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## **POLICY BRIEFS**

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**POLICY BRIEF 1****Single Procedure: "The One Stop Shop"**

By Kay Hailbronner and Staff of the Migration Policy Institute

**Introduction**

The way in which EU Member States handle the protection claims of asylum seekers can be placed in three broad categories. Some use a single procedure to consider all possible protection needs and make a single decision. Some operate a partial single procedure where Geneva Convention grounds are examined with other asylum related grounds in one procedure. Other Member States use separate procedures for the examination of different grounds for protection. In this last situation, a person rejected for protection on Convention grounds might apply again for a form of subsidiary protection, for example, and have their case re-heard under a second form of procedure.

In Spring 2004 the Justice and Home Affairs Council issued two final Directives under the Tampere Agenda. The first was on the qualification for Convention status and subsidiary protection. The second, which is subject to review by the European Parliament, is on the Procedures for granting Convention status. A European Commission July 2004 Communication, "A More Efficient Common European Asylum System: the Single Procedure as the Next Step" (COM (2004) 503) points to a discrepancy that arises as a result of these directives. The qualifications for statuses across the EU will be uniform, but there will be a common procedure for only one status – Convention status. The Communication, drawing on the Study on the Single Procedure conducted by a team led by the lead author of this paper in 2002-2003, describes the rationale for introducing a common procedure for subsidiary and other forms of protection, but also sets out the reasons for which a single procedure giving access to all available status would be the most efficient system for the EU Member States to develop. These include the speed of final decision-making; the positive approach to protection needs achieved through simplicity and clarity vis á vis the applicant; an improved image of an effective asylum system for the consumption of public opinion across the Union; and an optimal relationship between the protection decision and enforcement of the return of rejected asylum seekers. The Communication also develops reasoning on which action should be taken at the EU level.

A single procedure could also play a role in deterring abuse of the asylum system for entry to the EU. A single procedure can generally be completed, with a determination made of any level of protection need, within a much shorter time frame than that required for multiple procedures. Under a multiple procedure system an asylum applicant sets out with a claim to Convention status. If this application fails, the person could file a new application for subsidiary or other forms of protection. What is more, such separate procedures often require the shaping of the flight story to fit different criteria – giving rise to questions of credibility, as well as prolonging the ordeal for those who do indeed require protection. For those who do not in fact qualify for a protection status, lengthy and complicated procedures only serve to extend their period of residence in the Member State, and to postpone the time at which their return to their country of origin should or could be enforced.

While there are strong reasons for considering EU-wide use of a single procedure, concerns do arise regarding the relationship between the Geneva Convention status and other forms of protection. This is pointed to in both the Communication and the Study on a single procedure commissioned by the European Commission. Some are concerned that a single procedure covering all forms of and reasons for granting protection might have the effect of diluting Convention protection. The Communication suggests that such potential 'devaluation' can be sufficiently tackled through procedural rules. There are, however, a number of other issues that arise from the specificity of the Geneva

Convention status. In a single procedure, there should be no possibility of raising successive or separate claims to protection. The subject of the procedure should be entitlement to protection rather than the right to a certain "status". Nonetheless, the status for which the applicant qualifies should be the one granted: a person who qualifies for protection on Convention grounds should be granted Convention status rather than being given subsidiary protection in those Member States which have two separate statuses.

Other key concerns relate to judicial review and the various costs of developing a single procedure where multiple procedures are currently the norm. The Communication stresses the importance of an 'effective remedy' and the need to assess Member States' implementation of this core principle of the Asylum Procedures Directive. UNHCR, among other organizations representing the interests of refugees, has stressed the need for a strong and credible appeals process. As to the financial aspects, it would seem logical that the resource efficiencies to be gained through the implementation of a single procedure would at some point counterbalance the short-term costs of its introduction.

### Discussion

Two statuses (Convention and subsidiary) are defined in the Qualification Directive. The Procedures Directive applies to decisions on Convention status, regardless of the system operated by the Member States. Those Member States that operate a single procedure where asylum applications are treated as applications for both Convention status and subsidiary protection are obliged to apply the provisions of the Procedures Directive, once it enters into force, to decisions on subsidiary protection also, because they are part of the same procedure. For those Member States that operate multiple procedures, the Procedures Directive does not have to be applied to applications for subsidiary protection.

Nonetheless, the Commission suggests in its July 2004 Communication that, over time, the Procedures Directive should be extended to cover both statuses that have been agreed upon at EU level. This would mean that the guarantees of the Procedures Directive should be the basis for the procedure through which subsidiary protection decisions are made in Member States with multiple procedures under two sets of circumstances:

1. For those applicants who only apply for subsidiary protection where the procedures are separate.
2. For those applicants who request subsidiary protection following a rejection of their application for Convention status.

This would create a situation in which all applications for international protection as defined in the Qualification Directive were covered by the same procedural guarantees. The result might not be a single procedure in the first instance, but rather a system of parallel procedures. Even that system would, the Commission notes, close the potential 'protection gap' which could result from the combination of the Qualification and Procedures Directive. Once that 'protection gap' is closed, only applications for a national form of protection (i.e. not Convention and not subsidiary) would fall outside a modified Procedures Directive in those Member States that consider these national forms of protection under a separate procedure.

The Commission suggests taking a phased approach towards expanding the Procedures Directive to cover subsidiary protection claims, in view of the basically identical legal nature of subsidiary protection with Convention protection under the Qualification Directive. It is possible, however, that problems could arise in the medium- to long-term if the guarantees of the Procedures Directive are extended on the basis of *separate procedures* to subsidiary protection examination. In particular, some of the problems that a single procedure can overcome could be exacerbated during this intermediate step. For example, Member States with multiple procedures, where the initial (failed) application is

for Convention status, would be obliged – successively and separately under first the Convention and then the subsidiary protection procedures – to grant privileges to applicants including the right to remain during both procedures. During that step of the phased approach towards the introduction of a single procedure, therefore, some applicants who ultimately prove to be ineligible for either form of protection would spend a substantial period of time in the Member State in question. That period of time would be significantly shorter under a single procedure. What is more, an applicant in need of subsidiary protection would be awaiting a decision on their claim for a longer period of time, as well as potentially facing suffering on receipt of the rejection for Convention status.

Similar problems arise with regard to judicial review. Having only one appeal possibility based upon refusal of protection rather than appeals to the rejection of a claim to a certain status has merit. However, as long as there is a special Convention status coupled with specific rights different from those arising from subsidiary protection it will not be possible to exclude the right to appeal for applicants who have been granted subsidiary protection but refused Geneva Convention status. An applicant should indeed provide all relevant information in the application and during the procedure. A single procedure requires strict preclusion rules. Unless new facts or evidence are convincingly presented, an applicant would be refused access to a new procedure – in line with the rules of the Procedures Directive.

There is a widespread “priority rule” in single procedure systems, which requires that Geneva Convention status be examined first. Introducing such a rule at the EU level may not be compatible with the full spectrum of relevant directives, in particular the Temporary Protection Directive, which allows Member States to suspend applications for Geneva Convention status during the time of temporary protection. The development of a single procedure approach across the EU could also require re-assessment of other directives (e.g. on Reception conditions) and the Dublin Regulation.

It will be important that a single procedure includes provisions granting clear access, where needed and applicable, to Geneva Convention protection while at the same time including other forms of protection as appropriate. The rights derived from the Geneva Convention must be respected: those who are deemed to fall outside of those rights after a determination procedure is complete, but who are nonetheless deemed to have a protection need in accordance with other accepted statuses (e.g. subsidiary status) should see their need met with the grant of that status. The issue at hand is how to achieve efficiently and effectively a decision on the nature of the protection need (Convention related or otherwise) of individuals applying for status in the EU.

Deciding that a single procedure is appropriate for the EU is one level of decision that will be required during the coming agenda period. In order to take that decision, Member States would need to be clear on how a single procedure could be affected, and what it could look like. Such advance thinking on the working of a procedural method should in no way pre-empt actual negotiations on the substance of a single procedure. Rather, an overview of the modalities could contribute to the decision to move, as a Union, in this direction.

A single procedure for protection at the EU level could require the following:

1. Establishment of a single national authority in charge of examining qualification for refugee status and subsidiary protection (as defined in the Qualification Directive) and, on an optional basis, other forms of protection according to national law and policy.
2. Alternatively, a single procedure could be used for Convention status and subsidiary protection, while Member States engage a parallel and simultaneous procedure covering any other protection categories they maintain

- domestically. This could be a way of using a staged approach as set out by the European Commission.
3. Although there could be a single protection decision-making authority, there might be various national agencies involved in the outcome to decisions. This could require at least that enforcement authorities would have exclusive competence to examine objections against enforcement/removal decisions.
  4. A single procedure should result in a decision either to grant protection (under the Qualification Directive or under national rules) or to reject the application for protection.
  5. Following the logic set out above, the Basic Rules and Principles contained in Chapter II of the Procedures Directive should apply with regard to claims on the grounds of all international protection reasons (Convention and subsidiary). With regard to forms of national protection Member States could be given the option of applying these same standards.
  6. Applicants could be required to detail all the grounds on which they seek protection at the point of the initial request. Applicants could be precluded from access to procedures for renewed applications unless new facts or evidence are produced which could not, for reasonable reasons, have been included in the initial application.
  7. The legal consequences of filing an application for international protection (Convention or subsidiary) would need to be clearly established and, through appropriate information mechanisms, conveyed to applicants whether they apply at the border; within the Member States after irregular entry; within the Member State after regular entry with visa or residence status; or following expiry of other status, to avoid deportation.
  8. The Dublin Regulation would need to be extended to all international protection claims, not just those on Convention grounds.
  9. With a single procedure covering Convention and subsidiary statuses, the scope of the Reception Directive would need to be extended.
  10. Appeal rights should be granted to all applicants. In principle, appeals could be limited to those rejected; however, so long as specific rights are linked to one status only (eg the full Convention rights are linked only to Convention status and not replicated for subsidiary protection), appeals based on refusal of a Geneva Convention status should not be ruled out.
  11. The single procedure could provide for a cooperation mechanism with the authorities competent for enforcement of return at the national level. There could be a monitoring procedure to supervise the enforcement of decisions. The competence of alien/police authorities in charge of enforcement could be limited to deciding on and putting into effect the details of voluntary or involuntary return and organisational measures related to expulsions.
  12. Rejected applicants could be registered EU-wide. All EU Member States could be able to enforce final negative decisions unless they would choose to grant a residence permit to particular individuals in their jurisdiction according to national law.

## Conclusions

The elements of the Common Asylum System developed under the Tampere work programme clearly provide a basis for a proposal to develop an EU-wide single procedure (e.g. through the Qualification Directive). At the same time, the decisions in place also pose challenges which will need to be overcome if a single procedure is determined to be appropriate across the EU and is implemented (e.g. in the links to the Dublin Regulation, the Temporary Protection and the Reception Directives). The efficiencies, in resource as well as bureaucratic terms relative to both individual protection seekers and the populations of Member States, have been described in the Commission's Communication. Additional advantages in developing a single procedure are likely to become clear as Member States consider ways in which both their common asylum system and their Area of Freedom, Security and Justice more broadly can be sustained and completed. One of

these issues will lie in consideration of the reasons for and mechanisms of transferring protection status between Member States (as discussed in a recently completed study for the European Commission).

Minimum standards for a nationally implemented common *single* procedure for both Convention and Subsidiary Protection appear to be a logical next step in a Union in which many states already employ some kind of unified procedure for granting these statuses. The key question then becomes what such a single procedure should look like. Some key facets for consideration have been set out above.

### Questions for discussion

1. What practical and legal problems arise with respect to the “priority” nature of the Geneva Convention status within a single procedure?
2. To what extent, if at all, would it be necessary to modify the Asylum Procedures Directive if subsidiary protection were to be included in a single procedure with Convention status?
3. Could Convention and subsidiary statuses be covered by a single procedure, with alternative national forms of protection being determined under a separate, but simultaneous procedure (the ‘staged approach’)? Would this be desirable?
4. How can Member States ensure that in a single procedure obstacles to removal are quickly examined so as not to impede the return process, particularly if separate enforcement authorities are competent for making removal decisions?
5. What practical problems would have to be resolved for subsidiary protection to be included in a revised Dublin Regulation?

**POLICY BRIEF 2****Access to Durable Solutions**

By Joanne van Selm

**Background/Overview**

There are three traditional durable solutions to the protection needs of refugees: local integration in a country of asylum, return or repatriation to the country of origin, and resettlement to a third country. These solutions were employed by states in many refugee crises of the past century. For some, comprehensive plans were developed including all three durable solutions. There was less attention for these long-term solutions during the 1990s, when it was thought that many refugee crises could be resolved relatively quickly through temporary protection and return. While the number of refugees worldwide seems to be slowly diminishing, as are the number of claims for asylum in Europe, the need for protection and assistance remains strong for several million people. Most of these refugees remain in their region of origin, although some do move on for protection and other reasons.

Throughout the twentieth century European states and the countries of North America, Australia and New Zealand played a significant role in providing assistance to refugees within their regions of origin, through nationally run programmes and funding for UNHCR and NGOs. This has helped in ensuring some level of initial assistance, and has contributed to return processes. Several EU Member States have also conducted resettlement programmes. In policy terms, however, European attention has been particularly drawn to the issue of asylum within European borders, to the integration of newcomers and to returns from Europe, rather than to policies for refugee protection in the places where most refugees are to be found. Policies aimed at protection in regions of origin of refugees are quite distinct from the provision of assistance to those refugees.

In her statement to the Standing Committee of June 2004, the Director of the Department of International Protection at UNHCR, Erika Feller, pointed to the differences between Refugee Policy and Asylum Policy. Refugee policy is the 'umbrella' for global action. Asylum policy is the domestic mechanism through which some refugee protection takes place. In re-focusing on refugee policy more broadly, by encompassing access to durable solutions everywhere in its policy thinking, the European Union will strengthen its essential role in global refugee protection. Increasing access to durable solutions through a wider approach to refugee policy also has the potential to make a significant contribution towards the efficiency and effectiveness of the asylum system within the EU. Situating asylum in Europe within a clearly articulated broader refugee protection policy framework would help to clarify debate across the continent for the benefit of the public, politicians and policy makers, as well as refugees.

The European Commission's June 2004 Communication on "Improving Access to Durable Solutions" (COM (2004) 410) elaborated some of the current, and initial, thinking on the role of promoting access to durable solutions linked to the European Union's asylum system. Responding to Conclusion 26 of the Thessaloniki European Council, the Communication set out the ways and means to enhance protection capacity in regions of origin and proposed a series of policy measures, including the outline of a resettlement scheme for the European Union. Both of these elements would clearly contribute to increased access to durable solutions for the world's refugees.

Discussions among states on issues including closer cooperation on protection, resettlement and return have begun in the context of the High Commissioner's Forum and UNHCR's Convention Plus initiative, as well as in other contexts. Nonetheless, there remain confusion and misunderstandings about some policy aims, contents and motives. Some advocacy groups and some key actors within major international organizations and within several European Union Member States are cautious in dealing with refugee

protection policy issues going beyond asylum in Europe. Others see a strong need to investigate fully the potential for these policies, while cautioning that refugee protection **must** include asylum in Europe. Amnesty International's assessment of the Tampere Agenda (2 June 2004), for example, says that resettlement schemes and protection in the region are "valuable instruments" and indicates that they and other NGOs would be "ready to support [them] provided that they are never used as a substitute - legally or politically - for the legally binding rights that are attached to a refugee or asylum seeker who has directly engaged the protection obligations of a state party to the Refugee Convention." Many on both sides of this spectrum acknowledge the need to go beyond short-term measures, to deal with the causes of forced migration and to cooperate with countries most immediately affected by refugee movements.

In order to proceed with a comprehensive approach to increasing refugees' access to durable solutions, all concerns, fears, desires and hopes need to be fully discussed between participating states, and between states and civil society.

## Discussion

Recent discussion on refugee protection has brought renewed attention to durable solutions. The UNHCR "Agenda for Protection" re-emphasises the three durable solutions. The solutions are complementary and together form a comprehensive package. None can stand alone: the fact that each of the three is theoretically possible enhances them all.

The renewed discussion on durable solutions turns the spotlight on the roles that all states and International Organizations could play both in enhancing opportunities for protection and integration in the region of origin, and in assisting in return programmes between countries in the region. This discussion also draws attention to the links between capacity for effective protection in the region and secondary movements to seek asylum further afield. For refugee protection to be globally effective, all three solutions must co-exist and must be the concern of all states.

### Local Integration: protection in the region

As a durable solution, local integration in the region of origin is the key. Short-term integration can provide a basis of confidence from which people can in fact choose to return to their country of origin as their 'ultimate' solution. For many refugees, longer-term integration in a regional host society is the most likely durable solution, but at present this is not always possible. Integration in a neighbouring state is often inhibited by a lack of readiness on the political, economic or social front.

In order for local integration to be possible, there must first, of course, be protection: protection from *refoulement*, the granting of a legal status, and social, cultural and political acceptance of the refugees' presence within the territory, in the community and in the economy. Is there a role for European states to play in helping states in the region to increase their capacity to offer this sort of effective protection?

If there were such a role it would be one that goes beyond the type of humanitarian assistance in emergencies (including any large scale refugee influx) currently in place and beyond development aid. In order to enhance capacity for protection in the region that could lead to longer-term local integration, the governments of regional states need to develop strong legal systems, to adjudicate asylum claims, or provide *prima facie* protection, for example. They need to strengthen their physical infrastructure to accommodate refugees in such a way that their integration with their host society is not obstructed by charges of favouritism towards the refugees. Local civil society organizations need to be strengthened so that they can play an active implementing and advocacy role, on behalf of both the refugees and of the local, host society. How could the European Union support states in Africa and Asia in particular to undertake such

capacity building, and to develop popular support for long-term refugee protection initiatives?

In its June 2004 Communication, the European Commission draws on UNHCR's "Handbook on strengthening protection capacities in host countries" to set out five key features, namely:

- Accession and adherence to refugee instruments;
- National legal frameworks for refugee protection/asylum;
- Registration and documentation of asylum seekers and refugees;
- Admission and reception of asylum seekers; and
- Support for self-reliance and local integration.

The most effective support from the EU and its Member States to enhance capacity in all of these areas would need to show several key characteristics. It would need to be:

- Targeted;
- Tailored to build on the existing capacity;
- Pragmatically and directly negotiated with the government of the asylum country concerned;
- Sustained over the medium- to long-term; and
- Evolutionary in nature, since protection needs and local readiness to meet those needs evolves over time.

Besides careful discussion within the Union, bi-lateral and multi-lateral discussions with countries in regions of origin are essential. Those are the states that already shelter millions of refugees: they will surely continue to do so.

The focus on durable solutions involves elaborating the mutually beneficial and acceptable means by which those states that receive refugees can be supported in their front line role. Such support does not have to be a question of 'shifting' the burden: it is rather a matter of acknowledging that refugee protection is a concern of all states, and creating a supporting role through which EU Member States can effectively demonstrate solidarity with refugee-receiving states and their populations.

#### Return and repatriation within the region

Voluntary and assisted return is the most tried and tested of the durable solutions – and the one most often used and sought out by refugees. EU governments contribute to existing programmes through their funding of UNHCR and IOM's role for example. However, the policy focus in the EU with regard to return issues is most strongly on the repatriation of people who have sought asylum in Europe. A more comprehensive approach to international refugee protection could involve more significant and targeted support to organizations, governments and societies involved at both ends of a regional return process. Such involvement in returns within a region of origin might give rise to opportunities for establishing the type of inter-state relationships required for the successful conclusion of meaningful readmission agreements where appropriate.

Intra-regional return frequently involves several hundred thousand refugees departing situations in which their sense of protection and personal security may have been limited, and going back without full confidence in their future. Support to such intra-regional return movements would not only be part of a comprehensive approach to ensuring durable solutions, but could also be effectively combined with appropriately timed returns from EU Member States. There is often a sense that return is called 'unsafe' for people who have been protected further away, while it is deemed 'safe' for people who were protected in the region of their country of origin. Some in Europe sees this as contradictory: in some situations that may be the case. In other situations, however, a

geographically spread approach to return might be most effective. It can also be the case that return is unsustainable, giving rise to renewed movement within the region.

### Resettlement

Most refugees do either return to their country of origin or, over a period of years, achieve local integration in a country in their region of origin. For those who do not achieve this durable solution there are currently three alternatives:

- They might remain in a protracted refugee situation, where they are not integrated locally but rather remain in camps or urban settings. Some term this 'warehousing'.
- The second possibility, open only to very few refugees at the moment, is that they will be resettled to one of the eighteen countries with resettlement programmes.
- If a protracted refugee situation becomes intolerable for an individual, and if resettlement, which is very limited, does not arise, then they might turn to the third alternative and seek a means to travel further afield to seek asylum.

A comprehensive refugee protection approach would include a resettlement component, which, if conducted on a sufficient scale, might have the beneficial effect of limiting the need for people to make hazardous and expensive journeys, often at the mercy of smugglers. Efforts to enhance capacity for local protection and integration, and to assist in intra-regional returns would seem most likely to be effective if the full spectrum of durable solutions is available. With the promise of resettlement opportunities for refugees who cannot be integrated locally and who cannot return, states in regions of origin are more likely to feel fully supported in accepting both the burden and responsibility for refugees in the first instance.

The Commission's June 2004 Communication on Communication on "Improving access to durable solutions" (COM (2004) 410) and the study conducted by MPI on the feasibility of setting up resettlement programmes in the EU, discuss the potential scope, objectives and mechanisms of a resettlement programme for the EU as a whole. The nature of resettlement as a durable solution with humanitarian motives is stressed in both of those papers. In responding to the Thessaloniki Conclusions and deciding whether or not to develop resettlement as part of a wider approach to durable solution, Member States would need to consider the ways in which resettlement could be made operational. As an organized programme, resettlement requires planning, in terms of broad ranges of numbers and of criteria. At the same time flexibility is required to address real world needs.

Resettlement's nature as a durable solution is not its only facet. Resettlement programmes generally have two further impacts: solidarity with states in regions of origin and providing an effective tool of protection. These three aspects of resettlement combine to make it an essential component in a complete refugee protection approach.

### A solutions-focused European approach to international refugee protection

How can the European Union move towards the development of a refugee protection policy approach, which includes the relatively well developed asylum system and national approaches to protection within Member State borders? Such a move does not necessarily mean an expansion of either thinking or activities. Assistance is already offered to refugees in regions of origin. Some level of funding for UNHCR activities, including the location of protection officers and regional protection-oriented training programmes, is also in place across Member States. Some return assistance is already in place. Some Member States have resettlement programmes, and others have joined UNHCR working group discussions, showing an interest in creating such programmes.

The development of a solutions-focused European approach to refugee protection is thus not a matter so much of shifting the conceptual underpinning of a broad refugee protection regime. It is rather a case of needing to reassess the scope of protection-related activities and their coordination. In addition, the relatively simple step of giving these activities an umbrella name in the EU context might solidify their nature as a managed approach to refugee protection issues. However, in order to achieve the desired outcomes, a number of changes in actual policy implementation would be required.

In its June 2004 Communication on "Improving access to durable solutions" (COM (2004) 410), the European Commission proposed the development of Regional Protection Programmes (RPPs). These programmes would involve a shift in terms of the required coordination of all protection efforts. Under an RRP, EU Member States and the International Organizations they support, especially UNHCR, would focus efforts and attention on specific regions and caseloads in one coordinated attempt to resolve a particular situation. This coordination would be intended to avoid the piecemeal approach that often prevails at present. The focus on a specific region and/or caseload should not mean that others are ignored. Rather it should mean that the solution to protection needs in a given area receives concentrated attention – and once one case appears to be resolved, and not just contained, another could be dealt with.

The required coordination in policy-making and in implementation would require a significant expansion in institutional cooperation at Member State and at European (Commission and Council of Ministers) levels. Justice and Home Affairs, Foreign and Development Ministries and Departments would all need to be involved in policy decisions and delivery.

Europe's interest in undertaking a more coordinated and comprehensive approach to durable solutions for refugees is not isolated to the altruism of protecting and assisting refugees elsewhere, or to simply supporting the states that undertake such protection. The benefits of a comprehensive and well-managed approach should be felt in various ways in Europe too. If successful in enhancing access to durable solutions, Member States might find that secondary spontaneous movements to the EU decrease, while access to protection in Europe through resettlement would be available to refugees whose protection in their region is not effective or sustainable. Secondary movements for economic purposes could be dealt with without the issue of asylum arising, if protection was not a central motive for the movement. Assessing the effectiveness of protection in regions of origin will require consistent attention, and the involvement of a range of actors.

Asylum channels must remain open for those in need. Creating full and effective regional protection for all displaced persons would be impossible, although protection in some regions and for many refugees could be enhanced through targeted projects. If such projects were to be comprehensive, both in relation to the specific situation they seek to address and in the scope of a broad refugee policy, effective methods of monitoring and evaluation of the protection available would be important components.

With full and careful explanation of the approach, Member States might find that populations across Europe understand refugee protection issues and the role of their states better, and see their own humanitarian principles reflected in the actions of their governments. A focus on the positive response to protection needs could in turn be channelled into greater acceptance of both those asylum seekers who need to request protection in Europe and resettled refugees.

While resettlement would be one of the steps needed for such a successful solutions-oriented approach, the other key would be assistance to governments of countries of first asylum in developing the social, economic and political circumstances in which their populations accept the need to protect and potentially integrate refugees. If such integration becomes possible, and protection in the region is effective, then fewer

refugees should simply be 'warehoused', and fewer would be likely to need to turn to smugglers to seek a protection goal further afield. Support through capacity building for protection in regions of origin can only be successfully offered in a situation-specific way, and in full cooperation and dialogue with the governments and civil society representatives of the countries in the region.

## Conclusion

Greater attention to the long-term solutions to refugee protection needs, and to the fact that those needs change and solutions evolve, could enhance the international protection regime and bolster the EU's position in that regime. The effects of re-developing a broad, coordinated and comprehensive refugee protection policy could have beneficial effects on the asylum system within the EU. These would come, for example, from the potential impact on secondary movements. A comprehensive approach to refugee protection would embrace policies designed to:

- Enhance the political, legal, administrative, social and economic capacity of states in regions of origin to protect the refugees who cross their borders;
- Support voluntary intra-regional return programmes;
- Continue to strengthen the Common European Asylum System; and
- Offer resettlement to refugees for whom that is the only way in which a durable solution can be achieved.

## Questions/Challenges

- How can EU Member States cooperate with each other and with other states to increase access to the three durable solutions for refugees?
- How can European states play a role in helping states in the region increase their capacity to offer effective protection and/or long-term local integration as a durable solution?
- How could capacity building be undertaken to support effective protection in 'front-line' states and intra-regional returns while respecting the sovereignty and national interests of those states as well as upholding international law?
- What practical steps would have to be taken by European states, states in regions of origin with EU support and by international organizations to improve access to durable solutions?
- What would be the role of civil society in Europe and in the regions of origin in enhancing capacity for fuller access to all durable solutions?
- How can EU Member States convey to citizens that their refugee protection policies, in order to be effective, need to encompass elements complementary and supplementary to asylum in Europe?
- To what extent is institutional cooperation and coordination necessary within the EU and within individual Member States to fully address the external relations components of a broad refugee protection policy that includes asylum?
- Does the European Union have the capacity to generate situation-specific approaches to the spectrum of protection needs and the range of mechanisms, if an approach to greater emphasis on durable solutions and refugee policy were to be pursued?
- What kind of monitoring and evaluation mechanisms would need to be in place to assess the effectiveness of protection in regions of origin when considering the use of the asylum channel by refugees from specific countries of origin and when considering the resettlement of refugees?

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**POLICY BRIEF 3****Migrants and the European Labour Market:  
Current Situation and Outlook\***

By Rainer Münz and Thomas Straubhaar

**Introduction**

Today almost all West European countries and several new EU member states in Central Europe have a positive migration balance. And it is very likely that sooner or later this will be the case in the other new EU member states and today's accession countries. As Europe's population ages, immigrants and their descendants-and the possibility of active labour migration-will become an important factor stabilising the size and influencing the composition of the European workforce. In the context of the European Employment Strategy (EES) launched in 1997 and the Communication issued by the European Commission (2002) assessing progress in the Strategy, a discussion of labour migration and its effects on employment structure may be helpful. This paper contributes to this discussion by analysing the size, and structure of Europe's migrant population and assessing the economic position of migrants in the broader context of European labour market developments.

The European Labour Force Survey (LFS) is used as the main data source for this paper. Unlike other official data sets, which only distinguish between those holding the citizenship of an EU member state and those who do not, the LFS allows one to use the criterion "place of birth" to distinguish between foreign-born and native-born residents of the EU. The results for both groups are then compared with those of *foreign nationals* legally residing in an EU member state-a group that partially overlaps with the *foreign-born* population. This exercise shows lower employment and higher unemployment rates as well as a concentration in certain sectors of the economy and in low-pay jobs for both foreign-born residents and foreign nationals from middle- and low-income countries, but above-average employment rates for immigrants from high-income countries residing in EU 15 (including intra-EU migrants).

The picture, however, is somewhat different when looking at the foreign-born population, as this includes naturalized citizens of EU member states who on average are economically better integrated than those who remain third country nationals. As a result, foreign-born residents of EU countries have higher employment rates and, on average, are employed in better positions than legal foreign residents. This suggests the following: in Europe, the process of integration of immigrants differs to a lesser degree from that of traditional countries of immigration such as the US, Canada and Australia than has been previously assumed, although labour market outcomes remain disappointing for migrants from low and middle-income countries, in particular from Northern Africa and Turkey.

Further sustained efforts to enhance integration of immigrants and their children and to provide equal opportunities are necessary. Confronted with an aging and eventually shrinking domestic population Europe also has to consider migration policies based on skill based selection mechanisms and measures to identify future labour and skills gaps. In the medium- and long-term the EU will have to compete with other OECD countries for attractive potential migrants. A planned Green Paper from the European Commission will provide one touchstone for this important conversation on when and how migrant should be admitted for employment and what status they could be accorded during their residence in the Union. Such efforts are necessary if Europe is to take the proactive migration management approach needed to maintain both economic advantages and social cohesion in the midst of demographic change.

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\*A more detailed version of this paper including data tables will be available online starting September 1, 2004 at:  
[http://www.migrationpolicy.org/events/2004-08-31.euroconf\\_publications.php](http://www.migrationpolicy.org/events/2004-08-31.euroconf_publications.php).

### How Many Migrants Live in Europe?

The exact number of migrants residing in Europe is unknown. This is partly due to the fact that many European countries-in contrast to Canada and the US-continue to use nationality, but not place or country of birth as a standard criterion in their demographic, economic and social statistics. "Foreign nationals", traditionally counted in European statistics, are residents of EU 25 who do not have the nationality of the country they reside in. "Foreign born," on the other hand, refers to all people who were born outside of a particular member state, regardless of their current citizenship. Thus, it includes immigrants who have acquired the nationality of their county of residence in-which can make a significant difference, considering that in the decade 1992-2001 some 5.8 million people were naturalized in EU 15 (OECD/Sopemi 2004).

Data collected by OECD for 2000-2001 put the number of foreign nationals in the EU 15 at 20.1 million people. Of these, fewer than 6 million people were EU 15 citizens living in another EU 15 member state, and some 14.3 million were third country nationals. The largest group of third country nationals residing in the EU are citizens of Turkey (2.6 million), followed by Morocco (1.4 million).

Additional information can be obtained by combining data from the LFS with that produced by the UN Population Division and data from national censuses and population registers. Looking at only the highest figure for each country, this method puts the number of first generation immigrants (=foreign born population) in the EU 15 (2002) at 33 million. As published and unpublished data for some countries still to certain extent under-estimate the size of the foreign-born population, one can assume the presence of 33-36 million people in the EU 15 (2001-02) who are either legal immigrants - both foreign nationals and citizens - or irregular migrants. Another 1.7 million immigrants living in the other EEA states and Switzerland and some 1.5 million immigrants living in the new EU member states in Central Europe bring the size of Western and Central Europe's migrant population to 36-39 million people.

### Recent Flows

In 2003, the 28 EU+EEA countries and Switzerland had an overall net migration rate of +2.2 per 1000 inhabitants. The net gain from migration was +1.0 million people. This accounts for more than three quarters of Europe's total population growth (+1.3 million people in 2003). In absolute numbers the gross immigration was largest in Germany, the UK and Italy. Relative to population size, Cyprus had the largest positive migration balance (+14.1 per 1000 inhabitants), followed by Ireland (+7.0), Portugal (+6.1), Switzerland (+6.0), Liechtenstein (+5.9) and Spain (+5.5). Only Lithuania (-1.4 per 1000 inhabitants), Iceland (-0.9), Poland (-0.4), Latvia (-0.3) and Estonia (-0.1) recorded a negative migration balance.

### Gates of Entry, Relevance of Labour Migration

In many European countries recent regular immigration is dominated by family reunification and migration related to the formation of new families, by the inflow of asylum seekers (412.000 applications in the EU 25 in 2002), and by the inflow of co-ethnic "return" migrants. For instance in Sweden (2001) over 70% of residence permits were granted for purposes of family formation/reunion. In Belgium and Denmark this was the reason in over 50% of cases, while in Austria, Finland, France and Italy it applied to between 20% and 30% of all people taking legal residence in these countries. In 2000, in 61% of the cases, employment was the basis for legal entry in Italy, 46% in Portugal and 36% in Spain. In Ireland and Greece admission for economic reasons played a dominant role. In the UK, employment was the reason for entry in only 27% cases, with family reunification applications accounting for another 27%.

Looking at the EU overall, nearly 40% of all residence permits were granted for the purpose of employment whereas 30% were granted for the purpose of family reunion. These figures, however, do not give the full picture as in several EU countries economic migration on a larger scale takes place in the form of seasonal and temporary labour migration (529,000 persons admitted in 2001 in EU 15) as well as in the form of irregular labour migration of at least the same magnitude. The latter only statistically becomes visible at the occasion of so-called amnesties and regularization programs. During the period 1995-2002 some 2.5 million migrants were regularized in EU 15.

#### Labour Migration in the New EU Member States

In the new EU member states in Central Europe labour migration is still relatively small. Only in (the government controlled, i.e. Greek part of) Cyprus is the share of foreign labour above EU average. In Poland the number of work permits for labour migrants fluctuated between 15,000 and 18,000 (1997-2002), but irregular labour migration has already become visible; in Slovenia the number of work permits fluctuated between 34,000 and 40,000. The Czech Republic, in 2001, counted 104,000 non-nationals legally working in the country. When adding trade licenses the number of economic migrants can be put at around 168,000 (2001). In Slovakia their number was 9,000 in 2002. Relative to work force and population size Hungary has the largest number among the new member states of legal foreign workers and employees: 115,000 in 2002 or 2.3% of the work force.

In the new EU member states, the great majority of migrant workers come from neighbouring countries and regions. In Slovenia, more than 90% of the foreign workers and employees come from other successor states to the former Yugoslavia. Foreign workers from Ukraine, Belarus and the Russian Federation represent the majority in Poland and some 30% in the Czech Republic. In Hungary 43% of the foreigners were Romanian citizens, followed by citizens of Serbia (11%) and Ukraine (8%), most of them ethnic Hungarians. Around 10% had come from the EU. The Czech Republic and Poland also have a sizeable share of migrant workers from Asian countries, notably Vietnam, whereas Hungary hosts the largest Chinese diaspora community in Central Europe, making up 6% of all foreign residents in Hungary.

#### Education, skills

The skills profile of the foreign-born population is markedly different from that of the total EU population. Both people with low skills (immigrants: 52%; EU 15 average: 48%) and with high skills (immigrants: 20%; EU 15 average: 17%) are overrepresented among immigrants. People with medium skills are underrepresented among migrants (immigrants: 28%; EU 15 average: 39%). This is mainly a result of labour markets primarily creating demand for high and low skilled migrants.

Skill levels vary greatly by national origin. Immigrants from Southern Europe living in another EU country as well as immigrants from Turkey, North Africa/Middle East and sub-Saharan Africa have relatively high proportions of people with low skills. In contrast immigrants from North-western Europe living in another EU country and in particular immigrants from other industrialized regions (North America, Australia/New Zealand) have higher proportions of highly skilled people.

#### Work Force, Dynamics of the Labour Market

In 2002 some 290 million people living in the EU 25 were of working age (15-65). Of them, 62.8% were actually employed (employment rate in age groups 15-65). Employment rates range from 51.5 % in Poland and 55.5 % in Italy to 73.6 % in Sweden, 74.4 % in the Netherlands and 75.9 % in Denmark. Big differences between male and female employment rates can be found in Southern Europe, namely in Greece, Italy, Malta and Spain - countries (except Malta) with high unemployment rates for

women. Labour force participation of women is significantly above average in Scandinavia.

Currently, unemployment rates diverge significantly between EU states, ranging from 19.8% in Poland to 2.7% in the Netherlands. Regarding unemployment there is no clear pattern that would distinguish EU-15 states from new member states.

Migrants are of increasing importance to the EU workforce. Between 1997 and 2002 the number of people employed in the EU-15 increased by about 12 million (+8.1%), out of which 9.5 million were EU-nationals and more than 2.5 million were third-country nationals. While the share of third-country nationals in total EU employment was 3.6% in 2002, they contributed 13% of employment growth during the period 1997-2002. If we also account for foreign-born naturalized EU citizens the contribution of immigrants to employment growth is in the order of 20% (European Commission 2004).

The employment of migrants has increased in recent years due to strong economic growth and increases in the number of skilled migrants. In 2002, the employment rates of EU-nationals already had reached at 82% for the medium skilled and 89% for the high skilled. In 2002 they had further risen to 82% and 89% respectively. Between 1997 and 2002 the number of employed medium skilled migrants increased by 50% and that of highly skilled migrants doubled, amounting to more than 60% of the total increase in the employment of migrants. This reflected cyclical growth in employment and the migrants' over proportional contribution to this increase. The situation for the low skilled is less favourable.

#### Employment and Unemployment Rates of Immigrants

The employment rate of the foreign-born population (61%) is lower than the EU 15 average (64%). But immigrants from Western and Southern Europe living in another EU 15 country and from other industrialised countries have higher employment rates and lower unemployment rates than the total EU population. The opposite is true for immigrants from other parts of the world. Employment is particularly low and unemployment correspondingly high among immigrants from Turkey, Middle East/Africa, and Asia. Immigrants from the new EU member states, the Balkans and Eastern Europe and from Latin America have almost the same employment rate as the EU 15 average, but higher unemployment (Münz and Fassmann 2004).

Foreign-born men only have a slightly lower employment rate (71%) and higher unemployment (9.3%) than the EU 15 average for the male population (empl.: 73%; unempl.: 6.9%). Employment is high among male immigrants from other EU member states, the Americas and Australia. Only male immigrants from Turkey, Africa and the Middle East have significantly lower employment rates and much higher unemployment. Differences are larger among women. Foreign-born women have a lower employment rate (52%) and higher unemployment (9.7%) than the EU 15 average for the female population (empl.: 56%; unempl.: 7.8%). Female immigrants from Turkey, Africa and the Middle East have particularly low employment and high unemployment, while women from Asia have particularly low employment but average unemployment rates. Women from Latin America have average employment rates but particularly high unemployment rates. The opposite is true for women from Western EU countries and from other Western countries.

As employment and unemployment rates vary to a considerable degree with acquired skill levels, lower employment rates among certain immigrant groups are partly the result of differences in skills compositions. However, skill differences are not the only explanatory factor. Employment rates of male migrants moving within EU 15 countries do not differ much from the EU average while lower skilled women from other EU 15 countries have higher employment rates. This is particularly true for women from Southern EU 15 countries. In contrast immigrants from Turkey and North Africa/Middle

East at *all* skill levels have lower employment and higher unemployment rates than the EU average. The employment rates of immigrants from new EU member states, Eastern Europe and the Balkans are below the EU 15 average for highly skilled men and women, but above EU average for low skilled women.

There are indications that, for most nationalities, those who have naturalized are doing better in the workforce than those who remain foreign nationals: discrepancies in employment and unemployment rates are clearly visible when comparing highly skilled male and female immigrants from new EU member states, the Balkans and Eastern Europe with foreign nationals of these countries residing in the EU 15. Such discrepancies are visible at all skill levels when comparing female immigrants from Turkey and male as well as female immigrants from North Africa/Middle East with Turkish nationals (women) and with nationals of North African and Middle Eastern countries (men and women) residing in the EU 15. Such discrepancies do not appear when comparing highly skilled and unskilled male immigrants from Turkey with Turkish nationals of the same skill level (male).

#### Occupational Structure, Industry Structure

On the whole, the occupational structure of the foreign-born population in Europe (as identified in the LFS) is different from the EU 15 average. Economically active immigrants are underrepresented in medium-skilled non-manual positions (immigrants: 9%; EU 15 average: 13%) and over represented in non-skilled manual positions (immigrants: 24%; EU 15 average: 18%). Immigrants from North-western Europe living in another EU country as well as immigrants from other industrialized countries predominantly occupy highly skilled non-manual positions. Immigrants from Southern Europe living in another EU country as well as immigrants from the Balkans, Central and Eastern Europe and from Turkey are over proportionally active in skilled and unskilled manual positions. Immigrants from North Africa/Middle East and sub-Saharan Africa as well as from Asia have an average representation in highly skilled non-manual positions but are over proportionally active in unskilled manual positions (Münz and Fassmann 2004).

#### Economic inclusion and exclusion of migrants

Third-country nationals have also much lower employment rates than EU-nationals (by 14 %-points lower in 2002), in particular in the prime-age group (by 20 %-pts. lower). The gap is on average wider for women than for men, within all working age groups (European Commission 2004).

In more than half of the EU 15 the gap in employment rates has been shrinking over the last decade. From 1994 to 2002, the employment rates of non-EU nationals improved significantly in Portugal (+28 %-pts.), Spain, (+22 %-pts.), Denmark (+18 %-pts.), the Netherlands (+16 %-pts.), Ireland (+13 %-pts.), and Finland (+12 %-pts.). Smaller increases were recorded in the United Kingdom, Sweden and Greece. The employment rates for non-EU nationals remained below average in France and Belgium, and there was a decline in the employment rates of non-EU nationals in Austria (-3.5 %-pts.), Luxembourg (-3.1 %-pts.), and Germany (-2.0 %-pts.).

Migrant workers and employees originating from non-Western and non-EU countries are not only concentrated in a few sectors of the economy, but within them, in the lower skilled segments. A growing number of them are employed in the health and care sector as well as in education. Domestic services also play an important role, though not always visible in available statistics due to the high proportion of irregular migrants working in this sector. By contrast young people of foreign origin tend to be increasingly working in jobs closer to the domestic profile.

Whether these changes mean a better starting point for migrants' longer-term integration in the labour market is questionable, as they still tend to remain concentrated in low quality service jobs offering little room in terms of adaptability and mobility. The picture, however, tends to be better if one does not compare third-country nationals with EU nationals, but native-born with foreign-born workers and employees. This is to be expected as naturalized citizens tend to be better integrated than legal foreign residents. However discrepancies between immigrants from non-industrialized countries and Europe's majority populations remain strong.

The employment rate of legal foreign residents from North Africa and Turkey is systematically lower than for EU-nationals whatever the skill level is. In contrast citizens of Balkan countries have employment rates that are at or above EU-nationals' levels both for men and women. The same is true for North Americans and Australians residing in Europe as well as for citizens of North-western Europe residing in another EU member state.

As naturalization in many EU 15 countries has drastically increased since the 1990s the sub-segment of foreign nationals has become much less representative of the migrant population. In fact, the economic position of the foreign-born (=migrant) population in EU 15 differs on average less from Europe's total population than the economic position of the foreign resident population. The latter are in a less favourable economic position. If one looks at foreign nationals only instead of immigrants with or without citizenship of the receiving country, one could therefore derive an overly negative picture.

The analysis of European Labour Force Survey data shows that apparently immigrants in Europe are more successful than surveys and data only focusing on foreign nationals suggest. Thus, differences between traditional countries of immigration - such as Australia, Canada and the US - and European countries are probably smaller than assumed. Nevertheless for certain immigrant groups-in particular those coming from middle- and low-income countries-considerable employment gaps remain.

The analysis of LFS data also makes it clear that those immigrants who do not naturalize within the first 10-15 years are more likely to remain in low-skill and low-paid employment. This sectoral concentration of legal (and irregular) foreign residents can partly be explained by labour shortages and lower requirements in terms of specific skills. Such circumstances may provide immigrants and their children with better chance to enter the labour market. At the same time, relatively large numbers of migrants in some sectors with limited rights or scope for mobility within the labour market will not be in a strong position as regards wages and job-quality.

Therefore integration of third-country nationals newly arriving and residing in Europe remains an important issue for the EU, its member states and European civil society. In recent years a growing number of EU member states have introduced integration programs, ranging from language training courses to civic education. This goes along with efforts of the EU to implement anti-discrimination and equal opportunities legislation in all its member states.

### Demographic Imbalances

For EU-25, a recent population forecast from the United Nations projects a 10% decline in the EU population to 2050, with the new member states anticipated to have particularly marked population declines. The real political and economic challenge, however, lies in the decline of the population at prime working age and the associated phenomenon of population aging. Low fertility and increasing life expectancy in Europe both reverse the age pyramid, leading to a shrinking number of younger people, an aging work force, and an increasing number and share of older people. In the absence of massive recruitment of economically active migrants, in Western and Central Europe the number of people between ages 15 and 65 will decrease from 312 million (2000) to 295

million (a drop of 5.5%) by 2025 and to 251 million (a drop of 19.6%) by 2050. During the same period the old age dependency ratio, defined as the population over 65 divided by the working age population, is likely to increase from 23 percent (2000) to 35 percent (2025) and to 45-50% (2050).

Even more worrisome is the change in the ratio between economically active and retired persons. Assuming an employment rate of 70%, the number of employed persons per persons aged 65 and over will decline from 2.7 in 2010, to some 2.2 in 2020, 1.8 in 2030, and 1.5 in 2040. If, by reaching the Lisbon target, the employment rate were to rise further to 75% between 2010 and 2020, the decline in this ratio would be attenuated, reaching 2.4 in 2020.

### Labour Force and Labour Market

The change in the economically active population will be smaller than the projected changes for the 15-65 age group, because only 60-80 percent of this age group are currently employed or self-employed. After 2010, Western and Central Europe (the EU-25) can expect a decrease in the active population. Until 2025, the decrease in the EU 25's active population will be on the order of -16 million. In other European countries such as Bulgaria, Moldavia, Romania, Serbia and Montenegro, the active or job-seeking population is already shrinking. In addition to shortages due to demographic change, we can also expect significant skills shortages, or qualitative mismatch, due to structural change and innovation.

Regarding structural change, European countries can expect a decrease in the employment share of the manufacturing and agricultural sectors, and an increase in the service sector share. These structural changes will be accompanied by changing qualifications requirements. While the share of the service sector in the EU-15 countries is already relatively high, significant structural changes will take place in new EU member states and accession countries. In these countries a relatively high share of the labour force is still employed in the agricultural sector while the service sector is underdeveloped compared to the EU average. In addition, there are substantial mismatches dating back to transformation processes in these countries, which brought about a decline in the oversized public sector. These problems will become even more acute in the accession countries if extensive migration of highly skilled individuals to the EU 25 and to traditional countries of immigration occurs.

If future labour supply fails to keep pace with demand, there are likely to be serious skills shortages on EU markets. This type of qualitative mismatch could in turn become a serious problem for economic growth throughout the EU.

### **Outlook**

Given the high levels of employment already reached by skilled EU-nationals, recruitment of migrants from third countries appears as one of the primary options for responding to the growing demand for medium and high skilled labour. At the same time, Europe experiences a continuing demand for low skilled labour. For these demographic and economic reasons, during the 21<sup>st</sup> century, all present EU+EEA member states and accession countries will either remain or become immigration countries.

After 2010, burgeoning demographic and economic needs may force many countries to develop pro-active migration policies. For a relatively short period of time, European east-west migration will continue to play a role in balancing labour and skill gaps. But in the medium and long term, potential migrants will inevitably be recruited from other world regions. In this context, Europe will have to compete with traditional countries of immigration-in particular Australia, Canada, and the US-for qualified migrants to fill labour gaps.

The migrants most likely to help match shortages of labour and skills and with the best chances to integrate probably are those who are able to adapt to changing conditions, in view of their qualifications, experience and personal abilities. Future selection mechanisms, migration and admission policies must be put in order to assess both qualifications and adaptability of potential immigrants.

At the same time, given the political sensitivity of immigration, it is likely that governments will find it difficult to justify introducing programmes in the absence of already existing acute labour shortages. Even if projections might predict quantitative and qualitative shortages with a sufficient degree of certainty, governments may require more tangible “proof” in order to convince their electorates of the need for additional foreign labour. This implies that while projections provide a basis for policy planning in the areas of education, labour market, welfare or social reforms, because of the special political sensitivity linked to immigration, it is likely that migration policy will remain subject to more short-term, ad hoc planning. In this context the EU is well placed to develop medium and long-term migration policies able to cope with future demographic and economic challenges for Europe.

### Challenges for Policymakers

- In the years ahead, other highly industrialized countries and even some middle-income countries will compete with EU member states for highly skilled migrants. EU member states should therefore begin to plan for ways in which they might become more “competitive” in attracting talented migrants. The prospect of permanent resident status and access to citizenship are one important factor worth additional consideration. These issues are also important for the social sustainability of labour migration programs.
- New methods of selecting economic immigrants of all skill levels might be tested: possible models could include temporary-to-permanent transitional visas, variations of the “points” systems used in Canada, Australia, New Zealand, and the United Kingdom, legalisation of irregular migrants through “earned regularisation,” and smoothing the transition of foreign students from the university systems of member states to employment in the EU. (Papademetriou and O’Neil, 2004)
- Greater efficiency in processing speed as well as the streamlining of paperwork and legal costs in the admission of foreign workers, employees and entrepreneurs will help define better the contribution that labour migration can make to European economies. EU member states might devise new methods in admitting immigrants for particular jobs when EU/EEA nationals are not available. This, however, has to be done in ways that continue to protect domestic workers.
- The continuing need for low-skill labour in most EU member states should be acknowledged and managed by reducing the de facto reliance on irregular migration. Preparing for possibly even higher reliance on low skill foreign labour - in particular for domestic, health and care service - is one of the issues EU member states will need to consider. High skill labour migration is thus unlikely to constitute a complete migration management package, but will continue to play an important role for most countries in Europe.
- The new EU member states in Central Europe will inevitably become recipients of significant migration within the next decade. Preparation now may help them avoid some of the discontinuities, social and economic exclusion and political polarisation associated with poorly managed migration.
- Persistent gaps in employment and unemployment rates of certain immigrant groups (namely, people from Turkey and North Africa) across skill levels continues to be a challenge for European policy makers. Among the needed policy

improvements is the “mainstreaming” of immigration and integration issues into economic and social policy portfolios, with the workplace remaining one of, if not the most important fields of action. Making the acquisition of skills (particularly language skills) compatible with employment should be a priority, as should promoting recognition of foreign qualifications. Continued implementation and evaluation of national anti-discrimination efforts are also an important first step.

- Better information regarding migrants needs to be collected in both migration specific and generalized surveys and censuses. The LFS provides one new tool contributing to informed policy making, and there are other promising signs. Following the Action Plan for the collection and analysis of Community Statistics in the field of migration (European Commission 2003b), the Commission is now preparing a proposal for a regulation to harmonise the collection of data and statistics. The first Annual report on migration and asylum has been released (European Commission 2004). However, stronger cooperation among EU member states as well as between them and the European Commission on this front are needed if these Annual Reports are to become a true source of compelling ideas, best practice and better outcomes in the fields of migration and integration.

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**POLICY BRIEF 4****Managing Irregular Migration**

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**Introduction**

In the past two decades, the Member States of the European Union have seen their population of irregular immigrants grow at ever increasing rates. Visa-free entries, visa overstaying and a poorly managed asylum system are three of the most frequently used routes to unauthorized stay but unauthorized entries also result in many irregular immigrants. No Member State publishes official estimates of the size of its irregular immigration. Impressionistic accounts, however, partly based on the large number of persons who have participated in regularisation programmes, suggest that the population of unauthorized immigrants in the EU might start at about one percent of the population of the EU 25 (at about four million persons) and is growing at annual rates that are well into the lower hundreds of thousands.

Responding to this trend, Member States have, individually and collectively, developed a bundle of policy responses to migration generally and, by extension, to irregular migration. So far, these efforts have been slow in bearing fruit—an outcome that requires the evaluation of each of these responses and how they are used. One aspect requires particular attention, namely, how policy outcomes might be different if the various policy tools were to be used in consciously mutually-reinforcing ways—that is, within a more explicit strategic framework.

The “tools” used most frequently include more vigorous border controls and improved visa policy, interior enforcement measures and measures to prevent illegal employment, and as a distant last, the removal of unauthorized immigrants. (Commission, 2003, 2004) Not all Member States apply these policies with equal vigour, and few would argue that they have particularly successful with any one of them, let alone across all of them in recent years. Some of these tools have been used with the nominal cooperation of third countries.

Most of these measures have been the subject of debate, have been evaluated, and have become the focus of EU-level action. One measure, however, the regularisation of irregular immigrants, has received little such attention despite being one of the most used and earliest-developed tools for managing illegal migration. As a result, regularisation remains a blunt and problem-ridden policy option.

**The Regularisation Option**

Since 1973, when a French programme launched the modern age of European regularisations, nearly 4 million people have been regularised in countries now belonging to the European Union. Most Member States that have carried out major regularisation programmes have done so more than once a decade, on average, despite repeated vows that such programmes would be “one-time-only.” Most other Member States have quietly but continuously regularised migrants, one at a time, or on a small group basis. There is no indication that the rate of regularisations has slowed. If anything, the frequency and total numbers of beneficiaries have continued to increase; In fact, Spain has just announced that its intention to conduct another regularisation program later this year. Yet, regularisation today is a stopgap measure. It is both evidence of and the result of the continued failure of other immigration management and control policies.

This paper seeks to raise the bar. It makes the case that regularisation, thoughtfully employed within a broader strategy of migration management, can not only prevent the population of unauthorized immigrants from building to unacceptable levels, but also play

an important role in making other migration management tactics more effective. This case is made as follows:

- By drawing out some of the strengths and limitations of regularisations and other migration management tools;
- By identifying ways in which previous regularisation efforts have failed and succeeded (and explaining some of the reasons for this success or failure), and;
- By suggesting ways in which the various components of regularisation programmes might be improved and become integrated into an overall migration management and illegal migration control strategy.

## Discussion

It has become evident that single-faceted policy solutions are simply not sufficient to control illegal immigration. The more vigilant visa, border and interior controls applied with increasing tenacity since the early-to-mid 1990s have not lowered unauthorized entries to acceptable levels. In fact, with the fundamental reasons for irregular migration essentially unchanged (if not strengthened), greater control efforts have pushed migrants to more dangerous and more complicated ways of crossing borders and remaining illegally in countries of destination. This has increased the human cost, deepened the underground existence of irregular migrants, and fuelled their potential for engaging in criminal activities beyond those of illegal presence and employment. Furthermore, much greater controls have their own non-pecuniary costs, some of which can be perverse:

- Tighter visa policy can only do so much before inhibiting legitimate travel.
- Increased controls, by disrupting circular migration, can encourage unauthorized migrants to make longer stays in the European Union than might otherwise have been intended.
- Markedly tighter interior controls can disrupt the economy, overwhelm the court systems, and give rise to human rights and civil liberties issues.

Other policy options have proven equally weak when used alone. Increased legal migration opportunities, implemented alone, are unlikely to substitute for illegal migration to a sufficient degree unless they are of a very large scale. Yet, very large flows are politically unacceptable in any EU Member State. Furthermore, and as the Commission has noted in its communication on the topic, the link between legal and illegal migration flows is difficult to establish with any reasonable precision (Commission, 2004). In any event, since the early 1970s, legal labour migration in Europe has not been open at anywhere near the level at which one would be able to test any hypothetical linkage between the two processes. Efforts to control the irregular, or underground/informal, economy, while occasionally effective, are not a cure-all for illegal immigration. The presence of substantial numbers of unauthorized immigrants in countries with relatively small informal employment, such as France, is a strong demonstration of this point. Finally, the regularisation and expulsion of unauthorised immigrants are clearly only remedial measures that do not alter the fundamental dynamics—or realities—that drive unauthorized migration.

Taken together, each of the elements for controlling illegal immigration (and managing migration better) named above reinforces and increases the probability of success for the other. Here, we present a few important and frequently overlooked connections among many of the key elements of illegal migration control.

### Expanded labour migration channels

Significantly expanded opportunities for labour migration have been thought of largely as a bargaining chip with which to secure the cooperation of countries of transit and origin. Concerns about adverse public reactions to that approach, however, have made this policy option very difficult to implement. It might be at least equally useful to think of labour migration programs as a way of giving domestic employers—whether factory owners, hospital administrators, elderly care facilities, personal and low-value added service providers, farmers, or homemakers and families—a reasonable alternative to hiring irregular workers.

For expanded labour migration to succeed in displacing illegal migration, several preparatory interventions are necessary. The most important are these are:

- First, the public must be prepared for the possibility of expanded labour migration, through public education and a reduction in domestic unemployment rates, particularly among minority and immigrant populations.
- Second, the existing unauthorised population must be minimized: if many immigrants remain in an irregular-status, some employers will be tempted to continue to employ them irregularly, perhaps continuing pre-existing relationships.
- Third, employers must be brought into the process of planning the migration programme at an early stage so that they can “buy-in” to the overall approach and cannot claim any incentive to continue to employ unauthorized migrants.
- Finally, illegal migration and irregular employment must not be allowed to continue to be attractive options for migrants or employers, making enhanced enforcement of immigration and labour law crucial.

These preparatory actions are justified by the logic that public support for expanding legal migration channels cannot be reasonably expected if the presence of unauthorised immigrants continues to be high.

An important element of the possible link between labour migration and illegal immigration is often overlooked. Labour migration openings can also be used as an “enforcement” tool. Firms and sectors that use legal migrant labour could be targeted for higher but less intrusive inspection for compliance with employment regulations (through audits and spot checks) and employers found employing unauthorized workers, or employing people off the books, could be denied access to migrant workers in the future. Additionally, expanded labour migration channels can serve as a “soft” regularisation tool of sorts, at least in the early years of the strategy’s implementation, by allowing illegally resident workers to apply for legal work with the assistance of their employer without leaving the host Member State. Several Member States already take variants of this approach to on-going regularisation.

### Fighting irregular employment

A large proportion of Europe's unauthorized immigrants live in EU Member States where employment in the underground economy is high among migrants and natives alike. Unauthorized migrants both fuel and are drawn to vibrant underground economies. Informal employment is thus a magnet for unauthorized immigration that is likely to overwhelm even the strongest controls—and often leads even authorised workers to work in the underground economy. The relationship works both ways, however. Just as the informal economy attracts irregular migrants, unauthorised immigrants make the informal economy more efficient, more profitable for both employers and consumers, and more durable. Workers who have few other employment options use ever-more creative ways of finding employment and continue to be a temptation to employers, making

efforts to combat informal employment far more difficult. The existence of migrants who are determined to stay and survive (and who may fear returning to their country of origin because of conditions there, because they could be branded as “failures,” or because they may have to pay off debts associated with their travel and entry) can be problematic for other EU Member States *if employment options in the underground economy of the country of entry truly dry up*. If that becomes the case, these migrants may find movement to a more “hospitable” Member State or engagement in criminal activities to be their only options. For these reasons, removals and regularisation are intimately linked to other efforts to control the informal economy.

### Removals and Regularisations

Both removals and regularisations are ways of reducing the stock of unauthorized immigrants. Yet, neither can really affect rates of irregular presence by itself. This reality challenges policy makers to understand better the important links between the size of the existing unauthorized immigrant population and policies intended to affect future inflows directly.

The two policy options have obviously different advantages and pitfalls. Large-scale removals are expensive, can be socially and economically disruptive, and may have serious humanitarian consequences, such as impacts on families with members of mixed legal statuses. Removals’ more benign cousin, voluntary return, does not seem to be applicable on a large scale, even when it is accompanied by financial incentives. Regularisation can be even more controversial as large proportions of the host population are likely to have a negative opinion of that option and may be willing to oppose it actively. Furthermore, regularisations operate under the cloud that they may encourage further illegal migration, possibly even by third country nationals residing in other Member States.

One of the most remarkable things about regularisation is that, despite its frequent use, there has been relatively little attention paid to improving it as a policy tool. The remainder of this paper will be dedicated to exploring the virtues and limits of this tool, and to investigating ways in which it can be improved and be employed more strategically.

### Selected Regularisation Types, Requirements, and Effects

Analytically, regularisations can be organized according to the administrative techniques employed; the criteria used to determine who can qualify and how; the programme’s intent; and, the type of status granted.

The most frequently used regularisations are ones in which migrants must qualify within a limited period of time by satisfying a very small number of criteria. Almost invariably, the state claims that the proposed programme is “exceptional” and “one-time-only”. The most commonly used criteria are employment-related, such as the requirement that applicants demonstrate that they have a steady formal sector job. In a frequent variation, applicants must also show that they have been employed for a certain amount of time, or have been resident since before a certain date. This last requirement is designed to avoid encouraging an influx of migrants in response to the regularisation.

General regularisations often involve large numbers of migrants and are sometimes sold politically as a way to “clean the slate.” They are also a way to reduce social and economic marginalisation and, in today’s environment of intense sensitivity to security, they are the most effective way to reduce dramatically the number of “unknown” residents and process them through the appropriate security screens. Yet, such regularisations can also become a *de facto* migration policy as some “one-time-only” programmes are repeated—often, again-and-again. This is the case in several Member States, most notably Italy, which has regularised more than 1.5 million immigrants on about half-a-dozen occasions since 1982.

At the other end of the spectrum are the less-known “continuous” or “permanent” regularisations. These are done on a case-by-case basis by administrative or judicial bodies, usually without much fanfare. To some degree, most advanced industrial societies rely on them, even those with no publicly acknowledged policy of regularisation.

The criteria used in such regularisations are generally similar to those that apply to overall migration. Economic need on the part of an employer, family connections to a legal resident (often justified by the fact that the regularised individual would qualify for immigration privileges had they not already entered the country), or humanitarian circumstances (usually, for people who have not qualified as refugees but face other humanitarian threats or health problems).

One of the most systematic—and large-scale—current examples of a continuous regularisation programme started in France under a May 11, 1998 law. The law broke with a French tradition of exceptional regularisations, and has survived a transition of government with widespread support. The law allows the following five categories of non-legal foreign residents who have strong links to France, or otherwise have strong reasons to stay, to petition the French immigration service for a permit.

- Foreigners who can prove they have been living in the country for ten years (three if they have children);
- Foreign parents of French children;
- Eighteen year old young adults who arrived in France before the age of 10;
- Family members of legal residents, whose immigration privileges are implied in Article 8 of the European Convention on Human Rights (ECHR); and
- Sick people who can prove that their deportation would prevent them from receiving the medical attention necessary to save their life.

In 2003, about 28,000 permits were issued on that basis, representing about 20 percent of all the permits issued to non-European foreign residents in France. The system is seen as a way to give residence rights to immigrants who have strong ties to France and to prevent the build-up of unauthorised immigrants without the political disruption surrounding exceptional regularisation programmes. Additionally, the gradual nature of the programme means that it is a relatively smooth administrative process, with the NGO community serving as a facilitator.

The status granted at regularisation also varies among states. Permanent or quasi-permanent status is granted relatively rarely in Europe, and usually only when the degree of integration and length of stay of the migrants is part of the qualification criteria. Temporary status—lasting the period of employment, the duration of the relevant humanitarian crisis, or a set number of months or years—is more common, although renewals and successive regularisations can make such stays anything but temporary.

### Assessing Regularisation

One of the principal goals of regularisation is to reduce the number of people living in a country without the protections, privileges, and responsibilities of legal status. Today, this goal is joined by the need to reduce the number of people who are unknown to the security and intelligence services of a Member State. To the extent that these goals are thought to warrant a regularisation, its success must be evaluated in terms of the proportion of the potentially eligible unauthorized population that applies.

The very nature of illegal migration makes knowing the size of the illegally resident population impossible. That reality, in turn, makes estimating how many unauthorized immigrants will apply or qualify for regularisation equally impossible. Yet, it is clear that qualification criteria play a critical role. In the U.S. case, for example, the 1986 regularisation programme that granted legal status to nearly 2.8 million migrants included primarily those migrants who had been continuously resident in the United

States since January 1, 1982. The final number who qualified was much larger than official estimates but about half of the undocumented population could not qualify because they had entered subsequent to that date.

In Spain's 1985 regularisation, the requirement that migrants be employed in the formal sector led about four out of ten migrants who applied only to seek a one-year residence permit that did not permit them to work. Presumably, many of these migrants were in fact working and/or intended to work, but because they could not show formal-sector employment they could not qualify for the full regularisation grant. Yet, stringent requirements do not always exclude large numbers of migrants from participation. In Italy's most recent regularisation, the requirements that employers pay fines for missed social contributions and that immigrants demonstrate that they had a formal-sector job offer did not prevent over 700,000 migrants—almost three times the number predicted by the government—from applying.

Criteria for regularisation, even if they do not exclude a large number of unauthorized residents up front, can create intense incentives for fraud. Criteria that require migrants to prove past behaviour that cannot be verified independently by public records do so most directly. For instance the residence requirement of the U.S. regularisation law created a significant industry surrounding the creation of false documents to demonstrate residence. So, too, can criteria that tread into areas where informality is the norm or that depend on promises about future behaviour. In one of Italy's regularisations, about 20 percent of inspected applications were found to have false information concerning the job offer and many migrants were found to have paid their own fines (although in the name of their employer). Even legitimate employers who declared their intent to provide a job to applying migrants often did not end up employing the migrant at formal sector wage and social contribution rates. There are probably no qualification criteria for regularisation that can avoid such perverse incentives entirely. However, attention to the design of the criteria and solid investments in processing and investigations can contain the problem.

Beyond the level of participation and perverse incentives, regularisations must also be evaluated in terms of their success in allowing migrants to reach their full potential as workers, in ending social marginalisation, and in reducing informal employment. Despite the great number of regularisations conducted in Europe, evidence on the socio-economic effects of regularisations is sketchy, incomplete, and sometimes contradictory.

#### Labour market and social effects of regularisations

Evidence shows that regularisation can provide a critical opening in the workplace for regularised immigrants. In Italy, such immigrants have been able to move from street vending and other informal jobs in the south to manufacturing jobs in the north, while in the United States, regularisation allowed immigrants with higher skills to earn more than their lesser-skilled counterparts. In many more instances, regularisation also allows immigrants to access educational and training opportunities, join labour organizations and stand up against exploitation. Similarly, employers can view regularised immigrants as stable employees, which may entice employers to invest in them. In all these scenarios both immigrants and receiving societies benefit from regularisations.

Yet, regularisation is no magic bullet. For the least skilled immigrants who occupy the worst jobs, or in countries where the informal economy is large and employs both natives and authorized immigrants, regularisation may lead neither to upward mobility nor to formal-sector employment. In Greece's regularisations in the late 1990s and early 2000s, it is estimated that as many as 40 percent of regularised migrants failed to emerge from the informal sector. For better-skilled irregular migrants the lack of (relevant) language skills, the absence of adequate procedures to recognize foreign qualifications, and the relatively low value assigned by European employers to foreign work experience may leave immigrants working at levels far below those of citizens with similar skill-sets—

even after regularisation. The conclusion is plain to see: in many cases regularisation is necessary, but not sufficient, for upward mobility.

The weak effect of regularisation on upward economic (and some social) mobility is also related to the fact that regularised immigrants often fall back into unauthorised status. Where the residence permit is temporary and its renewal depends on evidence of formal and stable employment, migrants often lapse into unauthorised status, initiating a vicious cycle that traps migrants in the informal labour market. However, such cycles are very much dependent on the depth of unwillingness by employers to hire foreign workers on the books—and can be disrupted by granting permanent, rather than temporary or conditional residence permission.

In France and the United States, for example, irregular employment is not as pervasive as it is in much of Southern Europe and regularisations have typically granted permanent residence permission. Although this correlation does not imply causality, it is important to note that surveys in both countries have found low rates of informal employment post-regularisation.

There is even less evidence on the effect of regularisation on social inclusion than there is about economic advancement. Yet, the less tangible effects of regularisation may be the most significant. Regularisation opens the doors to many crucial public services for those who are in many ways well integrated and have no intention of returning to their country of origin. The most important effect of such an opening may be on the second generation of mixed work status immigrant families and its value may be both psychological and measured in greater economic independence. Evidence in the U.S., for example, finds that the children of unauthorised migrants are less likely to seek social benefits to which they may be entitled than are the children of authorised immigrants. (Both groups may use public benefits at rates lower than those of eligible citizens and natives.) Finally, regularisation can open the door to dialogue and acceptance by the general population of the host country. Repeated regularisations, however, can undermine confidence in immigration—and in extreme cases, governance as a whole.

#### Selected critiques of regularisations

Regularisations are often criticised on the grounds that they tend to create artificial pressures for more unauthorised immigrants to seek entry into the country that uses them. The draw is thought to be the prospect of participating in the ongoing regularisation or the general impression that if one survives long enough as an unauthorised immigrant, one will eventually be regularised. These movements could be either secondary movements from within the EU or direct entries from third countries. This view finds some support in the literature. Some of that support takes the form of surveys of apprehended immigrants in which they refer to regularisation programmes as a reason for their attempt to enter illegally. Other support relies on correlations that “match” the top destinations of unauthorised immigrants and the countries that have performed the most regularisations—a correlation whose causality could run either way.

Such evidence does not make a conclusive case. In Southern European countries, where the risk of apprehension is particularly low, informal job opportunities abundant, and prospects for formal sector employment uncertain (at best), the prospect of regularisation is probably a far less important draw factor than is the general availability of work for unauthorised migrants. However, the possible signalling effect of repeated mass regularisations must not be dismissed.

A second point of concern is that immigrants might leave their state of residence following a regularisation. In the absence of internal frontiers, people can move virtually at will. Furthermore, that right (but not the right to work) is now available to all legally resident persons in the EU for up to three months. In fact, the Directive concerning the status of third-country nationals who are long-term residents raises the possibility that, at some future time, regularised immigrants, depending on the status they receive, could receive more broad employment and settlement rights in other Member States.

A final point of tension with regard to regularisations is the relationship between expulsion (removal) and regularisations. In some ways, these two options are substitutes and are difficult to deploy jointly. Most obviously, a regularisation programme in which not all applicants qualify, or in which some regularised immigrants later lose legal status, raises the question of what to do with those now-identified unauthorised migrants. There will always be a temptation to use the application process as an opportunity to identify and expel those who do not qualify for regularisation or those whose status later lapses. On the other hand, using regularisations to enable expulsion discourages migrants from applying, undermines goals such as reducing informal employment and social exclusion, risks being unable to check on as many people as possible against security criteria, and is likely to motivate civil society to stand firmly against the government.

Putting in place robust controls and increasing enforcement first, however, *and then following with a very broad and "generous" regularisation* (rather than vice-versa), is a superior way to deploy governmental resources. Together with strong incentives for all to participate in an effort akin to a "national project", the government may in fact also win civil society support for a "post-regularisation" increase in enforcement.

#### New concepts in regularization: "earned" regularisation

The chief problems with regularisation programmes so far may be as follows:

- (a) They take little account of the behaviour and needs of migrants;
- (b) A single policy is expected to meet too many goals;
- (c) There has been remarkably little evaluation of and even less experimentation with that programme; and
- (d) Regularisations have been too infrequently deployed *jointly* with the other measures that one finds in the full migration management toolbox.

The requirement that a migrant should demonstrate formal sector employment in order to receive or maintain legal status, for example, has not been shown to be an effective measure in drawing migrants out of vibrant informal labour markets. An alternative, and as yet formally untested, approach might be to grant regularised migrants unconditional work permits and then target the sectors and companies in which they worked for greater enforcement of labour and migration laws.

Another example of an area where too little experimentation has taken place is the duration of residence permits. Most regularisations have assumed either that all unauthorised migrants would decide to return home within a few years or that all migrants desired and "deserved" to live permanently in the host country. Both assumptions are partially false, and the results can be seen in migrants who drop out of legal status yet stay on, and in political anxiety about granting the very important privilege of permanent residence too readily to people who have entered or stayed illegally.

The concept of "earned" regularisation addresses some of these problems. Earned regularisation has received most attention in the United States but has also entered the policy discussion in the United Kingdom. In such a programme, unauthorised migrants would enter a tiered regularisation process. In the first tier, applicants would qualify for temporary residence and work permission by registering with the government and submitting to full background checks. The important security concern would thus be satisfied first.

After a reasonable length of time, migrants would be able to apply for permanent residence and work permission, based on meeting criteria such as having a record of stable formal sector employment, paying taxes, passing a basic language skills test, engaging in the life of the community of which they are part, etc. Migrants would be awarded "credits" or "points" for meeting those and other reasonable requirements, and would earn permanent status if they gain enough points. Of course, the criteria for

qualifying for each tier and the exact privileges, rights, and responsibilities awarded at that tier can vary without altering the basic concept. **An example of such a criteria set is included in Appendix Two.**

Earned regularisation appears to have the following strengths.

- First, by setting the bar for gaining temporary legal status relatively low, it can pull the largest possible number of unauthorized migrants out of the pool of unknown population and, hopefully, and with time, out of the informal economy.
- Second, it takes into account, without prejudging the fact that unauthorized migration is not an exclusively temporary activity, that many migrants may want to stay and work towards earning permanent status—and that they could be an asset to Europe if they were allowed to do so. In fact, a well-designed earned regularisation programme would grant settlement rights only to those migrants that demonstrate the prospect and the desire to succeed economically and integrate socially.
- Finally, a well-designed earned regularisation programme would place most of the burden of evidence on criteria that are a matter of public record, and thus less prone to fraud (e.g., tax receipts), are otherwise easily proven (e.g., language skills), and create incentives for ongoing positive behaviours.

### **Concluding Thoughts and Issues for Further Reflection**

The regularisation of unauthorised immigrants, while controversial and complicated, is a public policy challenge that no country can ignore forever or, for that matter, ever perfect. Still, there remain a host of ways that regularisation can be made into a better policy tool. Some of the ways have to do with understanding better both conditions at the countries of origin (and, wherever appropriate, intervening thoughtfully) and migrant behaviour—such as the complex array of factors that drives a migrant to stay or leave his place of residence.

By considering such issues more carefully, the incentives that are built into regularisation programmes can be more carefully shaped, moving beyond the overly simplistic observation that regularisation engenders further irregular migration. Such observation leads to a policy dead-end—as do such pronouncements as that temporary labour migration programmes quickly become permanent. Part of creating better regularisation (or temporary labour) programmes will be not only better design, but better administration, with increased attention to verifying the information offered by applicants and to following more closely regularised (and temporary labour) migrants afterwards. Regularisation programmes must thus be allowed to become what they have the potential to become: investments in more orderly labour markets, in the rule of law, and in social inclusion and stability.

Beyond better-designed regularisation programs, however, lies the issue of how regularisation is to be coordinated within the broader context of managing migration better—much better—than is the case today. Clearly, regularisation is not an effective migration management tool in the absence of its full coordination with other measures, and may even be counterproductive in some cases. Yet regularisation can be an important stop-gap measure and a useful policy tool—as long as one does not expect it to be either the “last” one and/or to somehow end unauthorized migration. What may perhaps be more important is that regularisations be part of a larger strategy for managing migration, so that each regularisation is carried out in a society where illegal residence and its most troublesome corollaries—namely, lawless behaviour of several types and employment in the underground economy—are less pronounced than the last time a regularisation was carried out.

### **Challenges for Policymakers**

1. Coordination among regularisation programmes, interior enforcement and border control efforts, relations with third countries and sustained efforts to formalise labour markets are all essential elements in the struggle to manage illegal migration. Existing national, and, gradually, Union-wide, methods of coordination across inter-related policy domains should be examined more systematically, and, where appropriate, strengthened. In doing so, however, Member States and all relevant European institutions must think through and decide on the role of selected immigration in their future economic growth and social evolution and place irregular immigration controls in that broader context.
2. The Commission, in its communication on the links between legal and illegal migration, suggested that the regularisation programmes of one Member State could affect the interests of other Member States adversely. It then suggested consultation between Member States on regularisation, and, eventually, the possibility of agreement on “common criteria”. Freedom of movement certainly raises the possibility of both shared benefits and consequences. This issue clearly requires further reflection.
3. In some Member States, regularisations have now become a near permanent feature of their migration “management” repertoire. Hence, it is important to draw out good practice and lessons from recurring regularisation programmes in Member States that have traditionally relied on them and begin to construct both an inventory and a “clearinghouse” for each practice. The policy objective in this regard would be to move beyond relying on regularisations merely as a tool for reducing the size of the irregular migration pool and move toward more comprehensive migration management approaches—of which regularisations are but one tool.
4. How to address the inherent tension between removals and regularisations has yet to be explored directly. Special attention must be devoted to the issues of applicants who do not qualify for regularisation or who later lose legal status. The potential of financial incentives for voluntary return could also be explored but only as part of a multifaceted policy architecture whose different parts reinforce the policy’s overall objective.
5. Most European societies are now undeniably recipients of large-scale and ongoing permanent settlement by migrants, including unauthorised migrants. Illegal or otherwise precarious legal statuses appear to have a particularly strong negative effect on the second generation of immigrant families. Discussions about regularisation should take this fact into account.
6. The fact that migration is now a permanent phenomenon is widely accepted—and recent Council directives and conclusions attest to that. This means that more migrants will be settling in European societies. Earned regularisation programmes could become an additional way in which some prospective immigrants are “selected” and made full participants in these societies. Of course, such a policy decision will probably have to overcome public scepticism and can be only an adjunct to, rather than principal means of, selecting immigrants.
7. Regularisation programmes work best when incentives for participation are balanced to include migrants, employers, and the State. Disincentives, in turn, must be focused first and foremost on employers and new would-be irregular migrants. Thorough examination of the incentives created by past regularisation programmes and their effectiveness, as well as attention to creating “out-of-the-box” incentives for positive behaviour, are essential for all the main actors in regularisation efforts.

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**POLICY BRIEF 5****Securing External Frontiers in a Union of 25**

By the Staff of the Migration Policy Institute and Giuseppe Callovi

**Background**

Physical boundaries have been one of the ways in which political entities have typically defined their sovereignty. Border controls and the defence of the integrity of national territory are thus natural consequences of this commonly recognised principle. The European Union has in some ways broken that mould by attempting to shape a new political decision-making landscape in which sovereignty is shared among its Member States. The resulting redistribution of responsibility among 25 states and the Union is an ongoing political process in which national interests and aims do not always converge. Furthermore, the Union's institutions have only limited and explicitly specified "sovereign-shared" powers.

The issues surrounding internal frontiers date back to the preparation and adoption of the Single European Act on July 1, 1987. But while the removal of internal frontier controls has met almost complete success when it comes to the movement of goods, services and capital, achieving the free movement of persons has proven to be much more difficult. (A draft Convention on the crossing of external borders, though finalised, has never been signed).

At the core of the difficulty lies a simple yet compelling fact. States rely on national border controls for their own security. If they are to loosen—let alone surrender!—this measure of control, a trustworthy and effective compensatory mechanism must be set up to tighten controls at the Union's external borders. Nearly two decades since the 1985 Commission White Paper on the subject, the fundamental issues have in some ways remained the same—while the challenges to the state (particularly in the areas of drugs, trafficking of all types, international crime, and terrorism) seem to have grown exponentially.

**Discussion**The Schengen "Experiment" and the Single European Act

In the face of significant scepticism about easing internal frontier controls, France, Germany, Belgium, the Netherlands and Luxembourg signed the Schengen Agreement on June 14, 1985. The initiative was conceived of as a sort of "laboratory" for testing a variety of technical and legal ideas for speeding up the removal of internal controls throughout the Community. On June 19, 1990, the Schengen Group, enlarged to include additional Member States, signed an Implementing Convention incorporating all measures into a single legal instrument.

Meanwhile, the attempt to reconcile issues such as national sovereignty; domestic interests; requirements for security; and different political and administrative cultures, while withholding shared and/or supplementary powers from the Union's central institutions, continued to delay the implementation of the movement of persons components of the Single European Act. Nonetheless, with the Act, a journey without return had begun in the form of linking politically the abolition of internal border checks on persons and the necessity of strengthening controls and surveillance on the Union's external borders.

The Treaty of Maastricht took tentative steps towards addressing the difficulties that arose from this fundamental impasse by introducing provisions on cooperation in the field of rules governing the crossing by persons of the external borders and the exercise of controls thereof, in the newly-established "Third Pillar," but that arrangement quickly showed its limits. The Treaty of Amsterdam tackled the issue more directly by

establishing common measures and procedures, particularly in article 62 (common rules on control and surveillance, common visa policy and the right to travel for third country nationals). Protocols to the treaty acknowledged the special position of the United Kingdom, Ireland, and Denmark, as well as that of Norway and Iceland, two countries associated with Schengen while not part of the Union. With these protocols in place, the immediate implementation of enhanced co-operation among States which were parties to Schengen commenced. On May 1, 1999, all legal and operational aspects of the Schengen acquis were integrated into the EC Treaty. Most of the acquis (the parts relating to the crossing of external borders by persons) became part of Title IV of the EC Treaty (first pillar), while other measures, such as police and judicial co-operation, were incorporated into Title VI (third pillar).

The Schengen acquis, already implemented by some Member States since March 26, 1995, underwent a metamorphosis. From an inter-governmental instrument drawn up in the form of a Convention under international public law, it became fully incorporated into the EC Treaty and took its place within the Union's institutional framework. From that point onwards, the European Parliament, the Council, the Commission, and the Court of Justice could proceed to play their proper roles in the relevant matters.

#### From "Theory" to Practice

As one would expect, legally agreeing to common rules and procedures on the control and surveillance of external borders has led neither to the uniform organisation of work nor to the uniform implementation of rules and practices on controlling external borders. Some national authorities have continued to interpret rules and practices differently and to operate without guaranteeing "equivalent" levels of protection at all external borders. Gaps in both theory and practice have thus translated into the uneven implementation of rules by Member States, a reality at times augmented by instances of mutual suspicions and antagonisms.

Nonetheless, the effort continues to deepen and intensify. The ten new EU Member States were required to agree to apply the Schengen/EC/EU acquis on external borders from the date of accession in all aspects except those directly linked to the absence of controls on persons crossing internal borders. (Those controls are to be lifted only following a unanimous Council decision based on a thorough monitoring and assessment process.)

#### The "Renewed" Relevance of External Border Controls

The relevance of external borders, and the importance of more integrated management of the Union's external borders, began to gather momentum again in 2001, in large part for four mutually reinforcing reasons:

- The need to guarantee a high level of security in view of and after the enlargement of the EU;
- The need to pursue the fight against "imported" organised crime, especially in the field of illegal immigration and human trafficking;
- The need to neutralize, in a coordinated way, terrorist risks in the post-September 11 environment; and
- The need to reinforce mutual trust between and among Member States who had already lifted their internal border controls. (A lack of trust might have meant, conceivably, the re-introduction of internal controls.)

These concerns resulted in significantly increased activism among Member States. For instance, the Belgian Presidency proposed defining a "European management concept on border control" in preparation for the Laeken European Council. Accordingly, it offered to organise in a systematic way the various proposals already tabled by Member States, including legislation, practices, evaluations, studies, meetings of practitioners, high impact operations, and even "blue helmet frontier guards for crisis situations". Indeed, the European Council of Laeken of 14/15 December 2001 invited the Council and the

Commission to “examine the conditions in which a mechanism or common services to control external borders could be created....” Furthermore, JHA Commissioner Antonio Vitorino declared that “the lack of a clearly asserted common vision and common policy on external borders entails major political and strategic risks ... [and that] European solutions are the only solutions to these trans-national questions”. The urgency of the issues at hand was reflected further in a May 2002 Commission Communication proposing the integrated management of the European Union’s external borders, an effort that culminated in a proposal to establish a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

#### Elements of and Requirements for an Integrated Border Strategy and the Establishment of a European Agency for External Borders

A coherent and integrated “border strategy” would encompass four distinct but interrelated levels of measures:

- The first level would consist of activities in and agreements with countries of origin and transit, with a particular focus on consular cooperation (the issuing of visas).
- The second level would refer both to bilateral and Union cooperation with neighbouring countries.
- The third level would seek to ensure border security by carrying out effective checks at the authorised crossing points as well as surveillance between them.
- The fourth level would focus on activities inside the territory of the Member States when there are grounds for investigation and law enforcement.

The 2002 Commission Communication focused mainly on the third level, and so did the Member States. Under the Spanish Presidency, they endorsed a “Plan for the Management of External Borders” intended, *inter alia*, to improve the coordination of national and joint operational activities. These activities had started with the creation of an External Borders Practitioners’ “Common Unit”. The pace of activities, however, had increased with the creation of several specialised *ad hoc* Centres (one each for land borders, air borders, risk analysis, and training and two for maritime borders—for the Eastern and Western parts of the Mediterranean) as the result of an Italian feasibility study on the establishment of a European Corps of Border Guards. The activities of these Centres include training, risk analysis, land borders, sea borders centres and, finally, general research support.

For its part, the Commission had suggested structuring the common policy around five components:

- A common body of legislation;
- A common and operational coordination and cooperation mechanism;
- A common integrated risk analysis capability;
- Convergence on staff training and inter-operational equipment; and
- Burden-sharing between the Member States and the Union.

With regard to the first component, in May 2004, the Commission put forward a proposal on a “Community Code on the Rules Governing the Movement of Persons across Borders”. The proposal aimed to restructure, clarify, and develop the existing rules and practices in the field of external borders. (Chapter 2 of Title II of the Schengen Convention and its “Common Manual on External Borders”, along with the “Catalogue of Best Practices and Recommendations on External Borders and Removals”, had already anticipated this. These documents set out these matters in considerable detail and the Schengen Evaluation Group had been monitoring the implementation of common rules.) The “Code” also integrated recent decisions and proposals addressing specific border-related issues, such as the obligation to stamp travel documents at external crossing points or on establishing a specific regime for local border traffic.

The integrated border management's four other components were incorporated into the November 20, 2003 proposal to establish a European Agency for the Management of Operational Co-operation at the External Borders. Member States reached political agreement in May 2004, but formal adoption is still pending. The Commission's aim is to make the Agency operational as early as next year.

Meanwhile, concerns about the Common Unit's adequacy in meeting the rising challenges has grown, fuelled by its apparently loose organisation; its situation as a sub-group of a Council working party; the absence of day-to-day monitoring; the lack of capacity to respond immediately to emergency situations, and related reasons. In response, the Greek Presidency at the European Council in Thessaloniki, on 19/20 June, 2003, promoted the idea of a more pro-active, permanent and comprehensive structure in the form of an Agency. The new body would be under the political control of the Council but would not be authorised to carry out border checks. Instead, it would do the following:

- Coordinate and evaluate the different activities of the Centres, the pilot projects and the joint operations--and even start operations on its own initiative;
- Assist Member States in dealing with circumstances requiring increased attention;
- Carry out risk analyses, ensure a systematic flow of information, and follow up on the development of research;
- Assist in developing common training core curricula for border guards;
- Enhance cooperation with third countries;
- Take a significant first step toward burden-sharing by assisting those Member States that face disproportionate expenses in dealing with third country nationals and bear exceptional pressures in the control and surveillance of their external borders; and, finally,
- Provide assistance with joint removals of third country nationals who are subject to an individual expulsion order.

Several of the tasks to be performed by the Agency deserve further comment. These are training, risk analysis, burden-sharing, joint return operations, and cooperation with third countries.

### ***Training***

The training centre in Vienna has already developed common standards for the basic training of first, second and mid-level officers and has set up a permanent network composed of national academies for border guards. Three training modules are of particular importance:

- Taking into account and "levelling" out national customs and administrative rules as they intertwine with common Community rules;
- The development of immersion training programmes in different Member States in order to give guards specific legal and linguistic knowledge before joining multinational teams in joint operations;
- Shaping the personal behaviour of border guards to observe the human dignity and basic rights of border crossers, to develop a professional and welcoming attitude toward the "client" (border crossing people), and to refrain from humiliating treatment in words or acts.

### ***Risk analysis and assessment***

The risk analysis centre in Helsinki has developed a common integrated risk analysis model that is flexible enough to be used for global reports but can also be tailored for the analysis of specific target groups or territories. The risk analysis reports can in turn stimulate and plan with greater precision the kinds of joint operations that need to receive priority. Conversely, when border guards in a specific locality become aware of repetitive criminal behaviour (for instance, the discovery of recurrent and similar types of forged documents or a repetitive modus operandi of human traffickers) an information chain can be immediately established to start a rapid risk analysis. If the circumstances demand it, this could be followed by joint operational decisions. In other words, risk

assessment should trigger joint action when weaknesses are identified, in particular if the latter are of a structural nature.

### ***Burden-sharing***

Burden-sharing has two aspects: operational and financial. The Agency will clearly provide operational support to Member States in need. It is not clear, however, whether this concept takes fully into account the variable geographical realities of Member States. Once all internal controls are lifted, the human and financial responsibilities of Member States without external land and sea borders will decrease dramatically. At the same time, Member States with long and difficult external borders will experience greater responsibilities and will be discharging these responsibilities in part on behalf of all Member States. It may be difficult to imagine a direct monetary contribution from one Member State to another. As all Member States benefit from the effective and efficient management of external borders, the case for consistent institutional support of the Union both in terms of financing and equipment is therefore compelling. This would, however, give rise to the question of how Member States and/or the Commission would control this support.

There are temporary solidarity instruments in place in the form of a lump sum of about €960 million for the period 2004-2006 for seven of the new Member States, aimed at financing better control of their external borders, and the ARGO programme. A more progressive financial framework would thus be required for 2007-2013. Such financing might also take into account such other areas in need of common action, such as the setting up of common consular offices (see below).

Tellingly, the need for greater integration and financial cooperation on these matters is also envisioned in the new Constitutional Treaty. It provides for "the gradual introduction of an integrated management system for external borders" (Article III-166), and promotes the principle of solidarity and the fair sharing of responsibilities, including financial ones, between the Member States (Article III-169).

### **Organising joint return operations**

The tasks of assisting with and identifying best practices with regard to travel documents and the removal of illegally present third country nationals apparently fall outside the core mandate of the authorities responsible for the control of external borders. Cases of detention in international transit zones seem to be the only exception to this rule. Since the Agency's activity is limited to the provision of training and seminars, and a return policy is not within the Agency's mandate, one must raise the question of the rationale for such a decision.

### **Co-operation with third countries**

Strengthening and systematising the dialogue with third countries on migration and asylum is recognised as a key component of the European Union's external relations. Similarly, operational cooperation and practical working level arrangements with third countries are also necessary, not only in order to enhance security, but also in order to create a smoother system of managing borders and help anticipate potential problems before they become critical. This is a particularly relevant issue in the area of trading and trafficking in human beings. (Similarly, close contacts and arrangements with the various international and inter-governmental bodies, including EUROPOL, can also facilitate better controls and surveillance.) The negotiation of wider agreements with third countries will require a strong push from EU bodies, leaving to the Agency the task of finalising and carrying out the operational side, including the offering of training assistance and technical aid outside the Union.

### **Conclusion and Next Steps**

Establishing an area without any internal border controls on persons may be conceivable only in connection with an efficient integrated external border management regime. Such

a proposition draws legitimacy from its necessity while its effectiveness depends upon equal levels of commitment from all Member States operating within a single structure. Putting it differently, it is not enough to talk of common external border controls if every country minds primarily only its own interests.

The Constitutional Treaty authorises the European Union to take any measure necessary for the gradual establishment of an integrated management system for external borders. "Gradual" implies that Member States should not jump immediately to the creation of a European Corps of Border Guards--even if such a corps might eventually be an appropriate answer for sharing fully the responsibility to secure all external borders. While such a step might be opposed by many Member States (in large part, on the grounds of sovereignty and national traditions), it might not be an inappropriate target for a future new EU strategy.

Tactically, applying an integrated management approach to the most pressing border control issues (in areas where common action is most needed) might pave the way to informed political discussions about such a target. At first, such efforts might follow the model used in the establishment of Schengen, whereby the more reticent Member States can refrain from an active immediate participation. One thing is certain: More effective border controls are a political project that will be driven by needs, evidence of success, and growing habits of cooperation.

### Challenges for Policy Makers and Points for Discussion

- Better and more comprehensive organisation of responsibilities at external borders yields measurable security and efficiency benefits. This is particularly the case since criminal organizations now traffic both in people and in various types of unwanted and dangerous goods. Several services operate at the borders: border guards, customs authorities, police and immigration officers, transport and (sometimes) judicial authorities, etc. The Agency should thus prioritise the facilitation of links between these official bodies. In this regard, it might start by inviting national authorities to do the same within their own internal organisation and by suggesting good practices for cooperation across fields of competence.
- The issue of common standards in the interpretation and application of rules deserves greater and more forceful institutional attention if mutual confidence among member states is to be secured and reinforced. Current measures are weak. The peer-review mechanism of the Schengen Evaluation Working Group (which has taken over the tasks of the former Standing Committee on the Evaluation and Implementation of Schengen) does not include unannounced visits. Moreover, the checks for 25 countries take place every two to three years (at best), the conclusions are neither totally autonomous nor immediately operational, and the membership of the evaluation team constantly changes. A permanent pool of "*multinational external border inspectors*", composed of border guards, customs officers, police agents, EUROPOL, CEPOL, Commission and Council civil servants, and (possibly) intelligence services, selected and detached by the Member States, could provide stronger assurance that Member States are fully meeting their obligations. This corps of inspectors could intervene upon the request by a Member State, by the European Institutions or on its own initiative. In some ways, it could be conceived as a virtual body, ready to be activated within 24 hours. Furthermore, the reports and conclusions of this corps of border inspectors could be regarded as confidential or secret, being addressed directly to the competent Council bodies, to the Commission and to the Member States individually, although procedures regarding infractions would follow Community law (some parallels with OLAF could be valuable here).
- The control of maritime borders is an issue where a pressing need exists and the creation of an operational EU multinational body with a legal capacity for action should be considered. The horrors of human trafficking and deaths in illegal sea

crossings are by now familiar, but there are other types of smuggling and illegal activities that are also problems on the EU's coasts. The current array of responses includes liaison officers, one-time operations, joint working teams at ports, and common rules. These are useful tools but they are subject to legal and technical limits. Joint operations have encountered language problems, differences in operational methods and, above all, legal difficulties due to the limited tasks that officers of one Member State are authorised to carry out on the territory of another Member State.

Establishing a "*EU multinational coast guards corps*" could address many of these issues, particularly since, unlike with land borders, most maritime controls would be carried out outside national ports. Such a body would share a common staff and procedures, a common hierarchical structure and operational command, common training and use of languages, common use of both fixed and mobile infrastructure (such as radar and satellites), common prerogatives of public authority irrespective of the officer's nationality, and the authority to apprehend a person and hand him/her over to the competent national authorities. Such an effort would share and reduce national and Union costs. It could also be a first step in the more politically complicated project of creating a European corps of border guards whose work and authority would complement national teams. Officers of interested neighbouring third countries could also be invited as observers to familiarise themselves with rules, practices and technologies.

- Visa issuance and consular co-operation are the first level of control in a comprehensive control system. There are signs of progress in this regard. These include a common visa policy; a planned recast of the Common Consular Instructions would also be welcome. New proposals concerning the security of travel documents (including biometric identifiers), and the new Visa Information System, and the Schengen Information System (SIS II)—when they become operational—will also help.

However, the day-to-day implementation of visa policy by 25 consular and diplomatic representations requires far greater attention. Proposals for common administrative structures and joint visa offices date to the action plan of February 2002, but they continue to meet resistance. Moreover, the sharing of costs for the premises, the implementation of biometrics on the visa sticker and the distribution of the tasks for the consular staff in a multinational team are rather complicated issues. Clear political guidance and a EU budget line could accelerate the integration of the consular/diplomatic visa sections, at least in third country capitals of particular interest. Fulfilling these two conditions could then pave the way to *common consular offices* and an authentic "Union visa". Such a visa would be issued by a virtual Union body composed of national diplomats and civil servants who share decision-making authority on whether to issue or refuse a visa. Such a system could offer significant cost savings, improve the integrity of the entire visa-issuing process, and eliminate "visa shopping".

- The new Union must work within its limits. Creating more secure borders is not about building a fortress or new walls. It is about making clear common rules and practices for legally crossing the EU external borders. Thus, transparency, public awareness, quality and speed of service, and protecting the confidentiality of travellers should be high priorities. If it is to enhance border controls through a common approach, this new Union has to be more accessible and attentive to citizens' needs and concern.

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**POLICY BRIEF 6****Cooperation with Sending and Transit Countries:  
Beyond Sticks and Carrots?**

By Ferruccio Pastore and the Staff of the Migration Policy Institute

**Recoupling Migration and Foreign Policy**

Until 1973/1974, when Western Europe closed its borders to new economic migrants, migration policy was firmly embedded in most countries' foreign policy. It gradually became obvious, however, that restricting and generally "managing" immigration better required increasing levels of cooperation among the then European Community countries. In many ways, this realization was at the root of the Schengen system and the effort to harmonize asylum and, over time, immigration policies within the Justice and Home Affairs field.

Awareness that such cooperation had to be complemented by extensive dialogue and cooperation with sending and transit states has only recently developed. This gradual reactivation of the "external dimension of migration policy" was "rediscovered" first at national level. Following the Tampere Summit of October, 1999, however, that dimension's importance was re-established and has been pursued by European institutions with increasing vigour.

Initially, the more systematic exploration of the external dimension of migration policy was tentative. Cooperation was viewed as a necessary component of the overall strategy of managing migration more effectively but its aims and priorities were still defined in terms of immigration controls—some will say "exclusion"—and the agenda was set by the ministers of Justice and Home Affairs. The results can be observed in the effort's nearly exclusive focus on readmission agreements and in the institutional dynamics of the pillar-bridging High Level Working Group on Immigration and Asylum, which brings together representatives of Foreign Affairs and Justice Ministries.

Opening up a new and more productive phase in the external dimension of European migration policies would require that the effort be broadened beyond control-oriented, unilaterally inspired measures and the exclusive concerns of the JHA policy domain. Such refocusing would add a more realistic appreciation of the international dimension of the issue. That appreciation in turn would bring a richer understanding of the interests of source and transit countries and how these might become more consonant with those of the receiving EU societies and the Union's immigration control priorities. Only through expanding the conceptual and political framework for negotiations can a more comprehensive and sustainable response to the need for cooperative migration management be found. This shift has in many ways already begun, as evidenced in the December, 2002, Commission Communication on "integrating migration issues in the European Union's relations with third countries" (Com (2002) 703).

This policy brief concentrates on some of the key issues that must be tackled under the rubric of "cooperation with third countries in managing migration better" in the years ahead. The closely related question of how to enhance migrants' roles in development processes is not dealt with directly here. The entire brief, however, is written in the vast shadow cast by the reality that substantive, sustained and equitable development is the true longer-term antidote to unwanted migration. In the meantime, there is a need to radically rethink and reinforce cognitive and institutional bridges among the various pieces of a comprehensive approach to the mutually beneficial management of migration.

## Managing Migration in Concentric Circles: Enlargement, Neighbourhood and Beyond

The external relations of the European Union in the migration field are based on different sets of principles, rules and procedures that depend on the group of third (that is, non-EU) countries one considers. In fact, the whole system of external relations of the EU is increasingly grounded on a “concentric circles model”, where the fundamental geopolitical categories are:

- a) The Enlargement Sphere;
- b) The Neighbourhood and “Wider Europe” belt; and
- c) Countries with which the Union has some sort of special relationship.

The rest of the world, the last concentric circle, is of little interest to the discussion at this time. This is a geostrategic pattern that applies to many issues. The centrality of borders for policymaking makes the concentric circles model particularly relevant in the migration arena.

### *(a) The Enlargement Sphere*

In the sphere of Enlargement, relations on the migration issue are generally governed by two key principles: the full commitment of each Member State (except those that were allowed opt-outs in the past) to the Schengen/EU *acquis*, and the general principle of freedom of circulation as a key element of European Union citizenship for every Member State national. With regard to the circulation of persons, however, the latest enlargement provided a further reminder that turning “free movement” into a fundamental freedom in an era of economic anxiety and pre-occupation with security can hardly be a quick and smooth operation. In fact, the accession of the new Member States on May 1, 2004 has seen the establishment of *two distinct transition regimes*. The one delays (by various time frames) granting of freedom of movement to the nationals of eight of the ten Accession countries. (See also the accompanying MPI Policy Brief, “The Enlargement of an Area of Freedom, Security and Justice,” by Joanne van Selm, Senior Policy Analyst and Eleni Tsolakis, Research Intern.) The other delays full Schengen membership and the consequent elimination of police controls at internal borders.

### *(b) The Neighbourhood Belt*

A different type of migration regime applies to prospective and aspiring candidates for membership (Bulgaria, Croatia and Romania, as well as Turkey, and the remaining Western Balkan countries). For this geopolitical layer, migration dialogue and cooperation with the EU is less structured and comprehensive—if variably so. As a result, the degree of leverage available to EU institutions and Member States, as well as the mechanisms to monitor compliance, vary in focus and strength. The efforts done in this area by the Stability Pact through the MARRI (Migration, Asylum, Refugees Regional Initiative) still need to be reinforced and better focused.

In the “Wider Europe” framework, migration dialogue and cooperation is even less structured. This is true even for the many Mediterranean third countries that represent principal source and transit areas for unwanted migration to the EU. In spite of some recent progress, such as the adoption of a Framework document on cooperation on JHA affairs during the Fifth Euro-Med Conference held in Valencia in April 2002, concrete achievements are modest at best. Most cooperation on migration is still generated at the bilateral level and thus mostly conducted outside the EU framework. (See in particular the Ministerial Dialogues on migration in the Western Mediterranean within the so-called “5+5 Dialogue” in Tunis, October 2002, in Rabat, October 2003, and most recently, the Italian Initiative with Libya and ongoing bilateral initiatives by most Southern EU Member States with a number of countries along the Mediterranean littoral and the Western Balkans.) The Spring 2004 request by the Commission to the Council for a mandate to negotiate a *visa facilitation* agreement with Russia is one interesting item on the EU agenda in this regard.

### **Migration, Asylum, Refugees Regional Initiative (MARRI) in the Western Balkans**

MARRI was formed in 2003 by the merger of two Stability Pact for South Eastern Europe programs. Its core geographic focus is the five Stabilisation and Association process (SAP) countries, but some MARRI programs have included neighbouring candidate countries Bulgaria and Romania, as well as Moldova. Regional fora have also included the new EU member states. MARRI is currently transitioning to a new governance structure outside of, but associated with the Stability Pact, in which the SAP countries will take primary control, with other countries, the European Commission and non-governmental organisations playing an advisory and supportive role. This regional forum structure was inspired, in part, by the cooperative framework among the Nordic states.

MARRI complements the broader Stability and Association process and coordinates its efforts with associated EU-sponsored activities. Country action plans under MARRI are carried out in partnership with individual supporting countries, most of them EU member states. MARRI's agenda takes in a very comprehensive set of issues—including sustainable return, the development of asylum procedures, irregular migration, visa policies, border control (primarily regarding reception of asylum seekers) and information systems interoperability. MARRI plays an advisory, information-sharing and coordination role, with the eventual goal that the associated states will develop European-level standards of legislation, training, and processes. The approach to individual issues is also comprehensive: in a region where some 1 million refugees and displaced people are still thought to be awaiting return or a settlement solution and that still is a top source of asylum-seekers and irregular migrants in other European states, MARRI has gone beyond traditional refugee issues to focus on access to rights and citizenship and on the social and economic conditions necessary for sustainable return or integration. Significant among those preconditions are access to affordable housing and property rights. Another agenda item currently before MARRI is the creation of a regional mechanism to discuss management of irregular migration with areas of origin, transit, and destination.

#### *(c) Countries and Areas of Special EU Interest*

The December 2002 Commission's Communication (COM(2002) 703) has highlighted the importance of the Union's relations with third countries on migration issues. However, actual cooperation has been limited and the dialogue focuses almost exclusively on control measures and readmission—although there are, again, signs that this is changing. A geographical area worth watching for possible initiatives on the JHA issues are the ACP (Africa Caribbean and Pacific) countries, many of which already provide unwanted migrants to the EU. Finally, US/EU agreements on a variety of security-related aspects of international migration and other types of mobility have intensified since September 11, 2001. Of course, migration specific agreements have long been part of the transatlantic conversation, but these are almost exclusively bilateral and many of them date to the period immediately following the Second World War.

#### **“Outsourcing” Migration Control and Law Enforcement**

Beyond the three spheres discussed above, EU and Member State relations with most third countries in the migration field have focused on migration controls and law enforcement concerns. Specifically, they deal with the following three areas:

- a) Readmission;
- b) Controls over irregular emigration and transit flows; and
- c) Police and judicial cooperation against smuggling and trafficking.

These priorities reflect the agenda on migration of most EU Member States during the last decade. One is hard-pressed, however, to point to substantial results from this strategy.

The focus of exit controls and readmission agreements is on controlling irregular migration by preventing a prospective irregular immigrant's departure from (or transit through) another country and swiftly removing/repatriating those who might still find their way into the EU. Yet, there is little empirical evidence to support the thesis that repatriation somehow ends the migration cycle. On the contrary, some evidence seems to suggest that those who are returned quickly re-enter the migration stream, thus enriching and fuelling further the power and reach of smuggling networks.

Studies also point to the serious reintegration difficulties of forced returnees and the additional burden they create on the socio-economic systems of sending countries. Both findings help explain the high "recidivism" among those returned and the low probability that sending countries will meet their obligations under such agreements.

Another unintended, if predictable, consequence of this approach is the strong probability of political backlash in countries of origin resulting from robust cooperation by their authorities. Urging the governments of such countries to police their own population on this issue can boost corruption and fuel political unrest and instability. Neither outcome is desirable from the perspective of overall migration management.

Transit flows raise their own distinct set of concerns. Transit populations have no political voice in the transit country and are therefore potentially exposed to systematic human rights violations. As the European Commission recognizes (see Communication on "Improving access to durable solutions", COM (2004) 410), international protection is at risk when migration control is delegated to non-democratic governments without adequate technical training and supervision. This is the situation in most countries on the irregular migration routes to Europe and other destinations.

#### **"Negative Migration Conditionality" or Positive Incentives?**

Experience to date in securing the the cooperation of sending and transit countries in tackling irregular migration is poor. But what are the alternatives?

At the June 2002 Seville European Council, certain Member States, including the Spanish Presidency, advocated the creation of a *negative migration conditionality*, whereby EU institutions would cut aid to uncooperative migrant sending and transit states. Although the Seville conclusions on this issue reflected the majority's discomfort with the proposal, Seville established a review mechanism that could result in the decision to delay "the establishment of closer relations between that country [*i.e., a country which cooperates insufficiently in combating illegal immigration*] and the Union" (Presidency Conclusions, item 35). (The original proposal was diluted further on item 36, which admonishes that "...honouring the Union's contractual commitments [should] not jeopardis[e] development cooperation objectives".)

Monitoring third country cooperation in the field of migration management is an important EU priority. Such monitoring is important not only to achieve greater regulation of immigration but also to ensure a high degree of consistency with the Union's democratisation and human rights objectives. In the broader context of EU external relations, even sanctions could be useful, if applied carefully and consistently. Cutting aid and reducing favourable trade terms as a migration management tool, however, might prove shortsighted. In addition to the potential for retaliation (in the forms of further reducing exit/transit controls and perhaps even actively encouraging outflows), such actions might encourage populist opposition to cooperation and even fuel political and economic instability. Such instability could become, of course, a likely emigration trigger.

The problems with negative sanctions have led to the search for positive leverage mechanisms and incentives aimed at strengthening third countries' interest in and capacity to cooperate. When considering incentives, a distinction must be made between *general incentives* (based on trade, aid or Common Foreign and Security Policy tools) and *specific* (migration-related) ones. The latter may be of greater interest than the former.

Specific migration-related incentives are very attractive to sending countries' governments.

Put simply, "selling" readmission or exit controls to one's own citizens becomes more reasonable if one is simultaneously offered greater opportunities for legal movement. The Commission's recent study on the links between legal and illegal migration (COM(2004) 412) makes the connection clear. Further, the experiences of some Member States, such as that of Italy with Albania or of Greece with both Albania and Bulgaria, seem to suggest that opening up privileged legal migration channels does help to curb illegal migration. However, the Albanian case is idiosyncratic (Albanians have been emigrating for more than a decade; many have been given a legal status in an EU country; and, Albanian law enforcement cooperation with Italian authorities has been long, deep, and multi-faceted) so one should caution against quick generalization. Furthermore, most Member States are only interested in to the immigration of skilled personnel, a goal which coincides neither with the profile of most irregular migrants to the EU nor the interests of most sending states.

Negotiating legal immigration openings is not the only migration-specific incentive that can increase the propensity of third countries to cooperate in joint migration management initiatives. *Visa policy* is also a potentially important policy tool. Short-term international mobility has become victim to generalized fears of "overstayers". It is a fact that overstaying is a main channel for irregular stay in Europe and elsewhere. However, in the context and spirit of Neighbourhood policy as well as of existing relations with partners of "special interest", such as Russia, visa facilitation agreements must find their proper place in the European migration management strategy. This will become more realistic once such control tools as the Visa Information System (VIS) are fully implemented and provide further security guarantees.

### **Inserting Migration into Broader Partnerships: A Governance Challenge**

Improved results in cooperation with third countries require the advancement of three key processes:

- *Broadening the policymaking process*, by involving actors from beyond the JHA policy community within and beyond the EU, engaging third countries as full partners and considering a larger range of issues than just migration;
- *Deepening engagement* on the migration issue, by creating the conditions for better mutual knowledge and dialogue. This must be accompanied by the application of a more complete set of policy tools and a commitment to strengthening truly cooperative migration management efforts;
- *Creating the structures* that institutionalise this deepened and broadened effort and guarantee that the appropriate dialogue, experimentation and commitment take place in an integrated fashion.

These objectives reflect the newness of the issue and the rather primitive state of discussion on the issue of international cooperation on migration. Better *cooperative* management begins with a solid *and shared* understanding of migration and human mobility dynamics, and of the impacts policies have on them. The above objectives are necessary steps in creating this understanding.

Unfortunately, the politics of migration today discourage experimentation. Furthermore, the institutional apparatuses for dealing with international mobility are neither refined enough nor sufficiently integrated for experimentation to occur in optimal conditions. Within receiving regions, the degree of understanding, dialogue and cooperation among the various research and policy communities dealing with migration is still immature, while channels and local resources for scientific exchange in sending and transit countries are almost nonexistent. The institutional and cognitive gaps between sending and receiving societies and polities are even greater. Building bridges at all these levels is therefore essential.

Insufficient institutional integration does not stop there, however. Within both Member States and EU institutions the migration decision-making architecture is deeply imbalanced. Migration cuts across many competencies. Yet, the principal mandate of the institutions most frequently entrusted with its management is much narrower than the issue itself. This holds true both in the policy development and implementation phases. Some tentative progress is being made to address this issue. For instance, a process has begun that is likely to transfer certain management competencies from the JHA Directorate General to the RELEX Directorate General and EuropeAid, in the transition from the B7-667 budget line to the AENEAS programme. The increasing interest of the RELEX DG and the robust (re)engagement of the Employment and Social Affairs DG on the issue are promising developments.

At the EU level, it is important to be careful that such “rebalancing” between the JHA and other policy communities does not generate undesirable side effects, such as operational glitches or loss of efficiency. This concern can be addressed, however, by investing in capacity building on migration issues for development officials, diplomats and other Commission services’ sectors—and especially within the Office of the Commission President.

There is little doubt that the short- and mid-term interests of sending and receiving countries with regard to most items on the global migration agenda diverge. There might be little change in this situation in the coming years. Hence the challenge to find effective, equitable and sustainable compromises. As the title of this policy brief suggests, however, a more broadly and long-term oriented policy perspective allows one to go beyond the “carrot and stick” logic. A major obstacle to such a path is that the *institutional incubators* for such an evolution are at an embryonic stage of development at best. Nonetheless, the seeds of an opportunity for a robust dialogue and cooperation at the regional level have been sown in the framework of the EU’s Neighbourhood strategy.

### Challenges and Questions for the Future

This analysis raises a number of challenges and questions for the future of EU Neighbourhood policy in the context of controlling irregular and otherwise unwanted migration. These include the following, grouped loosely by the three objectives identified above.

#### *Broadening the policymaking process*

- Discussion surrounding the broadening of both the decision-making and implementation circles in migration-related issues (in Member States and in Brussels) raises questions. What would be the proper balance between “compartmentalising” the migration issue and entwining it with other competencies and portfolios? What would be the risks and benefits found in linking migration to other Commission (or national government) structures and portfolios? How can these be most fully debated and explored?
- One of the many gaps identified above is the area of exchanges of ideas and research results between and across institutional, academic and geographic divides. In order to begin to close such gaps, regional and sub-regional policy dialogues could be systematically linked with independent, multinational, cross-disciplinary and policy-oriented research networks. Under what circumstances could this be achieved? How could knowledge on migration be systematically shared with those outside the existing JHA community?
- As the current debate on repatriation policy is narrowing the Union’s focus to purely operational issues (joint flights) and financial arrangements (repatriation fund), the policy as a whole is losing its strategic perspective. (Might a Commission paper on assisted repatriation and other alternatives to simple expulsion reinvigorate thinking on this approach? Such a paper could draw on the

small experimental programmes that are mushrooming in Member States and in third countries. No overall “learning” based on these programmes is evident as yet.) Furthermore, the policy conversation on repatriation might be simultaneously bilateralised and multilateralised to include both sending and transit countries. The objective—and the key policy challenge—is to make EU repatriation policy more cost-effective, smarter, fairer, and sustainable.

#### *Deepening Engagement*

- If migration control and law enforcement are to remain “outsourced”, there must be clear criteria and solid safeguards to ensure respect for human rights and the protection of refugees and asylum seekers. Similarly, the protection capacity of third countries must be enhanced systematically and proactively—in many ways along the lines of the “EU Regional Protection Programmes” recently proposed by the Commission. How can this be achieved? How can cooperation with third countries on migration controls be re-aligned with safeguards for human rights and the international legal obligations of the EU Member States and their partners?
- The tools available in each of the “spheres” of European foreign policy might be inadequate in helping improve the Union’s ability to manage migration more effectively. What tools and options from the inner spheres (in the extreme, accession) can be “exported” to the outer spheres in order to make migration dialogues more effective policy tools?
- How can the EU visa policy be made more flexible and cooperation-oriented, and what specific mechanisms need to be developed along the way of getting there? Experimentation is important in this area so that the intrinsic rigidity of the Schengen system can be addressed by making visa regulations part of the Union’s negotiating arsenal with third countries, particularly with regard to short-term mobility. Of course, given current concerns about security, priority should be given to innovative solutions that are able to reconcile greater flexibility with increased security.

#### *Creating Structures*

- The model of the Migration Sub-Committees and Working Groups created in the framework of the Euro-Mediterranean Association Agreements and of the Stabilisation and Association Agreements for the Western Balkans have created workable models for bilateral EU-third country migration dialogue and decision making. This model can be strengthened, expanded and perfected. Effort must thus be invested in identifying and implementing some of the most important practical steps to improving these dialogues. Can the model also be extended to other regions?
- Under some circumstances, regional and sub-regional fora might provide a good springboard and setting for policy dialogue and decision-making on multilateral issues. The MARRI is a case in point—although the Initiative requires more attention. Further thought could be given to bringing the “5+5” migration dialogue inside the Euro-Mediterranean framework.

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