

**ILPA Response to the
House of Lords Select Committee on the European Union
Sub-Committee F (Home Affairs, Health and Education)
Call for evidence: the EU's five year agenda for EU justice and
home affairs activity (2015 – 2019)**

1. The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including Home Office, and other consultative and advisory groups.
2. ILPA welcomes the opportunity to submit some considerations in respect of this inquiry of the House of Lords Select Committee into the EU's forthcoming agenda for the area of freedom, security and justice.
3. As the Committee rightly points out, assuming that there will indeed be a fourth multi-annual programme for the development of the EU area of freedom, security and justice, work will begin shortly or has in some cases already begun on what that programme should look like.
4. There are two main issues which we will develop in this submission: firstly, is there a need for a new five-year agenda for the development of the area? Secondly, is there a role for the UK in the development of the EU area of freedom, security or justice?
5. Regarding the first question, our comments are limited to the area of border controls, immigration and asylum within the EU's area of freedom security and justice. As our expertise is in this field we will not comment on cooperation in criminal or civil justice.
6. The purpose of multiannual programmes for the development of the area of freedom, security and justice is to highlight the policy priorities of the Council in the field. The first of these programmes, the Tampere Conclusions¹ in 1999, were particularly important because of the way in which competence for the area was passed to the EU, with many powers to adopt legislation but little guidance on where to start².

¹ The Tampere European Council, 15-16 October 1999, conclusions 16/10/1999 - Nr: 200/1/99.

² See *Whose freedom, security and justice? EU immigration and Asylum Law and Policy*, Guild, E., A Baldaccini and H Toner, Hart Publishing, June 2007.

7. The EU Member States transferred powers to the EU in the Amsterdam Treaty³, which entered into force in 1999, regarding the adoption of common measures on border controls immigration and asylum. However, those powers lack clear definition and certainly are not able to carry direct effect. The result was the need for political impetus to give definition to the initial area of freedom security and justice.
8. In 1999, as the Select Committee is well aware through its inquiries, the UK negotiated the inclusion of a protocol⁴ which permits it to remain outside the EU common system of border controls (the Schengen acquis⁵) and to choose whether to participate or not in measures in the fields of immigration and asylum.
9. The choice of the UK government of the time and subsequent governments to remain outside the Schengen border control free system has resulted in the UK being excluded also from measures regarding border security even in circumstances where the UK authorities have sought to participate.⁶ The maintenance of UK border controls with other EU Member States and indeed, the UK's application of additional border controls on persons travelling by train from Brussels to London has shown the UK authorities' determination to remain outside of the Schengen common travel area.
10. The first Schengen agreement was signed in 1985 followed by a second in 1990 and the abolition of border controls on the movement of persons among the Schengen states from 25 March 1995 (with some exceptions as regards France). The EUROSTAT statistical series, Crime and Criminal Justice⁷, commenced in 2007. The reports show that since the abolition of border controls among most EU states in 1995 there has been a stagnation of total crime reported by the police from 1995 with a small peak in some countries in 2002. Thereafter there are continuing substantial drops in total crime rates up to and including 2009. In the years following the big enlargements of the EU, 2005 and 2008, the EUROSTAT statistics show a continuing drop in total crime and a dramatic drop in motor vehicle theft.⁸ These statistics appear to indicate that crime rates do not rise when border controls on persons are abandoned.
11. Nonetheless, the UK authorities appear committed to maintaining border controls on persons arriving in the UK from a destination other than the Republic of Ireland.

³ The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Amsterdam, 2 October 1997.

⁴ I2008M/PRO/19 Consolidated version of the Treaty on European Union Protocol (No 19) on the Schengen Official Journal L15, 09/05/2008 P. 0290 – 0292. See Council Decision 2000/365/EC.

⁵ See Council Decisions 1999/435/EC and 1999/436/EC of 20 May 1999.

⁶ See for instance the Court of Justice decision C-137/05 *UK v Council* judgment 18 December 2007 on biometric information in passports or C-77/05 *UK v Council* judgment 18 December 2007 on participation in the EU external border agency, FRONTEX.

⁷ See <http://epp.eurostat.ec.europa.eu/portal/page/portal/crime/introduction> (accessed 2 October 2013).

⁸ EUROSTAT, Statistics in Focus, Crime and Criminal Justice 15/2007, 58, 2010 and 6/2012.

12. A one-off data collection effort by the Council in 2009 which only measured movement of people into and out of the EU as a whole during one week (31 August – 6 September 2009) revealed that there were 2,130,256 entries and exits by non-visa third country nationals and 1,464,660 entries and exits by visa nationals.⁹ This indicates that there are probably more than 182 million entries and exits by third country nationals into and out of the EU annually. According to the latest published FRONTEX data, in the first quarter of 2013, EU border guards refused admission to 27,911 persons at the external borders.¹⁰ This information appears to indicate that EU border guards are not overwhelmed by numbers of third country nationals seeking to enter the EU in circumstances where they do not fulfil the criteria. The FRONTEX data indicates that over the same quarter only 9,717 persons were apprehended irregularly crossing an external EU border. This data does not reveal a picture of urgent problems in the control of the EU's external borders.
13. In respect of the EU's development of law on the control of its external frontiers, the key measures have now been adopted, the Schengen Borders Code¹¹ and the Visa Code¹². It is not clear that there is any evidence based need for a substantial political impetus to the law on the control of the EU's external borders. The main challenges to the control practices at the EU's external borders have come in the form of allegations of human rights abuses and decisions of the European Court of Human Rights finding human rights abuses in some practices such as the push backs of little boats to Libya.¹³ The amendment of the FRONTEX regulation to include a fundamental rights competence was adopted in 2011¹⁴. The implementation of the new competence is at issue but this is a matter of consistency with the EU Charter of Fundamental Rights.
14. In respect of the adoption of EU legislation in the field of immigration – this is proceeding in accordance with the initial programme set out in the Tampere Conclusions. As regards asylum, the second generation Common European Asylum System measures were adopted in June 2013¹⁵. It is now a matter of implementing the new legislation correctly.
15. In sum, the need for a new multi-annual programme in the field of border controls, immigration or asylum has not been made out, in our opinion. The field has been subject to substantial legislative measures over the past ten years and it is now time to ensure their correct application, allow the courts

⁹ Council Document 13267/09, 22 September 2009.

¹⁰ FRONTEX FRAN Quarterly, Quarter I, January – March 2013.

¹¹ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

¹² 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).

¹³ *Hirsi Jamaa v Italy* (Application no. 27765/09) 23 February 2012.

¹⁴ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

¹⁵ See European Commission - MEMO/13/532 12/06/2013.

to interpret their provisions and enable all institutions to incorporate their fundamental rights obligations fully in the field.

16. Regarding our second question, is there a role for the UK in the development of the area of freedom security and justice, as we have noted above, the UK chose not to participate at all in the development of the Schengen area of common border controls. As measures were put forward by the Commission (and initially also the Member States) in the area of immigration, the UK chose to opt into to very few of them¹⁶. It has remained outside all measures since 2004. In the field of asylum, while the UK opted into the Common European Asylum System measures in their first phase, in the negotiations towards the second phase instruments it has chosen to remain outside all measures except the Dublin III Regulation¹⁷ on the division of responsibility for asylum applicants.
17. In light of the UK's increasingly distant relationship with the area of freedom security and justice as regards border controls, immigration and asylum, even if the EU decides to adopt a new programme, there is no role for the UK in determining the priorities of the area.

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¹⁶ See most recently Cm 8541, Third Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) ("the Treaties") in Relation to EU Justice and Home Affairs (JHA) matters (1 December 2011 – 30 November 2012) April 2013.

¹⁷ Regulation (EU) No 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).