Asylum and immigration: difficulties of a common approach

Despite the so-called “zero immigration” policy advocated by EU governments in the 1980s, migration into the European Union never really came to a halt. The increase in the flow of migrants since the start of the 1990s is both a reflection of the changes which have occurred since the Berlin Wall came down and a consequence of war in the Balkans, the attraction of the Union in Asian countries and globalisation. Having acknowledged through gritted teeth the need to permit a little more legal immigration, the fifteen “old” Member States nevertheless decided to have recourse to measures negotiated in the accession treaties with the new Member States enabling them to derogate from the *aquis communautaire* in respect of free movement for workers. Yet immigration and asylum policies require, above all else, cooperation with neighbouring countries. As far as asylum is concerned, the Member States seem less concerned about protecting asylum seekers than about devising policies to prevent them from entering the territory of the Union. As is clear in the case of measures to combat illegal immigration, what really counts is the existence of political will. Although the Union’s powers in this field are of recent date, the complexity of the decision-making process is at least partially to blame for the lack of ambition evident in the texts adopted at European level. There is a good deal of vocal opposition and resistance. Certain aspects of the Constitution undeniably make the procedures more democratic, without however enabling the Union to define a genuine common policy on labour market access.
1. Europe, a reluctant land of immigration

Having long been a land of emigration, especially to the United States, Europe has become a continent of immigration. Since the 1990s, the migrants flowing into Europe have been more numerous than those bound for the United States. A report published by the United Nations in March 2000 about demographic trends over the next fifty years argued for “replacement immigration” with a view to offsetting the inevitable decline in Europe’s population (United Nations, 2000). The report envisaged net annual migration of 857,000 individuals. This document was highly controversial in that it raised the question of a more open European migration policy as a solution to the demographic deficit, while at the same time asking how pension systems are to be funded and how older workers can be retained in the labour force. Owing to the closure of legal immigration channels, would-be immigrants are using the political asylum route for purposes of economic migration. Consequently, the EU Member States have gradually toughened the conditions for granting refugee status; what has followed is a curtailment of a fundamental right of persons fulfilling the criteria laid down by the Geneva Convention and other international texts.

Certain traditional countries of emigration are now becoming the chosen destination of migrants, including those coming from east European countries. This is particularly true of Spain, Ireland, Portugal and Italy. The new Member States are also experiencing migration flows and have, since enlargement, become an access route into the territory of the Union. The migrants concerned do not necessarily intend to settle permanently: cross-border commuting (Wihtol de Wenden, 2004), namely temporary migration involving some to-ing and fro-ing, is another new dimension in the migration flows from east European countries (seasonal and farm workers, domestic servants, builders, etc.). Some EU countries are drawing on highly skilled foreign labour, authorised to enter their territory subject to quota limits (most notably Germany). Other temporary stays for service providers are negotiated.
under the auspices of the GATS Agreement (General Agreement on Trade in Services) (1).

2. Free movement for persons and enlargement

As the Commission notes in its first report on immigration, “It is, however, not only high skilled labour that is in demand as some, in particular Southern European countries or recent immigration countries, have a need for low-skilled workers” (CEC, 2004a: 4). In this report, the Commission gives a picture of migration trends in Europe, looking at changed immigration patterns and describing action taken at national and European level in respect of admission and integration. It sets out the changes experienced within the new Member States which, having previously been countries of emigration, are now attracting immigrants from the countries of the former Soviet Union and the Balkans. This immigration is helping to make up for a labour and skills shortage. Several publications have dealt with the population movements coming from the new Member States, fuelling fears that a massive influx would occur after enlargement. A study carried out by the Dublin Foundation on migration trends in the enlarged Europe, and published belatedly, took a more considered view of these arguments (2). This study did not contest the aptness of the transitional measures negotiated in the run-up to accession, but nor did it predict that nearly all the Member States would resort to them. The result has been a two-speed approach to European citizenship as concerns labour market access, which constitutes real discrimination between citizens of the Union.

In principle, European citizens enjoy freedom of movement and the right to settle anywhere on the territory of the Union. These rights have been fashioned on the basis of economic rights and enshrined in a directive (European Parliament and Council of the European Union, 1999). However, as concerns labour market access, which constitutes real discrimination between citizens of the Union.

1 “Mode 4” of the GATS concerns the movement of natural persons, mainly highly skilled people, with a view to carrying out service contracts as self-employed workers or as employees of foreign service companies coming to Europe for a fixed period of time to work as sub-contractors.

But the directive’s provisions apply only in part to nationals of the new Member States following their accession on 1st May 2004, on account of the transitional measures written into the accession treaties (apart from those of Cyprus and Malta) in respect of free movement for workers. These measures derogate from the principles laid down by various European texts (Council of the European Communities, 1968a and 1968b; European Parliament and Council of the European Union, 1996) and authorise the fifteen former Member States to regulate access to their labour markets for a maximum period of seven years (two plus three plus two years). These measures, denounced by citizens of the new Member States who feel that they are being treated as second-class citizens, will be reassessed by the Commission at the end of a two-year period. The general transition period is scheduled to end after a five-year period, i.e. on 30 April 2009. Should the labour market suffer serious disruption, the Fifteen may be authorised to keep their national measures in place for a maximum period of two more years.

Ireland and Sweden have refrained from restricting access to their labour markets (3). Access is also free in the United Kingdom, but a registration system has been introduced with a view to monitoring the impact of EU enlargement on the UK labour market. Social security legislation has been amended so that access to certain benefits is now means-tested. The measures taken vary from one Member State to another. For instance, Germany and Austria – on which, for historical and geographical reasons, enlargement is likely to have the biggest impact – may well restrict labour market access to a greater extent than the rest of “old” Europe (especially with regard to self-employed persons providing certain services, above all in the construction industry).

Fears of a massive influx of workers from a new Member State are even more real in view of the prospect of Turkish accession. In its recommendation on Turkey’s application, the European Commission envisaged for the first time the possibility of introducing permanent safeguard measures relating to free movement for citizens/workers (CCE, 3)

---

3 In Sweden, the Parliament (Riksdag) rejected on 28 April 2004 a government bill to limit free movement for workers from central and eastern European countries for a period of two years.
This was one of the elements considered by the European Council in December 2004 which scheduled the start of these negotiations for 3 October 2005, linking the negotiating process with unprecedented restrictions that could quite simply lead to a breakdown in the process if the terms of the agreed negotiating framework are breached.

3. The external dimension

With regard to external relations, the EU endeavours to integrate immigration policy into its relations with third countries, and more particularly the management of migration, to include combating illegal immigration and trafficking in human beings (CEC, 2002). To this end the Union has developed a network of “immigration liaison officers” in third countries in order to establish and maintain contact with the host countries’ authorities. Their role is to help prevent and combat illegal immigration, as well as assisting with the return of illegal immigrants and the management of legal immigration (Council of the European Union, 2004a: Article 1). The EU also runs a technical assistance programme for the benefit of third countries, aimed at backing their efforts to better manage all aspects of migration flows (European Parliament and Council of the European Union, 2004b). This multiannual programme (2004-2008) has a budget of €250 million and “is particularly, but not exclusively, intended for those third countries actively engaged in preparing or implementing a readmission agreement initialed, signed or concluded with the European Community” (European Parliament and Council of the European Union, 2004b: 2).

Five main areas are identified for action: drafting legislation on legal immigration; disseminating information on the opportunities for legal immigration and the consequences of illegal immigration; developing international protection; establishing a policy to combat illegal immigration, including measures to combat the trafficking of human beings and the smuggling of migrants; and the readmission and reintegration of persons who are sent back. The programme can provide support for various initiatives such as information campaigns, aid for the creation of asylum and migration management systems, the establishment of systems for the collection of data on migration phenomena and exchanges of information on migration trends, especially towards the Union, and support for the reintegration of persons who return to their country of origin.
Since enlargement, the Union has also been faced with managing its new external borders. This has entailed drawing up a new Neighbourhood Policy, one aspect of which relates to migration (CEC, 2004c) (4). The Union’s stated aim is to export “stability, security and well-being for all concerned” and “to avoid new dividing lines at the borders of the enlarged Union”. One of the means to this end is the establishment of a new “Neighbourhood and Partnership Instrument”, one of six instruments intended to replace the Union’s existing external relations tools and focused on fostering cross-border relations (CEC, 2004d). This also requires the adoption of national action plans, the first of which were adopted by the Commission in December 2004 (CEC, 2004e) (5). These action plans, based on existing association or partnership or cooperation agreements, share common principles but are tailored to each country’s specific circumstances. One of the first plans sets out the framework for relations between the EU and Ukraine. The crisis unleashed in Ukraine at the time of the presidential elections in late 2004 highlights the importance of fine-tuning these agreements on a case-by-case basis. It may well be that the terms of the plan proposed in December fail to meet the European aspirations of the Ukrainian President, Mr Yushchenko. The way in which these relations evolve will speak volumes about the Union’s future borders but also about the EU’s relations with Russia, a country which has by no means fully accepted Ukraine’s independence and from which the last vestiges of dictatorial and imperial pretensions have yet to disappear.

4 The countries in Europe covered by the Neighbourhood Policy are Russia, Ukraine, Belarus and Moldova. But Russia has opted to establish a special partnership. In the Mediterranean region, with the exception of Turkey which is engaged in a pre-accession strategy, the Policy applies to all of the non-EU countries participating in the “Barcelona process”: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Syria, Tunisia and the Palestinian Authority. The Brussels European Council of June 2004 welcomed the Commission’s proposal on the European Neighbourhood Policy as well as the one on including Armenia, Azerbaijan and Georgia.

5 The countries concerned are Israel, Jordan, Morocco, the Palestinian Authority, Tunisia and Ukraine.
4. From the Amsterdam Treaty to the draft Constitution: a Europe of variable geometry

Having progressed from a total lack of powers to the development of negative powers during the course of the 1980s, the Community/Union had very little say until recently in the highly sensitive area of immigration policy. The Maastricht Treaty had introduced a new “third pillar” on cooperation in the field of justice and home affairs, which included asylum and immigration measures in the same context as measures to combat terrorism and crime (6). The Amsterdam Treaty, signed in June 1997, introduced a new objective for the Union: to establish an area of freedom, justice and security, based on the one hand on a new Title IV of the EC Treaty concerning “Visas, asylum, immigration and other policies related to free movement of persons” and, on the other, on the revised provisions of the third pillar on police and judicial cooperation in Title VI of the EU Treaty. This had the merit of dissociating asylum and immigration matters from those related to the fight against crime.

At the same time, another consequence of the Amsterdam Treaty was to incorporate into the EC and EU Treaties the cooperation already underway between certain Member States in the framework of the Schengen Agreement. Moreover, the right of Ireland and the United Kingdom to take part in – or to remain outside of – the process of adopting decisions covered by Title IV, together with Denmark’s opt-out from the same Title, illustrates the high degree of complexity created by the Amsterdam Treaty. The Treaty of Nice failed to simplify the complex state of affairs created by the Amsterdam Treaty: it paved the way for more use of the Community method but in a gradual and limited fashion (see Box). The Treaty of Nice also leaves intact the restrictions which the Amsterdam Treaty placed on the powers of the Court of Justice in Title IV areas. It likewise preserves the derogations to the Amsterdam Treaty negotiated by the United Kingdom and Ireland on the one hand and by Denmark on the other.

6 For the record, the Maastricht Treaty bases the European Union on three “pillars”: Community policies (agriculture, transport, etc.); the common foreign and security policy; and justice and home affairs.
Complexity of the decision-making process

Until 1st May 2004, the Council acted unanimously after consultation of the European Parliament for the adoption of texts concerning asylum and immigration, with the exception of visa policy. The Commission did not possess its usual exclusive right of initiative, since individual Member States were also able to submit proposals. Since then, the Commission has regained its right of initiative but must examine any initiative taken by a Member State calling on it to submit a proposal to the Council. Qualified majority voting (QMV) is applied in three different ways (a qualified majority with or without co-decision; dependent on the adoption of earlier measures; applicable at the end of a five-year period following the entry into force of the Amsterdam Treaty, i.e. on 1st May 2004). QMV and consultation of the European Parliament have applied to visa policy since the entry into force of the Amsterdam Treaty (list of third country nationals subject to a visa requirement and establishment of a uniform format for visas, Article 62(2b i & ii). QMV and co-decision of the European Parliament are used since 1st May 2004 for the procedures and conditions for issuing visas by the Member States and rules on a uniform visa, Article 62(2b ii & iv). Administrative cooperation measures have since 1 May 2004 been adopted by the Council acting by a qualified majority on the basis of a proposal from the Commission and after consultation of the European Parliament. As far as asylum is concerned, the move to QMV with co-decision by the European Parliament takes place only once the basic legislation has been adopted. The same applies to measures concerning refugees and displaced persons: these measures consist in laying down minimum standards for granting temporary protection to displaced persons from third countries who cannot return to their country of origin and to persons who otherwise need international protection. QMV and consultation of the European Parliament have applied to new fields of visa policy since the Amsterdam Treaty entered into force (list of third country nationals subject to a visa requirement and establishment of a uniform format for visas, Article 62(2b i & ii)).

The five-year period which expired on 1st May 2004 did not apply to the adoption of measures in the following areas: receiving refugees and displaced persons, legal immigration – mainly the conditions for entry and residence; the procedures for issuing visas and long-term residence permits, including for the purposes of family reunification; setting out the rights and conditions under which third country nationals who are legally resident in a Member State may reside in other Member States. The adoption of these measures requires a unanimous decision of the Council based on a proposal from the Commission or from a Member State, with mere consultation of the European Parliament, unless the Council were to decide otherwise and resorted to the *passerelle* article. Declaration No.5 invited the Member States to draw on this article as from 1st May 2004 with a view to applying the co-decision procedure in respect of free movement for third-country nationals for a maximum period of three months and in respect of illegal immigration. This likewise applied to checks on persons at the external borders, starting from the date of an agreement reached on the scope of the measures concerning the crossing of the external borders. The Council took up this invitation at the end of 2004 and slightly extended its scope (see below).
The EC Treaty likewise contains a so-called passerelle mechanism enabling the Council, from 1st May 2004 onwards, to decide unanimously after consultation of the European Parliament to move to co-decision and to extend scrutiny by the Court of Justice to some or all of the areas under Title IV. Declaration No.5 authorises the Council to apply this mechanism as from 1st May 2004 in respect of free movement of third country nationals (Article 62(3)) and illegal immigration (Article 63(3b)). After much discussion, the Council has successfully resorted to the use of this mechanism, which is by no means applicable to all the “freedom” aspects of Title IV, as was originally proposed by the Netherlands presidency of the Council; it does nonetheless go slightly beyond the terms previously agreed at Nice (see below).

5. The draft European Constitution

The Intergovernmental Conference (IGC) did not call into question the results of the European Convention as concerns asylum and immigration, which went a considerable way towards making the procedures more democratic. As part of the area of freedom, security and justice, asylum and immigration policies are among the shared competences between the Union and the Member States. By contrast with the existing situation, the Commission entirely regains its right of initiative, and the normal legislative procedure (a qualified majority in the Council and co-decision with the European Parliament) becomes the rule for the adoption of European laws and framework laws on asylum and immigration. Such legislation covers all the areas set out in the Tampere programme, including aspects related to integration policy and the definition of the rights of third-country nationals who are legally resident, but without envisaging any new rights for long-term residents. The measures adopted will be subject to scrutiny by the Court of Justice. This is a significant change, once and for all putting an end to an approach characterised ever since the incorporation of the Schengen Agreement by the rejection of any supranational judicial scrutiny (Bigo and Guild, 2004).

In a break with the principle whereby the European Council has no legislative competence, the Constitution sanctions the existing practice by writing into the text the current role of the European Council in
determining strategic orientations for legislative and operational planning in the area of freedom, security and justice. The Commission and European Parliament are not involved. A new mechanism is created for the purpose of assessing policy implementation with a view to realising the area of freedom, security and justice (Title IV of Part Three); the European Parliament and national parliaments will be kept informed of this assessment. Scrutiny by national parliaments is stepped up in the context of police and judicial cooperation in criminal matters: a quarter of all the votes allocated to national parliaments (instead of a third) will be sufficient in order for a reasoned opinion to be forwarded to the Commission regarding non-compliance by a draft legislative act put forward in the context of the area of freedom, security and justice. The procedures vary depending on what action is envisaged at EU level. This applies to the adoption of measures where there is a sudden influx of third-country nationals: such measures will take the form of Council “regulations” or “decisions”, with the Council acting by a qualified majority on a Commission proposal and after consulting the European Parliament. Finally, as concerns policies on external border checks, asylum and immigration, the politically highly sensitive principle of solidarity and a fair sharing of responsibilities among Member States is sanctioned, including from a financial point of view.

Nevertheless, many factors still stand in the way of defining a genuine immigration policy. Firstly, following intense pressure from Germany, the Union will not have the right to determine the number of third-country nationals entitled to enter the Union; the Member States will retain responsibility in this field. Secondly, on the subject of social security for migrant workers, whereas Article 42 of the TEC provided for unanimity in the Council and co-decision with the European Parliament, the Convention laid down the ordinary legislative procedure, namely a qualified majority in the Council and co-decision with Parliament. The price paid for the IGC’s retention of the ordinary legislative procedure was the inclusion of an “emergency brake”, i.e. the possibility for a Member State to refer the decision to the European Council. That body must then refer the matter back to the Council within a period of four months and lift the suspension of the procedure or else ask the Commission to submit a new proposal. This mechanism, which makes no provision for enhanced cooperation among Member
States wishing to forge ahead (as is the case in respect of judicial cooperation in criminal matters), could ultimately lead to paralysis within the Union. Thirdly, concerning employment conditions for third-country nationals, the current situation under Article 137 of the TEC is maintained, namely a decision taken by the Council acting unanimously, consultation of the European Parliament and a passerelle mechanism enabling the Council to decide unanimously to make the ordinary legislative procedure applicable to this matter. Finally, these proposals did not enjoy the support of all Member States, and the most stubborn ones have managed to preserve their derogations. Variable geometry has been maintained: the United Kingdom and Ireland on the one hand, and Denmark on the other, have managed to keep their opt-outs (7).

6. From Tampere to the Hague

After the entry into force of the Amsterdam Treaty and following the Vienna Action Plan (Council of the European Union and CEC, 1999), the Tampere European Council adopted guidelines and priorities aimed at establishing a common asylum and immigration policy with a view to realising the area of freedom, security and justice. Under this approach, the separate but closely linked issues of asylum and migration required the development of a common EU policy comprising the following four aspects:

- partnership with the country of origin;
- a common asylum system;

7 In Denmark’s case the Protocol reflects the current situation: the country will not participate in the adoption of measures related to the realisation of the area of freedom, security and justice (Part III, Title III, chapter 4 of the Constitution). A new sentence was introduced in the Protocol whereby “it would be in the best interest of the Union to ensure the integrity of the acquis in the area of freedom, security and justice” (Protocol No.20). The opt-out of the United Kingdom and Ireland concerns provisions on policies related to border checks, asylum and immigration (section 2) but also judicial cooperation in civil matters (section 3) (Protocol No.19). It likewise concerns the mechanism for assessing the implementation of EU policies in the area of freedom, security and justice. The state of affairs created by the Protocol on the Schengen acquis incorporated into the context of the European Union also remains unchanged (Protocol No.17).
- fair treatment for third-country nationals;
- management of migration flows.

At the request of the Tampere European Council, the Commission drew up a six-monthly scoreboard for gauging progress. The difficulty of attaining the goals laid down in the five-year programme adopted by the Tampere European Council in 1999 for the development of asylum and immigration policies can be explained by the specific nature of the institutional and decision-making context resulting from the creation of an area of freedom, security and justice (CEC, 2004f). The different EU Member States’ conceptions of migration policy reflect the diversity of policies dictated by political circumstances and by labour market requirements. Population ageing is a growing trend, including after enlargement to take in ten new countries since they are confronted by the same phenomenon. Yet the need for foreign labour to compensate for shortages on the EU’s labour markets has been acknowledged by the Commission ever since the year 2000 (CEC, 2000).

The Commission’s proposed introduction of an open method of coordination (OMC) in this field has been without consequence in the Member States (CEC, 2001a). At the same time, the Commission put forward a proposal for a directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities (CEC, 2001b). This draft was never discussed. However, even though there is no formally approved OMC, mechanisms have nevertheless been put in place for exchanging views. A group of experts, the Immigration and Asylum Committee, was instituted by the Commission in 2002. In addition, it also established the European Migration Network as a pilot project to analyse the political, legal, demographic, economic and social aspects of migration and asylum. Information in specific fields is exchanged by the national contact points on integration, set up by the Commission in 2003, and, within the Council, by the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI) (Council of the European Union, 1994). The Commission also published in June 2004 a study on the links between legal and illegal immigration, in which it argues for an intensification of information exchanges as well as consultation and cooperation among
Member States. It announced a public consultation and the publication of a Green Paper on whether or not the admission of persons for economic reasons should be governed at EU level (CEC, 2004g).

From one report to the next, the Commission's attempts to put the definition of a genuine immigration policy on the European agenda have encountered resistance from national governments. Few texts on the rights of third-country nationals have actually seen the light of day, and even those contain a number of derogations. The goals set out at Tampere with a view to a common immigration policy are certainly still a long way off. The directive on family reunification (Council of the European Union, 2003a) and the one on long-term residents (Council of the European Union, 2003b) were adopted only after the addition of several national derogations. In connection with the Lisbon strategy, the Commission put forward a number of proposals intended to facilitate the admission of third-country nationals to carry out scientific research in the European Community (CEC, 2004h). It is estimated that 700,000 such researchers will be required by 2010. The Justice and Home Affairs Council of 19 November 2004 reached a political agreement on the draft directive and scheduled its implementation for the end of 2008. Finally, having been the subject of a political agreement on 30 March 2004, the directive on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service was formally adopted by the Council in December 2004 (Council of the European Union, 2004b) (8). The United Kingdom, Ireland and Denmark stood aside from the adoption of these texts.

7. The Hague Programme

The Hague Programme was drawn up at an informal meeting of the Justice and Home Affairs Council held in Scheveningen, near The Hague (Netherlands), on 30 September – 1 October 2004. It provoked a good deal of debate on account of the questions raised about asylum,
in view of the events of the summer and the human tragedies which had occurred in the Mediterranean. By way of a response, the German and Italian Ministers of the Interior, Otto Schily and Giuseppe Pisanu, had on 12 August floated the idea of creating reception centres outside of the EU to process asylum applications, or the “outsourcing of asylum procedures”. Meanwhile, the “G5” – which brings together the Ministers of the Interior from Italy, Germany, the UK, France and Spain – failed to agree on the German/Italian plans at its meeting in Florence on 17-18 October 2004 because of opposition from France and Spain. The Netherlands presidency did not however abandon the idea (see below).

7.1 Drawing up an action plan

The Hague Programme was adopted by the European Council of 4-5 November. It builds on the headway made in the Constitution, which identifies certain objectives and priorities for inclusion in an action plan to be submitted by the Commission in 2005. The Commission is to submit an annual report (rather than six-monthly ones, as with the “scoreboards” of the past) on the implementation of the Programme. The Council will produce some specific assessment measures in 2005, given the need for better monitoring of the Programme's implementation, as emphasised by both the Commission and Parliament. Regular reports will be drawn up by the Commission and by the Council.

7.2 Citizenship

In terms of protecting fundamental rights and citizenship, the Hague Programme welcomes the Commission’s proposal to extend the mandate of the European Monitoring Centre on Racism and Xenophobia, turning it into a Human Rights Agency. The enforcement of the directive on free movement and the right of residence is scheduled for review in 2008.

7.3 Recourse to the passerelle mechanism

In the field of asylum, immigration and borders, the European Council called on the Council to decide by 1 April 2005 at the latest whether or not to apply the passerelle article to all Title IV measures, this decision being confined to the adoption of measures intended to enhance
“freedom” except as far as legal immigration is concerned. The decision was in fact taken on 22 December 2004 and scheduled to take effect on 1st January 2005 (see below).

7.4 Towards a common asylum system in 2010

The European Council considered that the second phase of the asylum procedure began on 1st May 2004, and scheduled the adoption of the second-phase instruments and measures to take place “before the end of 2010”. This should mean in practice that the Council will act by a qualified majority in co-decision with the European Parliament. The implementation of the first phase has not however been completed yet, on account of difficulties encountered over the adoption of the directive on asylum procedures, one of the key documents of the first phase (Council of the European Union, 2004c). The need to achieve a unanimous vote on this text, under discussion for three and a half years, resulted in a scaling-down of its ambitions. Immediately prior to its adoption, the draft directive was criticised by several NGOs for constituting a clear infringement of Member States’ commitments under the European Convention on Human Rights and the 1951 Geneva Convention relating to the Status of Refugees. The United Nations High Commissioner for Refugees (UNHCR) had likewise deplored the fact that this text rowed back on existing international standards. The sticking-point was the list of safe countries of origin.

This document is nonetheless a centrepiece of the first phase in the establishment of a European asylum system, as is the proposal for a Council directive on the minimum standards to be met by third-country nationals or stateless persons to claim refugee status or by persons who otherwise need international protection and the content of the protection granted (the “qualification” directive, also formally adopted on 29 April) (Council of the European Union, 2004d). The Council therefore called for full implementation of this phase, which will include the final adoption of the directive on asylum procedures but carried out in accordance with the procedures in force at the time of the first phase, namely unanimity in the Council and consultation of the European Parliament. The Justice and Home Affairs Council decided on 19 November that the list of third countries would be finalised after the adoption of the directive “on the basis that, at present, it is not possible to reach
agreement on such a list’. A study on the advisability, prospects, difficulties and practical implications of joint processing of asylum applications is to be undertaken by the Commission. Cooperation mechanisms will be put in place prior to the setting up of a European asylum bureau once a common asylum procedure is established. Furthermore, a separate study, to be conducted in close consultation with the UNHCR, is to look into the merits, appropriateness and feasibility of “joint processing of asylum applications outside EU territory”. It is worth noting that this idea has been rejected by the European Parliament (European Parliament, 2004a: point 9). The idea of outsourcing asylum requests, naturally “in complementarity with the Common European Asylum System and in compliance with the relevant international standards”, is still on the European agenda.

7.5 Legal immigration and integration

As concerns legal immigration and measures to combat illegal employment, the European Council called on the Commission to present before the end of 2005 an action plan on legal immigration, comprising admission procedures enabling the labour market to respond to a constantly changing foreign labour force. Concerning illegal immigration, the Member States are expected to meet the targets for scaling down the informal economy contained in the European employment strategy. The programme contains a new section on the integration of third-country nationals. The European Council identified the minimum aspects on which common principles should be determined. These basic principles should create a European framework within which the Member States, the Council and the Commission are called upon to promote a properly structured exchange of experiences and information on integration, with the creation of a publicly accessible website. The Handbook on Integration for policy-makers and practitioners, alluded to in the Commission’s report on immigration, appeared in November 2004 (CEC, 2004i). The first common principles adopted by the Council on 19 November constitute only a very patchy and incomplete reflection of the Handbook’s chapter on civic participation, which stresses the importance of political rights.

7.6 The external dimension of asylum and immigration

In terms of external relations, the Commission is invited, by the spring of 2005, to fully incorporate the issue of immigration into country-by-
Asylum and immigration: difficulties of a common approach

country and region-by-region strategy documents for all the third countries concerned. The European Council reasserted the importance of the Neighbourhood Policy. With respect to the protection of refugees, the European Council called on all third countries to accede to and comply with the Geneva Convention. In this same line of thought, the European Council asked the Commission to draw up regional protection programmes, inspired by the pilot protection programmes to be launched by the end of 2005.

In June 2004 the Commission published a communication on the “protection capacity of regions of origin” (CEC, 2004j) which provoked conflicting reactions. Some saw it as the first step towards realising the ideas put forward by the United Kingdom in 2003 about outsourcing asylum procedures to the periphery of the Union or to far-off countries, whilst the aim according to the Commission is to improve the managed entry of persons in need of international protection in the Union and to assist the countries of the regions of origin, often merely countries of transit, to become genuine first countries of asylum. To this end, it recommends the setting up of multiannual “EU resettlement schemes” as well as “EU regional protection programmes”, formed in partnership with the third countries in the region concerned (an action plan and a regional protection programme are scheduled for December 2005 at the latest).

At the informal Justice and Home Affairs Council in The Hague, the Ministers of the Interior announced on 1st October that a sum of € 1 million, funded to the tune of 80% by the Commission and 20% by the Netherlands, would be released in order to help the north African countries (Mauritania, Morocco, Algeria, Tunisia and Libya) to develop national asylum systems with trained staff. Commissioner Vitorino stated that the Commission, backed by the Netherlands, would finance five pilot agency projects for refugees in North Africa in order to upgrade the existing installations in Libya, Tunisia, Algeria, Morocco and Mauritania. The Commissioner subsequently made it very clear that these camps would not be involved in “processing” asylum requests (9).

9 At a conference jointly organised by the European Policy Centre and the Fondation Roi Baudouin on 4 October 2004.
8. Implementation of the Hague Programme: a slight relaxation of decision-making procedures

In its recommendation, the European Parliament called for co-decision and extended scrutiny by the Court of Justice to apply to all aspects of the area of freedom, security and justice, and “initially for immigration measures” (European Parliament, 2004b). It should be remembered that, during the European Parliament debate on the area of freedom, security and justice in October, the Dutch Minister of Justice, Mr Donner, justified the fact that the Netherlands presidency was not proposing an extension of scrutiny by the Court on the grounds that it would constitute an excessive workload for the Court in the newly enlarged Union. The Parliament likewise called for recourse to Article 42 TEU so as to apply the Community method to measures for combating terrorism and international crime. Following the adoption of the Hague Programme, the Council forwarded to the European Parliament a proposal restricting the move to co-decision to Title IV measures intended to strengthen the “freedom” dimension, excluding the field of legal immigration (Council of the European Union, 2004e).

The European Parliament approved the draft Council decision in December, asking that the co-decision procedure should also apply to measures on legal immigration; these measures should not affect the right of Member States to set entry numbers for third-country nationals coming from third countries, as indicated in the Constitution. The Parliament also called for the curbs imposed on the powers of the Court of Justice to be abolished (European Parliament, 2004c). It likewise stressed the fact that on 5 November 2004 the European Council had invited the Commission, after consulting the Court, to present a proposal for a Council decision instituting a specialised panel for actions relating to matters covered by that same Title IV, in conformity with Article 225A of the EC Treaty. According to the decision adopted by the Council at the end of December (Council of the European Union, 2004f), the co-decision procedure applies as from 1 January 2005 to measures aimed at removing checks on persons when crossing internal borders, measures on the crossing of external borders and measures laying down the conditions under which non-Europeans may move around the territory of the Union for a maximum period of
three months. The decision also relates to illegal immigration and measures aimed at ensuring a balance between Member States as regards the reception of refugees and displaced persons. Measures concerning legal immigration by non-Europeans into Member States and from one Member State to another will continue to be adopted by the Council acting unanimously after consulting the European Parliament. This affects entry and residence conditions as well as rules on the procedures whereby Member States issue visas and long-term residence permits, including for the purposes of family reunification. It also affects measures determining the right of third-country nationals who are legally resident in one Member State to take up residence in another Member State.

It is worth noting that recital 10 of the decision encourages the adoption of incentive measures geared to supporting action by Member States to integrate non-Europeans who are legally resident on their territory. These measures “might be adopted by the Council acting in accordance with the appropriate legal basis provided for in the Treaty”. Finally, Denmark took no part in the adoption of this decision, but the United Kingdom and Ireland expressed their desire to participate in the adoption and enforcement of the decision.

**Conclusions**

The issues of asylum, immigration and free movement, but also mobility within the EU, will remain high on the European agenda. The aim is to create a unified, borderless area while complying with the international rights and obligations deriving from the Geneva Convention and its additional protocols, but also with fundamental rights. With regard to free movement of persons on EU territory for employment purposes, the measures adopted by most Member States in the run-up to enlargement will have to be reviewed. The formulation of a common asylum policy is a contentious issue in a Europe which is at risk of abandoning its tradition of tolerance if it continues to adopt measures restricting access to refugee status by persons who meet the conditions.

This presupposes the gradual introduction of a genuine immigration policy so as to prevent people wishing to come and work in the Union from abusing the asylum method, thereby depriving people who are
fleeing their countries for reasons recognised by international agreements from enjoying the protection to which they are entitled. The Lisbon goal calls for an easing of entry and residence conditions for highly skilled persons. But unless an admission policy is devised for migrant workers, labour shortages will only be filled in the meantime by tolerating undeclared employment. Under these circumstances, discrimination between EU workers in respect of their right to free movement should be removed as quickly as possible. Whether confronted by a need for skilled, less skilled or low-skilled labour, the Union ought to invent a new method whereby it can elaborate a common approach together with the Member States. Four challenges have to be met: developing an area of free movement, non-discrimination and integration for all persons resident on EU territory; establishing relations with the EU’s immediate neighbours such that it is unnecessary to deploy excessive resources in protecting its external borders; being bold enough to open up legal immigration channels; and refraining from infringing the fundamental principles on the protection of persons which are guaranteed by international agreements.

References


CEC (2001b), Proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM (2001) 386
CEC (2002), Communication from the Commission to the Council and
the European Parliament “Integrating migration issues in the European
Union’s relations with third countries – I. migration and development –
II. Report on the effectiveness of financial resources available at
community level for repatriation of immigrants and rejected asylum
seekers, for management of external borders and for asylum and
migration projects in third countries”, COM (2002) 703 of 3 December
en01.pdf).

CEC (2004a), Communication from the Commission to the Council,
the European Parliament, the European Economic and Social
Committee and the Committee of the Regions “First Annual Report on
Migration and Integration”, COM (508) final of 16 July 2004, (http://

CEC (2004b), Communication from the Commission to the Council
and the European Parliament “Recommendation of the European
Commission on Turkey’s progress towards accession”, COM (2004)
656 final of 6 October 2004 (http://europa.eu.int/eur-lex/en/com/

CEC (2004c), Communication from the Commission - European
0373en01.pdf).

CEC (2004d), Proposal for a regulation of the European Parliament and
of the Council laying down general provisions establishing a European
Neighbourhood and Partnership Instrument, COM (2004) 628 final of
com2004_0628en01.pdf).

CEC (2004e), Communication from the Commission to the Council on
the Commission proposals for Action Plans under the European
Neighbourhood Policy (ENP), COM (2004) 795 final of 9 December
2004.


Asylum and immigration: difficulties of a common approach


