

THE END OF EUROPEAN »ZERO« IMMIGRATION POLICY MODEL: PROACTIVE ECONOMIC MIGRATION POLICY AND ACTORS' INTERESTS

The »zero« immigration policy model based on two major lines of action - the closing of borders to new influxes of immigrant labour and measures to promote the integration of the immigrant populations in place - has proved inadequate in dealing with existing 'stocks and flows.' Likewise is there hardly any evidence that it would be flexible enough to deal with the current situation. Furthermore, the accompanying calls for a 'common' European immigration policy are the result of the integration objectives of the European Union and the anticipated enlargement in May 2004. A Community immigration policy, as set out by the European Commission, represents an attempt to synthesise the economic and demographic aspects of the arguments for a proactive immigration policy, taking into account humanitarian, family reunion and economic types of migration. It implicitly recognises the number of tensions between Member States, business and individual migrants. This article examines how the balance between these competing, but also overlapping interests has been tackled by current proposals on admission of economic migrants. In order to understand the dynamic relationship of these key interests and the evolution of the construction of a common EU immigration policy the author (a) discusses the interaction between 'new migration' and 'new' policy initiatives, (b) analyses immigration policy in the demographic and economic context and (c) argues that the best model for a common European immigration policy would be the human rights approach.

Keywords: immigration policy, EU, human rights approach

KONEC EVROPSKEGA MODELA »NIČELNE« IMIGRACIJSKE POLITIKE: PROAKTIVNA EKONOMSKA IMIGRACIJA IN INTERESI UDELEŽENCEV

Model »ničelne imigracijske politike«, ki temelji na dveh glavnih usmeritvah delovanja - zapiranju meja novim tokovom imigrantske delovne sile in ukrepih za pospeševanje integracije že priseljene imigrantske populacije - se je pri obravnavi obstoječih »stocks and flows« izkazal za nezadostnega. Prav tako skoraj ni dokazov, da bi bil ta model lahko kos aktualni situaciji. Imigracijska politika Skupnosti, kakršno je načrtala Evropska komisija, je poskus sintetiziranja ekonomskih in demografskih vidikov argumentov za proaktivno imigracijsko politiko, upoštevajoč humanitarne, družinske in gospodarske tipe migracij. Implicitno priznava številne napetosti med državami članicami, delodajalci in posameznimi migranti. Članek obravnava aktualne predloge za sprejem ekonomskih migrantov v luči ravnotežja med nasprotujočimi, a tudi prekrivajočimi se interesi. Da bi razumeli dinamična razmerja teh ključnih interesov in proces izgradnje skupne imigracijske politike Evropske skupnosti, avtorica (a) obravnava interakcijo med »novo migracijo« in »novimi« političnimi iniciativami, (b) analizira imigracijsko politiko v demografskem in ekonomskem kontekstu in (c) dokazuje, da bi bil najboljši model za skupno evropsko imigracijsko politiko pristop z vidika človekovih pravic.

Ključne besede: imigracijska politika, Evropska unija, pristop z vidika človekovih pravic

1 INTRODUCTION*

There is the increasingly apparent need for a 'new approach' to immigration in Europe. The intensified debate and search for new immigration policies stems from a combination of deficiencies of policies evolving since the 1970s, the changing nature of migration and attitudes towards it. The »zero« immigration policy model, based on two major lines of action - the closing of borders to new influxes of immigrant labour and measures to promote the integration of the immigrant populations in place - has proved inadequate in dealing with existing 'stocks and flows.' Likewise is there hardly any evidence that it would be flexible enough to deal with the current situation. Furthermore, the accompanying calls for a 'common' European immigration policy are the result of the integration objectives of the European Union and the anticipated eastern enlargement. By the Treaty of Amsterdam, immigration and asylum have become the »1st pillar« issue. In October 1999, the special meeting of the European Council in Tampere discussed the establishment of an Area of Freedom, Security and Justice and elaborated the political guidelines for the coming years. It was agreed that »the separate but closely related issues of asylum and migration call for the development of a common EU policy«. This would include the following elements: partnership with countries of origin, a common European asylum system, fair treatment of third country nationals and management of migration flows.¹ But until recently, partly because of the developments of the 1990s which are closely connected with the phenomenon of 'new migration', the political and practical agendas have been influenced predominantly by asylum, irregular immigration, smuggling and trafficking in human beings, with limited attention paid to family reunion and even less to labour market requirements and integration of third country nationals. There has been little debate about the role that immigrant labour might play in enhancing the competitiveness of European national and regional economies. There are signs, however, that this attitude may be changing. In the last couple of years, issues as the shortages of skilled persons and the ageing and decline of populations have been drawn to public migration debate. Comprehensive immigration policies are called for.

The problems now confronting governments have resulted from a piecemeal approach to specific problem-solving, which led to a series of (im)migration-

* This contribution is largely based on the author's paper »A Common European Immigration Policy or How Common is Common Enough? « published in *Towards a Common European Immigration Policy* edited by Bernd von Hoffmann, Frankfurt am Main 2003: Peter Lang, pp. 53-85.

¹ Tampere European Council, 1999, particularly points 10-27.

related policies, addressing a series of issues (such as asylum, labour, family reunion and formation, trafficking, illegal immigration and return) separately or in parallel rather than in an integrated fashion. An integrated management strategy is required to bring these together and to be applied over the long term. Failure to do so will only replicate the mistakes of the past where action in one direction has often resulted in creating new problems in another. The European Commission in its proposals, specifically in its *Communication on a Community Immigration Policy*² supports such a management approach. Whether countries are able to develop their own integrated policies and to harmonise them with others are questions that can no longer be evaded.

However, the feasibility of commonly agreed and consistent immigration policy objectives that could underpin the elaboration of a legislative framework common to all Member States may be questioned, not only on the sensitive issue of sovereignty, but on a few other issues as well. Among them a highly diverse geography and experience of migration within Europe: three interlinked, but separate migration sub-systems have evolved within Europe in the last decade, which are characterised by different types and scales of movement. Although they are acting largely independently, at least in geographical terms, they are nevertheless influenced by economic globalisation. Consequently, the formulation of a common European immigration policy needs to include a common understanding of a multi-dimensional global matrix of movement involving capital, goods, services, ideas and people as well as taking into consideration the interests of the various actors involved in the process.

2 THE AIM OF THE PAPER

Economic migration involves at least three main actors or three main interests.

- First, there are the interests of the State. For the purposes of economic migration the state means a sovereign State, which has the capacity to confer nationality on individuals, and to recognise the nationality of non-nationals; this to control their movement according to its purposes.³ State can be subdivided into the state of destination, the state of origin as well as of transit, but here I shall mean the interests of Member States of the European Union, which have declared strong interests in the regulation of labour migration regarding promoting, preventing and controlling.

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² COM (2000) 757 final, 22.11.2000.

³ Cf. E. Guild, 2002.

- Secondly, there are the interests of the economic sector, more particularly of companies and business. These interests can be manifested in various ways. The employer may rely on the destination state to undertake recruitment of labour migrants, or it may recruit migrant labour directly, either in the destination state or abroad.
- Thirdly, there are interests of individuals, meaning the migrants themselves. An individual has an interest in economic migration both individually and as a part of a family and network structure and strategy.

A Community immigration policy, as set out by the Commission, takes into account humanitarian, family reunion and economic types of migration. It represents an attempt to synthesise the economic and demographic aspects of the arguments for a proactive immigration policy and implicitly recognises the number of tensions between Member States, business and individual migrants. It is my intention to look how the balance between these competing, but also overlapping interests has been tackled by current proposals on admission of economic migrants.

In order to understand the dynamic relationship of these key interests as well as the evolution of the construction of a common EU immigration policy I first discuss the interaction between 'new migration' and 'new' policy initiatives (Section 3). This will be followed by a discussion of actors' interests in immigration considering the demographic and economic context (Sections 4 and 5). Finally, after analysing the proactive economic immigration policy and its common framework (Sections 6 and 7), I will argue that the best model for a common European immigration policy would be the human rights approach.

3 'NEW' MIGRATION, 'NEW' EUROPE, 'NEW' POLICY

The last decade or so has been the most migratory for Europe since 1945.⁴ Much of the academic literature has described the period as being characterised by 'new' migrations.⁵ These are identified in a number of ways, but at its heart are the dynamic relationships between geopolitical and geoeconomic changes and evolving patterns and processes of migration, normally traced back to 1989 and the end of Europe's Cold War political division.⁶ While any estimations of migration are clouded by the reservations of data deficiencies, a number of commentators have suggested that the extent of migration since 1989 in Europe alone

⁴ This section is based on the author's lecture *Migration in Context of the European enlargement* given at the Academy of European Law, Trier, 25-26 April 2002.

⁵ K. Koser and H. Lutz (eds.), 1998.

⁶ S. Castles and M. J. Miller, 1993; W. T. S. Gould and A. M. Findlay (eds.), 1994; A. H. Richmond, 1995.

allows for its qualification as 'new', as it outnumbers any other migration in Europe since the end of the Second World War.⁷ However, in the 1990s it was political-military perturbations in Central and Eastern Europe, particularly in the Balkans, that have affected flow regimes, created human rights difficulties and injected major uncertainties into the policy-making process.

3.1 NEW GEOGRAPHY OF MIGRATION

Along with the extent of international migration emerged a new geography of migration in Europe.⁸ The geographical patterning has altered greatly already since the early 1980s. In particular, the proportion of immigrants coming from other developed countries has fallen markedly. Recent migration has emerged from new countries of origin; in the late 1980s and early 1990s there was a marked escalation of flows into Western Europe from two sources: the East and the 'South'. Changes in the former Soviet Union and Eastern Europe have not resulted in the mass migrations initially predicted, but these countries are nevertheless also significant new countries of origin for migrations in Europe.⁹ The wars in the Balkans dominated movements in the 1990s as they brought sudden and massive forced movements on a scale not seen since 1945. New countries of destination have also emerged. These include countries of Southern Europe as well as of Central and Eastern Europe. The larger Southern European countries such as Italy and Spain became net immigration countries.¹⁰ The new and newly democratic countries of Central and Eastern Europe increasingly find themselves in the role of transit countries for migrants aiming to enter the EU as well as becoming destination countries in their own right as the process of economic transition advances and as the EU countries reinforce their controls.

With regard to immigration European countries fall into several groups. The vast majority of immigrants in Central and Eastern European countries come from elsewhere in Europe, mainly from other countries of the same region, and with only small proportions from EU and EFTA states. Scandinavian countries also display a relatively high degree of 'Euro self-containment', mainly from EU and EFTA states, and from 'Other Europe' (largely Turkey and former Yugoslavia) with only small proportions of flows from Central and Eastern Europe. Germany's immigration field is strongly European, and along with Austria and Finland receives a high proportion of its immigrants from Central and Eastern

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⁷ R. King (ed.), 1993a; H. Fassmann and R. Munz, 1994.

⁸ R. King (ed.), 1993b.

⁹ J. Salt and J. Clarke, 1996; D. Tränhardt, 1996.

¹⁰ R. King and K. Rybaczuk, 1993.

Europe. In contrast, almost a third of the United Kingdom's immigrants come from outside Europe. The Mediterranean countries also tend to look beyond Europe, as does the Netherlands.¹¹ These marked differences in the migration fields of individual countries, reflect a range of historical (such as post-colonial links) and geographical (especially proximity) processes. Finally, the patterns depicted reinforce the diversity of migration experience across Europe.

3.2 NEW TYPES OF MIGRATION

The new geography of migration has often become associated with new types of migration and with changing migrants' profiles more generally. The emergence of a 'post-industrial' pattern over the past two decades, represents the latest of the waves affecting post-war Europe, following the displaced persons resettlement after 1945, the 'guest worker' phenomenon of the 1950s and 1960s and the subsequent phase of family reunification. This latest 'post-industrial' wave comprises three relatively distinct elements:

- The first element consists of high-skilled labour migration movement. At least until recently this movement constituted an essentially »invisible« process in that it involves mainly professional, managerial and technically skilled workers who are relatively cosmopolitan in culture, play an important role in the economy and are likely to be on some form of temporary contract or posting from their home companies. However, there appears to have been a steady growth in the migration of the highly-skilled across Europe as a whole. While the bulk of this movement is still westwards, the continent is now seeing an increasingly complex pattern of »brain exchange«.¹²
- The second element consists of refugees and asylum seekers to whom the most attention in recent years has been accorded, partly because these are closely monitored under international agreements and partly because the numbers applying for asylum in the EU States exploded during the 1980s and early 1990s and, in the late 1990s in some of the EU Candidate States.
- The third element consists of irregular, 'illegal' or clandestine migration. There is a commonly held view that an increasing proportion of immigrants are becoming 'illegal' either by entering a country in violation of that country's laws or by doing something to violate a condition for legal stay. This type of migration is largely labour-market related, the process is

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¹¹ J. Salt, 2000.

¹² P. Rees *et al.* (eds.), 1996.

controversial however. For example, even refugees and asylum seekers often appear to be little different from the 'illegals', as many are believed to be basically 'economic' refugees rather than people fleeing from fear of persecution. Furthermore, it is sometimes difficult to identify the differentiation of human trafficking from illegal immigration. Smuggling of migrants and particularly trafficking in human beings is currently one of the most urgent and complex human rights issues and a priority concern of the EU international co-operation in the fight against transnational organised crime.¹³

A substantial amount of literature deals with each of these types. An important overall comment is that together they embody an increasing polarity in migration flows. In particular, this is manifested by a bipolar distribution according to skills, occupation and income. Another result of new migration is family fragmentation, bringing about a growing participation of women and children. A growing number of female migrants and minors are also reported as being the victims of trafficking in human beings, exploited in sexual and other industries in slavery-like situations.¹⁴

3.3 NEW NATURE OF MIGRATION

Thus, the term new migration may suggest that using the term 'migration' has changed in some way. It is not immediately clear what is meant by 'migration' and 'immigration'. Migration is a sub-category of a more general concept of 'movement', embracing a wide variety of types and forms of human mobility each capable of metamorphosing into something else through a set of processes which are increasingly institutionally driven. What we then define as migration is an arbitrary choice, and may be time specific.

In recent decades, 'immigration' has been associated with some notion of permanent settlement, which for the most part occurred indirectly as a development of previous temporary labour migration, mainly through family reunion and family formation. Most voluntary migration in recent decades has featured temporary labour migrants, yet this is an enormously diverse group, which can be blended with numerous other international movers. Today, 'permanent' settlement may be associated with return migration of former labour migrants or certain ethnic groups such as German *Aussiedler* or Romanian Magyars. It is important to see that diverse types of 'mobility' (permanent migration, temporary labour

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¹³ F. Medved and P. Cullen, 2002.

¹⁴ See among others J. Apap and F. Medved, 2003.

migrants, asylum seekers, refugees, temporary protected persons, students, working holidaymakers, highly skilled) may easily be transposed into another. It does not therefore make sense to think in terms of rigid categories, nor to place 'immigration' at some defined point on the mobility continuum.¹⁵

Eurostat reports that migration flows are now composed of a mix of people: asylum seekers, displaced persons and those seeking temporary protection, family members coming to join migrants already settled in the EU, labour migrants and growing numbers of business migrants. The flows have become more flexible - in particular there has been an increase in short-term and cross-border movements - with a complex pattern of people entering but also leaving the Union.¹⁶ The European Commission's new approach to immigration sees new trends in migration within »the concept of migration as a *pattern of mobility*«,¹⁷ limited to the element of policy concerning partnership with countries of origin. In this sense flexibility of policy is concerned with encouragement of migrants to maintain and develop their links with their countries of origin rather than including recognition that new migration as a 'pattern of mobility', involving different 'categories' of migrants, motivations, methods and roles of insertion into the societies into which they come is largely influenced and managed by different agencies and institutions. Categories are often rigid, and it is sometimes difficult for migrants to go from one category to the other. In my view, a new approach to immigration should also provide a framework for flexibility in this sense.

3.4 NEW EUROPE POLICY

Immigration policies often emerge out of political, social and economic imperatives, which have little direct relationship with migrants or migration itself. To the extent to which the changes in policy-making have been a response to changes in migration, either stocks or flows, is hard to discern. It may be claimed, however, that simultaneously with the new migration, 'new' Europe and 'new' policy responses have emerged.

Political transformations have brought into sharper focus questions surrounding the definition of Europe and its boundaries. New migration is located at the centre of competition and conflict about the nature of organising principles, which can unify the 'new' Europe. The first decade of the 21st century confronts Europe with challenges relating to five interrelated subjects in particular: (a) the enlargement of the Union, (b) the strive for a common foreign and security poli-

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¹⁵ Cf. J. Salt, 2000.

¹⁶ COM (2000) 757 final, Annex I.

¹⁷ COM (2000) 757 final, p. 8, emphasis original.

cy, (c) the urge to provide a sustainable basis for employment and growth, (d) the establishment of the Union as an »Area of Freedom, Security and Justice« and (e) the decision to agree on a common asylum and migration policy. Hence, the 'new' migration cannot be understood in isolation from the economic, political and social orientation of the 'new' Europe.¹⁸

Nevertheless, it was already before 1989 that Western Europe recognised to have a 'common interest' in the field of asylum and migration policy and searched for a forum for strategy creation and co-ordinated action. When it became clear that guest workers »come to stay«,¹⁹ the initial reaction of most governments was to stop further recruitment of foreign workers, try to induce those residing in the country to return, and prevent family reunification. When this proved not to be possible, the problem of regulating international migration shifted in the 1980s to one of stepped up border control, increasing internal regulation of labour markets and integrating large, established foreign populations.²⁰ Controlling borders required a renewed emphasis on international co-operation, especially among the Member States of the European Community, committed to building a border free area, relaxing and eventually eliminating all internal borders in order to complete the internal market. This process of integration was given new impetus by the Single European Act of 1986, which called for the elimination of all barriers to the movement of capital, goods, services and people within the territory of the European Community by January 1992. Given the desire of Member States to stop further immigration, creating a border free Europe meant reinforcing external borders. A series of intergovernmental agreements dealing with asylum, migration and security issues were drafted to help construct a kind of European migration regime. These include the Schengen Agreement of 1985, whereby some of the EU governments committed themselves to eliminating border checks in exchange for common visa requirements to control the movement of third country nationals and the Dublin Convention of 1990, which requires asylum seekers to apply for asylum in the first 'safe country' where they arrive. These agreements, with further 'transgression' of the »European borders« in view of the eastern EU enlargement helped to establish buffer states in the Central and Eastern Europe.²¹

Project 1992 together with the Maastricht Treaty, ratified in 1993, launched the most ambitious program of regional integration and economic liberalisation in

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¹⁸ On making of 'new' Europe see e.g. the author's discussion *'New' Europe's »brave« motto: »United in its diversity«*, presented at the conference »New Brave Europe«, Faculty of Social Sciences, Ljubljana, 2-3 July 2003.

¹⁹ R. Rogers (ed.), 1985.

²⁰ G. Brochmann and T. Hammar (eds.), 1999.

²¹ J. F. Hollifield, 1992; F. Medved, 2000.

world history.²² But just as this process was taking off, the strategic situation in Europe was turned upside down, with a refugee migration and asylum-seeking crisis. A large percentage of those whose asylum claims were refused would remain in the host countries either legally - pending appeal of their case - or illegally. With continuing attempts to slow or stop all forms of legal immigration, the number of illegal immigrants has increased steadily. New migrants, particularly asylum seekers and undocumented migrants, have become the focus for a brand of moral panic in many European societies, in which they represent a broader social symbol of immigrants who abuse the welfare state, commit crimes and threaten the employment of established citizens. In this context, the 'new migration' has been associated with the current resurgence of extreme nationalist and racist movements in a number of European societies.²³ The construction of 'frontiers of identity' against the 'others' has intensified.²⁴ With the perception among European publics that immigration is raging out of control and with the rise of right wing and xenophobic movements and political parties, governments have been reluctant to create new programmes for legal immigration, or to expand existing quotas. Instead, the thrust of policy change has been in the direction of further restriction.²⁵ Policy changes that have taken place increased vulnerability of many migrants from asylum seekers deprived of welfare, through undocumented migrants indebted to smugglers and traffickers.

It is becoming clear that the 'new migration' in Europe has a significance, which outweighs the before described changing patterns and processes alone.²⁶ Migration has assumed a growing importance on political agendas and opened new dilemmas. In addition, the meaning of the 'new' migration has become the focus of competition and sometimes conflict between policy makers, new migrants and resident population - indigenous and immigrant.

Most European governments recognise that they now preside over multicultural immigrant societies, and attempts to ostracise settled foreign populations

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²² J. F. Hollifield, 2002.

²³ R. Miles, 1993; J. Solomos and J. Wrench (eds.), 1993.

²⁴ R. Cohen, 1994.

²⁵ For example, Germany in 1993 amended its constitution in order to eliminate the blanket right of asylum that was enshrined in Article 16 of the old Basic Law. France in 1995-96 enacted a series of laws that were designed to roll back the rights of foreign residents and make it more difficult for immigrants to naturalise. See e.g. G. Brochmann and T. Hammar, 1999.

²⁶ Of course, describing phenomenon as 'new' corresponds with the modern desire to order and arrange societies according to certain characteristics of which the expression of time and sequential structure is a major principle. It is, however, an example of an *a posteriori* description. Such descriptions have in other contexts been challenged at a later date on the basis of differing ordering principles. It follows that the description of recent migration in Europe as new is still preliminary and the validity of the notion new stands to be tested and proved in the long term.

only feed the flames of xenophobia and racism. In the late 1990s, several European states passed laws to liberalise naturalisation and citizenship policy.²⁷ Furthermore, irregular immigration and trafficking in human beings have occupied much of the attention from both media and authorities. New national and international efforts have been launched to combat these phenomena.²⁸ In the meantime, acute shortages of skilled workers in the labour market and issues regarding the »demographic deficit« anticipated within the EU over the next 10 to 30 years, have driven the debate on the question of relaxing immigration controls both in Member States and across the EU and added a wider dimension to the arguments as to whether immigration can benefit the EU economically. European governments are now turning to new recruitment programmes, seeking to emulate some aspects of the U.S., Canadian and Australian dynamic and selective immigration policy, and make their economies more competitive in a rapidly globalising world.

Thus, regarding the competence the European Commission has in the field of immigration, the document on a Community immigration policy with such key-words as »common legal framework«, »new integrated approach« and »proactive immigration policy«, appeared relatively late. It stated that »in view of the strongly divergent views in the Member States on the admission and integration of third country nationals, the Commission feels that it is essential to discuss these issues openly and to try to reach a consensus on the objectives of the policy to be followed«. The purpose of the communication has in fact been to »stimulate this debate«.²⁹

4 IMMIGRATION IN THE DEMOGRAPHIC CONTEXT

The role of migration in European population change has come under increasing scrutiny in recent years as a result of growing concerns about a cocktail of prospective changes to labour supply and demand. Issues raised include demographic ageing, shortages of working age populations, dependency ratios and payment of pensions, and possible shortages of both skilled and less-skilled labour. But while for demographers migration is one of the three key variables affecting the size of population, for migration policy makers the effects of migration on populations have mostly not appeared that interesting. The slow demographic changes have been viewed as long-term concerns, which often appear to be beyond the politicians' horizon. The need for interaction between demo-

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²⁷ See e.g. F. Medved, 2001.

²⁸ F. Medved and P. Cullen, 2002; F. Medved, 2002; J. Apap and F. Medved, 2003.

²⁹ COM (2000) 757 final, Executive Summary, p. 3.

graphic and migration policy goals has also been overshadowed by concrete concerns as the illegal immigration, smuggling of migrants and human trafficking or difficulties in the integration. However, the United Nations Population Division report *Replacement Migration – Is it a Solution to Declining and Ageing Populations?* published in March 2000 attracted large publicity and brought the demographic facts and projections into the public debate on migration policy.³⁰

During the 1990s the world's population increased more rapidly than ever before and looks set to continue its rapid growth (rising to around 9.4 billion by 2050), with Europe's share becoming increasingly modest, halving between 1995 and 2050. Whether or not one subscribes to the notion of a 'post-industrial society', both in economic and social terms, coming into being in Europe, it cannot be denied that contemporary demographic behaviour in Europe is very different from that prevailing during the main period of demographic transition. Indeed, it can be claimed that demography is one of the main driving forces for change in Europe. Over the last three decades the continent appears to have embarked on 'a second demographic transition', with the overall level of fertility moving below the replacement rate and alterations taking place in sexual and household-forming behaviour.

Main demographic features recently recorded by Eurostat included the generally low rates of fertility and mortality and the widespread occurrence of natural decrease. Net migration to the EU declined rapidly over the last decade after peaking in the early 1990s at over 1 million per year before starting to climb again and reaching just over 700 000 in 1999 and being estimated just over 1 million for 2001.³¹ The general trend among all the Central and Eastern European countries is one of even slower population growth than that of the EU-15 for the first quarter of this century. The various European countries fare differently in the process, mainly according to their current levels of fertility but in spite these disparities, across the EU as a whole it is net migration that has become the principal component of population growth.³²

Irrespective of any future trends in the three basic demographic components these developments have put in train a variety of consequences, which will have repercussions lasting well into this century and raise a whole series of important policy issues. The direct impacts of the likely changes in numbers of people are modest compared with those arising from changes in the structure and composition of the population. The three aspects of population change have brought about the fundamental restructuring of the population in the past three decades

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³⁰ UN, 2000.

³¹ COM (2000) 757 final, Annex 1; COM (2003) 336 final, 3.6. 2003, p. 9.

³² COM (2000) 757 final, Annex 1.

and have set in motion a pattern of demographic development, which appears to contain a high degree of inevitability.

4.1 THE 'GREYING' OF POPULATION

The 'greying' of population is considered to be one of the most important changes to be affecting European populations. Certainly, the statistics on the growth of the aged population are impressive. All European countries have larger proportions of the elderly than ever before, a development, which will be strongly reinforced in many countries as their baby-boom generations reach retirement age. As shown in Table 1 the proportion of Europeans aged 65 years and over has been rising steadily over the past four decades being half as much again in 1990 as its 8.7 % level in 1950. Moreover, this growth is projected to accelerate as the baby boomers of the 1950s and early 1960s move into retirement age. It can also be seen that the phenomenon is widespread across Europe, though not entirely uniform; the biggest increases being for Western and Southern Europe (reflecting the very low birth rates there) and the smallest for Northern Europe.

Table 1: Proportion of the population aged 65 years or more, and elderly dependency ratio, 1950-2025

Area	Year	1950	1970	1990	2010	2025
% aged 65+ Europe total		8.7	11.4	13.4	16.1	20.1
Northern		10.3	12.7	15.5	16.1	19.8
Western		10.1	11.4	13.4	16.1	22.3
Central		7.4	9.9	12.7	16.3	20.0
Eastern		7.0	10.4	11.3	13.5	17.6
Dependency ratio Europe		13.2	17.9	20.0	24.3	31.7

Notes: Areas of Europe are arranged in order of percentage of persons 65+ in 1990. Dependency ratio refers to the number aged 65+ per 100 persons aged 15-64.

Sources: A. M. Warnes, 1993; T. Champion, 1998.

This ageing has at least three major consequences:

- First, it increases the costs of health treatment and personal care.
- Second, there is the problem of raising money for people's pension, given that an increased pension-able-age population will have to be supported by a shrinking number of people of working age. The dependency ratio has already risen from 13.2 to 20 in 40 years to 1990, but it is projected to reach 31.7 by 2025. The Commission even estimates its increase to 40 per cent for year 2030.³³ This represents a massive redistribution of economic, social and political power, which governments are currently grappling with.
- Third, and particularly important for employment, is the ageing of the labour force. Much of Western Europe has already experienced a large downturn in the number of labour market entrants, but the next two decades will see a reversal in the balance of younger and older workers from around 1.2 20-39-years-old for every 40-59-year-old in the early 1990s to 1.2 40-59-years old for every 20-39 year old around 2015.³⁴ The accession states will experience a similar ageing of the population and challenges expected from the fall in their working-age population to those faced by EU-15.

Particular issues are also raised by the arrival of less skilled immigrants and of those of 'non-European' culture.³⁵ These problems are often exacerbated by the uneven spatial patterns of immigrant's destinations, traditionally in areas needing low-wage labour in declining industries and more recently in the largest cities, where cheaper housing is more plentiful and job openings are expected to be more numerous.

Thus, the geographical patterning of population growth and decline across Europe has undergone some substantial changes during the post-war period but these lack consistency and provide a rather weak basis for anticipating future trends. One important development has been the convergence of birth and death trends across most of Europe, not only at national level but also intra-regionally within countries. The inter-regional range of natural change rates is much smaller now than in the past, and migration has become relatively more important in accounting regional differences in overall population change.

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³³ More detail on this scenario in COM (2003) 336 final, p. 12.

³⁴ A. Green and D. Owen, 1995.

³⁵ See e.g. P. White, 1993.

4.2 REPLACEMENT MIGRATION

The United Nations Population Division has suggested that Europe might need replacement migration - to cope with the potential problems caused by the declining and ageing populations - ranging from around a million to 13 million new migrants per year between 2000 and 2050. For example, immigration required to keep the support ratios unchanged during the next five decades, would mean a growth of the EU's population from 375 million in 2000 to 1.2 billion, out of which 918 million or 75% would be immigrants or their descendants. Others have contested such a scale of immigration as being unnecessary or impractical.³⁶

An OECD report, *Maintaining Prosperity in An Ageing Society*, emphasised that policy choices have to be made for the medium-long term in order to support pension and health systems.³⁷ Most frequent mentioned policy choices are those aimed to raise fertility rates or encourage greater immigration. There is also a need to understand better the capacity of labour markets to adapt to ageing work forces, including how it can be enhanced. It is suggested that most workers have the potential to remain productive up to and beyond currently standard retirement ages, provided they receive adequate training. However, these adjustments may not go so far, or proceed as rapidly, as desirable and it remains true that older workers face elevated risks of skill obsolescence and poor health.³⁸

Tapinos presented a useful framework for the future dilemmas. The issues related to migration, population ageing and population decline can be analysed with help of three time horizons. During ten years or so, the labour market will be the main focus of concern, and the relevant action parameters would be thus linked with labour market demand and supply. Impact on fertility and mortality will be limited. In this time horizon international migration can play a decisive role. This seems to be the case in many industrial countries where labour shortages and mismatches in domestic labour markets have motivated special arrangements and measures facilitating immigration of the skilled labour especially. In the next 20-40 years, »structural imbalances of age distribution«, and the threatening imbalance in the social security system would be the main concern. The impact of demographic trends, and the obviously weakening support ratios on the social security balance would be crucial but »a number of social economic and institutional variables may strengthen or dampen the demographic impact«. In the »very long run« the concern is the total population decline, for which no other meaningful option would exist than an increase in fertility in order to sus-

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³⁶ See e.g. D. A. Coleman, 1995; *Economist*, September 9th, 2000.

³⁷ OECD, 1998.

³⁸ See OECD, 2000.

tain a stationary population, which is, for Tapinos, an unquestionable end for any society.³⁹ It is obvious that the key problems pointed out do neither appear nor fade away in a subsequent period. It is rather that they have already started to emerge, and policies to counteract them would be better found as soon as possible.

Thus population projections and labour market shortages have been the main triggers for a new wave of debate and active search of the policy making, particularly in the search of a possible combination of the many issues, interests and concerns that are represented in the policy making. These are different and often conflicting and are articulated both in national migration debates and at the European Union level.

Some EU Member States have already developed concrete policy initiatives to address labour market shortages, and implicitly the increasing demographic issue.⁴⁰ The European Commission has also identified a number of trends in the demographic situation in the EU, notably the slow down in population growth and a marked rise in the average age of the population. The decline in the working age population, beginning in the next 10 years and the long term rise in the percentage of the population who are over 65 and over 80 are identified as issues of concern to the EU, both in terms of the economic consequences and the impact on social security regimes.

The Commission recognises that increased legal immigration cannot, in itself, be considered as an effective way to offset these demographic changes, but should be part of an overall structural strategy to tackle these problems. In the short term, it could be an important element in population growth when accompanied by other responses such as more friendly family policies. Equally, controlled immigration may help to alleviate shortages provided it takes place within the context of an overall structural strategy to deal with labour market imbalances, including skill shortages, which should be addressed by an overall strategy of structural policies in the field of employment and human resources development.

In this sense, the Commission paper on immigration policy emphasised policy co-ordination in the EU in the area of employment, a process, which did the European Council in Luxembourg initiate in 1997. According to Article 126 of the Amsterdam Treaty, Member States implement their employment policies - outlined in their National Action Plans - in a way, which is consistent with the employment guidelines and the broad economic policy guidelines drawn up each year

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³⁹ Tapinos (2000) as referred to in H. S. Mattila, 2001.

⁴⁰ As for example Germany in *The Report of the Independent Commission on Migration*, 2001.

by the Council. A number of weaknesses in the EU economy are highlighted as well, notably the high number of people still unemployed, insufficient participation of women and older people in the work force and long-term structural unemployment with marked regional differences. Attention is also drawn to the need to modernise social protection systems and in particular to secure their sustainability in the face of an ageing population.⁴¹ The Commission believes that the strategies, proceeding from the Lisbon European Council in March 2000, will reduce the effects of the ageing population in the EU and the level of dependency between those in work and those who have retired. With respect to social security systems the presence of legal labour migrants and their families may, in the short term at least, be a positive factor in face of ageing and declining population. The Commission recognises that there may be initial settlement costs, but that the availability of effective integration measures for third country nationals reinforces their socio-economic contribution to their »host« society and may be a lesser long-term cost to society than the absence of such policies, leading to discrimination and social exclusion.

The 2003 Commission's *Communication on immigration, integration and employment* deals with these issues in more detail.⁴² The significance of demographic developments for employment growth is particularly stressed. By using the Eurostat assumption of moderate immigration to EU-15 at around 630 000, corresponding to a net contribution to the working age population of approximately 450 000 persons, the document illustrates a demographic scenario incorporating the achievement of the Lisbon target of a 70% employment rate by 2010 and a constant rate of employment afterwards. As shown in Table 2 an overall decline of employment could be expected after 2010 and the fall in the number of employed people between 2010 and 2030 would be in the order of 20 million workers for EU-25, of these 13 million for EU-15.⁴³

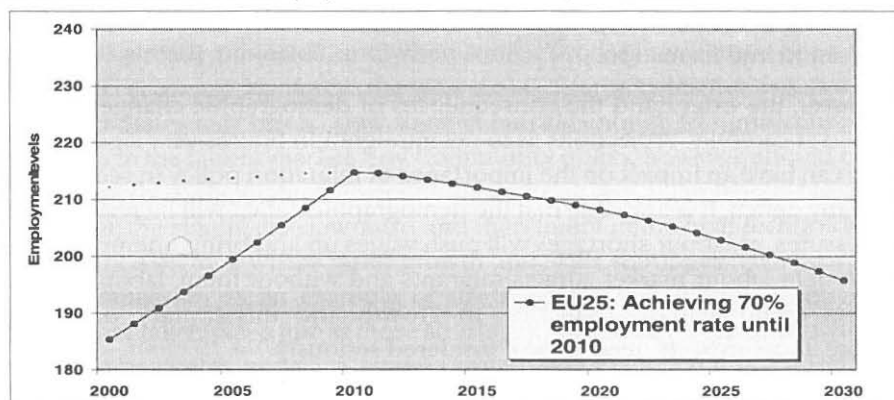
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⁴¹ COM (2000) 622 final.

⁴² COM (2003) 336 final.

⁴³ COM (2003) 336 final, pp. 12-13.

Table 2: Scenario of future employment levels in the EU-25, 2000-2030



Notes: Total employment (in millions) assuming an employment rate of 70 % in 2010 and for the following period until 2030.

Source: COM (2003) 336 final, p. 13.

The negative contribution of employment to economic growth, implied by the decline of the total volume of employment, could be compensated by increases in productivity growth. The latter however, would have to reach 2.8 per cent between 2010 and 2020 and would have to climb beyond 3 per cent in the next decade. The Commission rightly acknowledges that in spite of the potential of other factors influencing productivity, as for example labour-saving technologies, such a productivity growth is questionable. In the depicted scenario, the Commission calculates that the average GDP growth in the EU would slow down to 1 per cent between 2010-2020 and to 0.6 per cent between 2020-2030.

Furthermore, the dependency ratio will continue to rise even if the employment rate target of 70 per cent is achieved and maintained throughout the coming decades.⁴⁴ This indicates that the impact of the population ageing on the welfare system, which is already noticeable, can only be partially averted by immigration.

4.3 ACTORS' INTERESTS

In this context, the migration interests of the Member States can be evident in a wish to maintain or increase revenues from a successful economy in order to pay for the social costs of an ageing population without disrupting social solidarity. The interest of business are to have a flexible labour market with sufficient workers, either highly skilled or low skilled, to meet demand and to keep wages as low as possible in order to remain competitive in the global economy. The

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⁴⁴ COM (2003) 336 final, pp. 13-14.

interest of individual migrants are to improve their living and working conditions, to achieve their full potential and not least to be able to exercise their right to family unification and formation.

However, the extent and the consequences of demographic changes should be looked at carefully. Projections as to net immigration figures vary significantly and this can have an impact on the importance of migration policy in seeking the redress any deficit. It is arguable that the demographic deficit will increase migratory pressures, as labour shortages will push wages up and bring unemployment down. A tight labour market attracts migrants and without them, labour market shortages could lead to reduction in growth and inflationary pressures. Therefore, these aspects need to be considered seriously.

5 IMMIGRATION IN THE ECONOMIC CONTEXT

A strategic goal of the EU for the first decade of this century is to »become the most competitive and dynamic knowledge-based economy able to sustain economic growth and create more and better jobs with greater social cohesion.«⁴⁵ An overall strategy to this end was adopted by the Lisbon European Council, which also pointed to the problems caused by the under-development of the services sector, especially in the areas of telecommunications and the Internet and the widening skills gap, especially in information technology. The strategy outlined by the Council is to raise the employment rate from an average of 61% in 2000 to near 70% in 2010, for women from 51% to over 60%. Charting the progress, the Joint employment report 2000 stressed that further efforts are needed because of a worrying growth in skills shortages and miss-matches in supply and demand for labour. It also reported that shortages in the traditional low-skilled areas, such as agriculture and tourism, are continuing even where there are high levels of unemployment.⁴⁶ These shortages, in view of the Report, could threaten the European Union's competitiveness in the global economy.

In overall, the Commission's Communication on a Community Immigration Policy points to good macro-economic prospects for the European Union and cites a number of benefits to the economy such as the introduction of Euro and the completion of the internal market, as leading to improved growth and job creation with a consequent drop in unemployment. These, the Commission states, provide an ideal environment within which to look at the benefits of increased immigration.

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⁴⁵ COM (2000) 757 final, p. 26.

⁴⁶ See COM (2000) 551 final.

Issues such as possible downturn in the EU economy are not addressed. This, particularly in view of the document's timing, when slowdown of the U.S. economy was already projected, and when similar process could have been expected in the EU economy, reinforces the view that Community institutions as well as the Member States may be too slow to react quickly enough to significant and rapid changes in the labour market. Any Community policy, however, should be able to react rapidly to fluctuations in economy and changes in the labour market. As an example, the significant downturn and investment in the high technology and e-commerce sectors, where rapid growth and skills shortages have been used by the Commission as an example of the need for immigration throughout the paper, has taken place just as these shortages have finally been acknowledged by the Member States, as well as by the Commission in its Communication.

5.1 ACTORS' INTERESTS

The fluctuations in the economy and the often-changing needs for migrant labour highlight the differences between the competing interest groups. The interests of the Member States have historically been driven by the wish to have migrant labour for the shortest possible time. An illustrative example is provided by the *Gastarbeiter* approach when no commitment is given to the security of residence of individuals. From the employer's perspective, there is clearly no benefit having a continuing obligation to employ migrant labour in the event of an economic downswing. From the individual's perspective, migrants' priorities are clearly security of employment and residence, which will effectively compensate for their commitment to a specific labour market. There is a risk that if no such security is provided migrants will be reluctant to take up employment and residence in a particular Member State. Such a reaction was evident in the poor response to the May 2000 German government's launch of a »green card« programme designed to recruit up to 20 000 highly skilled workers from outside the EU. After criticism from human rights groups and gentle reminders from experts about the difficulty of preventing »guest workers« from settling, the government quickly revised its policy to allow for the possibility of settlement and family reunification.

6 THE NEW ECONOMIC MIGRATION?

The Commission recognises that »there is a growing recognition that the »zero« immigration policies of the past 30 years are no longer appropriate.«⁴⁷ It

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⁴⁷ COM (2000) 757 final, p. 3.

should be understood however, that the concept of »zero« immigration brought in the following the economic crisis from 1973 onward, has largely been a fiction, maintained for political ends by Member States throughout the 1980s and 1990s. In reality, even after the official suspension of recruitment programmes, substantial immigration has taken place as a result of powerful supply-push forces and networks giving immigration the form of family rather than worker immigration and as a result of both the liberalisation of trade and the globalisation of the economy. All Member States have, to some extent, admitted economic migrants for the purposes of employment, business and investment during this period. The development of international business across frontiers has continued hand in hand with the transfer of personnel within international companies. Strict labour market testing has sought to protect local labour markets but the reality has been that migrants have always possessed skills and experience, often sectorally based, which could not be found in Member States. The hypocrisy of the »zero« immigration policies has been that they have effectively sanctioned the continued economic migration, often on an entirely discretionary basis, where the grant of work permits has been an exception (or derogation) from the general rule that there should be no economic migration.

6.1 AN »ACCEPTABLE« FACE OF IMMIGRATION - HIGHLY SKILLED LABOUR

Currently there is no doubt that the existing workforce cannot meet the demand for specialised skills in the EU labour market. This is particularly so in the information technology sector where numerous high profile schemes and changes in existing rules took effect in the second half of 2000 in some Member States. The Commission's Communication reflects the arguments for an increased economic immigration, which have been driven largely by the »acceptable« face of migration – that of highly skilled and highly educated migrants, required by the economies of the Member States in its most buoyant sectors and makes it clear that migration for the highly skilled is necessary for the continued economic growth of the EU.

6.2 SOCIAL DIFFICULTIES OF IMMIGRATION - »LOW QUALIFIED« MIGRANTS AND UNDOCUMENTED LABOUR

The assessment of the need for low skilled labour is unsatisfactory. While a certain need for low skilled labour is recognised, concerns are focused on the possible social difficulties of encouraging such labour migration to the EU. The question of low skilled immigration is looked at in the context of a number of problem areas and weaknesses identified in the EU economy, notably the high

unemployment figures. While dispelling myths that immigration contributes to unemployment, the Communication identifies the economic benefits of migration as being more positive in respect of highly qualified migrants, as the low qualified may be competing with national workers for jobs. The Commission sees direct competition between low skilled migrants and national workers, with migrants undercutting local wage rates, as being susceptible to lead to some social unrest.⁴⁸

It is clear from the experiences of the last decades that low skilled migrant workers have filled jobs, which national workers do not wish to do. This is true even at a time of economic prosperity, where the shortage in these areas becomes more acute as the national labour force becomes more prosperous and better educated. Failure to fill these posts with legally resident labour leads to the use of undocumented migrant labour outside the formal economy, often undercutting local workforces and in cases, national minimum wage requirements. It may be argued that the problems of lack of employment and social protection for these 'illegal' migrants is far greater than any perceived social tensions which the Commission believes may exist. The demand for low skilled immigration clearly exists and should be managed in a way that will bring these migrants within the legal framework of migration and social protection. It is clearly accepted within the Commission paper that labour shortages, which exist in a number of fields such as agriculture, construction and domestic services are often met by irregular/illegal labour and that the demand for that labour may add to trafficking in human beings and to migrant workers being exploited and unprotected. The problems of undocumented migrants are also recognised. The Commission observes that these problems have led to several Member States resorting to regularisation and amnesty measures. What is not pointed out is that these measures often lead to the polarisation of public opinion for and against immigration. A more rational immigration policy which aims to channel potential illegal migration into legal channels to satisfy clear labour market demands would go a long way in eliminating both misery of undocumented migrants and the politicisation of the immigration debate.

Therefore, both the EU and Member States ought to take a realistic view as to the need for low skilled labour and should seek to influence the public debate on the need for migration in this context. More should also be said about the positive aspects of immigration in general. The Communication indicates, although tentatively, that immigration may contribute to economic growth and to growth per capita and that the fiscal impact of migration is generally thought to be positive. However, it has not been pointed out that there is little evidence that

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⁴⁸ See Annex 1 to COM (2000) 757 final.

indigenous workers are harmed by immigration. When markets are functioning well, migration usually improves economic welfare, both for the migrant and for the indigenous population.⁴⁹

6.3 ATYPICAL WORK AND SERVICE PROVISION

One of the principal challenges facing Member States is to provide a flexible immigration policy, which reflects the recent structural trends in the labour market. The increase incidence of atypical working, part-time flexible and occasional work as well as a move from the individual as employee to businessperson has been more and more evident, particularly in the last decade. Furthermore, the EU as a whole needs to ensure that it is able to attract not only skilled individuals, but also investment. Recognising the way in which individuals and companies who succeed in a competitive environment operate can aid to do this. If immigration policies for economic purposes are to be successful, they must encompass all types of migrants who benefit to the EU economy. The Community institutions should therefore look carefully at encouraging and developing flexibility within its own policies.

Another issue is the increased liberalisation of trade in cross-border services. These issues are mentioned in passing.⁵⁰ Nevertheless, in the proposed *Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities*,⁵¹ the Commission recognises that a successful policy should provide a place for such short-term migration to take place and encourages the Member States to apply the provisions of the General Agreement on Trade and Services (GATS) in this respect.⁵²

6.4 ACTORS' INTERESTS

Hence, from the Member States' point of view, the demands for labour at both the top and bottom end of the labour market must be addressed. The public debate about illegal immigration is the result of inadequate arrangements at the bottom of the labour market. For business, there is an interest to be able to take on workers who are able to work legally with maximum flexibility. There is also an acute problem of business within the ethnic immigrant communities, which are often perceived as employers of illegal migrants because the nature of their

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⁴⁹ F. Medved, 1998; F. Medved, 2002. But refer as well to COM (2003) 336 final.

⁵⁰ COM (2000) 757 final, Annex 1.

⁵¹ COM (2001) 386 final. 11. 7. 2001. Note: The follow-up decision-making process is not dealt with in this contribution.

⁵² See below, section 7.4.

business mainly involves the employment of low skilled labour. For the individual, the right to security of residence remains paramount, whether at the top or bottom ends of the labour market.

7 TOWARDS A COMMON IMMIGRATION POLICY?

7.1 WHO DECIDES ON APPROPRIATE IMMIGRATION LEVELS?

The intention of the Community immigration policy is not to set »detailed European targets«.⁵³ While accepting that quotas may be impractical for a flexible approach to changing economic needs, the Commission turns instead to establishing »an appropriate system of indicative targets« which would also take in account other than labour market factors such as public acceptance, resources available for reception and integration, possibilities for social and cultural adaptation.

A mechanism established at EU level, based on co-operation exchange of information and reporting, as announced in the Communication, was set out in *Communication on the open method of co-ordination to the field of Community immigration policy*.⁵⁴ The key element of this method are multiannual guidelines, approved by the Council, and accompanied by specific timetables for achieving the goals which they set in the short, medium and long term. They are then to be translated into national policy by the setting of specific targets, which take into account national and regional differences. According to the guideline referring to the admission of economic migrants, a coherent and transparent policy and procedures should be established for opening the labour market to third country nationals within the framework of the European employment strategy.⁵⁵ The admission of economic migrants for economic purposes should, as far as possible, be done also in partnership with the countries of origin and in a transparent and coherent way based on the procedures set out in the Community legislation on the admission of third country nationals for the purpose of taking up employment.⁵⁶ Member States will need to ensure, *inter alia*, that the changes, which might be required, should be decided in consultation with the social partners, national, regional and local authorities, non-governmental organisations, migrants associations and other relevant organisations.⁵⁷ Under such a scenario,

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⁵³ COM (2000) 757 final, p. 16.

⁵⁴ COM (2001) 387, 11. 7.2001.

⁵⁵ The Commission proposed six guidelines in the following areas: management of migration flows; admission of economic migrants; partnership with third countries and the integration of third country nationals.

⁵⁶ COM (2001) 386 final.

⁵⁷ COM (2000) 757 final, pp. 9-10.

Member States will prepare annual National Action Plans, consisting of two parts; the first would review the development and overall impact of their immigration policy over the previous period, including the numbers of third country nationals admitted under the various categories and their situation in the labour market; the second would set out the Member States' future intentions on immigration, including a projection of labour migrants they would wish to admit as set in their National Action Plans for employment.⁵⁸ On the basis of these reports the Commission will prepare a synthesis report of the implementation of the common policy, drawing attention to common problems and identifying areas where European solutions might be appropriate. The preparation of this report will be co-ordinated with the corresponding reports on employment and social inclusion.⁵⁹ This entails that the responsibility for dealing with the labour market aspects of immigration should lie with the bodies responsible for the implementation of the European employment strategy at both Member State and Community levels.⁶⁰

The assessment of appropriate immigration levels is clearly left in the hands of the Member States. As they continue to be responsible for the selection of economic migrants and for deciding how many are needed to meet national requirements, it is likely that the indicative targets established under the Community immigration policy would effectively be treated as quotas and that migration over and above those would politically be extremely difficult. However, the nature of economic migration is no longer one where the State is the primary determiner of the need for labour. The EU economy has moved from one where the State was the main employer of labour (and thus having competence to recruit labour itself) to one where many of the fields within State control in the 1950s, 1960s and 1970s have moved into the private sector.⁶¹ Although, particularly in the area of health, the State retains an important remit in assessing the need for migrant labour, it is the market that takes the lead. The deregulation of the EU economy, a process brought about in no small part by the exercise of the Community's powers, has defined the role of the government as framing the economic environment within which businesses flourish, not as one where the State should be directly involved in the economic decisions of those businesses. It is to some extent inconsistent to approach future EU immigration from a perspective which involves not only a major involvement by the Member States but also by

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⁵⁸ COM (2000) 757 final, p. 16 and COM (2001) 387, p. 12.

⁵⁹ COM (2001) 387, p. 13.

⁶⁰ In addition the Commission believes that a more open admissions policy should be accompanied by additional measures to eliminate undeclared work which itself encourages illegal migration, smuggling and trafficking.

⁶¹ See below, section 7.4.

the Community in the decisions of those businesses which require migrants for their own success.

While it is certainly important to ensure that migration policy is complementary and consistent with other internal and external policy areas so that they are mutually reinforcing within a context of sustainable development, it is - to some extent - difficult to see the benefit of the synthesising of information on the admission of migrants and in laying down principles of the «common approach» to be implemented within the EU. Will this genuinely assist economic needs of business in a fast moving and highly competitive market? As has been seen in the recent past, translating grass roots business need for migrant workers, particularly the highly skilled, into positive action by Member States to allow for the admission of those workers, is often a lengthy process. For this process to be further lengthened by the Community's common approach may not assist EU businesses and the economic sectors concerned.

In addition to assessing the level of migration, it is also important to recognise that some European industries, particularly small and medium sized, often need to recruit migrants quickly. The application of assessment procedures, involving co-operation of a range of institutions (governments, regional and local authorities, social partners, non-governmental organisations, migrants and international bodies) could make the process extremely cumbersome and damage the flexibility of recruitment of labour from outside the EU.

7.2 ECONOMIC NEEDS TEST

Finally, the principle of «respect for the domestic labour market situation» which is currently applied in all Member State is not intended to be touched.⁶² The Commission recognises that industry should be assisted and that employers need «a practical tool» for demonstrating that there is a concrete shortage on the EU labour market⁶³ but does not encourage enough flexibility on this issue. The «*economic needs test*» and «*beneficial effects test*» as the proposed criteria in the common legal framework on admission of third-country nationals to employed and self-employed economic activities needs to address the realities of how businesses operate.

A practical tool for employers as designed in the proposed Directive, provides for an *individual assessment* of compliance with the requirements of the Directive: if employers have published a job vacancy via the employment services of

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⁶² COM (2001) 386 final, Article 6.

⁶³ COM (2001) 386 final, Explanatory Memorandum, p. 2.

several Member States, e.g. by means of the European Employment Services Network (EURES), for at least four weeks and if they have not received an acceptable application from within the EU labour market, from the Candidate States or certain persons privileged under international agreements, they will be allowed to recruit a third country national.⁶⁴ As regards self-employed persons, third country nationals must show that the activity will create a job for them and will have a beneficial effect on the economic development of the Member State concerned.

It is not difficult to see that most high skilled posts are not advertised by the employment services of Member States but through other means such as newspapers, specialised publications, recruitment consultants or the Internet. In many cases, it would be better not to apply the economic needs test, especially when there are recognised labour shortages in specific sectors and in cases where employment of migrant workers involve extremely highly experienced or skilled individuals and/or accompanying investments into the EU economy.

Some options are given in this direction to the States rather than employers. Member States shall have a possibility for a *horizontal assessment* to react - with-in »transparency provisions« of the Directive - to worker shortage in a specific sector, by establishing, for instance, national »green-card programmes« for the recruitment of certain specialists and to fix - at national level - appropriate *income thresholds*.⁶⁵ This is based on the idea that the high-income sector of the European labour market needs less protection and can afford to be more open to global competition. Another option or idea of »competing for successful models« is an »employers contribution«, an extra premium for recruiting a third country paid by the future employer to the competent authorities.

7.3 COMMON LEGAL FRAMEWORK

The common legal framework on admission of economic migrants as one part of the »two-tier approach« on Community immigration policy was proposed at the same time as co-ordination mechanism.⁶⁶ The proposed Directive deter-

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⁶⁴ It needs to be added here that the exact terms of possible restriction of access of citizens of the new EU Member States to the labour market of the EU-15 will be determined in the Accession Treaties. Currently, the EU Common Position on Chapter 2 - Free Movement of Workers states that current Member States will introduce a preference for new Member State nationals over non-EU labour.

⁶⁵ On »green-card« legislation in four European states see J. Apap, 2003.

⁶⁶ Other categories of migrants such as asylum seekers, family members of citizens of the EU or third-country nationals, third-country nationals established within the Community who are posted worker for the purpose of providing cross-border services or who provide such services are - or will be - covered by other directives or regulations.

mines common definitions, criteria and procedures regarding the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed. It seeks to provide a single, simplified national procedure for issuing a combined title - residence and work permit in one administrative act - and standards of the differentiating rights of third-country nationals according to length of stay. It also allows for special residence permits to be issued to certain other categories such as »seasonal workers«, »transfrontier workers«, »intra-corporate transferees«, »trainees«, »youth exchange«/»au pairs«. ⁶⁷ The directive will apply except where bilateral or multilateral agreements contain more favourable provisions. These may also be applied to university students, artists, journalists, professional sportsmen, members of religious orders and representatives of non-profit making organisations.

The creation of a single national application procedure leading to one combined title will contribute to simplifying and harmonising the diverging rules currently applicable in Member States. For Member States this may be an incentive to streamline their internal administration and to avoid duplication of work. The residence permit will initially be valid for a period of up to three years and initially restricted to the exercise of certain fields of activity or to paid employment in a particular region. It will be renewable for a further three years only. After five years the »horizontal« provisions of the draft *Directive concerning the status of third country nationals who are long term residents* would phase in and workers who have fulfilled the conditions for »long-term residence status« could apply for it. ⁶⁸

The holder of a »residence permit – worker« will enjoy various rights, notably the right: to enter and reside in the territory of the Member State that issued the permit, even after a temporary absence; to pass through other Member States and to exercise the activities authorised by the permit; to enjoy the same conditions as EU citizens (working conditions, pay, vocational training, social security, medical care, freedom of association). The latter catalogue of rights is aligned with the catalogue of rights proposed in Article 12 of the proposed Directive on long-term resident third-country nationals but is less exhaustive, in line with the principle that that rights of third-country nationals should be incremental with their length of stay.

The directive on economic admission leaves a high level of discretion to

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⁶⁷ The proposal defines also a number of other key terms, such as 'third-country nationals' or 'activity as an employed or self-employed person'.

⁶⁸ COM (2001) 127 final. The present analysis refers to the original proposal not including amendments. It has to be stated however, that the Council reached political agreement on draft Directive on June 5, 2003. See PRES/03/150.

Member States. They may apply horizontal measures (ceilings and »quotas«). Member States must adopt the necessary provisions to comply with the directive by 1 January 2004. However, Title IV of the EC Treaty does not apply to the United Kingdom and Ireland unless they decide otherwise. Likewise it does not apply to Denmark. Furthermore, although article 63 of the EC Treaty as a 'five year window' for the 'communitarisation' of specified migration measures is formally set out and the process should be over by 1 May 2004, measures to be adopted pursuant to points 3 (a) and 4 shall not be subject to a five year period. It is with this in mind that it should be considered what Europe has already agreed upon in »common« immigration policy and particularly what model could (or should) be developed for economic types of migration.

7.4 WHAT MODEL SHOULD EUROPE DEVELOP FOR ECONOMIC TYPES OF MIGRATION?

When constructing a viable common immigration policy for economic purposes we should first bear in mind successes and failures of known models. Two main models were dominant in the post World War Two period: the ILO and GATS models.

a) The ILO model

The model prevailing in the period of massive effort to reconstruct the war-ravaged economies of Western Europe was based on bilateral agreements with labour-rich countries in Southern Europe and Turkey and allowed recruitment of millions of guest workers during the 1950s and 1960s. In spite of some distinctions between European states, guest worker migrations were primarily seen to be economic in nature. Foreign workers constituted a kind of economic shock absorber (*Konjunkturpuffer*); they were brought into the labour market during periods of high growth and low unemployment, and they were supposed to be sent home during periods of recession and rising unemployment. It also seemed logical that in such circumstances guest workers should behave according to the laws of supply and demand.⁶⁹ The international stage for providing both state and non-state collective recruitment of labour was set by the 1949 International Labour Organisation (ILO) Convention 97 concerning migration for employment.

The ILO framework, complemented by other ILO and the Council of Europe activities regarding the treatment of migrant workers, gives legitimacy to the

⁶⁹ See e.g. M. J. Miller and P. L. Martin, 1982; S. Castles and G. Kosack, 1973; W. A. Cornelius *et al.* (eds.), 1994; C. Joppke, 1998.

authority of the State's monopoly over the means of movement to work and assists companies based in the destination state to find suitable workers. Individual is clearly the object of the labour recruitment activity, but there is little space allowed for the individual's active role. The protection of the individual migrant worker was, in theory at least, the responsibility of the State of nationality or protected in accordance with the interests of the host and home states. Security of work and residence and family reunification were excluded and the State's monopoly over security for aliens was broken only by the decisions of the European Court of Human Rights specifically concerning Article 8 of the ECHR.

Rising unemployment rates in northern Europe combined with the rise in oil prices led to a political 'stop' on state labour recruitment and sanction. The use of work permits changed and they became a mechanism of the State's protection of the domestic market. The political commitment to guarantee a right to work for their nationals created a direct conflict with the interests of companies in the recruitment of foreign labour. The test applied became one of the determining whether indeed there was a need for the admission of migrant workers to fill labour market gaps described by private enterprises. So long as the State's political priority was to ensure the availability of employment for domestic labour force, the interest of companies to import workers would be in principle illegitimate and only approved of as a matter of exception. The migrant's interest in a secure residence right independent of employment became paramount. A right to secure residence, which provides free access to the labour market, has developed in EU Member States from approximately 1965 onwards.

b) The GATS model

With the rise of a new service industry, the corporate regulation of labour migration was negotiated within the World Trade Organisation Agreement. The GATS as one of the integral parts of the WTO includes services, which involve movement of persons. The provisions of GATS are designed to ensure market access for service providers or, in other words, to restrict the power of States to impede access to their territory by foreign competitor in the service field through the use of restrictive labour migration laws. The individual is dependent on the economic activity, both security of residence and family reunification are not regulated, and she or he is increasingly dependent on the company for the protection against the control capacities of the state.⁷⁰

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⁷⁰ See E. Guild, 2002.

c) The EC model

A quite different legal framework for labour migration has been worked out within the European Community. Movement of persons is seen as an important part of European economic integration and for this vision the role of individuals, as the means of production, has been critical. Two of the four freedoms, i.e. freedom of movement of persons and services involve the right of movement of natural persons. This alternative approach, expressed in the EC Treaty (and earlier EEC Treaty) was developed for migration of nationals of the Member States and has been driven principally with a view to completing the Single Market. The Community put into a place a model for migration which placed a strong emphasis on the rights given to individual workers, the self-employed and service providers and recipients, rights guaranteed by the Community and subject only to derogation by Member States in very specific circumstances. The Community's model clearly sought to balance the interests of the Member States to protect their population from threats to public policy, the need of business for labour and the need of individual migrants to exercise a choice to move for economic purposes and to have security of residence and benefit from equal treatment. This has been a successful example of managing migration for an economic end with the emphasis firmly placed on the right of the individual.

However, the Community's experience of extending free movement provision to third country nationals has been less successful. The extension of economic migration rights to nationals of European Economic Area (EEA) countries was uncomplicated, but numerous agreements with other third countries, starting with the 1970 Protocol to the Turkey Agreement, the 1976 Maghreb Agreements (replaced by the 1995/96 Euro-Mediterranean Agreements), the Europe Agreements and the Co-operation and Partnership agreements with the CIS states (P&C Agreements) have proved more problematic. This has been due largely to the reluctance of the EU Member States to accept the extent of the free movement provisions contained in those agreements and implementing decisions. For example, some provisions of the Europe Agreements are delayed for some Candidate States. There are also sectoral limitations, which are to be lifted in accordance with a timetable and the possibility of temporary suspension of the provisions under specified circumstances. Partly this is a result of the »zero« immigration period in which these agreements had been negotiated and the strong emphasis on aspects of policing and security rather than thinking about the economic benefits or implications of migration policy.

In the Community's approach to economic migration within and from outside the EU we can find aspects of both the ILO and GATS models. The emphasis on equal treatment in working conditions, remuneration and social security is reminiscent of ILO 97. It is found in the EC Treaty and is incorporated into all

Community's third country agreements, which include provisions on labour. Similarly the GATS approach is to be found in the Community's interpretation of the right of an enterprise within the Community to send its third country national personnel anywhere in the EU to carry out service provision. Further, the approach has been formally introduced into all of the post-1994 third country agreements of the Community, which include provisions on services. A more sophisticated version of the GATS provision is included in the Europe and the P&C Agreements, permitting enterprises to move their key personnel in order to carry out their service provision and establishment rights. This type of temporary migration is likely to expand. Recently some sectors have been consistently reporting labour shortages and more use of possibilities under the GATS have been looked for, also as a result of the Doha Development Agenda (so-called »Mode 4«).

8 CONCLUSION

It is undeniable that the EU is advancing towards a common immigration procedure. However, the question is when and how such a system will be set up. In my view, any European immigration policy ought to take place within the framework, which protects the rights of migrants, meaning that a Community immigration policy should adopt a rights-based model. This does not mean advocating that there is a human right to migrate for any purpose whatsoever, rather it means that migration law regarding any form of migration should be set out in legally binding rules that can be interpreted and enforced by courts and tribunals, which can consider the merits of the authorities' decisions when applying those rules. This is the approach applied by Community law regarding entry of third country goods and capital, and to a large extent services and establishment. The binding rules need not be as liberal as the rules governing movement of citizens of the European Union, just as the rules governing entry into the Community of third country goods, services and capital are not as liberal as the rules governing movement within the Community. Thus, the Community has to be brought into the relationship between the State, business and individual so that the enforcement of rights granted to an individual under Community law is also governed by Community law. According to my reading the Commission in its immigration policy proposals endorses this view and in a long term such a common European immigration policy would be common enough to benefit all actors involved.

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