

THE IMMIGRATION AND ASYLUM POLICY OF THE EUROPEAN UNION

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1 Introduction

Mass migration, as it appears in the 21st Century, is one of the greatest challenges of our globalized world. Nothing makes this more obvious than the massive increase in the rate of immigration in recent years that has mostly affected Europe. At the peak of the European migration crisis, in 2015 *over 1.000.000 migrants* crossed the borders of the European Union, either to seek refuge from persecution or just in hope of a better life. As Donald Tusk, the President of the European Council put it in his opening address to the Valletta Summit on Migration⁵¹¹ in November 2015: ‘The number of people on the move globally has never been so big.’

However, the insecurity apparent in the way leaders of the EU treat the crisis and in their approach to future challenges of migration is clearly illustrated by the contents of the *European Agenda on Migration* published in May 2015 by the European Commission. It claims: ‘[w]hile most Europeans have responded to the plight of the migrants, the reality is that across Europe, there are serious doubts about whether our *migration policy* is equal to the pressure of thousands of migrants, to the need to *integrate* migrants in our societies, or to the economic demands of a Europe in demographic decline.’

The unanswered questions of EU immigration policy that emerged over the past few decades have become more pressing than ever. One of these urgent questions is: how can we provide for a developing European economy in an era of *demographic decline* in a way that it is based on the *opportunities opened up by legal forms of migration*. A second, perhaps more burning question is: how can the European Union ensure the safety of the incoming people in need and, at the same time, keep away illegal migrants and eliminate criminal activities related to migration. Built on the ruins of WWII, the European Union is destined to spread the principles of peace and unconditional respect for human rights not only within its own borders, but also on a global scale, when engaging in international affairs.⁵¹² In addition to observing human rights, however, the European

511 European and African heads of state and government were invited to the summit with the particular aim to enhance their cooperation in dealing with issues related to migration, to seek answers for the current challenges, and to discuss the opportunities brought about by migration.

Union must also take into account all *security considerations* that are pertinent in guaranteeing the free movement of its citizens within the Member States.⁵¹³

What is more, the crisis made it all the more obvious that Member States with a different historical, economic and cultural heritage have *different perspectives* on particular issues related to migration vindicating their sovereign rights to legislate in a number of areas. Therefore, when formulating its migration policy the European Union should not unnecessarily interfere in areas traditionally regulated by national law.

It is important to consider, however, that on their own, individual Member States are often unable to cope with the challenges posed by the crisis, as such, it has by now become obvious that an area formerly perceived to be marginal in the European Union, i.e., immigration and asylum policy, is now the key to the future of Europe, and must therefore be reinforced. Following a short historical overview, we shall give an account of the major steps taken in and the most important legal instruments of EU immigration and asylum policy, accompanied by a brief overview of the European Agenda on Migration published by the European Commission in May 2015 in response to the crisis.

2 Historical background

We may better understand the migration and asylum policy of the European Union if we put it in a *historical context*. The rebuilding of the European continent began after WWII attracting a great number of foreign workers to the war-torn countries of Europe, mainly from southern, Mediterranean countries and from the former colonies.⁵¹⁴ The majority of foreign workers arrived within the framework of *migrant worker programmes* and were only granted temporary residence in the host countries. The large-scale recruitment of foreign workforce and the generally liberal practices in granting work permits were cut short by the economic recession at the end of the 1960's and the first oil crisis in 1973. During this period Member States were already taking measures to limit the influx of foreign workforce, partially due to the increase in the unemployment rates and the growing social tensions created by the arrival of the migrants and fuelled

512 Naturally, the EU intends to fully comply with these principles in its foreign relations, including its agreements with third countries.

513 While citizens may therefore move freely in the 'Area of Freedom, Security and Justice', they also have the right to security. This can best be achieved by the stringent control of external borders, and thus, the exclusion of unwanted persons from third countries, and by the proper management of issues related to migration.

514 Workers from the former colonies mainly settled down in the Netherlands and the United Kingdom, while Germany, Denmark, and Sweden received foreign workforce primarily from North Africa and Turkey.

by the fear that the growing migrant communities appearing in certain Western countries would pose a significant threat to social cohesion. However, the stricter rules applied by the receiving countries to the entry of foreigners resulted in the permanent *settlement* of those foreign workers who had arrived earlier, since they faced the risk of not being able to re-enter once they left the receiving country. The same period was characterized by unstable political and economic conditions in certain countries of origin, e.g. in Turkey, further contributing to the fact that many third-country foreign workers, who originally only planned on a temporary stay, finally decided to settle down in the receiving country. Naturally, the phenomenon of permanent settlement gave rise to a dramatic increase in entries for the purpose of family reunification, which contributed to the second major wave of migration.

From the end of the 1980s Member States received an *increasing number of third-country nationals seeking refuge from conflicts and arriving under the protection of international law*. After 1989, the Balkan Crisis and the conflict in the Middle-East triggered a sudden and dramatic increase in the influx of asylum seekers and refugees, and the tendency continued for several years.

Although from 2004 onward the rate of influx of migrants arriving to the European Union seemed to demonstrate a modest decline – except for certain southern Member States, as well as the United Kingdom and Sweden –, the immigration of third-country nationals nevertheless significantly contributed to population growth, and in many countries the rate of immigration exceeded that of natural growth. As far as the purpose of entry is concerned, the first decade of the new Millennium witnessed a significant increase in the figures of employment related migration, since almost 40% of the migrants entered the receiving countries for that purpose.

The most recent, and still ongoing wave of migration is the outcome of the crisis that erupted in 2011 in North Africa, commonly referred to as the Arab Spring,⁵¹⁵ which prompted tens of thousands of African migrants to try and reach Europe at the shores of the Italian island of Lampedusa.⁵¹⁶ Since then, this series of events has gained further momentum due to the conflicts ravaging the Middle East. Growing numbers of refugees mainly from the Middle East, the Balkans

515 Political oppression, the global economic crisis and the recent burst of population growth in North African countries are among the primary causes of the Arab Spring. The protests first started in Tunisia and in Libya. The fall of Colonel Gaddafi practically opened the way for migrants from inside the African continent to Europe. In 2011 the wave of protests reached Syria and escalated into a civil war due to the operations of the Assad regime.

516 The first, highly mediatised major disaster occurred in October 2013 when a boat that was transporting migrants shipwrecked and 400 people lost their lives. The event triggered the Italian government to launch Operation Mare Nostrum that was intended to search and rescue migrant ships even near the shores of Lybia.

and Central Asia attempt to enter the European Union by crossing the Mediterranean or via the Western Balkans migration route.

3 The legal framework

3.1 History and main periods of EU immigration and asylum policy

The general legal framework for the adoption of EU rules on immigration and asylum has changed over time, but it has moved steadily towards increased EU competence and a greater role for the *supranational Community method*.

The first period of the immigration and asylum policy of the European Union spanned the beginning of integration until 1993. In this period the national governments had exclusive competence in policy related to migration and refugees, and they entered into ad hoc forms of co-operation with one another while maintaining their sovereign privileges. The idea of 'Fortress Europe' emerged in this period, an approach in which migrants were perceived as a threat to public order and blamed for taking advantage of the social services provided by the state.

The beginning of the second period of EU immigration and asylum policy is marked by the Maastricht Treaty, which entered into force on the 1 November 1993. After the incorporation of justice and home affairs (JHA) into the Treaty on European Union – institutionalizing thereby a 'diluted' form of intergovernmental structure – issues of migration were dealt with also on the EU level. While the treaty emphasized that the regulation of migration is of common concern, the national governments maintained their key role in shaping the policy. Nevertheless, the Maastricht Treaty brought the issue of migration into the centre of political and regulatory activities and it became a regular topic of intergovernmental negotiations. Intergovernmental cooperation, however, suffered from a number of flaws, mainly due to the requirement of unanimity, and the lack of parliamentary participation and judicial review.

The fairly limited output of the EU in this field marked by this period stood in stark contrast to the successful development of a legal framework established outside the EU system. This was the *Schengen Convention* signed by six Member States (Germany, France, and the Benelux States). The signatory States have abolished all internal border controls between themselves and, as a corollary, they strengthened their common external border control. They also agreed to adopt a common visa policy and to establish rules on the allocation of powers related to asylum applications, irregular migration and judicial and police cooperation. At the heart of the Schengen mechanism lay an information system set up by the signatories. The SIS allows Schengen States to exchange data on sus-

pected criminals, on persons who had been denied the right to enter the EU, on missing or stolen property. The Schengen Convention was applicable from 1995.

The 1997 revision of the founding treaties of the European Union in Amsterdam opened a new chapter in the immigration policy of the EU, since a new title IV was inserted into TEC III entitled ‘Visas, asylum, immigration and other policies related to free movement of persons’ within the ‘Area of Freedom, Security and Justice’. As a result, ‘community’ competence was extended to measures taken in the areas of asylum, immigration and safeguarding the rights of third-country nationals, external border controls, visas, administrative cooperation and judicial cooperation in civil matters. Enhancing community competence obviously required certain compromises. The Treaty defined a *temporary period* of five years ending on 1 May 2004 during which all important Council decisions still required unanimity, while Member States maintained their right to propose regulations, and the European Parliament was not an equal party to the decision making process but was merely consulted.

Finally, it is necessary to mention that the Treaty of Amsterdam integrated the 1985 Schengen Agreement and the 1990 Convention implementing the Schengen Agreement and measures based upon it (the so-called Schengen acquis) into the EU legal order without the participation of the UK and Ireland.

3.2. Changes brought about by the Treaty of Lisbon

Initiated by the Nice Intergovernmental Conference the creation of the *Treaty of Lisbon* marked a major milestone in the history of European integration. The Treaty of Lisbon entered into force on the 1 December 2009 bringing about significant changes in the ‘Area of Freedom, Security and Justice’ by eliminating the pillar structure.⁵¹⁷

With the elimination of the pillar structure the ‘supranational Community method’ became the general rule, i.e., decisions are now made by a *qualified majority voting*.⁵¹⁸ The Treaty also extended the powers of the European Parliament, since now this area is regulated through the ordinary legislative procedure. The co-decision process, including QMV, now applies both to the regulation of legal migration, as well as the establishment of visa lists and visa formats. This system facilitated agreement upon a number of legal migration proposals that had previously been vetoed by the Member States. In accordance with the provi-

517 The ‘Area of Freedom, Security and Justice’ is regulated in Part 3, Title V (Arts. 67-89) of TFEU and in Art. 276 TFEU. Provisions on policy are regrouped in five chapters: 1. General provisions; 2. Policies on border checks, asylum and immigration; 3. Judicial cooperation in civil matters; 4. Judicial cooperation in criminal matters; and 5. Police cooperation.

518 Exceptions include: operative cooperation within police cooperation, judicial cooperation in criminal matters, and family law, where the requirement of unanimity is maintained.

sions of the Treaty of Lisbon the application of the consultation procedure is limited to exceptional cases. A sudden influx of third-country nationals is such an example, where the Council may take temporary measures, upon consultation with the Parliament, in respect of the countries involved. In addition to securing the monopoly of the Commission to initiate legislation, the Treaty also extended the jurisdiction of the European Court of Justice granting judicial protection also under this area of European law.⁵¹⁹

The Lisbon Treaty also complemented the rules on the British and Irish opt-outs by way of new provisions on a possible termination of British and Irish in earlier EU measures in case they fail to opt-in to new measures amending these acts.⁵²⁰

3.3 Programmes intended to create the Area of Freedom, Security and Justice

After the entry into force of the Treaty of Amsterdam the foundations of the migration policy of the European Union were developed in *five-year programmes*. The European Council defined the main objectives together with a strict schedule in the Tampere Programme adopted in October 1999 which was replaced by the Hague Programme in November 2004 (covering the period of 2005-2009). The Stockholm Programme offered guidelines for the period between 2010 and 2014 prepared by the Swedish Presidency of the EU Council.

These programmes are characterized by rather different approaches depending on the political climate of the particular period. While the *Tampere Programme* set rather ambitious goals for the European Union and the Member States, and primarily focused on the rights and the integration of third-country nationals residing legally in the territory of the European Union, launched in the aftermath of the terror attacks of 11 September 2001, the *Hague Programme* is much more moderate and mainly focuses on security considerations. While the first programme expressly states that the Union must ensure the fair treatment of third-country nationals residing legally in the territory of the European Union and grant them rights and obligations comparable to those of citizens of the Union,⁵²¹

519 Art. 68 (1) limited the rights to request preliminary rulings in relation to measures based on Title IV of TEC (visas, asylum, immigration and other policies related to free movement of persons) to national courts against whose decisions there is no judicial remedy under national law.

520 Steve Peers, 'Immigration and asylum', in: Catherine Barnard & Steve Peers: *European Union Law*, Oxford University Press, 2014. p. 780.

521 Paras. 18-21 of the Tampere Programme claim that third-country nationals holding long-term residence permits should be granted a set of uniform rights which are as near as possible to those enjoyed by EU citizens. The programme claims that the Union should also enhance non-discrimination in economic, social and cultural life. This latter objective is in accordance with the

the latter programme concentrated more on border control, and other means of combatting terrorism, illegal immigration and human trafficking.

Entitled ‘An open and secure Europe serving and protecting citizens’ and accepted in 2009 the *Stockholm Programme* focuses on ensuring the interests of citizens, and emphasizes the needs and interests of everyone – such as third-country nationals – for whom the EU has a responsibility. It also emphasizes that the protection of fundamental freedoms and human rights should be accorded primacy over security considerations. The Stockholm Programme, together with the Commission’s action plan implementing the program represents a moderate, middle course approach compared to the Tampere Programme that promoted the rights of third-country nationals and heavily focused on human rights on the one hand, and to the security-oriented Hague Programme on the other.

After the Stockholm Programme lapsed in 2014 the conclusions of the European Council of 26 and 27 June 2014 defined the strategic guidelines for legislative and operational planning for the period between 2014 and 2020 within ‘the Area of Freedom, Security and Justice’ (‘Ypres Guidelines’). This document does not set out a full-scale programme but rather, it offers fairly general guidelines promoting the transposition, implementation and harmonisation of existing legal measures.

As it was mentioned earlier, the Commission published the *European Agenda on Migration* on 13 May 2015 in reaction to the migration crisis, and made it clear that it intends to treat the issue of migration as a top priority. The Agenda sets out *immediate actions* in order to cope with the crisis in the Mediterranean, as well as *medium to long-term priorities* in order to better manage aspects of migration. The Commission sets out four areas where medium to long-term priorities are proposed:

- *Reducing the incentives for irregular migration*: development cooperation agreements, humanitarian aid, fight against smuggling and trafficking networks and against illegal employment of third-country nationals by means of an effective return policy;
- *Effective border management* by means of consolidating the patchwork of sectorial documents and instruments into a Union standard for border management by making better use of the opportunities offered by IT systems and technologies and by creating the European Border Surveillance System out of FRONTEX;
- *Creating a strong common asylum policy* based on the implementation of the Common European Asylum System, and the evaluation and possible re-

contents of Art. 13 incorporated in the Treaty of Amsterdam that grants a wide spectrum of powers to the Union to realize the principle of non-discrimination.

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vision of the Dublin Regulation in 2016 that was heavily criticized for uneven responsibility sharing;

- *Creating and reassessing a new policy on legal migration* through a revision of the Blue Card scheme, and by maximising the benefits of migration policy for persons and countries of origin, e.g. by facilitating cheaper, faster and safer remittance transfers.

Among the *immediate actions* the Commission made the decision to triple the budget allocated for the search and rescue patrols in the Mediterranean (FRONTEX joint-operations Triton and Poseidon). It also put forward two proposals to implement the principle of solidarity set out in Article 80 TFEU.⁵²² It proposed a temporary European relocation scheme for the distribution of asylum seekers in the territory of the European Union on the one hand, and a European resettlement scheme that would provide settlement in the EU for persons *waiting in refugee camps outside the EU*.⁵²³ The distribution keys of the above schemes are based on objective criteria, such as GDP, population size and unemployment rates of the Member States, as well as the number of former asylum applications received and the recent efforts made by Member States in the area.

Finally, the Agenda proposes considering options for possible Common Security and Defence Policy operations to eliminate smuggling networks and to target human trafficking in the Mediterranean.

4 Visas and border control

The European Union has been quite active in the area of regulating visas and border control, primarily by reason of the fact that the Schengen Acquis was integrated into EU law, and a wide spectrum of further acquis was built upon it. The Schengen system is grounded upon the following pillars:

- the right of any person, irrespective of his/her nationality, to cross the internal borders without checks being carried out;
- the reinforcement of external borders;

522 Art. 80 TFEU: ‘The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.’

523 These proposals were adopted by the Council as decisions made on the 14 and the 22 September 2015 (Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, pp. 146–156; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, pp. 80–94).

- the effective control over the movement of persons across the external borders;
- common policy of issuing visas for short stays.

The Convention implementing the Schengen Agreement of 1990, together with the legal instruments serving its implementation set out the detailed regulation of the above issues, while most of these instruments have been replaced by *EU regulations*.

1. The regulation establishing the *Schengen Borders Code*, for instance, constitutes a detailed regulation of the conditions of external border control, the crossing of external borders, and the reintroduction of border controls at internal borders, as well as the conditions for issuing visas at the border. The former SBC was codified already in 2006 (Regulation (EC) No 562/2006) though only in March 2016 the consolidated version appeared (Regulation (EU) 2016/399).⁵²⁴

A basic principle of the Schengen system is that the *external borders of the Union* may be only crossed at border crossing points and during fixed opening hours. When crossing an external border, EU citizens and other persons enjoying the right of free movement under Union law undergo a minimum check, while non-EU-country nationals (aka. third-country nationals) are subject to checks upon leaving and entering the EU. Minimum checks are carried out to establish their identity on the basis of their travel documents.

Any person, irrespective of his/her nationality, may cross the *internal borders* at any point without checks being carried out.

Member countries may only *reintroduce border controls* at their internal borders in exceptional cases.⁵²⁵ The criteria against which any justification by a Schengen state to reintroduce border controls with another Schengen state must be assessed are now set out in Articles 25–30 of the new Regulation. The first requirement of Article 25, setting the general framework, is that there must be a ‘serious threat to public policy or internal security’ in a Member State. Neither public policy, nor internal security is defined in the Regulation. However, there may be a presumption that the meaning is consistent with the use of the same words in other EU instruments.⁵²⁶

524 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, 23.3.2016., pp. 1–52.

525 This was the case in 2015, when overall eight countries of the Schengen area have reintroduced border controls at their internal borders in view of a serious threat to internal security and public policy related to secondary movements of irregular migrants. The countries concerned are Belgium, Denmark, Germany, Hungary, Austria, Slovenia, Sweden and Norway.

526 Internal border controls in the Schengen area: Is Schengen crisis-proof? Directorate General for Internal Policies. Study for the LIBE Committee, European Parliament, 2016.

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According to Article 25 (1) and (2) the reintroduction of intra-Schengen border controls must be exceptional and introduced as a last resort. This confirms the status of intra-Schengen border controls as an exception to a fundamental right – the free movement of persons. Accordingly, the interpretation of any exception should be narrow and the monitoring of the use of the exception must rest with the Union.

There are three types of controls that may be invoked. The first are exceptional controls where an unforeseen event justifies the immediate reintroduction of border controls as there is not time to inform the other Member States and institutions (emergency procedure laid down in Article 28). This type of border control can be extended for ten-day periods for up to two months.

In case the threat is foreseeable, the second type of control must be used where advanced notice to the other Member States and institutions is required before the introduction of the controls (regular procedure laid down in Article 27). This form of control can be used for up to six months with regular updates regarding the continuing existence of the threat.

The third type of control is where the overall functioning of the Schengen area is put at risk (prolongation procedure laid down in Article 29). This requires a decision of the Council on the basis of a proposal by the Commission specifying the nature of the risk and why it constitutes a threat to the overall functioning of the system.

The criteria for the temporary reintroduction of border controls are laid down in Article 26. The main question that the Member State must assess is the extent to which the measure is likely to adequately remedy the threat to public policy or internal security and the proportionality of the measure in relation to the threat.

The so-called *local border traffic system* (established by *Regulation (EC) No 1931/2006*) is also worth mentioning. It has created an exception from under the strict provisions of the Schengen Borders Code for residents of the border area of neighbouring third countries subject to a visa requirement granting them the right to simplified entry procedures.⁵²⁷

2. *The regulation establishing FRONTEX*⁵²⁸ (*Regulation (EC) No 2007/2004*). According to its founding regulation, FRONTEX performs the following tasks:

- coordinating operational cooperation between Member States in the field of management of external borders;
- assisting Member States in training national border guards;

527 In 2007, Hungary entered into an agreement on the rules of local border traffic with Ukraine in order to maintain a closer relationship with the Subcarpathian Hungarian community (promulgated by Act CLIII of 2007).

528 The full name of FRONTEX: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

- assisting Member States in circumstances requiring increased technical and operational assistance;
- providing Member States with the necessary support in organising joint return operations, i.e., in deporting persons illegally staying in the Member States;
- carrying out risk analyses;
- following up on the development of research relevant for the control and surveillance of external borders.

The operability of the Schengen system was repeatedly questioned during the 2015 migration crisis. Therefore, in December 2015 the Commission presented a set of proposals in order to further increase the security of the EU's external borders and to protect the Schengen area. Among them the Commission proposed two major modifications. Through a targeted amendment of the Schengen Borders Code the Commission intends to *introduce mandatory systematic checks* of EU citizens entering or exiting the Schengen area.⁵²⁹ In a similarly significant proposal the Commission intends to develop FRONTEX into the European Border and Coast Guard Agency (EBCGA) with extended competence, and to create a joint European Border and Coast Guard (EBCG). The operability of FRONTEX used to be limited by the fact that it could only conduct border control operations and return illegal migrants *upon request of the Member States*.⁵³⁰

3. Following the incorporation of the Schengen Acquis into the first pillar of EU law, the Council adopted the so-called *EU visa regulation* (Regulation (EC) No 539/2001) which offers a comprehensive list of the third countries whose nationals must be in possession of visas when crossing the external borders (Annex I – ‘black list’) and those whose nationals are exempt from the said requirement (Annex II – ‘white list’). The lists in this regulation are regularly updated and the decision whether the nationals of a particular country are subject to the visa requirement is always based on individual consideration. It is primarily a political decision that is, at the same time, dependent on a number of factors, such as considerations related to public policy and internal security as well as economic considerations; the number of illegal migrants arriving from the particular country; reciprocity, i.e., if one of the third countries decides to make the nationals of Member States subject to visa requirement, then the Union does the same.⁵³¹

529 Obligatory checks on EU citizens will be introduced against databases such as the Schengen Information System, the Interpol Stolen and Lost Travel Documents Database and relevant national systems.

530 The Commission is convinced that the new competences proposed will allow the Agency to survey the control of external borders by Member States, and in case of urgency, to intervene upon request from a Member State or even against the will of a Member State.

531 In Europe the citizens of Western Balkan countries (except Kosovo) and the European microstates are currently exempt from visa requirement, while the citizens of Russia, Ukraine and the Post-Soviet states remain subject to visa requirement. Basically the citizens of all of the states in the Asian

At this point it is worth mentioning *Turkey*, the country that the EU has recently tried to involve in its efforts to ease the migration pressure on the continent. To this end an EU-Turkey action plan was drawn up to stop the dramatic influx of migrants. A part of the action plan is a *visa liberalisation roadmap* that envisages visa free entry into the Schengen area to Turkish citizens with biometric passports. The system is planned to start operation from October 2016.

The EU seeks to mitigate the negative effects of the visa requirement by entering into *visa facilitation agreements* with third countries which serve as incentives to third countries subject to the visa requirement in other issues related to migration, such as in the cooperation in removal; such measures are considered to be rather important foreign policy instruments of the Union.⁵³²

4. The procedures for issuing visas are enshrined in the *Regulation establishing a Community Code on Visas (Regulation (EC) No 810/2009)* which defines the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period. The Member State competent for examining applications is the Member State whose territory constitutes the sole or the main destination of the visit. If no main destination can be determined, the competent Member State shall be the one whose external border the applicant intends to cross in order to enter the territory of the European Union. The issuing of EU visas valid in the 26 Member States, therefore, pertains to the national competence.⁵³³

5. The *Visa Information System (VIS)*, which was established by *Regulation (EC) No 767/2008*, is meant to facilitate the issuing of visas, becoming operative in 2011 following a regional roll-out scheme. VIS is a joint European database that enables through a central database the exchange and sharing of personal data between the Member States – such as biometric photographs and fingerprint data – on short-stay visas in order to prevent visa shopping and visa fraud. VIS was rolled out on a regional basis, starting in 2011 with North African coun-

and Pacific region are subject to visa requirement, except for Japan, Australia, New Zealand, South Korea and Taiwan. Most of the countries of the American continent are exempt from visa requirement (except for Colombia, Peru, Ecuador, and Bolivia). Finally, the countries of the African and Caribbean region are all subject to visa requirement, except for a few tropical island countries, such as Saint Kitts and Neville or Trinidad and Tobago.

532 Boldizsár Nagy & Petra Jeney, 'A szabadság, biztonság és jog térsége az Európai Unióban' (The Area of Freedom, Security and Justice in the European Union), in: Tamás Kende & Tamás Szűcs (eds.), *Bevezetés az Európai Unió politikáiba* (Introduction to the Policies of the European Union), Complex, Budapest 2011, p. 662.

533 The application for visa is refused if the applicant presents a travel document which is false, counterfeit or forged, does not provide justification for the purpose and conditions of the intended stay, does not provide proof of sufficient means of subsistence for the duration of the intended stay / the return to his country of origin, is a person for whom an alert has been issued in the SIS for the purpose of refusing entry, is considered to be a threat to public policy, internal security.

tries, followed by other regions, such as India and China at the end of 2015 in keeping with a strict roadmap.

5 Long-term residence and immigration

According to the TFEU, a common immigration policy is aimed at ‘ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.’ Article 79(1) TFEU serves as the legislative basis for the common immigration policy. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

- the conditions of entry and residence of third-country nationals;
- the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
- combating illegal immigration and the trafficking in persons.

The Treaty of Lisbon brought about significant progress in the exercise of EU competence in the area of immigration policy by excluding a former treaty provision (Article 63 TEC) from the text of the treaty which stated: ‘...measures adopted by the Council shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.’ It should be noted, however, that the procedure for issuing long-term visas and residence permits for the purposes of employment and residence remains with the Member States. This is clearly illustrated by the fact that the definition of the number of economic immigrants seeking entry, i.e., the regulation of the migrant quota remains in national competence. Article 79(5) TFEU *expressis verbis* states on the level of primary EU law that Member States retain the right to freely determine volumes of third-country nationals admitted to their territory in order to seek work, whether employed or self-employed. The legal basis for enacting measures aimed at the integration of immigrants appears to be an important new element. In addition, the common immigration policy is now extended to the removal and repatriation of persons residing in the territory of the Union without authorisation, and the combating of human trafficking, affecting in particular women and children.

5.1 Secondary EU legislation in the field of common immigration policy

EU legal acts established in the area of immigration policy are the product of two waves of regulation. The first wave of regulation was practically the outcome of the Tampere Programme.⁵³⁴ In accordance with the Tampere conclusions of the European Council of 1999 the European Commission made ambitious efforts to establish community level rules for the admission and residence of third-country nationals who seek work, whether employed or self-employed. The proposal for a directive drawn up in 2001 by the Commission applied a horizontal approach and intended to define the conditions for the admission and residence of all third-country nationals who seek work, whether employed or self-employed, together with the rights of these persons.⁵³⁵ The proposal, however, failed due to resistance from Member States, and therefore, the rules on the conditions of entry for economic migrants were not adopted.

During the implementation of the Tampere Programme this period saw the adoption of several Union acts for the facilitation of legal forms of migration:

1. Council Directive 2003/86/EC on the right of third-country nationals to family reunification is a prerequisite to the social integration of migrants and it also regulates the employment of family members.

2. Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents. The directive observes the principle established in Tampere stating that persons holding a long-term residence permit should be granted in a Member State a set of uniform rights which are as close as possible to those enjoyed by citizens of the European Union.

3. Council Directive 2004/114/EC on the conditions of admitting third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. The directive permits admission to the territory of the Union of third-country nationals for the purposes of study, pupil exchange or training, and defines the possible limitations on employment of students by the Member States.

4. Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research in the European Community. The directive enables researchers to join European research programs through a simplified procedure and, at the same time, it facilitates the return of researchers to their country of origin so that they can contribute to the development of their home country with the experiences they gathered.

534 Nagy & Jeney2011, p. 664.

535 COM (2001) 386 final.

5.1.1 Council Directive 2003/86/EC on the right of third-country nationals to family reunification

Up until recently, family reunification was the most frequent legal basis for the legal forms of immigration into the European Union.⁵³⁶ Therefore, the Council intended to accept Directive 2003/86/EC on the right of third-country national to family reunification as a means of protecting third-country nationals. The ambitious proposal was significantly curtailed by the fierce resistance from Member States, therefore, today it practically functions as a means of minimum harmonization. The directive was harshly criticised for failing to observe certain fundamental rights. This was apparent from the legal action initiated by the European Parliament to annul the directive on family reunification⁵³⁷ claiming that it breached the general legal principles of community (today union) law, such as human rights.

The first report on the application of the directive⁵³⁸ arrived at the conclusion that the measure provides too much discretion for Member States. As a result a Green Paper⁵³⁹ was issued, launching a process of public consultation. In April 2014 the Commission issued a Communication on the guidance for the Member States for the application of the directive. The objective of the directive is to ensure the right to family reunification for third-country nationals residing lawfully in the Member States by defining the minimum criteria to be met by all Member States in the procedure for family reunification. According to the directive this regulation must be applied if a sponsor holds a residence permit issued by the Member State valid for at least one year and has reasonable prospects of obtaining the right to permanent residence. The directive does not provide a definition of the above terms putting the applicability of its rules in question.

The directive provides a list of family members who are entitled to entry and residence in the particular Member State according to the family reunification directive. The rules differentiate between cases where – if all other criteria defined in the directive are met – the Member States are obliged to permit family reunification, and other cases where the decision belongs to the discretion of the Member States. The latter group of persons may be different in the individual Member States.

In accordance with the above provisions Member States are obliged to grant entry and residence to the following family members: the spouse of the sponsor,

536 While formerly 55% of the permits were issued for the purpose of family reunification, due to the restrictive policies applied by Member States this figure decreased to 21%.

537 Judgment of 27 June 2006 in Case C-540/03, *European Parliament v. European Council*, [2006] ECR 05769.

538 COM 2008 610.

539 Green Paper on the right to family reunification of third-country nationals living in the European Union COM 2011 (735).

minor or adult unmarried children of the sponsor and of his/her spouse, including adopted children. Thus, the directive focuses on the concept of nuclear family but it may be extended under the discretion of the Member States.

In addition, this group of persons may be further limited according to the – rather questionable and frequently questioned – provisions of the directive. The directive allows Member States to determine in relation to children over 12 arriving independently from the rest of their families whether they meet the conditions for effective integration. (Paragraph (1) Article 4). This limitation is currently only applied by Germany.

None of the Member States applied the second limitation that allows Member States to authorise the entry of children on grounds other than family reunification if the application is submitted after they had reached the age of 15 (Paragraph (6) Article 4).

Nevertheless, the European Parliament believed that the above two legal acts posed serious limitations on human rights and the fundamental right to the respect for private and family life.⁵⁴⁰ These limitations are particularly in conflict with the right to the respect for private and family life and the principle of non-discrimination as enshrined in the European Convention of Human Rights.

The Court of Justice of the European Union did not consider annulling the directive for the above reasons to be justified. In its procedure the Court primarily relied on the well-established but less ‘children friendly’ European Convention of Human Rights and the established case-law of the Strasbourg forum, as opposed to other international conventions laying more emphasis on the protection of children or the relevant EU law established by the Court in relation to the citizens of the Union. As far as the violation of Article 8 ECHR on the right to respect for family life was concerned, the Court ruled that international law does not oblige Member States to grant entry to third-country nationals even if their close relatives live in the particular Member State.⁵⁴¹ The directive prescribing exact and positive obligations for the Member States still maintains a scope of discretion of Member States even if to a limited extent. The application of the integration test by the Member States falls within this particular scope of discretionary powers.⁵⁴²

As far as spouses are concerned, Member States may define a minimum age for the spouse before he/she meets the sponsor. This minimum age defined may

540 These limitations are especially in conflict with the right to respect of private and family life and the principle of non-discrimination as enshrined in the European Convention of Human Rights.

541 As it has been mentioned above, according to the general practice of ECtHR, the ECHR does not ensure the right of family reunification in a particular country but the right to conduct a family life anywhere, where it is feasible.

542 The latter, however, is strictly limited by the regulations of the directive, since Member States may only apply the test to children over 12 arriving independently of the rest of their families.

not exceed 21. The directive claims that the age limit has two aims: to ensure better integration of the spouse and to prevent forced marriages.

Statistical data shows that a number of countries are especially affected by the problem of forced marriages, such as Germany, where nearly 3400 such cases were registered in 2010. There are 50 countries in the world where this tradition prevails. However, NGOs believe that education and the spreading of information are key to solving this problem, rather than the limitations of the rights to family reunification.

As far as ‘substantive’ regulations for the practice of the right to family reunification are concerned, the directive first defines the list of the so-called negative requirements, i.e., the issues of public policy or public security or public health on grounds of which a family member’s application for entry or residence may be denied. Member States, therefore, have discretion in this area. In addition to the negative requirements the Member State concerned may require that the person who has submitted the application provide evidence that the sponsor has accommodation considered to be adequate for a comparable family, sickness insurance and resources which are sufficient to maintain himself/herself and the members of his/her family.

As far as sufficient resources are concerned the text of the directive – in contrast with the rules affecting the citizens of the Union – is completed by the requirement of stable and regular resources. The directive also sets out the negative consequences of the failure to apply for the social assistance system.

In the *Chakroun* case⁵⁴³ the Court held that Member States may not exercise their discretion in relation to the above requirements in case this means jeopardizing the objective and efficient implementation of the directive.

In the operative part of the judgment the Court stated that the strict Dutch regulations on the requirements of family reunification are in conflict with EU law; such violations include, among others, national rules on resources that differentiate between cases where family relations in the Member State were established before, and where they were established after the sponsor’s entry into the receiving state.⁵⁴⁴

543 Judgment of 4 March 2010 in Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken (Chakroun)*, [2010] ECR 01839.

544 According to the bearings of Case *Chakroun*, M. Chakroun who is of Moroccan nationality has resided in the Netherlands since 1970 and there holds a residence permit for an indefinite period. R. Chakroun, who also has Moroccan nationality and was married to Chakroun in 1972 in Morocco, applied to the Netherlands Embassy in Rabat (Morocco) for a provisional residence permit in order to live with her husband in the Netherlands.

Dutch regulations make a sharp distinction between the concepts of family formation and family reunification in the narrow sense. In case of family formation a residence permit may be issued only if the reference person has a lasting and independent net income which is equal to at least 120% of the minimum wage, while in case of family reunification this amount is equal to 100% of the minimum wage. In this respect, the Court claimed that the provisions of the relevant directive – requiring

Finally, optional provisions allow Member States to require third-country nationals to be subjected to integration measures. This proved to be one of the most controversial and debated requirements during the negotiations. Three Member States (Germany, France and the Netherlands) apply such measures as a prerequisite to the entry in their territory requiring family members to take a language exam or an exam on information about the society of the receiving country, or require them to sign a contract when entering the receiving country that obliges them to attend a training course – or language course – offered by an NGO.

While the directive does not provide assistance for the application of the integration clause, Member States do not enjoy complete freedom in this respect. All instances of applying and interpreting the provisions must be consistent with the general legal principles of law, such as the principle of proportionality, and the objective of integration itself, i.e., the facilitation of the integration of long-term residents.

What are the rights the directive grants to family members? After accepting the application the Member State concerned shall grant family members a first residence permit of at least one year's duration. The directive also defines the rights of family members to access to education, access to employment and self-employed activity, and finally the right to an autonomous residence permit when particular requirements are met. The right to employment, however, is not without limitations; based on the assessment of their labour market Member States may regulate the conditions of exercising such right.

In conclusion, the most important merit of the directive is that it consolidated earlier, rather inconsistent and diverse Member State rules on the family reunification of third-country nationals in a more coherent form by *expressis verbis* defining the right to family reunification. Unfortunately, the measure has little effect on the harmonisation of Member States' laws.

5.1.2. Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents

The term 'denizen',⁵⁴⁵ originally introduced by John Locke was revived by Thomas Hammar who applied it to immigrants who migrated to certain Western and Northern European countries in the 1960's for the purpose of short-term employment, and finally settled down in the receiving country for several decades. Who do we mean by this term that is now widely used? The term refers to for-

individual assessment by the authorities of all applications for family reunification – are not in accordance with Dutch regulations that generally define the particular amount of minimum wage under which all applications for family reunification are refused.

545 The etymology of the word 'denizen': from Latin roots, 'de+intus', meaning 'from within'.

mer immigrants, who have not yet been granted citizenship by the receiving country in the legal sense, but due to their level of social integration they are no longer considered aliens in the society of the host country. In other words, they are halfway towards acquiring full citizenship.

Directive 2003/109/EC applies to third-country nationals who are long-term, legal residents in a Member State, and have a ‘half alien–half citizen’ status, similar to the above group. The directive is an important milestone in the development of EU immigration policy since it affects more than half a million third-country nationals residing in altogether 24 Member States that fall under the scope of this directive.

The directive aims at providing third-country nationals who are long-term residents in a Member State a new, more secure status attaching particular rights to the same (principally, the right to residence, and the right to quasi equal treatment comparable to those of the citizens of the receiving country). Finally, under certain conditions, the directive grants these persons the right to free movement within the territory of the Union, thus solving the problems arising from ‘being bound to one Member State’.

The directive is applicable to third-country nationals who are legally residing in a Member State. Its provisions, however, define a number of exceptions, i.e., third-country nationals who reside in a Member State on temporary grounds such as au pairs or seasonal workers are excluded from the scope of the directive, and in addition, the directive does not apply to third-country nationals whose residence permit has been formally limited. This latter category is interpreted in a number of ways by the Member States, compromising the effectiveness (*effet utile*) of the directive. In the Singh case⁵⁴⁶ the CJEU declared that where the validity of a residence permit may be extended at any time, it does not qualify as a formally limited residence permit as defined under the directive.

The prerequisite of obtaining long-term resident status is that the applicant must reside legally and continuously within the territory of a Member State for five years. While the directive fails to define the meaning of legal residence, the report on its implementation states that the limitation of legal residence to residence based on ‘residence permit’ and, in principle, the exclusion of visas, amounts to an incorrect transposition of the regulation.

What other requirements are defined by the directive with regard to the obtaining of such status in addition to the requirement of five years legal residence? Besides sickness insurance in respect of all risks normally covered,

546 Case C-502/10, *Staatssecretaris van Justitie v. Mangat Singh*, judgment of 18 October 2012, not yet published. Mr Singh, an Indian national, arrived in the Netherlands in 2001 where he was granted a renewable, fixed-period residence permit, the validity of which was limited to the exercise of an activity as a spiritual leader or religious teacher. It fell into the category of formally limited residence permit for the purposes of the national law and was excluded from the scope of the directive.

Member States may require third-country nationals to provide evidence that they have, for themselves and for dependent family members stable and regular resources which are sufficient to support himself/herself and the members of his/her family. Member States may refuse applications for such status where the person concerned constitutes a threat to public policy or public security. Finally, Member States may require third-country nationals to comply with integration conditions, in accordance with national law. Such integration conditions applied by Member States include language proficiency, although different proficiency levels may be required. They may also include information on the society of the receiving country, usually covering its history, and its legal- and value systems.

The status of 'long-term resident' is a permanent status. The Member State grants a long-term resident's EC residence permit to long-term residents. The residence permit is valid for a minimum of five years, and following its expiry – if necessary – the residence permit can be automatically extended by submitting an application to this end. The report on the application of the directive held that the high fees applied on this occasion seem to be incompatible with the concept of automatic renewal, nor do the high fines (up to 1659 euros) that are reportedly applied in Slovakia to long-term residents that do not apply for the renewal of their permit in due time.

In its judgement⁵⁴⁷ in the *Commission v. the Netherlands* case the Court held: the amounts of the charges claimed by the Kingdom of the Netherlands vary within a range in which the lowest amount is about seven times higher than the amount to be paid to obtain a national identity card is a case of unfair treatment of third-country nationals.

Long-term residents lose their status in case a fraudulent acquisition of long-term resident status is detected, or a return measure against said person is taken, or in the event of absence from the territory of the Union for a period of 12 consecutive months. Long-term residents also lose their status acquired in the first Member State when such status is granted in another Member State, or following six years of absence from the territory of the Member State which granted long-term resident status.

What are the rights granted under the directive to persons acquiring such status? First and foremost, the right to long-term residence in the territory of the receiving country, as well as the right to quasi equal treatment with citizens of the receiving country. The inclusion of the requirement of equal treatment⁵⁴⁸ into the

547 Case C-508/10, *European Commission v. Kingdom of the Netherlands*, judgment of 26 April 2012, not yet published.

548 Such as in respect to employment, pursuit of studies or vocational training, mutual recognition of professional diplomas, certificates and other qualifications, tax benefits, access to goods and services, freedom of association and affiliation, including membership of trade unions, social security,

directive is significant in and of itself, even if it is overshadowed by the wide range of derogations the Member States may apply. But what exactly are these possible derogations?

First of all, we must mention certain general, geographic, i.e., territorial restrictions on the requirement of equal treatment that significantly limit the movement of third-country nationals within the Union. Such a restriction is that the Member State concerned may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned. This restriction was probably ‘addressed’ to long-term residents who intend to stay in another Member State in accordance with regulations on mobility, without however obtaining the status of long-term residents.

Occasional involvement in the exercise of public authority may also constitute a legal basis for restrictions with respect to third-country nationals.

Member States may also retain restrictions in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens.

The judgement of the Court in the *Kamberaj* case⁵⁴⁹ was also brought in the context of equal treatment. Servet Kamberaj was an Albanian national who had been residing and was employed in the Autonomous Province of Bolzano since the year 1994 and was the holder of a residence permit valid for an indefinite period. Mr Kamberaj received, in respect of the years 1998 to 2008, a ‘housing benefit’, i.e., a contribution by provincial authorities to the rental fees of less affluent tenants.

The benefit is divided among citizens of the Union (whether Italians or not) on the one hand and third-country nationals and stateless persons on the other. The Social Housing Institute of the Autonomous Province of Bolzano rejected Mr Kamberaj’s application for a housing benefit for the year 2009, on the grounds that due to an amendment of the applicable law the budget for the grant of that benefit to third-country nationals was exhausted. The Court stated that if the determination of the part of the funds granted, as housing benefit, to citizens of the Union on the one hand and third-country nationals on the other hand, is made subject to different methods of calculation, it is to disadvantage of third-country nationals, since the budget available to satisfy their demands is smaller than that for Union citizens and likely to be exhausted more quickly than the former funds.

social assistance and social protection, and last but not least, free access to the entire territory of the Member State concerned.

549 Case C-571/10., *Servet Kamberaj v. Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano*, judgement 24 April 2012, not yet published.

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The directive introduces an important novelty by enshrining the right to reside in the territory of Member States other than the one which granted the applicant the long-term residence status, for a period exceeding three months (intra-EU mobility). While formerly only third-country national family members of EU citizens crossing the borders were granted the above right when moving to a new Member State, Directive 2003/109/EC extends this right to all third-country nationals with a long-term resident status, who reside in the Member State for the purposes of economic activity, pursuit of studies or vocational training, etc. The directive, however, allows for further restrictions that may reduce motivation for intra-EU mobility: Member States, for instance, may introduce labour market restrictions on entries for the particular purpose of economic activity, and require third-country nationals to comply with integration measures⁵⁵⁰. The limited opportunities, together with the large number of risk factors third-country nationals have to face in their new place of residence may positively deter persons with a secure legal status obtained in the first Member State from leaving the territory of that country.

While the directive achieves only minimum harmonization, it significantly eases the financial burdens of third-country nationals by reducing the expenses of entry into and residence in the Member State. In addition, while the mobility between Member States is still more of symbolic significance, it is a large step in the improvement of the circumstances of third-country nationals in the Union. At the same time, the relevant figures show⁵⁵¹ that third-country nationals generally do not have enough information on the status of long-term resident and the rights attached to it, and a number of deficiencies appear in the implementation of the directive.

550 Long-term residents, however, are subject to integration measures in one of the Member States alone. Where the third-country nationals concerned have been required in the first Member State to comply with integration conditions in order to be granted 'long-term resident status', the second Member State may not require so, the migrant citizen may only be required to attend language courses. In this respect, the intra-EU mobility regulation basically eliminates the applicability of the integration condition in the second Member State, and ensures the mutual recognition of integration programmes conducted by the Member States.

551 In 2009 about four fifths of third-country nationals with long-term resident status lived in four Member States: Estonia (187,400), Austria (166,600), Czech Republic (49,200), and Italy (45,200). In France and Germany only around 2,000 third-country nationals obtained long-term residence permit. What is more, according to available data, so far only a low number of third-country nationals (less than 50 per Member State) have taken advantage of the new opportunity of intra-EU mobility.

5.1.3 Council Directive 2004/114/EC on the conditions of the admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service

In December 2004 the Council accepted the directive on the entry of third-country national students. Indeed, the admission of third-country students has a number of short and long-term benefits for the receiving countries. For instance, following the completion of their studies third-country students are likely to remain in the receiving country and compensate for the shortage of skilled labour in areas suffering from such shortage. The admission of third-country students has similarly positive effects on the general view on the phenomenon of migration, since incoming students represent a skilled segment of migrants who can easily integrate into the society of the receiving country. Their presence does not constitute an immediate threat to the welfare of the citizens of the receiving country. What is more, their presence may not only result in a better understanding and acceptance of the migrants themselves, but also those of their country of origin, significantly contributing to the strengthening and deepening of political and economic relations between the receiving country and the students' country of origin. Third-country nationals studying in the Union can also contribute to the balanced functioning of the education institutions in the Member States. Higher tuition fees paid by foreign students increase the budget of the receiving education institution, resulting in a higher quality of education. Considering the above benefits, it is no surprise that Directive 2004/114/EC and its transposition to national laws was the least problematic of all of directives on immigration policy. It seems that Member States are more willing to receive students than any other category third-country nationals.

The directive defines mandatory rules in case of third-country nationals who apply for leave of entry into the territory of a Member State for the purpose of studies (university, college students), while entry for the purposes of pupil exchange, unremunerated training or voluntary service remains in the discretion of the Member State concerned. Since these provisions of the directive are optional, their 'added value' is questionable.⁵⁵²

⁵⁵² On the 23rd of March in 2013 the Commission put forward its proposal for the joint modification of the Education directive and the Researcher directive (COM/2013/151). The Proposal significantly changes and extends the scope of persons affected by the two former directives. In addition to the two target groups currently affected by mandatory rules, i.e., researchers and students who study in higher education institution, the Commission proposes to make mandatory the optional regulations of the Education directive concerning entries for the purposes of pupil exchange programmes or unremunerated training or voluntary service. In order to secure their rights and provide them protection the Proposal also introduces conditions of admission for two groups of third-country nationals, i.e., au-pairs and remunerated trainees, currently not affected by the scope of the mandatory EU legal frame.

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As far as the conditions of entry are concerned, the directive defines the uniform conditions for permission with respect to all four groups of persons. The applicant must have a valid travel document and sickness insurance in respect of all risks normally covered. Other provisions of the directive define the additional conditions for entry in relation to each group of persons. Students, for instance, are required to provide evidence that they had been accepted by an establishment of higher education and that during their stay they will have sufficient resources to cover their subsistence and return travel costs. In addition, Member States may require students to provide evidence of sufficient knowledge of the language of the course to be followed by them, and that they have paid the fees charged by the establishment.

As far as the validity of the residence permit is concerned, as a general rule, the residence permit must be issued to the student for a period of at least one year. Outside their study time students are entitled to exercise economic activity. Each Member State determines the maximum number of hours per week or days or months per year allowed for such an activity.

By limiting economic activities the directive intends to reduce cases of abuse of student visas. According to the mobility provisions of the directive students are also entitled to apply continue their studies already commenced in another Member, or to complement them with a related course of study in another Member State, if they meet the conditions laid down in the directive.

Finally, it is unfortunate that the directive does not regulate the rights of students to family reunification, especially since the family reunification directive entirely excludes them from its scope. The lack of parental emotional support often discourages even the best students from leaving their home country in order to study abroad. On the whole, it seems that the rights granted by the directive and the national regulations on its basis enjoyed by third-country students are narrower than those afforded to EU citizens with a similar status, who may freely choose the Member State in which they wish to study. EU citizen students may settle in any of the Member States for a period exceeding three months, provided they have sufficient resources and proper sickness insurance. In addition, they may exercise unlimited economic activity in the Member State of residence, thus enjoying treatment equal to that of the citizens of the receiving country. The requirement of equal treatment is only limited in relation to the first three months of the stay and the range of available allowances for subsistence, but only if the student concerned does not exercise economic activity. While due to the restrictions defined in the directive third-country nationals may only exercise marginal, supplementary activities, EU citizen students are entitled to exercise actual economic activities, also providing them access to grants and allowances for subsistence. It is important to mention that a separate programme

serves the facilitation of the mobility of EU citizen students (ERASMUS programme).

5.1.4 Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research in the European Community

The facilitation of the entry of third-country researchers into the Union is in accordance with the objective set out in Lisbon, according to which the Union was to become the most competitive and dynamic knowledge-based economy in the world by 2010. The directive is intended to lay down the conditions for the admission of third-country researchers for more than three months for the purposes of carrying out a research project under hosting agreements with research organisations. The directive provides a relatively broad definition of the term 'research', meaning all kinds of creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this stock of knowledge to devise new instruments and design new procedures. By the term 'Researcher' the directive in question means a third-country national holding an appropriate higher education qualification, which gives access to doctoral programmes, who is selected by a research organisation for carrying out a research project for which the above qualification is normally required.

Perhaps the greatest merit of the directive is that it – at least partially – delegates the power to decide on the admission of third-country researchers from the national authorities to the receiving institutions. According to the directive research organisations receiving the researcher play a key role in the admission procedure of third-country researchers. As a general rule, receiving institutions must seek preliminary approval from the national authorities valid for five years. Research organisations, however, may be made somewhat deterred by the provision of the directive which states that Member States may require, in accordance with national legislation, a written undertaking of the research organisation that in case a researcher remains illegally in the territory of the Member State concerned, said organisation is responsible for reimbursing the costs related to his/her stay and return incurred by public funds.

In addition to the above conditions to be met by the receiving institution the directive also sets out the rules governing the relationship between the receiving institution and the third-country researcher. A so-called 'hosting agreement' specifies the legal relationship between the researcher and the receiving institution. However, research organisations may sign hosting agreements only if certain conditions set out in the directive are met, such as, that the research project has been accepted by the relevant authorities in the organisation, and the neces-

sary financial resources for it are available, and finally, if the third-country researcher provides sufficient proof of his/her qualification. The research organisation must always examine whether during his/her stay the researcher has sufficient monthly resources to meet his/her expenses and return travel costs, and if during his/her stay the researcher has sickness insurance for all the risks normally covered. Finally, the hosting agreement also specifies the legal relationship and working conditions of researchers. In a number of areas the directive affords researchers residing in a Member State under the above conditions equal treatment with nationals of the host Member State as regards the recognition of diplomas, certificates and other professional qualifications, working conditions, including pay and dismissal, social security, tax benefits, access to goods and services and the supply of goods and services made available to the public.

Researchers admitted under the directive may also teach. Member States may set a maximum number of hours or days for teaching. More importantly, researchers are allowed to carry out part of their research in another Member State, under the conditions set out in the directive.

As far as the objectives of the Tampere Programme are concerned, it seems that EU citizen researchers still enjoy more rights than their third-country colleagues, which is illustrated by the fact that research institutions of the Member States may employ members of the latter group as 'traditional employees' as set forth in the Agreement.

5.2 Directives on immigration for the purpose of employment

Since the majority of the Member States did not support the horizontal approach applied in 2001 to the rules on the right to entry and residence of economic migrants, in its 2005 Policy Plan the Commission proposed the application of a sectorial approach. The Policy Plan envisioned the establishment of a general framework directive (single permit directive), which would include provisions on the rights of third-country workers, and the single application procedure with respect to a single permit for third-country nationals to reside and work in the territory of a Member State. In addition, the Policy Plan envisioned the establishment of separate directives on the conditions of the entry and residence of four groups of third-country workers: highly skilled workers, seasonal workers, intra-corporate transferees, and remunerated trainees. The negotiations, however, did not proceed as planned: the single permit directive was drafted among heated legal and political disputes. This explains why the Council first accepted Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment in 2009, while the

Single Permit Directive 2011/98/EU,⁵⁵³ technically a framework directive, was accepted only in December 2011. Finally, Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, and Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer were established only in 2014.

5.2.1 Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment

In light of the objective set out in the ‘Lisbon Strategy’ the aim of the European Blue Card Scheme is to attract highly qualified third-country workers to the territory of the Union. This aim is clearly illustrated by the blue card system of the directive, which is intended to compete, both symbolically and actually, with the American Green Card system that governs and represents the immigration of workers to the US. The majority of highly qualified workers arriving to the US do not arrive directly from developing countries but from European countries, which suffer from severe labour shortages themselves. Persons leaving European countries usually complain about excessive bureaucracy, financial problems, and the various kinds of discriminative treatment they are subjected to. The Union has so far not been really successful in attracting skilled workers. The Commission is convinced that this is due to the fragmented labour market with its 28 different systems of entry, as well as the limited mobility between the Member States. The recently accepted EU Blue Card directive intends to facilitate the admission of highly qualified workers and their families by establishing a ‘simplified admission procedure’ on the one hand, and by granting applicants equal social and economic rights with nationals of the host Member State on the other. The third crucial element of the directive is that it ensures the mobility of highly qualified workers between Member States. Studies on economics seem to support the view that the geographic mobility of highly skilled workers may significantly contribute towards preventing a possible crisis on the labour market and thus, a sudden decline in economic development. The benefits for third-country nationals from the opportunities opened up by the internal market, i.e., from the free movement of persons would create a significant competitive edge over the United States. Therefore, the objective of the directive is to define the conditions for entry and residence of highly qualified third-country workers and their families. It is important to note that the directive does not affect Member

553 European Parliament and Council 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.

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State competence over the admission of skilled third-country workers, i.e., Member States maintain the right to define the number of third-country nationals they wish to admit to their territory for the purposes of highly qualified employment. While the application of national quotas is both legally and politically justifiable, it may constitute a significant obstacle in the realization of the objective set out in the directive. Another provision of the directive is aimed at the protection of the national labour market, which allows Member States before taking the decision on an application for an EU Blue Card, and when considering renewals or authorisations during the first two years of legal employment as an EU Blue Card holder, to examine the situation of their labour market and reject the application on this ground.

The directive offers a comprehensive list of the criteria for the application for the Blue Card. Since admission is based on demand, third-country nationals must present a valid work contract or a binding job offer with a duration of at least one year when applying for admission. They must also present a document attesting the fulfilment of the conditions set out under national law for the exercise of the regulated profession by Union citizens, as well as valid travel documents, visa and sickness insurance. The application is also refused if the applicant poses a threat to public policy, public security or public health. Finally the salary of the applicant must be at least 1.5 times the average gross annual salary in the Member State concerned.

The validity of the Blue Card may be between one to four years and Member States always set a standard period of validity themselves. In light of the above, the directive does not seem too competitive compared to traditional host countries, such as the US and Canada, which have been providing permanent settlement for skilled workers, thereby maintaining a successful immigration policy for several years.

For the first two years of legal employment in the Member State concerned as an EU Blue Card holder access to the labour market is restricted to the exercise of paid employment activities which meet the conditions for admission. During this period changes in employer shall be subject to prior authorisation in writing by the competent authorities of the Member State of residence, and any modifications that affect the conditions for admission shall be subject to prior communication. The latter probably applies to cases when a Blue Card holder wishes to perform a different kind of task at the same employer, or when his/her salary falls under the limit specified above. The directive does not consider the possibility that the case may come under the scope of restriction even without the modification of the conditions, e.g. if the increase in the worker's salary is slower than that of the average salary. After the first two years, Member States may grant the persons concerned equal treatment with nationals as regards ac-

cess to highly qualified employment. This, however, is merely an option for the Member States.

In order to prevent limiting the geographical mobility of highly qualified workers who have not yet obtained long-term resident status, residence of EU Blue Card holders in different Member States may be cumulated. The effect of the European immigration policy on the developing countries is one of its greatest dilemmas. Statistical data show that the majority of highly qualified third-country nationals from these countries. There seems to be an irresolvable tension between the efforts to make third-country nationals leave their home countries, and the objective of contributing to the development of these countries. It is also true that in most of the developing countries people find it hard to get a job even with a university degree and the financial support from immigrants is a major contribution to the living conditions of those who remained in the home country. It is hard to tell which way the balance will finally tip, therefore, the effects of the directive on third countries should be monitored.

5.2.2 European Parliament and Council Directive 2011/98/EU on a single application procedure

The Single Permit framework directive was established following its adoption by the Council and the Parliament on 13 December 2011, and entered into force a few days later on 24 December 2011. The directive has two objectives: first, it regulates the application procedure of third-country nationals to work in the territory of a Member State. Therefore, the directive aims simplifying and rendering the rules more efficient both for the workers themselves and their employers by introducing a single application procedure, in the framework of which the competent authority issues the applicant a combined title encompassing both residence and work permits within a single administrative act.

The other main objective of the directive is to provide migrant workers with uniform rights and equal treatment with nationals of the receiving country in accordance with the objectives of the Tampere Programme.

As far as the personal scope of the directive is concerned, while it excludes a number of categories, as a framework directive it aims at covering the widest possible scope of third-country workers, regardless of the primary purpose of their entry to the territory of the Member States. An important novelty introduced by the directive is that it not only considers those third-country nationals to be workers who have been admitted to a Member State for work but also those who have been admitted for other purposes and have been given access to the labour market of that Member State in accordance with the provisions of national law.

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A new, central and very positive element of the directive is the single permit procedure itself, as a result of which a single permit is issued for the applicant. The single permit is a uniform document combining a residence permit and a work permit. It is of crucial importance that Member States are not entitled to issue other types of permits, such as a separate work permit. Therefore, this directive significantly simplifies the procedure by reducing the number of competent authorities and the steps taken in the procedure. Naturally, it also makes it easier to control the legal status of residents and workers.

The very first article of the directive declares that it is without prejudice to the Member States' powers concerning the admission of third-country nationals to their labour markets.

One of the most crucial regulations of the directive is that Member States maintain the right to define the most important conditions of obtaining the permit to reside and work in their territory, what is more, they may also define their national procedure, including the relevant authorities participating in the procedure and their competence.

A particularly important provision of the directive stipulates that an application may be considered inadmissible on the grounds of the volume of admission of third-country nationals arriving for employment purposes and, on that basis, these applications need not be processed.

Another important result of the directive is that it grants unified rights to third-country nationals legally working in the territory of the Member States. By regulating the requirement of equal treatment the directive aims at, among others, eliminating the significant gap between the status of migrant workers and those of the nationals of the receiving country. Unfortunately, however, the directive does not include the applicable rules on equal treatment in two important areas: access to the labour market and social benefits.

The directive does not provide increased protection against expulsion either. Naturally, by obtaining long-term resident status one may be protected against expulsion, but as demonstrated above, this status is not easy to obtain, and until obtaining such status, the legal and economic situation of affected migrants is rather uncertain.

5.2.3 European Parliament and Council Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers

Directive 2014/36/EU⁵⁵⁴ passed in February 2014 regulates the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. The directive intends to provide a legal framework for third-country nationals, formerly employed in violation of alien employment rules, to perform seasonal activity on the territory of the Union dependent on the passing of the seasons, and, affording them protection against exploitation. The maximum duration of stay is determined by the Member States and limited to a period of between five to nine months within a period of twelve months. It is also important that the work be of genuinely seasonal nature. The directive allows for an extension of the contract or change of employer, provided that the admission criteria continues to be met. That basically reduces the risk of abuse that seasonal workers may face and, at the same time provides for a flexible response to employers' actual workforce needs. The possibility to change the employer, however, does not entail the possibility for the seasonal worker to seek employment while being unemployed.

The directive also clarifies the rights of migrant workers. Seasonal workers are entitled to equal treatment in respect of the terms of employment, including the minimum working age and working conditions, pay and dismissal, working hours, leave and holidays, as well as health and safety requirements at the workplace. Equal treatment also includes branches of social security (related to sickness benefits, invalidity benefits and old-age benefits), and consulting services on seasonal work afforded by employment offices. At the same time, housing constitutes an exception from the social benefits provided. The right to equal treatment excludes family benefits and unemployment benefits, and Member States may also restrict equal treatment with respect to tax benefits, education and vocational training.

554 European Parliament and Council Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, pp. 375–390.

5.2.4 European Parliament and Council Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer

Directive 2014/66/EU⁵⁵⁵ on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer was adopted in May 2014. The new directive aims to facilitate the mobility of managers, specialists and trainee employees of branches and subsidiaries of multinational corporations, temporarily relocated for short assignments to other units of the company in the European Union by reducing the administrative burden associated with work assignments in several Member States. This is a mutually beneficial practice for both workers and the receiving company: while workers acquire work experience the company is provided with the necessary skills.

The directive seeks to define the conditions applicable to third-country nationals and their families in case their company relocates them for work purposes for more than 90 days to one or more other units of the company in the European Union. The directive does not apply to self-employed workers, students or those who are assigned by employment agencies.

The maximum duration of the intra-corporate transfer is three years for managers and specialists and one year for trainee employees. A primary condition of relocation is that the transferees be employed within the same company prior to the transfer for a certain period of time. This period must be at least three to twelve uninterrupted months of employment immediately prior to the transfer in the case of managers and specialists, and from at least three to six uninterrupted months in the case of trainee employees. Transferees must have work contracts, and they must present evidence that the third-country national will be able to transfer back to an entity pertaining to that undertaking or group of undertakings and established in a third country at the end of the intra-corporate transfer.

The directive also sets a minimum wage by requiring that intra-corporate transferees are entitled to equal treatment with nationals of the receiving country occupying comparable positions as regards remuneration which will be granted during the entire transfer. Negative conditions include the possibility to refuse entry to the territory of the EU to persons considered to pose a threat to public policy, public security or public health.

555 European Parliament and Council Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014, pp. 1–22.

6 Fight against illegal migration

6.1 Historical overview

The *Treaty of Amsterdam* signed in 1997 and entered into force on 1 May 1999 was the first EU primary law instrument that gave the European Union *actual competence* in the area of fighting illegal migration, in the form of a ‘Community’ policy within the first pillar. While certain aspects of the Union level fight against illegal migration were already included among the so-called matters of collective interest in the third pillar established by the 1992 Treaty of Maastricht actually in force from 1 November 1993 (cooperation in the areas of justice and home affairs), this era merely saw the reconciliation of interests within the confines of traditional intergovernmental cooperation. The competences related to ‘combating unauthorized immigration, residence and work’ (Article K.1 (3) lit. (c) of the original TEU) were characterized by unanimous decision-making processes typical of traditional intergovernmental organisations, and – in lack of Community law – by special, mostly ‘soft’ legal instruments (recommendations, resolutions, conclusions, etc.), without actually involving the European Parliament in the legislative process and by practically excluding the jurisdiction of the European Court of Justice.

The area the Treaty of Amsterdam elevated to the ‘Community level’ continued to exist as a first pillar Community policy forming part of the cooperation in justice and home affairs which was renamed the ‘*Area of Freedom, Security and Justice*’ (hereinafter: AFSJ), equipped with all the instruments of secondary Community law, and the structural characteristics of EC law (direct applicability, direct effect, supremacy). As a part of the emerging common European immigration policy the fight against illegal migration was moved to *Title IV* of the Treaty Establishing the European Community (TEC), authorizing the Community to adopt measures in relation to *illegal immigration and illegal residence, including repatriation of illegal migrants*.⁵⁵⁶ Article 64 TEC added restrictions to this authorization by claiming that this EU competence *may not affect* the exercise of the responsibilities incumbent upon Member States *with regard to the maintenance of law and order and the safeguarding of internal security*. The relevant strategic guidelines, referred to as ‘milestones’ in the conclusions on justice and home affairs of the 1999 Tampere Summit of the heads of state and government of the Member States (the so-called *Tampere Programme*) contributed to the opening up of the contents of this still rather laconically worded competence. The Programme, among others, intends to introduce strong measures in order to tackle illegal immigration at its source, in particular by combating those

⁵⁵⁶ Art. 63 (3) lit. (b) TEC.

who engage in trafficking in human beings and the economic exploitation of migrants, to promote the voluntary return of illegally staying third-country nationals to their country of origin, to facilitate the closer co-operation and mutual technical assistance between the Member States concerned in combating networks of human smuggling and trafficking of persons, and to establish and negotiate EU level readmission agreements and/or to include ‘readmission clauses’ in more general international agreements with third countries.

This was followed by the *comprehensive action plan of 2002* that was intended to implement the Tampere Programme and to combat illegal immigration and trafficking of human beings; the action plan was approved by the Justice and Home Affairs Council the same year.⁵⁵⁷ This crucial document defined the framework of Union policies centred on the fight against illegal migration, and listed the related tasks, among which the most important ones include the reinforcement and the development of a common policy on readmission and return; more operative powers given to EUROPOL to enable it to collect information on networks of trafficking in human beings or human smuggling; and the proposed introduction of a number of sanctions in order to tackle the *pull factors* of illegal migration (to be imposed on those employing illegal migrants, or by determining the liability of carriers transporting third country nationals not in the possession of the necessary travel documents for admission).

These objectives regularly appeared in the latter thematic action plans of the European Commission (e.g. in its 2006 Communication on Policy priorities in the fight against illegal immigration of third-country nationals⁵⁵⁸), and also in other strategic programmes of the *European Council*, which filled the framework of AFSJ as set out in the founding treaties by providing guidelines on specific policies (in relation to combating illegal migration, see: Chapters 1.6. – 1.7. of the Hague Programme for 2005–2009; Chapter II of the European Pact on Immigration and Asylum of 2008, or Chapter 6 of the Stockholm Programme for 2010–2014).

6.2 Current objectives and legal instruments of the fight against illegal migration

1. Within the architecture of the founding treaties of the post-Lisbon era *Article 79(1)* of the Treaty on the Functioning of the European Union (TFEU) defines the *general objectives* of Union action on illegal migration. It declares: ‘[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, [...] and the prevention of,

557 2002/C 142/02 [OJ C 142, 14.6.2002., pp. 23–36.].

558 COM 2006 (402) final, Brussels, 19 June 2006.

and enhanced measures to combat, illegal immigration and trafficking in human beings.’

2. *Further objectives* of the common European strategy for the fight against illegal migration are defined in the strategic policy guidelines endorsed by the European Council on the basis of Article 68 TFEU, such as the current *Ypres Guidelines* governing the development of this policy field until 2020 (adopted by the European Council in its Ypres/Brussels meeting on 26-27 June 2014). The conclusions claim that *addressing the root causes of illegal migration* is an essential part of EU migration policy, together with the prevention of illegal migration, as well as an *effective return policy* for third-country nationals illegally residing on the territory of the European Union. This requires intensifying cooperation with countries of origin and transit (including assistance to strengthen their migration and border management capacity). Looking ahead into the upcoming years the heads of state and government of the EU Member States strongly agreed that further steps must be taken to ensure that the common migration policy becomes *a much stronger integral part of the Union’s external and development policies (enhancing synergies)*, applying the ‘more for more’ principle (i.e. the more a partner country contributes to the fight against illegal migration, the more generous technical and financial support it receives from the EU). The above mentioned conclusions of the European Council set out the following priorities for the period between 2014 and 2020 in the area of curbing illegal migration:

‘strengthening and expanding Regional Protection Programmes, in particular close to regions of origin, in close collaboration with UNHCR; increase contributions to global resettlement efforts, notably in view of the current protracted crisis in Syria; addressing smuggling and trafficking in human beings more forcefully, with a focus on priority countries and routes; establishing an *effective common return policy and enforcing readmission obligations in agreements with third countries*;

[...]

FRONTEX, as an instrument of European solidarity in the area of border management, should reinforce its operational assistance, in particular to support Member States facing strong pressure at the external borders, and increase its reactivity towards rapid evolutions in migration flows, making full use of the new European Border Surveillance System (EUROSUR);

*in the context of the long-term development of FRONTEX, the possibility of setting up a European system of border guards to enhance the control and surveillance capabilities at our external borders should be studied.*⁵⁵⁹

559 Conclusions of the European Council of 26-27 June 2014 (EUCO 79/14, Brussels, 27 June 2014), pp. 3–4.

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3. During the seventeen years that have passed since the entry into force of the Treaty of Amsterdam a number of legal acts and other initiatives enhancing and facilitating practical cooperation were introduced in the area of the fight against illegal migration (see details below). Following the implementation of the relevant legislation in this domain, building on past programmes, the overall priority now is to consistently *transpose* current EU legal instruments and policy measures into Member States laws, *as well as to effectively implement and consolidate the same*. As a part of this intensifying operational cooperation – by using the potential of Information and Communication Technologies' innovations –, enhancing the role of the different EU agencies (e.g. FRONTEX, EASO, EUROPOL), and ensuring the strategic use of *EU funds* will be of key significance (the resources available for activities related to return are primarily defined in Chapter IV of the regulation on the Asylum, Migration and Integration Fund⁵⁶⁰).

6.3 Legal bases and decision-making procedure

1. Article 79 (2) and (3) TFEU define the applicable legislative procedures in this area:

‘(2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

[...]

c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation,

d) combating trafficking in persons, in particular women and children.

(3) *The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.*’

It is worth noting that, as a novelty, the term *removal* was mentioned separately as an area of EU intervention, and that Article 79(3) offers a *definition* for the term ‘illegal migrant’ from the perspective of EU law. It is also of crucial importance that the external competence of entering into readmission agreements between the Union and third countries is now expressly mentioned in EU primary law, what is more, the role of the *European Parliament* in the treaty-mak-

560 European Parliament and Council Regulation 516/2014/EU of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [OJ L 150, 20.05.2014. pp. 168–194.].

ing procedure was reinforced, becoming an important partner as opposed to its former, consulting role: its *consent* is now required for the Union to enter into EU level readmission agreements.⁵⁶¹

2. The above powers of EU institutions laid down in the founding treaties were supplemented and placed into a marked human rights context by the elevation of the *EU Charter of Fundamental Rights* to the level of primary law with the entry into force of the Lisbon Treaty. This novel layer of binding rights (forming also the standard of legal review of secondary law) declares not only the *principle of non-refoulement* and the *prohibition of collective expulsions* (Article 19), but also grants several *other fundamental rights* to illegally staying third-country nationals (e.g. prohibition of torture and inhuman or degrading treatment or punishment – Article 4; prohibition of slavery and forced labour – Article 5; right to liberty and security – Article 6; respect for private and family life – Article 7; right to property – Article 17).

3. As a general rule, legal acts of the Union elaborated in the areas related to the fight against illegal migration in accordance with Article 79(2)-(3) TFEU are subject to *ordinary legislative procedures*. Acting as co-legislators, the Council of the EU and the European Parliament negotiate secondary Union legislation within the framework of a so-called *codecision procedure*, based on the proposal for legislation *submitted by the European Commission*. The fact that as of 1 December 2009 the *Court of Justice of the European Union* enjoys full and unrestricted jurisdiction over this area, brought about an important change since it provides significant additional legal protection against expulsion and removal – both sensitive issues from the perspective of human rights. This is illustrated by the rich and continuously growing case-law of the Luxembourg Court related to the so-called Return Directive (2008/115/EC) aiming at the reconciliation and fine-tuning of the fundamental rights of illegal migrants and the sovereign prerogatives of the Member States to take effective and rapid decisions about the return of such persons.

6.4 EU legal and policy instruments to combat illegal migration

6.4.1 The volume and main forms of illegal migration in the EU

Due to its latent nature the *volume* of illegal migration is very *difficult* to accurately determine. It is as just difficult to define the number of third-country nationals who avoid border controls or get around them by presenting fraudulent documents, as those who lawfully enter the territory of the EU but fail to leave it (the so-called overstayers), or no longer meet the conditions of legal residence

561 Art. 218 (6) a) (v) TFEU 218.

(e.g. due to illegal employment). A comprehensive, pan-European research conducted within the auspices of an international consortium at the end of the 2000's (the so-called *CLANDESTINO project*⁵⁶²) could also conclude that by the end of 2009 the number of illegally resident third-country nationals was somewhere between *2.5 and 4.5 million people*. The annual reports of the European Commission on the immigration and asylum situation in the EU⁵⁶³ *do not even venture* to estimate such figures, they only report the numbers of illegal migrants who were returned that year during the border control procedure or were refused entry, and those who were captured on the territory of the Member States by the authorities of the Member States (during internal controls).

The term 'illegal migration' is actually an umbrella term for situations that take a number of *different forms*. The term includes the *illegal entry* of third-country nationals into the territory of an EU Member State by land, sea or air (including the transit zones of airports), either through the border crossing points (by hiding in vehicles and getting around controls or by corrupting the border guards), or through 'green' or 'blue' borders by avoiding control. This is often carried out by using counterfeit or forged documents and/or visas and with the active participation of networks of organized crime engaged in human smuggling and trafficking who organize the transport.⁵⁶⁴ Another form of illegal migration into the EU is when a third-country national legally enters the EU with a valid visa or is exempt from visa requirement and *stays longer than permitted* (*overstayers*) or changes his/her purpose of residence without filing a separate application (*status change*), e.g. if a third-country national does not change his/her status as a student to that of a worker after the completion of his/her university studies, but seeks employment regardless. And finally the term also covers *refused asylum seekers* who fail to leave the territory of the Union after receiving a final refusal of their application for international protection and a return decision, thereby becoming illegal residents.

6.4.2 Legal instruments

The considerable number of EU law measures concerning the fight against illegal migration may be categorized in various ways. The present subchapter first discusses measures related to the prevention of illegal migration, moving on to

562 The website of the CLANDESTINO project (including the major findings of the research) is available: <http://irregular-migration.net> (Accessed: 1 March 2016).

563 See e.g.: Communication from the Commission to the European Parliament and the Council – 5th Annual Report on Immigration and Asylum (2013), COM (2014) 288 final.

564 Tamás Jagusztin & Gergely Bodnár, 'Az illegális migráció elleni küzdelem jogi és politikai eszközei az Európai Unióban' (Legal and Policy Instruments of the Fight Against Illegal Migration), in: Szilveszter Póczik & Szilveszter Dunavölgyi (eds.), *Nemzetközi migráció – nemzetközi kockázatok* (International Migration – International Risks), HVG-Orac, Budapest 2008, pp. 93–95.

the legislative acts aiming at the return and readmission of third-country nationals actually residing illegally on the territory of the EU, and finally it discusses the legal instruments curbing undesirable factors within the EU attracting illegal migrants (*pull factors*). The above categories will serve as the basis for discussing the relevant measures adopted by the EU.

6.4.2.1 Prevention of illegal migration

The elimination or at least the possible reduction of illegal migration, i.e., the prevention of this phenomenon is the most attractive policy option for Member States, since successful prevention reduces the number of administrative activities and the volume of resources and expenses necessary for the search for, the capture and then the expulsion of third-country nationals illegally residing in the territory of the country. As a form of prevention Member States may share their responsibility with the private sector (e.g. carriers).

a) The common European rules governing the *responsibility of carriers and the penalties they may be subjected to* are included in Article 26 of the Convention implementing the Schengen Agreement, Directive 2001/51/EC⁵⁶⁵ on the responsibilities of carriers, and Directive 2004/82/EC⁵⁶⁶ on the obligation of carriers to communicate passenger data. In accordance with these rules carriers, transporting people by land, sea or air (bus companies, shipping companies, airline companies), must communicate *certain data of passengers* transported from outside the territory of the Union in advance, because if the authorities conducting border control receive information on third-country nationals intending to enter before they arrive at the border crossing point, the pace and the efficiency of the border control can be significantly enhanced. The development of Union law reached the point when it requires carriers to proceed with due care – in order to prevent illegal migration – before the commencement of the trip or the crossing of the border.⁵⁶⁷ It is the obligation and responsibility of carrier companies to check whether third-country nationals have the necessary travel documents and/or visa required to enter the territory of the EU. If the border control authorities deny the entry of third-country nationals on the basis of insufficient documents or for other reasons, the carrier is required to *transport back* third-country nationals not entitled to entry to the point of departure or to another destination in a (third) country outside the EU, or if there is no such a country, to *transport them onward* to a Member State that is required to admit the third-

565 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [OJ L 187, 7. 10 2001., pp. 45–46.]

566 Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data [OJ L 261, 8.6.2004., pp. 24–27.]

567 Jaguszcin & Bodnár 2008, p. 103.

country national. This obligation to transport back or transport onward third-country nationals must be in accordance with the 1951 Geneva Convention relating to the Status of Refugees, especially with the principle of *non-refoulement* having the character of international customary law. The gravity of the responsibility of carriers and the severity of the penalties that may be imposed are illustrated by the fact that carriers are subject to *penalties between EUR 3.000 and EUR 5.000*, if failing to properly check the travel documents and/or visas, and in case the third-country nationals concerned are not transported back by the carrier at fault, the latter shall bear the *expenses of transportation*.

b) In order to prevent *human smuggling* Article 27(1) of the 1990 Convention Implementing the Schengen Agreement states that '[t]he Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.' This treaty provision was replaced by the new legal regime established by *Directive 2002/90/EC*⁵⁶⁸ – based on the definition provided in the 2000 Palermo Protocol against the smuggling of migrants by land, sea and air –, which state that any person who *intentionally* assists a person who is not a national of a Member State *to enter, or transit* across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; or any person who, *for financial gain, intentionally* assists a person who is not a national of a Member State *to reside* within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens⁵⁶⁹ is to be considered a human smuggler and will be penalized. Any Member State may decide not to impose the above sanctions where the aim of the behaviour is to provide humanitarian assistance to the person concerned. Penal sanctions adopted with respect to human smuggling are regulated in *Council Framework Decision 2002/946/JHA*,⁵⁷⁰ which supplements the directive was originally structured in three pillars. It requires Member States to apply targeted strict measures to human smugglers working for financial gain or within the framework of a criminal organisation, or if the life of the smuggled alien was endangered, by setting the maximum penalty at no less than eight years of imprisonment. On the one hand, the framework decision generally states that penalties provided for by Member States and applied to human smuggling must be *effective, proportionate and dissuasive*, including extradition, and on the other, the le-

568 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [OJ L 328, 12.5.2002., pp. 17–18.]

569 Art. 1 (1) lit. a)-b) of Directive 2002/90/EC.

570 Council Framework Decision 2002/946/JHA (28 November 2002) on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [OJ L 328, 2002.12.5., pp. 1–4.]

gal act defines further penal sanctions, such as the confiscation of the means of transport used to smuggle humans, the disqualification from the practice of commercial activities and the deportation of third-country human smugglers, etc.⁵⁷¹ In its communication issued on 13 May 2015 under the title ‘*A European Agenda on Migration*’, the flagship of strategic EU responses given to the migration and refugee crisis of 2015, as a disincentive to illegal migration the European Commission defined the fight against smugglers of migrants as a priority in order to prevent the exploitation of migrants by criminal networks. According to the Agenda the goal must be to transform smuggling networks from ‘low risk, high return’ operations for criminals into ‘high risk, low return’ ones. In order to realize this goal an *EU Action Plan against migrant smuggling*⁵⁷² was published at the end of May 2015, which defines specific measures in relation to the fight against and the prevention of migrant smuggling, covering all phases and types of migrant smuggling, and all migratory routes – while ensuring the protection of the human rights of migrants. The Action Plan identified the following *measures*: 1) identifying, capturing and disposing of vessels used for smuggling; 2) depriving smugglers of their profits; 3) enhancing Member States’ operational cooperation against migrant smuggling with each other and with EU Agencies; 4) enhancing information gathering and exchange in third countries; 5) creation of a Eurojust thematic group on migrant smuggling; 6) enhanced prevention of smuggling and effective assistance to vulnerable migrants; and 7) revision of EU legislation on migrant smuggling by 2016.

c) *Trafficking* in human beings is often considered a form of modern-day slavery, meaning more than human smuggling. ‘While smugglers and their clients are partners in trying to elude the immigration laws of a Member State, human traffickers and their victims are far from being partners.’⁵⁷³ In cases of human trafficking the common accord between the parties participating in human smuggling, the approval of the person smuggled is *missing*, since the trafficker *forces* the victims to work, or become a prostitute or to perform a similar activity through violence, intimidation, deceit, or abuse of power. The phenomenon and the felony of human trafficking do not necessarily involve the crossing of borders, but in the age of globalization and the increasingly transnational networks of organized crime it frequently appears as an activity that operates across borders and fuels illegal migration. The ex-third pillar acquis was ‘lisbonised’ in 2011, i.e., the original framework decision⁵⁷⁴ was replaced by *Directive*

571 Art. 1 of Framework Decision 2002/946/JHA.

572 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Action Plan against migrant smuggling (2015–2020), COM 2015 (285) final.

573 Nagy & Jeney 2011, p. 714.

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2011/36/EU⁵⁷⁵ adopted on the basis of Article 79 TFEU and completed by several new provisions. The EU acquis heavily relies on the 2000 Palermo Protocol supplementing the United Nations convention against transnational organized crime, intended to prevent, suppress and punish trafficking in persons, especially women and children, as well as the 2005 *Warsaw Convention* of the Council of Europe on action against trafficking in human beings, also serving the effective implementation within the Union. The comprehensive and consolidated, new directive, which takes a more fundamental rights oriented approach, defines the minimum standards for the *definition of and the penalties applicable for offences* related to human trafficking (e.g. the minimum penalties of imprisonment), also guaranteeing the protection of *victims' rights*. For the implementation of the directive further Union legal acts were elaborated primarily in relation to illegal migration but also with an effect on human trafficking [e.g. Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings, who cooperate with the competent authorities, or the so-called Employers' Sanctions Directive (2009/52/EC)]. Directive 2011/36/EU *adopts a broader concept of what should be considered trafficking in human beings* than the former 2002 framework decision and it includes additional forms of *exploitation* (such as sexual exploitation, prostitution, forced labour, begging, slavery) under its material scope. The renewed legislation defines measures in order to *reinforce the prevention* of this phenomenon, and, among others, extends the responsibilities of Member States in providing *assistance for victims* of human trafficking, and also established the position of an *EU anti-trafficking coordinator*.⁵⁷⁶

6.4.2.2 Return and readmission

a) *Expulsion* from the territory of the Member States, i.e., the obligation to leave the country either by *voluntary departure* or by force (*removal*), is a coercive measure of crucial importance intended to remove third-country nationals illegally residing on the territory of the Union. The return of illegally staying third country nationals clearly serves both as an effective treatment of existing cases of illegal residence, and as the greatest deterrent and general prevention of illegal migration. An indispensable element of a well-organised European migration policy is the establishment of transparent and fair common rules providing for

574 Council Framework Decision 2002/629/JHA (19 July 2002) on combating trafficking in human beings [OJ L 203, 8.1.2002., pp. 1–4.].

575 European Parliament and Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [OJ L 101, 4.15.2011., pp. 1–11.].

576 Available: https://ec.europa.eu/anti-trafficking/eu-anti-trafficking-coordinator_en (Accessed: 1 March 2016).

an effective return policy. In order to unify domestic legislations and practices of the Member States applied in case of return, the Council and the European Parliament reached an agreement on *Directive 2008/115/EC* establishing common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter referred to as the *Return Directive*).⁵⁷⁷ The preamble of the Return Directive claims that ‘it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place, which fully respect the principle of non-refoulement.’⁵⁷⁸ The most effective legal instrument available to the Union includes the obligation to return illegally staying third-country nationals, as well as the rules governing voluntary departure, removal, and other coercive measures, the provisions on the of issuing EU level entry bans and bans on residence, as well as the requirements governing the detention of third-country nationals and return procedures, including measures related to legal remedy and legal assistance provided to third-country nationals. The *return decision* is the key term of the directive and must be issued in relation to all illegally staying third-country nationals (except for a rather narrow range of exceptions recognized under the Return Directive, e.g., if the third-country national concerned is taken back by another Member State or if the Member State grants a residence permit for humanitarian reasons). This black-and-white normative logic of ‘return or permit residence’ eliminates former ‘grey zone’ cases prevalent in the legal practice of certain Member States (when, after their detection authorities practically tolerated the presence of illegally staying third-country nationals and refrained from giving effect to return decisions they were subject to). In case of expulsion, return, as a general rule, is carried out by so-called *voluntary departure* for which the illegally staying third/country nationals are provided a period between seven and thirty days. If the third-country national voluntarily departs, he/she is exempt from the *entry ban and the ban on residence* (the 5 or even 10 year length of the ban is a considerable incentive for voluntary departure). The directive also specifies cases when illegal migrants may be returned by force (*removal*), together with the standards of fundamental rights to be complied with in such cases, and the requirement of the establishment of an independent and effective *monitoring system*. The unification of the rules on *aliens' police detention* is another novelty, which is justified only to prepare the return and/or carry out the removal process and is limited to a maximum of *6 months*, which in exceptional cases, *may be extended* on two occasions to a maximum of *18 months* (justified by the lack of cooperation by the third-country national concerned on the one hand, and delays

577 European Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [OJ L 348, 12.24.2008., pp. 98–107.].

578 Directive 2008/115/EC, preamble-para. (8).

in obtaining the necessary documentation from third countries on the other). Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. The Return Directive seeks to create a *delicate balance* between providing for a successful and effective return, in a fair and transparent procedure, of third-country nationals illegally staying in the EU, while fully respecting the fundamental rights and the dignity of those concerned.

b) The efficiency of the common return policy is significantly enhanced by the *mutual recognition of return decisions*. Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals was adopted to facilitate the recognition of an expulsion decision issued by a competent authority in one Member State against a third country national present within the territory of another Member State. Any expulsion decision taken will be implemented according to the applicable legislation of the enforcing Member State. Council Decision 2004/191/EC⁵⁷⁹ was drafted later in order to set out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of the Directive. The 2001 directive, however, does not cover all, only a part of the types of return decisions defined in the Return Directive, therefore, although an EU level mutual recognition of return decisions rendered by Member States was the goal set for the negotiations on the Return Directive, this eventually failed. As a compromise, a non-binding mechanism was established in the fall of 2011 for *the transit by land through several Member States of voluntary returnees* (in the form of Annex 39 to the Schengen Handbook), in which Member States may voluntarily participate. This opportunity to return home establishes the mutual recognition of return decisions between the Member State of departure and the Member States affected by the transit (transit states). The participation of the authorities of the Member States in *removal by air* is also regulated under EU law: by Directive 2003/110/EC⁵⁸⁰ on assistance in cases of transit for the purposes of removal by air. The directive aims at establishing cooperation between the authorities of the Member States responsible for the removal, if it is not possible to use a direct flight to the (third) country of destination.

c) An effective fight against illegal migration is impossible without close cooperation with the countries of origin and transit countries. The most profound instruments of this external dimension are the EU level *readmission agreements*

579 Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals [OJ L 60., 2.27.2004., p. 55.].

580 Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air [OJ L 321, 12.6.2003., p. 26.].

concluded with third countries, who undertake to provide for the readmission of their nationals and other persons (third-country nationals) illegally arriving to the Union directly from their territory. The European Community was first expressly authorized to enter into readmission agreements by the Treaty of Amsterdam.⁵⁸¹ In this respect, the Conclusions endorsed by the European Council on 15-16 October 1999 in Tampere proposed that the Council include readmission clauses in agreements with third countries, or to enter into separate readmission agreements with third countries. The Council gave the Commission mandate to negotiate in several steps, and – according to the jurisprudence of the Court of Justice of the European Union (Case No C-466/98, *United Kingdom v. Commission*) – this excludes the competence of the Member States to conduct bilateral negotiations with the same objective. Between December 1999 and the end of 2015 the Council authorized the Commission to negotiate with 22 countries/entities,⁵⁸² and such agreements were successfully concluded with 18 countries, 17 agreements of which have already entered into force, with Turkey and Cape Verde as the last countries (there are ongoing negotiations with Morocco, Algeria and Tunisia, while actual negotiations have not yet started with China). The *aim* of the readmission agreements is to create unambiguous international legal obligations based on reciprocity in the following areas: 1) to introduce *accelerated and effective procedures*, endeavouring to identify and return persons illegally entering to or staying on the territory of the parties (nationals of the Member States and those of the contractual party, as well as third-country nationals and stateless persons in transit on the territory of the parties), and 2) to cooperate in facilitating *the transit of persons to third countries (transit by the authorities)*. However, the practical implementation of the agreements creates imbalances: the apparent mutuality covers an asymmetric distribution of responsibilities, since the rate of illegal migration from EU Member States to the partner countries concerned is negligible, while the other contractual party is usually a significant contributor to illegal migration as a country of origin or as a transit country. Therefore, the most sensitive element of the readmission agreements is not the readmission of the respective nationals of the parties (which is also based on generally accepted international customary law), but rather, the readmission of persons, who are not the nationals of the other contracting party but made a transit through its territory before they illegally entered the territory of the Union. In order to reach a compromise between the interests of the parties,

581 Article 63 (3) d) TEC; read in conjunction with Article 300 (1) TEC.

582 The Commission may enter and has entered into return negotiations with regard to the following 22 countries/entities: Morocco, Sri Lanka, Russia, Pakistan, Hong-Kong, Macau, the Ukraine, Albania, Algeria, China, Turkey, Macedonia, Serbia, Montenegro, Bosnia and Herzegovina, Moldova, Georgia, Cape Verde, Belarus, Armenia, Azerbaijan, and finally, based on a mandate granted in December 2014, Tunisia.

clauses pertaining to *the readmission of third-country nationals* were often ‘activated’ years after the entry into force of the agreement (e.g. the readmission agreement with Turkey). In 2011 the institutions of the Union evaluated the functioning of the common readmission policy and, as a result, the Council of the EU adopted conclusions defining the Union’s renewed and coherent *strategy on readmission*.⁵⁸³ These, among others, defined the following guidelines for the future: the EU readmission policy should be more embedded in the *overall external relations policy of the European Union*; Member States should take measures necessary to *further improve the rate* of approved readmission requests and effective returns; with regard to future mandates on readmission, the migration pressure from a third country on a particular Member State or on the European Union as a whole, cooperation in return by a third country, as well as the geographical position of a third country situated at a migration route towards Europe should be considered *the most important criteria*, while clauses on the readmission of *nationals of third countries*, and rules on *accelerated procedure and transit operations* should be incorporated into future agreements.

d) In order to establish a mutually beneficial cooperation in the fight against illegal migration the EU participates in a number of *bilateral regional dialogues* and *platforms of cooperation (so-called regional consultative processes)*⁵⁸⁴ with third countries (e.g. towards the East, the Budapest Process, the Silk Routes Partnership or the Panel on Migration and Asylum of the EU Eastern Partnership, or towards the South, the Rabat Process and the Khartoum Process). These include a wide range of topics from the capacity building of institutions, and the effective integration of legal migrants, to the management of returns, and the efficient implementation of readmission requirements. In accordance with the Global Approach to Migration and Mobility (abbreviated in Union jargon as GAMM) and according to international norms countries of origin or transit countries must also be *motivated* to provide international protection to those in need of such protection, to improve their asylum and admission capacities, to develop properly functioning migration systems, and to protect the fundamental human rights of migrants, by paying special attention to vulnerable migrants, such as unaccompanied minors, victims of human trafficking, women and children. In order to effectively support their efforts, the Union offers these countries (*technical and financial assistance*, extending its cooperation with third countries concerned in order to achieve capacity building in the areas of return and readmission, supporting partner countries in their negotiations on readmission agreements to be made with other third countries. Most recently, dialogues

583 Council Conclusions defining the European Union strategy on readmission (Council Document 11260/11., Brussels, 9–10 June 2011).

584 For more, see: <https://www.iom.int/regional-consultative-processes> (accessed: 1 March 2016).

with third countries on migration are also aimed framing the topic in the context of the *development and cooperation policy* of the EU, so that the Union could more effectively influence the management of the root causes of illegal migration (*push factors*), such as poverty, unemployment, lack of access to health and social care, or the actions of a corrupt and unpredictable government.⁵⁸⁵

6.4.2.3 Sanctions against employers of illegal migrants

Illegal employment is one of the most important factors motivating illegal migration, that is to say it constitutes a significant *pull factor*. Companies and other agents on the labour market (agricultural cooperatives, the catering trade, or even well-off households) in the Union tend to employ undeclared foreign workers, including third-country nationals without legal status, whose precarious situation makes them ready to accept jobs for low wages and without the protection afforded under labour law, because they still hope for a more decent life than in the one they were living in their home country. In order to eliminate this form of illegal employment a separate directive was adopted on sanctions and measures against employers of illegally staying third-country nationals (in the wording of the directive: ‘illegal employment’) (*Directive 2009/52/EC*).⁵⁸⁶ The so-called *Employers’ Sanctions Directive* defines common European minimum standards and specifies *sanctions and measures* (e.g. exclusions from entitlement to public benefits, aids or subsidies, or public procurement procedures for a definite period) against employers of third-country nationals illegally staying in the Member States. The directive primarily *sanctions* the *employment* of third-country nationals hired without a legal status, and the *employers* participating in such activity. The penalties may include *administrative* sanctions (e.g. closure of shops), or *financial* sanctions, and they should be effective, proportionate and dissuasive, and the most serious cases may even result in *criminal penalties* (e.g. in case of the simultaneous employment of a significant number of illegally staying third-country nationals, or particularly exploitative working conditions, and the employment of victims of trafficking in human beings or minors). To prevent illegal employment the directive requires employers *to check* the legal status of third-country national employees, and *to notify* the competent authorities designated by Member States of the start of employment of third-country nationals. The Employers’ Sanctions Directive also requires Member States to carry out effective and adequate *labour inspections* on their territory to guarantee the transparency of the employment of third-country nationals. In or-

585 Nagy & Jeney 2011, p. 671.

586 European Parliament and Council Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [OJ L 168., 6.30.2009., pp. 24–32.].

der to provide *legal protection* to illegally employed third-country nationals, the directive secures their rights to any outstanding remuneration, even after they return to their country of origin. Member States are required to put in place the necessary internal legal mechanisms to achieve this end.

6.4.3 Practical cooperation

The quick and extensive *sharing of information* is indispensable for successful and effective operational cooperation between Member State authorities competent in issues related to illegal migration. Proper channels and infrastructure are required to achieve this aim. This was the goal of the ministers of the interior at the beginning of the 1990s when they established the *CIREFI*⁵⁸⁷ (a task force of experts, which met every month) in order to provide a platform for sharing information on trends in illegal migration, methodologies and statistics. CIREFI was abolished in 2010 and its activities were transferred to FRONTEX, the EU agency set up to facilitate operational cooperation in border control. In 2005 an already web-based, secure Information and Coordination Network was established for Member States' migration management services (*ICONET*).⁵⁸⁸ In 2004 the *immigration liaison officers network* (ILOs)⁵⁸⁹ was established to collect and exchange well-grounded prognoses on migration and information on trends in migration between the Member States. The ILO-regulation defined the forms of cooperation between the ILOs of the Member States, and determined the functions and appropriate qualifications of such liaison officers, as well as their responsibilities vis-à-vis the host country and the sending Member State. The ILOs collect information for use either at the operational level, or at a strategic level, or both, in particular concerning issues such as: flows of illegal immigrants and the routes followed by those flows; the means of transport used and the involvement of intermediaries; the activities of criminal organisations involved in the smuggling of humans; events that may become the cause for new developments with respect to flows of illegal immigrants; methods used for counterfeiting or falsifying identity documents and travel documents; or the ways and means to facilitate the return and repatriation of illegal immigrants to their countries of origin.

587 Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration. Its legal basis was provided by the following two former third pillar legal acts: Council Conclusions of 30 November 1994 on the organisation and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (Cirefi); and Resolution of 27 May 1999, on the creation of an early warning system for the transmission of information on illegal immigration and facilitator networks.

588 Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based Information and Coordination Network [OJ L 83, 4.1.2005., pp. 48–51.].

589 Council Regulation 377/2004/EC of 19 February 2004 on the creation of an immigration liaison officers network [OJ L 64, 3.2.2004., pp. 1–4.].

As a further aspect of practical cooperation, the Union provides support (coordinated by FRONTEX) for the effective implementation of return decisions issued by the Member States by *organizing joint flights for the removal* of illegal migrants staying on the territory of the EU, who are subjects of individual removal decisions. Technical procedures and conditions of inter-Member State coordination related to joint removal flights are regulated by *Council Decision 2004/573/EC*.⁵⁹⁰ Common guidelines on security provisions, the protection of the health of deportees, the code of conduct for escorts and the use of coercive measures are set out in the annex to the decision.

6.4.4 Financial resources available for the policy (EU resources)

The practical implementation of EU legal instruments in the fight against illegal migration is impossible without the necessary *financial resources* – these have been altered for the current multiannual financial framework for the period between 2014 and 2020. In the beginning, in order to finance administrative cooperation against illegal migration EU resources were allocated within the framework of the ARGO programme which ran between 2002 and 2006,⁵⁹¹ and was later replaced by the *European Return Fund* (2007-2013). This EU financial fund, together with two other migration solidarity funds (the European Refugee Fund and the European Fund for the Integration of third-country nationals) were then merged into the new *Asylum, Migration and Integration Fund (2014–2020)*,⁵⁹² which was finally allocated EUR 3.137 billion.⁵⁹³ Compared to the budget of the former funds in the previous seven years (2007–2013), the resources for the new fund have been considerably increased, which is a clear sign that the Union has recognized the crucial importance of the fighting illegal migration. The *national programmes* of the Member States were approved by the Commission in 2015, and therefore, applications, and projects supported by the new fund and aimed at the fight against illegal migration may commence in spring 2016 (objectives related to return and readmission, as well as actions eligible for funding are included in Chapter IV of the regulation establishing the Fund).

590 Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [OJ L 261, 8.6.2004., pp. 28–35].

591 Council Decision 2002/634/EC [OJ L 161/11].

592 European Parliament and Council Regulation No 516/2014/EU of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [OJ L 150, 5.20.2014., p. 168].

593 Available: http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund/index_en.htm (Accessed: 1 March 2016).

6.5 Evaluation and future prospects

The ‘*external dimension*’ of EU politics (i.e. cooperation with third countries) has recently gained further impetus in the European Union’s fight against illegal migration, and must remain in focus, while also fostering a more organic connection with the ‘*internal dimension*’ (i.e., the EU *acquis* on coercive measures, especially the Return Directive). These efforts should not be limited to entering into *further readmission agreements* (with certain privileged countries of origin), instead, the policy against illegal migration should become an integral part and an inter-policy component of the *overall external relations policy of the EU* with effective support from the European External Action Service and the Commission. Accordingly, the increasingly structured dialogues on policy with third countries concerned should expressly cover the topics of return and readmission.

In terms of practical measures, the operation of *assisted voluntary return (AVR) programmes* easily accessible for returnees (primarily under the coordination of the International Organization for Migration), supplemented by a *reintegration component*, may also significantly increase the number of voluntary returns by means of providing financial incentives and the hope of succeeding in the country of origin. Experienced local representatives of the International Organization for Migration and other international organisations (e.g. UNHCR) operating in the countries of origin may also be involved in supporting and monitoring of the reintegration of returnees. Resources for such Union initiatives are provided by allocations from the Asylum, Migration and Integration Fund.

A major step would be to establish mechanisms for the future exchange of information between Member States on return decisions, possibly in the form of a *common EU database of return decisions* issued by the Member States (e.g. within SISII). It is also of crucial importance to *conduct extended information campaigns* in countries of origin and transit countries most affected by illegal migration with the active participation of the European External Action Service and the EU Delegations operating in third countries.

In trying to effectively manage and reduce the ever increasing waves of illegal migration of yet unseen scale, there is no alternative to complex and comprehensive measures effectively coordinated on the Union level (coupled with substantial financial resources), as well as veritable and mutually supportive action by the Member States for the full implementation of the relevant *acquis* of the Union.

7 Asylum policy

7.1 Historical retrospect

1. Originally an organisation of economic integration, the European (Economic) Community (EEC/EC) *did not have competence*, for several decades, over certain areas of home affairs which traditionally belonged to the Member States, such as the regulation of territorial asylum and asylum policy. The seed of cooperation between the Member States in the areas of justice and home affairs was planted by the *TREVI Group* ('*Terrorisme, Radicalisme, Extrémisme, Violence Internationale*'), which started operation in the mid 1970's as an informal gathering of experts – without legal basis in the founding treaties and driven by practical necessity. From 1984 onward, it was followed by the informal meeting and conference of the ministers of home affairs and justice which was held twice a year (e.g. in their meeting on the 30 November 1992 in London the ministers of home affairs defined, for the first time, the terms 'safe third country' and 'manifestly unfounded asylum applications').

These fora only briefly discussed cooperation in areas related to asylum, which was first put into black letter law in the 1990 *Convention implementing the Schengen Agreement*,⁵⁹⁴ in the form of technical and coordinative rules determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. It is clear from the above that the groundwork for the common asylum policy was laid down outside the institutional framework of the EEC/EC, by certain Member States wishing to proceed faster and deeper in integration. These norms were replaced by a self-standing international agreement: the 1990 *Dublin Convention*. In this respect, the beginning of EU-wide regulation on asylum shows similarities with the Schengen cooperation, and this *acquis* was likewise incorporated into the institutional architecture of the European integration process.

2. The Maastricht *Treaty on the European Union* (TEU) of 1992 – having created the so-called pillar structure, which existed until December 2009 –, elevated asylum policy to the rank of so-called 'issues of common concern', *as a part of the third pillar* of the EU (in Chapter IV of original TEU).⁵⁹⁵ Intergovernmental cooperation in this area had to be conducted in accordance with the 1951 Geneva Convention relating to the Status of Refugees which could not result in the harmonization of the legal systems of the Member States; it merely proposed the establishment of traditional (intergovernmental) international agreements,

594 Chapter 7 (Arts. 28-38) of the Convention implementing the Schengen Agreement.

595 Art. K1. of original TEU.

and it only required the exchange of information and consultation between the Member States in order to better coordinate their activities.⁵⁹⁶

The special, supranational decision-making process of the first pillar, the so-called supranational Community method, was not applied in the third pillar of the EU, instead, it operated through unanimous decision-making processes typical of traditional intergovernmental organisations, and – for lack of Community law – with special, mostly ‘soft’ legal instruments (joint actions, common positions, etc.). In addition, the European Parliament was excluded from the legislative procedure (it was merely consulted), and the jurisdiction of the European Court of Justice was also rather limited in this area. During the period beginning with the entry into force of the Treaty of Maastricht in November 1993, cooperation within the EU framework in asylum related issues was still in such an embryonic state, that only one common position was issued: on the common interpretation of the term of refugee included in the 1951 Geneva Convention. This was followed by the Council’s decision in 1995 on the minimum guarantees of asylum related procedures, and the agreement between the then Member States on temporary protection, and the distribution of responsibilities in relation to the refugees fleeing from the current Balkan conflict, in particular, the Bosnian War.

3. The next significant change was brought about by the *Treaty of Amsterdam* signed on 2 October 1997 (entered into force on 1 May 1999). It elevated certain ‘issues of common concern’, including *asylum policy* as part of the cooperation in justice and home affairs renamed the ‘*Area of Freedom, Security and Justice*’ (AFSJ) to the ‘*Community level*’. With this reform asylum policy was moved to *Title IV* of the Treaty Establishing the European Community (TEC), now in the form of a fully-fledged first pillar policy, equipped with all the instruments of secondary legislation, and with the autonomy and structural characteristics of EC law (direct applicability, direct effect, primacy). Considerable legal progress – in legal framework and Community competence – was hindered by the fact that the five years following the entry into force of the Treaty of Amsterdam served as a kind of *transitory period* and as a result, in the areas of cooperation incorporated into the first pillar as of 1 May 2004 – such as asylum policy – decision-making mechanism differed from the general Community procedures. For instance, during this five year period the Council could not only act on the basis of proposals from the Commission, as an institution with the monopoly of initiating legislative proposals, but on the basis of proposals submitted by any of the Member States. In addition, despite the fact that the co-decision procedure had already become widespread by then, under this policy field the European Parlia-

596 Art. K2. and K3. of original TEU.

ment had only to be consulted, and Member States had the power of veto in most issues.⁵⁹⁷

4. Asylum policy, which has become part and parcel of Community law and a shared competence with the Member States, appeared as one of the objectives of TEC as an organic part of the ‘Area of Freedom, Security and Justice’. The founding treaties envisaged the elaboration of *a number of Union level measures*. Title IV of the TEC, inserted by the Treaty of Amsterdam, foresaw measures in the following areas:

- harmonisation of the refugee laws of the Member States (in accordance with the 1951 Geneva Convention and its 1967 Protocol);
- establishing common minimum standards on the reception of asylum seekers in Member States, on asylum procedures in Member States, on procedures in Member States for granting or withdrawing refugee status;
- criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a third-country national in one of the Member States;
- promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.⁵⁹⁸

These objectives regularly appeared in the five year strategic plans of the European Council – which fill framework of the AFSJ laid down in the founding treaties with substance by providing guidelines on specific policies.

5. After the expiry of the five year period defined in the Treaty of Amsterdam an important *change* occurred *in the decision-making process* of the area of asylum policy. The common standards and principles of cooperation in asylum matters were almost completely adopted, and as of *December 2005*, the *co-decision procedure* applied, i.e., the Council and the European Parliament became co-legislators. That is to say, after the establishment of the first phase (2003–2005) of the Common European Asylum System (CEAS) the second phase was launched in rather different political and institutional context, that entailed a number of challenges, unforeseen difficulties, as well as unavoidable compromises.

7.2 The aims of the Common European Asylum System

1. In relation to EU asylum policy, Article 67(2) TFEU declares the following as a rather *general aim*: ‘It shall frame a common policy on asylum [...] based on solidarity between Member States, which is fair towards third-country nationals.’

⁵⁹⁷ Steve Peers, *EU Justice and Home Affairs Law*, Oxford University Press, 2012, pp. 19–20.

⁵⁹⁸ Art. 63 (1)–(2) of the consolidated version of TEC as amended by the Treaty of Amsterdam.

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2. Chapter 2 of the Title V of the TFEU defines *specific, more detailed objectives* in Article 78:

‘(1) The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.’

The text of Article 78(1) TFEU is about the formation of ‘a common policy on asylum, subsidiary protection and temporary protection’. In addition, paragraph 2 of the same Article introduced the expression Common European Asylum System in primary law, which constitutes a closer and more profound form of harmonisation and EU level action compared to the ‘common policy’ and minimum standards employed so far. The provisions quoted above also showcase that the text of the Lisbon Treaty unambiguously differentiates among various types of international protection: refugee status in accordance with the 1951 Geneva Convention, the so-called subsidiary protection which does not amount to refugee status, and the so-called temporary protection which is applied in case of mass immigration.⁵⁹⁹ In addition, references to minimum standards were removed from the text of the TFEU’s relevant provisions –they now refer to ‘common’ standards. Furthermore, the ultimate ambitious goal to establish ‘*a uniform status of asylum for nationals of third countries, valid throughout the Union*’ [Article 78 (2) lit. a) TFEU] was foreseen.

EU action is still *embedded in international refugee law*; therefore, this policy must be invariably in compliance with the 1951 Geneva Convention and its 1967 Protocol, including the principle of non-refoulement having the character of customary law. What is more, as a new element, harmonisation with other relevant agreements has to be ensured when forming EU policy (e.g. with the 1959 European Agreement on the Abolition of Visas for Refugees accepted within the framework of the Council of Europe with regard to other Member States, or with the 1980 European Agreement on Transfer of Responsibility for Refugees⁶⁰⁰).

3. *Further aims* of the Common European Asylum System are included in strategic policy guidelines endorsed by the European Council (cf. Article 68, TFEU), including among others the *Stockholm Programme* for the period be-

599 Peers 2014, pp. 303–305.; Marianne Dony, *Droit de l’Union européenne*, Editions de l’Université de Bruxelles, Brussels 2012, pp. 454–455.

600 1959 *European Agreement on the Abolition of Visas for Refugees* (CETS No.: 031); 1980 *European Agreement on Transfer of Responsibility for Refugees* (CETS No.: 107). Agreements available: conventions.coe.int.

tween 2010 and 2014, and the *Ypres Guidelines* setting the direction for the development of this policy area until 2020 (the latter ones adopted by the European Council meeting on 26-27 June 2014). According to these, the European Union needs an efficient and well-managed asylum policy, which is based on the principles of *solidarity* and the *fair sharing of responsibility* set out in the founding treaties (Article 80 TFEU) and their effective implementation. It is essential that asylum seekers – irrespective of the fact in which Member State they submitted their application for asylum – should receive *equivalent treatment* with regard to the *conditions of admission*, and the *same treatment* with respect to *procedure standards and legal status*. The aim is to treat similar cases similarly, and to achieve congruent results. While the Common European Asylum System should promote a high level of protection, due attention must be paid to fair and efficient procedures facilitating the *prevention of abuse*. Moreover, the *full transposition and actual implementation* of the achievements of the Common European Asylum System into national law should receive absolute priority in the upcoming period. This way, based on the common normative system and close cooperation equal conditions are expected to develop, ensuring guarantees of identical procedures and protection for asylum seekers in the whole Union. In line with the above the role of the *European Asylum Support Office* should also be reinforced, in particular with regard to promoting the uniform implementation of EU *acquis*. The convergence of practices implemented by the Member States will contribute towards increasing *mutual trust* in this field.

7.3 Legal bases

1. The *entry into force of the Treaty of Lisbon on the 1 December 2009* indicated a qualitative change in the formation of EU asylum policy. The Treaty of Lisbon brought about *horizontal changes* in the functioning of the Area of Freedom, Security and Justice: the ordinary legislative procedure was introduced which meant that the European Parliament became a co-legislator to the Council in almost all respects; qualified majority decision-making became the general rule; the jurisdiction of the Court of Justice of the European Union was extended to this area; third pillar legal acts were abolished *pro futuro*, thus, all legal acts adopted after 1 December 2009 took the form of secondary EU law (regulation, directive, decision or recommendation, opinion). EU *asylum competences* continue to belong to shared competences [Article 4(2) lit j) TFEU].

2. Due to the modifications enacted by the Treaty of Lisbon, *measures* which can be adopted by the EU include the following, according to Article 78(2) TFEU:

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- '(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.'

Article 78(3) TFEU proposes measures to deal with an emergency situation caused by a mass inflow of third-country nationals:

'In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.'

In addition, it is worth mentioning the so-called *solidarity clause* (Article 80 TFEU) which states that '[asylum policy] and [its] implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.'

3. The above powers of the EU institutions laid down in the founding treaties were supplemented and placed into a strong human rights context by the elevation of the *EU Charter of Fundamental Rights* to the level of primary EU law simultaneously with the entry into force of the Treaty of Lisbon. This novel layer of fully binding rights (forming also the standard of review in respect of secondary EU law) declares not only *the right to asylum* (Article 18) and the *principle of non-refoulement* (Article 19), but it also defines numerous other rights in relation to asylum seekers and recognized refugees or those who enjoy international protection (e.g. the prohibition of torture and inhuman or degrading treatment and punishment – Article 4; the right to freedom and security – Article 6; respect for private family life – Article 7). The *Court of Justice of the European Union* has already cited and applied the EU Charter of Fundamental Rights in its most recent case-law concerning asylum, and in turn it has also interpreted EU asylum acquis in light of the Charter – on more than one occasion extensively, creating independent EU law categories.⁶⁰¹

601 See e.g.: the judgment of 28 July 2011 in Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*; judgment of 21 December 2011 in *Joined Cases C-411/10 and C-*

7.4 The establishment and the legal instruments of the Common European Asylum System (2003–2013)

1. EU institutions began to elaborate common legal norms constituting the first phase of the ‘*Common European Asylum System*’ (CEAS) already envisioned in the 1999 Tampere Programme. This initiative originated from their intention to make the European Union a unified area of protection for refugees and other persons in need of international protection on the basis of common humanitarian values shared by all Member States as well as through applying the 1951 Geneva Convention comprehensively. In order to achieve this ambitious objective, secondary EU *acquis* enacted between 2000 and 2005 introduced harmonised, common norms in the *following specific areas*:

- the assignment of a Member State responsible for application for asylum submitted in one of the Member States on the basis of a prescribed set of criteria and related principles (in the form of the Dublin II Regulation replacing the 1990 Dublin Convention and its implementing regulation);⁶⁰²
- facilitating the designation of responsible Member State, and to filter duplicate asylum application establishing EURODAC for the comparison of fingerprints;⁶⁰³
- the definition of common measures in the event of a mass influx of third-country nationals, and thus giving protection while ignoring individual evaluation, or the implementation of sharing burdens (the so-called temporary protection directive);⁶⁰⁴

493/10, N.S. v Secretary of State for the Home Department and M.E. e.a. v Refugee Applications Commissioner; judgment of 22 November 2012 in Case C-277/11, M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General; judgment of 6 June 2013 in Case C-648/11, The Queen, on the application of MA, BT, DA v. Secretary of State for the Home Department intervener The AIRE Centre (Advice on Individual Rights in Europe) (UK); or lastly, the judgment of 30 January 2014 in Case C-285/12, Aboubacar Diakite v. Commissaire general aux refugies et aux apatrides, and respectively the judgment of 2 December 2014 in the Joined Cases C-148/13 - C-150/13, A, B, and C v. Staatssecretaris van Veiligheid en Justitie.

602 Council Regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [OJ L 50, 2.25.2003., p. 1.]; Commission Regulation 1560/2003/EC of 2 September 2003 laying down detailed rules for the application of Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [OJ L 222, 9.5.2003., p. 10.].

603 Council Regulation 2725/2000/EC of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention [OJ L 316, 12.15.2000., 1.]; Council Regulation 407/2002/EC of 28 February 2002 laying down certain rules to implement Regulation 2725/2000/EC concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention [OJ L 62, 3.5.2002., p. 1.].

604 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of ef-

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- on minimum standards for the qualification and status of persons who need international protection (conventional asylum status or subsidiary protection) (Qualification Directive);⁶⁰⁵
- laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive);⁶⁰⁶
- on minimum standards on procedures in Member States for granting and withdrawing refugee status (Procedures Directive);⁶⁰⁷
- in order to facilitate the above mentioned legislative package the European Refugee Fund⁶⁰⁸ was established in 2000, the last (third) period of which lasted from 2008 to the end of 2013, as part of the so-called SOLID funds.

The *first phase* of the CEAS was completed by the end of 2005. The first phase aimed to harmonise the legal frameworks of the Member States on the basis of common minimum standards ensuring fairness, efficiency and transparency. A considerable corpus of EU legal acts (regulations, directives and decisions) was elaborated in this interval spanning a couple of years. Qualitatively, however, the system was found wanting: e.g. it altogether managed to realise minimum harmonisation, and as a result of Council decision-making alone, it mostly represented the interests of major Member States, affording a great leeway to Member States and hardly enforceable rules; in addition, this was only an intermediate phase serving the implementation of short-term goals. The realisation of long-term aims, namely the second phase of the Common European Asylum System followed subsequently.

2. The high political incentive for establishing the second phase of the Common European Asylum System was provided by the so-called Hague Programme, which intended to complete the CEAS by 2010. It is also added that this has to be preceded by the revision of the EU *acquis* on asylum constituting the first phase in 2007. In order to realise the latter, the European Commission submitted a *Green Paper* in 2007 on the future Common European Asylum System,⁶⁰⁹ and at the same time initiated a comprehensive consultation procedure to

forts between Member States in receiving such persons and bearing the consequences thereof [OJ L 212, 8.17.2001., p. 12.].

605 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country national or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [OJ L 304, 4.30.2004., p. 12.].

606 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [OJ L 31, 2.6.2003.,p. 18.].

607 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [OJ L 326, 12.13.2005.1, p. 13.].

608 European Parliament and Council Decision 2007/573/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC [OJ L 144, 6.6.2007., p. 1.]

609 Green Paper on the future Common European Asylum System COM(2007) 301 final, Brussels, 6 June 2007.

determine what kind of options are available and into which directions further development might extend within the framework of EU law. According to the Commission, the ‘*the ultimate objective pursued at EU level is thus to establish a level playing field, a system which guarantees to persons genuinely in need of protection access to a high level of protection under equivalent conditions in all Member States while at the same time dealing fairly and efficiently with those found not to be in need of protection.*’⁶¹⁰ In addition, the document emphasises that the second phase of the common asylum policy has to serve to enhance the general quality of the procedures and to boost the capacity of all stakeholders involved in the asylum process, as well as to eliminate former deficiencies by pursuing legislative harmonisation based on high standards.⁶¹¹

3. Partly on the basis of the experience gathered from the consultation on the Green Paper, the Commission published the *Policy plan on asylum* in 2008,⁶¹² which focused on the revision of the existing asylum acquis, reworking it in light of new developments with the dual purpose to increase the standard of protection set up by common norms as well as to further harmonise domestic legal frameworks of Member States. Furthermore, the 2008 Policy plan stated: the task of the CEAS is to provide unified legal standards and norms, common instruments and cooperation mechanisms which guarantee the availability of high quality international protection standards during the whole asylum procedure, from the reception of asylum seekers to the full integration of those receiving protection, in addition to maintaining the integrity of the asylum system while eliminating abuses.⁶¹³ In order to realise these aims, the Commission proposed several legislative drafts following December 2008, which were intended to build up the second phase of the CEAS.

4. The *Stockholm Programme*, which served as the AFSJ strategic policy paper in the period between 2010 and 2014, repeated the main objectives of the common EU asylum policy already laid down in the founding treaties and the earlier programmes (Tampere Programme, Hague Programme). At the same time, the Stockholm Programme urged the Council and the European Parliament to increase their efforts to complete the Common European Asylum System by 2012 at the latest, including providing for a unified legal status of persons recognised as refugees or granted subsidiary protection.⁶¹⁴ The same had already been formulated in the strategic guidelines adopted under the French presidency of

610 Ibid. 2.

611 Ibid. 3.

612 Policy plan on asylum – An integrated approach to protection across the EU {SEC(2008) 2029} {SEC(2008) 2030} COM(2008) 360 final, Brussels, 17 June 2008.

613 Ibid. 12.

614 The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4 May 2010, p. 1.

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the Council: the *European Pact on Immigration and Asylum* finalized in October 2008 set out to establish ‘a European framework for asylum’. The Commission’s *Action Plan* outlined the main directions of EU asylum policy for the period following the entry into force of the Treaty of Lisbon more precisely, since it made the Stockholm Programme optional and furthermore laid down guidelines and tasks envisaging concrete actions.⁶¹⁵

5. As far as *legislative measures* are concerned, instead of designing a new legislative package for realizing the ambitious aims of the TFEU completely replacing and going beyond EU norms constituting the first phase of the CEAS, the Commission merely set out to *recast* the Dublin II Regulation, the EURODAC Regulation and its implementing rules, the Reception Conditions Directive, the Procedures Directive, as well as the Qualification Directive. A further proposal sought to facilitate the extension of *extend* long-term residence status to persons receiving international protection.

These legislative drafts (the so-called asylum package) contained more precise, more detailed and more accountable rules in comparison to the provisions elaborated exclusively by the Council during the first phase of the CEAS, while at the same time granting greater freedom to Member States in the ambit of implementation. As a result, provisions were often rendered opaque and operated with vague notions. Moreover, these drafts were conceived with the intention of eliminating existing differences between the legal statuses of persons who were either recognised as refugees or received subsidiary protection (see e.g. the extent of the validity of the residence permit; the possibility of extending long-term residence to both groups of persons; the unification of access to labour market).

The legislative process of constructing the second phase of CEAS and the negotiations within the Council as well as among the co-legislators progressed very slowly, and was met with resistance on numerous points, sometimes even coming to a halt. The elements of the so-called asylum package were submitted gradually by the Commission between December 2008 and spring 2012. On several occasions, the Commission had to withdraw its original proposal because of the clear resistance demonstrated by the Member States. This was the case with the new Reception Conditions Directive and the new Asylum Procedures Directive in the fall of 2010 (new proposals were submitted by the Commission in July 2011), and the same situation ensued with regard to the EURODAC Regulation. Finally, it was only the fourth version submitted in 2012 which was accepted. In the negotiation of the EURODAC Regulation the most heated debates between the Council and the European Parliament centered on the question of

615 Delivering an area of freedom, security and justice for Europe’s citizens – Action Plan Implementing the Stockholm Programme. COM(2010) 171 final, Brussels, 20 April 2010.

granting Member States' law enforcement authorities access to data stored in the EURODAC system. Due to the deadlock in negotiations the original package-approach failed, hence the EU acts constituting the second phase of the Common European Asylum Policy were conceived in a number of steps.

First, *Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC (of 25 November 2003 concerning the status of third-country nationals who are long-term residents) to extend its scope to beneficiaries of international protection and subsidiary protection* (2011/51/EU European Parliament and Council Directive)⁶¹⁶ was successfully adopted by the co-legislators. The Member States were to transpose the directive in their domestic law by 20 May 2013.

Second, the *recast Qualification Directive* was adopted by the co-legislators in autumn 2011. Compared to the other legislative proposals, this triggered the least number of conflicts, and the articulation of interests was moderate. Directive 2011/95/EU of the European Parliament and the Council,⁶¹⁷ however, is less ambitious, thus it does not introduce an asylum status that would be valid and mutually equivalent in all the Member States. With respect to eliminating secondary movements ('*asylum shopping*') between Member States, the recast directive re-regulated the qualification of international protection and the content of the protection granted, in a more detailed and unified manner, with a few improvements (e.g. the extension of the notion of family member to a third-country national who is responsible for the child, and the further approximation of asylum and subsidiary protection statuses). The deadline for the transposition of the directive expired on 21 December 2013.

The remaining proposals, namely the Dublin III Regulation, the recast EURODAC Regulation as well as the also revised Reception Conditions and Asylum Procedures Directives, were agreed by the Council in June 2013, and they were also adopted by the European Parliament. As regards the directives, Member States had two years to transpose them into their legal systems (the deadline for both directives expired on 20 July 2015).

616 European Parliament and Council Directive 2011/51/EU of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [OJ L 132, 5.19.2011., p. 1.].

617 European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [OJ L 337, 12.02.2011., p. 9.].

The *recast EURODAC Regulation*⁶¹⁸ established the criteria and mechanisms for the law enforcement authorities of Member States and the EUROPOL to access the EU fingerprint database for law enforcement purposes, and a European Agency for the operational management of EURODAC through operating large-scale IT systems in the Area of Freedom, Security and Justice. The regulation was to be directly applied by Member States from 20 January 2015.

The *Dublin III Regulation*⁶¹⁹ – which was directly applicable from 19 January 2014 – and its *Implementing Regulation*⁶²⁰ redressed former deficiencies of the Dublin System, ensuring the harmonisation of the standards laid down in the EU asylum acquis accepted thus far, as well as facilitating the management of situations when the asylum system of a Member State is under an exceptionally great pressure. As far as the latter is concerned, it establishes early warning, emergency and crisis management mechanisms in cooperation with the European Asylum Support Office and the Member States.

Compared to the preceding directive, the *revised Reception Conditions Directive*⁶²¹ contains major novelties, for example, it lays down far more detailed standards for asylum detention, prescribes the application of alternatives to detention (residence in a designated location, reporting obligation, financial warranty); moreover, it increases the quality of reception conditions by diminishing differences between Member States strengthening the guarantees afforded to applicants, especially to vulnerable applicants with special reception needs. The new directive also enhances the rights of applicants to employment (compared to the previous legislation, the new directive claims to provide access to the labour

618 European Parliament and Council Regulation 603/2013/EU of 26 June 2013 on the establishment of – Eurodac – for the comparison of fingerprints for the effective application of Regulation 604/2013/EU establishing the criteria and mechanisms for determining the Member State responsibility for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation 1077/2011/EU establishing a European Agency for the operational management of large-scale IT systems in the Area of Freedom, Security and Justice (recast). [OJ L 180, 6.29.2013., p. 1.].

619 European Parliament and Council Regulation 604/2013/EU of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. [OJ L 180, 6.29.2013., p. 31.].

620 Commission Implementing Regulation 118/2014/EU of 30 January 2014 amending Regulation 1560/2003/EC laying down detailed rules for the application of Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsibility for examining an asylum application lodged in one of the Member States by a third-country national. [OJ L 39, 2.8.2014., p. 1.].

621 European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection [OJ L 180, 6.29.2013., p. 96.].

market for asylum seekers 3 months earlier, i.e., at most 9 months after the submission of the application).

The *recast Asylum Procedures Directive*,⁶²² among others, defines a uniform procedure for facilitating the consistent implementation of the asylum acquis and simplifies applicable norms. The directive unequivocally states that asylum applications shall be assessed in accordance with both forms of international protection, and it also incorporates the special needs of vulnerable persons into the procedure also placing considerable emphasis on the further training of asylum authorities' staff in order to further unify Member State practices.

6. Besides the legislative acts constituting the second phase of the CEAS, *supplementary measures* must also be mentioned, which *facilitate the practical application* of the recast asylum acquis and aim to *unify* the implementation practice of Member States, thereby increasing solidarity among the Member States.

With its headquarters in Malta, the *European Asylum Support Office (EASO)*⁶²³ has operated as an independent EU agency since June 2011, carrying out an essential mandate by coordinating the support given to Member States facing a massive influx of asylum seekers; what is more, if needed, the EASO is entitled to send so-called asylum support groups (consisting of experts from other Member States) to the Member State in need. In spring 2012 the Council and the European Parliament defined the *common EU priorities for refugee resettlement* from third countries.⁶²⁴ In addition, *relocation projects* are also taking place as an expression of EU solidarity among the Member States (the transfer of recognized refugees among the Member States, e.g. the EUREMA project from Malta to other EU Member States; or more recently, the emergency relocation mechanisms organizing transfers from Italy and Greece⁶²⁵).

7.5 Financing the Common European Asylum Policy

The common norms on asylum cannot be efficiently implemented without allocating *financial resources* to the policy, implying a system of EU resources reformed by the current multiannual financial framework of the EU for the period

622 European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [OJ L 180, 6.29.2013., p. 60].

623 European Parliament and Council Regulation 439/2010/EU of 19 May 2010 establishing a European Asylum Support Office [OJ L 132, 5.29.2010.].

624 European Parliament and Council Regulation 281/2012/EU of 29 March 2012 amending Decision 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' [OJ L 92, 3.30.2012.].

625 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [OJ L 239, 15.9.2015] and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [OJ L 248, 24.9.2015].

between 2014 and 2020. The European Refugee Fund established in 2000, together with two other migration solidarity funds (the European Return Fund and the European Fund for the Integration of third-country nationals) were merged into the new *Asylum, Migration and Integration Fund (2014–2020)*,⁶²⁶ which was finally allocated EUR 3.137 billion.⁶²⁷ Compared to the budget for the previous seven years (2007–2013) allocated to the former funds, the financial resources of the new fund increased considerably, which is a clear sign that European decision-makers recognized the significance of migration and asylum. Member States' *national programmes* were adopted in 2015, and applications for the realisation of projects supported by the new fund and aimed at combating illegal migration started arriving in spring 2016 (CEAS objectives, as well as actions eligible for funding are included in Chapter II of the regulation).

7.6 Rules on national implementation

1. Among the legal acts enacted by EU institutions in the area of asylum we may equally find regulations that are directly applicable and produce direct effect, ones that, at the most, require supplementary implementing measures by the Member States, as well as directives that provide Member States with considerable freedom in adopting national implementing measures, and generally define the objectives to be pursued within the act's general framework. Such freedom applies to the establishment of the Member States' *institutional system related to asylum* (the Commission must only be informed about the asylum authorities), although certain *minimum conditions* must also be met in this area. The revised Reception Conditions Directive requires Member States to take various actions *to improve the efficiency of their reception system*, e.g. with due respect to their constitutional structure, Member States are required to put in place relevant mechanisms in order to ensure that appropriate guidance, monitoring and control are established in the competent institutions. In addition, they are also required to provide a professional staff and allocate the resources necessary to fulfil the needs arising from the admission of and the care provided for asylum seekers. The revised Asylum Procedures Directive foresees similar requirements with respect to authorities dealing with asylum procedures, adding also that *regular trainings* must be provided for the members of the staff, who must be sufficient in number and possess appropriate knowledge. Member States, in liaison with

626 European Parliament and Council Regulation 516/2014/EU of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [OJ L 150, 5.20.2014.].

627 Available: http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund/index_en.htm. (Accessed: 1 March 2016).

the Commission, must take all appropriate measures to maintain *direct cooperation and an exchange of information* between the competent authorities.

2. Nevertheless, as a prerequisite to participating in and accessing the resources of the *Asylum, Migration and Integration Fund*, Member States must establish, and submit to the Commission for approval, multiannual *national programmes* – currently for the period of the multiannual financial framework spanning 2014 and 2020. This is preceded by so-called *policy dialogues* between Member States and the Commission at the level of senior officials in accordance with Regulation (EU) No 514/2014 (the so-called Horizontal Regulation) laying down general provisions on the Asylum, Migration and Integration Fund and other AFSJ-funds.⁶²⁸ Policy dialogues must focus on achievable and results of national programmes, assessing the needs and priorities of Member States in the funded areas, considering the baseline situation in the Member States concerned as well as the objectives of the relevant legislation. The outcome of the dialogue serves as a guideline for establishing national programmes, and provides an indicative date for the Member States when to submit their national programmes to the Commission in order to allow sufficient time for approval. National programmes on asylum policy are primarily intended to facilitate, on a national level, the implementation of the Common European Asylum System, and to ensure the effective and uniform application of union *acquis* in the area of asylum policy, including the proper functioning of the Dublin III Regulation. The so-called Horizontal Regulation also defines *the compulsory elements* of national programmes (e.g. a detailed description of the baseline situation in the Member State; an analysis of requirements in the Member State and the national objectives and strategy designed to meet those requirements; information on the monitoring and evaluation framework to be put in place; indicators to be used to measure progress; the identification of the competent authorities; or the mechanisms to be used to publicise the national programme).⁶²⁹

As far as the *management* of the allocations of the Asylum, Migration and Integration Fund to the Member States is concerned, the Horizontal Regulation requires that Member States notify the Commission of the formal designation *at ministerial level of the Responsible Authorities in Member States responsible for the management and control of expenditure* as soon as possible following the approval of the national programme. This designation shall be made subject to the body complying with the designation criteria on internal environment, control

628 European Parliament and Council Regulation 514/2014/EU of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management [OJ L 150., 5.20.2014.]

629 Ibid., Art. 14.

activities, information and communication, and monitoring laid down in or on the basis of the Regulation.

In order to channel and adapt to the experiences of implementation, *in 2018* the Commission and the Member States will *revise* the situation in light of the so-called interim evaluations and the changes that took place in Union policies and the Member State concerned. Following this revision and in light of its results national programmes may be further adjusted.

7.7 Assessment of the EU asylum acquis

In terms of the quantity and complexity of the acquis adopted, the Common European Asylum System *may be considered a successful policy*, since the Union legal architecture of asylum is governed by more than half a dozen EU legal acts serving the unification and the approximation of laws respectively, while enhancing cooperation between Member States.

As far as the substance of the policy is concerned, *the question emerges* to what extent the new rules and standards meet the following strategic objectives: the establishment of a common procedure, a uniform status, a homogeneous framework, and a high level of harmonised protection in all Member States guaranteeing the consistent implementation of the 1951 Geneva Convention.⁶³⁰

The development of the asylum policy of the European Union and its legal framework will most certainly not come to a halt, as this area of European law is characterized by *permanent development*.⁶³¹ Therefore, we should expect further development, notwithstanding the fact that the most important challenge of the upcoming years will be *the proper transposition and application of the revised and renewed acquis related to asylum*, and its monitoring and enforcement by the Commission.

What shall be the *direction of these developments* in the upcoming period? On the one hand – due to the increasing judicial activism of the Court of Justice of the European Union, which is now entitled to full review in issues related to asylum and applies the EU Charter of Fundamental Rights – the interpretative, clarifying and complementing role of *case-law* is expected to become more prominent. This will all the more be the case since the revised norms designed to

630 Opinion of the European Economic and Social Committee on the Green Paper on the future Common European Asylum System (2008/C 204/17), Art. 1.3.

631 As early as 2010 the General Secretariat of the Council of the European Union compiled a compendium including the EU asylum acquis, as well as the universal and regional conventions on asylum and other *soft law* norms relevant in the context of EU asylum policy. The content of the volume is printed in small fonts, yet it nevertheless takes up about 500 pages. (General Secretariat of the Council of the European Union: *European Union legislation and other essential international instruments on international protection*, Brussels, July 2010).

eliminate the former regulatory deficiencies cannot be formed into a perfectly coherent, logical and self-inclusive system. On the other hand, the *Action plan on the Stockholm Programme* still includes measures that the Commission has not yet implemented, let alone the future action plan expected from the Commission on the *implementation of the Ypres Guidelines*. Other proposals are expected on the feasibility as well as the legal and practical implications to establish joint processing of asylum applications in the Union, on the legal and practical feasibility of the accession of the European Union as an independent international legal person to the 1951 Geneva Convention, and on the establishment at Union level of a mechanism for the mutual recognition of national asylum decisions.

Without doubt, we have challenging years ahead of us. And while the present legal situation is far from perfect, we may say that currently the European Union is the only regional international organisation in the world, which, acting in the most uniform manner possible, provides the highest level of protection to those seeking refuge from persecution and, at the same time, provides significant resources for capacity-building and the efficient operation of asylum systems in a community encompassing 28 states and 503 million people.