

# Immigration Policy in the European Union: Still bringing up the walls for fortress Europe?

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## Abstract

Abstract: Immigration and asylum policies in the European Union have entered into a new period. The author sums up the most important achievements and failures of the EU's efforts to create a common European asylum and immigration system, and she evaluates the new Hague Programme of the European Council (November 2004) in the light of the hitherto existing policies. She concludes that the European Council's new programme lags behind the more promising guidelines of its predecessor of Tampere.

**Keywords:** immigration, asylum, European Union.

## Introduction: the Tampere guidelines for a common European immigration and asylum system

In May 2004 the deadlines for the transitional five-year-period of the Amsterdam Treaty (in force since May 1999) ended for those European regulations which were supposed to create a common European asylum and immigration system. The European Council in Tampere, 1999, had agreed on quite an ambitious programme in order to create an "area of freedom, security and justice". Underlining a strong EU commitment to the common values of freedom based on human rights, democratic institutions and the rule of law, the Presidency of the European Council stressed that the European Union's common rights should be guaranteed to its own citizens but, at the same time, must "offer guarantees

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to those who seek protection in or access to the European Union". An open and secure European Union, therefore, has to be "fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity." Also, the Tampere conclusions of the Presidency<sup>2</sup> wanted to ensure the integration into the EU societies of those third country nationals who are lawfully resident in the Union.

In order to reach these overarching aims, according to Tampere, the following policies should be developed: The "Partnership with the countries of origin", the creation of a common European Asylum System, measures to guarantee a fair treatment of third country nationals (that is, citizens of Non-EU-countries), the management of migration flows. These policies were transformed in a catalogue of measures to be taken within a five years period. Apart from one measure<sup>3</sup>, a broad set of new and common European Directives and basic principles was actually agreed upon in these last five years.

In November 2004, the European Council in Brussels has adopted a new programme for Justice and Home Affairs, the so-called "Hague Programme" (often nick-named "the vague programme" in Brussels), which sets the political terms of reference for immigration issues for the next five years, but is certainly less ambitious than the Tampere Programme. In addition, we may be in the eve of a new European Constitution, which, if ratified by the Member States, would reinforce the tendencies introduced by the Hague Programme. This seems to be a good moment to back-pedal and have a close look at the achievements as well as the problems of this European policy.

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<sup>2</sup>[http://www.europarl.eu.int/summits/tam\\_en.htm](http://www.europarl.eu.int/summits/tam_en.htm)

<sup>3</sup> The Directive on asylum procedures has not yet been formally adopted, but was politically agreed upon in April 2004.

### **Transfer of competences from the Member States to the European Union**

On the one hand, it is surely true to say that in some important areas national asylum and immigration policy has long become unthinkable without the EU. The Community has gained enormous competence in the delicate area of immigration and asylum policies: With the Treaty of Amsterdam, European law in this area, particularly regarding policies of visa as well as most asylum and refugee issues, is now binding and justifiable, and it is superior to national legislation. National veto power on immigration and asylum policies within the European institutions was gradually reduced and the European Parliament's competences were by and by extended. According to article 67 (2) of the EC Treaty, the Council shall now, after the transitional period that has ended since May 2004, vote to change the decision making rules. It could, then, vote by qualified majority (QMV) and the European Parliament would gain co-decision competences, although, as we will see below, still not in all aspects of immigration. The Hague Programme calls for an adoption of these decision making rules established in the Treaty of Nizza by 1<sup>st</sup> April 2005 at the latest. The draft EU Constitution, too, determines QMV and the co-decision procedure for all the EU measures on immigration and asylum – except for legal migration.

It is legal migration where, on the other hand, some Member States have continued to insist on retaining their domestic competences. Whereas the UK, Ireland and Denmark have opt-outs from the common immigration, asylum and civil law (Peers, 2004), Germany and its *Bundesländer* in particular (struggling at home for a new domestic immigration law that was finally passed in 2004 and trying to “protect” their national labour markets), have been the most rigid defenders of maintaining domestic competence with respect to labour migration issues. The Hague Programme, therefore, retains unanimous voting and, that way, national veto opportunities, as well as restricted parliamentary rights for legal long-term migration on third-country nationals, the

freedom to travel for third-country nationals for up to three months, but also for some other measures, such as the abolition of internal border controls between the member states, standard external border controls, measures of “illegal” migration, “burden-sharing” regarding asylum and family law aspects of civil law. Germany and its *Länder* also succeeded with their position in the European Convention by embodying domestic instead of European responsibility in the draft EU Constitution for those aspects that regulate the numbers of third-country nationals coming to the EU for economic purposes. Access to work for third-country nationals is, of course, a very sensitive issue which, according to the European Commission itself, can only be “put in place progressively”.

### **Goals and measures of EU immigration policies: An evaluation**

If we accept, as I propose, that immigration policy can and should follow different (certainly sometimes even contradictory) aims, such as: 1) the restriction and control of immigration, 2) the protection of refugees, 3) the prevention of refugee movements and 4) the integration of migrants or 5) the attraction of special groups of immigrants (for instance, the highly skilled), we have to admit that communication of migration policies in the EU has, so far, concentrated excessively on the control of migration and on combating of irregular migration and on an ‘effective removal and repatriation policy’, once again stressed in the Hague Programme.

#### ***The overarching aspect: Security, restriction and control***

Burden sharing between the Member states that accept asylum seekers and refugees by a European Refugee Fund (renewed for the period 2005-2010) and attributing responsibility for examining asylum applications between the member states have always been top on the EU agenda since the 1990s. A common European “Schengen Information System” (SIS I and II) as well as a Visa Information System (VIS) were

adopted, an electronic system for the identification of asylum seekers' fingerprints (EURODAC, in order to determine which country is responsible for an asylum claim) was introduced as well as an image archiving system (FADO) in order to combat "illegal" immigration. The Hague Programme wants the SIS II, VIS and EURODA-systems to be linked. Common Visa regulations have been adjusted, repatriation policies as well as measures relating to border management of the common borders of the European Union, Europol and penalties have been harmonised. Large scale measures against "illegal" immigration and human trafficking have been adopted<sup>4</sup>. This overarching aspect of security and control was still reinforced in migration policy after 9/11 2001 in New York, and after 9/3 2004 in Madrid. The Hague Programme for the next five years once again stresses this: The combat of terrorism is mentioned as the first and central task of the common policies in Justice and Home Affairs. Within immigration and asylum policies, the security aspect is central in the form of border checks and the "fight against illegal immigration", and it is found in many other guidelines issued by the European Council. In order to guarantee more security, the European council invites the European organs and Member States "to continue their efforts to integrate biometric identifiers in travel documents, visa, residence permits, EU citizens' passports and information systems without delay and to prepare for the development of minimum standards for national identity cards". The exchange of law-enforcement information is another important element of common policies. Although control and surveillance of external borders is, of course, still national competence, a specialist border assistance provided by the European Agency for the Management of Operational Cooperation at the External Borders (to be established in May

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<sup>4</sup> This list is not supposed to be complete. For a detailed list of European legislation on immigration and asylum issues comp. the Scoreboard [http://europa.eu.int/comm/justice\\_home](http://europa.eu.int/comm/justice_home). The Hague Programme also invites the Commission to present a yearly (before it was twice a year) scoreboard to the Council on the implementation of the Programme.

2005) is envisaged. Moreover, the European Council invites to study the feasibility of a European border guard. Security is surely a legitimate and, up to a certain point, also a necessary group of measures to be taken.

### ***Humanitarian aspects: Protection of refugees***

But criticism has to set in at the fact that other aspects, such as the protection of refugees, have so far been comparatively underdeveloped. Although common minimum standards for the reception of asylum seekers (2003/9/EC) and for giving temporary protection in the event of a mass influx of displaced persons (2001/55/EC) were agreed upon, common guidelines for the recognition of the refugee status and for the subsidiary forms of protection offering an appropriate status to any person not covered by the 1951 Refugee Convention, but nevertheless in need of international protection, lack behind the expectations of many NGOs concerned with the fate of refugees. Also, the Directive on asylum procedures, which was agreed upon, but not yet formally adopted, was harshly criticized by human rights groups for its low standards. The Hague Programme even envisages a study for an eventual joint processing of asylum applications *outside* the EU; but the text fails to make clear what that would entail (cf. comment of Steve Peers, 2004a).

### ***Prevention of refugee movements***

With regard to the prevention of refugee movements, the European Union has not been too active either: Although cooperation with the countries of origin is said to be a cornerstone of common policies, this cooperation has actually also been largely restricted to control aspects. “Partnership with third countries” is, above all, established in order “to improve [these countries] capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return.” (Conseil Européen,



2004). At least, the Council endorses the Commission's Communication on improving access to durable solutions and invites the Commission to develop EU-Regional Protection Programmes with the countries of origin.

*Integration of migrations living in the EU*

Looking at the integration of migrants who are already living in the European Union, the principle of non-discrimination in Article 13 of the Treaty of Amsterdam confers the right to the Council to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." This has led the Council of the EU to adopt a Directive on racial discrimination (2000/43/EC) and a Directive on discrimination in employment (2000/78/EC), a fact that was very surprising for many observers, given the liberal character of the Commission's proposal (Geddes and Guiraudon, 2003). Notwithstanding the importance of this agreement, it is also true that many member states have still not fully implemented the Directives, although the deadline ended in 2003 (Jenaro Tejada *et al.* 2002; Nickel *et al.* 2003).

Family reunification, one of the most important aspects of integration policy and still one of the most outstanding pull-factors for migrants towards Europe, was only agreed upon after long discussions. The respective Directive on Family reunification (2003/86/EC) is now being treated by the European Court of Justice (ECJ), because the European Parliament has claimed infringement of its rights to examine the last version of the Directive and to present comments and observations. Below that action for annulment brought to the ECJ, there are concerns about possible contradictions with the European Convention on Human Rights, particularly with article 8 of the ECHR.

In the meantime, the rights of third-country nationals who are long-term residents (2003/109/EC) were passed in the Council. This Directive is designed to third-country nationals to enjoy a legal status comparable to that of citizens of the member states (Kostakopoulou, 2001).

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It is also true that the European Commission has called the Member States for more cooperation to ensure the integration of the immigrants. In addition, it has tried to provide a very complex and coherent European policy-framework for integration (Commission of the European Communities, 2003: 26), including its European Employment Strategy (EES). Nevertheless, progress in these areas has certainly been very slow. In 2003, however, the European Commission launched a number of pilot projects on the integration of migrants, supporting networks and transfer of information and good practices. The integration of third-country nationals into society depends on comprehensive integration policies which include integration into the labour market, education and language skills, housing issues, health and social services, nationality/citizenship and respect for diversity, but all these areas are still part of national legislation. The Hague Programme stresses the necessity to exchange information and experiences, but does not touch domestic competences. It does call the Member States and the European institutions to develop common basic principles underlying a coherent European framework on integration.

### *Legal migration*

National competence is, above all, retained in the area of legal migration, especially with regard to the attraction of specific groups of migrants. This is true although the European Commission has presented a very interesting proposal on common European policies (COM 2003/336 final) that emphasizes the importance of the economic potential of migrants and their integration.

Although the need for migration into certain sectors and regions of the EU is openly recognised by the European Commission and the European Council, and although the Member States themselves see the necessity to foster migration in order to cope with bottlenecks with regard to particular professional qualifications and demographic changes, there is still no genuine European labour market and, therefore, no common interest in widening the common policies



in this area.<sup>5</sup> The Directive proposed in July 2001 by the European Commission (COM (2001) 386) determining common definitions, criteria and procedures for third-country nationals working in the European Union had, in principle, respected the member states' discretion to limit economic migration domestically. It had proposed a very interesting possibility to attract migrants quickly in accordance with economic and demographic necessities and interests, but, due above all to Germany's opposition, has not been discussed any more in the Council of Ministers since 2002. The Commission should have presented a Green Paper on labour migration in October 2004, but did only recently, at the beginning of 2005 (COM 2004: 811).

In its Hague Programme, the European Council pays some lip services to the importance of legal migration for a "knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy." But at the same time, it fails to mention the principles laid down by the European Council in Tampere, such as: the treatment of third country nationals comparable to nationals, the equal treatment of long-term residents as near as possible to the treatment of nationals (cf. Peers, 2004a). It also emphasizes "that the determination of volumes of admission of labour migrants is a competence of the Member States." Taking into account the outcome of discussions on the Green Paper on labour migration, best practices in Member States and its relevance for implementation of the Lisbon strategy, it nevertheless "invites the Commission to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005" (Conseil Européen, 2004). This could possibly lead to resume at least some aspects of the "frozen"

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<sup>5</sup> It is true that intra-EU migration from the new EU countries could also help to alleviate the effects of demographic distortions and professional necessities in the future. However, it is anticipated that migration from countries such as Poland, the Czech Republic, Hungary, Slovenia, and Estonia would have temporary rather than permanent character.

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Directive proposal on labour migration. Most recently, the new Commissioner and the new President of the Commission, José Manuel Barroso, re-opened the discussion on the necessity of creating an economic migration system, necessity which is still strongly debated in some of the Member States with high levels of unemployment (but, nevertheless, gaps in the labour markets of some specific segments). For the end of 2005, the Commission plans to present a new political plan for a common migration policy for labour migration.

### **Conclusion: A backward step**

As we have seen, border control, sanctions for human trafficking and return policies are still the most important bricks in the walls of “fortress Europe”, a fortress that seems tempted to extend its walls even beyond its own borders – as in the case of the debate about holding centers in North Africa, opened by British Prime Minister Tony Blair and re-warmed by the German interior minister Otto Schily.

Following the terrorist assaults of New York and Madrid and making justice to the more conservative political changes in the European countries’ governments and, subsequently, of the Council, the Hague Programme has once again restricted priorities to the security aspects of migration, and to measures that reinforce restriction and control. But taking into account the five criteria developed in this study, restriction and control will certainly not provide for a comprehensive and modern approach to migration in the European Union. With its “vague programme”, the European Council relapses far behind the predecessor’s of Tampere programme, which would at least try to regulate prevention of refugee movements, protection of refugees and integration of migrants within the EU.

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