



# Can the European Union deliver feasible options for legal migration? Contradictions between rhetoric, limited competence and national interests

SVR's Research Unit: To The Point 2019-1

## At a glance

- While the Europeanisation of migration and asylum policy by and large has come a long way, the EU's efforts to open up new admission channels for legal migration and mobility as part of its external migration policy are not yet bearing much fruit.
- Although the EU has limited competence in this policy area, it continues to make promises to its partners, in particular the governments of African countries, regarding enhanced legal migration and mobility options, and these tend to end in disappointment.
- Faced with these contradictions, the new EU leadership could take a step back. Rather than attempting to set up ambitious strategies, the EU may be better advised to consider the initiatives undertaken at the national level as a starting point for the gradual process of deepening cooperation.

## Legal migration as part of a comprehensive policy at EU level<sup>1</sup>

Although not a new phenomenon, mixed migration flows to Europe have increasingly become the focus of political debate in recent years, especially in connection with irregular migration across the Mediterranean. Disentangling different types of migration (e.g. for humanitarian, economic or family reasons), determining protection entitlements and **rerouting irregular migration into regular channels require a comprehensive set of measures** in different, intertwined policy domains: functioning asylum systems, controlling the EU's external borders, effectively returning third-country nationals without protection needs, creating legal pathways for protection (such

<sup>1</sup> This To The Point was supervised by Prof. Petra Bendel and Prof. Daniel Thym, members of the Expert Council of German Foundations on Integration and Migration (SVR). Responsibility for publication lies with the SVR Research Unit. Arguments and conclusions do not necessarily reflect the opinion of the SVR. The publication is part of the project "Legal Migration for Work and Training: Mobility Options to Europe for Those Not in Need of Protection", conducted by the Research Unit of the Expert Council of German Foundations on Integration and Migration in cooperation with the Migration Policy Institute Europe, funded by Stiftung Mercator.



as resettlement) and, not least, **legal opportunities for those who wish to enter the EU for other reasons (such as to study, work or undergo training)**. The level of legal harmonisation differs substantially across these sub-policy areas: there has been progressive harmonisation of asylum-related policies at the EU level and, although keenly contested, work on the third generation of legal acts to consolidate the Common European Asylum System (CEAS) has not yet been abandoned. The EU has significantly stepped up its efforts on joint border management and is now planning to expand the Frontex standing corps to up to 10,000 border guards by 2027. However, the EU's attempts to harmonise policies on the various channels for legal migration from third countries and to make them more meaningful in terms of their admission volume have only been of limited success so far.<sup>2</sup> While **legal migration options** are presented as a **key component of a more sustainable and orderly common external migration policy** of the EU and its Member States, they constitute an area in which Member States are rather reluctant to cede control to the EU level, and joint strategies are still lacking. Nonetheless, cooperation with countries of origin and transit is crucial if the EU is to successfully address irregular migration and mixed migration flows.

This *To The Point* by the SVR Research Unit explores how the EU navigates the tensions between its limited competence for legal migration and the (sometimes competing) interests of Member States and third countries in its endeavour to develop a coherent external migration policy. Following a brief overview of existing policy initiatives at the EU level, the contradictions within the common external migration policy will be analysed from three different angles: (1) the EU's limited legal framework, (2) its

rhetoric on including legal migration and mobility as a genuine component of its broader external migration policy vis-à-vis partner countries and (3) its de facto outputs, which have been patchy so far due to Member States' limited buy-in with regard to the further promotion of legal migration and mobility. Challenges with regard to multi-level governance (between the EU and Member States) will be illustrated by providing some insights into German policymaking.

## Roots and milestones of the EU's external migration policy

The idea of developing a comprehensive and coordinated EU migration policy encompassing asylum and return as well as legal migration policy dates back to the late 1990s. However, it was not until 2005 that the EU launched the Global Approach for Migration (GAM),<sup>3</sup> which became the Global Approach for Migration and Mobility (GAMM)<sup>4</sup> in 2011. The GAMM is a general conceptual framework for the EU's engagement with third countries on migration issues which makes use of dialogue, political, legal and financial instruments, programmes, projects and actions. Within the GAMM, Mobility Partnerships<sup>5</sup> are a concrete tool for establishing bilateral cooperation frameworks with third countries. As non-binding agreements, they address a range of migration issues, offering legal migration opportunities while simultaneously seeking to enhance migration control. The latter aspect is crucial when it comes to selecting partner countries, **since opening up such partnerships is conditional on the willingness of third countries to engage in external border management, to fight irregular migration, and to foster the return and readmission of**

2 The Member States' uptake of the EU Blue Card for highly-skilled third-country nationals, for example, has been very low as national admission channels for this group of migrants continue to exist in parallel. Germany is the only exception, having issued more than 27,000 Blue Cards in 2018 (see <http://www.bamf.de/SharedDocs/Pressemitteilungen/DE/2019/20190604-blaue-karte-eu-2018.html>, 7 June 2019, only available in German). In 2017, approx. 85 per cent of all Blue Cards in the EU were issued in Germany (see [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_resbc1](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resbc1), 7 June 2019). The number of people admitted under concrete EU projects, such as mobility or pilot projects (see section below), are another even more striking example. On average, these programmes have far fewer than 100 participants and mostly target medium- to highly-skilled migrants (for more information on German programmes, see SVR Research Unit 2018: 29–32).

3 Council of the European Union: Global Approach to Migration. Attachment 1 to the Presidency Conclusions of the Brussels European Council on 15/16 December 2005. Doc. 15914/1/05 REV 1, Brussels, 30 January 2006.

4 COM(2011) 743 final.

5 Mobility Partnerships are open to countries in the European Neighbourhood (Eastern and Southern Partnership countries), see [https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/overview\\_en](https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/overview_en), 7 June 2019. To date, nine partnerships have been signed. Starting with pilot countries (Cape Verde, Moldova, Georgia) in 2008, the instrument was then extended to other countries (Morocco, Tunisia, Jordan, Armenia, Azerbaijan, Belarus). Common Agendas for Migration and Mobility (CAMMs) are another policy instrument which is open to other third countries with which the EU has less close relationships. So far, the EU has signed CAMMs with Nigeria, Ethiopia and India.



## Box Pilot projects on legal migration

With its call on Member States “to fully engage and cooperate on developing pilot projects with African countries and with other non-EU countries in the future”<sup>6</sup> the European Commission is trying to deliver more on the legal migration component of its European Agenda for Migration. Although neither the term nor the idea is new (see Hooper 2019: 3), given past efforts to launch coordinated legal migration measures for work and training (as within the Mobility Partnerships), the Commission presents the pilot projects as being part of a “new approach” to “test and put in place new structures and approaches to manage legal migration more effectively with key partner countries” (COM(2019) 126 final). To date, Belgium and Lithuania have both launched projects in the IT sector with Moroccan and Nigerian migrants respectively and Spain will start a programme for Moroccan students. France and Germany are planning to engage in further initiatives with North African countries. Pilot projects will receive funding from several EU funds (COM(2018) 798 final) via the Mobility Partnership Facility (MPF), the North African window within the EU Emergency Trust Fund for Africa (EUTF) and the Asylum, Migration and Integration Fund (AMIF).

### own nationals who do not fulfil the conditions for entry, stay or residence in the EU.

On paper, these partnerships should be a “triple win” – benefitting both the countries of origin and destination and the migrants themselves, because such partnerships are supposed to be tailored to the needs of all sides. In doing so, the legal migration and mobility component operates at two levels. First, at the diplomatic level in order to give new impetus to stalled negotiations on readmission agreements by offering visa facilitation in return<sup>7</sup> and, second, at the operational level by setting up concrete initiatives and projects run by voluntarily participating Member States (see Reslow 2013: 134). In reality, the “mobility” component has rather been neglected within the partnerships, which have to some extent remained devoid of substance.

In May 2015, the European Commission launched another policy framework, the European Agenda for Migration. It echoes the objectives stipulated by the GAMM and is based on four pillars: reducing irregular migration and combatting traffickers and smugglers; securing external borders; ensuring protection through a common asylum policy; and offering legal migration, i.e. a “well managed regular migration and visa policy” (COM(2015) 240 final).<sup>8</sup> However,

given the increase in irregular migration since 2015, actions based on the Agenda have focused on restrictive aspects of migration control, which has led to the subordination of legal migration and mobility policy initiatives (see Kipp 2018: 10). It was not until 2017 that the Commission launched a call for proposals for pilot projects on legal migration (see Box), but it remains to be seen whether this will shift the emphasis from migration control to the facilitation of legal migration given that pilot projects are, by nature, small in scope and uptake by Member States remains low.

Further, the EU launched the Migration Partnership Framework (MPF) in 2016, establishing partnership agreements (known as “compacts”) with five priority countries – Niger, Nigeria, Senegal, Mali and Ethiopia – in order to better manage migration, increase returns and combat irregular migration.<sup>9</sup> To this end, the “full range of policies, financial instruments and EU’s external relations instruments will need to be used” (COM(2016) 385 final) by offering negative and positive incentives to cooperating countries, in particular development aid which is to be used for migration-related measures (see Castillejo 2017). Reports by Member States and African officials indicate that **it is still rather unclear what the value added of these new agreements will be and how**

6 See [https://ec.europa.eu/commission/sites/beta-political/files/sotou2018-factsheet-legal-pathways\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/sotou2018-factsheet-legal-pathways_en.pdf), 7 June 2019.

7 In contrast to Mobility Partnerships, CAMMs do not include negotiations on readmission and visa facilitation agreements.

8 The latter point was further elaborated by the Commission a year later in its Communication “Towards a Reform of the Common European Asylum System and enhancing legal avenues to Europe” (COM(2016) 197 final).

9 Cooperation has been extended to North and West African countries as well as to some Asian countries, including Bangladesh, Pakistan and Afghanistan (COM(2017) 471 final).



they relate to other adjacent policy initiatives such as the Valetta Action Plan or Common Agendas for Migration and Mobility (CAMMs, see footnote 3). So far, measures taken within the context of the MPF are clearly focussing on border control, return and readmission, as well as on job creation at the local level, mainly financed by the EUTF (see Castillejo 2017: 20).<sup>10</sup> The promotion of legal migration and mobility options has been subordinated to these priorities. This is not least due to a core challenge of the EU, namely its limited competence for offering concrete mobility options to third-country nationals.

### The EU's competence for legal migration policy: Setting standards but not determining numbers

Since the entry into force of the Treaty on the Functioning of the European Union (TFEU), the EU has a shared competence (Article 4(2)(j) TFEU) with the Member States in the area of freedom, security and justice, including the policy fields of external border control, asylum and immigration policy. While pursuing its goal of establishing a "common immigration policy" (Article 79(1) TFEU), the EU has to respect the principle of subsidiarity and proportionality (see Thym 2016: 277). With regard to the internal dimension of immigration law, since 2003 the EU has passed a series of group-specific directives laying down the conditions and standards for the entry and residence of third-country nationals, most prominently family migrants, seasonal workers, intra-corporate transferees, high-skilled migrants, students and researchers. This **step-by-step approach** has not meant a full but more of a **gradual harmonisation** within this policy field, even though the EU has been granted "extensive competence for core aspects of immigration law" (Thym 2016: 277). Indeed, Member States are concerned about ceding sovereignty rights with regard to their national admission policies.<sup>11</sup> The EU's

margin of discretion is limited by the caveat in Article 79(5) of the TFEU, which states that the decision "to determine volumes of admission of third-country nationals" for work reasons remains the exclusive right of Member States. Thus, while the EU legal framework defines conditions and standards for the entry and residence of numerous groups of third-country nationals, these channels need to be brought to life by the Member States' admission policies and legal migration programmes.

### The EU's external bargaining tools

Although cooperation with third countries is considered necessary in order to achieve the internal objectives of immigration policy and the "efficient management of migration flows" (Article 79(1) TFEU), the competence of the EU as regards the external component of legal migration policy is not made explicit in the Treaties. In fact, they are rather to be considered "implied external competences" (García Andrade 2013: 265), which are codified by the right to negotiate international agreements (Article 216(1) TFEU) which can serve the overall objectives of the internal dimension. The **most tangible result** in its external legal migration policy **is the right to negotiate (legally binding) visa facilitation agreements** (though this is not explicitly mentioned in the Treaties),<sup>12</sup> whereas the right to negotiate readmission agreements with third countries is explicitly laid down in Article 79(3) of the TFEU. However, it should be noted that visa facilitation is only applicable to short-term visas (Schengen visas) and thus only facilitates mobility for specific groups of people (e.g. students or researchers) and residence purposes (e.g. for medical treatment). Options for "offering" legal mobility for work and training therefore hinge on the willingness of Member States to admit migrants to their labour markets. These limited opportunities explain why the EU is trying to develop its external migration policy

10 Cooperation with Niger, an important transit country, has been showcased in this regard. The EU has been actively cooperating with the Nigerien authorities to combat human smuggling, control irregular migration routes to Libya, repatriation to origin countries and to conduct awareness campaigns about the perils of migration.

11 They rejected the Commission's far-reaching harmonisation attempts, including the attempt to introduce a single application procedure, as proposed in 2001 (COM(2001) 386), because they were intent on keeping their regulatory powers in order to steer admission in accordance with their labour market needs.

12 As negotiations on agreements were progressing slowly, the Council decided in 2004 to transfer competence for negotiating visa facilitation to the Commission.



through (legally non-binding) programmatic initiatives and frameworks as outlined in the above.

## Rhetoric: A bold promise of comprehensiveness

Notwithstanding the limits of the EU's formal competence, EU institutions, in particular the European Commission and the European External Action Service, have reiterated their conviction that legal migration and mobility are an integral part of a comprehensive EU external migration policy. The Commission has pushed for including partner countries of origin in addressing "all relevant aspects of migration in a balanced and comprehensive way" (COM(2011) 743 final). At least on paper, legal migration and mobility are – not least since the GAM of 2005 – presented as equal alongside international protection and asylum policy, the fight against irregular migration (including return and readmission) and the promotion of developmental effects of migration through diasporas. The GAMM 2 and the renewal of the EU Neighbourhood Policy in 2011 reiterated this claim (COM(2011) 303 final), while the Commission announced a "new European policy on legal migration" in 2015 (COM(2015) 240 final). While it remains unclear what exactly is "new" about the strategy, the Commission stresses that partner countries should capitalise on legal migration opportunities which could thus also serve developmental goals. In the same vein, the Valetta Action Plan of 2015 considers "legal migration and mobility" as one of five priority domains for cooperation between the EU and African countries.

The rhetoric in regard to fostering legal migration and mobility as a (seemingly) equally important goal alongside other policy priorities is misleading. In fact, Member States give much greater emphasis (and financial and administrative capacities) to reducing irregular migration than to opening legal channels for third-country nationals. Instead, **offers of legal migration opportunities** (such as visa facil-

itation measures) **are typically symbolic and used as bargaining chips to incentivise cooperation on border control, readmission and general migration management** (see Kipp/Koch 2018). In general, EU Member States clearly make visa facilitation and mobility options conditional on readmission agreements by requiring the conclusion of the latter in order to set up the former (see Reslow 2013: 23; García Andrade/Martín 2015: 73). At the same time, during negotiations and meetings with partners, legal migration opportunities for remunerated activities are promised time and again. One example is when, in November 2017 at the EU–Africa summit, German Chancellor Angela Merkel said that in return for readmission agreements the EU could issue work permits for nationals of cooperating countries in those sectors in which labour is needed.<sup>13</sup> So far, though, hardly any of these legal migration options have been offered and it is therefore doubtful whether policy priorities can really be considered as equally as important or whether the EU's rhetoric in regard to comprehensiveness and partnership is thwarted by the Member States' obvious greater interest in migration control.

## Limited outcome: The prerogative of national governments and interests

Contrary to the EU's stated ambition of shaping a comprehensive common external migration policy and given its limited competence, it is the Member States which continue to call the shots when it comes to admitting third-country nationals for work or training purposes. Against the backdrop of the "migration crisis" rhetoric and rising populist movements in various EU Member States, national interests influence national migration policy to a large extent and **promoting legal migration is not always considered politically opportune**, even when it is compatible with labour market needs.

At best, it is within Mobility Partnerships that the EU and its Member States have achieved some con-

13 <https://www.bundesregierung.de/breg-de/aktuelles/pressestatement-von-bundestkanzlerin-merkel-beim-gipfeltreffen-der-europaeischen-union-und-der-afrikanischen-union-848084>, 7 June 2019 (only available in German). In theory, offering visa facilitation in return for enhanced cooperation and the effective readmission of nationals without protection needs seems a promising bargain for the EU in a functioning migration partnership. However, in reality it rarely is, not least since the short-term visa facilitation which the EU can offer is not always perceived as a sufficiently positive incentive for cooperation (see Chou/Gibert 2012; Reslow 2013: 193).



crete results, as is exemplified by Germany's involvement. So far, Germany's contributions to Mobility Partnerships have resulted in projects being carried out in cooperation with Moldova, Georgia and Morocco. Germany ran a pilot project with **Georgia**, in which around 40 skilled trainees were recruited for an internship in the hospitality, catering and care sectors. The focus of the Mobility Partnership with **Moldova** was on building the labour migration management capacities of the Moldovan authorities.<sup>14</sup> Both projects emphasised the concept of circular migration, although this was not necessarily in the interest of the participating migrants, nor that of most of the employers in Germany, who invested in training and in some cases wanted to retain their workforce in the long run.<sup>15</sup>

The idea of capacity-building has also been at the core of the EU Mobility Partnership with **Morocco**. In this context, Germany's International Placement Services (ZAV) and the Moroccan employment agency (ANAPEC) exchanged views on further collaboration, identifying common sectors of interest for labour migration which led to the conclusion of a working agreement in the software, web development, IT consulting and catering sectors, for instance. However, a pilot project for around 100 Moroccan migrants who began vocational training in the hotel and restaurant industry<sup>16</sup> was launched at the same time on a purely bilateral level. Even though experience gained in terms of capacity-building in this project was subsequently shared with European partners, the EU had neither a financial nor an ideological impact on this initiative. It would have been launched anyway, regardless of whether a Mobility Partnership existed or not.

This example clearly demonstrates that the EU's relevance when it comes to promoting concrete migration and mobility initiatives for work and training purposes is more indirect, as the **relevant projects are to be realised bilaterally** between national governments. Such projects and initiatives **have not been initiated at the EU level**. They are, at best, "relabelled" by putting them under a common EU umbrella and

co-financing them from the EU budget. Member States like Germany cooperate with third countries whenever it is in their best interests, but the EU's value added at the operational level remains blurred. While it is, in principle, standard procedure for Member States to implement EU projects, given that the EU lacks administrative and implementing powers in most policy fields (due to the decentralised multi-level approach), the EU's contribution should be more effectively signposted and framed. So far, cooperation entails an exchange of views and best practices but does not normally lead to real joint initiatives which are labelled and advertised as such. Instead, as Member States voluntarily participate in these projects, they have a tendency to "hijack" them for their own interests.

Another core challenge is the **perspective of those partner countries' governments which show little appetite for negotiating with the EU. They have good reason to question the comparative advantage of the EU**, which offers limited mobility through short-term Schengen visas, compared to more favourable admission channels offered as part of agreements with individual Member States. Thus, EU negotiations tend to be sluggish and lengthy, and some even fail. For instance, a Mobility Partnership with Senegal petered out as bilateral undertakings with France undermined the Union's negotiations (Chou/Gibert 2012). Ongoing talks with Morocco have virtually stalled because the EU provided insufficient incentives<sup>17</sup> compared to the existing legal admission schemes offered bilaterally by Spain and France. In terms of concrete mobility opportunities for work and training, third countries are very much aware of the EU's limited competence and their choice of partner is a strategic one which is based on bargaining position.

## Taking stock before moving forward

In contrast to the number of programmatic frameworks and policy initiatives which have been launched

14 More information about Germany's contribution to the Mobility Partnership with Moldova can be found on the official website of the Partnership (scoreboard): <http://scoreboard.mfa.gov.md/project/view/261>, 7 June 2019.

15 According to expert interviews conducted within the context of these projects.

16 More information about the "German-Moroccan partnership for training and skilled worker recruitment": <https://www.giz.de/en/mediacenter/68745.html>, 7 June 2019.

17 This also concerns the question of whether third countries are willing to readmit other irregular third-country nationals in addition to their own nationals, a central claim put forward by the EU during negotiations which is a constant source of unease for partner countries.



since the mid-2000s, the EU and its Member States have little to take credit for so far in terms of concrete projects and measures of legal migration and mobility in cooperation with third countries. **The EU** is caught in a contradiction between its own rhetoric, limited competence and national interests. It **aspires to expand its sphere of influence** by offering the prospect of more legal migration opportunities to Europe, presented as “joint commitments” (rhetoric), while in fact **it lacks the power to actually implement those opportunities** due to the Member States’ reluctance to cede sovereignty (limited competence). **This leads to a situation in which the individual political interests of Member States and third countries determine the outcome** (national interests).

The EU has already come a long way on its path to adopting a more realistic approach by taking into account the prerogatives of its Member States in terms of legal migration policymaking. Rather than attempting to time and again impose ambitious top-down and EU-wide strategies (like the GAMM), **the EU may be better advised to scrutinise and develop further existing efforts and pilot schemes at the Member State level and to regard them as the starting point for a gradual process of deepening cooperation**. Therefore, the challenges, common interests and pitfalls in policymaking and the implementation of legal migration policy for work and training at the national level as well as existing EU initiatives need to be assessed. This was the starting point for a joint project by the Research Unit of the Expert Council of German Foundations on Integration and Migration in cooperation with the Migration Policy Institute Europe, funded by Stiftung Mercator. Against the backdrop of large-scale irregular migration flows to Europe, the project asked what legal alternatives exist and could exist for third-country nationals who are not in need of protection and who move for education, training or work. Through a combination of five country case studies (on France, Germany, Italy, Spain, Sweden) and an analysis of the EU’s external migration policy, the project explores existing legal migration opportunities, challenges in policy design and implementation, and reflects on the options for developing effective legal migration policies and programmes. Comprehensive results of the research project will be published in late 2019.

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## About the Expert Council's Research Unit

The Expert Council's Research Unit conducts independent, practice-oriented research projects in the field of integration and migration. The project-based studies are dedicated to emerging trends and issues and focus mainly on the fields of education and refugees/asylum. The Research Unit complements the work of the Expert Council. The core funding is provided by Stiftung Mercator.

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