



The EU as a Regional Actor: Migration

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Abstract

The EU enacts its security policy on different levels and through various frameworks and structures of cooperation. One of these levels is the regional dimension (i.e. within the Union) where the EU acts as a regional security actor. This paper puts forward an analysis of the regional dimension of migration by assessing (i) the institutional dimension underpinning this issue, (ii) the EU's policy output in the field of migration, and (iii) an evaluation of the Union's institutional and output dimension; this 'check-up' of EU policy through the assessment of its coherence, the current levels of accountability, and the legitimacy of EU action enables a reflection on the merits of EU policy in the security field.

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The EU as a Regional Actor : Migration¹

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Introduction

Migration has always been under the looking glass as far as policies with an external dimension are concerned. The last decade's debate on terrorism and the calls for a stricter monitoring of the Union's external borders have only served to strengthen this focus (See *inter alia* Pawlak 2009; Lavenex and Wichmann 2009; Dover 2008; Boswell 2007). The EU is very active in the area of migration, as new institutional developments such as the Blue Card initiative, the SIS II and the Visa Information System geared towards streamlining migration within the Union illustrate.

This paper firstly provides an overview of the development of an EU (im)migration policy and an analysis of its institutional dimension. Secondly, an overview is given of the Union's policy output and legal instruments in the (im)migration field. Thirdly, an evaluation is made of the Union's policy coherence, the checks and balances on its output as well as its legitimacy in the field of (im)migration policy. (Im)migration as used in this paper is understood as referring to all issues associated with migration of third country nationals.

The Institutional Dimension of Migration

Immigration policies within the EU became of major importance during the 1990s, partly because of the geopolitical turmoil at the end of the cold war, and partly due to the outbreak of the Balkan conflict in the mid-1990s. With regard to immigration policies, the most important aspect relates to the questions of asylum and burden-sharing, yet immigration also relates more generally to free movement and citizenship. The intra-EU migration regime dates back as far as the Treaty of Rome of 1957, but the first ad hoc cooperation on police matters and border control started in the TREVI²

¹ An earlier version of this paper was presented at an EU-GRASP workshop in July 2009 hosted by UNU-CRIS.

² The acronym TREVI meant Terrorisme, Radicalisme, Extrémisme et Violence International.

Group in 1975. What followed was intergovernmental cooperation under the Schengen Agreement³ of 1985 and the Dublin Convention⁴ of 1990. The Maastricht Treaty introduced “citizenship of the Union”, which provided for a differentiation between Union citizens and third country nationals. Intergovernmental cooperation in this area continued in the third pillar, but suffered from the unanimity rule. Following the Treaty of Amsterdam, a new Directorate-General for JHA was instituted in the European Commission, and a start was made to “communitarise” a large part of the European immigration *acquis* (Vink 2002: 204; Peers and Rogers 2006: 19-28).

Division of Competences in the Field of Migration

Recalling that with the Treaty of Amsterdam, asylum, migration and judicial cooperation in civil matters were transferred from the third to the first pillar, the Community was therefore granted competence to adopt measures with respect to visas, asylum, immigration and other areas connected with the free movement of persons⁵, customs cooperation⁶ and countering fraud⁷. The policies in Title IV TEC are not as comprehensive as the common commercial policy. There is no exclusive competence as regards visas, asylum and migration. Community competence is limited to specific aspects, and in a number of cases only minimum standards are to be adopted. The presumption is therefore that this is an area of shared competence (Eeckhout 2004: 134; Lenaerts et al. 2005: 214, 216-221; Monar 2004: 399). With respect to judicial cooperation in civil matters⁸, the most significant acts that come within the scope of this provision concern conflicts of law or jurisdiction. It should be understood here that the Community competence in this area is shared and that in any event the scope of this provision is limited to what is necessary for the proper functioning of the internal market (Eeckhout 2004: 135; Lenaerts et al 2005: 206-211).

Article 62(2) TEC provides for the Community powers on measures concerning the crossing of external borders of the Member States. Article 62(2)(a) TEC confers power onto the Community for standards and procedures to be followed by Member States in carrying out checks on persons at such borders. One institutional measure, aimed at enhancing operational cooperation at the

³ The Schengen Agreement was later supplemented by the Schengen Convention, implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239/19 of 22 September 2000.

⁴ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, OJ C 254 of 19 August 1997. This Convention is currently no longer in force.

⁵ Title IV TEC, Arts. 61-69.

⁶ Art. 135 TEC.

⁷ Art. 280 TEC.

⁸ Art. 65 TEC.

external borders, was the setting up of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Council of the European Union 2004c) is this a good format or do you want day and month as well?. Article 62(2)(b) TEC lists four powers concerning short-term visas. These, however, do not form an exhaustive list of powers as the residual powers over short-term visas are not listed. The powers of the Community over visa lists however do not extend to drawing up a list of countries whose nationals would be required to have airport transit visas during the “Maastricht era”.⁹ However, the judgment of the Court in this case was based on the prior wording of the Community’s objective in Article 3 TEC, which has since been amended by the Treaty of Amsterdam. It is therefore questionable if the Community’s powers are still limited in such a way. The purpose of issuing airport transit visas being primarily to control unauthorised migration, Article 63(3)(b) TEC is the logical legal basis for a measure setting out a list of countries whose nationals need a visa.¹⁰ This set aside, Article 62(2)(b) is in any event the correct legal basis for adopting measures on the procedures and conditions for issuing such visas. The powers enshrined in Article 62(3) TEC concerning freedom to travel do not cover extensions of stay for additional periods, which is instead covered by Article 63(3)(a) TEC. Measures concerning freedom to travel for persons with long-term visas are covered by Article 62(3) TEC. Article 63(2)(a) TEC provides the Community with power over the issue of temporary protection for displaced persons from third countries who cannot return to their country of origin. It also confers power on the Community over issues of subsidiary protection of such displaced persons. Article 63(1) TEC covers all of the issues addressed as regards Geneva Convention refugee status, but the Community cannot regulate such issues (responsibility for applicants, reception conditions, definitions and procedures) unless Article 63(2)(a) TEC is used as a legal basis to do so (Peers & Rogers 2006: 54-55).

The EC’s powers over access to employment by third country nationals can only be exercised on the basis of Article 137 TEC in the first Member State a third country national moves to, and subsequently by Article 39 TEC if the third country national moves, exercising freedom of movement as one of the “workers of the Member States”, to another Member State. Alternatively, Articles 63(3)(a) and 63(4) TEC grant the Community with sufficient powers to address issues related to access to employment by third country nationals, at least where the issue is ancillary to the main issue being regulated by Community legislation. There is no suggestion of a limit among

⁹ ECJ, Case C-170/96 *Commission v Council* [1998] ECR I-2763.

¹⁰ This has been the legal basis for a Finnish Proposal on this issue. See Council of the European Union, Council Doc. 10867/99 of 9 September 1999.

the various clauses limiting EC powers over matters such as access to employment by third country nationals. As regards irregular employment, when the Community uses Article 63(3)(a) TEC to set out conditions for legal residence, it can also set out the circumstances in which unauthorised employment will terminate that status. The EC can also, using its powers under Article 63(3)(b) TEC, regulate the position of persons who have definitively lost their legal status because of irregular employment or who engaged in irregular employment despite never having had such a legal status. The Community however lacks the powers to adopt measures concerning irregular employment in and of itself; it can only act on the issue where it is ancillary to one of the powers which has clearly been conferred upon the Community. As regards the Community's "emergency powers" in Articles 64(2) TEC, it has never used these. They can only be used where there is an actual "influx" of people, rather than the threat of one, and cannot be used to amend existing EC legislation. It can only be used to assist all Member States if all of them are faced with an "influx", and this only when in relation to a given emergency (Peers & Rogers 2006: 59-60, 62 and 64).

The measures set out in the provisions of Articles 62 and 63 TEC are almost all concerned with non-EU citizens, making it an explicit externally oriented policy, even if it consists mostly of the adoption of internal legislation. The policy area most suited for the conclusion of international agreements is immigration, as defined in Article 63(3) TEC, which refers to conditions of entry and residence of third country nationals. Many association and cooperation agreements regulate certain forms of immigration from the other contracting parties. However, other provisions under Articles 62(2)(b) TEC and 63(1) TEC relating to visas and asylum also provide scope for international action (Eeckhout 2004: 134).

Implied powers exist within Title IV TEC as the EC Treaty only speaks of "measures", which are nowhere precisely defined. The *ERTA* principle¹¹ applies here, leading to exclusive Community competence for the negotiation and conclusion of international agreements affecting acts adopted under Title IV TEC. This means that once the basic harmonisation of asylum law is in place, the development of international asylum law will require Community involvement. In terms of international agreements negotiated under Title IV TEC, most of these concern agreements on readmission of illegal immigrants, so-called readmission agreements (Eeckhout 2004: 134).

¹¹ See ECJ, Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

Decision-making Methods

The provisions in Title IV TEC are subject to different kinds of decision-making procedures. Measures taken on the basis of Article 62(2)(a) TEC on measures on the crossing of external borders of the Member States, in particular standards and procedures to be followed by Member States in carrying out checks on persons at such borders, take place according to the co-decision procedure of Article 251 TEC and qualified majority voting, adapting the provisions to the powers of the Court of Justice.¹² The same method applies to measures taken on the basis of Article 65 TEC.¹³

Some exceptions exist with respect to Article 62(2) TEC, on the rules on visas for intended stays of no longer than three months. Measures taken on the basis of Articles 62(2)(b) (i) TEC on the list of third countries whose nationals must be in possession of visas when crossing the external borders and whose nationals are exempt from requirement and 62(2)(b) (iii) TEC on a uniform format for visas are adopted by the Council acting by qualified majority on a proposal from the Commission and after consulting the EP.¹⁴ Measures adopted on the basis of Article 62(2)(b) (ii) TEC on the procedures for issuing visas by Member States and 62(b) (iv) TEC on rules on a uniform visa are adopted by the Council acting in accordance with the co-decision procedure of Article 251 TEC, not indicating that the provisions are adapted to the powers of the Court of Justice.¹⁵

Measures taken on the basis of Article 63 TEC on asylum take place with the Council acting unanimously according to the procedure described in Article 67(2) TEC. The exception to this rule relates to Articles 63(1) on asylum¹⁶ and 2(a) TEC with respect to minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection. Measures taken on this

¹² See Art. 67(2) TEC.

¹³ Art. 65 TEC relates to measures in the field of judicial cooperation in civil matters having cross-border implications in so far as necessary for the proper functioning of the internal market. Examples include, *inter alia*, improving and simplifying the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases. For a full overview see Art. 65 TEC.

¹⁴ See Art. 67(3) TEC.

¹⁵ See Art. 67(4) TEC

¹⁶ Art. 63(1) TEC relates to (a) criteria and mechanisms determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; (b) minimum standards on the reception of asylum seekers in Member States; (c) minimum standards with respect to the qualification of nationals of third countries as refugees; and (d) minimum standards on procedures in Member States for granting or withdrawing refugee status.

basis take place with the Council acting unanimously subject to the co-decision procedure of Article 251 TEC.¹⁷

Judging from the provisions as laid down in the Treaties, it can be seen that decisions related to legal migration taken under Title IV TEC require unanimity. This requirement in itself does not make for swift decision-making, and possibly hampers a swift and effective implementation of the provisions of Title IV TEC in the formation of a Common Asylum Policy.

As the provisions regarding migration are essentially all found within Title IV TEC, the level of cross-pillarisation occurring is likely to be limited. However, as second and third pillar policies also encompass elements of migration, the level of cross-pillarisation occurring when enacting such policy is high. Migration policy *in itself*, however, is located within the Community pillar.

The Impact of the Treaty of Lisbon

The Treaty of Lisbon would establish more explicit objectives for the AFSJ than those in the current Treaties. Those objectives include the absence of internal border controls, a common policy on asylum, immigration and external borders, and fairness towards third country nationals, access to justice and respect for fundamental rights (Cremona 2008: 4-5).¹⁸ The new Treaty would move the provisions of pillar three into the provisions of current Title IV TEC. Upon doing so Title IV would be renamed Title V.

Apart from inserting two express external competences into the AFSJ provisions on asylum issues, the external AFSJ would remain a field of largely implied external competence. The TFEU however does render the existence of external powers more transparent in such cases, by inserting a statement on the existence of treaty-making competence even in cases where the Treaty does not expressly confer such powers.¹⁹ Under the Lisbon Treaty, qualified majority voting and co-decision (which would be renamed the “ordinary legislative procedure”) would be extended to measures concerning legal migration. The ordinary legislative procedure would also apply to measures concerning visa lists and visa formats, which would enhance the Parliament’s current powers on these matters (Peers 2008: 221).

¹⁷ The applicability of this rule is subject to whether the Council has previously adopted, in accordance with Art. 67(1), Community legislation defining common rules and basic principles governing these issues. As this is the case, Art. 251 TEC applies.

¹⁸ Art. 67 TFEU, OJ C 115/73 of 9 May 2008.

¹⁹ Art. 216(1) TFEU.

In a limited number of other areas, despite lacking co-decision powers, it will still need to give its consent before an initiative can be taken. These include the procedure to create the European Public Prosecutor's Office (EPPO), and subsequent initiatives to extend its powers. Situations where the Parliament is merely consulted are measures taken by the EU concerning passports and other documents that go beyond the powers conferred by the Treaties;²⁰ the adoption of temporary measures to help a Member State facing an emergency situation, caused by a sudden influx of third-country nationals; the adoption of measures concerning family law (unless the Council decides, by unanimity and after consulting the Parliament, to move elements of this area over to co-decision); measures concerning law enforcement authorities, and legislation setting down the conditions and limits under which law enforcement and judicial authorities may operate in other Member States. In the current situation, consultation applies to all measures concerning legal migration and family law (Brundsen 2007: 32).

In sum, the changes brought about by the Lisbon Treaty in the area of JHA matters would impact the Union's migration policy twofold. Firstly, the abolishment of the third pillar and the integration of the provisions on police and judicial cooperation in criminal matters with the current Title IV TEC would serve overall policy coherence, for example, between the fields of combating smuggling and trafficking, organised crime and illegal employment, and the Union's migration policy. Secondly, the move towards qualified majority voting as the norm (with some exceptions) would possibly accelerate the decision-making process in the Council and reduce the risk of arriving at "lowest common denominator" decisions.

EU Migration Policy Objectives, Output and Legal Instruments

Key Legislative Measures and the Tampere Programme

The Tampere European Council in October 1999 explicitly linked for the first time the protection of the EU's internal security to external relations. The Presidency Conclusions state that Member States recognised that the realisation of the internal Area of Freedom, Security and Justice also had an external aspect. It can be read that 'all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the Area of Freedom, Security and Justice' (European Council 1999: point 59).

²⁰ Art. 216(1) TFEU.

The Presidency Conclusions go on to speak about the development of common policies on asylum and immigration, while taking into account the need for consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to the Union's citizens and also offer guarantees to those who seek protection in or access to the European Union (European Council 1999: point 3). A further call was made for more efficient management of migration flows and the development, in close co-operation with countries of origin and transit, of information campaigns on the actual possibilities for legal immigration, and for the prevention of all forms of trafficking in human beings (European Council 1999: point 22). The European Council expressed its determination to tackle the source of illegal immigration and urged the adoption of legislation foreseeing severe actions against trafficking of human beings (European Council 1999: point 24, 26). A need for closer cooperation and mutual technical assistance between the Member States' border control services, such as exchange programmes and technology transfer, especially on maritime borders, and assistance to countries of origin and transit in order to promote voluntary return and strengthen their ability to effectively combat trafficking in human beings, was also expressed (European Council 1999: point 24, 26). The Council was invited upon the adoption of the Tampere Presidency Conclusions to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries (European Council 1999: point 27).

The above statements made the Tampere European Council the starting point for the development of a true European immigration policy from which subsequent developments took root with respect to immigration²¹, asylum²² and freedom to travel²³ policy. The Conclusions mentioned above have come to constitute the Tampere Programme.

²¹ Ever since the Tampere European Council, the Union has adopted a great number of measures which including, *but are not limited to*, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98 of 24 December 2008; Council Regulation (EC) No 1104/2008 of 24 October 2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II), OJ L 299 of 8 November 2008; Council Decision 2008/839/JHA of 24 October 2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II), OJ L 299/43 of 8 November 2008; Commission Decision 2007/675/EC of 17 October 2007 setting up the Group of Experts on Trafficking in Human Beings, OJ L 277 of 20 October 2007; Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers, OJ L 199/23 of 31 July 2007; 2007/435/EC: Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General programme Solidarity and Management of Migration Flows, OJ L 168/18 of 28 June 2007; Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme Solidarity and Management of Migration Flows, OJ L 144/22 of 6 June 2007; Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007

establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme Solidarity and Management of Migration Flows, OJ L 144/45 of 6 June 2007; Council Decision 2006/688/EC of 5 October 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration, OJ L 283/40 of 14 October 2006; Council Decisions 2006/618/EC and 2006/619/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, OJ L 262 of 22 September 2006; Council Decisions 2006/616/EC and 2006/617/EC of 24 July 2006 on the conclusion of the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime, OJ L 262 of 22 September 2006; Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289/15 of 3 November 2005; Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services, OJ L 83/48 of 1 April 2005; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375/12 of 23 December 2004; Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, OJ L 261/5 of 6 August 2004; Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261/3 of 6 August 2004; Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), OJ L 80 of 18 March 2004; Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals, OJ L 60/55 of 27 February 2004; Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, OJ L 64 of 2 March 2004; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23 December 2003; Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L 321/26 of 6 December 2003; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44 of 23 January 2004; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12 of 3 October 2003; Commission Decision 2003/209/EC of 25 March 2003 setting up a consultative group to be known as the "Experts Group on Trafficking in Human Beings", OJ L 79 of 26 March 2003; Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328 of 5 December 2002; Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17 of 5 December 2002; Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203 of 1 August 2002; Council Decision of 28 June 2001 establishing a second phase of the programme of incentives, exchanges, training and cooperation for persons responsible for combating trade in human beings and the sexual exploitation of children (STOP II), OJ L 186 of 7 July 2001; Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149/34 of 2 June 2001; Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children (STOP), OJ L 63 of 4 March 1997; Joint action 96/700/JHA, of 29 November 1996, adopted by the Council pursuant to Article K.3 of the Treaty on European Union, establishing an incentive and exchange programme for persons responsible for combating trade in human beings and the sexual exploitation of children, OJ L 322 of 12 December 1996.

²² Examples of measures on asylum include, *but are not limited to*, Council Regulation (EC) No 380/2008 of 18 April 2008 amending Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals, OJ L 115 of 29 April 2008; Council Decision 2006/188/EC of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and Council Regulation (EC) No 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 66/37 of 8 March 2006 (Also known as Dublin II Regulation); Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 of 13 December 2005; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12 of 30 September 2004; Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25 February 2003; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the

Implementation of the Tampere Programme

Related to the Tampere Programme is the Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (Justice and Home Affairs Council 1999) that was adopted in December 1998. This speaks of the establishment of an overall migration strategy in which a system of European solidarity should figure prominently, and where the overall priority should be to improve the exchange of statistics and information on asylum and immigration. It spells out a series of measures which were due to be adopted after the entry into force of the Treaty of Amsterdam (Justice and Home Affairs Council 1999: points 32-38). Following

reception of asylum seekers, OJ L 31/18 of 6 February 2003; Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 62 of 5 March 2002; Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12 of 7 August 2001; Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316 of 15 December 2000.

²³ Examples of measures on freedom to travel include, *but are not limited to*, Council Decision 2008/262/EC of 28 February 2008 on the signature, on behalf of the European Union, and on the provisional application of certain provisions of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ L 83/5 of 26 March 2008; Council Decision 2008/261/EC of 28 February 2008 on the signature, on behalf of the European Community, and on the provisional application of certain provisions of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ L 83/3 of 26 March 2008; Council Decision 2008/903/EC of 27 November 2008 on the full application of the provisions of the Schengen acquis in the Swiss Confederation, OJ L 327/15 of 5 December 2008; Council Decision 2007/801/EC of 6 December 2007 on the full application of the provisions of the Schengen acquis in the Czech Republic, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, OJ L 323/34 of 8 December 2007; Council Regulation 1932/2006/EC of 21 December 2006 amending Regulation 539/2001/EC listing the Non-EU Member Countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 405 of 30 December 2006; Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland, OJ L 395/70 of 31 December 2004; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 229/35 of 29 June 2004; Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, OJ L 64/20 of 7 March 2002; Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 185/45 of 10 July 2001; Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ L 131/43 of 1 June 2000; The Schengen acquis, as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999 (published in the Official Journal on 22 September 2000), including the Schengen Agreement and the Schengen Convention, OJ L 22.9.2000; Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, OJ L 176/17 of 10 July 1999; Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*, OJ L 176 of 10 July 1999.

the Tampere European Council, the 2000 Communication from the Commission on a Community immigration policy details the Tampere framework for a common EU asylum and immigration policy through partnership with countries of origin, a common European asylum system, fair treatment of third country nationals and management of migration flows (European Commission 2000: 3).

In 2001, shortly before the Laeken European Council, the Commission issued a Communication on a common policy on illegal immigration which included an Action Plan. In this Communication, the Commission identified six priority areas for action aimed at preventing and fighting illegal immigration: (i) visa policy; (ii) infrastructure for information exchange, cooperation and coordination; (iii) border management; (iv) police cooperation; (v) aliens law and criminal law; and (vi) return and readmission policy. Immigration, it is emphasised, should take place within a clear legal procedural framework in order to manage migratory flows effectively and to avoid any competitive distortion. Illegal entry or residence should not lead to the desired stable form of residence (European Commission 2001: 6). It further calls for the integration of migration issues into the existing partnerships with third countries and, in the context of enlargement, for candidate countries to fully accept the Schengen *acquis* and to adopt the existing EU *acquis* on the fight against illegal immigration into their domestic legislation (European Commission 2001: 8-9).

The Commission goes on to state that prevention plays a crucial role in the fight against illegal immigration and as such should include research on the causes, improving understanding of the phenomenon and detection of new trends, the launching of information campaigns, as well as promoting new partnerships and developing existing networks (European Commission 2001: 9). The development of appropriate legal instruments to combat human trafficking was stressed, which led, *inter alia*, to the development of a Council Framework Decision on combating trafficking in human beings.²⁴ In line with the Conclusions of the 20 September 2001 JHA Council, which recommended a more systematic checking of identity papers and residence permits (Council of the European Union 2001: point 25), the Commission proposed the development of a VIS, which was eventually adopted in 2004 (Council of the European Union 2004a). Other measures include the provision of financial support to third countries to help these countries strengthen their capacity to combat trafficking in human beings and to cope with their readmission obligations;²⁵ calls for a

²⁴ See Council Framework Decision 2002/629/JHA *supra* note 21.

²⁵ European Commission, *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration*, COM(2001) 672 final of 15 November 2001.

more coherent European border management;²⁶ calls for more operative powers for Europol;²⁷ the use of Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing and confiscation of instrumentalities and the proceeds of crime concerning illegal immigration in order to repress the smuggling of migrants and trafficking of human beings;²⁸ closer cooperation on the issues of transit and readmission, taking into account the political and human rights situation in the country of origin or transit and the inclusion of readmission clauses in association and cooperation agreements.²⁹

In its Conclusions, the Laeken European Council of December 2001 stated that a true common asylum and immigration policy implied the establishment of the integration of the policy on migratory flows into the Union's foreign policy (in particular through the conclusion of readmission agreements); the development of a European system for exchanging information on asylum, migration and countries of origin; the establishment of common standards on procedures for asylum, reception and family reunification, including accelerated procedures where justified; and the establishment of specific programmes to combat discrimination and racism (European Council 2001b: point 40). The European Council of Seville emphasised the need to speed up the implementation of all aspects of the programme approved at Tampere, especially on matters relating to the development of a common European policy on asylum and migration (European Council 2002: point 26). It acknowledged the results achieved by the 2001 plan on a common policy on illegal immigration³⁰, and proposed a variety of measures to be taken including,³¹ *inter alia*, a review of the list of third countries whose nationals are required to have visas or are exempt from that requirement;³² the introduction of a common identification system for visa data; (Council of the European Union 2004a) the speeding up of the conclusion of readmission agreements; the formal adoption of the Council Framework Decision on combating trafficking in human beings;³³

²⁶ The Communication states that high standard external border controls are an important contribution in order to prevent illegal immigration. Border management also includes customs purposes, traffic security, prevention of the entry of dangerous or illegal goods, identification of persons wanted for arrest or extradition at the request of a competent judicial authority, etc. See: European Commission, *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration*, COM(2001) 672 final of 15 November 2001.

²⁷ European Commission, *supra* note 25, p. 20.

²⁸ European Commission, *supra* note 25, p. 23.

²⁹ European Commission, *supra* note 25, p. 25.

³⁰ See European Commission, *supra* note 25.

³¹ European Council, 2002, *Presidency Conclusions*, Seville European Council, 21 and 22 June 2002, points 26-39.

³² This list is reviewed periodically. See *Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice* - Text adopted by the Justice and Home Affairs Council of 3 December 1998, OJ C 19 of 23 January 1999. Currently a proposal for amending the list once more is pending in the Council. See, COM(2008) 761 final of 28 November 2008.

³³ See Council Framework Decision 2002/629/JHA *supra* note 21.

the gradual introduction of the coordinated, integrated management of external borders;³⁴ and the speeding up of legislative work on the framing of a common policy on asylum and immigration through the adoption of the Dublin II Regulation³⁵, the minimum standards for qualification for refugee status and the content of refugee status and the provisions on family reunification and the status of long-term permanent residents, and the common standards for asylum procedures.³⁶

In addition to the previous *continuous* requests made by the Seville European Council, the Thessaloniki European Council called for the establishment of an Immigration Liaison Officers (ILOs) network in third countries; (European Council 2003: point 15)³⁷ a more efficient cooperation between Member States regarding the return of illegally residing persons;³⁸ the development of a monitoring and evaluation mechanism to monitor relations with third countries which do not cooperate with the EU in combating illegal immigration;³⁹ the further reinforcement of asylum procedures in order to make them more efficient with a view to accelerating, as far as possible, the processing of non-international protection-related applications;⁴⁰ it stressed the importance of developing cooperation and exchanges of information within the framework of the newly established group of national contact points on integration, with a view in particular to strengthening coordination of relevant policies at national and EU level;⁴¹ and it called for the Commission to present an annual report on migration and integration in Europe, in order to map EU-wide migration data, immigration and integration policies and practices.⁴²

In a response to these requests, the Commission established, *inter alia*, a European Migration Network (EMN) in 2003 as a pilot project, acting on the endorsement of the Thessaloniki European Council of June 2003 (European Commission 2005d: 3).⁴³ The EMN consists of a network of 14 national contact points (NCPs) designated by Member States to carry out documentation, analysis

³⁴ See the eventual establishment of FRONTEX pursuant to Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349 of 25 November 2004.

³⁵ See Council Regulation (EC) 343/2003, *supra* note 22.

³⁶ These measures were all subsequently adopted. See *inter alia* Council Directive 2005/85/EC *supra* note 22; Council Directive 2004/83/EC *supra* note 22; Council Directive 2003/9/EC, *supra* note 22; Council Directive 2003/86/EC, *supra* note 21; and Council Directive 2003/109/EC, *supra* note 21.

³⁷ These ILOs were subsequently established. See Council Regulation (EC) No 377/2004, *supra* note 21.

³⁸ European Council, 2003, *Presidency Conclusions*, Thessaloniki European Council, 19 and 20 June 2003, point 17.

³⁹ European Council, 2003, *Presidency Conclusions*, Thessaloniki European Council, 19 and 20 June 2003, point 19.

⁴⁰ European Council, 2003, *Presidency Conclusions*, Thessaloniki European Council, 19 and 20 June 2003, point 27.

⁴¹ European Council, 2003, *Presidency Conclusions*, Thessaloniki European Council, 19 and 20 June 2003, point 32.

⁴² European Council, 2003, *Presidency Conclusions*, Thessaloniki European Council, 19 and 20 June 2003, point 33.

⁴³ The European Migration Network was eventually fully established on the basis of a proposal by the Commission. See Proposal for a Council Decision establishing a European Migration Network, COM(2007) 466 final of 10 August 2007. The proposal was adopted in 2008. See Council Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network, OJ L 131/7 of 21 May 2008.

and research activities. The EMN's main task is to provide the Community, its Member States, and in the longer term the public, with objective, reliable and comparable information on the migration and asylum situation at the European and national levels. This includes information monitoring, comparison, analysis and research by collating existing information from Member States and undertaking some of its own research for European-level analysis, as well as developing a comprehensive database for such information. Networks at the national level contribute to the EMN's analysis and research activities. EMN action is implemented on the basis of annual work programmes by the Commission (European Commission 2005d: 5). In response to the reporting request by the Thessaloniki European Council, the Commission has regularly produced an annual report on migration and integration, the first of which was in 2004 (European Commission 2004). It discusses current trends in migration and provides for analyses on pressing issues.

The Hague Programme

The Brussels European Council of November 2004 reiterated once again that the security of the Union and its Member States had acquired a new urgency, especially in light of the terrorist attacks of September 11 2001 and 11 March 2004. European citizens therefore expect the EU, while guaranteeing respect for fundamental freedom and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime, as well as the prevention thereof. The European Council asserts that notably in the field of security, coordination and coherence between the internal and external dimensions has been growing in importance and needs to continue to be vigorously pursued (European Council 2004).⁴⁴ As a follow up to the achievements of the Tampere Programme in the AFSJ, a new programme had to be established. The European Council adopted a new multi-annual programme in 2004, was dubbed the Hague Programme. It called for a comprehensive approach that involves all stages of migration, with respect to the root causes of migration, as well as entry, admission, integration, and return policies (European Council 2004).⁴⁵

The Council and the Commission launched their 5 year Action Plan implementing the Hague Programme on strengthening Freedom, Security and Justice in May 2005 (Council of the European Union 2005). The Action Plan takes the overall priorities for the AFSJ as set out in the Hague Programme and turns them into concrete actions, including a timetable for their adoption and implementation. The Commission speaks of developing a balanced approach, implying the

⁴⁴ ANNEX I, p. 12.

⁴⁵ ANNEX I, p. 16.

establishment of a common immigration policy, covering admission procedures and criteria to legally enter the territory, and ensuring a secure legal status and a better defined set of specific rights to third country nationals temporarily working or staying legally for other reasons in the EU, while carrying out a policy against illegal migration that is firm yet respects the rights of third country nationals. In order to reduce the social and economic costs of illegal migration, re-admission agreements and further coordination to combat smuggling and trafficking in human beings are proposed. With respect to internal borders, external borders and visas, new information systems were proposed: the SIS II and the VIS. The Action Plan also envisaged an important role for the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) in coordinating and assisting Member States' action in surveillance and control of external borders. With a view to developing a second phase of the Common European Asylum System before the end of 2010, the measures in the Action Plan aim to establish a common procedure and uniform status for persons benefiting from asylum or subsidiary protection. In addition, the EU aims to enhance the protection capacity of regions of origin through Regional Protection Programmes (see *infra*) that should reduce the dangers that asylum seekers regularly have to face while attempting to reach a safe country (Council of the European Union 2005) .

The Hague Programme stresses the importance of reinforcing the collection, provision, exchange and efficient use of up-to-date information in this regard. The European Council thus envisages a Common European Asylum System with a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection, built on a thorough and complete evaluation of the legal instruments that were agreed upon in the framework of the Tampere Programme.⁴⁶ Furthermore, the Hague Programme called on the Commission to present a study on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications, of joint processing of asylum applications within the Union. In addition a separate study was to be conducted in close consultation with the office of the United Nations High Commissioner for Refugees (UNHCR) that looks into the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards.⁴⁷ However,

⁴⁶ The European Council urged the Council to adopt unanimously the Asylum Procedures Directive. It eventually did so in 2005. See Council Directive 2005/85/EC *supra* note 22.

⁴⁷ European Council, 2004, *Presidency Conclusions*, Brussels European Council, 4-5 November 2004, ANNEX I, p. 18.

neither one of these studies was ever conducted. They may be launched either towards the end of 2009 or in 2010.

The European Council goes on to state that after a common asylum procedure has been established, the appropriate structures involving asylum services in the Member States should be transformed, on the basis of an evaluation, into a European support office for all forms of cooperation between Member States relating to the Common European Asylum Support Office.⁴⁸ The Commission has recently tabled a proposal for a regulation of the EP and of the Council to this end (European Commission 2009b). Throughout the Programme, the European Council calls for the establishment of several funds, such as a European Return Fund,⁴⁹ a Community Border Management Fund,⁵⁰ and the European Refugee Fund.⁵¹ Furthermore, the European Council called for a policy plan from the Commission on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005.⁵² The Commission responded by issuing its policy plan on legal migration in December 2005 (European Commission 2005e). In this plan the Commission advocates the adoption of a general framework directive guaranteeing a common framework of rights to all third country nationals in legal employment already admitted in a Member State, but not yet entitled to the long term residence status. In addition, the Commission proposed four specific directives which are complementary to the framework directive.⁵³

⁴⁸ European Council, *supra* note 47

⁴⁹ European Council, *supra* note 47, ANNEX I, p. 23. This was established in 2007 by Decision 575/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows', OJ L 144/45 of 6 June 2007.

⁵⁰ European Council, *supra* note 47, ANNEX I, p. 24. This was established in 2007 by Decision 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows', OJ L 144/22 of 6 June 2007.

⁵¹ European Council, *supra* note 47, ANNEX I p. 18. The most recent version of this fund dates back to 2007 in Decision 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows', OJ L 144 of 6 June 2007.

⁵² European Council, *supra* note 47, ANNEX I, p. 19.

⁵³ The Commission proposed a directive on the conditions of entry and residence of highly skilled workers (also known as the "Blue Card initiative"). The Blue Card initiative deals with the conditions for EU entry and residence for highly qualified employment. This plan would offer skilled workers a single multi-year visa to work and move freely throughout the European Union, similar to the American green card permit. Signing up to the Blue Card scheme would give foreign workers limited social welfare rights and benefits, and allow them to bring in their families while they work in an EU country. Political agreement on the initiative was reached on 25 May 2009 and it is a matter of time before it is approved by the Council. The other directives include: a directive on the conditions of entry and residence of seasonal workers; a directive on the procedures regulating the entry into, the temporary stay and residence of Intra-Corporate Transferees (ICT); and a directive on the conditions of entry and residence of remunerated trainees. See European Commission, Communication from the Commission, Policy Plan on Legal Migration, COM(2005) 669 final of 21 December 2005, pp. 6-7. The general Framework Directive on the basis of socio-economic rights of third country workers in the Union and the Directive on the admission of highly skilled immigrants were both proposed in 2007. See Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a

With respect to the external dimension of asylum and migration, the Hague Programme frames EU policy in terms of assisting third countries, in full partnership, in their efforts to improve their capacity for migration management and refugee protection, preventing and combating illegal immigration, providing information on legal channels for migration, resolving refugee situations by providing better access to durable solutions, building border-control capacity, enhancing document security and tackling the problem of return.⁵⁴ In terms of partnerships with countries and regions of origin, the Commission was asked to develop EU-Regional Protection Programmes in partnership with the third countries concerned and in close consultation with the UNHCR. These programmes have as a long term goal for third countries to adopt or amend their national asylum legislation in conformity with the obligations under the Geneva Convention. The Programme is said to provide general assistance for the improvement of the local infrastructure and assistance to countries of origin and resettlement in order to enhance the protection capacity of third countries. In its 2005 Communication, the Commission presented such a proposal (European Commission 2005a). In this proposal, the Commission detailed possible core activities for such Regional Protection Programmes.⁵⁵ With respect to the return and re-admission policy, the European Council called for discussions on minimum standards for return procedures including minimum standards to support effective national removal efforts to commence by early 2005.⁵⁶ These discussions have led to the adoption of Directive 2008/115/EC in December 2008.⁵⁷ The European Council invited Member States to improve their joint analyses of migratory routes and smuggling and trafficking practices and of criminal networks active in this area, *inter alia*, within the framework of FRONTEX and in close cooperation with Europol and Eurojust. In line with this reasoning, the Council and the

Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final of 23 October 2007 and Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final of 23 October 2007.

⁵⁴ European Council, *supra* note 47, ANNEX I, p. 20.

⁵⁵ Possible activities include projects aimed at, *inter alia*, (i) improving the general protection situation in the host country; (ii) the establishment of an effective Refugee Status Determination procedure which can help host countries better manage the migration implications of refugee situations, thereby allowing them to better focus resources on the core refugee population; (iii) giving direct benefits to refugees in the refugee situation, by improving their reception conditions; (iv) benefiting the local community hosting the refugees, for example by addressing wider environmental concerns which affect both refugees and the host community and by disseminating information on the positive impact of refugees; (v) providing training in protection issues for those dealing with refugees and migrants; (vi) building a registration component, based on UNHCR's Project Profile for persons of concern to UNHCR in the area, which could assist in measuring the impact of Regional Protection Programmes; (vii) a resettlement commitment, whereby EU Member States undertake, on a voluntary basis, to provide durable resettlement places in their countries.

⁵⁶ European Council, *supra* note 47, ANNEX I, p. 23.

⁵⁷ See *supra* note 21.

Commission were invited to develop a plan to prevent and combat trafficking in human beings.⁵⁸ Such a comprehensive plan was developed in late 2005 (European Commission 2005c).⁵⁹

The Hague Programme emphasises the role of biometrics and information for their crucial role in the management of migration flows, in particular in the fight against illegal immigration. Strengthening measures in this field such as the SIS II, the VIS, and the European Dactylographic System (EURODAC) are therefore important. Since then reports have been issued regularly on the development of the SIS II and the VIS and the activities of EURODAC. The latest progress report on the state of the SIS II reads that tests have been conducted on the system, but the Main Development Contractor encountered significant problems in the central system. The immediate consequence of this was the suspension of the Operational Systems Test (OST) on 4 September 2008, thereby putting the global schedule that foresees an end date of September 2009 in question (European Commission 2009c: 3). The latest progress report on the development of the VIS states that the project is divided into three phases. The first phase (Detailed Design) has delivered all the documents necessary to fully describe the VIS from a technical perspective and was closed during the previous reporting period. Phase 2 (Development, Testing and Deployment) is currently in progress with the Main Development Contractor having completed in 2007 an analysis of the additional system development work needed to make the VIS fully compatible with the proposed legal framework agreed in June of that same year⁶⁰ and to prepare the interfacing with the biometric component, the Biometric Matching System (BMS). In Phase 3 (Migration and Integration) it is envisaged that the Member States will connect their national systems to the VIS central database (European Commission 2008e). The Annual Report on the activities of the EURODAC Central Unit in 2007 (released in January 2009) states that in response to the evaluation report of the Dublin system covering the first three years of EURODAC, various issues were identified relating to the efficiency of the current legislative provisions. In order to address these issues the Commission put forward a proposal for a regulation amending the EURODAC Regulation on 3 December 2008 (European Commission 2008f). In terms of the management of the system,

⁵⁸ European Council, *supra* note 47, ANNEX I, p. 25.

⁵⁹ This Communication provided the basis for the later Action Plan. See Council of the European Union, EU plan on best practices, standards and procedures for combating and preventing illegal trafficking in human beings, OJ C 311 of 9 December 2005. The Annex to this plan details a table of actions for the EU ranked according to objective, type of action envisaged, time of implementation, responsible party and the indicator for its post-implementation assessment.

⁶⁰ This proposed framework, also known as the "VIS legislative package" consists of a VIS Regulation and a VIS Decision on which agreement was reached on 7 June 2007. This package was adopted in June and July of 2008. The VIS Regulation will allow consulates and other competent authorities to start using the system when processing visa applications and to check visas, see Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218/60 of 13 August 2008.

the increasing amount of data to manage (with some categories of data being stored for as long as 10 years), the natural obsolescence of the technical platform (originally delivered in 2001) and the unpredictable trends of the EURODAC transaction volume due to accession of new Member States Bulgaria and Romania, an upgrading of the system is deemed necessary. This is planned to be finalised in the second half of 2009. The progress report notes however that the essential upgrades have already been implemented (European Commission 2009a).

Other Initiatives in the Field of Migration

In December 2005, the Heads of State and Government adopted the Global Approach to migration, priority actions focusing on Africa and the Mediterranean. The Global Approach aims to formulate comprehensive and coherent policies that address the broad range of migration-related issues, bringing together different policy areas - development, social affairs and employment, external relations and justice and home affairs - and taking both short term actions as well as a longer term vision to address the root causes of migration and forced migration (Council of the European Union 2005c).⁶¹ One year later in November 2006, the Commission issued a report on the progress made in the Approach (European Commission 2006). Ministerial conferences were held in 2006 on migration and development,⁶² and migration was a recurrent theme in dialogue and cooperation programmes with Mediterranean countries, building on the work already carried out in the ENP framework. Dialogue on migration issues on the basis of Article 13 of the Cotonou Agreement was opened with key sub-Saharan African States, and FRONTEX has taken forward joint operations at

⁶¹ Specific measures include, *but are not limited to*, calls for: the implementation of joint operations by FRONTEX and pilot projects in the Mediterranean; the exploration of the technical feasibility of establishing a surveillance system covering the whole southern maritime border of the EU and the Mediterranean Sea (on which the Commission launched a Communication on 13 February 2008, COM(2008) 68 final); the presentation of an analysis of the existing international instruments on the law of the sea, including relevant aspects of refugee law (a Commission staff working document was issued on this matter on 15 May 2007, SEC(2007) 961); making migration a shared priority for political dialogue between the EU and the African Union, including through regular senior officials meetings; working in partnership with African countries and regional organisations such as the Economic Community of West African States (ECOWAS); enhancing the dialogue with key sub-Saharan African States on the basis of Article 13 of the Cotonou Agreement on issues such as institution and capacity building, and implementation of re-admission agreements; developing a regular dialogue with UNHCR to share experience and expertise on working with countries in Africa; promoting cheaper and more easily available remittance services; establishing information campaigns on the risks associated with illegal migration; engaging Mediterranean countries in the feasibility study of a Mediterranean Coastal Patrols Network, Mediterranean surveillance system and related pilot projects, where appropriate; undertaking priority work with Morocco (combating trafficking, re-admission agreement), Algeria (EC-Algeria Association Agreement migration provisions) and Libya (EU-Libya action plan on migration).

⁶² A ministerial conference on migration and development was held in Rabat in July 2006 bringing together some 60 countries along West and Central African migration routes; African and EU States participated in the UN High Level Dialogue on Migration and Development in September 2006; and an EU-Africa Ministerial Conference on Migration and Development was also held in Libya in November 2006 to formulate a joint approach to migration between the EU and the whole of Africa for the first time.

all kinds of borders: in 2006 5 sea border operations, 2 land border operations, and 2 air border operations, as well as an additional 3 operations in 2006 covering several types of borders.⁶³

One month later, in December 2006 the European Council invited the Commission to propose ways to integrate legal migration opportunities into the Union's external policies in order to develop a balanced partnership with third countries adapted to specific EU Member States' labour market needs, to suggest ways and means to facilitate circular and temporary migration, and to present detailed proposals on how to better organise and inform on the various forms of legal movement between the EU and third countries (European Council 2006: point 24a). In its response, the Commission introduced the concept of so-called mobility partnerships between the EU and third countries, which involve working closely together to manage migration flows, and in particular to fight illegal migration, in partnership with the EU, in exchange for enhanced possibilities of mobility between their countries and the EU for their citizens, in terms of legal migration opportunities and of short term movements (short stay visa issues), thereby fostering circular migration. Such mobility partnerships require close cooperation between the EC and interested Member States, as some of their components (in particular the opening up of legal migration opportunities for citizens of the relevant third countries) fall within the remit of Member States. Mobility partnerships make a contribution to the joint management of migration flows in a spirit of shared responsibility, in line with the principles of the "Global Approach to Migration". Mobility partnerships are tailored to the specific needs of each relevant third country, to the ambitions of the country concerned and of the EU, and to the level of commitments which the third country is ready to take on in terms of action against illegal migration and facilitating reintegration of returnees, including the availability of employment opportunities (European Commission 2007a).

Under the French Presidency, the so-called European Pact on Immigration and Asylum (Council of the European Union 2008) was further developed. The Pact was adopted by the Brussels European Council of October 2008. The implementation of the Pact will be the subject of an annual debate starting with the European Council in June 2010 (Council of the European Union 2008: points 19, 20). The Pact's preamble states that the current measures in the field of immigration and asylum are insufficient and further advances are necessary (European Council 2008a: 3). The Pact identifies five basic commitments for the development of a comprehensive EU policy on migration

⁶³ In 2007 FRONTEX undertook 4 sea border operations, 10 land border operations, 5 air border operations, and 2 operations covering several types of borders. A total of 10 pilot projects (2006-2007) have been implemented to complement the joint operations. All Member States participated in at least one joint operation or pilot project both in 2006 and in 2007. In 2008, 8 air and 9 land joint operations were conducted.

and asylum. First, a comprehensive approach to legal immigration should be devised, in harmony with the needs and the capacity of each Member State to receive immigrants "in a spirit of solidarity". The Pact builds upon the Commission's Policy Plan on Legal Migration and the Blue Card initiative⁶⁴, which received approval on 25 May 2009. Second, the Pact speaks of "selective repatriation of illegal immigrants". This policy area is covered mainly by the recently adopted Returns Directive.⁶⁵ However, the Pact calls on Member States to further enhance co-operation by organising joint flights for repatriation, improving readmission agreements and increasing the fight against human trafficking. Third, the Pact proposes the establishment of two separate permanent bodies of command for FRONTEX, one for Southern and one for Eastern Member States. Fourth, Member States are expected to develop common guarantees on asylum, as well as an asylum support office by 2009 and a single asylum procedure by 2010. Fifth and finally, the EU's approach to migration policy should deal with the origin of third-country immigrants. The Pact suggests offering opportunities for legal migration tied to employment and education, but stresses the significance and benefits of circular migration (c.f. *supra*: mobility partnerships).⁶⁶ The Pact forms the current basis for a common immigration and asylum policy for the Union and its Member States.

Evaluation of the Institutional and Output Dimensions

Coherence

Coherence with respect to migration policy is aimed for at multiple levels. Firstly, coherence is an important element of the quality and sharing of information and the availability of reliable statistics between Member States. Secondly, coherence should exist in terms of the mainstreaming of migration issues with other policy areas of the Union. Thirdly, coherence is strived for in terms of operational cooperation between the Member States.

Use of Technology and Quality and Sharing of Information

With respect to technological development the Union needs to make better use of new technologies for monitoring and detection by ensuring the full interoperability of existing systems, developing new tools, and making full use of the potential offered by biometrics (European Commission 2007d: 5). Furthermore, the migration management capacities as part of the core tasks of Commission

⁶⁴ See *supra* note 53.

⁶⁵ See Directive 2008/115/EC, *supra* note 21.

⁶⁶ Council of the European Union, *European Pact on Immigration and Asylum*, Council Doc. 13440/08, Brussels, 24 September 2008, pp. 5-15.

Delegations and Member States' Embassies should be enhanced and upgraded through, for example, setting up a migration support mechanism for the exchange of information, expertise and training (European Commission 2008d: 12).

Statistics on the presence of irregular migrants prove hard to obtain. Regularisations can provide information on the population of irregular migrants. One of the weaknesses in the machinery set up so far is the inadequacy of European policy on returning immigrants. Only one expulsion order in three is enforced, according to the Commission. One of the pull factors that attract illegal immigrants warrants special attention, in particular undeclared work. As long as the European market offers such openings it will not be possible to manage immigration flows coherently; indeed they can even be expected to increase (European Commission 2007d: 5). The directive proposed in May 2007 should allow the tackling of the source, the employers of workers staying illegally in the Member States (European Commission 2007b: 249). Agreement on this proposed directive was reached on 25 May 2009 and the proposal is currently awaiting adoption in the Council (see *supra*). The Commission further notes that legal immigration policies and measures to combat illegal immigration lose much of their relevance when Member States mount large-scale legalisation operations. National measures taken in isolation may weaken European cohesion and solidarity (European Commission 2007d: 5).

Mainstreaming of Migration with Other Policy Areas

The integration of immigration into the Union's external relations has helped to ensure coherence and complementarity with other policy areas and to better address the challenges associated with migration in partnership with the third countries concerned. In addition, integrating immigration into development policy is enabling immigration policy to take development concerns into consideration and vice-versa (European Commission 2007d: 10). A possible downside, however, is the contamination of the development agenda by migration (Hayes and Bunyan 2003).

Overall, the Commission calls for greater coordination between the EU and the national, regional and local levels, especially in the areas of statistics and economic, social and development policies. Furthermore, the economic, social and international dimensions of immigration should be factored into all related policy areas, including development; trade; cohesion policy; employment and social policy; environment; research; education; health; agriculture and fisheries; security and foreign policy and economic and fiscal policy. In addition, there is a need for a common methodology for the EU and its Member States to ensure transparency, mutual trust and coherence. The Commission calls for the establishment of national immigration profiles that should be developed in cooperation

with each Member State to increase knowledge of immigration flows. These profiles should ascertain the national labour market situation and immigration patterns and help to strengthen the evidence base for immigration policies that effectively address the priority needs of the Member States. These profiles will cover both immigrants already in their territory as well as potential immigrants. They should look at the skills composition of the immigrant population and identify future labour needs (European Commission 2008a: 15).

In its 2008 Communication on increasing the coordination, coherence and synergies of the Global Approach to Migration, the Commission called for the strengthening of the Policy Coherence for Development (PCD) dimension of the migration and development nexus in close cooperation with the countries concerned and with particular emphasis on the brain drain, by acquiring a more in-depth and sector-specific understanding of the current and forecast scale and impact of the brain drain; supporting the definition and implementation of country specific 'safeguarding skills for development' policies, based on training, ethical recruitment and return; and considering how best to develop ethical recruitment of health service staff from third countries, as part of a green paper on the European health workforce. It furthermore called for regular analysis and evaluation of the Global Approach in close cooperation between Member States and the Commission (European Commission 2008d: 8).

Operational Cooperation

The solidarity⁶⁷ required to enable the common immigration policies to achieve their strategic goals should include a strong financial component that takes into account the specific situation of the external borders of certain Member States and the specific migratory challenges faced by them. In this light, the coordination of activities funded through Community and national resources should be improved in view of increasing transparency, coherence and efficiency to avoid overlaps and to fulfil policy objectives of immigration policy as well as other related policy areas (European Commission 2008a: 9). In terms of partnerships with third countries, coherent and strategic use should be made of all the policy instruments developed in recent years within the framework of the "Global Approach to Migration", including migration profiles of third-countries and cooperation platforms (European Commission 2008a: 12). With respect to integrated border management, the current policy on the management of external borders should be strengthened and policies on

⁶⁷ Solidarity should be understood as meaning coordination between Member States and cooperation with third countries.

border controls should develop in coherence with policies on customs controls and on prevention of other safety and security related threats (European Commission 2008a: 12).

There is a clear need to enhance cooperation between the Commission and the Member States in third countries in the Global Approach, and to ensure that efforts are properly coordinated. There is also a need to improve and enlarge the evidence base for migration initiatives. Combining all the information available to the Commission, Member States, EU agencies and other bodies is deemed helpful to this extent. Furthermore, the operational terms of the political objectives of the EU as regards migration in its dialogue and cooperation with third countries are in need of better translation. Also, the EU and its Member States should adopt a higher profile and actively engage in promoting the Global Approach in various multilateral, global and regional cooperation frameworks, such as the Global Forum on Migration and Development (GFMD), for example through strengthening capacity building in selected source and transit countries of migration, e.g. by initiating Migration Support Teams, with experts assigned from the Member States' authorities (European Commission 2008a: 12).

Accountability

As detailed earlier in paragraph 1.1, the Treaty provisions most commonly used concerning migration are found in Titles IV TEC. Under Title IV TEC, the Parliament is involved according to the co-decision procedure on measures adopted on the basis of Articles 62(2)(a), 62(b)(ii), 62(2)(b)(iv), 63(1), 63(2)(a) and 65 TEC⁶⁸, whereas the Parliament is merely consulted (without going through the whole co-decision procedure) for measures adopted on the basis of Articles 62(2)(b)(i), 62(2)(b)(iii), 63 TEC (with the exception of 63(1) and 63(2)(a) TEC).⁶⁹

Apart from as laid down in the provisions in Title IV TEC, the holding to account of the institutional actors active within the AFSJ also takes the form of the annual debate that is held by the Parliament on the progress made in the AFSJ. In the debate on progress made in 2007, the Parliament noted that the Hague Programme was seriously behind schedule. In particular, it noted a lack of mutual trust and solidarity among Member States, especially with regard to policies on legal and illegal immigration and police and judicial cooperation in criminal matters. It went on to state that these problems also affected the phase of transposition of the few measures adopted as “an insufficient level of achievement” was witnessed in the areas of, *inter alia*, visa policy, sharing of information

⁶⁸ See *supra* on the nature of Articles 62(2)(a), 62(2)(b)(ii), 62(2)(b)(iv), 63(1), and 63(2)(a) TEC.

⁶⁹ See *supra* on the nature of Articles 62(2)(b)(i) and 62(2)(b)(iii) TEC.

among law enforcement and judicial authorities and police and customs cooperation (European Parliament 2008a: point E). The Parliament further added that the *acquis* in the field of Home Affairs is unstructured and therefore difficult to explain to citizens of the Union and at times difficult even for specialists to understand. Furthermore, it noted that in its opinion some of the instruments overlap and at times the legal basis for actions can be found in different acts (European Parliament 2008a: point F).

In order to address these concerns, the Parliament suggested a number of priorities to be dealt with by the Commission and the Council subject to the co-decision/assent procedures. The Parliament requested that the Council and the Commission drive the Union's strategy on legal migration in light of the legal migration package (Blue Card, Single Application Procedure seasonal workers, and the intra-corporate transferees and remunerated trainees proposal).⁷⁰ The Parliament further invited the Commission and the Council to table proposals on illegal migration including sanctions and an EU resettlement scheme. With respect to information systems, the Parliament urged the Council and the Commission to adopt appropriate measures to ensure the full entry into use of the SIS II.⁷¹

With regard to asylum, the Parliament requested that the Commission and the Council implement Phase II, including the revision of Council Directive 2005/85/EC of 1 December 2005,⁷² and Council Directive 2004/83/EC of 29 April 2004,⁷³ and the establishment of a European Asylum Support Office. It further emphasised the development of a Community policy on migration and asylum based on the opening up of channels for legal migration and on the definition of common standards for the protection of migrants' and asylum seekers' fundamental rights in the Union and the inclusion, within EC decisions and framework decisions, of all the provisions laid down by the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by the UN General Assembly on 18 December 1990.⁷⁴

When looking at a resolution which was aimed at a specific proposal by the Commission vividly debated in the Parliament, namely the proposal for a directive of the EP and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (the so-called "Returns Directive") (European Commission 2005b), it is notable that the

⁷⁰ See *supra* note 77.

⁷¹ European Parliament, *supra* note 53, point J2.

⁷² See *supra* note 22.

⁷³ See *supra* note 22.

⁷⁴ European Parliament, *supra* note 53, point J2, subheading "Regarding migration and asylum".

Parliament had studied this proposal meticulously and suggested many amendments (European Parliament 2007). Many of these amendments were followed through by the Council.⁷⁵ As this was a co-decision procedure, the involvement of the Parliament was significant. As with data protection issues, it is noticeable that the Parliament takes a tough stance on the protection of the individual and exerts a great effort in seeing to it that the rights of the individual (in this case third country nationals) are respected. With the original proposal dating back to September 2005, and its adoption having taken until the end of 2008, the significant delay that was associated with it is clear. This was, among other things, due to its controversial nature and the subsequent discussions in the Parliament. This Directive can be seen as an example of lengthy, yet successful, holding to account of the institutional actors by the Parliament.

In the annual debate on the progress made within the AFSJ in 2008, the Parliament again noted the persistent legal weakness and complexity of the EU decision-making process, the delays in the implementation of the Hague Programme and the difficulties in ensuring the timely and correct implementation of much recently adopted Community legislation. The Parliament called for a more extensive involvement of both itself and national parliaments in assessing the real impact of EU legislation on the ground, thereby hinting at a perceived lack of accountability (European Parliament 2009: point B). The Parliament urged the Commission and the Council once more to present as soon as possible the pending legal instruments on other “EU blue card” categories of third country workers, such as seasonal workers, intra-corporate transferees and remunerated trainees, thereby indicating that this had not been completed despite a call to work on this a year earlier (European Parliament 2009: point C3(e)). It furthermore reiterated a call to make all necessary efforts with a view to completing the projects concerned and ensuring that the VIS and the SIS II can enter into force as quickly as possible (European Parliament 2009: point C4).

Legitimacy

Input Legitimacy

As can be seen from the above analysis of accountability, the Union’s *input* legitimacy shows a different picture in terms of the accountability arrangements present depending of the level of

⁷⁵ Adopted amendments include, *inter alia*, amendment 1 on the 20 guidelines on forced return adopted by the Council of Europe on 4 May 2005; amendment 2 on the Tampere Council; amendment 8 on a fair and transparent procedure employed; amendment 9 on voluntary return and a period of voluntary departure; amendment 10 on the use of detention; among many others.

analysis. Accountability arrangements are sufficient at a very detailed level, when specific instruments and directives are concerned, yet are lacking at a more strategic policy level.

The 67th Eurobarometer of June 2007 shows that 15% of respondents find immigration to be one of the most important issues facing their country, in comparison with 21% in December 2006, indicating a drop in public weight attached to the matter (Eurobarometer 2007a: 11).⁷⁶ In December 2007, this figure remained at 15% (Eurobarometer 2007b: 22).⁷⁷ Whereas in June 2007 59% of the respondents believed immigration should be a policy dealt with at the EU level, this percentage rose to 63% in December 2007 (Eurobarometer 2007b: 29).⁷⁸ Moreover, in June 2007 29% of respondents believed that immigration issues should be dealt with more strongly in the coming years in order to strengthen the Union in the future. This percentage rose to 33% in December 2007 (Eurobarometer 2007b: 40).⁷⁹

The December 2008 Eurobarometer showed that the percentage of respondents who think immigration issues are one of the most important issues facing their country dropped further to 9%, indicating a further drop in importance (Eurobarometer 2008: 21).⁸⁰ On a personal level, only 4% of respondents felt that immigration was one of the most important issues facing them (Eurobarometer 2008: 25).⁸¹ Despite the low results related to the importance of the issue, 60% of respondents felt that immigration issues should be dealt with at the EU level, compared to 63% a year earlier. In terms of the amount of money spent on immigration issues, 8% of respondents think that most of the EU's budget *is* spent on immigration issues, whereas 12% thinks that the EU budget *should be* spent on immigration issues (Eurobarometer 2008: 68).⁸²

Overall, these figures show that the priority attached to EU migration policy has been gradually dropping. However, despite this declining relative importance that EU citizens attach to issues of immigration, the desire for citizens to see immigration policy dealt with at the EU level instead of at

⁷⁶ Response to the question: "The two most important issues facing (OUR COUNTRY) at the moment".

⁷⁷ Response to the question: "Was sind Ihrer Meinung nach die beiden wichtigsten Probleme, denen (UNSER LAND) derzeit gegenübersteht?".

⁷⁸ Response to the question: "Sagen Sie mir bitte für jeden der folgenden Bereiche, ob er Ihrer Meinung nach von der (NATIONALITÄT) Regierung oder gemeinsam innerhalb der Europäischen Union entschieden werden sollte."

⁷⁹ Response to the question: "Welche Belange sollten Ihrer Meinung nach durch die europäischen Institutionen in den nächsten Jahren verstärkt beachtet werden, um die Europäische Union in Zukunft zu stärken?".

⁸⁰ Response to the question: "What do you think are the two most important issues facing (OUR COUNTRY) at the moment?".

⁸¹ Response to the question: "And personally, what are the two most important issues you are facing at the moment?".

⁸² Response to the questions: "On which of the following do you think most of the European Union budget is spent?" and "And on which of the following would you like European Union budget to be spent?".

the level of their Member States' administration remains consistently high, indicating that the EU has a clear mandate to deal with issues of migration.

Output Legitimacy

With regard to the Union's *output* legitimacy, the Commission and the Member States invest heavily in the implementation of the Union's overall programmes through operational cooperation (see *supra*). More than ever before a broad range of (specific) instruments is at the Community's disposal in order to ensure proper implementation of the programmes. As regards output legitimacy, this is not a bad strategy in itself. It may, however, be difficult to rhyme effectiveness with the overall need for coherence as these do not necessarily go hand-in-hand.

As briefly indicated in *supra* the Commission launched a report in late 2006 on the progress made in the Global Approach to Migration. The report distinguishes between three different priority areas: (i) the increasing of operational cooperation between Member States, (ii) dialogue and cooperation with Africa, and (iii) working with neighbouring countries (European Commission 2006).

With respect to the first priority area of increasing operational cooperation between Member States, a call was made on FRONTEX to implement border management measures in the Mediterranean region, in particular joint operations and pilot projects, as early as possible in 2006 (European Commission 2006: 16). The report noted the coordinating of several joint operations by FRONTEX to assist Southern Member States. Among the operations that were carried out in the autumn of 2006 are HERA II in the Canary Islands and off the Coast of North-Western Africa, and NAUTILUS in the central Mediterranean. The purpose of these operations, which also involved the cooperation of neighbouring African States, was to enforce the control of the external maritime borders of the Union, thereby disrupting and preventing illegal immigration by sea, and at the same time contributing to saving the lives of illegal immigrants in distress at sea (search and rescue operations) (European Commission 2006: 15).

A second goal was to seek the establishment of regional networks of ILOs involving priority countries or regions, and to present reports on illegal immigration and trafficking, with the assistance of ILOs in key countries, all in 2006 (European Commission 2006: 19). FRONTEX has coordinated the detachment of experts in nationality identification from other Member States to Spain and Malta to assist the authorities of these two Member States in repatriating third country nationals who cannot remain legally in their territories. Furthermore, four key migration routes

from Africa to Europe were identified in line with the Immigration Routes Initiative and the presence of ILOs along these routes was determined. These ILOs drafted reports on illegal immigration, which gave a picture of the situation in their respective countries and operational recommendations for stepping up cooperation along the routes.

A third goal was to bring forward a proposal for the establishment of Rapid Border Intervention Teams (RBITs) to be managed by FRONTEX, made up of national experts able to provide rapid technical and operational assistance at times of high influx of migrants, in accordance with the Hague Programme, by Spring 2006.⁸³

With respect to the second priority area of dialogue and cooperation with Africa, calls were made to make migration a shared priority for political dialogue between the EU and the African Union, including through regular senior officials' meetings to prepare for EU-Africa Ministerial Troika discussions (European Commission 2006: 23). Several high-level meetings were organised with migration as their central theme, which saw the participation of many key states from Africa.⁸⁴ Another goal was to enhance dialogue by spring 2006 with key Sub-Saharan African States on the basis of Article 13 of the Cotonou Agreement, covering a broad range of issues from institution and capacity building, effective integration of legal migrants to return, and the effective implementation of readmission obligations, in order to establish mutually beneficial cooperation in this field (European Commission 2006: 25). Such a dialogue has been initiated with certain key Sub-Saharan African States.⁸⁵ Also, progress was made on the migration and development agenda. Several meetings related to this theme were organised.⁸⁶ In addition a call was made to establish a pilot Regional Protection Programme (RPP) involving Tanzania. This project began as of 1 January 2007. The project includes strengthening the capacity of national authorities to protect refugees, improving security in refugee camps, promoting voluntary return of Burundian refugees, enhancing access to resettlement and the registration of refugees (European Commission 2006: 26).

⁸³ This proposal was eventually adopted in 2007. See Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L 199/30 of 31 July 2007.

⁸⁴ See *supra* note 61.

⁸⁵ These include Mauritania, Senegal and Mali. These discussions now continue as part of the political dialogue led by Heads of Mission.

⁸⁶ Belgium and the International Organisation for Migration (IOM) organised a conference on migration and development in March 2006, which brought together high level representatives from across continents to discuss achieving greater coherence between migration and development policies, forming partnerships among countries of origin, transit and destination, and involving migrant communities in the development of their home countries. In June 2006 the Commission hosted an expert meeting on migration and development where topics such as remittances, working with the Diaspora, temporary and circular migration and the brain drain were discussed. This was done in response to calls to promote cheaper and more easily available remittance services.

With regard to the third priority area of working with neighbouring countries, it was asked to hold a Euro-Mediterranean (EuroMed) Ministerial meeting on migration in 2006. In response to this call, two senior officials' meetings were held. In these meetings it was agreed to collect information on projects and best practices in areas identified by the Barcelona Summit in November 2005: legal migration, migration and development, trafficking and return issues (European Commission 2006: 29). Furthermore, it was requested to make available experiences and best practices where appropriate from other regional cooperation structures, including those related to the Baltic Sea. In response to this, Finland hosted a Member State expert visit to the Helsinki Headquarters of the Border Guards to assess the Baltic experience in dealing with Border security management, comprising technical means, legal framework, regional cooperation and operational activities (European Commission 2006: 30).

Another goal was the undertaking of priority work with Morocco, Algeria and Libya,⁸⁷ and the intensification of research to improve understanding of migratory flows, building on the migration component of the regional JHA/ MEDA programme. MEDA stands for "financial and technical measures to accompany the reform of economic and social structures in the framework of the Euro-Mediterranean partnership". In response to this the activities launched by the Consortium for Applied Research on International Migration in the Mediterranean (CARIM), hosted by the European University Institute in Florence, Italy were continued throughout 2006 (European Commission 2006: 32).

The above Communication seems to indicate that work on the Global Approach to Migration is largely getting underway as planned. However, the state of implementation of the Hague Programme is a different story. With respect to achievement in terms of the presentation of Commission proposals and initiatives and their adoption by the Council and the EP, the overall assessment proves to be rather unsatisfactory. The most recent report by the Commission on the implementation of the Hague Programme shows a lower rate of achievement (38% of measures achieved) compared to that of 2006 (53% of measures achieved), with a substantial increase in actions that had to be delayed: 41% compared to 27% in 2006. A further 13% of measures were

⁸⁷ Negotiations on an EC readmission agreement with Morocco continued in 2006, Morocco hosted the Euro-Africa ministerial conference (see *supra* note 91) and the implementation of various projects using MEDA and AENEAS (Community Financial and Technical Assistance to third countries in the field of migration and asylum) funding were promoted; Algeria hosted an AU expert meeting on migration and development in April 2006, whereas the negotiations on the readmission agreement had not started yet at that time; various missions of the Commission have gone to Libya to discuss cooperation, Libya organised the EU-Africa Ministerial Conference on Migration and Development in November 2006 and the AENEAS funded IOM Programme for the Enhancement of Transit and Irregular Migration Management (TRIM) in Libya has continued.

deemed no longer relevant (European Commission 2008c: 2). A satisfactory level of achievement was said to have been reached in the areas of migration and border policy. An insufficient level was evident in the area of visa policy (European Commission 2006: 3).

With respect to asylum, migration and border policy, the developments in this area were satisfactory. The proposal establishing the EMN was put forward by the Commission on 10 August 2007 and the JHA Council agreed to a general approach on a draft Decision establishing the EMN on 6 December 2007. Formal adoption by the Council took place in 2008.⁸⁸ Progress towards the development of a Common European Asylum System is said to be mixed. The results of an evaluation of the transposition and implementation of the legal instruments of the first phase of the Common European Asylum System were incorporated into a Policy Plan which was released in 2008 (European Commission 2008b). Various issues were identified.⁸⁹ The evaluation showed a number of problematic issues with the Reception Conditions Directive (RCD),⁹⁰ largely due to the amount of discretion allowed to Member States in a number of key areas. Moreover, it noted issues related to the Asylum Procedures Directive (APD),⁹¹ in the sense that diverse procedural arrangements and qualified safeguards produce different results when applying common criteria for the identification of persons genuinely in need of international protection. This can be damaging to the very objective of ensuring access to protection under equivalent conditions across the EU. In order to amend these shortcomings, the Commission proposed an amended version of the RCD (European Parliament 2008b) and will propose amendments to the APD in 2009.

With respect to legal migration, several initiatives not included in the 2005 Action Plan were undertaken in 2007, in particular a Communication on circular migration and mobility partnerships between the Union and third countries⁹² and two legislative proposals.⁹³

Progress in the fight against illegal immigration has been constant and consistent in line with the idea that unless effective measures are taken to combat illegal immigration, the credibility of Europe's migration policy will be irreparably undermined. The most significant proposal in this regard was the proposal for a Directive providing for sanctions against employers of illegally staying third country nationals, on which agreement was reached on 25 May 2009 (European

⁸⁸ See *supra* note 43.

⁸⁹ See *supra* note 43, pp. 4-5.

⁹⁰ Council Directive 2003/9/EC, *supra* note 22.

⁹¹ Council Directive 2005/85/EC, *supra* note 22.

⁹² See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries, COM(2007) 248 final of 16 May 2007.

⁹³ See COM(2007) 638 final of 23 October 2007 and COM(2007) 637 final of 23 October 2007. *supra* note 55.

Commission 2007b). Furthermore, FRONTEX launched numerous activities in 2007 (see *supra*) and five readmission agreements were negotiated and concluded with Ukraine, Moldova, the Former Yugoslav Republic of Macedonia (FYROM), Bosnia and Herzegovina, and Montenegro. All these agreements entered into force on 1 January 2008.⁹⁴

The report speaks of good progress made in the areas of border management, biometrics information systems and visa policy. Evaluations of the SIS were carried out in September 2007 and the Council Decision on the lifting of controls at land and sea borders with and between the new Member States was adopted on 6 December 2007 (Council of the European Union 2007). The dismantling of air borders was completed on 31 March 2008 (European Commission 2008c: 6). The proposal establishing a mechanism for the creation of RBITs was adopted in 2007.⁹⁵ Furthermore, formal adoption of the Council Regulation amending Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third country nationals took place in April 2008.⁹⁶

The development of the VIS has been delayed, and a new project schedule has been drawn up under which the central VIS is planned to be “available for operation” at the end of May 2009 (European Commission 2008c: 7). The visa facilitation agreement with Russia entered into force on 1 June 2007. The visa facilitation agreements with Ukraine, FYROM, Serbia, Montenegro, Bosnia and Herzegovina, Albania and Moldova were negotiated and signed in 2007 and entered into force on 1 January 2008.⁹⁷ The report further notes that despite progress in relation to some third countries

⁹⁴ See, *inter alia*, Council Decision 2007/839/EC of 29 November 2007 concerning the conclusion of the Agreement between the European Community and Ukraine on readmission of persons, OJ L 322/46 of 18 December 2007; Council Decision 2007/826/EC of 22 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation, OJ L 334/148 of 19 December 2007; Council Decision 2007/817/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation, OJ L 334 of 19 December 2007; Council Decision 2007/820/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation, OJ L 334/65 of 19 December 2007; Council Decision 2007/818/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorisation, OJ L 334/25 of 19 December 2007. In addition to these, the Commission has been authorised by the Council to negotiate Community readmission agreements with several other countries. The Council so far authorised the Commission to negotiate Community readmission agreements with 16 third countries: Algeria, China, Hong Kong, Macao, Morocco, Pakistan, Russia, Sri Lanka, and Turkey. The agreements with Hong Kong, Macao, Russia, Sri Lanka, entered into force between 2001 and 2008. See: http://ec.europa.eu/justice_home/fsj/immigration/relations/fsj_immigration_relations_en.htm. Accessed on 5 June 2009.

⁹⁵ See *supra* note 83.

⁹⁶ See Council Regulation (EC) No 380/2008, *supra* note 22.

⁹⁷ See, *inter alia*, Council Decision 2007/340/EC on the conclusion of the Agreement between the European Community and the Russian Federation on the facilitation of issuance of short-stay visas, OJ L 129/25 of 17 May 2007; Council Decision 2007/840/EC of 29 November 2007 on the conclusion of the Agreement between the European Community and Ukraine on the facilitation of the issuance of visas, OJ L 332/66 of 18 December 2007; Council Decision 2007/824/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and the former Yugoslav Republic of Macedonia on the facilitation of the issuance of visas, OJ L 334/120 of 19 December 2007; Council Decision 2007/825/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and the

(Australia, Canada), there remain other third countries in connection with which reciprocal visa-free travel for citizens of all Member States has not yet been achieved (European Commission 2008c: 7).

The notification of transposition measures in the field of asylum is said to be generally rather slow (European Commission 2008c: 12). In July 2008, nine Member States still needed to fulfil their communication obligation regarding the Directive on minimum standards for the qualification and status of refugees or persons who need international protection. The obligation to do so was set before 6 February 2005.⁹⁸ Measures fully transposing the Directive on asylum procedures had at that time not been communicated by thirteen Member States. The obligation to do so was set before 1 December 2007.⁹⁹ As regards legal migration, efforts were undertaken to speed up the notifying of measures transposing Directives on family reunification and on the status of long-term-resident third country nationals. However in July 2008, respectively one and three Member States had not fulfilled their obligation, already more than two years after the transposition deadline.¹⁰⁰ With regard to illegal immigration, progress had been achieved in completing transposition of three instruments.¹⁰¹

Judging by the dates on which these measures were adopted, the process of transposition took a great amount of time. Concerning more recent measures, progress in transposition is said to be mixed. In July 2008, three Member States were said to have particular difficulties in fully transposing the Directive on assistance in cases of transit for the purposes of removal by air¹⁰², and the Court has ruled against them for non-communication. With regard to the Directive on the obligation of carriers to communicate passenger data (Council of the European Union 2004b), two

Republic of Serbia on the facilitation of the issuance of visas, OJ L 133/136 of 19 December 2007; Council Decision 2007/823/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Montenegro on the facilitation of the issuance of visas, OJ L 133/108 of 19 December 2007; Council Decision 2007/822/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and Bosnia and Herzegovina on the facilitation of the issuance of visas, OJ L 133/96 of 19 December 2007; Council Decision 2007/821/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Albania on the facilitation of the issuance of visas, OJ L 133/84 of 19 December 2007; Council Decision 2007/827/EC of 22 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Moldova on the facilitation of the issuance of visas, OJ L 133/168 of 19 December 2007.

⁹⁸ See Council Directive 2004/83/EC of 29 April 2004, *supra* note 22, Art. 38.

⁹⁹ See Council Directive 2005/85/EC of 1 December 2005, *supra* note 22, Art. 43.

¹⁰⁰ See, *inter alia*, Council Directive 2003/86/EC, *supra* note 21 and Council Directive 2003/109/EC, *supra* note 21, Art. 26.

¹⁰¹ See Directive 2001/40/EC of 28 May 2001, *supra* note 21; Council Directive 2001/51/EC of 28 June 2001, *supra* note 21; Council Directive 2002/90/EC of 28 November 2002, *supra* note 21.

¹⁰² See Council Directive 2003/110/EC of 25 November 2003, *supra* note 21.

Member States still lagged behind the transposition deadline in July 2008 (European Commission 2008c: 13).¹⁰³

Conclusion

In sum, judging from the above it becomes clear that despite significant progress in working towards a Common Immigration Policy, the collection and sharing of reliable and consistent information still proves difficult. Increased cooperation among the Member States, the Commission services and the relevant third country authorities is needed to this end. Furthermore, the linking of migration with themes such as development has helped to improve overall coherence, yet migration “clauses” should not only be integrated into policies related to development. Including migration in discussions on other themes could serve to improve overall policy coherence.

Furthermore, looking at the provisions in the Treaties and the annual reports of 2007 and 2008, it can be seen that accountability arrangements exist that provide for various degrees of parliamentary involvement. Also, the Parliamentary report on the Returns Directive shows a meticulous participation of the Parliament as well as the considerable influence of its proposed amendments. Yet, in both 2008 and 2009, the Parliament noted that not enough progress has been made in terms of the transposition of legal measures into national legislation. The Commission and the Council are held accountable for this lack of progress, yet do not seem to have undertaken significant steps in addressing this issue. Furthermore, the Parliament itself called for a more extensive involvement of both itself and national parliaments in assessing the real impact of EU legislation on the ground, thereby hinting at a perceived lack of accountability. Therefore it seems, when looking at paragraph 2 *supra*, the resolution on the Returns Directive and the annual reports of 2007 and 2008, that overall the accountability arrangements are sufficiently present yet differ in their effects. Significant attention is given to Parliamentary comments on the level of a specific directive, whereas on a more strategic policy level (i.e. general implementation of legislative measures) the Parliament’s comments are followed up much less.

Finally, the picture in terms of the Union’s *output* legitimacy is multi-fold. Since the Tampere European Council an impressive amount of initiatives have been developed and the Union has come significantly closer to realising an AFSJ and instituting a Common Immigration and Asylum Policy. The external dimension of migration is thereby one of the most dynamic ones, dealt with appropriately through initiatives such as the Global Approach to Migration, the Blue Card Initiative,

¹⁰³ European Commission, *supra* note 152, p. 13.

Mobility Partnerships and the European Pact on Immigration and Asylum, to name but a few. One can clearly distinguish a line in the policy, and the development of the AFSJ is likely to continue down this road.

There are, however, some causes for concern. The development and implementation of the Hague Programme is facing delays and is behind schedule. More specifically, the development and implementation of vital information systems such as the VIS and the SIS II are facing significant delays. Furthermore, the national transposition of Community legislation agreed under the Hague Programme is not proceeding according to schedule as Member States are lagging behind transposition deadlines. As with counter-terrorism policy, these information systems and legislative measures are the only *hard* instruments available to the Union and a lack of EU-wide implementation and transposition serves to limit the effectiveness of EU policy and prevents the realisation of a true AFSJ and the institutionalisation of a Common Immigration and Asylum Policy. Moreover, as the multitude of specific instruments may contribute to the overall level of output legitimacy that is achieved, it remains a question as to how well the Union succeeds in achieving overall policy coherence.

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