

# Informing the Immigration Debate

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Many areas of EU policy will be the subject of critical debate and discussion in the campaigns leading up to the European Parliament elections on 4-7 June 2009. Although the broad themes and the relative importance attached to these themes will vary substantially from one member state to another, the issues that have become EU policy and law over the past ten years in the Area of Freedom, Security and Justice deserve informed and consistent analysis. These policies touch the core of every individual's right to liberty and security in an enlarged Europe.



This Background Briefing focuses on immigration. It first sets the scene by outlining the current state of play of EU immigration policy and the next steps that are expected to be taken in the near future. We then present the key shortcomings and issues surrounding this policy domain. The concluding section highlights the main challenges in this field and puts forward key recommendations for the next five years.



This Briefing is one in a set of four dealing, respectively, with immigration, asylum, borders and data protection. They have been produced as part of a project: "Informing the Immigration Debate: Preparing for the European Parliament Elections 4-7 June" supported by the Barrow Cadbury Trust, an independent charitable foundation that funds and promotes social justice initiatives (for more information, see <http://www.bctrust.org.uk>). The Background Briefings aim to inform the debate about these controversial and often technical issues for the political parties as they prepare for the EP elections and address the voting public.

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## 1. State of Play and Next Steps

Since 1999 the EU has been developing a common immigration policy. Progress has been surprisingly rapid. EU laws set out the minimum standards for family reunification, long-term resident third-country nationals, admission and treatment of researchers, admission and treatment of students, coordination of social security systems and common rules on expulsion (for a full list of measures adopted in the field of immigration, see Annex 1). One area that has not yet been tackled fully, however, is first admission to the territory and the labour market by third-country nationals. The Blue Card proposal currently on the EU table will start this process as regards the highly skilled. The Commission will propose further measures in the second half of 2009 dealing with seasonal workers, intra-corporate transferees and remunerated trainees.

Member states have been nervous about letting too much decision-making in this sensitive field move to the EU level. In fact, the common EU immigration policy has been characterised by the predominance of intergovernmentalism and the principle of subsidiarity. This has been the case even though, since the entry into force of the Amsterdam Treaty in May 1999, these domains have fallen under the shared competence between the EU and the member states.<sup>1</sup> Indeed, member states continue to struggle to preserve their primary role in the management of admissions, stay and inclusion of non-EU nationals. A telling example of their resistance towards Europeanisation is the application of the unanimity rule and consultation procedure in the field of legal migration (i.e. conditions of entry and residence, and standards on procedures for the issue by member states of long-term visas and residence permits, including those for the purpose of family reunification).

Intergovernmentalism and subsidiarity have led the European Commission to develop new political discourses (e.g. the global approach to migration)<sup>2</sup> and new policy strategies (alternative methods of European cooperation such as the EU Framework on Integration)<sup>3</sup> in an attempt to have 'more Europe' over these nationally-sensitive areas. Another consequence of this is that the EU common legal framework on immigration developed so far provides 'minimum standards' – at times giving broad discretion to member states. However, some central aspects of immigration law now fall within the scope of EU law and are no longer open to the member states to change or to go 'below' European standards. Matters such as long-term resident status and family reunification

*“The common EU immigration policy has been characterised by the predominance of intergovernmentalism and the principle of subsidiarity.”*

are now covered by the EU principles of transparency, proportionality and rule of law and are subject to the EU legal system's monitoring and evaluation mechanisms.

Denmark, Ireland and the UK all have the possibility to opt out of this policy agenda. Although the UK does not participate in the main EU legal measures, its national law mirrors them. The rules on family reunification are very similar to the directive. The UK's treatment of long-term resident third-country nationals is very close to the EU directive as well. Even the UK's new Points Based System of labour migration is a close parallel to the Blue Card Proposal. As regards expulsion, UK rules fit fairly well into the terms of the returns directive. This is no doubt about the result of the active role the UK has played in the negotiations of measures – even where the UK has already decided to opt out. Thus, the UK could opt into the field if there were political will, without much adjustment of current national policy.

As regards next steps, the Stockholm Programme, which will be negotiated during the upcoming Swedish Presidency, will provide the policy priorities for the next five years on an AFSJ, and particularly as regards immigration and integration policies.<sup>4</sup> Further steps are expected in the fields

of labour immigration, family reunification, mobility partnerships and the integration of third-country nationals. Proposals on labour immigration, seasonal workers, intra-corporate transferees and remunerated trainees will be presented before the end of the year. As for family reunification, a wide consultation in the form of a Green Paper will be launched to assess whether the current regime is adequate. Further, the EU expects to conclude more mobility partnerships with third countries following the models of those already agreed with Moldova and Cape Verde. The Spanish Presidency of the EU (in the first half of 2010) expects to play a major role in the formalisation of the EU Framework on Integration into a proper Open Method of Coordination (OMC), which is an EU mechanism for reaching common approaches to a policy area without actually harmonising the law. Finally, on the basis of the European Pact on Immigration and Asylum and the 2008 Communication on a Common Immigration Policy, it can be expected that the debate on establishing an OMC on the wider aspects of immigration policy will be also addressed in the next phases of European integration processes affecting immigration and integration.

## 2. Shortcomings and Issues

The European integration process and the principle of free movement of persons have largely been upheld by a 'desecuritisation' logic – characterised by the abolition of border controls. The entitlement and protection offered by the EU to individuals (and their families) to freely cross borders, and while doing so benefit from the same equal

<sup>1</sup> See Article 63 TEC.

<sup>2</sup> Commission Communication, A Common Agenda for Integration – Framework for the Integration of Third Country Nationals in the European Union, COM(2005) 389, Brussels, 1 September 2005. European Commission, Communication, The Global Approach to Migration one year on: Towards a Comprehensive European Migration Policy, COM(2006) 735 final, Brussels, 30.11.2006.

<sup>3</sup> Commission Communication, Third Annual Report on Migration and Integration, COM(2007)512, 11 September 2007, Brussels.

<sup>4</sup> E. Guild, S. Carrera and A. Faure Atger (2009), Challenges and Prospects for the EU's Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme, CEPS Working Document No. 313, April.



and non-discriminatory treatment as the nationals of the host state, constitutes one of the fundamental pillars upon which the EU is founded, and a key tool to foster a sense of European identity. EU immigration policies increasingly constitute a supranational framework that confers rights and guarantees to third-country nationals.

As stated above, one of the features characterising EU's immigration policy is its nature of 'minimum standards'. The main problem with this, as revealed by the Commission's analysis of implementation of EU measures by the member states, is that the variations become so great between member states as a consequence of transposition that there is no longer any common rule, or any level playing field at European level. For instance, fees for family reunification vary from a symbolic sum of €35 for administrative costs to €1,368 in the Netherlands.<sup>5</sup> Such discrepancies in what is supposed to be a common system diminish coherency.

Further, the process of EU enlargement welcomes nationals from the new member states into this system of free movement and rights. Some member states have claimed that the freedoms of citizens from EU-10 countries (those that joined the EU in May 2004) and the EU-2 (Bulgaria and Romania) are a threat to the security (welfare system), stability and social cohesion of the receiving EU-15 member states. However, mobility from these member states to the EU-15 has remained statistically low.<sup>6</sup> According to data provided by the European Commission,<sup>7</sup> since 2004 the number of EU-10 citizens resident in the EU-15 has increased by only 1.1 million – standing now at a total of 2 million. By 2007, only 1.8 million EU-2 nationals were resident in the EU-25. Further, according to the EU's statistical agency, Eurostat, the total EU population stands currently at around 500 million. The Commission estimated in 2007 that there were around 19 million third-country nationals resident in the EU-25 (this figure was for 2005),<sup>8</sup> which accounts for only 3.8% of the EU's total population.

<sup>5</sup> In the Netherlands, an application for a visa for family reunification costs €830 and the integration test €350. Issuance of a residence permit for a temporary stay costs €188 (see European Commission (2008), "Report on the Application of Directive 2003/86 on the right to family reunification", COM(2008) 610 final, 8.10.2008, p. 10).

<sup>6</sup> Eurostat (2008), "Recent Migration Trends: Citizens of EU-27 Member States become ever more mobile while EU remains attractive to non-EU citizens", Eurostat Statistics in Focus, Population and Social Conditions, 98/2008.

<sup>7</sup> Commission Communication (2008), "The Impact of Free Movement of Workers in the context of EU enlargement – Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty", COM(2008) 765 final, 18.11.2008.

<sup>8</sup> Commission Staff Working Document (2007), "Impact Assessment 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", SEC(2007) 1408/3, Brussels, 23.10.2007, page 119.

Is immigration related to insecurity and illegality? According to FRONTEX, the EU's external border agency, in 2007 only 130,000 persons were apprehended irregularly in the EU. In a Europe of 500 million, this is not many people. Border-crossing and migration only rarely involve security issues. Addressing social exclusion remains a key insecurity challenge in Europe, and it affects EU citizens as well as third-country nationals who are long-term residents.

As enshrined in Art. 151 TEC<sup>9</sup> and Article 22 of the Charter of Fundamental Rights of the EU, diversity is a strength of the EU.<sup>10</sup> The diversity brought by migration is an asset to the EU. The use of integration as a mandatory state criterion to limit the legal channels of regular immigration (condition for having access to legality of residence and family reunification) is neither consistent with the way the EU has traditionally dealt with human mobility, nor is it coherent with the EU's motto – "United in diversity".<sup>11</sup>

### 3. Future Challenges and Recommendations

The following have been identified as major challenges for EU immigration and integration policy in the future:

First, combating social exclusion is one of the great challenges for the EU in the next 20 years. In particular, in view of the ageing of the population, ensuring that the elderly do not fall into social exclusion and that intergenerational solidarity is a reality will require complex social strategies. The principle of fair treatment and equality for resident third-country nationals with EU citizens agreed at the Tampere Summit in 1999 should continue to guide EU law and policy.<sup>12</sup>

Second, the dual challenges of the demographic transformation of the EU that point to a contracting market (through the reduction of fertility and the extended life expectancy in Europe) requires a dramatic re-thinking of EU policies towards third-country nationals. The EU must become a more welcoming place to those who seek work and will enhance our economy.

Third, mandatory, civic integration programmes on 'national and European values' pose serious conflicts with fundamental rights and non-discrimination. Imposing values (and national identity) in the context of immigration law on immigrants for enabling them

<sup>9</sup> Article 151.1 TEC provides that "The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore".

<sup>10</sup> Article 22 of the Charter of Fundamental Rights stipulates that "The Union shall respect cultural, religious and linguistic diversity". Charter of Fundamental Rights of the EU, OJ C303/01, 14.12.2007.

<sup>11</sup> For an analysis of how integration policies become instruments of restrictive integration policies refer to Guild, E., K. Groenendijk and S. Carrera (2009), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Hampshire: Ashgate Publishing (forthcoming) and Carrera, S. (2009), *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers.

<sup>12</sup> See the Presidency Conclusions of the Tampere European Council, 15-16 October 1999, SN 200/99, Brussels, Paras. 18 and 21.

to have access to EU rights and freedoms gives rise to various contradictions. Fundamental rights are there to set the limits on official criteria calling for nationalisation of the immigrant into a conception of national identity that goes beyond any acceptable (proportionate) remit of the rule of law.

Fourth, there is a serious deficit apparent in the delivery of fundamental rights in the EU, particularly to third-

country nationals. Closing this deficit so that third-country nationals are welcomed into the EU and enjoy fundamental rights in a framework of equality will require concerted efforts on the part of the EU institutions over the next 20 years. Fundamental rights and the protection of the individual (EU nationals or TCNs) must be at the heart of EU immigration and integration policy, as recognised by the EU Charter.

## ANNEX\*

### *Adopted measures*

1. Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ 2002 L 157/1), amended by Council Regulation (EC) No 380/2008 of 18 April 2008 laying down a uniform format for residence permits for third-country nationals (OJ 2008 L 115/1) [UK opted in].
2. Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 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) [UK, Ireland opted in].
3. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12).
4. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44).
5. 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 2004 L 375/12).
6. 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 2005 L 289/15).
7. Council Recommendation of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community (OJ 2005 L 289/26).
8. 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 2006 L 283/40) [UK, Ireland opted in].
9. 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 2007 L 168/18) [UK, Ireland opted in].
10. Council Directive 2008/115 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348/98).

### *Proposed measures*

1. Council Regulation extending the provisions of Regulation (EC) No 883/2004 on social security for EU citizens to third-country nationals who not already covered by these provisions solely on the ground of their nationality [COM (2007) 439, 23 July 2007].
2. Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [COM (2007) 637, 23 Oct. 2007].
3. Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [COM (2007) 638, 23 Oct. 2007].

\* The authors are grateful to Prof. Steve Peers (Essex University) for this table of measures.