Real Instituto Elcano working paper

Irregular Immigration Policy in the European Community: Action at all Stages of the Irregular Migration Flow (WP)

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Area: Demography, Population & International Migrations / Europe
Working Paper 38/2009
17/7/2009

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Summary
While EU member states have been reluctant to harmonise their policies for managing legal immigration, cooperation for the prevention and control of irregular migration has progressed.

Introduction
The title of this WP is the product of the author's creativity. The statement appears when browsing through the Justice, Freedom and Security website of the *Europa* portal, in the 'Illegal Immigration' subsection.[1] It was chosen as a heading for this text because it encompasses the gist of how the EU sees its role in the matter of irregular migration – 'combating' it at all stages– from its inception in developing countries across the globe to the end of the journey in fields and factories across the Union. Action at the European level is discussed in terms of what the Union can do better, what competences should be ascribed to the supranational level and what is better left to national authorities. In the area of immigration, this debate is particularly pertinent. Integration in justice and home affairs has been particular tedious, and the construction of the immigration *acquis* has been scattered over the years with pillarisation, control mechanisms, opt-outs, derogations and transition periods. This is understandable, as perhaps no other policy area is so intimately linked to the exercise of national sovereignty, the right of the state to decide to whom its benefits should be extended, who should be accepted within (and if so, how many) and who should be left out.

Over the past 20 years immigration has become very much a matter of politics. A certain position on immigration can make or break heads of states and governments, and from this many ills can emerge. Europeans are nervous about immigrants. Recently, Silvio Berlusconi, proponent of vote-winning anti-immigrant policies, said that he did not support the idea of a multi-ethnic Italy. In Denmark, Fogh Rasmussen's centre-right government came to power three years ago on a pledge to curb immigration and asylum-seeking, and the Prime Minister's popularity has been built on the voters' concerns about foreigners. The break-up of the Dutch government in 2006 was triggered by disputes over the tough immigration policy of the then Immigration Minister, Rita Verdonk. At the European level, perhaps what is most distressing is the result of the 2009 elections to the European Parliament, in which far-right parties profited on a platform of closed borders. Whether employment-related in the context of the undergoing financial crisis, security-

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[1] European Commission, DG Freedom, Security and Justice, Documentation Centre Illegal Immigration

related in light of the New York, Madrid and London terrorist attacks, or whether we are debating the role and place of Islam in Europe, immigration and borders (in the broad sense of the word), are a contentious issue among Europeans. More particularly, a policy of 'open borders' is unlikely to rally much popular support.

There is a growing awareness among EU leaders that at least some degree of harmonisation of immigration policies among the EU countries is required (although there is no consensus yet regarding how far it should go). Because the area of freedom, security and justice has no internal borders, Member States are not able independently to deter irregular migration. Once in the EU, migrants are free to travel without further checks to almost anywhere in the Union (23 of the 27 Member States are members of the Schengen area). This has led to a substantial cooperation between EU Member States in the area of irregular migration, not least because post-Amsterdam institutional arrangements have facilitated decision-making with respect to irregular migration (although willingness to cooperate might be the reason behind the institutional arrangement).

Tackling illegal immigration at the EU level through action at all stages of the irregular migration flow entails that the Commission's aim is to add a European dimension to the ongoing national efforts against irregular migration, as noted in its 2001 Communication on a Common Policy on Illegal Immigration.[2] The Commission's rationale is that the fight against irregular migration is an essential part of a common immigration policy at the European level, as noted in the same document. In its 2006 Communication on policy priorities in the fight against illegal immigration of third-country nationals, the Commission states that without reinforced Community action, 'the crisis would increase both in qualitative and quantitative terms'.[3] As discussed later in this paper, Community action has mostly focused on controls and deterrence. It is reasonable to say that irregular migration is more efficiently tackled through a balanced and wide-ranging array of instruments, which –besides controls– include properly managed legal immigration channels, especially for labour migrants. Yet the latter has so far been absent from EU immigration policy, as the Union does not have the competence to establish numbers and admission criteria for legal migrants, which remains the authority of the Member States. Therefore, the Community concentrates on 'hard' policy measures, aimed at 'combating' irregular migrants, as identified in the 2001 Commission Communication, particularly as regards visa policy, infrastructure for information exchange, co-operation and co-ordination, border management, police co-operation, aliens and criminal law and return and readmission policy.

[2] European Commission (2001), COM/2001/672 final.
[3] European Commission (2006), COM/2006/402 final.

However, EU action on irregular migration consists of more than just measures aimed specifically at irregular immigrants. Perhaps EU action against irregular migrants is just as much about what is not being done as what is being done. Migrants that do not satisfy the conditions for legality, or fall between provisions, are considered irregular. Therefore, when the Community takes any type of action that regulates in one way or another legal migration stocks and flows, or gives a set of rights to a particular group of people, it indirectly affects irregular migration as well. Visa policy, for instance, while facilitating the free movement of legal migrants, can also significantly contribute to the prevention of illegal immigration.[4] Effective action at the European level to counter irregular migration is hard to achieve without a common EU policy on legal migration.

Asylum and immigration have become an EU competence since the entry into force of the Treaty of Amsterdam in 1999. Immigration policy guidelines are agreed through five-year work plans: the first in Tampere in 1999, then The Hague in 2004 and the third is due to be adopted under the Swedish EU Presidency starting in the second half of this year. The broad idea that underpins these immigration action plans is that, given the free movement of people across the EU (and that of third-country nationals throughout the Schengen area), divergent national policies no longer make too much sense. Entry into a Member State also means entry into Europe and thus solidarity in the management of migration flows is a recurrent demand at the EU level, particularly from countries that control an external border.

The Commission defines 'illegal immigrants' as comprising three groups of people:[5] (1) third-country nationals who enter the territory of a Member State illegally by land, sea or air, either by using false documents or with the help of criminal trafficking networks; (2) those who enter legally with a visa or under the visa-free regime and overstay; and (3) the unsuccessful asylum seekers who do not leave after a final and negative decision to their request for asylum. The Hague programme of 2004 sets the agenda for the 'fighting' these forms of irregular migration for the period 2005-10 in a number of policy areas, namely border security, return, cooperation with third countries and illegal employment. EU policy in the area of immigration is a shared competence at the national and supranational levels. However, immigration is a domain over which Member States are hesitant about the need to have more Europe. Even if since 2005 qualified majority voting and the co-decision procedure apply in most of the areas relating to the free movement of persons (Title IV TEC), matters as important as legal and labour migration to and between Member States are being decided on the basis of unanimity in the Council and by consultation with the European Parliament (if and when the Lisbon Treaty enters into force, these matters will be brought under co-decision and qualified majority voting).

[4] European Commission (2001), COM/2001/672 final.
[5] European Commission (2006), COM/2006/402 final.

This analysis focuses on the policies that have been issued by the European Community in order to stop irregular immigrants from coming into the EU (migrant flows) and those aimed at reducing the numbers of those already here (migrant stocks). A great deal is devoted to the issue of borders, which is used in the broad sense of the word. The 'Security at the border' section looks at the security measures in place at the southern Schengen frontier, and in this case border means a line of demarcation between Europe and the immigrant-sending countries. Technological borders are less tangible but no less useful to deterrence. This section shows how technological innovation is used to control and even to predict future population movements. Technical advances are steadily being absorbed into the efforts to combat irregular migration and this means that the control function is exported away from the demarcation line and into the sending and receiving societies. Irregular migrants who make it to Europe face a permanent threat of repatriation. The return measures in place in the Member States have adopted a set of common European standards that, for better or worse, provide the basis for a possible future comprehensive European immigration policy. A policy of return does not function without an External dimension of the EU's approach to irregular immigration, that is, without the cooperation of the sending countries. Relations with third countries are of vital importance to the EU's approach to irregular migration, as not much can be done without the assistance of governments from the sender or transit countries. This means that the Community often needs to engage in give and take with them. There is also an internal dimension to the fight against irregular migration through a few Internal measures. These are mainly aimed at employers, with a view to curbing the possibility of irregular migrants finding work in the EU, which is a magnet to would-be irregular migrants.

Thus, so far the Community's immigration policies have been built around cutting back the number of irregular migrants and not on creating legal alternatives. However, this is not entirely the fault of the Community, as it can only act within the powers bestowed on it by the Member States. However, justice and home affairs is one of the fastest-growing European policy domains and still an ongoing project. Hence, there is likely to be increasing integration in the immigration area.

Security at the Border

Free movement throughout the EU is one of the most cherished and visible rights conferred to EU citizens and for those living on the 'right' side internal free movement is made possible by external borders. Border management is part and parcel of the EU's policies to combat illegal immigration, a priority action in the EU's Global Approach to Migration.[6]

[6] European Council (2005), Presidency Conclusions, Brussels, 15/16 December 2005.

The EU border-control system of today is a legacy of the Schengen Agreement of 1985, which aimed to abolish border controls between the five signatory countries.[7] Evidently, if a group of countries are to abolish frontier controls between themselves, they need to compensate this control gap with measures at their external borders. The Schengen Convention, in force since 1995, created the necessary flanking measures: a single external border with common rules on crossings, where immigration checks would take place in accordance with identical procedures, common visa rules and asylum applications. As this form of cooperation was created outside the EU institutional framework, the European Commission was merely an observer and at the time it considered Schengen a 'laboratory' for future Community-wide action in border management. Today, 23 of the 27 Member States are members of the Schengen area, making the EU's external borders a *de facto* EU-wide concern.

The Justice and Home Affairs Council meeting of 13 June 2002 adopted an action plan for the management of the external borders of the EU's Member States.[8] The plan, which is in force today, provides for a set of operational measures by Member States aimed at establishing co-ordination and co-operation mechanisms, common integrated risk analysis, personnel and inter-operational equipment, common legislation and burden sharing between the Member States and the EU. This common legislation is the Schengen Borders Code[9] and the intended (intended, because this is not always the case) .mechanism of burden-sharing and solidarity is called FRONTEX.[10]

FRONTEX, the EU borders agency, was created in 2005 to complement the national border management systems of the Member States. In fact, each Member State is responsible for managing its respective borders, so that FRONTEX's task is to coordinate the operational cooperation between Member States in the field of border security, and not to stop the influx of migrants. However, it also ends up performing rescue operations. The then EU Commissioner for Justice and Home Affairs, Franco Frattini, is satisfied with FRONTEX, saying that it has a deterrent impact on irregular migration flows as 'the first eight months of 2007 showed 72% fewer migrants crossing to the Canaries and 41% fewer in the central Mediterranean than the year before' (Economist, 2008).

The creation of FRONTEX is the first concrete step in the institutionalisation of EU border management and in the financial solidarity among Member States, although it is still at an early stage. Article 8 of the Council Regulation that established FRONTEX says that the agency will assist Member States in circumstances requiring increased technical and operational assistance; however, these circumstances are not clearly defined and therefore further direction on this from the European Council (Donoghue *et al*., 2006) is required.

[7] These were France, Germany, Belgium, Luxembourg and the Netherlands.
[8] European Council (2002), 10019/02.
[9] Regulation (EC) No 562/2006.
[10] Council Regulation (EC) 2007/2004.

Moreover, FRONTEX's operational capabilities are entirely dependent on the solidarity of Member States and the degree of cooperation they wish to engage in. Thus, even if border control at the EU level has been steadily communitarised since the adoption of the Schengen Agreement, the Member States are still resisting delegating power to the supranational level, which is clearly regarded as a prerogative of national sovereignty (Carrera, 2007). On the other hand, Member States on the external borders of the EU, notably in the Mediterranean, which are mostly and directly affected by the increased movement of irregular migrants originating from North Africa, have called for more financial support from other European governments (Donoghue *et al*., 2006).

In order to perform its duties, FRONTEX is entirely dependent on the officers, ships, helicopters and other equipment that the Member States are willing to provide. This has not always worked out well.[11] For instance, in the summer of 2006, when Spain registered particularly large numbers of migrant arrivals in the Canary Islands –a total of 31,863 irregular immigrants in 2006 compared with 4,790 in 2005 –see Carrera, 2007, quoting data from the Government of the Canary Islands–), the Spanish Deputy Prime Minister and her counterparts embarked on a European campaign to make sure that Member States recognised that this was a European problem, not just a Spanish one. But other Member States were not eager to support Spain in its immigration efforts, blaming the landings on Spain's 2005 amnesty of more than half a million undocumented immigrants. This shows that politics do play a prominent role in FRONTEX operations, whereas it is technically supposed to be an independent agency, free of any political bickering.

'The best ever example of European solidarity', according to Frattini, was in 2007 when the EU's Interior Ministers agreed to set up a rapidly deployable force of border guards to assist countries facing an immigration emergency. The rapid border intervention teams (RABIT), operational under FRONTEX, are a pool of some 450 national experts made available at short notice of up to five working days to any Member State whose borders are under 'urgent and exceptional' strain from illegal migration. All 27 countries are required to contribute to the teams, whose prime goal is to combat irregular immigration in the Mediterranean and Atlantic coastal areas. So far no Member State has requested the intervention of RABIT which, once in action, will be able to provide information on the feasibility of a fully-fledged European Border Guard, an idea which is recurrent in Commission communications on border management[12] (FRONTEX actually originated in the failure of Member States to agree in 2002 on setting up a European Border Guard).

The further development of the RABIT teams is part of the Commission's 'Border Package' presented on 13 February 2008, which according to the Commission encompasses new ideas 'for the control of our borders, at check points as well as along the length of the border, using the most advanced technology to reach the highest level of

[11] European Commission (2008), COM(2008) 67 final.
[12] European Commission (2002) COM(2002) 233 final and European Commission (2008), COM(2008) 67 final.

security, whilst at the same time facilitating the procedures for bona fide third country nationals wishing to enter the Schengen area'. The idea is that while Member States remain the sole authority responsible for controlling their own borders, the EU will develop a common legislative framework, common large-scale IT systems and foster practical cooperation between Member States. The package includes three proposals, intended to be operational by 2015.

The creation of a European Border Surveillance System (EUROSUR),[13] a satellite-based border surveillance facility, should provide the common technical framework for streamlining the cooperation between Member States and facilitate the use of technology for border surveillance purposes.[14] The main purpose of EUROSUR is to prevent unauthorised border crossings, thereby reducing the number of illegal immigrants trying to cross the Mediterranean and reach Europe. Secondly, the role of FRONTEX is to be enhanced, notably for the facilitation of EUROSUR, including the creation of a network that integrates all maritime surveillance systems. FRONTEX is expected to move forward with the operational coordination to counter illegal immigration at the southern maritime borders.[15] The third and most talked-about proposal of the integrated border-management package is the entry-exit system.[16] This aims to record on a biometric platform the dates of entry and exit of third-country nationals who enter the EU for periods of up to three months. The idea is to have a tool that is able to identify overstayers. Overstaying the duration of Schengen visas or the maximum period of three months for nationals who do not need a visa is the largest source of migrant illegality in the EU. Today, passports are being stamped at the entry and exit of the Schengen external border, but the dates of these movements of third-country nationals across the external borders are not recorded. According to the Commission,[17] this alert system would allow national authorities to identify overstayers and take the appropriate measures. It would act as a deterrent against overstaying and it would provide information on overstaying patterns (travel routes, fraudulent sponsors, country of origin and reasons for travelling) as well as data on migration flows and overstayers that would be used for visa policy purposes. However, it is not yet clear what type of 'appropriate measures' can be taken in the event of overstaying. Registering entries and exits at the EU borders might provide quantitative data regarding the numbers of overstayers throughout the EU, but actually finding the migrants, who might be anywhere in the Union, is a totally different story. However, the mechanism could have an important deterrent effect, leading would-be irregular migrants to think twice about using this method. But the system also has the potential to make the lives of irregular migrants more difficult by forcing them to lead even more reclusive and hazardous lives. Researchers have also found that tough border

[13] European Commission (2008), COM (2008) 68 final.
[14] Europa Press release (2008), MEMO/08/86.
[15] European Commission (2008), COM(2008) 67 final.
[16] European Commission (2008), COM(2008) 69 final.
[17] *Ibid*.

controls compel immigrants to deal with professional smugglers, making it more likely for the illegal smuggling networks to prosper.

Technological Borders

The extensive use of technology in EU border management has meant that borders, in the classical sense of the term –a fixed line of demarcation– have seen their substantive and institutional elements transformed, as well as deterritorialised. Security concerns about trans-border crime and terrorism have led to the development of European databases, information networks and –notably– biometric technology.

National policy initiatives have already included biometrics for border management. Privium at Schipol Airport in the Netherlands and IRIS at Heathrow in the UK both use iris recognition technology and, from 2009, all EU passports will feature a digital fingerprint and photograph. In the US, under the US-VISIT programme, all foreigners entering on visas will have their hands and faces digitally scanned. Starting from 2011, non-EU citizens who apply for a visa will also have to give their biometric details. The benefits of biometrics with regard to policing irregular migrants are two-fold. First, if a migrant does not have identity papers, his identity can be determined by taking his biometric data (fingerprints, face scan) and comparing them against a database of similar records. Secondly, the identity of a migrant can be verified by comparing his biometrics with those of the person he claims to be on a database. The Visa Information System (VIS) is currently being designed as a database to contain photographs and fingerprint information from third-country nationals who apply for a Schengen visa. As a future tool, the VIS will be a pivotal part of the plan to combat illegal immigration, because it targets third-country nationals who apply for visas with a view to overstaying their duration. The VIS will contain the personal details of the applicant, digitised photographs, biometrics (fingerprints) and EU visa history, ie, visas requested, issued, refused, annulled, revoked or extended.[18]. Having access to the immigration history of a visa applicant, consular authorities presume that they are able to predict their future immigration behaviour and thus identify those most likely to overstay. According to the Commission,[19] VIS should improve the administration of the EU's common visa policy, consular cooperation and consultations between central consular authorities. The retention of personal data in VIS will also prevent 'visa shopping', namely the submission of several applications to different Member States' consulates to increase the chances of obtaining a visa from the most 'friendly' consulate. The VIS can be used to facilitate the return of irregular resident migrants by providing information on his identity and country of origin. At present there is a large pool of migrants who cannot be expelled because they refuse to disclose their identity and country of origin. The VIS is also supposed to facilitate the application of the Dublin II Regulation, which determines which

[18] European Commission (2004), COM(2004) 835 final.
[19] *Ibid*.

Member State is responsible for examining an asylum application lodged in the EU (in short, if the asylum applicant is in possession of a Schengen visa, the Member State which issued that visa is responsible for examining the asylum application). VIS, together with another instrument, EURODAC, is designed to prevent abuses of the asylum systems of the Member States and to facilitate the application of the above-mentioned Dublin II Regulation. EURODAC consists of a computerised central database that compares the fingerprints of asylum applicants. By comparing fingerprints, Member States are able to determine whether an asylum applicant has previously claimed asylum in another Member State, thereby preventing 'asylum shopping'. EURODAC also logs the irregular migrants who are apprehended while trying to cross irregularly one of the EU's external borders or while sojourning irregularly in an EU Member State. For instance, if a migrant is found to sojourn irregularly in a Member State, his or her fingerprints can be compared against the EURODAC central database, and if it appears that the migrant concerned has applied for asylum somewhere else, he can then be sent back to have the asylum application dealt with in that country (although fingerprints of irregularly residing migrants are not stored, but simply checked). The initial scope of EURODAC has thus been extended from dealing with refugees *stricto senso* to also include irregular migrants (Aus, 2006). Perhaps this is a result of the fact that the flows of irregular migrants are increasingly mixed. It is difficult to distinguish flows of asylum seekers from those of economic migrants and the irregular migrant of today is the asylum seeker of tomorrow. Irregular migrants are also recorded in the Schengen Information System (SIS). This is a border control tool for the purpose of law enforcement, and the second-generation SIS II – with new features and able to address the needs of an enlarged EU– has been under development since 2001 (it is not yet clear as to when SIS II will be fully operational). Data on persons and objects fed into SIS are divided into several categories for the purpose of this analysis; however, Art. 96 of the Convention Implementing the Schengen Agreement refers to data on 'aliens for whom an alert has been issued for the purpose of refusing entry'. About 90% of the data on persons stored in SIS refer to the category of aliens for the purpose of entry refusal to the EU (Brower, 2006). SIS is an IT alert system that lies at the heart of the implementation of the Schengen *acquis*. It operates by a hit/no-hit system, thus enabling the competent authorities to identify a person (or an object) with a view to taking specific border control or law enforcement action. In the case of irregular immigration, when the SIS produces a hit on an irregular immigrant, the standard procedure is to refuse entry into the Schengen area. According to Broeders (2007) and Guild (2001), although the SIS is primarily intended to maintain order and security in the Schengen area, its main preoccupation lies with managing irregular immigration. For instance, the vast majority of entries on persons between 1999 and 2004 referred to immigrants in the meaning of above-mentioned Article 96 (Broeders, 2007). The second-generation SIS II, besides accommodating the new Member States, will have some additional functions and incorporate significantly larger amounts of data and new types of information, such as biometrics. There is even an attempt to increase the synergy

between VIS and SIS II in order to render them interoperable, as so far the databases are two separate projects functioning on separate platforms.

Recapping, these are all the irregular-immigration protection layers a third-country national would have to go through once all the databases are fully operational: all third-country nationals who require a visa to enter the EU are registered in the VIS; the consular authorities consult the SIS before a visa is issued; the transport companies perform the first check on the travel documents before the third-country national is able to embark on a carrier bound for the EU (according to the Carrier Sanctions Directive, which will be reviewed later in this WP); moreover, Council Directive 2004/82/EC requires the air carriers to supply the EU border authorities in advance with the personal data of all travellers on incoming flights to the Union, thereby allowing the authorities to perform security checks before passengers arrive at the Schengen border; once at the border post, the SIS database is consulted again, this time by the border authorities, and a thorough check on purpose of stay and means of subsistence is also performed; the date of the entry into the Schengen area is recorded in the entry-exit system; if the third-country national applies for asylum once in the EU, the EURODAC database stores his fingerprints; EURODAC is also used to run searches on third-country nationals illegally present in a Member State –also those who overstay their visa or the three-month visa-free period–; if this happens, the third-country national is liable for deportation and a 5fiveyear re-entry ban to the EU. Thus, taken together, SIS II, VIS and EURODAC will introduce an unprecedented level of surveillance of the movements of third-country nationals in general, and those of irregular migrants in particular. According to Broeders (2007), these databases also have a 'preventive function', seeking to log in as many immigrants as possible from suspect legal categories (such as asylum seekers) and suspect countries of origin (in need of a visa), in order to control the number of immigrants who might become irregular at some later stage of their lives. However, while the benefits of biometric technology are highly praised, those in charge hardly ever recognise its drawbacks. Does the additional security it provides justify the cost involved (with the inclusion of biometrics and supporting documents, the VIS would cost €157 million for development, while the annual operating costs would amount to €35 million)[20] or are we heading towards a situation where an elaborate sledgehammer has been built only to crack a nut with it? Another issue at stake is what happens to the data once it has been gathered, who has access to it and for how long, as the effectiveness of biometrics is easily undermined by failures of process or policy. The availability of personal data leads to a situation where end-users can be screened without their knowledge, leading to the misuse of personal information, unforeseen or consented to at the time of enrolment (Thomas, 2005).

[20] European Commission (2003), COM(2003) 771 final.

Return Measures

Technology facilitates the identification and therefore the deportation of irregularly-residing migrants. Non-voluntary return is controversial, and it is entrenched in issues most likely to lead to impassioned debates, such as human rights, fundamental freedoms, detention, physical forced removal, exclusion and *non-refoulement*. It is also the final element of immigration policy and, as such, is a part of all national efforts against irregular migration. The Commission considers that 'illegal entry, transit and stay of third-country nationals who are not in need of international protection undermine the credibility of the common immigration policy'.[21] Therefore, a common return policy for irregular migrants is regarded as an essential ingredient of a common European immigration policy. The EU Directive on common standards and procedures in Member States for returning illegally staying third-country nationals[22] was tabled by the Commission in September 2005. The Directive offers some degree of harmonisation regarding the procedures regulating the expulsion of illegal immigrants from the territories of all EU Member States, and it is the first major piece of European immigration law adopted under the co-decision procedure (Acosta, 2009). It concerns rules on return, removal, use of coercive measures, detention and re-entry into the EU. The Commission hopes that in the long run these rules will form the basis for a fuller harmonisation.[23]

The Return Directive foresees two stages for the return of irregularly-residing aliens from the EU's Member States. First, for a period of between seven and 30 days voluntary departure is offered to the migrant concerned. If voluntary departure does not take place, a repatriation order might be issued with the use, as a last resort, of coercive measures to carry out the removal of a third-country national who resists it. The Directive also establishes a maximum detention period for irregular migrants of six months, which can be extended for another 12 months in certain circumstances. This particular point has perhaps been the most controversial in the debate surrounding the adoption of the Directive. Detention periods vary between Member States. Some, such as Finland, Sweden, the Netherlands and Estonia had no limits in their national legislation for detention periods. Rumania had a maximum detention period of six months, France of 32 days, Hungary of one year and Latvia of 20 months. Thus, while for some Member States capping detention periods to a maximum of 18 months is a positive development, for other Member States it is an opportunity to increase them: Spain will extend the period under which illegal immigrants can be held in custody from 40 to 60 days), while in Italy a bill currently in the Senate increases the period of detention from two months to six. The Directive also provides a re-entry ban of no longer than five years and the right to judicial remedy with legal aid to be made available to migrants who lack sufficient resources. Unaccompanied minors are offered extra guarantees, taking into account the best interests

[21] European Commission (2006), COM/2006/402 final.
[22] Directive 2008/115/EC.
[23] European Commission (2009), SEC (2009) 320 final.

of the child in accordance with the 1989 United Nations Convention on the Rights of the Child.

However, human rights groups have criticised the adoption of the Directive. The UN High Commissioner for Human Rights, Louise Arbour, said that the Return Directive is difficult to combine with 'advancing the fundamental principles of the protection of individuals' rights who are in a very vulnerable situation' (EU Observer, 2008). Developing countries where migrant to Europe originate have also heavily criticised the Return Directive. The President of Argentina considers the Directive 'inadmissible', while the Chilean President said that it 'could seriously harm the human rights of immigrants' because of the 'degrading' treatment it allows, including the possibility of 'even children and teenagers being deported to third countries' (Human Rights Tribune, 2008).

It is up to the individual Member States to decide how to manage irregularly-residing third-country nationals, namely whether they should be deported or regularised. However, all Member States practice deportation and its use is more widespread than that of regularisations. In light of the European Pact on Immigration and Asylum of 2008, the general feeling is that in the future there are likely to be more returns and less generalised amnesties. Today, the conditions under which the removal of irregular migrants take place in the Member States are more or less transparent and the rules underpinning them are more or less clear. There is a risk that Member States who have higher standards for the return of irregular migrants will lower them to the minimum allowed under the Directive. On the other hand, Member States whose standards are already at the minimum level permitted by the Directive are unlikely to raise them. Still, the Directive requires some Member States with low standards to raise them in respect to at least some of the issues covered by the Directive. In the same vein, if the Return Directive were not adopted, nothing would prevent Member States from adopting lower standards than those allowed by it. The Commission's rationale is that at the European level, clear, transparent and fair rules are generally offered to irregular migrants who face deportation, while national discretion is being limited.[24] This is enhanced by the fact that Community mechanisms to assure compliance with the EU *acquis* will become applicable. Hence, the Commission will be able to monitor and have a degree of control over Member States' practices as regards immigrant return.[25]

Two instruments at the European level facilitate the implementation of the EU's return policy. First, on the financial side, the Community Return Fund provides financial support to Member States. Not having sufficient resources allocated for such operations negatively affects the standards and quality under which the return of irregular migrants from Member States takes place, whereas the Return Directive aims to harmonise such practices. Therefore, Decision 575/2007 of the European Parliament and of the Council

[24] *Ibid*.
[25] *Ibid*.

establishing the European Return Fund offers €676 million for the period 2008-13. The instrument's general objective is to support the efforts of Member States to improve the management of return with a view to aiding the fair and effective implementation of the common standards on return. The Fund is also a means to 'share the burden', a demand particularly made by the Member States on the EU's Mediterranean border.

Secondly, for a return policy to actually work, the sending countries need to agree to cooperate and take migrants back. One of the big drawbacks of a return strategy is that many countries are unwilling to facilitate the return of their nationals. When return deals are signed with partner countries, deportations from Europe rise. Even more importantly, the EU seeks agreements so that third countries take back not just their own nationals, but also stateless and unidentified migrants who have passed through their territory on their way to Europe (transit migrants). So far the European Commission has reached readmission agreements with several third countries[26] while others are currently under negotiation.

The External Dimension of the EU's Approach to Irregular Immigration

The roots of the relations with third countries in the field of immigration were established by the Treaty of Amsterdam, which conferred powers to the Community in regard to readmission (Art 63(3) of the Treaty of the European Community), and the Presidency Conclusions of the Tampere European Council of 1999. Today, partnership and dialogue with non-EU countries are known as the global approach to migration, an idea put forward by the British Presidency of the European Council in 2005. The Commission defines the Global Approach to Migration as the external dimension of the EU's migration policy.[27] As noted by the European Council in 2006, the global approach 'underlines the need for a balanced, global and coherent approach, covering policies to combat illegal immigration and, in cooperation with third countries, harnessing the benefits of legal migration. It recalls that migration issues are a central element in the EU's relations with a broad range of third countries'. This global approach has been built around three dimensions: legal migration and mobility, irregular immigration and migration and development.

One of the main challenges facing the successful implementation of the EU's global approach to migration is securing the cooperation of third countries, as called for at the 2002 European Council in Seville. The latter's conclusions state that any future agreement

[26] Readmission Agreements have been signed with Hong Kong, Sri Lanka, Macao, Ukraine, FYROM, Serbia, Bosnia-Herzegovina, Montenegro, Moldova and the Russian Federation; furthermore, negotiations with Pakistan have been completed, while talks with Morocco are at a final phase and those with Turkey were blocked in December 2006. Talks with Algeria and Georgia should start in 2009. Informal discussions with China are currently taking place with a view to launching formal negotiations (Peers, 2003, and SEC (2009) 320 final).

[27] European Commission (2008), COM(2008) 611 final.

concluded by the European Community with any country should include a clause on the joint management of migration flows and the compulsory readmission of irregular migrants.[28] Thus, the fight against irregular migration is externalised and incorporated into the area of foreign relations of the European Community, including trade and development policies. According to the European Commissioner for External Relations and European Neighbourhood Policy, 'migration policy and movement of persons have become strategic priorities of the EU's external relations'.[29] The European Community pursues two objectives through the externalisation of immigration policy:

(1) Trade and development agreements are part of a long-term strategy aimed at eradicating the root causes of both legal and irregular migration, by addressing the circumstances by which people immigrate in the first place –the so-called *push factors* in international migration–. The development of the sending countries is a key element for preventing would-be irregular immigration by improving conditions in the countries of origin. Having a development strategy in place means also having a more balanced approach to irregular migration, by emphasising not just the security-aspects but also by understanding the need to tackle the broad factors behind the reasons that drive people to migrate outside their countries. Migrants are pushed by the perceived added-value of life in Europe; hence, by creating the conditions for a dignified future in their own country, fewer people will venture into an undocumented life elsewhere. This was one of the ideas behind the first Euro-African Conference on Migration and Development held in Rabat in 2006, that integrated the three dimensions of the Global Approach to Migration. Regarding migration and development, the EU Ministers and their African counterparts adopted an Action Plan which, among others things, granted €18 billion worth of development aid to Africa for the period 2007-13 (EU Observer, 2006). The funds are intended to dissuade illegal immigration through development and poverty-reduction measures in the countries of origin. In its Communication on migration and development,[30] the Commission targets three specific areas of action in the migration-development nexus: remittances, diasporas and circular migration. Remittances are highly relevant to irregular migration, since private transfers to the countries of origin have the potential to contribute to the development of migrant-sending countries. By some accounts, in many African states remittances are of more importance than international aid and form the second most important source of foreign currency after foreign direct investment (Noll, 2006). For irregular migrants, the sending of remittances does not jeopardise their undocumented status, as the transfers are anonymous. Also, while a development policy yields substantial results only in the long term, remittances cater to more immediate needs. The Commission

[28] Europa Press Release (2005), MEMO/05/351.
[29] Europa Press Release (2007), SPEECH/07/80.
[30] European Commission (2005), COM(2005) 390 final.

considers that the benefits of such monies can be increased through cheap, fast and more secure forms of transfer. Currently, different regulatory regimes apply throughout the EU and the transfers are still expensive. According to the Commission, the added value at the European level would be to establish a level playing field with a new legal framework for payment services in order to enhance transparency, efficiency and competition.[31]

(2) In the short-term, the control-oriented approach requires third countries to accept provisions for allowing the return of irregular migrants and rejected asylum seekers, both own nationals and transit migrants, as well as to cooperate with the Community in the management of irregular migrant flows (Trauner & Kruse, 2008, see also Article 13 (5c) of the Cotonou Agreement). The second meeting of the Euro-African Process in 2008 in Paris, although further committing the Union to financial and technical assistance to partner African countries, expects the latter to cooperate in the EU's efforts against documentary fraud, border control and the return of irregular migrants and in combating the smuggling of migrants.[32] The question that arises is what kind of *sticks* can the EU use if a partner country does not cooperate in the joint management of irregular migration flows and to what extent is any kind of punishment even desirable. According to Peers (2003), by imposing penalties on a third country through reducing trade or aid, the latter will have both fewer resources and less incentives to cooperate in the return of irregular migrants. Moreover, if the EU's penalty actions deprive a third country of valuable resources to develop, its population is more likely to migrate to the EU. Perhaps in this particular context, inducements are more likely to yield results. In this regard, an issue that is mainly at stake for countries in the developing world is the preferential access to visas for their citizens. The EU operates a set of visa lists: a negative list for the nationals of countries who must be in possession of a visa when crossing the external borders of the EU, and a positive list for nationals who are exempt from the requirement.[33] According to the Commission,[34] irregular migration constitutes one of the main considerations according to which nationals are distributed between the two lists. The Hague Programme[35] acknowledges the link, 'in the context of the EC readmission policy it would be opportune to facilitate, on a case by case basis, the issuance of short-stay visas[36] (long-term visas are a competence of the Member States) to third-country nationals… as part of a real partnership in external relations, including migration-related issues'. By tying collaboration on curbing migration flows with

[31] Through the Directive on Payment Services - Directive 2007/64/EC.
[32] Paris Conference on Migration and Development, Final statement.
[33] Council Regulation (EC) No 1932/2006.
[34] European Commission (2009), SEC (2009) 320 final.
[35] European Council (2004).
[36] EU Observer (2008).

visa relaxation policies,[37] the Community therefore benefits from the use of a strong incentive which is contingent with the need to have readmission agreements in place as well as the cooperation of third countries in the joint management of irregular migration flows. This partnerships boils down to one key trade-off: if partner countries are willing to combat illegal migration, this will lead to easier access to the EU for their citizens (Collett, 2007). For instance, under the current visa facilitation agreement with Russia, EU visa fees are fixed at €35, the issuing period is cut to 10 days and the number of documents required is reduced. Students, schoolchildren and disabled people are exempt from visa fees, while businessmen and people visiting relatives in the EU find it easier to travel. A further step is visa liberalisation, which is currently under discussion between the EU and the countries of the Western Balkans. The Commission issued a roadmap to visa-free travel for citizens of Serbia, FYROM, Montenegro, Albania and Bosnia-Herzegovina with one of the benchmarks being the region's efforts to combat illegal immigration.

This does not mean that sending countries are eager to give in to the EU's readmission demands. The important amount of remittances sent by irregular migrants back home would be cut short by such agreements.

The idea of externalising borders through cooperation with third countries went even further in 2003 and 2004, when the British, German and Italian governments backed the idea of creating transit detention camps in North Africa under EU supervision for would-be asylum seekers. The aim was to stop irregular immigrants from reaching the EU, an idea reminiscent of Australia's 'Pacific Solution'.[38] After being suggested by Tony Blair in 2003, the German Interior Minister Otto Schily revived the idea in 2004, and indicated that Tunisia might be a possible location for a camp housing Africans trying to reach Europe. The proposal has been severely criticised and failed to obtain EU-wide support from the Member States. France and Spain fiercely opposed the plan while the European Commission noted that any measure against illegal migration must comply with principles and obligations derived from refugee and other human rights law. However, the issue is not dead and buried. The EU's Justice and Interior Ministers agreed at an informal meeting during the Dutch Presidency of the Council in the second half of 2004 to create reception centres for asylum seekers in Algeria, Tunisia, Morocco, Mauritius and Libya, not under supervision of the EU but under that of the respective countries (Dietrich, 2004). Italy, for instance, has funded the construction in 2004 of a detention centre for irregular immigrants in Libya, with two more camps under development at that

[37] Agreements on visa facilitation are in force between the European Community and the Russian Federation, Albania, Bosnia & Herzegovina, Macedonia, Moldova, Montenegro, Serbia and the Ukraine.

[38] Under the 'Pacific Solution', migrants attempting to reach Australia were held in high-security camps built by the Australian government on the islands of Nauru and Papua New Guinea, with a view to limiting the flow of asylum seekers. Both camps are now closed.

date (Turco, 2005). Most recently (May 2009), the Italian coast guard, under the 'Friendship, Partnership and Cooperation Treaty' signed between Rome and Tripoli in August 2008, returned a group of immigrants back to Libya immediately after being intercepted at sea and without giving them the possibility of applying for asylum in Italy. The asylum requests of these migrants are to be processed in Libya and not in Italy, which has been the case until this occurrence. According to Human Rights Watch, Libya is not a signatory to the 1951 Refugee Convention and does not have a domestic asylum law. The Office of the United Nations High Commissioner for Refugees (UNHCR), which is processing these asylum applications, operates in Libya without a formal agreement with the government (since Libya does not officially recognise the UNHCR's existence). It is commonly considered by human rights organisations involved in the issue that Libya is an unsafe country for irregular immigrants who are forcibly returned there. The Italian Interior Minister has said that the Italian coast guard's action was a 'historic achievement' that could 'represent a twist in the fight against illegal immigration' (*Times of Malta*, 2009). Malta is the only EU Member State to welcome Italy's decision to return the group of rescued migrants to Libya (the vast majority of irregular immigrants arriving in Malta leave from the Libyan coast); however, there has so far been no criticism from the other Member States or the Commission, at least not publicly. The Italian move is based on a bilateral agreement with Libya and therefore neither FRONTEX nor other Member States will be able to send to Libya those intercepted at sea. Yet this does not seem to be an isolated case. At least under its current government, Italy has overtly embarked on a strategy of sending more irregular migrants intercepted at sea back to Libya, clearly shifting the state of play in the Mediterranean. A somewhat positive effect might be deterrence: aware of the risks, fewer immigrants will take a chance at sea. However, exporting Europe's problem to a developing country that is less able and willing to care for the wellbeing of refugees denies asylum-seekers what should rightfully be theirs.

Shifting immigration controls to third parties is not a new practice in European immigration policy. The Directive on carrier sanctions[39] harmonises the financial penalties (of up to €500,000) imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission into the EU. Carrier sanctions have been in place in some Member States since the 1990s, when common rules were introduced with the Schengen Convention. The scope of the Directive is to shift part of the responsibility of immigration controls to the transport companies. These must ensure that third-country nationals who intend to enter the Union possess the necessary travel documents and visas. Transport companies also have to secure the return of the passengers who are refused entry at the EU frontier. A study commissioned by the European Parliament and conducted by Rodier (2006) finds that carrier sanctions have the effect of privatising identity and visa controls, by making the employees of the transport companies responsible for immigration checks well before the travellers arrive to the EU. Even if the implementation of the Directive is to be carried out without prejudice to the

[39] Council Directive 2001/51/EC.

obligations of the Member States resulting from the 1951 Geneva Convention, the European Parliament's study finds that penalties for carriers 'who assume some of the control duties of the European police services, either block asylum-seekers far from Europe's borders or force them to pay more and take greater risks to travel illegally'. As transport companies try to avoid the possibility of being fined, asylum-seekers are more likely to be refused transportation. Guiraudon & Lahav (2000) say that pre-border control is exactly what the Member States are seeking, namely the interception of refugees before they even have the opportunity to lodge their asylum application in the EU, while at the same time liberalising and accelerating other types of border movements which are beneficial for the Union, such as tourism and trade. Commentators refer to this approach as a 'delocalisation of the border' and 'remote control', ie, the removal of part of the border functions away from the border (see Walters, 2006, and Guiraudon, 2003).

Internal Measures

The Union has been given competence in policing the return of irregular migration. The reverse of repatriation, the regularisation of irregular migrants is still regarded as a strict national policy tool. As already mentioned, national authorities are free to decide how to handle the stock of irregular migrant on their territories. If the idea of expulsion is one that enjoys the full approval of all Member States, the reverse side of the coin, the legalisation of irregular migrants does not. On the contrary, its use provokes ire among Member States since, once regularised, these immigrants are free to travel anywhere in the Union. Moreover, it is also argued that regularisation policies generate a substantial 'pull factor', attracting more migrants to Europe in the hope that governments will subsequently legalise their status. On the moral side of the debate, irregularity itself is seen to be rewarded through subsequent legalisation. Spain's demand for help from other Member States in order to manage its porous Mediterranean borders has not been welcomed by the other Member States, precisely because it had just completed at the time a large-scale general amnesty programme. A regularisation policy is at odds with the generalised trend in the EU on prevention, deterrence, border enforcement, control and repatriation. What use, it might be argued, is it to have sophisticated measures in place if Member States hand out legalisation papers. However, irregular immigration cannot be singled out and considered outside the broader immigration context and the relationship between a country and its immigrants. Whether a country embarks on a general amnesty programme or not depends on its own internal conditions. A lack of alternatives, namely a well-functioning policy for legal migration, can put pressure on a country to legalise certain categories of irregular migrants.

In light of the calls for a common immigration policy at the EU level, both European Institutions and Member States have been vocal on the issue. There have been repeated calls to limit the freedom of Member States to engage in large-scale regularisation programmes because of the potential impact they might have on Europe as a whole. In its

Communication[40] of June 2004, the European Commission acknowledged that regularisations 'offer a form of encouragement to illegal migration' and that such practices should not be 'regarded as a way of managing migration flows', but rather 'avoided or confined to very exceptional situations'. The first step at the EU level in this regard has been the adoption of the Council Decision on the establishment of a mutual information mechanism concerning measures Member States take in the areas of asylum and immigration.[41] The Decision, based on Article 66 of the EC Treaty, requires national authorities to inform the other Member States and the Commission of national measures in the areas of asylum and immigration that are likely to have a significant impact on other countries or on the EU as a whole. Regarding regularisation policies, this simply means that each time a Member State wishes to adopt such a procedure, it will be compelled to first inform the other EU members.

The regularisation issue was again addressed at the EU level during the French Presidency of the EU in the second half of 2008. Immigration has been a priority for the French Presidency and in this regard, French President Nicolas Sarkozy, has been calling for a European Pact on Immigration and Asylum. The Pact, which has been agreed by all Member States, is supposed to pave the way for a future common EU immigration policy. With respect to regularisation, France has been very vocal, repeatedly calling for an agreement to outlaw such practices. The Pact urges governments 'to use only case-by-case regularisation, rather than generalised regularisation, under national law, for humanitarian or economic reasons', while enforcing the view that 'illegal immigrants on Member States' territory must leave that territory'.[42] An initial draft of the Pact proposed an outright ban on mass regularisations; however, this was deleted from the final text. Even if the majority of governments in the EU openly oppose general amnesty programmes, they are reluctant to commit themselves to common policies which restrict their freedom to legislate on immigration and which make them give up a certain policy line altogether (Collett, 2008). The Immigration Pact is based on principled considerations and not necessarily on practical ones, especially as regards the stance that 'irregularity should not be rewarded' (Kraler, 2009). This line of thinking is also found in various Commission communications on irregular migration. Obviously, a principled stance on this issue avoids answering what is a very practical problem, namely what is to be done with those irregular migrants who are non-deportable but who at the same time have no viable alternative out of irregularity. It is unlikely that there will be large-scale regularisation programmes in the Member States, while at the same time the emphasis will be on the expulsion of irregular migrants.

Another pull-factor tackled at the European level, this time through a binding legislative instrument, is the employment of irregularly-staying third-country nationals. The

[40] European Commission (2004), COM(2004) 412 final.
[41] Europa Press Release (2006), IP/06/1317.
[42] Council of the European Union (2008), Presidency Conclusions.

European Council is convinced that illegal employment available throughout the Union is one of the main pull factors driving illegal immigrants.[43] Therefore, at the beginning of 2009 the European Parliament endorsed draft legislation for a Directive penalising employers who illegally hire staying third-country nationals. Thus, the idea is to have a deterrent to discourage irregular immigration from coming to Europe. To this end, the Directive lays down minimum common standards on sanctions and measures to be applied in the Member States against employers who hire irregularly-residing third-country nationals. The EU's Member States already have sanctions in place to combat illegal employment, but they vary in intensity and level of enforcement. Therefore, the draft Directive is the first effort to standardise sanctions across the EU and is a means to ensure that countries enforce them effectively. Thus, while the Directive's paramount goal is to tackle irregular migration, the target is the employer and not the irregular immigrant himself. These sanctions ought to be 'effective, proportionate and dissuasive against the employer' and should include financial sanctions which rise according to the number of illegally-employed third-country nationals, as well as the payment of the cost of returning illegally-employed third-country nationals once return procedures are carried out.[44] Thus, the 'only' direct repercussion of the Directive on the irregular migrant is his deportation. Moreover, the employer is also required to pay any outstanding remuneration to the illegally-employed third-country national as well as an amount equal to any taxes and social security contributions that he would have had to pay had the third-country national been legally employed.[45] In this regard, the Directive also targets exploitative working conditions and seeks to compensate migrants subjected to this type of labour.

The Directive also provides for the setting up of effective mechanisms through which the migrants in illegal employment can lodge complaints against their employers, either directly or through third parties, such as trade unions and associations. More contentiously, the Directive provides that in a series of cases, illegal employment shall constitute a criminal offence. This is the case when the infringement continues or is persistently repeated, when the employer simultaneously engages a significant number of illegally employed third-country nationals, when the infringement is accompanied by particularly exploitative working conditions, when the employer is aware of the fact that the worker is a victim of human trafficking and, finally, when the irregular migrant employee is a minor. In the case of such criminal offences, 'effective, proportionate and dissuasive criminal penalties' shall apply. Criminal law is traditionally a national competence; however, an ECJ ruling in 2005 on environmental law[46] says that the Community can adopt legislation harmonising criminal sanctions under the EC Treaty rules as opposed to the intergovernmental procedure which applies to the 3rd pillar.

[43] European Council (2007).
[44] Proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals.
[45] *Ibid*.
[46] Court of Justice of the European Communities (2005), Judgment of the Court of Justice in Case C-176/03.

Nevertheless, the British government, for instance, has opted out of the Directive precisely due to concerns over what it regards as a lack of legal basis for the Community harmonisation of criminal sanctions.

Initially, the Commission's proposal included a clause for the inspection of the employee's records in 10% of a Member State's companies. This, however, was watered down in the final text, which now says that Member States should undertake 'effective and adequate inspections based on a risk assessment'. Committing to inspect 10% of the work establishment in a Member State would have imposed an increased administrative burden on the Member States, whereas now only around 2% of the companies are subject to such inspections.

Indeed, the existence of an underground economy and the fact that EU Member States face bottlenecks in terms of supply of both skilled and unskilled workers generate demand for people willing to work under certain conditions, usually for a fraction of the minimum salary and without social and welfare protection. But in order to have a supply of irregular workers, there has to be a demand. It is no secret that irregular migrant labour sustains certain economic sectors in the Member States, notably agriculture, construction and domestic care for the elderly. Hence, measures that target unlawful employment need to be coordinated with the creation of legal channels through which the otherwise irregular migrants should be diverted. In this regard, in 2001 the Commission made proposals for a directive on economic migration aimed at regulating the entry and residence conditions for all third-country nationals in paid and self-employed activities. At the time, Member States did not sufficiently support the Commission's proposal (legal economic migration requires unanimity in the Council), so the proposal was shelved and eventually withdrawn by the Commission and replaced with another set of legislative proposals. In its Policy Plan on Legal Migration of 2005, the Commission presented a package of legislation that addressed the conditions and the procedures of admission for a few selected categories of economic immigrants.[47] Thus, rather than having a policy for all third-country nationals entering the EU for labour as it had intended in 2001, the present proposal contains four instruments addressing four different types of labour migrants: highly skilled workers, intra-corporate transferees, remunerated trainees and, more relevant to the issue of irregular labour migrants, a proposal for a directive on the conditions of entry and residence of seasonal workers. According to the Commission,[48] seasonal workers are needed in certain sectors (mainly agriculture, building and tourism) where many immigrants work already, albeit illegally and most probably under precarious conditions. In the same vein, the Commission is also looking into how circular migration[49] can be promoted as a tool to help address the labour needs of EU Member States, while at the same time allowing third-country nationals to benefit from legal

[47] European Commission (2005), COM(2005) 669 final.
[48] *Ibid*.
[49] Europa Press Release (2007), MEMO/07/197.

migration opportunities. According to the Commission, 'circular migration can be defined as a form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries'. In fact, one of the reasons irregular migrants are reluctant to leave EU territory and return to their countries of origin is because if they leave, there is no legal option for them to eventually return. So even if temporarily out of work, migrants are locked in. Circular migration would cater to this need, allowing migrants to work during the availability of seasonal work and otherwise return to their country of origin, with the possibility of coming back when work is available again. Applied to seasonal migration, the idea would be to have a residence and work permit to allow third-country nationals to work for a certain number of months per year over a period of several years. Thus, the creation of legal migration channels is one of the ways to fight irregular migration. It is, however, unclear how much the Community can achieve in this regard, as Member States retain as their exclusive competence the conditions of entry of legal third-country nationals, as well as the right to establish their number (through migrant quotas). Even if –and when– the Lisbon Treaty enters into force, the role of the EU in the area of legal labour migration remains weak.

Conclusions

Immigration means different things to different Member States. It can easily be argued that Finland, for instance, is more relaxed about tackling irregular migration than, say, Italy, and this is also because within the EU, there are significant differences in the numbers of irregular migrants. But what one state does with its immigration policies affects the rest of the Union, particularly within the Schengen area. This is why at least some degree of harmonisation of immigration policies at the European level is necessary. Member States agree that there is a need for a common EU immigration policy and in this respect one particular aspect of immigration policy, irregular migration, has seen a substantial degree of cooperation. The EU action in this respect has been wide-ranging and includes comprehensive measures, ranging from the prevention of would-be irregular migrants in their countries of origin to the return of those who managed to settle irregularly somewhere within the EU. This cooperation in fighting illegal migration has taken the form of harmonisation of laws (as in the case of the Directive on the return of irregular migrants and the Directive on employer sanctions), coordination of operational cooperation (FRONTEX, RABIT), the use of advanced technological instruments (SIS, VIS, EURODAC and biometrics in the future) and cooperation with third parties (agreements with third countries and the Directive of carrier sanctions). Besides these, Member States cooperate through the sharing of information (through ICONet, a web-based network for the exchange of strategic, tactical and operational information concerning illegal migratory movements between Member States),[50] the networks of Immigration Liaison Officers of Member States posted in the sending countries and the support of Europol.

[50] European Commission, DG Freedom, Security and Justice, wide-ranging common actions to combat illegal immigration at the EU level and promote the return of illegal immigrants.

Both push and pull factors are tackled, through the acknowledgement of the link between development and migration and through tackling the possibility of illegal employment in Europe. The missing link (thus far) has been the use of legal migration channels at the European level as a counter-current and alternative to irregular migration. Deterring and controlling mechanisms can only go so far. While borders are certainly a necessary part of an orderly and beneficial immigration policy for both migrant and receiving society, as long as economic disparities and political oppression exist, people are prone to move in search of alternatives. In an ideal world, people would move out of choice, not necessity. As this is not the case, zero migration is not an attainable goal, but irregular migration might be reduced through a combination of border and internal controls, and the creation of legal migration channels, particularly for economic migration. So far, the 'measures at all stages of irregular migratory flows' focus on prevention, control and deterrence –on security and not so much on the economic aspect–. For those who follow developments at the European level in the area of immigration, the assertiveness of the Community on legal migration is the signal that the EU is ready to have a comprehensive immigration policy at all stages of the migratory flow.

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