THE REGULATION OF LEGAL MIGRATION IN THE EUROPEAN UNION: ACHIEVEMENTS AND CHALLENGES

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INTRODUCTION

Regulating international migration is a complex challenge, as migration is a varied phenomenon: the reasons behind individual decisions to migrate, the circumstances under which migration takes place, the readiness of a society to accept migrants, etc. can all differ considerably from state to state. The prerogative to decide who may enter the territory of a state is a traditional element of state sovereignty, states can however enter into international agreements in this field as well, and the European Union—as a supranational actor—also regulates migration, influencing and to some extent limiting the regulatory freedom of states in this regard. In our view, however, states are not able to effectively regulate the phenomenon of migration on their own at all, and this is even more the case regarding the Member States of the European Union, countries which are integrated in a common borderless economic area with common visa regulations.[1]

This paper aims to provide a brief overview of the regulation of legal migration in the law of the European Union, and to highlight some recent legislative developments in EU migration policy.

COMMON MIGRATION POLICY IN THE EU

First of all, a terminological point needs to be addressed: the migration policy of the European Union concerns the regulation of the entry, movement, rights and situation of third-country nationals in the EU. The movement of EU citizens (that is, the citizens of the Member States) within Union territory is regarded as a form of the free

[1] The Commission adopts the same view, see for example the communication 'A Common Immigration Policy for Europe: Principles, actions and tools' COM(2008) 359 final, p. 2.

movement persons, be it economic in nature (as an element of the internal market) or devoid of commercial intentions, based purely on EU citizenship status.

The primary law legal basis of migration policy in the EU has developed gradually. Between the 1970's and the adoption of the Maastricht Treaty (1992), cooperation in this area between the Member States of the European Communities occurred via the traditional means of international law, including consultation in the form of the so-called TREVI group. As a result of the Maastricht Treaty, however, migration policy became part of the intergovernmental "third pillar" of the European Union, as an integral element of cooperation in Justice and Home Affairs. In 1997, the Amsterdam Treaty "communitarised" a number of areas previously belonging to the third pillar—that is, the areas in question have been incorporated into the EC Treaty, enabling supranational integration (and the application of the Community law-making procedures) regarding these policies, including immigration. This change also meant that from 1999 onwards, secondary sources of Community law (Regulations, Directives, Resolutions) became adoptable in these fields. Amsterdam also meant the introduction of the concept of the EU as an Area of Freedom, Security and Justice—which became a new objective of the Union. In the third pillar, only the policy areas concerning police and judicial cooperation in criminal matters remained. The entry into force of the Treaty of Lisbon saw the abolishment of the pillar structure, thus integrating the remaining third pillar areas into a unified and supranational Justice and Home Affairs Policy of the EU.

Common migration policy is thus currently a goal of the European Union[2], as part of the Area of Freedom, Security and Justice – a competence area shared between the EU and the Member States.[3]

What are the main goals of EU migration policy? According to the Treaty on the Functioning of the European Union (TFEU), the fundamental aims of this policy area are to ensure the efficient management of migration flows, the fair treatment of third-country nationals (TCNs) residing legally in the Member States, and the prevention of—and enhanced measures to combat—illegal immigration and trafficking in human beings.[4] To achieve these goals, the EU has adopted a large amount of

[2] See Section 2 of Article 3 of the Treaty on European Union (TEU)

[3] Shared competence essentially means that the Union and the Member States may both legislate and adopt legally binding acts in a given competence area, but he Member States may only exercise their competence to the extent that the Union has not exercised its competence. (See Article 2 of the Treaty on the Functioning of the European Union.)

[4] Article 79 TFEU

secondary legislation over the years, essentially since the entry into force of the Treaty of Amsterdam.

IMMIGRATION LAW OF THE EUROPEAN UNION – AN OVERVIEW

To achieve the objectives set out in the primary law (i.e. the Treaties) of the Union, the institutions of the EU adopt secondary legislation. The legal framework of migration in the EU is complex and fragmented: it consists of a large number of legislative instruments aimed at addressing specific issues of migration—legislative instruments which also vary as to their form. The EU institutions may currently adopt Regulations (binding in their entirety and directly applicable), Directives (binding as to the result to be achieved, requiring implementation into national law by the Member States) and Decisions (binding norms of an individualised nature) in the field of immigration. At earlier stages of integration, when immigration policy was based on intergovernmental cooperation, other special legal instruments were available to regulate this policy area: these legal instruments themselves had an intergovernmental nature, as opposed to the supranational character of the abovementioned legal acts.

I will present an overview of EU immigration law in four sections. (The issue of asylum is also closely linked with migration. However, the asylum law of the EU will not be considered in this paper as it constitutes a separate area of public policy and international, European and national law.)

Legal instruments regarding admission

The EU regulates the admission of TCNs via the Schengen *acquis* and visa regulations. The Schengen *acquis* refers to the body of law establishing and maintaining the Schengen Area as an area without internal border checks, coupled with enhanced and coordinated control at the outer borders of the Schengen zone.[5] The day-to-day operation of the Schengen cooperation is enabled by the Schengen Information System, the largest information system for public security in Europe that allows for easy information exchanges between national border control, customs and police authorities.[6]

[5] The 'Schengen cooperation' started in 1985 as a collaboration between five states outside the European Community framework, but was later incorporated into EU law by a protocol attached to the Amsterdam Treaty (which entered into force in 1999).

[6] The modernization of the SIS is currently underway and almost completed: by 31 December 2012, SIS II should be operational, complete with new possibilities, such as the option to use biometric data, new types of SIS-alerts, and the possibility to link different alerts (such as an alert on a person and a vehicle),while

The EU determines the list of countries whose citizens need to be in possession of a visa when crossing the external borders and the list of countries whose citizens are exempt from this requirement.[7] The EU adopted a Visa Code laying down the procedures and conditions for issuing visas for the purpose of short stays and airport transit.[8] The format of visas is also uniform.[9] The establishment of the Visa Information System (VIS) was crucial in this field: as a system for the exchange of visa data between Member States, it enables authorised national authorities to enter, update and consult visa data electronically, in an integrated system.[10]

Legal immigration

Migration is considered 'legal' when the individual in question enters the territory of the EU while fulfilling all legal requirements (i.e. is in possession of the necessary documents, etc.). The EU aims to promote and foster legal migration, claiming that well-managed migration can be beneficial to all stakeholders.[11] The framework of legal migration includes Directives regarding family reunification (establishing common rules enabling family members of TCNs residing lawfully on EU territory to join them in the Member State in which they are residing, protecting family unity and facilitating the integration of nationals of non-member countries)[12], regarding the status of long-term residents (creating a single status for long-term resident TCNs ensuring equal treatment throughout the Union, irrespective of the country of residence—and ensuring equality with EU citizens regarding numerous aspects)[13] and determining favourable conditions for the admission of students (aiming to promote Europe as a centre of excellence for studies and vocational training by endorsing the

also ensuring enhanced data protection. See in this regard Regulation 1104/2008/EC of 24 October 2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) [OJ 2008 L 299/1] and Council Decision 2008/839/JHA on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) [OJ 2008 L 299/43]

7 Regulation 539/2001/EC [OJ 2001 L 81/1] (Amended in nine instances until 2012.)

8 Regulation 810/2009/EC establishing a Community Code on Visas [OJ 2009 L 243/1]

9 Regulation 1683/95/EC laying down a uniform format for visas [OJ 1995 L 164/1]

10 The VIS was established by Decision 2004/512/EC [OJ 2005 L 213/5]. Its define the purpose, the functionalities and responsibilities for the VIS, the conditions and procedures for the actual exchange of visa data between Member States was regulated by Regulation 767/2008/EC concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas [OJ 2008 L 218/60]

11 See section 1.1 of the Stockholm Programme, the EU's justice- and home affairs political strategy for the period 2010-2014 (The Stockholm Programme – An open and secure Europe serving and protecting the citizens, OJ 2010 C 115/1)

12 Directive 2003/86/EC on the right to family reunification [OJ 2003 L 251/12]

13 Directive 2003/109/concerning the status of third-country nationals who are long-term residents [OJ 2003 L 16/44]

mobility of TCNs to the Union for the purpose of studies for a limited time)[14] and for scientific researchers (applying to TCNs who request to be admitted to the territory of a Member State for the purpose of carrying out a research project)[15]. The Blue Card Directive aims to improve the ability of the EU to attract highly qualified workers from third countries, enhancing the competitiveness of the Union in line with the Lisbon Strategy.[16] The Blue Card scheme is a clear manifestation of the intention to 'manage' migration instead of merely reacting to it, utilizing legal instruments to shape and influence social tendencies.

The social situation of legal migrants is regulated in a referring manner: the relevant Regulation extends the application of the legal norms regulating the social situation of EU citizens to TCNs falling under its scope.[17]

The newest addition to the legislative framework regarding legal labour migration is the Single Permit Directive[18], which is analysed in more detail below, aims essentially to simplify residing and working in the EU legally.

The EU also makes efforts to support the integration of immigrants in the Member States. The European Integration Fund[19] assists national and EU initiatives promoting the integration of TCNs into European societies: it supports Member States and civil society in enhancing their capacity to develop, implement, monitor and evaluate integration strategies, policies and measures, plus exchanges of information and best practices on migrant integration issues.[20]

[14] Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [OJ 2004 L 375/12]

[15] Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research [OJ 2005 L 289/15]

[16] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [OJ 2009 L 155/17.]

[17] Regulation 859/2003/EC extending the provisions of Regulation 1408/71 and Regulation 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [OJ 2003 L 124/1]. It should be noted that the two Regulations referred to by Regulation 859/2003/EC are only applicable in a situation which is not confined in all respects within a single Member State: the existence of a cross-border element is thus a prerequisite, apart from the TCN being legally resident in a Member State.

[18] Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [OJ 2011 L 343/1]

[19] Established by Decision 2007/435/EC [OJ 2007 L 168/18]

[20] For more information of the Fund and concrete actions see http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/integration-fund/index_en.htm

Illegal immigration

As stated, the present paper focuses on legal migration. However, for the sake of clarity and because of the interlinked nature of the two issues, brief mention needs to be made of the EU's efforts to fight against illegal immigration.[21] Regardless of the continued effort to combat this phenomenon, irregular migration still constitutes a major component of immigration to the EU, although 'by its very nature, no reliable figures on the number of irregular migrants in the EU exist, with estimates of fewer than 2 million up to 4.5 million'.[22] Statistics are available on the 'visible side' of illegal immigration: in 2011, approximately 343,000 persons were refused entry to the EU, some 468,500 persons were apprehended and Member States returned cca. 190,000 TCNs to countries of origin.[23] As the large discrepancy between the numbers of cases discovered and the estimated amount shows, latency is very high regarding illegal migration. It must also be borne in mind that migrants cannot only 'become illegal' by entering EU territory illegally, but for example by overstaying their temporary residence permits.[24]

The focus of the Union is on combating illegal immigration and human trafficking, taking a security-oriented approach[25] that ranges from the criminalization of 'facilitation' of illegal entry and the employment of illegal immigrants to introducing effective surveillance technologies for border control. In order to manage the flow of illegal immigrants, the EU also concludes so-called readmission agreements with third countries in order to establish an effective return policy.[26]

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[21] Taking the wording of the TFEU as a starting point, EU law and jargon uses the term 'illegal immigration'. It has been suggested that the term 'irregular migration' should be preferred as it is neither accurate nor preferable to deem an individual 'illegal', as only acts and not persons as such can be illegal from a legal standpoint. (For a terminological analysis of the issue see Paspalanova, Mila: Undocumented vs. Illegal Migrant: Towards Terminological Coherence, Migraciones Internacionales. Vol. 4, 2008/3, pp. 79-90.) Apart from numerous NGOs, the International Organization for Migration and the International Labour Organization also use the term 'irregular migration'. In this paper we will adhere to the official EU terminology.

[22] European Commission: 3rd Annual Report on Immigration and Asylum (2011) [COM 2012 (250) final], p. 4

[23] Op. cit.

[24] A study commissioned by the Transatlantic Council on Migration (a project of the Migration Policy Institute) lists eight ways in which non-nationals can become unauthorized migrants: illegal entry; entry using false documents; entry using legal documents containing false information; overstaying a visa-free travel period or a temporary residence permit; loss of status due to nonrenewal of permit; being born into irregularity; absconding during the asylum procedure or failing to leave the state after a denied asylum application; a state's failure to enforce a return decision for legal or practical reasons. Morehouse, Christal – Blomfiled, Michael: Irregular Migration in Europe, Migration Policy Institute, 2011, p. 4

[25] Carrera, Sergio - Parkin, Joanna: Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union, Centre for European Policy Studies, 2011, p. 5 (http://www.ceps.eu/book/protecting-and-delivering-fundamental-rights-irregular-migrants-local-and-regional-levels-europ)

[26] This is mentioned as the first strategic priority area of managing migration by the Council action plan 'EU Action on Migratory Pressure – a Strategic Response'(23 April 2012, No. 8714/1/12 REV 1)

International agreements of the EU concerning migration

A rich area of law and research by itself, international agreements of the EU relevant to the issue of international migration also require attention. These international agreements can relate to establishing preferential treatment for citizens of certain third countries, having a positive effect on legal labour migration[27], or—as mentioned above—may concern raising the effectiveness of return migration, facilitate the readmission of individuals residing without authorisation in a Member State to their own country.[28]

Since 2007, the Union promotes mobility partnerships: a new instrument aimed at managing migration issues in a more complex way. Mobility Partnerships are meant to promote structured and sustained cooperation with third countries along the migration routes towards the European Union, bringing added value both to the EU and the third country with regard to the management of migration flows. Essentially, the idea of Mobility Partnerships was conceived as a soft law tool fostering circular migration, based on temporary recruitment of TCNs as workforce in a particular field in an EU Member State with the possibility of renewal.[29] Mobility Partnership agreements are legally non-binding instruments and EU Member State participation is voluntary. The 'added value' of such partnerships lies primarily in the fact that they are comprehensive and reflect a global approach to migration while the EU legal instruments used so far only focused on specific aspects of the issue.[30] Of course, the soft law nature of these agreements means that the commitments of the partners are not legally enforceable.

[27] Wiesbrock, Anja: Legal Migration to the European Union, Martinus Nijhoff, 2010, p. 93

[28] Such international agreements are referred to mostly as 'readmission agreements'. For a recent assessment of these instruments by the European Commission see the Communication 'Evaluation of EU Readmission Agreements' [COM 2011 (76) final]

[29] Hernández i Sagrera, Raül: Assessing the Mobility Partnerships between the EU and Moldova and Georgia, Eastern Partnership Community, 2011 (http://www.easternpartnership.org/publication/mobility-and-migration/2011-08-23/assessing-mobility-partnerships-between-eu-and-moldova#_ftn1)

[30] European Commission: Mobility partnerships as a tool of the Global Approach to Migration [SEC 2009 (1240) final], p. 6

THE SINGLE PERMIT DIRECTIVE – SIMPLIFICATION AND A COMMON SET OF RIGHTS

The European Parliament and the Council have recently adopted the Single Permit Directive—a directive aimed at creating a single permit for TCNs to reside and work in the EU, simplifying procedures and laying down a common set of rights.[31] The adoption of the act was lengthy, with political reluctance and various clashing institutional interests drawing out the legislative process, which in the end took four years to complete.[32] The Directive is nevertheless a positive development from the point of view of legal migration, even if its content was somewhat 'watered down' in the lengthy negotiations. The implementation deadline for Member States is 25 December 2013.

The most important element of the new Directive is that in introduces a single application procedure that enables TCNs to attain a permit that pertains to residence and the possibility of employment at the same time, i.e. it is a combined residence and work permit issued by an EU Member State. The Directive, however, leaves substantial regulatory freedom to the Member States, as it is up to them to decide in the implementing rules whether the would-be TCN employee or the employer should apply for the permit, and whether applications should be submitted in the country of origin or in the Member State.[33]

The Directive also sets out to provide TCNs falling under its scope with a set of common rights: as no horizontal EU legislation regarding this matter exists, the rights of TCNs may vary depending on the Member State in which they work and on their nationality. This new legislative measure thus means to narrow the 'rights gap' between legal migrants and EU citizens, as stated in its preamble: the defining factor is the right to equal treatment in various fields related includes working conditions (pay, dismissal, health and safety), freedom of association and trade union membership, education and vocational training, recognition of qualifications, social security, tax benefits, access to goods and services and support services provided by employment offices (Article 12). In specific situations, however, equal treatment can be restricted

[31] Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [OJ 2011 L 343/1]

[32] For details and reasons see Pascouau, Yves – McLoughlin, Sheena: EU Single Permit Directive: a small step forward in EU migration policy, European Policy Centre Policy Brief, 24 January 2012

[33] Pascouau – McLoughlin op. cit. p. 2

by the Member States (e.g. excluding TCNs from study and maintenance grants and loans), but only as defined by the Directive.

Although the Directive should be seen as a positive development that simplifies residence and working permit procedures and aims to ascertain a more unified set of rights for migrant workers, it does not effectively change the fragmented approach of EU migration law. EU law characteristically regulates migration-related issues in a fragmented way, tackling specific issues in individual legal norms, resulting in various parallelly existing regimes: as a good example it may be mentioned that this new Directive will not be applicable to seasonal workers or intra-corporate transferees (two fields of labour migration that will be the subject of two new legal norms[34]), and neither shall it be applied to highly-skilled workers (who remain covered by the Blue Card Directive). The scope of the Single Permit Directive as defined by Article 3 thus also reflects this fragmented approach, detailing to whom the Directive *does not* apply in no less than twelve subsections.

CONCLUDING REMARKS

The extensive body of EU law concerning legal migration has succeeded in regulating numerous issues of this policy area. The EU legislators have also made an effort to not only react to, but to shape (control) migration, most notably by introducing the Blue Card Directive and concluding Mobility Partnerships.

The legal framework, however, has its shortcomings, and – as stated above – demonstrates a quite fragmented approach to migration, resulting from Member State reluctance to regulate admission and migration issues 'horizontally' at the EU level. The fragmentation was also noted by the Commission who—in line with the Stockholm Programme—produced a roadmap for introducing an immigration code that would consolidate and replace five Directives currently in force (regarding family reunification, long-term residence status, the Blue Card and the admission of students and researchers). Considering that the Single Permit Directive has been adopted in the meantime, and the Commission also proposed two new Directives regarding intra-corporate transferees and seasonal workers, these (draft) regulatory provisions could also be incorporated into the Code. The adoption of such a Code obviously raises the question whether the new law should only aim to consolidate existing rules, and at

[34] Pascouau – McLoughlin, op. cit. p. 1. The Commission has already presented the legislative proposals regarding the aforementioned areas – see COM(2010) 379 final and COM(2010) 378 final respectively.

least ruling out inconsistencies and identifying potential regulatory gaps, or whether this opportunity should also be utilized to introduce more far-reaching material amendments to EU migration law. This is of course a policy decision, and the original initiative of the Commission has left both avenues of action open.[35] Reacting to the initiative, the NGO Statewatch has presented its own draft Code.[36]

Previous positive examples of codification (e. g. the Visa Code and the Schengen Borders Code) indicate that a well formulated and more consistent immigration code could support the effective management of migration flows by a European Union that due to its demographic situation and its ageing society requires labour migration[37]: even with an overall EU unemployment rate of approximately 10 percent, numerous Member States are experiencing labour and skills shortages in different sectors.[38]

As a final remark, I would like to draw attention to some developments, which are not legislative in nature. In this paper I have so far reflected only on legislative answers to immigration issues by the EU, but recent judicial developments in this regard are also quite noteworthy. The Court of Justice of the EU (CJEU)—which has traditionally not played a defining role in migration law mostly due to its previously limited competence in this area—has recently handed down a line of judgments which primarily concern EU citizenship, but indirectly also affect immigrants.[39] The CJEU has had to deal with issues affecting EU citizens and TCN family members, interpreting how the dependence of a Union citizen on a TCN can influence the residence rights of the latter.[40] Most notably for TCNs, it follows from the CJEU rulings that the right of residence of an immigrant may be based on his/her family relation with an EU citizen, provided that the EU citizen depends on the TCN in such a way that refusal to grant

[35] Roadmap: EU Immigration Code (Version No 2) COM DG HOME/B1 (http://ec.europa.eu/governance/impact/planned_ia/docs/2011_home_007_eu_immigration_code_en.pdf)

[36] The draft code was penned by Professor Steve Peers and is available at http://www.statewatch.org/analyses/no-167-immigration-code-steve-peers.pdf

[37] Carrerra *et al* are of the opinion that the new EU Immigration Code needs to adopt a more rights-based approach aiming at a fair treatment between TCNs and EU citizens: Carrera, Sergio – Atger, Anaïs Faure – Guild, Elspeth – Kostakopoulou, Dora: Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020, CEPS Policy Brief No. 240, 5 April 2011 (http://www.ceps.be/book/labour-immigration-policy-eu-renewed-agenda-europe-2020)

[38] European Commission: 3rd Annual Report on Immigration and Asylum [COM 2012 (250) final] p. 4

[39] See *inter alia* Cases C-127/08 Metock and Others v Minister for Justice, Equality and Law Reform [ECR 2008 Page I-6241]; C–60/00 Mary Carpenter v Secretary of State for the Home Department, [ECR 2002 Page I–6279]; C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department [ECR 2004 Page I-09925] and C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi [Judgement of the Court of 8 March 2011, not yet reported]

[40] For an analysis from the perspective of EU citizenship see Mohay, Á. – Muhvić, D. (2012).

him/her a right of residence would deprive the EU citizen of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.

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