FREEDOM, SECURITY AND JUSTICE

The Rocky Road from Empty Prescriptions to Meaningful Policy: Four Imperatives for a Better Immigration and Asylum Policy

Birgitte Mossin Brønden Analyst, DIIS

Roderick Parkes Head of Brussel's office, SWP

It is a myth, of course, that European Union (EU) officials spend their time lazing around, watching daytime television.[1] If anything, they are just a little too busy. And yet, they do seem to take inspiration from one staple of daytime easy-viewing: makeover shows. The Union is forever pouncing upon some neglected and unlovely policy field, tweaking one or two institutional elements, and creating a "common", "coherent" or "effective" policy.

Justice and home affairs policy is one of the EU's most regular makeover victims. Every time it emerges from the Union's frequent constitutional convulsions, it finds itself replete with new constitutional lip-gloss and perm. Migration policy, for example, came out of the Lisbon treaty reform as a common policy, based on principles such as burden-sharing between Member States, thorough transposition and coherence with the EU's foreign policy.

The trouble is, of course, that institutional makeovers are only meaningful if they reflect, alter or harness political realities in an intentional way. And the home affairs and migration policymaking that emerged from Lisbon does not seem to have been greatly improved.

It is odd, for example, that the EU's strategic prescriptions for an effective internal security policy currently have a shelf-life of around six months, whilst its tactical behaviour in international negotiations may take two or three years to work out. Recent developments in Greece and Bulgaria meanwhile throw up questions around the Lisbon Treaty's prescriptions on burden-sharing and implementation. And, even after Lisbon, moves towards a common legal immigration and asylum policy continue to lurch from one political limbo to the next.

The outgoing Trio Presidency groused about being landed with the – in reality rather jolly – task of implementing the Lisbon Treaty's institutional prescriptions. This new Trio Presidency, by contrast, has the altogether thornier task of actually realising the Treaty's intentions. This area of policymaking is cracking under its own deep political divisions, and the treaty makeover does nothing more than disguise a few wrinkles. The goals of a common policy based on solidarity, coherence and proper implementation can only be achieved by the Trio Presidency if the EU recognises the true nature of these political tensions. These run not only between member governments, but also between the Union's various policy communities, the EU and third countries, and the EU and civil society and immigrants.

In moving from the cosmetic world of daytime television and into real politics, the Trio Presidency should bear four principles in mind for a coherent, common policy based on burden-sharing and reliable transposition:

There can only be coherence with foreign policy when the EU has a foreign policy

The Lisbon prescriptions on coherence between foreign and migration policy are just the latest step in a long process. Since 2005, the EU has redoubled its efforts to ensure the complementarity of the two. Back then, the EU realised that regulating international migration in a certain way could be beneficial to its foreign-policy goals. Increased freedom of movement throughout the EU and its neighbouring regions could, for example, promote cultural and economic exchange as well as encourage political transformations in other countries. Migrants in the EU-27 might also play a key role in furthering the Union's development-policy goals in countries of origin (remittances, contribution to development made by diasporas in the EU) – and if the EU was not careful, also in disrupting them (if "circular" migration is not encouraged, brain drain can occur). At the same time, interior ministries realised that many of the migration and security challenges they face have roots outside the EU. They are keen for EU foreign policies to take the "root causes" of irregular migration and terrorism into account.

Yet, the EU is not seeking to achieve coherence between fully-fledged home affairs, development or foreign policies. And the fact that the EU's competencies in the relevant policy fields have developed at different speeds remains a considerable source of tension between its policy communities. It is fair to say that those political actors who are keenest on "coherence" tend to be those whose EU competencies and capabilities are fewest. They have enviously eyed up the EU's resources in other policy areas, using

1. The recommendations in this text draw on the more in-depth analyses by the authors. For an elaboration of their ideas on coherence, see: Birgitte Mossin Brønden (forthcoming DIIS Brief 2011) "Migration and Development in the EU tool box: for whom and for what purpose?", and Birgitte Mossin "Migration and Development – a mantra losing its impact?" in Den Ny Verden 2009, and Roderick Parkes, "When Home Affairs Becomes Foreign Policy", *SWP Comment,* 2010; on burden-sharing see: Steffen Angenendt and Roderick Parkes, "A New Impulse for EU Asylum Policy? The Potential of the European Asylum Support Office", *SWP Comment,* 2010; on implementation: Roderick Parkes, "Costing Free Movement: Fear and Non-transposition in the Schengen Area", *SWP Comment,* 2010, and Roderick Parkes and Moritz Schneider, "Partnership: A New EU Approach to Fighting Irregular Immigration", *SWP Comment,* 2010; and on common policies: Steffen Angenendt and Roderick Parkes, "The Blue Card Impasse", *SWP Comment,* 2010

the imperative of coherence as a means of pilfering other's goodies rather than building up their own approach and measures.

In the 1990s, for example, interior ministries enjoyed few tools to deal with migration flows before they reached the Union, and they enviously eyed the EU's ample capabilities in development policy. It was not just that they wanted to use development policy as a carrot to obtain readmission agreements. Stressing the need for coherence, they advocated a "root causes" approach, which would see a measure of development aid diverted to those third countries that produced the most illegal immigrants. "Coherence" in this regard implied the primacy of one policy over another, and the predictable result of this bid to reduce the economic and political "push factors" behind immigration to the EU was a disruption of development goals as some of the EU's development support was channelled away from countries most in need of it. Moreover, insofar as it had any effect on the "root causes" of migration, it may also have been counterproductive, tending to lead to a "migration hump": the resulting economic development led to an initial increase in mobility. So, it is surprising that interior ministries look set to repeat these mistakes in taking a "root-causes approach" to international terrorism.

The EU's foreign policy actors are just as guilty of this magpie version of "coherence". Visa policy is, for example, a core tool of home affairs. If it has become a core element in the EU's foreign relations with the western Balkans and eastern partners, it is in large part to make up for the EU's lack of broader foreign policy capabilities. The result of these efforts to exploit free movement and reform-conditionality for reasons of foreign policy has been unfortunate: due to international pressures, third states have been offered visa-free travel before they were ready; interior ministries have reacted by threatening to reintroduce controls, leaving the EU trying to leverage permanent reforms in third countries through incentives that look entirely wobbly; and the EU's existing efforts to improve and liberalise its visa practices (the new Visa Code) have been disrupted by their use as a *quid pro quo*.

If the Trio Presidency wishes to ensure fruitful coherence between its policy communities, it should acknowledge the cause of the political tensions that have disrupted past efforts: home affairs policy cannot substitute for foreign and development policy, just as foreign and development policy cannot substitute for home affairs policy. In some cases, coherence can actually best be ensured by building the EU's capabilities in a particular policy field, rather than trying immediately to exploit synergies. This should inform the Union's approach to countering terrorism outside its borders. Where its policy competencies are relatively mature, by contrast, the Trio Presidency should redouble its efforts to explore synergies – for example between migration policy and development. But even here, the Trio Presidency should keep an eye open as to whether migration policies have unintended consequences for development and vice versa: notice how the strict migration laws, the deportations and return programmes together with the deterritorialisation and externalisation of boarder controls have negative impacts on the EU's foreign and development policy aspirations.

The best place for policy implementation is the negotiating table

The Lisbon Treaty increases the Commission and Court's powers when it comes to policing the implementation of EU home affairs rules. It is hoped that this greater capacity to punish naughty Member States will improve the previously shaky transposition in policy fields such as police cooperation and criminal law. Yet, doubts remain. In the area of EU immigration and asylum policy, where the Commission and Court's coercive powers to oversee implementation are already quite robust, serious problems persist. European asylum statistics and the current problems in Greece, for example, show that there are enormous disparities in the way that the Member States interpret their obligations under EU law.

For academics who know their way around implementation theories, the continued problems in asylum and immigration policy will come as no surprise. They know that if serious political disagreements are papered over during the formulation of a policy, there will be a tendency towards a "politics of implementation", in which aggrieved parties use the transposition stage as an opportunity to make their dissatisfaction known. The trend, reinforced at Lisbon, to pursue implementation through reactive, coercive means suggests a disinclination to tackle pro-actively the underlying political causes of non-transposition.

To overcome persistent problems of non-implementation, the Trio Presidency could usefully acknowledge the way that tensions between governments at the negotiating table can disrupt later implementation: firstly, proper transposition relies upon the clarity of the obligation. If political differences between governments are not resolved during negotiations, they will be tempted into loose formulations and lowest-common-denominator rules. The resulting confusion will throw implementation into turmoil. Secondly, governments' willingness to implement policy depends in large part upon having the administrative capacity to do so. States which do not have the capacity to implement an obligation may nevertheless sign up to it on the basis that nobody will notice. The EU needs to better exploit administrative cooperation between its members as a means for better-off Member States to show solidarity to other members and to cajole them into improving their standards.

But, the most important lesson is that those *excluded* altogether from intergovernmental negotiations are most usually key to transposition. After all, good implementation and the policing of implementation occur largely out of sight of national governments and the European Commission. They instead rely upon "sheriff's deputies" who either implement policy or report transgressions: policies where these deputies – third countries, immigrants, citizens, businesses – gain positive rights are those that tend to be best implemented and policed. Quite simply, they are the policies which have the most stakeholders. The more

restrictive policies, by contrast, often tend to alienate those charged with implementation and give few bystanders an incentive to report non-implementation. Instead of co-opting other actors into policy implementation at pain of sanctions (employers' sanctions, carrier sanctions, international sanctions) and thereby creating paper tigers, the Trio Presidency could usefully build new policies in a spirit of partnership, starting with a revamp of the EU's mobility partnerships with third countries.

Common policies should be based on diversity

Most people would agree that the point of the EU is to achieve common policies and approaches. And yet, in migration policy, this goal routinely founders on Member State resistance and the notion of a common approach on asylum or legal immigration seems as distant as ever. Why? Common European policies tend to create shared standards relying upon a degree of homogenisation and centralisation. Only so, it is thought, can the EU create policies of scale which guarantee goals like fairness, clarity and global influence. This would explain why, in policy areas such as legal immigration, the Union has sought to compete with large states like the United States, creating a greater degree of coherence and commonality in its labour market policies towards migrants than even these states can achieve. The almost unanimous criticism of this policy tool suggests that there is something wrong with the EU's thinking.

The Blue Card approach of course maked perfect sense on paper. It was based on a desire to pool the EU's labour markets, offering certain forms of particularly desirable migrant access to all Member States. Yet, if its one selling point was the very thing that simply cannot be realised, to pursue it as an idea was clearly an act of folly. And this was very much the case in the Blue Card approach. Not only were the Member States unwilling to pool their visa and labour market policies to the necessary degree, but certain immutable differences of language, geography and history, undermined the idea of a homogenous policy of scale. Instead of trying to blend out differences in the Blue Card approach, the EU might have turned them to its advantage. A common policy tool in which small groups of Member States made use of shared traits – unusual labour market regulations for example or a shared language – in order to attract immigrants and to offer them preferential access to their labour markets would have worked better than homogenisation.

The same principle of creating common policies out of inter-national difference and diversity could usefully be applied to the EU's other policy goals. Homogenous rules do not, for example, necessarily guarantee fairness between EU members, but may rather cement structural inequalities. True fairness would take account of the differences between individual states, such as their geographical proximity to the EU border or their administrative capacities. If the Trio Presidency wishes to help the EU achieve common policies of scale, it should concentrate its efforts on a central question: how to reconcile the need for clarity and coherence with the realities of difference and diversity?

Think Global - Act European

Burden-sharing is not yet a value but a calculation

It is all very well for the Lisbon Treaty to underline values of solidarity and burden-sharing between Member States in the areas of asylum and illegal immigration, but if such values owe more to romanticism than reality, it will put the lives of migrants at risk. The EU may well be a community of grown-up values such as solidarity, but it is also an international organisation run by hard-headed governments carefully watched over by increasingly irritable national electorates. They are not convinced by the arguments for solidarity, and this plagues the work of the EU in areas such as border control and asylum.

The trouble is that different Member States tend to measure the burden they bear by different yardsticks, and all with some justification. Is, for example, the burden borne in asylum policy measured by the number of asylum-seekers a country accommodates (and in which case should it be measured in absolute terms or relative to the population)? Does it derive from having high asylum standards, and thus the possibility of encountering "pull factors" relative to those members with lower standards? Does it come from having a poor administrative capacity and being quickly strained? Does it come from having to deal with the new responsibilities of EU membership and cooperation?

Rather than stressing burden-sharing as an established value, the Trio Presidency needs to build it, creating it out of a series of hard-headed political calculations from member governments. The Trio Presidency could usefully start by identifying a means of overcoming the most obvious political division: the Member States on the Eastern and Southern borders of the EU demand solidarity in the form of practical, administrative support in dealing with their new responsibilities under the EU acquis. Member States in the North and West of the EU believe that solidarity lies in these peripheral countries raising their standards for border control and the treatment of asylum-seekers. The creation of the Asylum Support Office gives a credible framework for a mutually beneficial compromise in which administrative cooperation is conducive to, and contingent upon, a rise in standards. Member States in the North and West would share their administrative resources with those in the South and East, in return for the latter countries raising their standards.