

NEW CHALLENGES TO THE EU COMMON IMMIGRATION POLICY

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Abstract

The study investigates the current problems and new issues of EU common immigration policy. The article stipulates that the EU immigration policy is the object of common competence of the European Union and its Member States. The author defines the main directions of the European Union's common immigration policy: the promotion and economic development of legal immigration to EU Member States and the fight against the influx of illegal migrants from third countries. The study researches the effective means of combating illegal immigrants by means of the adoption of readmission agreements with third countries by both the EU and its Member States. The research states that readmission agreements facilitate the return of persons who do not have legal grounds to stay in the territory of the EU Member State to their country of origin or transit.

Keywords: Readmission Agreement, Legal Migration, Third Countries, Legal Instruments, Effective Means

INTRODUCTION

In recent years, issues related to the EU immigration policy have become key aspects for the European countries. Their proper solution depends largely on ensuring their economic, social and cultural development. Despite the fact that migrants have continued to make a significant contribution to the economic development of the European countries, all the tangible aspects related to immigration issues cause significant differences in the methods and means of their settlement. In this regard, S. Peers notes that disputes over the role of immigration processes are primarily related to the fears of certain European states regarding the threat of flows of illegal migrants to the national economy, social harmony and the established national values of each individual state¹.

It should be emphasized that the EU takes the first place in the world by the number of immigrants (56 million people). And every year the tendency to cross the borders of the European continent as legal and illegal immigrants is increasing. For example, more than 500 thousand legal immigrants annually arrive on the territory of European countries. In regard of illegal immigrants, their total number is from 3 to 7 million. When the number of immigrants reaches a certain critical mass, the process of immigration creates real and potential threats to virtually any aspect of the security of the host party. It distorts the social, demographic, territorial structure, exacerbates competition in local labor and housing markets, creates entire sectors of employment that do not have legislative regulation, causes social tensions, increase

xenophobia and extremism. Accordingly, these reasons have caused and made a huge impact on the changes in the formation of a common immigration policy of the EU Member States.

Nowadays, the issues related to the common immigration policy of the European Union are regulated by the TFEU (art. 77-80)². In particular, the European Union is developing a common immigration policy aimed at ensuring of the efficient management of migration flows at all stages, fair treatment of third-country nationals legally residing in the EU Member States, and prevention of illegal immigration (art. 79 TFEU). To implement the common immigration policy of the EU Member States in accordance with Art. 79 TFEU the European Parliament and the Council of the EU, acting in accordance with the ordinary legislative procedure, take a number of measures in areas related to: (a) entry and residence conditions, as well as rules on the issuance by Member States of long-term visas and residence permits, including those that aimed at the reunification of families; b) definition of rights of third-country nationals who legally reside within the EU Member States, including the conditions that govern the freedom of movement and residence in other EU Member States; c) illegal immigration and residence, including the repatriation of persons of persons who reside illegally; d) combating with trafficking of persons, especially women and children³.

In addition, the EU treaties also provide that the European Parliament and the Council of the EU may establish measures to encourage and support the activities of the Member States to facilitate the integration of third-country nationals legally residing within their territory (Art. 79, par. 4). The document states that any harmonization of laws and regulations of states is excluded. However, these provisions do not affect the right of European countries to impose quotas in regard of entry of third-country nationals who arrive from such countries to their territory be employed or self-employed (Art. 79, par. 4).

Nowadays, the EU common immigration policy is based on the principles of solidarity and responsibility and is being in dynamic development. The common immigration policy is comprehensive. It means that the whole range of EU legislation in the field of immigration policy is aimed at simultaneously resolving of two main problems: promoting of legal immigration to the EU Member States and overcoming of the illegal immigration into the European Union in particular. As a rule, when we are talking about the issues related to immigration, it immediately appears to be false, third-country nationals who cross the external borders of the EU Member States. At the same time, problems related to the development of legal immigration and its significant impact on the economy of European states remains out of the question.

I. MAIN COMPONENTS OF THE EU'S COMMON IMMIGRATION POLICY

First of all, it should be noted that for the European countries, the immigration problem does not mean only the problems with the illegal immigrants. Today, within the EU Member States, there is a need for legal migration, since the main importance of legal migration is to promote the economic development of European states. The inalienable components of the EU's common policy on legal immigration are: establishment of a unified approach to determining of the long-term stay status of third-country nationals in the EU; definition of measures for the reunification of families; the establishment of common conditions for the admission of third-country nationals for the purpose of studying, exchanging pupils, internship and voluntary service; definition of common approaches to labor immigration; introduction of measures to integrate immigrants into the European countries, etc. As the practice of the European Union shows, the procedure for legal access of third-country nationals to EU is limited by cases of granting work permits, training or family reunification.

In order to harmonize the national legislation and practice of the EU Member States in regard of the providing of residence status to third country nationals legally residing within the territory of one European country, Directive 2003/109/EC was adopted⁴. The document defines the conditions under which the third country nationals who have been living within the territory of the EU for a long time may use the right to freedom of movement.

In particular, according to the provisions of the Directive in order to obtain a residence permit, a third-country national shall meet the following basic requirements: a) legally and for at least 5 years, reside within the territory of a particular EU Member State; b) receive a stable income and health insurance for themselves and their family members. In addition to the specified basic requirements, the optional requirements are also provided. They include: compliance with the integration requirements established by the national legislation of the relevant EU Member State (for example, language proficiency or knowledge of the host country's history) and documentary evidence of proper accommodation conditions.

Another category of immigrants who obtain residence permits within the EU are victims of trafficking who cooperate with the competent authorities. The procedure and conditions for issuance of a residence permit of the EU for these persons are established by the EU Directive 2004/81 of 29 April 2004⁵. The document specifies the conditions for granting of residence permits for third-country nationals who work with the relevant authorities in fighting against human trafficking or illegal immigration, even if these persons have illegally entered the territory of the EU Member State.

In issues related to legal migration, in addition to granting permits to citizens who have lived for a long time in the territory of one of the EU Member States, cases of family reunification are of key importance. These issues are regulated by the EU Council Directive 2003/86 that defines the conditions for family reunification rights and creates proper conditions for the transfer to the European Union of legal immigrants family members. The document also provides the opportunity for such persons to perform their labor or other social and economic activities within EU Member States.

The term "family reunification" means entry into the territory of EU Member State and residence within this territory of third-country nationals in order to preserve family unity, independently from the fact that these ties appear before or after the entry of this person (Art. 2).

It is necessary to draw attention to the fact that the provisions of Directive 2003/86 are often criticized for violation of such fundamental rights as the right to private life. On this basis, the EU Commission has appealed to the EU Court to annul certain provisions of this Directive, in particular, in regard of stay of the applicant (on family reunification) on the territory of a third country before receiving of a permit for reunification with the sponsor, as well as establishing a two-year period for reunification (from the moment of filing of an application). At the same time, the EU Court did not support the position of the EU Commission, proclaiming that such requirements were caused by the necessity to ensure that there were favorable conditions for the family reunification, and the latter has strong ties⁶.

However, this document, as a legal instrument for introducing of a common approach to the issue of family reunification, leaves many unresolved issues at the European Union level, that causes the necessity to apply to the

⁵ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. In: *Official Journal of the European Union*. [online]. 29.04.09 [2019-09-22]. Available at: <[http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX %3A32004L0081](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004L0081)>.

⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. In: *Official Journal of the European Union* [online]. 22.09.1986 [2019-05-16]. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:en:PDF>>.

national law of the EU Member States. Moreover, the aforementioned directive sets low standards in relation to the right to family reunification in comparison with international standards, but it does not restrict the possibility of application by EU Member States of higher standards in accordance with their international legal obligations in the field of human rights protection. Thus, Directive 2003/86 establishes minimum standards for family reunification. It means that EU Member States have the right to establish higher standards in family reunification in their national legislation. Furthermore, this Directive does not prohibit to conclude the agreements of EU (alone or with EU Member States) which provide a more favorable treatment for family members for third-country nationals.

In order to ensure a common policy in the field of legal immigration at the European Union level common conditions for the admission of third-country nationals with the purpose of education, pupil exchange, internship and voluntary service have been established. These issues are governed by Directive 2004/114 of 13 December 2004⁷, that specifies the admission conditions for four categories of third-country nationals: students, pupils, trainees and volunteer workers.

The Directive defines the harmonized conditions for their entry and stay in the EU, including rules on the issuance and extension of residence. The document defines the general conditions for obtaining of a residence permit. The deadlines for residence permits for these categories of persons shall vary: for students - from one year, and for other categories of persons - no more than one year. For example, if the training covers a period of less than one year, then the residence permit for students is granted for the duration of this training. For students - no more than one year (with certain exceptions); volunteers - not more than one year (with a certain exception).

Directive 2004/114 provides the right of students to employ or conduct independent economic activity. Such persons can be hired as workers and engaged in independent economic activities in free time. However, the EU Member States are given the right to determine independently the time and conditions for such activities. The state may limit such right for the period of the first year of residence.

An important part of the common EU policy in the field of legal immigration is the development of common approaches to labor immigration.

Therefore, in order to introduce a joint accelerated procedure for admission of qualified workers the Directive 2009/50 on entry conditions was adopted⁸. It stipulates the following requirements for third country nationals: the ability of the labor contract or the invitation to work; relevant international instruments; the document that certifies the health insurance, etc. The competent authorities of the host EU Member State decide to grant the person "EU Blue Card". The period of validity of the latter is from one to four years with the possibility of renewal.

According to Directive 2009/50, the EU Blue Card holders are subject to the principle of "equal treatment" with nationals of the host EU Member State in regard of: working conditions; freedom of association; education, training and recognition of qualifications; social protection and pensions; access to goods and services, etc.

⁷ Council Directive 2004/114/EC of 13 december 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. In: *Official Journal of the European Union* [online]. 13.12.2004 [2019-05-16]. Available at: <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0114>>.

⁸ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. In: *Official Journal of the European Union* [online]. 25.05.2009 [2019-05-16]. Available at: <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0050>>.

Also the issues related to legal immigration are regulated by key documents such as: Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on the procedure for applying of a single permit for third-country nationals to reside and work in the territory of EU Member State and a common set of rights of third-country nationals who legally reside within EU Member State⁹; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals in the territory of the EU for the purpose of employment of seasonal workers (on a seasonal basis) and Directive 2014/66/EC of the European Parliament and of EU Council of 15 May 2014 on the conditions of entry and permanent residence of third-country nationals within the European Union within intra-corporate transfer¹⁰.

In regards of Directive 2011/98/EC, the document establishes a single application procedure to allow third-country nationals to reside in the territory of the EU Member States with the purpose of work. In addition, the document simplifies the procedure for admission of third-country nationals to the European Union. In particular, an application for the grant, modification or extension of a single permit must be submitted through the application of a single application procedure. This procedure should not be contrary to the visa procedure, which may be a requirement for initial entry.

The particular attention is paid to the status and common set of rights for third-country workers who legally reside within the European Union in that Directive. For instance, third-country workers are entitled to equal treatment with the nationals of the EU Member State where they reside. Third-country nationals are equated with EU citizens' rights in: working conditions; freedom of association and membership in the organization; education and vocational training; recognition of diplomas, certificates and other professional qualifications in accordance with relevant national procedures; types of social security; tax benefits; access to goods and services at the disposal of the public, including procedures for obtaining housing; counseling services provided by employment offices, etc¹¹.

Concerning the Directive 2014/36/EC of 26 February 2014, the document defines the conditions of entry and stay of third-country nationals within the EU for the purpose of employment as seasonal workers, i.e. on a seasonal basis. In particular, the Directive sets out a number of criteria and requirements for obtaining of a residence permit for a period not exceeding 90 days. They include the submission of the following documents: (a) a valid employment contract or a binding offer from the employer to a seasonal worker in a particular EU Member State, specifying the place and type of work; duration of employment; remuneration for work; working hours during the week / month; other essential working conditions; (if possible) the employee's starting date; (b) confirmation of the availability or application for sickness insurance covering all the possible risks normally covered by the insurance of Member States nationals; c) confirmation that the seasonal worker will have adequate accommodation or he will be provided with such accommodation. In doing so, the EU Member States should require seasonal workers to refrain from seeking social assistance. The EU Member State may also require the applicant to provide documentation confirming the qualifications of the third-country national and confirming his ability to perform the seasonal work specified in the contract (Art. 5)¹².

In addition to the essential requirements, seasonal workers must have a valid travel document, which must be valid for at least of the period of validity for which they are authorized to stay in the EU for seasonal employment. A residence permit in the territory of a Member State shall not be granted to a third-country national unless there is reason to believe that his or her stay constitutes a threat to public policy, national security and public health. In accordance with Directive 2014/36/EC, the EU Member States have the right to determine the number of third-country nationals who may be authorized to enter and stay for seasonal employment. On this basis, any application for such a permit may be declared inadmissible or rejected on the basis of this provision (Art. 7).

For staying not exceeding 90 days, the EU Member States shall issue to third-country nationals: 1) a short-term visa stating that it has been issued for the purpose of seasonal employment; 2) a short-term visa and work permit stating that they have been issued for the purpose of seasonal employment; 3) a work permit stating that it has been issued for the purpose of seasonal employment (in case a third-country national does not require a visa).

For staying exceeding 90 days, the EU Member States shall issue to third-country nationals: 1) a long-term visa stating that it has been issued for the purpose of seasonal employment; 2) a permit for seasonal work; 3) a long-term visa and permission for seasonal work if a long-term visa is required by the EU Member State (Art. 13). The document also defines the duration of stay of seasonal workers in the territory of the EU Member State. In particular, Member States should, at their discretion, determine the maximum period of stay for seasonal workers, which, however, may not be less than 5 months and more than 9 months over a twelve-month period. After the expiry of that period, the third-country national must leave the EU territory unless the Member State has issued a residence permit to that person in accordance with national or EU law who has not the intention for seasonal work.

Art. 21 of the document stipulates the rights of seasonal workers. These rights include: entry and stay in the territory of an EU Member State which has issued a residence permit for the purpose of seasonal work; have free access to the whole territory of the issuing Member State in accordance with national law; the right to carry out the specific work specified in the permission. In its turn, seasonal workers should be treated in the same way (non-discriminatory) as nationals of the country of residence. The following rights must be guaranteed: (a) the right to equal work conditions; b) the right to strike; c) free access to goods and services; d) access to social security institutions; e) seasonal work advisory services provided by the employer; f) preparation and vocational training; g) recognition of diplomas, certificates and other documents in accordance with national procedures; h) tax benefits; e) the right to file complaints against employers.

Employees who have been granted an intra-corporate transfer permit have the right of entry and stay in the territory of the EU Member State, free access to their entire territory, and the ability to carry out the activities provided by the permission. Such workers are also allowed to work in another EU Member State for a short period (up to 90 days for six months) at an entity within the same structure.

In 2011, the European Immigration WEB Portal was created to disseminate information on legal migration and employment opportunities in the European Union.

In our view, legal migration is currently seen in the European Union as a response to the demographic and economic challenges facing Europe, as well as to migratory pressure on the borders of European countries. Most of the instruments adopted within the encourage the potential of immigration for the development of Europe, including the integration of third-country nationals who are within the territory of the European Union Member States and the

attraction of new categories of foreign nationals. In other words, the European Union, by pursuing its policy on legal migration, encourages third-country nationals, as a rule, highly qualified workers, to their active integration into the European area. Thus, the European Union in the XXI century together with such countries as the USA and Canada, it plays one of the leading places in the legal immigration flows of third-country nationals, becoming a competitive world center.

Within the framework of the EU common immigration policy, there is a close relationship between legal and illegal immigration. For example, in July 2006, the EU Commission issued a Communication on policy priorities in the field of combating illegal immigration of third-country nationals.

II. LEGAL INSTRUMENTS OF THE EU COMMON IMMIGRATION POLICY ON COMBATTING ILLEGAL IMMIGRATION

An important component of the common policy on combating illegal immigration is the fight against trafficking. In the European continent, this issue is relevant both within the Council of Europe's activities under Council of Europe Convention against Human Trafficking, 2005, and the European Union in particular. For example, there is the Expert group on combating human trafficking within the EU, whose function is to provide guidance on the harmonization of different practices. In addition, there is a program for the exchange of information between the EU Member States on human trafficking and sexual exploitation of children.

On 5 April 2011, Directive 2011/36 of the European Parliament and of the Council of the European Union on the prevention and fight against human trafficking and the protection of victims of human trafficking was adopted. The Directive establishes minimum standards for the definition of criminal offenses and sanctions in the area of combating human trafficking, and establishes preventive measures for this group of crimes, as well as measures for the protection of victims of human trafficking. In order to combat the illegal immigration, the European Union is pursuing the policy of returning of illegal immigrants. The EU law defines two categories of return for illegal residents: voluntary (by decision of the illegal resident itself) and forced (under the influence of coercion by the competent authorities of the EU Member State).

Among the main legal instruments for implementing of the external dimension of the EU's common immigration policy are readmission agreements concluded by the European Union with third countries, as a rule, countries of transit and the origin of illegal immigrants. In doing so, the European Union considers such agreements as an effective means of combating illegal immigration.

The doctrine and practice of international law considers the readmission as the mutual obligations of States enshrined in international agreements to take back their own nationals, as well as third-country nationals and stateless persons who have illegally arrived on the territory of one of the contracting parties or upon their arrival grounds for legal staying there¹³. Readmission agreements are concluded to facilitate the transfer of persons who no longer fulfill the conditions of entry, staying or residence in relevant country. Such definition is contained in the Green paper on Community policy on the return of illegal immigrants (Hlushko, O., Gryshova, I., Shcherbata, M. 2015).

III. THE MECHANISM OF READMISSION AGREEMENTS REGULATION

The mechanism of legal regulation of readmission issues is bilateral and multilateral agreements. In view of the conclusion of international readmission agreements, we consider it appropriate to determine the competence of the European Union and its Member States in this area. According to Art. 2 and Art. 79 TFEU the European Union has

common competence with its Member States to conclude readmission agreements. In practice, it means that EU Member States have the right to conclude readmission agreements with third countries that have not concluded them with the European Union. (Gryshova, I.; Kyzym, M.; Khaustova, V.; Korneev, V.; Kramarev, H., 2020)

In the case of different interpretations or overlapping of legal provisions in both agreements, the readmission agreement with the European Union has priority over the readmission agreement with the EU Member State. Once the EU has concluded a readmission agreement with a specific third country, the EU Member States are required to adopt the enforcement protocols with this country.

In other words, it means that EU Member States will not fulfill their readmission competence until the European Union negotiates or concludes a readmission agreement on behalf of the EU with the relevant third country. However, it does not mean that EU Member States do not have the capacity to exercise their readmission competence. In order to do it, the EU Member States should regularly inform the Commission, the Council and the European Parliament of their planned readmission agreements with third countries, as well as of their existing bilateral readmission agreements.

Taking into consideration the lack of definitions of bilateral and multilateral readmission agreements in national science, we consider it necessary to provide their own definition.

Bilateral readmission agreements are international agreements concluded by both parties on a bilateral basis in the area of combating illegal immigration. In our view, it is necessary to define the types of bilateral readmission agreements: bilateral agreements concluded between the EU and third countries, and bilateral agreements concluded between EU Member States and third countries.

A striking example of the latter is 13 readmission agreements concluded by Germany with third countries. In particular, dated 2018, there are agreements with such countries as: Albania (entry into force 1.08.2003), Algeria (entry into force 12.05.2006), Armenia (entry into force 20.04.2008), Bosnia and Herzegovina (entry into force 14.01.1997), Georgia (entry into force 1.01.2008), Kazakhstan (the agreement has not yet entered into force), Kosovo (entry into force 1.09.2010), Morocco (entry into force 1.06.1998), Macedonia (entry into force 1.05.2004), Serbia (entry into force 1.04.2003), Southern Korea (entry into force 22.03.2005), Syria (entry into force 3.01.2009) and Vietnam (entry into force 21.09.1995).

Such examples also involve the readmission agreement between Spain and Romania, 1996 and the readmission agreement between Ukraine and Georgia 2003, etc.

Multilateral readmission agreements are international agreements concluded between the European Union, its Member States, on the one hand, and any third country, on the other, in the field of combating illegal immigration. If agreements require ratification by all EU Member States, these agreements should also be considered multilateral. An example of multilateral readmission agreements is the readmission agreement between Poland and Schengen States of 29 March 1991. Both types of international readmission agreements contribute to the effective fight against illegal immigration and are the necessary precondition for further visa facilitation.

Although readmission agreements are seen as effective tools for preventing and preventing illegal immigration, there are numerous difficulties in implementing such documents.

The problems are primarily in the lack of consular missions of some European countries abroad, that, in its turn, complicates the process of obtaining of citizenship, as well as the lack of well-established exchange of information and communication between countries, for example, between Armenia and Hungary, Slovakia, Liechtenstein. The practical way out of this situation is to create a network of immigration liaison officers or attaches to the foreign offices of European countries, as well as to use online tools for communication between EU Member States.

CONCLUSION

The common immigration policy is covered by the common competence of the European Union and its Member States, which, by adopting a number of legal acts and taking the appropriate measures, harmonize this field. The examples of harmonization are EU programs, action plans, declarations, communiqués, conclusions and other documents adopted by EU institutions, which are legal instruments for implementing of the common EU immigration policy and are the integral part of the EU *acquis*. (Gryshova, I.; Kofman, B.; Petrenko, O. 2019).

The main directions of the European Union's common immigration policy are the promotion and economic development of legal immigration to EU Member States and the fight against the influx of illegal migrants from third countries, which threaten national security, public policy and public order. Legal acts within the framework of legal immigration regulate issues related to the definition and granting of long-term residence status for third-country nationals within Europe; establishment of appropriate living conditions for such persons; setting measures and minimum standards for family reunification; adoption of uniform conditions for admission of third-country nationals to study, internships; introduction of an accelerated procedure for admission of skilled workers to the European labor market, etc. In other words, in pursuing its policy on legal immigration, the EU encourages third-country nationals to their active engagement and integration them into the European area.

Among the effective means of combating illegal immigrants are the adoption of readmission agreements with third countries by both the EU and its Member States. The main objective of readmission agreements is to facilitate the return of persons who do not have legal grounds to stay in the territory of the EU Member State to their country of origin or transit, as well as to resolve problems related to the return procedure, formalize an effective return process and prevent problems in this area.

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