

Partnership: A New EU Approach to Fighting Irregular Immigration?

Roderick Parkes / Moritz Schneider

Even when working in concert, EU governments cannot control irregular immigration. For some time now they have therefore been co-opting third countries, transport firms and employers into their efforts. Yet, the sticks and carrots they offer their reluctant helpers have not sufficed, and implementation has been poor. A new approach is emerging, based on an overlap of interests between the EU and these actors. The EU is seeking to rebuild its current relations with third countries and other actors as “partnerships”. It’s a fine idea, but at present a failure.

Border controls are no longer enough. Despite strengthening their checks at the EU’s boundaries, the 27 governments are struggling to deal with visa-overstayers, “mixed” migration comprising labour migrants and refugees, as well as clandestine and mass immigration. The EU-27 blame the end of the Cold War for most of these problems. The collapse of the Soviet Union not only opened new channels for individuals to migrate to the EU. By facilitating international economic interdependence and instability in former client states, it also created incentives to do so.

Yet, the end of the Cold War also created new opportunities for EU governments to regain control. In the thawed international system, international cooperation on immigration issues has increased. Under the terms of its founding regulation (2007/2004, Art. 14), for example, the EU’s Frontex

border agency has forged operational relations with countries in the Union’s proximity (western Balkans and the “eastern neighbourhood”) as well as with the United States and Canada. The 2009 Lisbon Treaty recognises the EU’s role in cooperating with third countries and gives a dedicated legal basis (Arts. 78(2g) and 79(3)) to activities that previously occurred within the scope of the Union’s broader foreign policy.

And it is not just beyond its borders that the post-Cold War EU has created new immigration controls. The migration challenges that emerged in the 1990s have legitimised the expansion of controls within the EU. Checks on employers, for example, had already been initiated in the 1970s to detect immigrants who eluded border controls or who broke the conditions of their stay. Such controls have become paramount in the past two decades, and

here too the EU has a clear competence to act (Art. 79(2c)).

Sheriff's deputies

In order to sustain this proliferation of immigration controls, the EU relies upon helpers. Border authorities sometimes refer to these helpers as “sheriff's deputies” – private actors and third countries that implement many of the practical aspects of EU immigration policy under the watchful eye of European immigration agencies.

Under the terms of Article 13 of the Cotonou Agreement on development and trade, for example, African, Caribbean and Pacific (ACP) states undertake to accept expellees from the Union. These expellees may not even be nationals of the signatory state. Within the framework of the EU's Neighbourhood Policy (ENP), meanwhile, third countries such as Ukraine and Moldova participate in readmission agreements and attempt to improve their control of migration flows to the EU. But it is those third countries with a concrete perspective of acceding to the EU that are bound closest of all into the Union's immigration control efforts. They have been described as providing a protective zone around the member states thanks to the way they check migration flows before these even reach the Union.

Transport companies bringing travellers into the EU also perform immigration checks before the border. EU Directive 2001/51/EC lays down that transport firms (“carriers”) that knowingly or unwittingly give passage to irregular immigrants should be made legally responsible for them. Transport companies are thus careful to check travellers' details. They then pass many of these details to authorities in the EU. European Directive 2004/82/EC penalises carriers for failing to transmit advance information on passengers' travel documents.

Controls carried out within the EU are also dependent upon private actors. Directive 2009/52/EC, for example, obliges firms to verify that future employees are in possession of valid residence permits. With

the threat of ‘employer sanctions’ hanging over them, firms supplement the oversight work of national labour market authorities. Failure to comply can entail a fine and a bill for the costs of detaining and expelling the immigrants.

Showdown

The helpers are unhappy and have been putting up resistance. Recently, for example, ACP countries defied EU efforts to make Article 13 of the Cotonou Agreement a self-executing clause. Taking back immigrants expelled from the EU, they complained, would entail costly problems of social re-integration. They point out more generally that, by colluding in the restriction of immigration to Europe, they risk losing out on positive aspects of migration such as remittances and training opportunities for their citizens. Although these countries share the EU's interest in the orderly management of international migration, therefore, they do not like the way this goal is being pursued.

Transport firms are upset about the way EU rules have complicated travel. They highlight the fact that, world-wide, different authorities demand different information about travellers. The EU has not properly coordinated its data demands with other international authorities. Of course, most carriers subscribe to the EU's stated goal of punishing those transport firms that actively exploit illegal immigrants. The trouble is that European rules actually make little distinction between exploitative and respectable transport firms – a picture that is similar for employers. Despite the safeguards of the 2009 EU directive relating to forged documents and falsified photographs, even respectable employers could find themselves penalised for unwittingly hiring illegal immigrants. Indeed, under the 2009 directive, employers may be made responsible for the practices of firms they subcontract.

The EU-27's initial response to this resistance was predictable. In order to make its policies more palatable, the Union sought

to generate new carrots and sticks. EU governments increased the penalties for non-compliance, whilst also sweetening the medicine with new incentives for compliance. It is a move that has, however, encountered further criticism. Many commentators argue that by making third countries' acceptance of migration obligations something of a prerequisite for closer relations with the Union, for example, the EU has prejudiced its broader foreign policy goals. Others are concerned about the implications of punitive carrier sanctions for data protection and asylum policy.

Moreover, the EU's response seems to miss the point. Those actors co-opted into EU immigration control measures complain that these policies simply do not take account of their interests. Whilst few are threatening to disregard the rules, it is usually the case that compliance is best when third actors feel their interests have at least been acknowledged. In the United States, for example, firms and business federations openly ignored rules on pre-employment checks when they did not have scope to recruit legal immigrants.

From deputies to partners

The EU-27 seem finally to be grasping the problem. Co-opting reluctant actors into carrying out immigration controls not only inflates public expectations – it also invites implementation deficits. A new approach is needed. As a result the word “partnership” has been added to the EU's lexicon of immigration policy. This marks a change of philosophy for the Union and a recognition that, in the fight against irregular immigration, the EU has certain common interests with other actors. Far better to build on joint interests than to cajole unwilling helpers.

The clearest examples of this new, more consensual approach are the “mobility partnerships” agreed by the EU with Georgia, Moldova and Cape Verde over the past two years. Under this scheme, EU members allow nationals from select third countries

to come to the Union for a limited amount of time. This is supposed to reduce the immediate demand amongst European businesses for labour immigration and thus the incidence of irregular employment. But it should also reduce the long-term causes of irregular migration abroad: the immigrants benefiting from the partnerships are only temporarily in the EU, meaning that their countries of origin not only receive remittances but will eventually gain in expertise when migrants return home. The resulting economic development in third countries will reduce the pressure for irregular migration to the EU. Both the EU and the third country are thus supposed to gain from this effort to reduce irregular migration.

The EU seems to be aiming at a more consensual approach towards NGOs, too. Past approaches to fighting irregular migrants' abuse of the asylum system were highly restrictive and proved in many ways counterproductive: with increasing numbers of asylum-seekers now obliged to resort to appeals to ensure a fair hearing, delays and backlogs made the asylum system open to abuse by migrants looking to extend their stay in Europe. Today, the “frontloading” approach (e.g., in Commission proposal COM(2009)554) offers an alternative. It seeks to expedite the asylum process by improving the standard of initial decisions. By ensuring that asylum-seekers receive a fair and thorough initial hearing by national asylum authorities, governments aim to reduce the incidence of appeals and the attendant backlogs. Whereas previous approaches have alienated NGOs, the frontloading concept requires the old collaboration between governments and non-governmental organisations to be reactivated.

More surprisingly perhaps, the EU is even seeking a more consensual approach with irregular immigrants themselves. This is in evidence not only in efforts to encourage immigrants to inform on firms that employ them illegally. A more consensual approach also informs the Union's expulsion policies. Efforts to expel immigrants from the EU against their will can involve

long drawn-out legal procedures, can be costly and can strain relations with countries of origin. Various EU member states (Spain, the Czech Republic, Italy and the United Kingdom) have thus begun programmes aiming to assist voluntary repatriation. Under these programmes, which are catered for in EU directive 2008/115/EC, irregular immigrants may be offered support for returning home, as well as basic help to re-integrate into their countries of origin and the opportunity to maintain links with the EU. Again, a win-win situation is supposed to be created in which both the state and the migrant gain.

The road ahead

The results of this approach are a let down. Recent analyses of voluntary return programmes have shown disappointing results. The Spanish programme, for example, achieved only 5 per cent of its projected figures of 87,000 in its first four months. NGOs in the United Kingdom have, meanwhile, expressed scepticism that the principles of frontloading are actually implemented by the authorities: whilst there have been efforts to expedite the asylum process, these have not necessarily relied upon an improvement in standards. And the EU's mobility partnerships have been roundly criticised for deviating from their conceptual principles: the EU has simply used the promise of new channels for temporary migration to encourage third countries to improve their border controls. Three improvements could be made to the overall approach.

1. The partnership approach should be applied even during the earliest conceptual stages of policy development. Although some new initiatives, such as frontloading in asylum, were indeed conceptualised with the help of prospective partners, this is not always the case. The concept of mobility partnerships draws more upon theory than an exchange of practical knowledge and priorities between prospective partners. This means that, although theoretically

sound, the new policy tools may not be practicable or mutually acceptable in their intended form.

2. The partnership approach should attain greater parity with earlier, more coercive approaches. Whereas the earlier EU measures continue to rely heavily upon hard law and enforceable penalties, the partnership approach often relies upon soft law and eschews enforceable rights. The EU uses legally binding international agreements for its readmission agreements with third countries, but it uses mere political declarations for the mobility partnerships. The new approach will only be attractive to potential partners if the EU is legally obliged to recognise their interests. More importantly perhaps, legally binding obligations will also reduce incidences of abuse and non-compliance by the EU's partners. After all, the partnerships may well rely upon a convergence of interests, but the motives behind these shared interests may nevertheless diverge. Non-compliance remains a very real risk.

3. The spirit of partnership should be applied more fully to earlier, more coercive policies. Many of the implementation problems with policies, such as carrier and employer sanctions, can be put down to the fact that these measures were imposed upon actors rather than developed with them. ILO analyses of employer sanctions, for example, suggest that employers in countries such as Germany are likely to be rigorous in their duties because the "social partners" are thoroughly consulted in policy and are more generally involved in the regulation of the economy. In countries where this is less the case, employers have nevertheless been mobilised by laws allowing them to seek legal redress against competitors that employ irregular immigrants. And, outside the EU, some states have employed mechanisms (e.g., "constructive knowledge") that give responsible employers scope to report suspicions about an employee's status voluntarily whilst keeping legal obligations and penalties to a minimum – an approach based more on partnership than coercion.

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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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