprocity with certain third countries in the area of visa policy, COM(2016) 221 final. Canada has undertaken to achieve full reciprocity by 1 December 2017. See Commission Communication, Defining the position of the Commission following the European Parliament resolution of 2 March 2017 on obligations of the Commission in the field of visa reciprocity and reporting on the progress achieved, COM(2017) 227 final.

Crime Agreement.⁵³ The lack of reciprocity with the US and Canada has been a very sensitive issue for the affected Member States in terms of domestic politics, and international prestige. The difficulties in achieving a positive solution for the affected Member States and the Union as a whole are reflected in the various amendments to the reciprocity clause in the Visa Regulation. The issue has also spilt over into other areas of EU competence, such as national ratification of the envisaged Transatlantic Trade and Investment Partnership with the US, and the Comprehensive Economic and Trade Agreement with Canada, as the affected Member States and the European Parliament threatened to use their leverage in those contexts.⁵⁴

As a result of two sets of amendments to the Visa Regulation, the reciprocity clause has been swinging between two different versions: one characterised by automatism, and the other characterised by diplomacy. In the original 2001 Visa Regulation, the clause, which was inserted on the initiative of the Council, was characterised by automatic reciprocity and solidarity, with the effect that third countries in the ‘white’ list that (re)imposed visas on nationals of a Member State would be automatically blacklisted.⁵⁵ It was believed by a number of Member States that ‘the advantage of such a clause lay mainly in its dissuasive effect’.⁵⁶ Notification of non-reciprocity by affected Member States was however discretionary, and the clause was never invoked.⁵⁷ In 2003, in view of the 2004 enlargement, the Commission started a reconsideration of the reciprocity clause resulting in a proposal for amendment.⁵⁸ According to the Commission, the clause had never been invoked by the Member States because of the

⁵³ Commission Communication, COM(2017) 227 final, p. 4.

⁵⁴ Andrew Rettman, ‘Visa dispute to haunt EU-Canada trade pact’, *Euobserver* (2016), <https://euobserver.com/foreign/133433>; Declaration of the European Parliament of 8 March 2011 on the restoration of reciprocity in the visa regime – solidarity with the unequal status of Czech citizens following the unilateral introduction of visas by Canada, PE460.335, point B.

⁵⁵ Article 1(4) Visa Regulation (unamended).

⁵⁶ Visa Working Party, Outcome of Proceedings, Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, Council doc. 7744/00, p. 3, and Council doc. 8446/00, p. 5.

⁵⁷ See Commission Explanatory Memorandum, Proposal for a Council Regulation amending Regulation (EC) No 539/2001 as regards the reciprocity mechanism, COM(2004) 437 final.

⁵⁸ *Ibid.*

serious political repercussions that automatic reciprocity would have for the EU external relations. Automatism was assessed by the Commission as the weakness of the reciprocity mechanism and as counterproductive.⁵⁹

Notwithstanding some disagreement between the Member States during Council discussions, the new reciprocity clause adopted in 2005 abandoned automatism for a more flexible approach based on diplomacy and political dialogue envisaging a central role for the Commission as negotiator, in line with its sole right of initiative. Thus, it contained an obligation for the Member States to notify non-reciprocity cases, and gave the Commission discretion to propose the introduction of the visa requirement on nationals of the third country concerned.⁶⁰ This was seen by some Member States as weakening solidarity in the common visa policy, and the EU's negotiating position vis-à-vis third countries.⁶¹ The Commission, on the other hand, defended the approach as the most appropriate and fruitful, as it allowed a political assessment of the suitability of retaliation in each case.⁶² Indeed, cases of non-reciprocity decreased significantly between 2004 and 2005 as a result of the diplomatic efforts of the Commission and the Member States.⁶³

However, in 2009 a further controversial case of non-reciprocity emerged as Canada re-introduced visa requirements for Czech nationals, as a result of a surge in asylum

⁵⁹ Ibid.

⁶⁰ Article 1(4) Visa Regulation as amended by Council Regulation (EC) No 851/2005 of 2 June 2005 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism, [2005] OJ L 141/3. The new reciprocity clause was accompanied by a Council statement stressing that the clause in no way prevented the application of other provisional measures in other fields (political, economic and commercial) if advisable as part of a strategy.

⁶¹ Visa Working Party, Outcome of Proceedings, Proposal for a Council Regulation amending Regulation (EC) No 539/2001 as regards the reciprocity mechanism, Council doc. 11555/04, p. 8-10, and Council doc. 12112/04.

⁶² Commission Explanatory Memorandum, COM(2004) 437 final; Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2011) 290 final.

⁶³ Commission Report to the Council on visa waiver reciprocity with certain third countries in accordance with Article 2 of Council Regulation (EC) No 851/2005 of 2 June 2005 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism, COM(2006) 3 final, p. 4.

applications from Czech nationals of Roma origin since the visa requirement had been lifted by Canada in November 2007.⁶⁴ As a consequence, in 2011 the opportunity was taken in the Council, on the initiative of a Member State, to reconsider the reciprocity clause in the context of the Commission proposal to amend the Visa Regulation primarily to introduce the ‘safeguard’ clause referred to above.⁶⁵ A political compromise was eventually reached whereby the new reciprocity clause, which entered into force in early 2014, essentially provides for mandatory notification of non-reciprocity cases by the Member States, which is followed by negotiations with the third country concerned led by the Commission, with a view to achieving reciprocity within a maximum period of two years. At the end of such a period, the Commission is to adopt a delegated act for the suspension of the visa exemption which is to come into force within 90 days, and which may be blocked by the European Parliament, or the Council within a maximum period of 6 months.⁶⁶

Twenty one Member States produced a statement, echoing parts of the new clause, providing that:

[t]he amendments concerning reciprocity could have far reaching implications for the external relations of the Union and its Member States. We underline that the relevant Union institutions are obliged prior to any proposal or decision to extensively scrutinise and take into account potential adverse political consequences for the external relations, both of the Union and the Member States. This applies in particular to external relations

⁶⁴ Commission Sixth report on certain third countries' maintenance of visa requirements in breach of the principle of reciprocity, COM(2010) 620 final, p. 6-7. Canada lifted the visa requirement in November 2013.

⁶⁵ Commission Explanatory Memorandum, COM(2011) 290 final.

⁶⁶ Article 1(4) Visa Regulation as amended by Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2013] OJ L 347/74, whose Article 1(1) and (4) was the subject of an unsuccessful annulment action by the Commission based on the ground that the powers they conferred on the Commission were not in compliance with Articles 290 and 291 TFEU, Case C-88/14, *Commission v Parliament and Council*, EU:C:2015:499.

with strategic partners. The Council should ensure that these obligations are carried out in full.⁶⁷

Under the new reciprocity clause, the Commission received a number of notifications of non-reciprocity in 2014.⁶⁸ While April 2016 marked the deadline for negotiating solutions with the relevant third countries, and non-reciprocity continues with the US and Canada, the Commission has so far declined to suspend EU visa free treatment for nationals of these countries arguing that the suspension would not lead to reciprocity but retaliation with all its negative repercussions on EU citizens, the EU's economy, and its external relations with the countries concerned.⁶⁹ While the Council, although invited by the Commission to express its position, has been silent on the issue, the European Parliament has called for the Commission to fulfil its legal obligation to act and has threatened a 'failure to act' procedure.⁷⁰

Independently of the Commission's legal obligation to act, the Commission's stance, which it describes as result-oriented and in the 'common' interest, can be criticised. The fact that the EU is not reciprocated by its strategic partners, and the Commission's perceived inaction in this context have an adverse effect on the EU's image and credibility, undermine the principle of equal treatment of EU citizens and make 'speaking with one voice' rhetoric. Furthermore, the US insistence in dealing bilaterally with the Member States has raised issues with regard to the division of competence between the EU and the Member States in the field of police and judicial cooperation in criminal matters and, on occasions, has weakened EU leverage vis-à-vis the US in relation to data protection issues.⁷¹ The solidarity crisis in the

⁶⁷ Article 1(4)(d) Visa Regulation.

⁶⁸ Commission Report of 22.4.2015 assessing the situation of non-reciprocity with certain third countries in the area of visa policy, C(2015) 2575 final, p. 2.

⁶⁹ Commission Communication, COM(2016) 221 final, p. 6-9.

⁷⁰ Ibid., p. 9; European Parliament resolution on obligations of the Commission in the field of visa reciprocity in accordance with Article 1(4) of Regulation 539/2001, 2016/2986(RSP).

⁷¹ Commission Seventh report on certain third countries' maintenance of visa requirements in breach of the principle of reciprocity, COM(2012) 681 final, p. 14; P. Hobbing, 'Tracing terrorists: The EU-Canada Agreement and PNR matters', *CEPS Special Report* (2008), p. 28.

context of reciprocity shows the limitations of the supranational legal method in the absence of convergence of interests between the Member States in sovereign sensitive areas.

4. INTERGOVERNMENTAL SOLIDARITY ON THE GROUND: LOCAL SCHENGEN COOPERATION AND REPRESENTATION ARRANGEMENTS

The implementation of visa policy remains the responsibility of the Member States through their consular authorities. Implementation of the policy raises a number of challenges for the Member States requiring solidarity.

One such challenge relates to consular territorial coverage. Under the Visa Code, responsibility for examining a visa application rests with a single Member State. ‘Visa shopping’, i.e. multiple applications for visas, is avoided through the Visa Information System (VIS) where Member States enter details of visa applications lodged with them.⁷² The Member State normally responsible for examining a visa application is the Member State of the sole or main destination of the visa applicant, or if this cannot be determined the Member State of first entry.⁷³ Furthermore, under the Visa Code applicants are expected to apply for a visa in their country of residence.⁷⁴ However, the Visa Code does not create any legal obligation for the Member States to have a consulate or representation in third countries. Rather, it requires the Member States to ‘cooperate’ to prevent situations whereby a visa application cannot be considered because the competent Member State is neither present, nor represented in the third country or region where the visa applicant resides.⁷⁵ Similarly, it provides that Member States lacking their own consulate in third countries ‘shall endeavour’ to conclude representation

⁷² Article 19(2) Visa Code.

⁷³ *Ibid.*, Article 5.

⁷⁴ Articles 5 and 6 Visa Regulation 539/2001.

⁷⁵ *Ibid.*, Article 5(4).

agreements with Member States that have a consulate there.⁷⁶ Currently, according to the Commission, ‘there are about 900 ‘blank spots’ in the table of consular presence/representation, where Member States are neither present nor represented’.⁷⁷ According to Hobolth, the average Schengen State ‘has independent visa –issuing consular representation in about 50 countries, relies on cooperative agreements in 50 and is not represented in 70 states’.⁷⁸

A further challenge in the implementation of the policy is consistency in the application of the common rules. While the Visa Code has introduced clearer and binding rules, it necessarily envisages a certain degree of discretion for the Member States in relation to the operational implementation of some of these rules, dictated by the need to adapt the rules to local circumstances. In this context, the Visa Code establishes an obligation for the Member States’ consulates and the Commission to ‘cooperate within each jurisdiction and assess the need’ to establish, inter alia, a harmonized list of supporting documents to be submitted by applicants. If such a need is established, the Commission may adopt the relevant measures following the examination procedure.⁷⁹ Furthermore, as reflected in the Visa Code, the assessment of the individual position of a visa applicant with a view to determining whether there are grounds for visa refusal is necessarily characterised by the exercise of discretion by consular authorities.⁸⁰ In such a scenario, it has been observed that there are large differences in the visa issuing practices of EU consulates, ‘with some EU countries clearly demonstrating more openness than others’.⁸¹

⁷⁶ Ibid., Article 8(5).

⁷⁷ Commission Staff Working Document, Evaluation of the implementation of Regulation (EC) No 810/2009 of the European Parliament and Council establishing a Community Code on Visas (Visa Code), SWD(2014) 101 final, p. 31.

⁷⁸ M. Hobolth, ‘European visa cooperation: interest politics and regional imagined communities’, *LSE ‘Europe in Question’ Discussion Paper 34* (2011), p. 2.

⁷⁹ Articles 48 and 5(5) Visa Code.

⁸⁰ Ibid., Articles 21(1) and 32(1); Case C-84/12, *Koushkaki*, para 56.

⁸¹ M. Wesseling and J. Boniface, in J. Melissen and A. M. Fernández (eds.), p. 115, p. 121.

Inconsistency in the application of the common rules has a number of negative implications. It may lead to consular shopping. While multiple visa applications can be detected through the VIS, it is submitted that some visa applicants are prepared to change their travel itinerary to be able to lodge their application with the consulate which they consider the most accessible in terms of visa issuing practices and geographical proximity.⁸² In the worst case scenario, the inconsistent application of the rules may lead to security deficits undermining the effectiveness of and confidence in the common policy with possible spill-over effects on the frontier-free Schengen area. Furthermore, inconsistency means the unequal treatment of visa applicants and arbitrariness which undermines the EU's image abroad.⁸³

Finally, the implementation of visa policy involves significant costs and resources. Although, as mentioned above, the Visa Code establishes an expectation, rather than an obligation, for the Member States to have a consular presence or representation in all third countries or regions of large third countries, when Member States do have a consulate, they come under several obligations in relation to staff, premises and security.⁸⁴ With the introduction of the VIS, the Member States are obliged to have in place in their consulates costly equipment for collecting biometric identifiers.⁸⁵ This is in a context where the number of visa applications is growing exponentially thus requiring an increase in capacity, although there seems to be a large discrepancy in the demands that Member States face.⁸⁶ Thus, a Local Schengen Cooperation Annual Report for China, for example, stated that most Schengen States 'do not feel that they currently have the capacity and resources needed to deal with the consequences of an introduction of biometrics'.⁸⁷

⁸² Commission Staff Working Document, SWD(2014) 101 final, p. 5.

⁸³ Commission Report to the Council and the European Parliament on the functioning of Local Schengen Cooperation during the first two years of implementation of the Visa Code, COM(2012) 648 final, p. 8-9.

⁸⁴ Articles 5(4), 8(5), 37 and 38 Visa Code.

⁸⁵ *Ibid.*, Article 40(2)(a).

⁸⁶ M. Wesseling and J. Boniface, in J. Melissen and A. M. Fernández (eds.), p. 115, p. 121.

⁸⁷ General Secretariat of the Council, Note, Local Schengen cooperation between Member States' consulates (Article 48(5), first subparagraph, of the Visa Code) - Compilation of summary reports covering the period 2013-2014, Council doc 12893/14, p. 60

Solidarity in response to these challenges has taken mainly two forms: Local Schengen Cooperation (LSC) and representation arrangements between Member States. Both are long-established intergovernmental practices which find a legal basis in the Visa Code.⁸⁸ EU funding, as a further form of solidarity, is available for the setting up and development of Common Visa Application Centres (CACs), which are envisaged in the Visa Code, but the Member States have scarcely availed themselves of the opportunity, which in the future may become available also for full representation.⁸⁹

4.1 LOCAL SCHENGEN COOPERATION

While LSC was conceived in the 1990s as a relatively marginal and voluntary intergovernmental mechanism whose coordination was undertaken by the EU Presidency, it has become, under the Visa Code, increasingly structured, with the Commission assuming a coordinating role exercised via the EU Delegations.⁹⁰ The concrete operational tasks that LSC is supposed to achieve are a harmonised application of the rules contained in the Visa Code taking into consideration local circumstances, and the exchange of information on various issues including statistics on visas and migratory and security risks.⁹¹

In relation to the first task, as mentioned above, the Visa Code establishes only a loose framework by requiring that the Member States' consulates and the Commission 'shall cooperate within each jurisdiction and assess the need to establish', inter alia, a harmonized list of supporting documents to be submitted by visa applicants.⁹² The Commission has reported

⁸⁸ Articles 48 and 8 Visa Code.

⁸⁹ Ibid., Articles 40 and 41; S. Mananashvili, *EUI Working Paper RSCAS 74* (2013), p. 9; Presidency, Note, Council doc. 7320/11, p. 5; Commission Staff Working Document, SWD(2014) 101 final, p. 32.

⁹⁰ A. M. Fernández, 'Towards a EU Consular Policy', in Bátorá and Spence (eds.), *The European External Action Service – European Diplomacy Post Westphalia* (Palgrave, 2015), p. 356; Article 48 Visa Code.

⁹¹ Article 48 Visa Code.

⁹² Ibid.

only limited progress in this regard due to ‘reluctance on the part of Member States at local level, seemingly unaware of the legal obligation to carry out this assessment’ and ‘lack of awareness by consulate of certain Member States regarding application of a common visa policy’.⁹³ In its proposal for a recast Visa Code, the Commission attempts to restrict Member States’ discretion to some extent by providing that the list of supporting documents which may be requested from visa applicants contained in the Visa Code should be exhaustive, and adopted by the Commission under the examination procedure. Furthermore, under the proposal, the Member States’ consulate and the Commission ‘shall cooperate within each jurisdiction’ to prepare harmonized lists of supporting documents.⁹⁴

Apart from these operational tasks, Member States seem increasingly aware of the need and advantages of coordinating their positions vis-à-vis third countries on the ground and they increasingly expect the EU Delegations to assist them with such coordination. Thus, in China, Member States sent ‘one joint answer’ elaborated in consultation with the Commission in response to the questionnaires that they received individually from the Chinese Minister of Foreign Affairs (MFA) consular department in relation to their visa policies. Also, with regard to China’s refusal to allow Schengen States to open visa centres or rely on mobile visa centres in Chinese cities where a Schengen country has neither an embassy or consulate, Member States agree to carry out bilateral talks with the MFA ‘but simultaneously want the EU Del to keep coordinating and monitoring this issue, not least since there is a risk that Schengen States will be played out against each other unless coordination is in place’.⁹⁵

⁹³ Commission Staff Working Document, SWD(2014) 101 final, p. 12-13; Commission Report, COM(2012) 648 final, p. 5-6.

⁹⁴ Draft Articles 13(4) and (11) and 46.

⁹⁵ General Secretariat of the Council, Note, Council doc. 12893/14, p. 61.

4.2 CONSULAR REPRESENTATION

Alongside LSC, solidarity in the implementation of visa policy has also taken the form of consular representation. Consular representation is a well-established practice between States which is regulated by the 1961 Vienna Convention on Diplomatic Relations. In the context of the EU, it has been practiced by the Benelux and Nordic States. For the purpose of implementing visa policy, consular representation has been increasingly relied upon by the Member States.⁹⁶ Representation is regulated by Article 8 of the Visa Code, which, as mentioned above, stipulates that Member States lacking their own consulate in a third country or region ‘shall endeavour to conclude representation arrangements’ with Member States that have a consulate there. Under such arrangements, a Member State may agree to represent another Member State for the purpose of examining visa applications and issuing visas on behalf of that Member State. In cases where the representing Member State contemplates visa refusal, it should transfer the relevant application to the represented Member State which will take the final decision, unless the representation arrangement stipulates that representation also covers visa refusals. It is also possible for the represented Member State to require prior consultation in relation to applications from certain categories of third country nationals. Representation is the main response of the Member States to the issue of lack of consular coverage. Since 2003, representation has also occurred in cases where a Member State is already present in a third country, to improve efficiency, save costs and achieve greater consistency in visa issuing.⁹⁷

The Visa Code also envisages other forms of cooperation to ensure consular coverage for the sole purpose of collecting visa applications and biometric data. These take the form of

⁹⁶ M. Hobolth, *LSE ‘Europe in Question’ Discussion Paper 34* (2011), p. 2.

⁹⁷ See Council, Initiative of the French Republic with a view to the adoption of a Council Decision amending point 1.2 of Part II of the Common Consular Instructions and drawing up a new Annex thereto, Council doc 14701/03.

limited representation (exclusively for such purposes), co-location, and CACs.⁹⁸ The establishment of CACs was on several occasions promoted by the European Council, which also envisaged the possibility of a role for the EU Delegations.⁹⁹ However, in practice, this form of cooperation is hardly used by the Member States notwithstanding the availability of significant EU funding.¹⁰⁰ Although there have been examples of successful Common Application Centres such as those in Kinshasa, Praia and Chisinau, according to the Commission, ‘practice shows that it is much easier to have another Member State to carry out the entire procedure (full representation)’.¹⁰¹ Even in those cases where CACs provide arrangements for the full visa procedure to be carried out, such as in Chisinau, thus avoiding the costs and difficulties relating to sending applications to other places, consular representation may not be permanent for all participating Member States, with consuls of some Member States present only occasionally.¹⁰² For the specific purpose of collecting applications and biometrics, the Member States have rather relied on private companies as a solution to limited resources and increasing numbers of applications, although the Visa Code currently treats cooperation with external service providers as a last resort measure.¹⁰³

In light of this reality, the draft proposed recast Visa Code agreed in the Council would introduce a number of changes. Firstly, it would introduce some limited degree of ‘mandatory’ representation, by amending the rules on the allocation of responsibility among the Member States for examining and deciding on applications. Thus, in cases where a visa applicant intends to stay in more than one Member State, if the Member State of main destination or of first entry, which would normally be responsible for examining the visa application, is neither

⁹⁸ Article 40 Visa Code.

⁹⁹ See for example European Council, The Stockholm Programme – an open and secure Europe serving and protecting citizens, [2010] OJ C 115, point 5.2.

¹⁰⁰ Presidency, Note, Council doc. 7320/11, p. 5; S. Mananashvili, *EUI Working Paper RSCAS 74* (2013), p. 10.

¹⁰¹ Commission Staff Working Document, SWD(2014) 101 final, p. 32.

¹⁰² M. Wesseling and J. Boniface, in J. Melissen and A. M. Fernández (eds.), p. 115, p. 130; S. Mananashvili, *EUI Working Paper RSCAS 74* (2013), p. 10.

¹⁰³ Article 17(5).

present nor represented, the visa applicant is entitled to lodge his application at the consulate of one of the Member State of destination, in order of planned travel itinerary. This is more restrictive than the Commission's original proposal which provided for the possibility, as a last resort, of a visa applicant lodging his application at the consulate of *any* Member State present in the relevant third country. Such extensive mandatory representation was however unacceptable to the Member States which prefer to rely on bilateral arrangements.¹⁰⁴ It was also opposed on the ground that it would 'entail an unequal burdening in staff and costs on certain Member States that have a broader consular network'. Some Member States also feared that such flexibility could lead to abuses and visa shopping by applicants, and wanted to clarify how the Dublin III Regulation would apply in this context.¹⁰⁵

Secondly, the proposed recast Visa Code amends the provisions on representation arrangements to support the sole responsibility of the representing Member State for the full visa processing. Thus, the current possibility of the represented Member State requiring prior consultation for certain categories of visa applicants and the current default option whereby negative decisions are normally taken by the represented Member State are removed as 'inconsistent with a common visa policy' in an attempt to strengthen representation.¹⁰⁶

Finally, cooperation with external service providers for the purpose of collecting applications and biometrics is no longer a last resort measure and when such cooperation takes place, Member States would no longer be obliged to maintain the possibility for visa applicants to lodge their application directly at their consulates.¹⁰⁷ This proposed change has been criticised

¹⁰⁴ Visa Working Party, Outcome of Proceedings, Draft Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast), Council doc. 15130/15, p. 12.

¹⁰⁵ Visa Working Party, Outcome of Proceedings, Draft Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast), Council doc. 12046/14, p. 10. Article 12(2) Dublin III Regulation establishes that it is the represented and not the representing Member State which will be responsible for examining the asylum claim of the visa holder.

¹⁰⁶ Commission Staff Working Document, SWD(2014) 101 final, p. 31. The proposal for a recast Visa Code, deletes current Article 23(4)(d).

¹⁰⁷ Draft Article 38(3) and deletion of Article 17(5) proposal for a recast Visa Code.

as making it harder for individuals to reach the Member States' consulates for the purpose of lodging an application for a humanitarian visa.¹⁰⁸

CONCLUSION

This article has attempted to highlight the form that solidarity has taken in the context of visa policy. Although visa policy has increasingly been characterised by a rights-based approach, and the Commission has strived to make it more user oriented and friendly, individual-focused solidarity may be considered as absent from the policy. This follows conclusively from the judgement of the Court of Justice in *X and X v Belgium* which has had the effect of sealing off visa policy from the issue of humanitarian visas, which according to the Court currently fall within the competence of the Member States.¹⁰⁹ Thus, the Charter of Fundamental Rights cannot create any obligations for the Member States to issue such visas, and the recast Visa Code, in light of its legal basis, cannot contain any provisions on them, as it was proposed by the European Parliament. Still the issue as to whether Member States have an obligation to issue humanitarian visas in certain circumstances as a result of Article 3 ECHR remains open and could be a game changer in prompting the Member States to formulate a common stance.

Solidarity in visa policy remains therefore essentially inter-state and state-centred. It has been important both for the formulation, and the implementation of the policy where it has taken a supranational and intergovernmental character respectively. The harmonization of the policy has been greatly promoted by the Member States' commitment to the Schengen project and the application of the Community method of decision-making. Furthermore, the EU has elaborated a number of strategies and mechanisms to accommodate diverging interests of

¹⁰⁸ U. I. Jensen, Study for the European Parliament, PE509.986 (2014).

¹⁰⁹ Case C-638/16 PPU, *X and X v Belgium*.

openness and restriction and foster solidarity, including a visa liberalisation process towards candidate and Eastern Partnership countries accompanied by the safeguard clause in the Visa Regulation. Still, this approach has also attracted criticism in relation to human rights protection on the ground that it serves the EU's strategy of externalisation of protection and migration management through cooperation with third countries. It remains, however, unlikely that the EU will extensively use visa policy in support of such an externalisation strategy in the future.

In the process of policy harmonization, the reciprocity mechanism has proven particularly problematic. The continuing lack of reciprocity between some Member States and the US and Canada has led to a solidarity crisis in visa policy. There is no agreement, either between the Member States or the EU institutions, as to what solidarity should mean in the context of reciprocity, essentially as a result of lack of convergence of interests between the Member States. The lack of agreement finds reflection in the various amendments to the reciprocity clause, its wording and the inter-institutional dispute as to its legal interpretation. The Commission pursues an interpretation of solidarity described as result-oriented and in the 'common' interest, where common means majority. The European Parliament pursues a more principled approach, which could also be seen in the common interest. If the European Parliament proceeds with a failure to act against the Commission, as it has threatened, the hot potato will eventually fall in the hands of the Council acting by qualified majority which has so far been silent. If anything, the reciprocity crisis shows the limitations of the supranational legal method in the absence of convergence of interests in sovereign sensitive areas.

Solidarity is also key for the effective implementation of the common visa policy on the ground. In this context, solidarity remains essentially intergovernmental in nature. It has mostly taken the form of LSC and representation agreements between the Member States,

which find their legal bases in the Visa Code. It is strongly functionally driven and has been progressively informed by EU norms and procedures. Still, Commission attempts to push solidarity forward for the sake of effectiveness, in the form for example of a system of 'mandatory' representation have encountered strong opposition from the Member States.