

Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020

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The EU's capacity for a legitimate, coherent and migrants' rights compliant policy on labour immigration is now more than ever at a test in light of the political priorities set in the EU's 2020 Strategy and the effects of the revolutions and war in North African states during the last four months. This Policy Brief examines the incoherencies characterising the current generation of EU's labour immigration policies and the challenges towards ensuring a global rights-based approach to migration. The analysis carried out in this paper is accompanied by a synthesis of the main policy recommendations discussed at the Workshop on "The Next Phase of EU Labour Immigration Policy: Enhancing Policy Coherence and Advancing a Rights-Based Approach" organised in the context of the Conference "State of the Union: Brussels Think Tank Dialogue 2011" in January 2011.

Introduction

The free movement of workers has long been at the heart of European integration. The evolving European edifice has made intra-EU labour migration not only a matter of exercising a fundamental freedom, but also a core fundamental right of EU citizens and their family members. This has reconfigured traditional conceptions of both state sovereignty and community membership, since greater importance has been attributed to the observable facts of residence and labour market participation than to the habits of loyalty and ideology associated with nationality.

It is only during the last eleven years - since the entry into force of the Amsterdam Treaty in 1999 - that the regulation of non-EU nationals' entry and residence conditions and rights in the field of employment has been transferred to the EU's shared competence, and legislative initiatives have been put forward. And when this journey formally began in the early 1990s with the establishment of the third pillar by the former version of the Treaty on the European Union, few could have anticipated the dynamic growth of the EU's Area of Freedom, Security and Justice (AFSJ).

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It is, nevertheless, the case that some of these ambitious and principled policy priorities have not yet been realised. This is particularly true of the milestones set by the first multiannual programme adopted in October 1999 – the Tampere Programme¹ – which called for

- the development of a common immigration policy driven by the principle of fair treatment of legally-residing third country nationals (TCNs);
- an integration policy granting TCNs rights and obligations comparable to those of EU citizens;² and
- long-term residents to be guaranteed TCN rights that are “as near as possible” to those of EU citizens.³

The Tampere Programme also underlined the objective of developing a European approach approximating national legislations on the conditions governing admission and residence for the purposes of employment (i.e. labour immigration policy).

Member states’ representatives have constantly referred to their exclusive right to determine the number of TCNs admitted to their territories, and their preference for making labour market regulation a manifestation of the application of the principle of subsidiarity. In addition, the rigorous application of the principle of free movement to intra-EU migration can be juxtaposed with the relative ‘unfreedom’ characterising the labour migration of non-EU nationals and the prevalence of a security-centred paradigm. Accordingly, we have been witnessing national executives’ unwillingness to make intra- and extra-EU migration more symmetrical. This has been to a large extent favoured by the exclusion of EU labour immigration proposals from the scope of the Community method of cooperation until the entry into force of the Lisbon Treaty in December 2010.

The resulting EU policy scenario is one of scattered legislative and policy frameworks

¹ Tampere European Council, 15-16 October 1999, Presidency Conclusions, SN 200/99, Brussels.

² *Ibid.*, paragraph 18.

³ *Ibid.*, paragraph 21.

covering (to a variety of degrees and levels) the rights, freedoms and conditions for entry and residence of specific categories of migrant workers and their families into the Union. (See annex I of this Policy Brief for a full list of the conditions of entry and residence for employment of TCNs included in the EU *acquis*.)

This fragmented state of affairs challenges the premise of the EU’s global approach to migration,⁴ the EU’s commitment to developing a coherent immigration policy and more general EU principles of legal certainty and the rule of law. Many are the obstacles facing the EU as it strives to achieve the political priorities laid down in its 2020 strategy. One of these priorities is inclusive growth – to be achieved through the development of a “forward-looking and comprehensive labour migration policy which would respond in a flexible way to the priorities and needs of labour markets”.⁵

Moreover, the human displacements and migratory flows into Europe as a consequence of the revolutions in North African states (Tunisia and Egypt) and the current war in Libya have added yet another testing ground for the EU’s capacity to develop a common labour immigration policy which is legitimate, rights-compliant and coherent when facilitating people-to-people contacts and legal channels for economic migration in the Southern neighbourhood region.

This Policy Brief assesses the incoherencies characterising the current generation of EU labour migration policies, the remaining difficulty of ensuring fair treatment of migrant workers and the introduction of a rights-based approach. It synthesises the main topics and policy recommendations which resulted from a workshop on “The Next Phase of EU Labour

⁴ For the EU’s ‘global approach to migration’ refer to Presidency Conclusions of the Brussels European Council of 15 and 16 December, 2005, SN 15914/01/05, 30.12.2005; and Commission Communication, The global approach to migration one year on: Towards a comprehensive European migration policy, COM(2006) 735 final, Brussels, 30.11.2006.

⁵ Commission Communication, A strategy for smart, sustainable and inclusive growth, COM(2010)2020 final, Brussels, 3.3.2010. See also http://ec.europa.eu/europe2020/index_en.htm.

Immigration Policy: Enhancing Policy Coherence and Advancing a Rights-Based Approach” organised jointly by the Justice and Home Affairs Section of the Centre for European Policy Studies (CEPS) and the Bertelsmann Foundation. The workshop took place during the conference, “State of the Union: Brussels Think Tank Dialogue 2011” on 25 January 2011 in Brussels. The programme is attached in Annex 2 of this brief.

Section one of this paper commences by addressing the question of ‘where we are’ in the current configuration of EU labour immigration policy. It then moves to an analysis of the main substantive and institutional innovations introduced by the Treaty of Lisbon in this policy domain. Section three examines the next EU policy steps, as envisaged by the Council’s version of the Stockholm Programme, the European Commission’s implementation programme and other latest policy developments. Section four concludes by putting forward a set of seven policy recommendations which, in our view, should guide the next phase of EU labour immigration policy through the implementation of the Stockholm Programme (and the building of its successor from 2015) as well as Europe’s 2020 strategy.

1. The state of play of EU labour immigration policy: fragmentation, dispersion and incoherence

The EU’s labour immigration policy is currently characterised by a high degree of fragmentation and dispersion and, therefore, incoherence. This is mainly the result of the Council’s failure to reach agreement on the Commission’s 2001 proposal for a directive on the conditions of entry and residence for the purpose of paid employment and self-employment – which intended to (horizontally) regulate the entry and residence conditions for all TCNs exercising paid and self-employed activities.⁶ The proposal,

⁶ Proposal for a Council Directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities, COM(2001) 0386 final, Brussels, 11.07.2001. European Commission, Withdrawal of Commission proposals following screening for their general relevance, their impact on competitiveness and other aspects, 2006/C 64/03, OJ C64/3, 17.3.2006. European Commission

which closely followed the 1999 Tampere Programme’s milestones, was finally withdrawn because representatives of certain EU member states expressed deep concern about the possibility of having ‘more Europe’ in these nationally sensitive fields.

The Commission followed up with the launch of a public consultation on the 2004 Green Paper on an EU approach to managing economic migration which addressed the ‘added value’ of, and the most appropriate form for, EU rules governing the admission and residence of TCNs in the field of employment.⁷ Most respondents to the consultation expressed their concerns about the implications of a sectoral approach in labour migration policy (by category of worker) and called for a horizontal legislative framework.

These included, as a way of illustration, the European Parliament which in its resolution on an EU approach to managing economic migration stated that “this legislation should define an overall (rather than sectoral) regulatory framework of reference”.⁸ The European Economic and Social Committee (EESC), the EU body representing civil society and social partners, also stressed that “if the European Council were to opt for a sectoral approach (geared towards highly skilled migrants), it would be discriminatory in nature. This might be easier for the Council, but it moves away from the Treaty provisions.”⁹

Notwithstanding such concerns, the Commission opted for a sectoral policy approach – in other words, one centred on categories of migrant workers instead of one horizontal approach that would cover the conditions of admission for all TCNs seeking entry into the labour markets of

(2007) Communication on applying the global approach to migration to the eastern and south-eastern regions neighbouring the European Union, COM(2007) 247 final, Brussels, 16 May.

⁷ Green Paper on an EU approach to managing economic migration, COM(2004) 811 final, Brussels, 1.11.2005.

⁸ European Parliament resolution on an EU approach to managing economic migration (COM(2004)0811 - 2005/2059(INI)), point 26.

⁹ Opinion of the European Economic and Social Committee on the Green Paper on an EU approach to managing economic migration (COM(2004) 811 final) (2005/C 286/05), point 2.1.4

the member states. The main justification was that, by doing this, the common European policy would be in line with the political priorities and legal regimes applying in most EU member states.¹⁰ The Commission's 2005 EU "Policy Plan on Legal Migration"¹¹ envisaged the presentation of one proposal for a directive on a single application procedure for a single (work and residence) permit and on a common set of rights for TCNs legally residing in a member state, and four separate proposals for specific categories of third-country workers.

The main result of the approach advocated by the EU "Policy Plan on Legal Migration" has been the emergence of a hierarchical, differentiated and obscure European legal regime on labour immigration which accords different rights, standards and conditions for entry and stay to different groups and countries of origin of TCNs. Concrete manifestations of this approach have been the adoption of the EU 'blue card' Directive, the presentation of the framework of rights/single-permit Directive (which is still under discussion) and the latest initiatives on seasonal employment and intra-corporate transferees.

The EU 'blue card' Directive was the first legislative measure adopted in the field of labour immigration.¹² Designed to respond to the 2000 Lisbon Strategy objective of making the EU a dynamic knowledge-based economy by attracting highly qualified TCNs, it establishes a common fast-track and flexible procedure only for the admission of those third-country workers considered to be 'highly qualified employees' and their family members. The directive has thus justified a questionable disparity in the treatment

of those workers not falling within the privileged category of 'highly skilled'; something that has raised concerns about potential discrimination.

The Commission presented the blue card together with a proposal for a Directive on a single procedure for a single permit for TCNs to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state.¹³ This directive, which aims to grant a common framework of rights to all TCN 'workers', is the first legislative measure on labour immigration to be considered using what is now called the 'ordinary legislative procedure' or Community method of cooperation. On some key points, the Council and the two committees involved in the European Parliament – the Civil Liberties, Justice and Home Affairs Committee (LIBE) and the Employment and Social Affairs Committee (EMPL) – have taken rather opposing positions.¹⁴ The EP voted against the last version of the initiative in December 2010, mainly because of the different rights it would establish for different categories of worker and also because of the exclusion of other categories of workers, such as seasonal migrant workers.¹⁵ Negotiations continue.

These measures were followed by the two proposals for directive on the conditions of entry and residence of third-country nationals working

¹⁰ The Policy Plan on Legal Migration states: "The public consultation drew the attention to possible advantages of a horizontal framework covering conditions of admission for all third-country nationals seeking entry into the labour markets of the member states. However, the member states themselves did not show sufficient support for such an approach", p. 5.

¹¹ Commission Communication, Policy plan on legal migration, COM(2005) 669, Brussels, 21.12.2005.

¹² Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L155/17, 18.6.2009.

¹³ Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state, COM(2007) 638 final, Brussels, 23.10.2007.

¹⁴ Council of the EU, Legal immigration (labour immigration) – Information from the presidency, Brussels, 1 December 2010, 16929/10.

¹⁵ <http://www.europarl.europa.eu/en/pressroom/content/20101214IPR09848/html/No-agreement-on-a-single-permit-to-live-and-work-in-the-EU> refer also to <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0265&language=EN&mode=XML>

as seasonal workers¹⁶ or intra-corporate transferees.¹⁷

The proposal on seasonal workers aims to establish a simpler admission procedure based on common criteria and definitions (in particular holding a work contract or a binding job offer, valid travel document, health insurance and accommodation). It sets a maximum duration for seasonal work of six months per calendar year and provides for a multi-seasonal work permit lasting three years and a simplified readmission procedure for subsequent seasons. It also sets common rules on working conditions and equality of treatment. The proposal on intra-corporate transfer provides rules for the conditions of entry and residence for people transferred within a single undertaking based on common definitions and criteria. Negotiations continue on both legal acts.

In addition to this package of directives, there are other immigration-related EU law measures which, while not formally or directly falling within the remit of labour immigration policy, do feature important employment-related provisions and common standards. These include, for example, the directives covering the conditions of entry and residence of long-term resident TCNs,¹⁸ families,¹⁹ students²⁰ and researchers.²¹ Similarly, EU asylum law also sets

out harmonised provisions dealing with access to labour market by asylum seekers and refugees.²²

Labour immigration policy is reflected increasingly in the EU's external relations activities. The Stockholm Programme, which will be discussed in section 3 below, confirmed the need for "Union migration policy to be an integral part of Union foreign policy" and called for a balanced partnership with third countries in policies related to "promoting mobility and legal migration, optimising the link between migration and development, and preventing and combating illegal immigration".²³ The global approach to migration upholds the ambition to integrate labour migration policy in the EU's external relations as an incentive (or compensation mechanism) for transferring the Union's irregular immigration policy priorities (especially those focused on the return and/or readmission of undocumented immigrants) to third countries.

Accordingly, three 'mobility partnerships' have been concluded so far – with Moldova and Cape Verde (May 2008)²⁴ and Georgia (November

¹⁶ Proposal for a Directive on the conditions of entry and residence of third country nationals for the purposes of seasonal employment, COM(2010)379, 13.7.2010, Brussels.

¹⁷ Proposal for a Directive on conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer, COM(2010)378, Brussels, 13.7.2010.

¹⁸ Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Official Journal L 016, 23.01.2004, pp. 0044 – 0053.

¹⁹ Directive 2003/86/EC on the right to family reunification, Official Journal L 251, 03.10.2003, pp. 0012 – 0018.

²⁰ Directive 2004/114/EC on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, Official Journal L 375, 23.12.2004, pp. 0012 – 0018.

²¹ Directive 2005/71/EC - on a specific procedure for admitting third-country nationals for purposes of scientific research, Official Journal L 289, 3.11.2005, pp 0015 – 0022.

²² Refer for instance to Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6.2.2003; the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, OJ L 304/12, 30.9.2004; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status, OJ L 326, 13.12.2005. See also the proposal for directive amending directive 2003/109 to extend its scope to beneficiaries of international protection, COM(2007)298 final, Brussels, 6.6.2007.

²³ Council of the EU, the Stockholm Programme – An open and secure Europe serving and protecting the citizen, 5731/10, Brussels, 3 March 2010. Section 6.1.1. of the Stockholm Programme (Consolidating, developing and implementing the global approach to migration).

²⁴ Council of the European Union (2008), Joint declaration on a mobility partnership between the European Union and Moldova, 9460/08 Add. 1, 21 May; Council of the European Union (2008) Joint declaration on a mobility partnership between the

2009).²⁵ These have been labelled as “the main strategic comprehensive and long-term cooperation framework for migration management with third countries”.²⁶ Mobility partnerships are not binding acts for EU member states and their actual legal effects are open to discussion. They are, in fact, political declarations driven by an intergovernmental and flexible framework of cooperation; the Commission acts as coordinator. The EP has been excluded from their negotiation, something which directly results in a profound democratic deficit in their nature. The intended public goal of the mobility partnerships is to facilitate circular (recurrent/temporary) channels for labour mobility between the signatories. Yet an assessment of their provisions reveals that their actual content is still one very much centred on the strengthening of border control policies and the return/expulsion of irregular immigrants.

The external configurations of EU’s labour immigration policy have been also substantiated by bilateral agreements between individual member states and specific third countries, as well as those agreements concluded by the EU. Examples include the employment related provisions of the association and Euro-Mediterranean agreements which the EU has concluded with countries such as Turkey, Morocco, Algeria, Tunisia, etc., and which add another layer of complexity to the EU legal framework on labour immigration.

2. The Lisbon Treaty: substantive and institutional innovations

The entry into force of the Lisbon Treaty in December 2010 has provided a unique opportunity for ambitious transformation of the EU’s AFSJ as well as its migration-policy components. In a nutshell, the Lisbon Treaty has

extended the Community method of cooperation – ordinary legislative procedure (qualified majority voting and European Parliament as co-legislator) – to labour immigration policy. Since 2005 this domain had been the only one of the fields falling under the former Title IV of the Treaty establishing the European Community not to be covered by the expansion of the co-decision procedure.

The Lisbon Treaty has also consolidated the powers of the Commission, widened the jurisdiction of the Court of Justice to review and interpret EU immigration law, and granted new powers to national parliaments and the Committee of the Regions in the subsidiarity and proportionality tests. Without a doubt, the binding nature of the EU Charter of Fundamental Rights and the EU’s accession to the European Convention of Human Rights will also aid the Court of Justice’s scrutiny of immigration law, ensuring the law’s compliance with fundamental human rights across the EU.

The Treaty of Lisbon has also for the first time introduced a new provision in the Treaty on the Functioning of the European Union (TFEU) dealing expressly with labour immigration policy. Paragraphs 1 and 5 of Article 79 now stipulate that

1. The Union shall develop a common immigration policy aimed at ensuring, at all the stages, the efficient management of migration flows, fair treatment of third country nationals residing legally in member states...
5. This Article shall not affect the right of member states to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

During the last eleven years, certain EU member states’ representatives have raised substantial questions about the existence of express legal basis for the Union to legislate on labour immigration and on the ‘added value’ of these powers. Interestingly, this is despite the fact that a number of legislative measures dealing with this domain had already been adopted before the Lisbon Treaty. As highlighted in section 1 above, some of these dealt directly with entry and residence for reasons of employment – e.g. the EU blue card or researchers’ Directives.

European Union and Cape Verde, 9460/08 Add. 2, Brussels, 21 May.

²⁵ Council of the European Union (2009), Joint declaration on a mobility partnership between the European Union and Georgia, 16396/09, Brussels, 20 November.

²⁶ European Commission (2009), Mobility partnerships as a tool of the global approach to migration, Commission staff working document, SEC (2009) 1240, Brussels, 18 September.

How should we interpret this new article introduced by the Lisbon Treaty in this context? Article 79 has in our view put an end to these debates. It is true that this article expressly excludes harmonisation on issues concerning ‘quotas’ (i.e. the right of member states to determine the volumes of admission). Yet it does offer a clear possibility for Europeanisation to move forward in dealing with other administrative aspects of labour immigration, such as those that are part of admission processes and other conditions and rights of residence. To this we need to add the now legally binding nature of the EU Charter of Fundamental Rights that includes a number of socio-economic rights which apply to ‘everyone’ (and not to nationals of EU member states only), and some of which are of particular importance to the field of employment.

3. The Stockholm Programme: what’s next in the EU’s policy agenda?

The entry into force of the Treaty of Lisbon came at the same time as the European Council’s endorsement of the third multi-annual programme on the EU’s AFSJ – the Stockholm Programme: an open and secure Europe serving and protecting the citizen – which sets out the EU’s policy agenda for the period 2010-2014.²⁷ The programme identified “A Europe of responsibility, solidarity and partnership in migration (...) matters” as one of its key strategic priorities. Reference was made to the European Pact on Immigration and Asylum,²⁸ adopted under the auspices of the French Presidency of the EU in the second half of 2008, as the “clear basis” for further development in these domains. The Stockholm Programme therefore stressed that “Europe will need a flexible policy which is responsive to the priorities and needs of member states and enables migrants to take full advantage of their potential.”²⁹

The forthcoming EU policy agenda is thus one greatly inspired (and expected to be driven) by

²⁷ Council of the EU, the Stockholm Programme – An open and secure Europe serving and protecting the citizen, 5731/10, Brussels, 3 March 2010.

²⁸ Council of the EU, European pact on immigration and asylum, 13440/08, Brussels, 24 September 2008.

²⁹ Ibid., p. 11.

member states’ immigration legislation and policy priorities, which broadly follow a selective and demand-driven logic. A majority of EU member states’ labour immigration policies are based on the ‘perceived’ needs and labour-market demands/gaps, and too often argue for the treatment of TCNs as economic units rather than as human-rights holders and/or workers in need of protection, security of residence and inclusion.

In its concrete policy proposals, the Stockholm Programme called for “a concerted policy for keeping with national labour-market requirements” which should encourage

the creation of flexible admission systems that are responsive to the priorities, needs, numbers and volumes determined by each member state and enable migrants to take full advantage of their skills and competence. In order to facilitate better labour matching, coherent immigration policies as well as better integration assessments of the skills in demand on the European labour markets are carried out.³⁰

The European Council envisaged achieving this political goal through the following initiatives:

1. The full implementation of the (above-mentioned) 2005 EU policy plan on legal migration through the adoption of the set of sectoral (labour immigration) directive proposals put forward by the Commission (i.e. the framework of rights/single permit, seasonal employment and intra-corporate transferees).
2. The improvement of existing information sources and networks (such as the European Migration Network)³¹ to ensure the availability of comparable data on migration issues in order to ensure, in turn, evidence-based EU policy choices.
3. An assessment of the impact and effectiveness of the existing EU *acquis* on labour immigration to ascertain the need “to consolidate existing legislation, including categories of workers currently not covered by EU law”. The European Council invited the Commission to submit proposals on the

³⁰ Ibid., Point 6.1.3. of the Stockholm Programme, pp. 104-105.

³¹ See <http://emn.intrasoft-intl.com/html/index.html>

consolidation of all European legislation on immigration starting with

... legal migration, which would be based on an evaluation of the existing *acquis* and include amendments needed to simplify and/or, where necessary, extend the existing provisions and improve their implementation and coherence.³²

4. The evaluation of existing policies with a view to improving “skills recognition and labour matching between the EU and third countries and the capacity to analyse labour market needs, the transparency of European online employment and recruitment information, training (...) and skills matching in the country of origin”.
5. The evaluation, “and where necessary review”, of the Directive on the right to family reunification (2003/86).

Reference has been made in section 1 above to the special emphasis given by the Stockholm Programme to the so-called “global approach to migration”. This common approach aims to find a balance between policy priorities covering legal immigration, the impact of migration on development and measures on irregular immigration in the EU’s cooperation with third countries, and more particularly with those in Africa and Eastern and South-Eastern Europe.

The Stockholm Programme identified the following policy initiatives for putting the global approach to migration into practice:

1. The use of migration profiles, migration missions, cooperation platforms on migration and development as well as mobility partnerships. The European Council called for further development of the mobility partnership instrument “while respecting (its) voluntary nature”, and emphasised that “success in implementing these partnerships requires improved coordination and substantial capacity-building efforts in countries of origin, of transit and of destination”.³³
2. A more efficient use of the EU’s cooperation instruments to increase the capacity of

partner countries, mainly in terms of infrastructure and administrative capacity.

3. Work on the central issue of migration's effect on development:

Efforts to promote concerted mobility and migration with countries of origin should be closely linked with efforts to promote the development of opportunities for decent and productive work and improved livelihood options in third countries in order to minimise the brain drain.³⁴

The focus here was on:

- i. the development of: “efficient, secure and low cost” remittance transfers, creating a common Union portal on remittances and promoting cooperation amongst remittance service providers.
- ii. the involvement of diaspora groups in the Union’s development policies and supporting them to help development in their countries of origin.
- iii. exploring the connections between climate change, migration and development by analysing “the effects of climate change on international migration, including its potential effects on immigration to the Union”.
4. The study of the concept of circular migration in order to facilitate temporary and ‘orderly’ circular mobility in the framework of specific projects and programmes.

In April 2010, the Commission published the action plan implementing the Stockholm Programme titled “Delivering an area of freedom, security and justice for Europe’s citizens”.³⁵ The legislative timetable (concrete actions and initiatives) for 2010-2014 was presented in the annex. It was hailed by the Commission as “*indispensable and consistent with the scale of ambition the Union needs to demonstrate*”. Moreover, it

... should not be seen as an agenda that is fixed once and for all. The Union must be able to

³² See p. 106 of the Stockholm Programme.

³³ *Ibid.*, p. 101.

³⁴ *Ibid.*, p. 102.

³⁵ Commission Communication, Delivering an area of freedom, security and justice for Europe’s citizens: Action plan implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20.4.2010.

react to unexpected events, swift in seizing opportunities and in anticipating and adapting to future trends. The Commission will therefore use its right of initiative whenever necessary to ensure this.

The Commission's Action Plan not only fine-tuned the general policy strategies put forward by the Council's version of the Stockholm Programme into concrete legislative actions, but it also went further by proposing new initiatives not set out in the Council's version. In fact, the action plan generated heated debate inside the Council during the last phase of the Spanish Presidency of the EU. Some Council representatives went so far as to describe the action plan as a clear 'act of provocation' and even as a 'shameful practice' by the Commission. What has come to be known as 'the Stockholm Affair' ended up in the Justice and Home Affairs Council meeting of 3rd June 2010, which adopted conclusions on the Commission Communication stating that the Council ³⁶

emphasises strongly that the Stockholm Programme is the only guiding frame of reference for the political and operational agenda of the European Union in the Area of Justice, Security and Freedom.

Notes however that some of the actions proposed by the Commission are not in line with the Stockholm Programme and that others, being included in the Stockholm Programme, are not reflected in the Communication of the Commission.

Urges the Commission in this regard to take only those initiatives that are in full conformity with the Stockholm Programme in order to ensure its complete and timely implementation.

One of the most controversial ideas included in the Commission's action plan on the Stockholm agenda was the presentation before the end of 2013 of an immigration code. This proposal for codification had previously been included in the Commission's 2009 contribution to the

³⁶ Council of the EU, Justice and Home Affairs Council 3018th meeting, Luxembourg 3-4 June 2010: Draft Council conclusions on the Commission Communication "Delivering an area of freedom, security and justice for Europe's citizens – Action plan implementing the Stockholm Programme" (COM(2010) 171 final), 9935/10, Brussels, 19 May 2010.

Stockholm Programme³⁷ and had elicited a cold reception from certain EU member states' representatives in the Council negotiations on the programme during the Swedish Presidency of the EU. The action plan revived the idea by stating that

The EU must strive for a uniform level of rights and obligations for legal immigrants comparable with that of European citizens. These rights, consolidated in an immigration code, and common rules to effectively manage family reunification are essential to maximise the positive effects of legal immigration for the benefit of all stakeholders and will strengthen the Union's competitiveness.³⁸

In the Commission's view, this would mean a "consolidation of legislation in the area of legal immigration taking into account the evaluation of the existing legislation, needs for simplification and where necessary (an extension of) the existing provisions to categories of workers currently not covered by EU legislation".³⁹

Furthermore, the Commission envisaged, among other things, the following policy steps to be taken by 2014 (which did follow more closely the Council's version of the Stockholm Programme):⁴⁰

1. (By 2012) A proposal for a modification of directive 2003/86/EC on the right to family reunification.
2. Reports on the application of Directives 2003/109 (long-term residents), 2005/71 (researchers) and 2004/114/EC (students), followed by a proposal for a modification of this last Directive.
3. Further development of mobility partnerships, migration profile processes and cooperation platforms facilitating the coordination among relevant actors.

³⁷ Commission Communication, An area of freedom, security and justice serving the citizen: Wider freedom in a safer environment, COM(2009) 262, 10 June 2009, Brussels.

³⁸ Commission Communication, Delivering an area of freedom, security and justice for Europe's citizens: Action plan implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20.4.2010.

³⁹ Ibid., p. 52.

⁴⁰ Ibid., pp. 48- 52.

4. (By 2011) A Communication on the evaluation and future development of the global approach to migration.
5. (By 2012) A Communication on addressing labour shortages through migration in EU member states.

The pressures of recent human displacements and migratory movements stemming from the democratic uprising in North African states, and the subsequent war in Libya, have also constituted a major driving force for the EU's priority-setting on its migration policy agenda. In its Declaration of 11 March 2011⁴¹ the Extraordinary European Council emphasised the need for the EU to:

Respond to the challenge of mobility and promote people-to-people contacts, using such instruments as mobility partnerships with all partners sufficiently advanced in their reform processes and cooperating in the fight against human trafficking and irregular immigration.

This was then followed by a number of visits by the Presidency of the EU and the Commissioner for Home Affairs Cecilia Malmström to Egypt and Tunisia in an attempt to put into practice “a long-term partnership for migration, mobility and security” between the EU and these countries.⁴² The European Council also called the European Commission to present a Plan for the development of capacities to manage migration and refugee flows which is expected to be adopted at the next European Council meeting of 24 June 2011.⁴³ It is expected that the Commission will propose as part of the long-term strategy the setting up of senior official level dialogues (working groups), which will include the participation of EU member states,

⁴¹ European Council, Extraordinary European Council, Declaration, 11 March 2011, Brussels, 11 March 201, EUCO 7/11, point 12.

⁴² European Commission, Statement by Cecilia Malmström, Commissioner for Home Affairs, on her upcoming trip to Egypt, MEMO/11/183, Brussels, 22 March 2011; European Commission, Joint statement by Stefan Füle, EU Commissioner for Enlargement and European Neighbourhood Policy and Cecilia Malmström, EU Commissioner for Home Affairs, on their trip to Tunisia, MEMO/11/204, 30 March 2011.

⁴³ European Council Conclusions, 24/25 March 2011, EUCO 10/11, Brussels, point 26.

and the launching of mobility partnerships with countries such as Egypt and Tunisia.⁴⁴

This was later confirmed by the Council Conclusions on the “Southern Neighbourhood Region” of 11/12 April 2011, which stated that dialogue on the prevention of irregular immigration, borders control, return and readmission of undocumented immigrants and the development of protection in the region, will be subsequently complemented with “possibilities for facilitating people-to-people contacts using instruments such as mobility partnerships”.⁴⁵

4. Conclusions and policy recommendations

The next phase of EU labour immigration policy provides an opportunity for the design of a European Union migration model which would accompany the EU's unique citizenship model. The challenges ahead are mainly those related to issues of policy incoherence (common and cohesive goals/strategies) and a rights-based approach (placing the worker and their socio-economic fundamental rights at the heart of the debate).

What is needed is a strategy of leadership that looks forward to the future, seeks collaborative solutions, protects the vulnerable and replaces national authorities' monologues with multilateral dialogues and strategies. The EU should become a promoter of standards, for it is by enhancing the ‘normative power’ of the EU that we demonstrate its ‘added value’. On the basis of the analysis provided in this Policy Brief and the number of tensions, challenges, opportunities and possibilities that emerged from the discussions in workshop 3, *The Next Phase of EU Labour Immigration Policy: Enhancing Policy Coherence and Advancing a Rights-Based Approach*, the following policy recommendations are put forward:

⁴⁴ European Commission, The European Commission's Response to the migratory flows from North Africa, MEMO 11/226, Brussels, 8 April 2011.

⁴⁵ Council Conclusions, Southern Neighbourhood Region, Justice and Home Affairs Council Meeting 3081, 11/12 April 2011, point 10.

Policy recommendation 1: The understanding of immigration

There is a profound tension between a policy approach to labour immigration which perceives migrants in purely economic terms (as short-term sellers of their labour power) and a more holistic approach which views them as settlers, participants, residents and citizens-in-waiting. The understanding and treatment of migration as an (in)security issue, as a threat to the cohesiveness of societies or as a phenomenon that needs to be tightly controlled impedes the acceptance of the reality of human mobility in a global world of flows.

A key policy priority should be to fully embrace the role of migration in enhancing Europe's competitiveness, stimulating growth and responding to the challenges of ageing populations and a shrinking labour force in the EU. The correlation between employment policy and migration should therefore be taken very seriously and developed further. As employees, self-employed persons, consumers and investors, migrants make significant economic contributions, while also boosting productivity, acting as a job-market safety valve, reducing pay pressures and raising the economy's long-term or 'trend' rate of growth. In addition, owing to their age profile, they generally pay more in taxes than they receive in welfare services.

Moreover, the way the EU treats TCN migrants should inform the way in which EU emigrants are treated, and should be treated, in third countries.

Policy recommendation 2: EU politicians and leaders' discourses and public opinion

The EU should also adopt a strong position in response to the increasing use by European leaders and politicians of anti-immigration policy agendas and discriminatory discourses portraying immigration as a threat to security and social cohesion, and artificially linking it with criminality. Tackling perceptions and responding to populist and xenophobic discourses in a responsible way should constitute another central policy priority for the Union. To this end, a common communication strategy on the ethical aspects of Europe's

immigration policy must be devised. The EU would in this way become a promoter of evidence-based (debates and opinions on immigration in Europe).

Policy recommendation 3: Situating migration

A global approach to migration should be one capable of overcoming the deficiencies of a purely esoteric, Eurocentric view by paying attention to the global politics of migration, the movement of people back and forth, the effects of a labour migration policy on countries of origin and the building of strong partnerships meeting EU standards on the rule of law.

The external dimensions of EU labour immigration policy require more legal certainty. The use of soft policy, i.e. of mobility partnerships, in the integration of EU immigration policy in external relations calls for a careful independent assessment of the partnerships' effects on the rule of law and fundamental rights of migrants. The added value of these instruments, from the perspective of fostering circular (labour) migration schemes, remains to be proved and calls for an independent evaluation. The European Parliament should be involved in the mobility partnerships process in order to ensure proper democratic accountability. The EU should seriously reconsider the added value and adequacy of the concept of circular (recurrent/temporary) migration, as there is a tension between forced circular (temporary) mobility and a rights-based and inclusionary approach to migration.

Migration can no longer be viewed through the lens of statist supremacy and sovereign prerogative. Instead, EU labour immigration policy should situate it within the legal framework of fundamental rights protection and the four fundamental freedoms on which European integration has been based and developed. The Treaty of Lisbon now provides the institutional and decision-making foundations needed for that goal to be achieved.

Further, when developing a European labour migration policy, European institutions should take care to ensure that the mechanisms they adopt do not obstruct or hinder the completion of the internal market. Labour migration

measures which carve up the EU territory into 27 different segments of separate labour markets run contrary to the EU's fundamental objective of one labour market.

Policy recommendation 4: Regulating labour immigration

The design of a labour migration regime should be one characterised by

- openness (as opposed to national protectionism);
- flexibility (the acceptance that migration can be temporary as well as long-term, that labour market gaps appear at all levels often quite unpredictably and that migrants often switch status);
- compatibility with other policies (including fundamental rights); and
- efficiency, thereby eliminating secondary movements and discouraging irregularity in Europe.

A utility-based and selective approach to labour migration should be replaced by a rights-based strategy. Such an approach should first and foremost ensure a common set of rights applicable to all TCNs, facilitate family reunification and a secure residence, eliminate vulnerabilities and labour exploitation and promote opportunities for political involvement, participation and access to citizenship. It should also take into account the interests of the migrant. The Treaty of Lisbon, the Stockholm Programme and the legally binding EU Charter of Fundamental Rights provide important opportunities for the design of a renewed EU migration model, which would accompany the EU's unique citizenship model.

The EU should be a more active promoter of the UN, Council of Europe and ILO instruments and conventions protecting migrants' human rights amongst EU member states. It could also contribute towards better national implementation of already existing human rights standards by building closer partnerships with these international and European actors.

Policy recommendation 5: Designing labour migration schemes

The current fragmented EU legislative framework calls for legislative consolidation, more transparency and legal certainty. The EU should support an independent inventory of this framework, itemising rights and standards in the field of labour market access, rights and conditions for TCNs and an assessment of their impact and added value in all EU countries.

Positive codification experiences in the field of visas and external borders suggest that the creation of an immigration code could be a positive step. Any proposal for an immigration code should be firmly founded on the Tampere Programme's milestones and a rights-based approach aiming at a fair treatment between TCNs and EU citizens. The principle of equality of treatment should be the general rule. The personal scope of the code should not only cover those labelled as 'legally residing TCNs', but should also address the rights and status of vulnerable groups such as undocumented migrant workers.

EU member states should not use the revision of current legal migration proposals and the presentation of the immigration code initiative as a political opportunity to reduce existing European rights, freedoms and standards already enjoyed by TCNs and their families.

Policy recommendation 6: Involving immigrants and feeding their views into EU policy-making processes

Engaging with social partners and civil society should be a key EU priority. Current EU platforms ensuring that civil society contributes fully to EU immigration policies should be further strengthened and developed. The results of the Commission's open consultation procedures should also be better taken into account in policy choices. Civil society and migrants' organisations should be regarded as key players in the development, monitoring and evaluation of EU immigration policies. The proposal to set up a European platform for dialogue on labour immigration could be one way of achieving this, but its actual role and input should be carefully considered and scrutinised.

ANNEX 1

EU *acquis* on conditions of entry and residence for employment of TCNs***The Internal Dimension***

(Conditions for entry and residence of third country nationals for the purposes of employment)

Directive 2003/86/EC on the right to family reunification, Official Journal L 251, 03.10.2003.

Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Official Journal L 016, 23.01.2004.

Directive 2004/114/EC on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, Official Journal L 375, 23.12.2004, pp. 0012 - 0018

Directive 2005/71/EC on a specific procedure for admitting third-country nationals for purposes of scientific research, Official Journal L 289, 3.11.2005.

Recommendation on admission of researchers, OJ 2005 L 289/26

Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009.

Proposals under discussion:

Proposal for Directive on conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer, COM(2010)378, Brussels, 13.7.2010.

Proposal for Directive on the conditions of entry and residence of third country nationals for the purposes of seasonal employment, COM(2010)379, 13.7.2010, Brussels.

Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state, COM(2007) 638 final, Brussels, 23.10.2007.

Also of relevance:

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 , 02.12.2000, pp. 0016 - 0022.

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 , 19.07.2000, pp. 0022 – 0026.

Regulation 1030/2002 on residence permit format, OJ 2002 L 157/1. See also the Regulation 330/2008, OJ 2008 L 115/1.

Regulation 859/2003 on third-country nationals' social security, OJ 2003 L 124/1.

Decision on asylum and immigration information exchange, OJ 2006 L 283/40.

Decision establishing European integration fund, OJ 2007 L 168/18.

Regulation 1231/2010 extending Regulation 883/2004 on social security for EU citizens to third-country nationals who move within the EU, OJ 2010 L 344/1.

The External Dimension

(Cooperation with third countries – integration of migration in EU's external relations)

Council of the EU, Joint declaration on a mobility partnership between the European Union and Georgia, 16396/09, Brussels, 20 November 2009.

Council of the EU, Joint declaration on a mobility partnership between the European Union and the Republic of Cape Verde, 9460/08, 21 May 2008, Brussels.

Council of the EU, Joint declaration on a mobility partnership between the European Union and the Republic of Moldova, 9460/08, 21 May 2008, Brussels.

Euro-Mediterranean Agreement establishing an association between the EC and Algeria (signed in Valencia on 22 April 2002 and approved on behalf of the Communities by decision no. 2005/690/EC of 18 July 2005), OJ L 265/1, 10.10.2005.

Euro-Mediterranean Agreement establishing an association between the EC and Tunisia (signed in Brussels on 17 July 1995 and approved on behalf of the European Community and the European Coal and Steel Community by decision 98/238/EC of 26 January 1998), OJ L 97/1, 30.03.1998.

Euro-Mediterranean Agreement establishing an association between the EC and Morocco (signed in Brussels on 26 February 1996 and approved on behalf of the Communities by decision No. 2000/204/EC of 24 January 2000), OJ L 70/1, 18.3.2000.

Agreement establishing an association between the European Economic Community and Turkey (signed at Ankara, 1 September 1963), OJ 1973, C113.

Decision no. 1/80 of the Association Council of 19 September 1980 on the development of the association.

ANNEX 2

PROGRAMME

State of the Union: Brussels Think Tank Dialogue 2011

Europe 3.0: Building a Viable Union

Tuesday 25 January 2011

10.30 am - 6.30 pm

Résidence Palace, Rue de la Loi 155, 1040 Brussels

Workshop: The next phase of EU labour immigration policy: Enhancing policy coherence and advancing a rights-based approach

- Speakers**
- Jean LAMBERT
Member of the European Parliament, EUROPEAN PARLIAMENT
- Claude MORAES
Member of the European Parliament, EUROPEAN PARLIAMENT
- Krisztina BERTA
Deputy State Secretary for EU and international relations, Ministry of Interior of the Republic of HUNGARY
- Jean Louis DE BROUWER
Director of Migration and Borders (DIRECTORATE C), EUROPEAN COMMISSION
- Sergio CARRERA
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