

The development of EU policy on immigration and asylum

Rethinking coordination and leadership

By Elizabeth Collett

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EXECUTIVE SUMMARY

The European Union has been charged with leading a response to a range of complex and interlinked challenges related to EU immigration and asylum policy, from the short-term need to respond to maritime migration in the Mediterranean, through to the long-term questions about Europe's future as a diverse, competitive society. However, it is becoming increasingly clear that the current modus operandi of the European institutions is ill equipped to respond in either a timely, or comprehensive manner.

In the wake of the European Council's Strategic Guidelines on Justice and Home Affairs, and as the European Commission develops a new in-house vision on migration, this policy brief (one in a series focused on future EU immigration policy), assesses the underlying *mechanics* of policy-making, and identifies areas in which the EU institutions must reform if they are to stand any chance of ensuring that the policy solutions designed this year in Brussels have the desired effect on the ground.

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The brief highlights the need for leadership and coordination: it has long been acknowledged that immigration policy is not confined to the Home Affairs domain, yet a coordinated, coherent, and comprehensive approach to migration has yet to emerge either within the EU institutions or in the national capitals. Commitments are needed, both from the political and technical levels, to ensure that migration becomes part of the everyday work of foreign affairs, employment, and other policy areas, and is linked in a more coherent fashion to relevant policies from humanitarian affairs through to education policy.

Aside from more effective coordination, Europe will need the resources to effect real change, both within the European Union, as well as with third countries. This will require a step-change in the level of investments currently envisaged by EU leaders, as well as a change in the types of expertise that will be needed to put new policy into practice. Legislative change has reached a natural plateau, and the next phase of policy will be far more focused on soft diplomacy, practical cooperation, and ensuring that policies agreed at EU level, are implemented effectively (and with sufficient capacity) at national level. This is particularly important for the future development of European asylum systems, and more committed monitoring and evaluation will be needed.

Reform of EU working practices is fraught with difficult choices, and no single mechanism of institutional coordination is perfect. It may also seem a secondary priority at a time when the European Union is being confronted by crisis and instability. Reform takes time to bear fruit—and time is clearly at a premium. But the work must begin now.

I. INTRODUCTION

Despite the sluggish pace of immigration policy development under the Stockholm Programme,¹ policymakers continue to have high expectations that the European Union can resolve the various challenges that European governments face, not least an inability to curb irregular immigration and manage localised border and asylum pressures. However, the mechanisms for designing, agreeing upon, and implementing EU policy are no longer capable of ensuring that any such solutions might be agreed on in a timely manner, or effectively carried out.

There are several reasons for this. One is that immigration as a topic has outgrown the Home Affairs portfolio and needs to be addressed in a more cross-cutting, yet coherent, fashion—a fact that has been amply recognised by the European Commission since its new president, Jean-Claude Juncker, took office in November 2014. Second, the process for designing, implementing, and reviewing legislation has failed to ensure coherent, robust, and consistent policy outcomes. And finally, the European Union will need to demonstrate leadership in the coming years on this most politically charged topic.

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In a reorganisation of the European Commission late in 2014, the Home Affairs portfolio was renamed and restructured: the new Directorate-General for Migration and Home Affairs (DG HOME) reflects the higher priority being accorded to the topic. However, this change has yet to be backed by more serious reconfiguration to address coordination within the European Commission. As the European Union reaches a turning point in how it addresses the development of immigration policy, both within and outside the Justice and Home Affairs (JHA) portfolio, the supporting framework must be strengthened for existing policy to be sustained, and effective new policy created.

II. REINVIGORATING LEADERSHIP

The obstacles to reaching agreement on EU policy witnessed over the past five years have reinforced a sense

of exhaustion amongst policymakers and reduced the capacity of all partners to engage in cooperation with the kind of commitment that characterised the first five-year programme for Justice and Home Affairs, developed in Tampere in 1999. The European Commission's strategic guidelines, published in June 2014, were a vague first step in what will be a long journey for Member States, the Commission, and the public as they seek to come to terms with a deeper understanding that the problems of a single state are ultimately shared by all.² There is a need to rebuild consensus among constituencies: across EU institutions, between the institutions and the citizenry, and between Member States with sharply divergent interests in immigration. This promises to be a slow, painstaking process that will require consummate political skill and needs to begin as soon as possible.

The European Union is sorely in need of public figures who can speak to policymakers, politicians, and publics about immigration, both within Europe and across the globe. The Commissioner for Migration, Home Affairs, and Citizenship can fulfil this role to some extent, but without support from elsewhere in the European institutions, the efforts of Commissioner Dimitris Avramopoulos will quickly run out of steam. The new term has heralded a shift in interest in investing in immigration policies at the European level: on the part of President Juncker, Vice President Frans Timmermans, and the High Representative for Foreign Affairs and Security Policy (and Vice President of the Commission), Federica Mogherini. The High Representative should consider making this rhetoric concrete by appointing a special representative on migration for the External Action Service—a high-level figure capable of speaking to his or her own experience managing a complex, multi-faceted issue in an international setting.

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A special representative on migration at the EU level would be able to act as an envoy beyond the capitals of Europe, and invest time and energy in understanding the particular parameters of each national debate, drawing together the often-polarised positions of countries in and outside the European Union. (In October 2014 the ministers of the JHA Council outlined a policy for migration management that set out an ambitious number of priority countries with which the European Union should engage.)³ Additionally, such a figure could advise the President of the European Council, Donald Tusk, and the rotating EU presidencies, thus offering continuity and bridging the gulf between

European institutions, in particular between the European Council and the European Commission. Such a figure would need to be an honest broker, considering the value of policy development and offering support when implementation falls short. A special representative on migration would be able to assume a critical role in bringing different constellations of policymakers, and their portfolios, together.

To be most effective, this position would need to be given scope to function outside the framework of the European Commission alone. Among the challenges observed over the past five years is the emergence of tension between the Commission and the Council, due in part to inadequate channels of communication. A special representative would not negate the importance of the new Commissioner for Migration and Home Affairs—who would have an important task coordinating the various strands of policy—but rather reinforce the commissioner’s work, and support a more cross-cutting approach. But Member State representatives are weary of negotiating on immigration topics with Commission officials, who lack both front-line experience and the type of political concerns that individual representatives must face upon return to their capitals. An ambassador-at-large would need to demonstrate the credentials and wisdom that long experience at the national level can bring, while working alongside commissioners committed to furthering EU policy development. This post would not be designed to undercut the authority of the Migration and Home Affairs Commissioner, but rather reinforce his ability to look both outside as well as inside the European Union to achieve policy goals.

For investment in such a high-level position to be worthwhile, two conditions need to be met. First and foremost, the position would need to be invested with a clear mandate, and sit at the apex of clear lines of responsibility and accountability to the EU institutions, Member States, and associated agencies. The second condition—reform of institutional coordination to ensure effective decision-making throughout the EU institutions—is outlined below.

III. CROSS-CUTTING POLICY DEVELOPMENT

It has become clear that a common immigration policy can no longer be successfully developed within the JHA framework alone. Managing human mobility is a whole-of-government matter. Whilst interior ministries are responsible for border controls and the regulation of entries

and stays, consideration must be given to a multitude of other policies that deal with the international and local effects of immigration—from employment and education policies, to trade policy and *all* economic policy portfolios, to foreign affairs. New policy developments, such as the Global Approach to Migration and Mobility (GAMM), exemplify how immigration spills over into other, critical areas such as development aid and even maritime policy. Meanwhile, at the April 2014 EU-Africa summit, migration was one of the top subjects on the agenda; a range of issues—from human trafficking to opportunities for legal migration—were discussed.⁴ Migration is a headline topic, with a vast array of invested parties.

Managing human mobility is a whole-of-government matter.

Ensuring more effective coordination is not just a challenge at the EU level. A number of Member States have themselves attempted to create whole-of-government approaches to immigration and, more frequently, integration.⁵ The German government has been a leading actor in calls for greater coordination at the EU level, and has mirrored this commitment within Germany through the creation of a state-secretary-level Standing Committee on Migration and Asylum that aims to fully integrate migration and asylum priorities into foreign policy. Led by the ministers of both Foreign Affairs and the Interior, the Committee has identified five areas of focus and set up a working group on international protection.⁶ Other countries that have made efforts to improve policy coherence include the Netherlands and the United Kingdom, though in many more EU Member States turf wars or indifference abound.

Coherence at the national level is needed for EU-level coordination to be effective. At the EU level, meanwhile, coordination is not just a challenge for the European Commission, where focus is typically placed, but also for the functioning of the European Council.

A. The European Commission

There are clear limits to how far the JHA’s priorities can be incorporated into the programmes of other Directorates-General (highlighted by the sometimes awkward positioning of the so-called ‘external dimension’ of JHA policies within the Stockholm Programme⁷). This, in turn, restricts how well JHA officials can effectively balance the broad range of concerns that must be considered when drafting proposals. The development of immigration policy is also negatively affected by failures in policy domains such as employment and training, education, foreign affairs, and

trade policy. Within these portfolios, immigration might be deprioritised in favour of more pressing issues, or instrumentalised to achieve broader goals.

Policy goals may also come into conflict. For example, while EU actors understand that offering easier access to the European Union through a facilitated visa policy would strengthen EU relations with the third countries concerned more broadly, Home Affairs officials focus more closely on security concerns and the possible overstay of those who arrive under facilitated schemes. Setting priorities, too, is difficult. For example, the Directorate-General (DG) for Employment, Social Affairs, and Inclusion de-emphasised immigration issues within its own portfolio, focusing instead on the more immediate challenges of youth unemployment, growing poverty gaps, and a workforce woefully underprepared for the long and slow road to European recovery. Some policy areas might be more reluctant to participate in what they may believe to be a subversion of their core task: development officials, for example, have broader goals that they do not wish to see undermined by the short-term needs of interior policy. And finally, experience is key. Despite increased focus on migration in recent months, the European External Action Service is still finding its feet on this global issue.

DG Home will need to become a policy coordinator as much as a policy initiator.

Meanwhile, information has proliferated, and become more complex. Actors in the spheres of development, employment, security, and social policy all have a vast range of data on trends, shifts, and emerging policy challenges, not all of which cohere. This lack of coherence affects relationships with third countries, as the characterisation of the relationship between the European Union and an individual country determines which DG will lead. If the country is considered to be in crisis or conflict, then the DG for Humanitarian Aid and Civil Protection (DG ECHO) may be the key interlocutor. If the country is in need of development support, then the DG for International Cooperation and Development (DG DEVCO) has the most competence and, critically, financial resources. Those countries situated closest to the European Union fall under the aegis of the DG for European Neighbourhood and Enlargement Negotiations (DG NEAR). Meanwhile, DG HOME's strategy for engagement must be tailored to each context and to the cross-portfolio priorities that emerge.

Similarly, a vast range of data collection, analytics, and repositories has been established over the past few years, from border surveillance systems (Eurosur), through to early warning analysis on changing asylum trends and factors (put together by the European Asylum Support Of-

fice, EASO). However, these do not currently connect to 'upstream' assessments of risk trends, such as the newly established Early Warning System on Conflict Prevention (established within the External Action Service), which might highlight pending crises and potential future forced migration flows. Raw data are only useful if analysed and utilised effectively; even where such analysis occurs, policymakers working on different portfolios rarely exchange information.⁸ Having established a variety of data-collection mechanisms in discrete areas, the European Union now faces the challenge of ensuring that the reams of data produced can translate into timely, targeted policy responses to what have become complex, cross-cutting issues.

In this rapidly evolving policy framework, DG Home will need to become a policy *coordinator* as much as a policy *initiator*, taking on the important and difficult task of assuring that the policies pursued within any one portfolio are consistent with an agreed, common purpose. Improving coherence will also help insulate policy from internal and external geopolitical 'shocks'—be they pressures at Europe's external borders, or political upheavals in the European neighbourhood. In the wake of the Arab Spring, a bewildering number of poorly choreographed commitments were made to North African countries. The result was a messy overture by myriad agencies and portfolios, and no strong, guiding set of principles for engagement. The balance between adapting to new situations and maintaining consistency is hard enough for policymakers developing bilateral mobility partnerships, even before any consideration of the panoply of external action priorities.

DG Home is in need of much greater human and financial resources if it is to achieve its many goals. Governments across the globe have increased the budgets of their migration agencies, often dramatically. The problem of funds may be ameliorated by the new budget cycle and the creation of a larger, amalgamated Asylum, Migration, and Integration Fund (AMIF). The intention of this fund is to enable more flexible and responsive spending through agreements with each individual Member State, though the reserves left at the EU level already seem woefully inadequate, with just 25 million euros of emergency funding per year for 2014 and 2015.⁹ But while additional funds may build the DG's capacity to accomplish the goals of a very complex and always growing portfolio, attention must also be paid to the skillset of the DG's professional staff, which may need to diversify to meet expanding and constantly evolving demands. To date, much of the DG's work has been legislative in nature, but this is slowly changing. Officials must now be capable of undertaking the type of soft policy negotiation and diplomatic engagement that emerging policy areas such as GAMM require. In their proposals, they must account for changing economic and labour market realities, while understand-

Box 1. Creating cross-cutting leadership

Efforts to ensure that migration policy cuts across institutions and nations are not a new goal. The European Commission has tried before to manage immigration across portfolios. Under Franco Frattini, then–Commissioner for Justice, Freedom, and Security, a short-lived initiative brought together eight commissioners on a regular basis to discuss priorities and policies. In 2005, the development of the Global Approach to Migration and Mobility (GAMM) was intended to help policymakers mainstream immigration priorities into foreign policy (and vice versa). Near the same time, the elaboration of the links between migration and development at the global level was replicated to some degree within the European Commission, and a unit focused on employment, social inclusion, and migration was created within the Directorate-General (DG) for Development. Then, in 2010, in recognition of its ever-expanding workload, the Justice and Home Affairs Council was divided in two.

Despite these efforts, immigration policy remains fragmented across the European Commission, and is not always coherently elaborated. Commission President Jean-Claude Juncker will need to seriously consider how to ensure that the various moving parts are synchronised. The Vice President for Better Regulation, Inter-Institutional Relations, Rule of Law, and the Charter of Fundamental Rights—to whom the Commissioner for Migration and Home Affairs will report—could be made responsible for chairing a Migration Working Group of commissioners, directors-general, and executive directors of key agencies to ensure coordination. The group would need to be staffed by a director-led task force, which would ensure the day-to-day coordination and preparation of cross-Commission priorities, particularly with respect to bilateral and multilateral dialogue structures.

ing the nuances of demographic change. As the European Union looks toward practical cooperation as a means to implement, and complement, harmonised legislation, Commission officials need to better understand the practical constraints and priorities of front-line officials. This is also true of the External Action Service, if it is going to increase its competence in migration under High Representative Mogherini. Of the EU delegations that have been established around the world over the past five years, few members have specific expertise and training in immigration and asylum issues.

Finally, the European Commission will need to invest in more robust research and analytical support, beyond the largely pro forma impact assessments it currently undertakes. To this end, it must understand and account for the frequent adjustments that Member State governments make to their own, ever-more-sophisticated immigration systems, based on year-on-year data, local and national needs, and internally developed benchmarks for success. Policy proposals will need to reflect the constraints imposed by national austerity measures, and identify potential weaknesses in policy (both on paper and in practice) at the earliest point. This does not just apply to discrepancies in transposition and implementation, but also to the review of negotiated compromises prior to final approval.

B. *The Council of Ministers*

For national decisionmakers sitting in the Council, the JHA programme has become particularly unwieldy; few policymakers have the necessary expertise to understand

the whole portfolio. This lack is evident in the complex constellation of working groups, dialogues, and contact groups that have grown up in the European Council framework, from the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) to the Working Group on Schengen. There are more than a dozen groups and committees meeting under the umbrella of the JHA, General Affairs, or Foreign Affairs Council. Some of these have a broad remit, requiring the presence of several national ministries to ensure a full response. One example is the High-Level Working Group on Immigration and Asylum, which is intended to bring senior interior and foreign affairs officials together (though, in practice, many Member States send just one representative, and others send fairly low-level officials). Other groups require a specific level of technical expertise and knowledge, which precludes any broad interchangeability of officials. Some working groups that focus on broader topics might have a migration component that could be better coordinated: the myriad geographically focused working groups within the Foreign Affairs Council are poorly integrated into the priorities of the JHA Council, and vice versa. This is not just about Council configurations, but national coordination: too often, officials at national level fail to communicate positions and decisions taken in one Working Group, to their counterparts discussing the same issues in other fora.

Outside the formal Council framework, national civil servants have the opportunity to meet in a number of more technical fora. The General Directors' Immigration Services Conference (GDISC) has met informally, yet regularly, since it was initiated by the Dutch EU Presidency in 2004—and despite being outside the EU framework. Meanwhile, both Frontex and EASO have management

boards that discuss the operational function of the agencies they oversee: the Frontex board brings together border and police officials, and the EASO board convenes the heads of the asylum services. These overarching fora help strengthen connections and improve the transfer of critical information and practice, but do not always lead to a concerted response when access to asylum is so intrinsically interlinked with border management. The deliberations of these boards, in addition, risk becoming overshadowed by national political considerations.¹⁰

Governance by committee has advantages: it can encourage socialisation, and help civil servants solve tricky, sensitive problems in a nonpoliticised environment. Focusing on particular policy issues in separate working groups can also shift the emphasis from the differences between countries to their shared administrative function. When faced with extraordinarily complex technical problems—like ensuring the compatibility of databases and systems across 28 Member States—a specialist forum can be helpful.¹¹ But a proliferation of meetings can also disconnect policymakers from the broader goals they are trying to achieve, and the overarching problems that collaboration is expected to fix. It can also disconnect policymakers from their colleagues—with potentially incoherent outcomes. The public, meanwhile, may not agree with the scope of the decisions made (e.g., regarding use and access to personal data), and these decisions—made in a technical, insulated environment—may overlook the essential humanity of immigration itself.

Migration is about people, but at the EU level immigration policy has increasingly become about the development of a framework upon which Member States can concur, rather than one that can effectively address the real impacts of the immigration process on individuals and society. Faced with a disaster situation in October 2013, the first impulse of EU actors was to develop a Taskforce for the Mediterranean rather than to respond immediately and coherently. Disaster has, sadly, become a key catalyst for policy development. However, in the absence of a coherent pre-existing working methodology, responses to disaster have been less than inspiring.

A new, more focused, hierarchy of Council working groups and competences is desperately needed, along with the practical rationalisation of the various technical groups; there have been extensive discussions regarding how to achieve this in recent months, some of which are seen as controversial. For example, if the same experts are sitting time and again in the same groups, can these not be merged and might they not learn valuable lessons from discussions in adjacent fora? In addition, for both the Commission and the Council, the development of more manageable themes might aid policymakers. To this end, the appointment of a

national focal point on EU immigration within each Member State (perhaps a formalisation of the current SCIFA configuration), alongside a dedicated EU immigration leader, could help European ministers reach decisions in constellations beyond the JHA portfolio. This might help connect the disparate dots of the migration portfolio, and help remind participants of the real impacts of the decisions taken. This focal point might be called the Migration and Mobility Committee and could extend links to other key working groups, offering to host joint sessions on a regional and thematic basis, to ensure that all portfolios have the opportunity to exchange information at pertinent moments (in the run-up to a large EU regional, bilateral, or otherwise significant meeting). Critically, it would need to be in close consultation with, and possibly adjacent to, the High-Level Working Group on Immigration and Asylum, which addresses the foreign policy dimension.

Policymakers have become paralysed by the absence of a silver bullet.

At the ministerial level, other instruments to improve coordination include the use of regional consultative processes and the so-called jumbo councils, which bring together officials and politicians from several ministries to discuss issues of mutual priority. These can be unwieldy forms of coordination that may result in broad, bland statements with little concrete commitment. But they offer two advantages. First, the meetings themselves afford policymakers an opportunity to express and align objectives on a multi-portfolio basis, both within the European Union and with key third-country partners. Second, the heavy preparation necessary for such high-level meetings can bring lower-level officials together (often for the first time) to discuss and coordinate on a more informal basis than usual. In a recent example, the Italian presidency of the European Union hosted a ‘jumbo council’ dinner composed of ministers of foreign affairs, development, and interior. This was followed by a meeting of the Rabat Process, which brought together ministers from 58 countries, including the key countries of the Southern Mediterranean.¹² High Representative Mogherini has expressed an intention to hold more of these mixed councils in the future, though to do so effectively, she will need to carefully frame the topics under discussion: too broad, and the Council will produce nothing concrete; too narrow, and the invited ministers may not feel the need to participate.

Of course, there are no perfect means of coordination. Each institutional constellation comes with risks of imperfect communication and the emergence of new policy lacunae. But policymakers have become paralysed by the absence of a silver bullet. Meanwhile, the familiar structures that have grown up over the past decade are beginning to in-

hibit effective policymaking. A period of experimentation within the Council will begin shortly, which may lead to the elimination or merger of some working groups—and regrouping discussions across portfolios may reveal better working methods.

Just as working to resolve specifically identified issues, as part of a shared agenda, may be a powerful incentive to collaborate, bringing less familiar groups together can also push experts to explore more creative proposals. This can be done through a multiyear calendar of set meetings that put relevant working groups adjacent to one another (SCIFA and the Magrebian Working Group, for example), with a communal discussion session. It might also avoid the dreaded ‘serial monologue’ tour de tables—whereby each Member State official offers a formal update rather than engaging in substantive exchange—in which the emphasis is on demonstrating national positions rather than moving toward consensus.

The precipitation of frank exchange would be, in itself, a major step forward. In this regard, it may be worthwhile considering the various regional constellations of actors that have emerged in recent years—from the like-minded group of largely Northern European states to the ‘Quadro’ group of Mediterranean states.¹³ There is need for a safe forum for dialogue between constellations of Member States that otherwise do not have the opportunity for honest and open discussions of the challenges they face—and the hard compromises needed to resolve these. Smaller, more informal working groups, composed of a balanced mix of Member States and addressing specific, politically sensitive challenges may help reinstate collegiality and a focus on solving problems rather than stoking conflicts. These would also offer an opportunity to bring in nonstate experts and representatives who can offer valuable perspectives.

IV. MONITORING AND IMPLEMENTATION

Member States’ submissions and statements concerning the development of EU policy have highlighted the need to hit the pause button and allow EU institutions to consolidate, review, and implement the legislation agreed to thus far.¹⁴ There are few objections to this, not least because the past few years have laid bare the patchy and inconsistent national implementation of key EU standards to date.

Pausing for review is not a new idea: the Stockholm Pro-

gramme invited the European Commission to submit a proposal for ‘consolidation of all legislation in the area of immigration, starting with legal migration’, which would go hand in hand with an evaluation of the existing *acquis*, and open the door to any necessary amendments.¹⁵ The European Commission’s ensuing action plan referred to the creation of an immigration ‘code’.¹⁶ However, a planned impact assessment to determine the mode and value of such a development was cancelled in 2012.¹⁷ In the absence of Commission action, some observers¹⁸ have articulated alternative drafts of an immigration code. It would seem that all actors and observers agree on the need for consolidation and evaluation in theory, but relevant efforts have proved difficult to put into practice. The challenge stems in part from the fact that initiatives in this area do not look like ‘sexy’ policy development—instead, they are reminiscent of administrative ‘housekeeping’—but require significant political will to effect. With all the headline distractions of the past five years, consolidation has been on the to-do list, but not prioritised.

Consolidation is nonetheless a useful and necessary task for the JHA portfolio as a whole, and is just a first step toward ensuring that the broad range of government bodies—implicated by new rules—are capable of transposing, implementing, and operationalising these rules. There is a need for a more rigorous monitoring and implementation mechanism to ensure function meets aspiration. How well the EU institutions respond to the call for implementation will depend on the ability of both the Commission and Member States to reconcile several competing objectives—and learn from previous efforts to monitor legislative implementation both within the JHA field and elsewhere.

Implementation involves a multistep cycle and a broad range of actors, from politicians to end users. First, there is the formal transposition of EU directives into national law, which must then be reviewed both for how it reflects general policy and interprets the spirit and goals of the legislation uniformly across the EU. Second, the laws on paper must be translated into effective practice. This requires not only developing guidelines and issuing orders, but mandating responsibility to effect the legislation in practice, and investing sufficient human and financial resources to ensure that those agencies responsible are capable of carrying out their work. This is particularly relevant for pieces of legislation that import new standards—from the Reception Conditions Directive to the Employer Sanctions Directive. Finally, there is a need to ensure that the implemented legislation fits within the overall system; in other words, it should achieve the overall aim of the legislation while avoiding conflict with competing goals and policies. This is the most challenging aspect of successful implementation, not least because each Member State has a be-

spoke design for its own immigration and asylum system. To import blocks of legislation into these individualised systems can have unintended consequences, particularly if elements of the systems are further devolved to regional and local governments. In an ideal world, a monitoring process that can effectively follow the full implementation cycle—and accurately assess the ensuing efficacy—can then play a role in amending the original EU legislation to better fit its purpose, if necessary.¹⁹

To date, efforts to assess effective transposition have depended on Member States’ reporting and on comparative reviews that have been outsourced to external organisations and networks. A key example is an assessment of the transposition of ten EU Directives in the area of immigration and asylum compiled by the Odysseus Network, which combined national government reporting with national analyses from legal experts in each Member State.²⁰ This extensive undertaking involved 270 reports from Member States, and offered an assessment of the legal transposition, though the report acknowledged that it was too early to be able to assess practical implementation. The European Migration Network (EMN) complemented this formal analysis with more ad hoc reporting on various aspects of immigration and asylum policy, using the network’s governmental and nongovernmental sources. The European Commission’s review of EU legislation has been largely paper-based to date, and reliant on both the activism and accuracy of governmental and nongovernmental reporting and analysis, which in turn depend on available data, reports, and interviews. The use of such reports, meanwhile, is subject to deep political sensitivities regarding both oversight and potential for reform.

The Family Reunification Directive is a good example of this. Following implementation, the European Commission published a green paper and launched a public consultation, inviting Member States and others to comment on the function of the legislation in practice.²¹ The green paper itself relied greatly on both the Odysseus report and an EMN report entitled ‘Misuse of the Right to Family Reunification’. The public consultation garnered 120 responses from Member States, nongovernmental organisations (NGOs) and individual experts.²² Despite this large response, the European Commission decided not to reopen the directive—not because of any substantive points raised about its function, but because the negative political climate surrounding family migration in many Member States would cloud the opportunity to improve the legislation through renegotiation.

But effective evaluation not only suggests whether the legislation should be reformed at the EU level, but also how it can be more effectively applied at the national and regional levels. High-quality reporting and evaluation are needed

for not only a law’s transposition, but how this fits within the particular national (and in some cases local) system, how far resources have been applied, and the intended and unintended consequences. One or more oversight bodies must invest in follow-up, and decide whether (and when) efforts to redress a deficient situation should be remedial or sanctioning. To reframe this last point, when should the European Union support a country to improve implementation, and when should it initiate legal proceedings to enforce implementation?

This last choice is a pragmatic one, but is frequently confused with principle and, more troubling, politics. Monitoring EU legislation requires more than passive reporting; it requires active, on-the-ground assessment of function, combined with systematic data acquisition and a set of practical benchmarks that can be attuned to context. The experience of twinning officials from existing EU Member States with those from pending EU Member States to promote the transposition of EU legislative frameworks during the accession processes of the early 2000s highlights that successful implementation depends to a great degree upon the precision with which rules are articulated, goals set, and clear benchmarks for success established.²³

For any monitoring and evaluation system to have real value, EU institutions should reach consensus on what effective implementation looks like and what goals it seeks to achieve. This is not always clear when negotiated texts leave the trickier issues unresolved, and also when national legal and empirical contexts remain so diverse. The European Commission will need to create a nuanced set of goals and indicators that can maintain the standards set by EU legislation, while recognising that investments and outcomes may not be identical. This requires going beyond legal analysis and assessing implementation according to the:

- ▶ scale and nature of migration and asylum flows in each country, and the number of those affected by the legislation;
- ▶ existing legal and administrative systems, including the level of centralised, or devolved, governance;
- ▶ existing systems in place, and whether transposition will require a significant shift in approach; and
- ▶ level of in-country technical expertise.

Benchmarks should be placed in context; data points, in themselves, offer little help in defining success or failure. A small number of family migrants found to be ‘misusing’ the system could be evidence of a state’s failure to identify fraud, but could equally be evidence that misuse is not

a significant problem: understanding cause and effect is essential, and requires investment in data collection and analysis. Nuanced criteria are needed to assess effective implementation; in case of a policy failure in a particular country, EU institutions must carefully decide whether it can be attributed to wilful negligence, obliviousness, or insufficient capacity. Any policy evaluation should incorpo-

rate both general recommendations—broad standards that each Member State must attain, irrespective of its existing system and resources—and recommendations specific to the country’s governance, frameworks, and capacities, which can then be followed up with specific support measures and technical expertise.

Box 2. Employer Sanctions Directive—A case study

Efforts to counter the illegal hiring of third-country nationals demonstrate the challenges of effective implementation. The Employer Sanctions Directive, passed in 2009, required EU Member States to put in place minimum standards regarding inspection of, and penalties for, employers who might be breaking employment law by hiring immigrants unauthorised to work. When the European Commission evaluated the formal transposition of the directive, it found that three countries—Belgium, Luxembourg, and Sweden—had fallen behind, necessitating the initiation of infringement proceedings.²⁴ For some countries, transposition required only marginal adjustments: Germany and the Netherlands, for example, already had sophisticated systems in place to check for the exploitation of immigrants. In other countries, such as Bulgaria, the directive required significant development of new policy frameworks.

It was more difficult to evaluate the efficacy and outcomes of implementation. Member States identify illegal employment and the exploitation of immigrant workers in vastly different ways. In some countries, this is done through broader labour inspections (as in Netherlands and Spain); in others, enforcement is primarily the responsibility of ministries other than labour—justice and interior ministries (as in the United Kingdom) through to tax and finance (as in Austria and Denmark). The execution of the Employer Sanctions Directive requires a great deal of coordination among numerous ministries, agencies, and officers on the front line (including police officers, immigration officials, and labour inspectors), and in federalised countries (e.g., Belgium) this responsibility is further devolved to regional governments. Thus a comprehensive review of implementation must assess the efficacy of coordinated approaches, as well as ensure that the EU legislation is applied evenly across a given country, regardless of the agency responsible.

Meanwhile, the resources available—both human and financial—go far toward deciding the effectiveness of any legal frameworks for sanctioning employers. Appropriate sanctions depend on a number of factors, such as the ability of labour inspectorates or other designated officials to identify high-risk employers and perform comprehensive inspections and raids. These resources are very difficult to disaggregate, not least because labour inspectors usually have a remit that goes beyond third-country nationals. The amount of resources required also depends on the structure of the investigations (do they require the coordination of multiple agencies?), the level of regulation in the labour market itself (are there separate sector-based rules?), and the size of the shadow economy overall (what is the scale of the problem?).

Thus, the system as a whole needs to be assessed. Some countries have invested significant human and administrative resources: for example, Austria undertook significant numbers of inspections (both pre- and post-the implementation of the Sanctions Directive), with 32,765 employers inspected in 2012 (17 per cent of employers in the country). Others have yet to scale up inspection: Estonia only managed 79 inspections in the same year, and focused on high-risk sectors alone. In other countries, the size of the penalty imposed—up to 500,000 euros in Germany—is designed to act as a deterrent (though also combined with significant numbers of inspections). Whether an employer will be taken to court is another decision that varies by country: applying on-the-spot administrative fees may be easier than pursuing a lengthy and expensive criminal process. Meanwhile, there is a paucity of research and evaluation worldwide regarding where investments make the most impact. In the United States significant resources have been invested in prevention rather than deterrence. One example here is the institution of an electronic verification (E-Verify) system through which employers can check work documents. In theory this investment reduces the need to invest resources in labour inspections of employers, who are required to participate in the system.

Conditions on the ground also affect implementation and effectiveness. Governments with lenient company registration requirements find that companies disappear overnight as soon as employment discrepancies are uncovered, leaving officials with no target for their sanctions. The existing EU directive has no remedy for this, but suggests that successful sanctions must take into account contiguous policy frameworks, from corporate law to broader labour market regulations.

Source: European Commission, ‘Communication on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards and measures against employers of illegally staying third country nationals’, COM(2014) 286 final, 22 May 2014.

Box 3. Adding value from the beginning

The continuum of monitoring and evaluation begins at the EU level, even before legislation has been proposed. Prior to the development of legislation, the European Commission outsources impact assessments and feasibility studies, designed to assess particular policy challenges, so that policymakers can consider whether—and what—an EU response might contribute. These assessments, however, have elicited criticism from both governmental and nongovernmental actors, who highlight that reports appear to justify decisions that the European Commission has already taken. Despite some improvements in recent years, there is an urgent need to ensure that impact assessments offer an objective, yet expert, evaluation of policy needs and the role that can be played by the European Commission.

Source: House of Lords European Union Committee, *Fourth Report: Impact Assessments in the EU: Room for Improvement?* (London, House of Lords: 2010), www.publications.parliament.uk/pa/ld200910/ldselect/lddeucom/61/6102.htm; European Commission, *Impact Assessment Board Report for 2013* (Brussels, European Commission: 2014) http://ec.europa.eu/smart-regulation/impact/key_docs/docs/iab_report_2013_en.pdf.

What to do

The above discussion highlights the need for a more in-depth and holistic approach to monitoring and evaluation that goes beyond formal legal analysis. The realisation in 2010 that the Greek government had transposed, but not implemented, much of the EU-level immigration and asylum *acquis* raised questions as to who should be in charge of reviewing Member States' implementation, and what remedial actions should be required.

Who controls the process is a significant and deeply sensitive question over which the EU institutions will need to compromise. The crisis surrounding the governance of the Schengen system, precipitated in part by the arrival of a large number of Tunisian migrants on the shores of Italy in 2011, has thrown into relief the fundamental challenge of establishing credible mechanisms to ensure that each Member State is fulfilling its EU obligations. Beyond monitoring formal transposition, understanding how well a piece of legislation has been implemented will require some form of on-the-ground review. The peer-review processes in place have been revealed to be inadequate, yet Member States are reluctant to submit themselves (though not necessarily their peers) to a more rigorous assessment.

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A number of models, already familiar to Member States, can offer some insight as to the way forward. The Open Method of Coordination (OMC), first proposed in 2001 as a possible mechanism for monitoring implementation of both asylum and immigration/integration policy, suggested that continuous reporting and peer review would ensure

the transposition of standards. The 2001 communications included, critically, a series of benchmarks and indicators that might prove informative to any future monitoring process, particularly in the area of asylum.²⁵ However, the OMC is better suited to softer areas of policy, such as integration, where Member States' control of the policy can be positively supplemented by information and exchange. For policy areas such as border management and asylum, where the failure of one state to live up to commitments has a concomitant effect on other Member States—weakening the EU system overall—a more robust monitoring system is needed.

The reformed model for Schengen governance, where responsibility for assessing implementation all aspects of external border management, as well as visa issuance and the absence of controls at internal borders, is now shared among the Council and the Commission (with a supplementary role for Frontex and EASO) suggests that compromise is possible, though evaluations won't begin until 2015. Shared responsibility might prove to be the most pragmatic, and effective, approach in other policy areas as well. First, if Member States are involved in monitoring, they are likely to be more invested in the outcome, and thus willing to undertake necessary reforms. Second, Member States have the technical knowledge and expertise necessary to undertake the type of monitoring outlined above, are capable of understanding the particular constraints each national government is experiencing, and could suggest innovative methods of remediation. Meanwhile, the European Commission has the ability to maintain consistency across the European Union and ensure strong follow-up, regardless of the national politics that might be involved. Finally, extending this type of evaluation to new policy areas may encourage EU Member States to go beyond implementation and invest in building up their national systems: currently many governments meet Common European Asylum System standards, but have little capacity to deal with more than a few hundred cases per year.

The European Union has the opportunity to make greater use of EU-led agencies to coordinate monitoring and implementation, including by external experts²⁶—but there are inherent challenges. Though agencies such as Frontex and EASO can offer oversight and consistency, and might become trusted interlocutors for the sensitive information that Member States may not wish to divulge to external evaluators, EU-led agencies tend to rely heavily on Member States and the Commission for patronage, mandate and budget.²⁷ As such, their role as agents of enforcers of implementation may be limited.

V. CONCLUSIONS

Any reform of EU working practices is fraught with difficult choices, and requires deep bureaucratic investments. No single mechanism of institutional coordination is perfect, and any practice comes with a range of advantages and disadvantages. It may also seem a secondary priority at a time when the Union is being confronted by urgent and multiple immigration and asylum crises that are only intensifying in 2015. Reform takes time to bear fruit—and time is clearly at a premium.

Nonetheless, it is imperative that at the start of a new policy cycle, and as the European Commission considers a new, forward-looking agenda for migration policy, EU institutions consider improving the mechanics of policy production to realise stronger, more effective outcomes. Existing policy tools are struggling to manage even the needs of short-term crisis response; longer-term solutions will prove impossible to realise without a few of the following reforms:

- ▶ **Invest in leadership.** The European Union needs more diplomatic firepower to realise the policy goals set out in the strategic guidelines laid out by the EU Member States in 2014, particularly with respect to forging a link between foreign policy and immigration priorities.
- ▶ **Improve coordination.**
 - The European Commission should establish a lightweight and workable set of coordination mechanisms for all aspects of mobility policy, from the intersection of free movement, immigration, and employment to the links between humanitarian crisis and asylum policy. It should find ways to identify a set of realisable, yet truly common goals, which unite the various portfolios

across the institution.

- The European Council needs to streamline its working groups and coordinate schedules to bring related working groups together on a periodic basis, particularly those groups working directly on foreign policy. So-called jumbo councils may be a useful way of establishing communication and trust between national ministries, but only where there are shared agendas and means to follow up at the technical level.
- ▶ **Invest in human resources.** Both DG Home and the External Action Service urgently require additional human resources with a broad range of expertise and experience in immigration policy, particularly those who have direct experience in applying policy on the ground.
- ▶ **Develop end-to-end monitoring and evaluation processes.** Following a road test of the revised Schengen mechanism, the European Commission should establish additional means of ensuring that proposed legislation does not just succeed in the Council, but achieves its goals on the ground. This may also require a rethink of how policy is formulated and designed, and include the possibility that policy may need to be reversed in order to progress.
- ▶ **Identify and utilise benchmarks for success that meet practical—and not just formal—standards and take specific, national contexts into account.** Despite an overall convergence, policy investments remain very different from Member State to Member State, and this needs to be taken into account at EU level.

It is imperative that at the start of a new policy cycle...EU institutions consider improving the mechanics of policy production to realise stronger, more effective outcomes.

The challenges facing those tasked with developing future EU immigration and asylum policy are significant and varied, and the fear that firm policy responses will give way to coordinated compromise between policy portfolios is not to be underestimated. However, moments of crisis can also become catalysts for action, and the European institutions are now taking critical steps to improve their mechanisms for responding both effectively, and with a long-term vision. This may well prove a challenge to EU Member States to up their coordination and leadership game in response.

ACKNOWLEDGMENTS

This policy brief is one of three that examine the European Union's steps to develop a new five-year programme for Justice and Home Affairs in the migration and asylum areas. The first outlined the challenges in developing new policy on immigration and asylum. The third will set out a number of policy proposals that could point the way toward more cooperative policy development than has been seen so far within and between EU institutions.

ENDNOTES

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ABOUT THE AUTHOR



Elizabeth Collett is Director of Migration Policy Institute Europe and Senior Advisor to MPI's Transatlantic Council on Migration. She is based in Brussels, and her work focuses in particular on European migration and immigrant integration policy.

Prior to joining MPI, Ms. Collett was a Senior Policy Analyst at the European Policy Centre, a Brussels-based think tank, and was responsible for its migration program, which covered all aspects of European migration and integration policy. During her time at EPC she produced numerous working papers and policy briefs focused on the future of European Union immigration policy. She has also worked in the Migration Research and Policy Department of the International Organisation for Migration in Geneva and for the Institute for the Study of International Migration in Washington, DC.

Ms. Collett holds a master's degree in foreign service (with distinction) from Georgetown University, where she specialised in foreign policy and earned a certificate in refugee and humanitarian studies, and a bachelor's degree in law from Oxford University.



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Residence Palace
155 Rue de la Loi 5th Floor
1040 Brussels
Belgium

Phone: +32 (2) 235 2113