

Angenendt, Steffen; Parkes, Roderick

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Asylum and Immigration Cooperation after Lisbon

New Competencies, Better Policy?

Steffen Angenendt / Roderick Parkes

The juncture is propitious to predict upcoming changes in European asylum and migration policy. After all, the institutional alterations being introduced by the Lisbon Treaty are predicated upon a desire to increase the European Union's capacity for action in home affairs. And the Stockholm Programme prescribes the strategic use of this institutional architecture over the next five years. Or at least, it ought to. In actual fact, the as yet unpublished Programme is unlikely to provide much in the way of far-sighted programming in asylum and immigration policy—and Lisbon's institutional changes may actually complicate decision-taking. Together they are a recipe for the persistence of the current deficits in policymaking, rather than for change.

The entry into force of the Lisbon Treaty lends itself to a prospective stocktaking of European asylum and immigration policy-making: what has been achieved and what is still to be done? The past decade of policymaking is usually distilled into the following vignette: the member state governments have forged ahead with the restriction of illegal immigration and asylum, but have achieved only limited progress on legal migration. If the potential of common action is to be exploited, therefore, the most work is still to be done on questions like labour migration.

The reality is rather more complex. European cooperation has advanced in almost all aspects of asylum and immigration—even in areas of legal migration,

such as immigrant integration, where the pre-Lisbon EU had no clear competence. These advances reflect the fact that cooperation has recently relied less upon a restrictive consensus than upon the case-by-case resolution of entrenched member state conflicts. Although measures have been agreed upon, these conflicts have been detrimental to the overall effectiveness and coherence of policy.

A tall order: strategic challenges 2010–2014

In order to overcome member state conflict, agenda-setters have often concentrated on immediate and visible migration problems, knowing that the political pressure for

consensus is highest there. As the EU finalises its agenda for the coming years, five strategic challenges arise from this short-termism.

1. *Preventing “invisible” illegal immigration:* although in urgent need of attention for humanitarian reasons, migration problems at the EU’s southern border are in large part a red herring in the Union’s illegal immigration agenda. Individuals arriving at the southern border are outnumbered by illegal immigrants in the Union from other parts of the world. If the latter have received less attention, it is because they do not crash upon European shores so much as simply overstay on visas.

2. *Re-opening access to European asylum:* visa regulations introduced in response to immediate problems of irregular migration make it today virtually impossible for asylum-seekers to reach the EU legally. Besides the humanitarian implications, this situation poses considerable difficulties for the management of migration. Without legitimate means of entry, asylum-seekers are increasingly pushed outside the ambit of state control, and the EU loses its political authority when encouraging third countries to better manage migration.

3. *Respecting the development interests of third countries:* For the past decade, third countries have been co-opted into EU migration policies, with unfortunate effects for their own development prospects. Circular migration, brain gain and remittances are, however, increasingly seen as providing the tools for the regulation of migration in the common interests of the EU and third countries. EU policies in this direction are underdeveloped.

4. *Attracting a broad range of labour migration:* immediate pressures associated with the financial crisis have weakened the political will behind attracting labour migration to the Union. Yet the economic and demographic pressures that point in favour of foreign labour are structural and will outlive the current economic downturn. It is thus necessary to begin even now

to hone the policies introduced before the crisis and to prepare new ones.

5. *Integrating immigrants:* in the EU, each member state is vulnerable to integration deficits in the others. Integration failures create economic and security problems with cross-border dimensions, as well as disrupting common European efforts to reduce irregular migration and attract desirable forms of migration. This gives rise to the need for a more concerted integration effort. Moreover, without a more substantial shared integration policy in place, the EU’s highly developed policy on illegal migration will continue to subsume integration tools.

The Lisbon Treaty: a tricky Portuguese recipe

With its introduction of new decision-making rules in Council and the expansion of EU competencies in this area, the Lisbon Treaty has been sold as a recipe for meeting such challenges: thanks to the Treaty, it is said, member state conflicts that previously obscured strategic challenges will be overcome and the potential for a common policy furthered. Policy-watchers, however, have long been sceptical about this rosy picture. Many suggest that other institutional changes effected by the Treaty—in particular the new powers afforded to parliaments—will simply replace one set of conflicts with another. In such a scenario, deadlock between parliaments and national governments will ensue.

The *European Parliament* will be strengthened in asylum and immigration policy not only by the shift to co-decision with the Council in legal migration issues. Its new powers over criminal justice and police cooperation also look set to boost its clout. In the past, the Parliament has engaged in “issue linkages”, which have diluted its existing co-decision powers in migration: the Parliament has made its amenability when co-deciding over migration control dependent upon the member states’ respect for its views on criminal justice and police

cooperation, where it had only limited powers. With its new powers over police cooperation and criminal justice, the Parliament will no longer have to behave in this way. Confrontations with the Council will presumably gain in intensity.

Parliamentary clout under Lisbon may not, however, be as great as commentators expect. Previous experience suggests that the European Parliament's committee system will be overwhelmed by the breadth of home affairs proposals to be scrutinised. And with increased power, there also comes a pressure to "behave responsibly".

The picture is similar for *national parliaments*. Their formal new powers may not translate into real clout. They gain new powers to judge the compliance of proposals with the principles of subsidiarity and proportionality and can band together to trip up the progress of legislation (Art. 12 TEU + Protocol on national parliaments). Yet these new powers might actually disrupt their scrutiny of the real substance of cooperation. National parliaments are being encouraged to focus on proportionality and subsidiarity rather than the real meat of proposals. Moreover, the fact that these new powers are to be asserted in concert with other parliaments could diminish the use of more practical domestic modes of scrutiny.

In reality, then, the Justice and Home Affairs Council will probably retain its prominence as an agenda-setting and legislative body and the political wrangling inside it, rather than between Council and the parliaments, will continue to define cooperation. The shift to qualified-majority voting in *Council* in questions of legal migration will do little to circumvent, let alone defuse, tensions between the member states. Even when the formal obligation of unanimous decision-taking falls away, member states tend to operate on the basis of consensus in these contentious areas. The formalisation of the *European Council's* role in strategic thinking (Art. 68 TFEU) will probably sharpen tensions, not least between large and small member states.

The *Commission*, traditionally seen as the motor of common policies, certainly gains new agenda-setting powers in asylum and immigration policy. Yet these new powers are restricted by safeguards on national competencies (Art. 79(4 & 5) TFEU).

The Stockholm Programme: flavourless Swedish ingredients

If the EU is to meet its strategic challenges, what is required is a politico-strategic document capable of overcoming member state wrangling. The Stockholm Programme is not it.

Certainly, the last available draft of the Programme mentions or alludes to each of the strategic challenges set out above:

Legal migration: existing policy and information sources are to be analysed with a view to improving the recognition of qualifications and potentially improve recruitment processes with third countries.

"Invisible" illegal immigration: a register of entries and exits from the Union is foreseen, along with more sensitive checks before visas are granted to third-country nationals.

Access to asylum: Frontex is to improve the treatment of migrants intercepted at or before the border, and the voluntary participation of member states in the EU's resettlement scheme is to be encouraged.

Migration and development: the Commission is to present proposals to encourage the low-cost transfer of remittances, to help diaspora groups in the EU to foster development in their countries of origin, and to study means to encourage circular migration.

Integration: the Programme foresees a mainstreaming approach with integration measures slipped into other EU policies, as well as the agreement of integration practices to be introduced by the member states, such as courses for immigrants.

Yet, the programming process has fallen prey to the same inter-institutional tensions and one-upmanship that have characterised the past decade of migration

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SWP
Stiftung Wissenschaft und Politik
German Institute for
International and
Security Affairs

Ludwigkirchplatz 3–4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

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policy-making. Its current provisions on legal migration are, for example, marked by a tug-of-war between the Commission and Council:

- ▶ The proposal in the Commission draft for a common system facilitating labour migration to the Union has been replaced by talk of *systems* (plural)—wording that better allows for the coexistence of national and European frameworks as opposed to the adoption of a single European frame.
- ▶ The Commission's attempt to set the focus of immigration policy-making on longer-term goals and to open agenda-setting to employers and unions—a study on Europe's skills needs until 2020 and a platform for dialogue—has been scuppered.
- ▶ In the Commission's draft, a mooted codex of migrants' rights was subtly given an important role. Although describing the codex as being concerned with codifying and consolidating existing European legislation, the Commission had foreseen it as a tool for increasing EU action in this area: thanks to some nimble wording, the codex would have become the prime vehicle in efforts to afford non-citizens rights that are comparable to those of citizens. The Swedes have reduced its role leaving more room for national solutions.

Meanwhile, issues that cause tension within the Council have been left open-ended. To take an example from asylum policy: countries on the southern border of the EU have pushed for mutual recognition of asylum grants. Member states further from the border have resisted, seeing this as a means for countries like Malta to give refugees the scope to move around the Union and assert their right to protection elsewhere. This could hand the burden for their care to northern states. In the latest draft, the concrete language of the Commission proposal has fallen away. The Commission is simply to examine possibilities for refugees to maintain their protec-

tion status when exercising their acquired residence rights under EU law.

Serve as a mixed menu: the role of the "trio-Presidency"

At this juncture, nothing is certain. The changes to all levels of the EU's institutional furniture—a new Parliament and Commission, a new semi-permanent president of the European Council, the split of the Commission's old justice and home affairs Directorate General into two separate DGs with dedicated Commissioners, the introduction of new policy coordination mechanisms in the Commission—creates many unknowns and suggests that much may yet change in this bleak picture.

Yet, if no change occurs, the task of pepping up the EU's emerging asylum and migration agenda would fall to the very actors that have acted as blockers and spoilers in the past: the interior ministries in the Justice and Home Affairs Council.

This need not be a bad thing. In such a case, a plucky agenda-setting grouping, which has previously failed to achieve its potential and which will actually lose in formal weighting post-Lisbon, will be well-placed to act. The "trio-Presidency" gathers the three incoming presiding governments of the Council for 18-month intervals.

The incoming three governments—Spain, Belgium, and Hungary—have considerable advantages. Between them, they incorporate the major fault-lines in immigration and asylum policy—big member states vs. small; southern vs. eastern states; resource-rich vs. resource-poor states; "land-locked" states vs. states on the external borders of the EU. Their incorporation of these political conflict-lines leaves the trio well-placed to resolve points of tension in the Stockholm Programme. By simply looking beyond their immediate interests and focussing instead upon strategic challenges of the kind described above, these three governments can lend more credibility to ambitious proposals that were diluted in, or omitted from, the programming process.