Chapter 3

The Formulation of the EU's Approach to Circular Migration

This chapter presents the process of the formulation of the circular migration approach at the European level. It examines the genesis of the circular migration concept in the EU's migration policy by discussing the main policy developments and legal acts adopted since the Tampere programme as well as by analysing the interviews concluded with EU and international actors that have had a bearing on the topic. In doing so it outlines the formulation of a two-fold approach towards the facilitation of circular migration at the EU level, incorporating legal migration directives and policy initiatives developed under the auspices of the Global Approach to Migration and Development (GAMM).

3.1 The Genesis of the Circular Migration Concept in EU's Migration Policy

The development of the EU's approach to circular migration can be traced back to the entry into force of the Treaty of Amsterdam, when the EU was endowed with competences in the field of migration under Title IV 'Visas, asylum, immigration and other policies related to free movement of persons'.¹ The newly-inserted Title IV gave the EU the competence to adopt measures in the ambit of internal and external border controls; short-term visas; asylum; and immigration policy, covering conditions of entry and residence, family reunion, measures concerning the rights and conditions under which legally-residing third-country nationals may reside in other Member States, as well as competence in the field of irregular migration and repatriation.²

¹Vankova (2018), p. 188.

²Articles 61–63 TEC. For more details, see Hailbronner (2000), pp. 35–122.

This provided a legal basis for the EU to start adopting secondary legislation in all of these respective policy fields and work towards the development of an Area of Justice, Freedom and Security within the EU, as well as securing a more robust role for the European Commission, not only in proposing policy and legislation but also in negotiating agreements with third countries.³ The first multi-annual programme for the development of the EU's Justice and Home Affairs policies was adopted by the European Council in Tampere on 15–16 October 1999. Covering a 5-year period, the Tampere programme set out the political guidelines for the establishment, *inter alia*, of a common EU migration and asylum policy.⁴

Making use of the competences granted to it by the Treaty of Amsterdam to legislate on the immigration of third-country nationals, four instruments pertaining to the admission of third-country nationals were gradually proposed by the European Commission between 1999 and 2002: on the right to family reunification; the status and rights of long-term residents; on admission for paid employment and self-employed activities; and, finally on the admission conditions for the purposes of studies, vocational training, or voluntary service.⁵ In 2004, in order to complement the proposal for the Students' Directive, the Commission also presented a proposal on the admission and mobility of researchers. Despite the 'ambitious' agenda on legal migration that followed from the European Council in Tampere, however, it took three-and-a-half years of difficult negotiations before the Family Reunification and the EU Long-term Residence Directives were finally adopted, followed by the adoption of the Students' and Researchers' Directives, respectively.⁶

Yet, due to the limitations of the institutional settings under Title IV of the Treaty of Amsterdam and the strong resistance exhibited by the Member States, the negotiations behind the proposal that focused on the admission for paid employment and self-employed activities were put on hold, and it was subsequently withdrawn.⁷ This proposal, however, should be briefly reviewed because it illustrates the EU's first attempt to legislate on the possibility for circular migration through 'secure legal status for temporary workers who intend to return to their countries of origin, while at the same time providing a pathway leading eventually to a permanent status for those who wish to stay and who meet certain criteria'.⁸ Furthermore, it contained provisions in the policy areas that needed to be addressed with regard to circular migration.

³Lavenex and Stucky (2011), p. 118.

⁴The rest of the policy domains are a genuine European area of justice; a union-wide fight against crime and stronger external action. In European Council (1999). These issues will not be discussed as they fall outside the focus of this study. For more details on the implementation of the Tampere Presidency Conclusions, see Wiesbrock (2010), pp. 717–31; De Somer et al. (2019) and Carrera et al. (2020).

⁵Papagianni (2006), pp. 157–158.

⁶*Ibid.*, p. 159.

⁷European Commission (2005a).

⁸Interview # 30 with European Commission official, Belgium, November 2017, Annex I. European Commission (2000), p. 17. Also included in the Explanatory Memorandum in European Commission (2001).

3.1.1 The 2001 Proposal for a Council Directive on Admission for Paid Employment and Self-Employed Economic Activities⁹

As Papagianni notes, the proposal was based on two main categories of principles: the establishment of a transparent, flexible, and clear mechanism to recruit workers both quickly and successfully, and respect for the domestic labour market needs of the Member States.¹⁰ Article 11 of the Commission proposal listed the rights conferred on economic migrants including, *inter alia*, the right to entry and re-entry after a temporary absence from the territory of the Member State that issued the permit.¹¹ The Commission stressed in its Explanatory Memorandum that 'this proposed Directive shall ensure that migrants are not cut off from their country of origin and that they have possibilities of going back as the situation develops in the country of origin'.¹²

Article 11 (3) of the proposal also legislated for the right to request and obtain the payment of the contributions made by economic migrants and their employers into public pension schemes during the period of validity of their permits under certain conditions. According to the Explanatory Memorandum, return migration would have been discouraged '(...) if third-country nationals were too "lose" the payments they made into public pension schemes in a Member State upon return to a third country'. Therefore, this provision served as 'supplementary protection addressing those cases in which the concerned third-country national has neither acquired a right to an EU pension to be paid now or in the future in a third country, nor a possibility to transfer his/her EU pension rights into a scheme of the third country where he/she resides'.¹³

What also needs to be mentioned is that the proposal envisaged that economic migrants should enjoy 'the same treatment in substance as citizens of the Union' at least with regards to certain basic rights, such as working conditions, access to vocational training, recognition of qualifications, and social security including health-care.¹⁴ According to the Explanatory Memorandum, this was aligned with the catalogue of rights that were present in the Commission's proposal for an EU Long-term Residence Directive, but was also designed in line with the principle that the rights of third-country nationals should be incremental with their length of stay. In addition, Article 10 (3) stipulated that unemployment per se was not to constitute a sufficient reason for revoking the permit, unless the period of unemployment exceeded a specified period of time. Nevertheless, economic migrants were

⁹European Commission (2001).

¹⁰Papagianni (2006), p. 170.

¹¹Article 11 (1) (a) and (b) of the Proposal. In European Commission (2001).

¹²Article 11 (3) of the Explanatory Memorandum. In European Commission (2001).

¹³Article 11 (3) of the Explanatory Memorandum. In European Commission (2001).

¹⁴Article 11 (1) of the Explanatory Memorandum. In European Commission (2001).

restricted to the exercise of specific professional activities or fields of activities for an initial period of 3 years.¹⁵

The Commission's proposal provided for specific rules in relation to certain categories of migrants such as seasonal workers, intra-corporate transferees, and trainees. This proposal's failure gradually led to the establishment of a sectoral approach to labour migration addressing different categories of migrants at the EU level and, eventually, to the adoption of the Single Permit Directive. These instruments are discussed later in this chapter.

3.1.2 The Notion of Partnerships with Countries of Origin

The development of the EU circular migration approach is also intertwined with the notion of partnerships with countries of origin.¹⁶ The European Council in Tampere identified partnerships with countries of origin as being one of the essential elements of a future comprehensive approach to migration, with the potential to address political, human rights, and development issues in third countries.¹⁷ Additionally, more efficient management of migration flows was highlighted as another integral part of the future common EU migration and asylum policy.¹⁸ The Council underlined that there should be efforts to conclude readmission agreements with third countries, as well as to promote voluntary return, both considered key elements in this development. Legal migration was one of the aspects acknowledged by the European Council, stressing the need for approximation of national laws on the conditions for the admission and residence of third-country nationals.¹⁹ Partnerships with countries of origin and readmission agreements were identified once again as being among the essential policy measures in the Council's report on 'European Union priorities and policy objectives for external relations in the field of justice and home affairs'.²⁰

The Communication of the Commission on a Community Immigration Policy that was issued 1 year later presented the idea of creating legal migration channels to the EU for third-country nationals.²¹ As Lavenex noted, however, 'the comprehensive partnership approach reached its rhetorical peak at Tampere'; in subsequent years, this gave way to the notion of partnership with a one-sided focus on migration control and readmission.²²

¹⁵ Article 8 of the Proposal. In European Commission (2001).

¹⁶ Carrera and Hernández i Sagrera (2009), p. 4.

¹⁷ European Council (1999), paras. 10–12.

¹⁸ Ibid, paras. 22–27.

¹⁹ European Council (1999), para. 20.

²⁰ Council of the European Union (2000); see also previous draft, document number 7512/00 LIMITE JAI 33 of 24 May 2000.

²¹ European Commission (2000), p. 17.

²² Lavenex and Stucky (2011), p. 119.

The Laeken Presidency Conclusions from December 2001 reconfirmed the need for integrating migration policy into the European Union's foreign policy, particularly through the conclusion of readmission agreements with third countries.²³ The conclusions from the Seville European Council took this one step further by placing a special emphasis on the link between the EU's relations with third countries and combating 'illegal migration'.²⁴ The European Council underlined that '(...) any future cooperation, association or equivalent agreement which the European Union or the European Community concluded with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration'.²⁵ As Carrera and Hernández I Sagrera stress, the Spanish presidency marked the beginning of a 'securitarian approach to human mobility' in the development of the external dimension of the EU's immigration policy.²⁶ However, that trend had actually commenced in 1985 following the initiation of the Schengen cooperation, when the set of rules adopted aimed primarily at preventing the entry of undesired migrants.²⁷ The prevalence of measures targeting visas, irregular migrants, border control, and expulsion continued after 1999.

In December 2002, the European Commission published a Communication titled 'Integrating Migration Issues in the European Union's Relation with Third Countries'.²⁸ This was the Commission's answer to the request from the Heads of States and Governments to apply a targeted approach and integrate immigration policy into the Union's relations with third countries by using all of the appropriate EU external relations instruments. One of the purposes of the Communication was to 'put the migration issue back in its broader context' within the political dialogue part of the Association and Co-operation Agreements negotiated and signed between the EU and third countries.²⁹ The Commission exhibited a shift in its approach by stressing that the focus of the dialogues with third countries would be broadened to address not only readmission and irregular migration, but also the legal migration channels. More specifically, the agreements would also include: measures targeting the root causes of migration; legal migration management, including ways of regulating the demand and supply of low skilled labour through temporary working permits; the integration of legal migrants; and, the facilitation of 'brain circulation' for legally residing migrants in the EU who wished to contribute to the development of their countries of origin.³⁰

In line with the securitarian approach promulgated by the Seville European Council, the Commission proposed in its Communication that Article 13 of the

²³ European Council (2001), para. 40.

²⁴ European Council (2002), p. 8–9, para. 33–36.

²⁵ European Council (2002), p. 8, para. 33.

²⁶ Carrera and Hernández i Sagrera (2009), p. 5.

²⁷ Gronendijk (2012), p. 12.

²⁸ European Commission (2002), p. 4.

²⁹ Ibid., p. 23.

³⁰ Ibid., p. 23.

Cotonou Agreement between the EU and African, Caribbean and Pacific Group of States (ACP States) should serve as a flexible model for migration clauses that are to be negotiated in future agreements with other third countries.³¹ Article 13 of the Cotonou Agreement contains provisions pertaining to cooperation on migration issues, including, *inter alia*, ensuring respect for human rights and the elimination of all forms of discrimination, fair treatment, and integration of legally residing third-country nationals.³²

However, Article 13 also provides for combatting and prevention of irregular migration, as well as a standard readmission clause containing a commitment for each of the ACP States to 'accept the return and readmission of any of its nationals who are illegally present in the territory of a Member State of the European Union, at that Member State's request and without further formalities'.³³ In addition, Article 13 includes a commitment to negotiating readmission agreements, if this is requested by one of the parties. All of this showed that even though the Commission advocated for 'a broader context', its rationale actually remained security-driven. This was also evident from the way that the European Commission justified the shift in its approach, which is reproduced as follows:

'Experience so far has taught that the time needed to negotiate a readmission agreement, which is seen as being in the sole interest of the Community, should not be underestimated and no quick results should be expected. They can only succeed if they are part of a broader co-operation agenda, which takes duly into account the problems encountered by partner countries to effectively address migration issues. This is the reason why the Commission considers that the issue of "leverage" – i.e. providing incentives to obtain the co-operation of third countries in the negotiation and conclusion of readmission agreements with the European Community – should be envisaged on a country by country basis, in the context of the global policy, cooperation and programming dialogues with the third countries concerned'.³⁴

Part 11 'Readmission agreements' of the Communication 'Integrating Migration Issues in the European Union's Relation with Third Countries' revealed that all measures, except those in the fields of readmission and irregular migration, were outside 'the sole interest of the Community' and were used as 'leverage' in order to ensure cooperation with third countries.³⁵ The ultimate goal of the partnership with third countries was to negotiate and sign readmission agreements. Therefore, the Commission also envisaged the possibility to ensure accompanying support in the form of technical and financial assistance for the better management of migration

³¹ Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L 317.

³² For more details, see Koeb and Hohmeister (2010).

³³ *Ibid.*, p. 25.

³⁴ *Ibid.*, p. 25.

³⁵ In European Commission (2002).

flows³⁶ as well as compensatory measures for cooperating countries such as a more generous visa policy or increased quotas for migrant workers.³⁷

Even though the Communication did not explicitly mention the term circular migration, it addressed the brain drain phenomenon and the need to facilitate brain circulation within the EU in Part 4.2, titled 'Brain circulation'. The Commission stressed the 'win-win scenarios' for all parties – the migrant as well as the sending and the receiving states – that were possible when migrants maintained links with their country of origin and returned voluntarily on either a permanent or temporary basis.³⁸

On the basis of the Communication 'Integrating Migration Issues in the European Union's Relation with Third Countries', the Council adopted conclusions on migration and development, acknowledging the 'development of a real partnership with third countries' in the 'broader context' set by the Commission in May 2003 as a key element of a future successful migration policy.³⁹ The Council formulated five key principles for action on migration and development, covering, *inter alia*, the Union's objectives to tackle the root causes of irregular migration, to combat the smuggling and trafficking of human beings, to improve the control and management of migration flows, and to address the root causes of migration as part of a comprehensive approach for dialogue and action with third countries.⁴⁰ The Commission was invited to advance the migration agenda within the context of current and future Association, Cooperation, or equivalent Agreements, as well as to continue to invest in efforts for the conclusion of readmission agreements for compulsory readmission in the event of irregular migration.⁴¹ The European Commission was also requested to formulate ways to regulate 'demand and supply and organising access of labour, e.g. through temporary residence-work permits' and to facilitate the brain circulation of highly-skilled migrants.⁴²

Five years after the adoption of the Tampere programme in 1999, the European Council approved a second multi-annual programme on the Union's policy priorities in the Area of Justice and Home Affairs for the 2005–2009 period. The Hague Programme once again emphasised the importance of partnership with third countries.⁴³ In light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004, and the strengthened securitarian approach, the

³⁶After Tampere, the European Commission started to provide support to third countries through programmes specifically dedicated to border management, the fight against irregular migration, and migration management. These include, for example, MEDA for the Mediterranean region, CARDS for the Western Balkans, TACIS in Eastern Europe and Central Asia, etc. In European Commission (2002), p. 18.

³⁷In European Commission (2002), p. 18.

³⁸*Ibid.*, p. 16.

³⁹Council of the European Union (2003), p. 4.

⁴⁰*Ibid.*, p. 5.

⁴¹*Ibid.*, p. 9.

⁴²*Ibid.*, p. 8.

⁴³European Council (2005a), p. 11.

European Council demanded the establishment of a removal and repatriation policy that was based on common standards.⁴⁴

To sum up, the circular migration concept emerged in the EU's policy agenda as a 'brain circulation' tool that was gaining prominence as part of the migration-development nexus discourse.⁴⁵ Initially adopted as one of the instruments of the external dimension of the EU's migration policy, it was soon coupled with the tools that were needed for the fight against irregular migration, border control, and readmission and it gradually became an integral part of the EU's securitarian approach towards migration. Eventually, these two parallel policy tracks merged, thereby forming security 'channels' for migration.

3.2 Introduction of the Circular Migration Approach in the EU's Migration Policy

The European Commission introduced the term circular migration into European policymaking circles through its Communication on Migration and Development in 2005.⁴⁶ One Commission official, who was involved in this process, shared that a number of academics and business sector representatives proposed to the Commission that they should utilise this concept.⁴⁷ The main motivation behind engaging with it was the fact that the labour market was changing – there were more temporary jobs requiring very specific skills and different means of production – and thus the argument was that the traditional understanding of migration leading to settlement as a main goal was not capable of capturing these new realities.⁴⁸ Additional reasons for introducing this concept were to counteract the 'brain drain' from third countries' health sectors and also because circular migration was seen as means of allowing 'skills to move back and forth'.⁴⁹ Another official with the institutional memory of the introduction of this concept shared with the author that the Commission honed in on the 'famous triple-win idea' and used it to make a case for legal migration in general and to '(...) make it easier for the Member States to step in (...)'.⁵⁰ In addition, the idea was also to use circular migration under the General Agreement on Trade in Services (GATS).⁵¹ Yet, the Directorate-General for Economic and Financial Affairs was not open to accepting this new concept.

⁴⁴ Ibid., p. 13.

⁴⁵ See for instance Global Commission on International Migration (2005), p. 17, p. 31.

⁴⁶ European Commission (2005b).

⁴⁷ Interview #29 with European Commission official, Belgium, May 2017, Annex I.

⁴⁸ Interview #29 with European Commission official, Belgium, May 2017, Annex I.

⁴⁹ Interview #29 with European Commission official, Belgium, May 2017, Annex I.

⁵⁰ Interview #9 with European Commission official, Belgium, March 2013, Annex I.

⁵¹ Interview #29 with European Commission official, Belgium, May 2017, Annex I.

Therefore, it had to make its way by being included in the different Communications that were related to development and migration.⁵²

The Commission defined it as '(...) migration, in which migrants tend to go back and forth between the source country and the destination country (...)'.⁵³ The term was used as an umbrella for return and temporary migration, which according to the European Commission had the potential to maximise the benefits of migration on the development of the countries of origin, mitigating the impact of brain drain and fostering brain circulation. The Commission's working definition was rather broad, covering seasonal and temporary migrants as well as highly-skilled migrants (e.g., researchers) residing both in the country of origin and in the host country (e.g. diaspora members). One interviewee who witnessed the introduction of this concept said: '(...) the interpretation of the Spanish was: we talk about seasonal workers, for whom there are instruments and which is nothing new, which could be better organized and Europeanized (...). The Swedish interpretation sometimes went so far by saying: if the kids of migrants go back, we should also see that as circular migration. We talked from something ultra-short, people going back after 3 months, to something that is interpreted extremely wide: everyone with migrant roots keeping a relationship with their country of origin going back'.⁵⁴

In its Communication, the European Commission also underlined the obstacles and prerequisites that had to be in place in order to realise the potential of this type of migration for the purposes of development. In order to encourage migrants to engage in circular migration and travel back and forth between their country of origin and their country of destination, the Commission emphasised the need to grant returnees a multi-entry visa allowing them to go back to their former country of residence, as well as maintaining the validity of the returning migrants' residence permits once back in their countries of origin.⁵⁵

Furthermore, according to the Communication, Member States could encourage circular migration '(...) by giving a priority for further temporary employment to workers who have already worked under such schemes and have returned at the end of their contract'.⁵⁶ It could also be facilitated by 'rewarding' participating migrants by reimbursing their pension contributions at the end of their contracts. In addition to financial incentives, public authorities in the Member States could: offer secondment opportunities to institutions in developing countries for migrants or diaspora members who wish to engage in such activities; remove the legal obstacles to unpaid sabbatical leave; and, encourage businesses to enable their foreign employees to take unpaid leave for engaging in such activities.

Other possible EU measures for facilitating circular migration envisaged in the Communication was the establishment of a general framework for the entry and

⁵² Interview #29 with European Commission official, Belgium, May 2017, Annex I.

⁵³ European Commission, (2005b), Annex 5, p. 25.

⁵⁴ Interview #22 with representative of international organisation, Austria, March 2017, Annex I.

⁵⁵ European Commission (2005b). Annex 5, p. 27.

⁵⁶ Ibid., p. 26.

short-term stay of seasonal migrants⁵⁷ as well as facilitating conditions for issuing uniform short-stay visas for researchers from third countries travelling within the EU for the purposes of conducting their scientific research.⁵⁸ The European Commission also presented the possibility of proposing measures regarding the transferability of pension rights and social security schemes benefits, the recognition of qualifications and mechanisms to facilitate voluntary returns, and the successful reintegration of researchers or other professionals who have worked in the EU.

One interviewee stressed that these were references to the rights under EU law from which circular migrants should benefit.⁵⁹ It was also clear that this required the establishment of certain 'regimes'. Yet, the Commission wanted to first see whether Member States were willing to engage with these types of policies and then subsequently focus on the rights dimension.⁶⁰ One interviewed representative of an international organisation underlined that many of the rights-related questions were not resolved at the European level mainly because of the lack of a completely harmonised interpretation.⁶¹

A broad interest in circular migration and its benefits was taken one step further in the Policy Plan on Legal Migration⁶² that was presented in 2005 by the European Commission, which proposed specific policy instruments.⁶³ The Policy plan was elaborated on the basis of the Green Paper on the EU's approach to managing economic migration⁶⁴ and the analysis of the contributions received. Its purpose was to serve as a roadmap for the remaining period of the Hague Programme (2006–2009), listing the actions and legislative initiatives that would lead to the coherent development of an EU legal migration policy.⁶⁵ The Commission envisaged a general framework directive that would regulate the rights of all third-country nationals in legal employment who were already present in a Member State but who had not yet obtained a EU long-term residence status, as well as the following four specific instruments:

1. a Proposal for a directive on the conditions of entry and residence of highly-skilled workers;
2. a Proposal for a directive on the conditions of entry and residence of seasonal workers;

⁵⁷ Refer to European Commission (2005c).

⁵⁸ The Commission already proposed in March 2004 a Recommendation concerning the facilitation of issuing conditions for uniform short stay visas for researchers from third countries travelling within the EU for the purpose of carrying out scientific research.

⁵⁹ Interview #29 with European Commission official, Belgium, May 2017, Annex I.

⁶⁰ Interview #29 with European Commission official, Belgium, May 2017, Annex I.

⁶¹ Interview #22 with representative of international organisation, Austria, March 2017, Annex I.

⁶² European Commission (2005d).

⁶³ Vertovec (2007), p. 4.

⁶⁴ European Commission (2005c).

⁶⁵ European Commission (2005d), p. 3.

3. a Proposal for a directive on the procedures regulating the entry into, the temporary stay and residence of Intra-Corporate Transferees (ICT); and
4. a Proposal for a directive on the conditions of entry and residence of remunerated trainees.

The proposed instruments did not make any explicit reference to circular migration. However, in a separate section called ‘Cooperation with countries of origin’, the Commission proposed feasibility studies for separate measures to support circular and return migration, and stressed that arrangements on managed temporary and circular migration would be included in some of the specific instruments.⁶⁶ Among the envisaged measures that aimed to facilitate circular migration were the provisions for long-term multi-entry visas for returning migrants; a possibility for former migrants to be given priority for obtaining new residence permits for further temporary employment under a simplified procedure; and the creation of an EU database of third-country nationals who left the EU upon the expiration of their temporary residence or work permit.

Moreover, the Communication referred to the EU Long-term Residence Directive as a good example that offered ‘interesting possibilities’ regarding circular and return migration. According to the Commission, the Directive offered a possibility for Member States to allow returning migrants to retain this status for longer than the 1-year period that was provided for under Article 9 thereof. Therefore the Roadmap for the proposed measures in the Policy Plan envisaged an analysis of the transposition and implementation of Article 9 of the Directive, which was due to be implemented in 2007.⁶⁷ Among the other Roadmap activities, there were also feasibility studies carried out in relation to long-term multi-entry visas and on the effective implementation of circular migration; financial support under EU instruments for pilot projects for the creation of training structures in the countries of origin; and presentation of proposals tangibly supporting circular and return migration based on preceding studies and feasibility analyses.

3.3 Circular Migration as Part of the Global Approach to Migration and Mobility (GAMM)

The deaths of hundreds of African migrants trying to enter the Spanish enclaves of Ceuta and Melilla in North Africa in 2005 triggered a new impetus for a policy response at the EU level in relation to cooperation with third countries.⁶⁸ At an informal meeting in Hampton Court in October 2005, the EU Heads of State and Government agreed on a comprehensive approach to tackle migration.⁶⁹ The Council

⁶⁶ European Commission (2005d), p. 11.

⁶⁷ Ibid., p. 13.

⁶⁸ Eisele (2014), p. 90.

⁶⁹ Ibid.

further stressed the importance of creating partnerships with third countries and the benefits of a 'comprehensive and balanced approach'.⁷⁰ It concluded that such an approach would 'enhance the benefits of migration for both third countries and the EU, as well as migrants themselves, whilst ensuring co-ordinated action against illegal migration, trafficking in human beings and people smuggling'.⁷¹ The existing agreements with third countries – the Cotonou Agreement, the Stabilisation and Association Agreements, the Neighbourhood Action Plans, and the Euro-Mediterranean Association Agreements, as well as the dialogue within the Barcelona Process – were identified as the basis of this future comprehensive approach.⁷²

In a follow-up Communication, the Commission also recognised the need for a coherent overall approach to migration issues. It committed itself to focusing on all aspects of migration and intensifying financial assistance within its existing institutional framework, covering the areas of Development, External Relations, European Neighbourhood Policy, Freedom, Security and Justice, and Employment.⁷³ Acknowledging that migration was a global phenomenon, it proposed priority actions aimed at increasing operational coordination between Member States and strengthening the dialogue with neighbouring countries and countries of origin, with a specific focus on the Mediterranean region and African countries.

The European Council officially adopted this approach, which started being referred to as the 'Global Approach to Migration' (GAM) in December 2005.⁷⁴ According to the Council Conclusions, the new approach consisted of policy measures that were designed to combat irregular immigration, ensure safe return, strengthen durable solutions for refugees, and build the capacity for better managed migration, including 'through maximising the benefits to all partners of legal migration'.⁷⁵ However, beyond that statement, it did not envisage any concrete labour migration measures and thus there was no mention of circular migration.⁷⁶

Circular migration based on EU partnerships with third countries became an attractive policy tool within the Franco-German initiative for a 'New European Migration Policy' initiated in 2006.⁷⁷ This approach was identified by Nicolas Sarkozy and Wolfgang Schäuble as a strategy that would reduce and control irregular migration on the basis of quotas for temporary labour migration into certain occupations and that would be accompanied by measures for readmission in cases where migrants do not want to return voluntarily.⁷⁸ Therefore, the Commission was

⁷⁰ Council of the European Union (2005), pp. 4–7.

⁷¹ Ibid.

⁷² Ibid.

⁷³ European Commission (2005e), p.2.

⁷⁴ European Council (2005b).

⁷⁵ European Council (2005b), para. 3.

⁷⁶ Carrera and Hernández i Sagrera (2009), p. 11.

⁷⁷ Angenendt (2007), p. 1.

⁷⁸ "German-French Initiative for a New European Migration Policy", a strategy paper presented by Nicolas Sarkozy and Wolfgang Schäuble to a meeting of interior ministers from France, Germany, Great Britain, Italy, Spain and Poland in Stratford-upon-Avon, England, 26 October 2006, p. 4.

invited to continue to negotiate readmission agreements, with a view to securing quotas and permits for temporary workers. Moreover, in order to address the need for enhanced cooperation with third countries, the European Commission also had to present to the Council a plan for developing partnerships between the Member States and main countries of origin based on a 'European treaty'.

By the end of 2006, the European Commission reported on the first year of the implementation of the Global Approach, which at this stage only focused on Africa and the Mediterranean region.⁷⁹ The Commission proposed the inclusion of two new policy areas in the GAM that were not covered in 2005 – legal migration and integration measures – in order to make 'the European Union's approach truly comprehensive'.⁸⁰ It acknowledged that legal migration had to form part of both external and internal EU policies, and it consequently proposed two concrete policy measures: the creation of migration centres and mobility packages.⁸¹

The aim of the migration centres was to provide information on employment opportunities within the EU and facilitate development of different skills that would increase the chances of third-country nationals finding legal employment in Europe. The Commission proposed to establish these centres with EU funding in partnering third countries and claimed that they could also contribute to facilitating the management of seasonal workers as well as the exchange of students and researchers.⁸²

The Communication linked circular migration to the newly-introduced Mobility Packages. In order to facilitate circular migration as a migration management tool, the Commission envisaged the adoption of measures relating to administrative capacity-building in third countries.⁸³ The boosted administrative capacity would enable third countries to meet 'certain conditions' with regards to cooperation on irregular migration and establish effective mechanisms for readmission that would allow them to start negotiations for Mobility Packages with the EU. The aim of the Mobility Packages was to serve as a framework for managing legal migration that was based on the 'possibilities offered by the Member States and the European Community, while fully respecting the division of competences as provided by the Treaty'.⁸⁴ The Commission also stressed that in the context of this framework, the conclusion of readmission agreements, strengthening cooperation on irregular immigration, and border management could be prerequisites for visa facilitation with the partnering third countries.

In December 2006, following the proposals of the Commission, the European Council⁸⁵ identified circular migration as one of the guiding principles in the

⁷⁹The geographical focus of this study is on the CEE and Eastern Partnership countries, thus the GAM's provision on cooperation with African countries of origin is not presented here.

⁸⁰European Commission (2006), p. 2.

⁸¹European Commission (2006), p.7.

⁸²Ibid.

⁸³Ibid.

⁸⁴Ibid.

⁸⁵European Council (2006), point 24, lett. a, p. 9.

development of the EU's policy on legal migration.⁸⁶ The Commission was invited to present proposals by June 2007 on legal migration focused on the development of a balanced partnership with third countries and on the ways and means of facilitating circular and temporary migration.⁸⁷ The European Council also decided to extend the GAM's geographical focus to cover the neighbouring Eastern and South-Eastern regions.

3.4 Towards an EU Two-Fold Approach to Facilitation of Circular Migration

In response to the invitation of the European Council, the Commission published a Communication in May 2007 that focused entirely on circular migration and Mobility Partnerships between the European Union and third countries.⁸⁸ The Commission used the working definition of circular migration that it adopted earlier in its Communication on Migration and Development in 2005. The Communication further elaborated upon the working definition by outlining two main forms of circular migration that were relevant in the EU context: temporary engagement of third-country nationals settled in the EU with business, professional, or voluntary activities in their countries of origin; and temporary opportunities for entry and re-entry for persons residing in a third country for the purposes of work and study or training in the EU.

The Commission envisaged two approaches for facilitating circular migration: based on a legislative framework promoting circular migration and through development of circular migration schemes enabling migrants to temporarily perform certain activities in the EU. In the Commission's view both approaches had to be accompanied by the necessary conditions and safeguards to ensure that this kind of migration would remain circular.⁸⁹ As Wiesbrock and Schneider underline,⁹⁰ the Communication emphasised the temporary character of circular migration that the EU wished to facilitate: 'if not properly designed and managed, migration intended to be circular can easily become permanent and, thus, defeat its objective'.⁹¹ The legislative harmonisation of the already-existing instruments and the introduction of special measures in future legislative acts, announced in the Policy Plan on Legal Migration, were identified as ways to put in place a framework conducive to circular migration.

⁸⁶ Schneider and Wiesbrock (2009) p. 4.

⁸⁷ European Council (2006), point 24, lett. a, p.9.

⁸⁸ European Commission (2007).

⁸⁹ European Commission (2007), p.8.

⁹⁰ Schneider and Wiesbrock (2009), p. 5.

⁹¹ European Commission (2007), p.8.

The directives that the Commission considered adjusting for the sake of fostering circularity included the EU Long-term Residence Directive,⁹² the Students' Directive,⁹³ and the Researchers' Directive.⁹⁴ The Policy Plan on Legal Migration already identified the EU Long-term Residence Directive as an instrument that offered 'interesting possibilities' in relation to circular migration, and it was envisaged to carry out an analysis of the transposition and implementation of Article 9 thereof. The Communication reconfirmed the Commission's idea to extend the permitted period of absence from the territory of the EU from 12 consecutive months to 2 or 3 years, after which the EU long-term status could be withdrawn. A similar measure was also envisaged in relation to the Students' and Researchers' Directives – the introduction of a multi-entry residence permit, allowing the holder to be absent from EU territory for long periods without losing his or her residence rights – already provided for in the Communication on Migration and Development in 2005.⁹⁵ Some of the special measures foreseen as beneficial to circular migration included fast-track admission procedures for highly-skilled migrants already legally resident in the EU, multi-annual residence/work permits for seasonal workers – a matter already proposed in the 2005 Communication – and facilitated re-entry for former trainees, allowing them to develop their skills.

Ensuring effective return was among the conditions and safeguards that the Commission foresaw as essential in order to make circular migration work. Therefore, Member States were encouraged to make return for migrants an attractive option through the enactment of measures that reward 'bona-fide migrants' as well as measures supporting the reintegration of returning migrants.⁹⁶ In cases of an irregular stay after the expiration of a migrant's permit, readmission measures were envisaged that would be facilitated through readmission agreements between the countries of origin and the EU or the Member States. The development of a set of criteria for monitoring future circular migration schemes was also part of the conditions and safeguards put forward by the Commission, along with an assessment of the contribution of the relevant legal instruments that were designed to facilitate circular migration.⁹⁷

The Commission's proposals were welcomed by the Council in December 2007. The adopted Council Conclusions on Mobility Partnerships and circular migration in the framework of the Global Approach to Migration⁹⁸ made it clear that circular

⁹² Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16.

⁹³ 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 [2004] OJ L 375/12, no longer in force.

⁹⁴ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289, no longer in force.

⁹⁵ European Commission (2005b), p. 10.

⁹⁶ Schneider and Wiesbrock (2009), p. 6.

⁹⁷ European Commission (2007), p. 12.

⁹⁸ Council of the European Union (2007).

migration should become an integral part of future Mobility Partnerships. The definition used in the document once again confirmed the temporary character of the migration at stake as follows: '(...) circular migration could be understood as the temporary, legal movement of people between one or more Member States and particular third countries, whereby third country nationals take up legal employment opportunities in the EU or persons legally residing in the EU go to their country of origin'.

The Council proposed a set of 'possible elements which could be addressed when facilitating circular migration' including integration and the accompanying measures that would be available to migrants prior to their arrival in the EU; partnerships between labour market agencies of partner countries and Member States to better match supply and demand; improved mutual recognition of qualifications; measures to ensure return and readmission; an adequate legal framework to promote circular migration, and so on. As Pastore stressed, most of these elements were not specific to the management of circular migration, but rather were part of a very traditional 'linear' migration management approach.⁹⁹

In line with the Policy Plan on Legal Migration, the Commission proposed two legislative measures in 2007: a directive on the admission of highly qualified migrants in the EU, creating the so-called EU Blue Card adopted in 2009, and a directive establishing a single permit and common set of rights for third-country workers legally residing in the EU. This latter measure could not be agreed before the entry into force of the Treaty of Lisbon. As Thym emphasised, unlike the instruments in the field of entry and border controls, political agreement on new legal migration measures was not easy to obtain.¹⁰⁰

The Treaty of Lisbon's entry into force recalibrated the EU's competence in the field of economic migration and brought about changes to the decision-making process that paved the way for the adoption of the legal instruments envisaged by the Policy Plan on Legal Migration on the basis of Article 79 TFEU. The EU migration policy that was conceived by the EU Treaties was based on 'differentiated and selective admission process' that was provided by statutory rules decided by the EU legislature on the basis of the ordinary legislative procedure (Article 79 (2) TFEU).¹⁰¹ In addition, this EU migration policy was established as a 'process of legal status change', allowing the EU to provide different permits depending on the circumstances of each individual case, including not allowing an option of renewal as was the case for the Seasonal Workers' Directive.¹⁰² However, the EU's established competence to adopt legal rules in the ambit of economic migration as a matter of principle meant that Member States were free to determine the numbers of third-country national workers coming to the EU (Article 79 (5) TFEU).¹⁰³

⁹⁹ Pastore (2008), p. 7.

¹⁰⁰ Thym (2016), p. 272.

¹⁰¹ Thym (2016), p. 276.

¹⁰² Ibid.

¹⁰³ Ibid, p. 278.

Following the entry into force of the Treaty of Lisbon, the European Council adopted the Stockholm Programme in 2009, which provided the Justice and Home Affairs programme to cover the period 2010–2014.¹⁰⁴ The European Council invited the Commission to submit proposals before 2012 ‘on ways to further explore the concept of circular migration and study ways to facilitate orderly circulation of migrants, either taking place within, or outside, the framework of specific projects or programmes including a wide-ranging study on how relevant policy areas may contribute to and affect the preconditions for increased temporary and circular mobility’.¹⁰⁵ Furthermore, the Justice and Home Affairs Council Conclusions at the end of 2009 stated that the Member States and the Commission were committed ‘to further examine issues which may have the potential to facilitate circular migration and voluntary return, such as portability of social rights, migrants’ opportunities to return to their countries of origin for longer periods of time without losing their right to residence in countries of destination as well as the promotion of viable livelihood options in countries of origin’.¹⁰⁶ The Council also called for an ‘in-depth qualitative and quantitative analysis in order to further explore the concepts of temporary and circular migration’.¹⁰⁷

In response to this invitation, the European Migration Network (EMN) undertook a study entitled ‘Temporary and circular migration: empirical evidence, current policy, practice and future options’, which was published in 2011.¹⁰⁸ The study concluded that despite the EU’s focus on facilitating this type of migration, the policy and legal developments at the national level were still ‘in an embryonic stage’ and were considerably diverse; whilst some of the Member States’ policies contained elements of circular migration, these were not explicitly acknowledged.¹⁰⁹ It also stressed that the initial evaluations pointed to positive outcomes for participating migrants.

The Treaty of Lisbon also made it possible to reach agreement on the Single Permit Directive in early 2010, after the Council had been deadlocked over this issue for more than 3 years.¹¹⁰ In 2010, the Commission also proceeded with their proposals on the position of intra-corporate transferees and seasonal workers. The EMN study that evaluated the impact of the Stockholm Programme stressed that the adoption of the Seasonal Workers’ Directive was a significant development with regards to circular migration, and that this legal instrument formalises ‘incremental work undertaken by Member States in this policy area throughout the period covered by the Stockholm Programme’.¹¹¹

¹⁰⁴ European Council (2010).

¹⁰⁵ Point 6.1.2. of the Stockholm Programme. European Council (2010).

¹⁰⁶ Council of the European Union (2009), p. 2.

¹⁰⁷ Ibid.

¹⁰⁸ European Migration Network (2011).

¹⁰⁹ Ibid., p. 63.

¹¹⁰ For more details see Peers et al. (2012), p. 223.

¹¹¹ European Migration Network (2014), p. 22.

In addition, on the basis of a GAM evaluation, the European Commission promulgated a renewed Global Approach to Migration and Mobility (GAMM) which aimed to make it 'more strategic and more efficient, with stronger links and alignment between relevant EU policy areas and between the external and internal dimensions of those policies'.¹¹² The inclusion of 'mobility' in the framework's title aimed to explicitly show that using migration and mobility in a safe environment was an essential part of the EU's external relations.¹¹³ Migration was understood as a general category covering both legal channels for migration and combating irregular migration. Mobility, on the other hand, was perceived as part of the general category of migration referring to the possibility to legally enter the territory of the EU and denoting the notion that the EU wanted to increase 'the movement of persons'.¹¹⁴

One of the interviewees who was involved in the Task Force on Temporary and Circular Migration coordinated by the European Policy Institute in the period 2010–2011 commented that interest in this concept sharply declined after the Task Force report was published as a result of the 'very difficult political context'.¹¹⁵ Therefore, it was not surprising that at the dawn of the next phase of the EU's Area of Freedom, Security and Justice for the period 2015–2020, none of the EU's institutional actors made reference to the concept of circular migration in their respective policy agendas and programmes.¹¹⁶ Nor was it mentioned in the European Agenda on Migration that was adopted as a response to the 2015 'European refugee and migrant crisis' and the tragedies that took place in the Mediterranean Sea.¹¹⁷ However, it kept being used as an instrument that was part of the framework of the GAMM,¹¹⁸ including in the latest Mobility Partnership concluded with Belarus. Furthermore, it was also part of the Legal Migration Fitness Check of the European Commission.¹¹⁹ A representative of an international organisation who was interviewed said that '(...) it lingers within the EU frameworks because it was mentioned as a point that nobody elaborated on and is part of all projects'.¹²⁰ However, according to the interviewee, 'it was out'.¹²¹

¹¹²European Commission (2011).

¹¹³Interview # 8 with EU Council official, Belgium, February 2013, Annex I.

¹¹⁴Interview # 8 with EU Council official, Belgium, February 2013, Annex I.

¹¹⁵Interview #14 with former think-tank officer, Belgium, August 2013.

¹¹⁶For more details, see also Carrera and Guild (2014), pp. 19–50.

¹¹⁷See European Commission (2015).

¹¹⁸European Commission (2014).

¹¹⁹European Commission (2016), p. 3 and p. 8.

¹²⁰Interview #28 with representative of international organisation, Austria, March 2017, Annex I.

¹²¹Interview #28 with representative of international organisation, Austria, March 2017, Annex I.

3.5 Conclusions

This chapter demonstrated that the circular migration concept entered the EU level through the policy efforts at the international level aimed at maximising the positive effects of the migration-development nexus. At the EU level it was perceived as a policy tool for migration management, which was to be facilitated through legal instruments and through formal, bilateral and multilateral, programmes and projects. The main difference with the international discourse was that at the EU level there was an additional securitarian rationale. Circular migration became one of the instruments of the Directorate General for Migration and Home Affairs and part of its securitarian approach to migration, putting emphasis on return and readmission rather than on facilitation of legal migration.

Despite the fact that the EU has invested efforts in promoting this type of migration since 2001, almost 20 years later it is difficult to identify a cohesive line of policy formulation that pinpoints the EU's approach to circular migration. Scattered among different instruments and characterised by volatility, the EU's approach is difficult to comprehend without putting some flesh on the concept through deeper analysis of its components, which is the task of the next chapter.

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