

Asylum and immigration: how consistent are the EU's policies?

The latest human tragedies to unfold in the Mediterranean and Aegean Seas in 2007 demonstrated the scale and sophistication of the resources available to the European Union (EU) in combating illegal immigration and protecting Europe's external borders. The European Commission put forward new proposals on illegal *and* legal immigration in 2007, thereby putting into practice its desire to pursue a common approach in a politically highly charged field. The Commission has likewise devoted further thought to the future common asylum system.

The Europeanisation of migration policies remains partial and fragmentary, while their external dimension is being further developed in various policies involving third countries, particularly African ones. Ever since the 1980s, Europe has tackled immigration policy primarily from the point of view of protecting its borders (the Trevi Group¹, Schengen, the Ad Hoc Group on Immigration, etc.). The Treaty of Amsterdam (1997) assigned to the EU the goal of creating an 'area of freedom, justice and security'. The five-year programme adopted at Tampere in 1999 contained the bare bones of a common European policy on immigration

⁴ Trevi, apparently an acronym of '*Terrorisme, Radicalisme, Extrémisme et Violence Internationale*', was an intergovernmental forum within which the EU Member States cooperated on mostly confidential matters, on the periphery of the Community institutions. It discussed matters such as the maintenance of law and order in Europe, the fight against serious crime, anti-terrorism measures, security in a frontier-free Europe, etc.

and asylum. That policy entailed action on four fronts: elaboration of a 'global immigration policy' in partnership with countries of origin, establishment of a common asylum system, fair treatment for third-country nationals and management of migration flows. The adoption of a 'European management concept on border control' after the attacks of 11 September 2001 heralded the pursuit of a security-based approach. Following on from the Tampere Programme, the Hague Programme of 2004 turned its attention to the external dimension of asylum and immigration policies. Another issue arising in the new context of labour shortages confronting certain countries in certain sectors relates to highly skilled migrants.

This chapter will examine, first, the way in which the Union goes about policing its external borders (1), and then the still-to-be-completed area of free movement for workers where checks on persons at internal borders between Member States have partially been abolished (2). During 2007, the EU incorporated the principle of mobility into its relations with third countries (3) and defined the new concept of 'circular migration' (4). Its introduction, geared to the admission of highly skilled foreigners, reveals the weakness of existing European rules on the rights of foreigners staying legally in one of the EU Member States (5). In view of the tougher line being taken on combating illegal immigration (6), the EU's asylum policy is the poor relation of the Hague Programme (7). This analysis of the different aspects of the matter – social, humanitarian, economic and even competitive – shows the extent to which Europe is struggling to adopt a consistent overall approach to immigration and freedom of movement. The variable geometry permitted under the existing European treaties and maintained by the Treaty of Lisbon is not of course unconnected with this absence of an overall vision.

1. Protection of the external borders: the Frontex Agency

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex, created in 2004) (Council of the EU, 2004) is an operational body which manages the EU's external borders. The purpose of this Agency is to 'coordinate operational cooperation between Member States

in the field of management of external borders' and to provide them with 'the necessary support in organising joint return operations'. After some joint operations and pilot projects carried out in 2006 and 2007, a provision was added to the Frontex regulation enabling the Agency to form and deploy rapid intervention teams comprising border guards from the Member States, with a view to lending operational assistance to another Member State. These teams, known by the name RABIT (Rapid Border Intervention Teams), may be made available by Frontex to a Member State 'facing a situation of urgent and exceptional pressure, especially the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of the Member State illegally' (European Parliament and Council of the EU, 2007a: 32).

In addition, at a financial level, an External Borders Fund introduces the principle of Community solidarity into border management (European Parliament and Council of the EU, 2007b). This Fund has been endowed with €1.82 billion for the period 2007-2013, including €170 million for 2007, with a view to 'modernising' the infrastructure (border crossing points, video-surveillance, etc.) located along the Union's external land and sea borders.

In the course of 2007, the media were full of images of people dying in the Mediterranean, the Aegean and elsewhere in the world, as well as of the treatment of survivors. Surveillance at the EU's southern maritime borders, in which certain third countries have been invited to join, results in migration routes becoming longer and more hazardous than before. According to data published in early January 2008 by the Italian association Fortress Europe, at least 1,861 migrants perished during 2007 while attempting to reach one of the southern EU countries, as opposed to 2,088 in 2006. Although these figures are difficult to compare, the events of summer 2007 raised questions about compliance with international humanitarian and maritime law, to such an extent that in July the European Parliament's Committee on Civil Liberties, Justice and Home Affairs held a public hearing on the migrant tragedies at sea. Thereafter, the Parliament implicitly acknowledged the humanitarian shortcomings of Frontex, stating that 'steps should be taken to

incorporate into the mandate of Frontex and rapid intervention teams at the EU's sea borders operations to rescue migrants and asylum seekers who are in emergency situations where their lives are at risk' (European Parliament, 2007a: paragraph 39).

2. Intra-European mobility: incomplete freedom of movement for workers

The EU is no more a common area of free movement for workers than it is a common area of free movement for persons. At the time of the 2004 enlargement, only three countries (Ireland, the United Kingdom and Sweden) decided not to impose any restrictions on freedom of movement for workers from eight of the new Member States (EU-8), as was permissible under the transitional derogation measures contained in the accession treaty. Two years later, the European Commission delivered a positive assessment of enlargement and consequently encouraged the other Member States to lift their restrictions (CEC, 2006a). And so it was that on 1 May 2006, Portugal, Spain, Greece and Finland decided to open their borders to workers from the new Member States. They were followed by Italy (27 July 2006), the Netherlands (1 May 2007) and Luxembourg (20 September 2007). Belgium, Denmark and France relaxed their legislation in accordance with labour market requirements. Thus only Germany and Austria still have restrictions in place. The German Government had already adopted a 'green card'-type scheme in 2005 for highly skilled IT workers, albeit with mixed results. It subsequently decided, in response to a labour shortage, to open up its labour market to mechanical and electrical engineers from eight Eastern countries which have joined the EU in 2004 as from 1 November 2007.

The accession treaty covering the two latest entrants, Romania and Bulgaria, likewise contains provisions allowing for temporary restrictions on freedom of movement for workers. As at 1 January 2007, only ten of the EU-25 countries did not have recourse to these provisions: Cyprus, Estonia, Finland, Latvia, Lithuania, Poland, the Czech Republic, Slovenia, Slovakia and Sweden. Six countries decided to maintain work permits and opened up their labour markets partially: France, Hungary, Italy, Luxembourg, Denmark and Belgium. Nine countries kept restrictions in

place: Austria, Germany, Spain, Greece, Malta, the Netherlands, Portugal, Ireland and the United Kingdom.

Thus Ireland and the United Kingdom significantly rowed back on their earlier policy of openness. The British Home Secretary officially issued a positive verdict on the opening of the labour market in 2004. The 'economic immigration' policy is regarded as beneficial and a contribution to enhancing national prosperity. According to figures published by the Home Office in August 2006, 447,000 workers originating from the new EU Member States were registered in the UK (600,000 taking into account the liberal professions). However, articles in the press about the working conditions and exploitation of some of the workers from the new Member States have given this 'immigration' a negative image, even though in reality it is not immigration but the practical manifestation of a fundamental freedom enshrined in the EC Treaty and of the right of citizens to freedom of movement. A survey published by the Financial Times on 20 October 2006 found that 76% of British people believe there are too many immigrants in the country, while 46% think that immigrants in general and 50% of recent immigrants from the new Member States have had an adverse impact on the economy. Do these findings justify the recourse made to transitional measures in respect of Bulgarian and Romanian workers (EU-2)? Be that as it may, the United Kingdom has decided on a gradual approach to opening up labour market access for nationals of these countries. Highly skilled workers require a work permit under the Highly Skilled Migrants Programme, while quota limits are imposed for those with lesser skills under the Seasonal Agricultural Scheme and the Sector-Based Scheme (Home Office, Border & Immigration Agency, 2007).

With respect to wages, the report issued by the Home Office in October 2007 states that 'Full-time workers from developed Western economies and the Middle East earn more than their UK-born counterparts. In contrast, those from the A8 and A2 countries earn noticeably less than UK-born workers' (Home Office, 2007: 20). The English-speaking countries are nonetheless one of the most popular destinations for nationals from the new States, which are in fact suffering labour shortages themselves.

3. Intra-European mobility and economic migration

This episode of transitional measures partially lifted in order to alleviate labour market 'tension' demonstrates (if ever proof were needed) the diversity in national circumstances. Simultaneously, it compels the Member States to speak out about their manpower requirements, thereby adding grist to the mill of those who advocate economic migration in view of the ageing of Europe's population.

It should not be forgotten that, besides family reunification, the two main causes of migration towards the EU are political and economic. Political migrants are refugees and asylum seekers, people who fear for their lives because they are fleeing from war or being persecuted on grounds of their sex, the colour of their skin or their faith. Economic migrants are people from poor countries who hope to find better living conditions in Europe by finding work here. These two groups have recently been joined by people fleeing their countries for climatic reasons (drought in sub-Saharan Africa). There is more and more talk, in the European and international jargon, of 'mixed flows, where the migratory flows arriving at a Member State's external borders include both illegal immigrants and persons in need of protection' (CEC, 2007a: 14). This results in a tendency at EU level to view the right of asylum in terms of migration policy (management of flows and protection of external borders), to the detriment of the human rights supposedly safeguarded by humanitarian law. For instance, Human Rights Watch notes that between October 2004 and March 2005, Italy returned more than 1,500 irregular migrants from Lampedusa to Libya, without even examining their applications for asylum. Another outcome is the introduction of a crackdown on illegal immigration, the 'return' part of which is sharply criticised by NGOs promoting the right of asylum and observance of human rights (see below).

The United Nations estimated the number of migrants in the world at 191 million in 2005: an increase of 23% in fifteen years. This figure, which is said to reflect the current phase of globalisation, includes migrants forced out of Africa as a result of conflict. However, whereas freedom of movement for goods, services and capital is being encouraged, the situation for international migrants is much less encouraging. Freedom

of movement for workers is a right enshrined in the United Nations Convention on the protection of the rights of all migrant workers (and members of their families) of 18 December 1990. The Convention states that fundamental rights and the principle of non-discrimination apply to everyone but must be reaffirmed for migrants 'without distinction of any kind', 'considering the situation of vulnerability in which migrant workers and members of their families frequently find themselves'. The Convention needed to be ratified by at least UN 20 member countries to enter into force; 35 states (mainly countries of emigration) have ratified it so far. Not one EU Member States has done so yet. As migrants' rights begin to suffer the restrictive consequences of European legislation (especially in respect of family reunion) ⁽²⁾, the argument that the EU countries grant more favourable conditions than those set out in the Convention begins to lose weight. Various voluntary bodies launched a petition ahead of International Migrants' Day (18 December 2007), calling on the EU Member States to ratify the UN Convention. Ratification is likewise backed by the European Economic and Social Committee and the European Parliament (European Parliament, 2005: paragraph 22).

In 2005 the Commission proposed bringing together migration and development cooperation, in partnership with countries and regions of origin. Its communication on migration and development made provision for different kinds of action, for example making it easier to send remittances to countries of origin by reducing the cost, and fostering 'brain circulation' while limiting the brain drain (CEC, 2005a). At the informal Hampton Court summit in October 2005, immigration policy was confirmed as one of the Union's priority actions, on the same footing as

⁴ See on this point the grounds for the appeal lodged by the European Parliament in 2003 against certain articles of Directive 2003/86/EC on the right to family reunification, calling for them to be repealed. Even though the Court referred to the Charter of Fundamental Rights for the first time in its judgment of 27 June 2006, it did not find in favour of the European Parliament, considering that the room for manoeuvre allowed to Member States did not conflict with fundamental rights. ECJ, Case C-540/03, *European Parliament/Council of the European Union*, 27 June 2006.

population ageing, research/development and energy. The global approach adopted in the following December focuses on Africa in two ways, as is evident from the adoption of the European strategy on Africa and the Global Approach to Migration: priority actions focusing on Africa and the Mediterranean; the latter is aimed at reducing the pressure placed on these regions by migration (European Council, 2005: Annex I). The Commission subsequently proposed extending the global approach to other regions, in particular the EU's eastern and south-eastern external borders (CEC, 2006b).

The Commission put forward a Policy Plan on Legal Migration in late 2005 (CEC, 2005b). It was designed as part of the Lisbon strategy and as a response to population ageing. The Plan sets out a roadmap for the remainder of the Hague Programme (2006-2009) and announces future legislative measures and initiatives to be proposed by the Commission on legal migration, concerning the entry and residence conditions for third-country nationals for employment purposes. There is to be a general directive and four specific directives relating to the conditions of entry and residence for certain categories of immigrants (highly skilled workers, seasonal workers, people transferred within their company and remunerated trainees). The Commission is likewise drawing up a number of non-legislative instruments with a view to improving the exchange and coordination of information available about immigration: an EU Immigration Portal is being established, the European Job Mobility Portal is being expanded, and the European Migration Network (EMN) is to be put on a permanent footing (CEC, 2005c). There are other measures relating to exchanges of statistics which represent an attempt by the Commission to discover the Member States' intentions, for example as concerns the regularisation of people without documents (Council of the EU, 2006; European Parliament and Council of the EU, 2007c). It is worth noting that the Commission advises against such operations because they make illegal immigration appear attractive. Since its mass regularisation of 690,000 individuals, Spain has undertaken not to resort to this practice again.

4. Immigration and external relations: 'mobility partnerships' and 'circular migration'

In response to the conclusions of the December 2006 European Council, the Commission put forward its ideas on incorporating options for legal migration into the Union's external policy. The proposal is to negotiate 'mobility partnerships' with countries 'ready to commit themselves to cooperating actively with the EU on the management of migration flows, including by fighting illegal migration in partnership with the EU, notably in the area of readmission and return' (CEC, 2007b: 13-14). By way of compensation, legal migration options, such as short-stay visas, could be offered to nationals of the countries concerned. The undertakings expected of third countries would of course vary, but they would mainly relate to security aspects: readmission of nationals, negotiation of readmission agreements including for non-nationals, efforts to improve external border controls and/or management together with the Frontex Agency, introduction of safeguards in travel documents – perhaps by inserting biometric data –, cooperation and information exchanges on border management problems, and specific measures or initiatives to combat the trafficking of migrants and the trade in human beings.

All agreements concluded between the Community and third countries since 1996 already contain a readmission clause. In order to be effective, these clauses require delicate negotiations to produce readmission agreements, including for non-nationals. The conclusions of the Seville European Council (2002) furthermore recommend including a clause on the joint management of migration flows and compulsory readmission in the case of illegal immigration in every cooperation, association or equivalent agreement. By demanding additional commitments on the management of flows at borders, the Commission is making relations between the Community and third countries even more contingent on the observance of security conditions. Curiously, the very last of these commitments concerns the country's development: 'Commitments to promote productive employment and decent work, and more generally to improve the economic and social framework conditions, should also be sought from the third country concerned as they may contribute to reducing the incentives for irregular migration' (CEC, 2007b: 4). Could

one doubt for even a second that a country's development is the foremost and most certain means of curbing illegal immigration? One might wonder in this respect whether the conditionality of aid from the International Monetary Fund (IMF) as well as EU policies (agricultural export subsidies and the trade part of Economic Partnership Agreements) may constitute the main obstacle to improving the 'economic and social framework conditions' in some of the poorest countries (see the chapter by Frédéric Lapeyre in this volume).

The other part of the Commission's communication examines ways of facilitating 'circular migration', so as to help the Union make up for its manpower shortages and contribute to development in the country of origin by preventing a brain drain. To this end, the EU could undertake not to recruit in sectors identified by the country concerned as being 'under pressure'. The Commission defines two types of circular migration. The first is that of foreigners established in the EU, mainly expatriates (business persons working in the EU and wishing to start an activity in their country of origin or in another non-EU country and doctors, professors or other professionals willing to support their country of origin by conducting part of their professional activity there); the second is circular migration of persons resident elsewhere. The second category covers the whole spectrum of migrants (temporary workers, persons studying or training in Europe, trainees, researchers, people taking part in intercultural exchanges and other activities in the field of culture or active citizenship, and those wishing to carry out an unremunerated voluntary service pursuing objectives of general interest in the EU).

5. The European 'blue card'

After several postponements, the Commission presented its plans for a European 'blue card', the first draft legislation encouraging the long-term 'circulation' of highly skilled workers, at the same time as a proposal establishing a procedure on a single application for the issuing of a residence and work permit. The latter will also guarantee a 'common set of rights' for all foreign workers who are legally resident in a Member State but cannot yet claim the status of long-term resident, as defined by

Directive 2003/109/EC (CEC, 2007c). Although the Commission put forward its proposal in the context of 'growing labour market globalisation', security concerns are not far away. According to the Commission, the combined residence and work permit should create useful synergies and enable Member States to better manage and control the presence of third-country nationals on their soil for work purposes. In this sense, the directive would usefully complement another proposal, which provides for the imposition of sanctions against employers of illegally staying third-country nationals (see below).

The European 'blue card' is in fact one of the four sectoral directives announced in late 2005: it sets out the entry and residence conditions for highly skilled workers. Although seasonal workers are regarded as the other key category of economic migrants, the draft text covering them will not be presented until the autumn of 2008 (CEC, 2007d). With the 'blue card', the Commission aims at 'effectively and promptly responding to fluctuating demands for highly qualified immigrant labour – and to offset present and upcoming skill shortages – by creating a level playing field at EU level to facilitate and harmonise the admission of this category of workers and by promoting their efficient allocation and re-allocation on the EU labour market' (CEC, 2007e: 2). The justification for this directive is that it falls within the Lisbon strategy, as is the case for Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research (Council of the EU, 2005a). Let us not forget the Commission's estimate that the EU will need to recruit 550,000 researchers by 2010 to make up its shortfall. The Union is experiencing its own brain drain (cf. Doquier and Marfouk, 2007): the Commission estimated in 2003 that 400,000 European graduate researchers in science and technology were resident in the United States.

As for attracting highly skilled workers, the EU faces competition from the United States and Canada as well as Australia. According to the Commission, the Union is the preferred destination of unskilled and semi-skilled workers from the Maghreb countries (87% of such immigrants), whereas 54% of highly skilled immigrants originating

from these same countries have established themselves in the USA and Canada. The Commission's initiative is likewise related to the ageing of Europe's population. Eurostat projections tell us that the total EU population is likely to fall by 2025 and the population of working age by 2011. Demographic decline is not affecting all Member States to the same extent (the decline is much smaller in France and Ireland).

The 'blue card' proposal in fact covers workers with an average to high level of skills. It defines 'highly qualified employment' as follows: 'the exercise of genuine and effective work under the direction of someone else for which a person is paid and for which higher education qualifications or at least three years of equivalent professional experience is required' (CEC, 2007e: 19). Taking its lead from the US 'green card', the Commission proposes issuing eligible workers with a residence permit enabling them to work for an initial period of two years (although holders of a US green card are entitled to work indefinitely). The blue card would confer on them and their families a common set of rights, most notably favourable conditions for family reunification. The blue card proposal derogates from Directive 2003/86/EC on family reunification in that it allows immediate family reunification, even in the case of a temporary stay. A blue card holder is not entitled to move to a second Member State during the first two years, but may do so thereafter on certain conditions. At the end of the two-year period, the directive derogates from Directive 2003/109/EC on the status of long-term residents (granted after five years of authorised residence in a Member State) by allowing 'mobile workers' to add together periods of residence of two, or at most three, Member States for the purpose of obtaining that status. Further derogations from that directive are proposed once the status of long-term resident has been obtained, in connection with 'circularity'. For example, a blue card holder and his/her family members who possess long-term resident status would be authorised to live outside of the Community for a maximum period of two consecutive years, as opposed to one year for long-term residents.

Although Member States remain responsible for determining the number of workers they require, the proposal is very controversial owing to the politically sensitive nature of immigration policy and the varying needs

of different countries. At the time when this proposal was put forward, France and the United Kingdom had just adopted restrictive migration policies (tougher conditions on family reunification, a selective immigration strategy and an enhanced 'numbers policy' aimed at combating illegal immigration, in France and, in the UK, a tightening of admission conditions including for highly skilled workers). Spain, meanwhile, had already concluded an agreement with Morocco, followed by others with Senegal and Mali, aimed at recruiting seasonal farm labourers.

The 'blue card' scheme is moreover a sensitive issue in that it would exacerbate the brain drain, especially for Africa in the field of health ⁽³⁾, but also on account of the persistently high unemployment rates in several Member States and the presence of people without documents, some of whom are unregistered workers in highly, average or low skilled occupations. All that will be required for this proposal to be adopted is consultation of the European Parliament and a unanimous agreement in the Council, albeit under conditions of variable geometry. Denmark has an opt-out from migration policy. Ireland participated in the adoption of Directive 2005/71/EC on the admission of foreign researchers. But inasmuch as Ireland, like the UK, opted not to adopt the directive on the status of long-term residents or the one on the right to family reunification, it appears unlikely that any of these two countries will join the other 24. Of those, Austria has already come out against the very principle of adopting such a text.

6. Combating illegal immigration

Measures to combat illegal immigration have been dealt with through co-decision between the European Parliament and the Council (the latter acting by a qualified majority) since 1 January 2005. Two draft legislative texts attracted attention in 2007.

³ In this area, the United Kingdom is already one of the main EU countries of destination for numerous nationals of countries in sub-Saharan Africa (cf. ACP-EU Joint Parliamentary Assembly, 2007).

The first one, put forward in 2005, is a proposal for a highly controversial directive on common standards and procedures in Member States for returning illegally staying third-country nationals (the 'return' directive) (CEC, 2005d). The Commission's proposal contains a set of rules applicable to any 'illegally staying' third-country national, whatever the reason for the illegality of their stay (e.g. expiry of a visa or residence permit, revocation or withdrawal of a residence permit, negative final decision on an asylum application, withdrawal of refugee status, illegal entry). A two-stage procedure is envisaged to put an end to 'illegal stays'. Once the return decision has been taken, there is a period of up to four weeks for voluntary departure. If the person concerned does not return voluntarily, the text stipulates that the Member State must execute the obligation to return by means of a removal order. Removal orders are accompanied by a re-entry ban valid for a maximum of five years. This is the principal element of 'Europeanisation' sought by the Commission. One of the most roundly criticised aspects of the proposal is the recourse made to temporary custody (in effect detention), which is authorised where there are serious grounds to believe that there is a risk of absconding and where it would not be sufficient to apply less coercive measures.

In September, once the European Parliament committee had completed its work, the text was made more flexible in certain respects, but at the same time it contains some aspects which are potentially more restrictive than the Commission's initial proposal (European Parliament, 2007b). For instance, a Member State would be able to decide on the re-entry ban on a case-by-case basis rather than in an automatic, mandatory fashion. On the other hand, whereas the Commission's proposal envisages a six-month period for what it calls 'temporary custody', the new text refers to 'a period of three months after which temporary custody shall cease to be justified'. This period could be shortened or extended by 18 months at most (it varies from 32 days in France to six months in Austria and 18 months in Germany).

A petition against 'the Outrageous Directive' was launched by European human rights and pro-asylum organisations in November 2007.

Following differences of opinion between the European Parliament and the Council, Parliament's first reading has been deferred until May 2008. The priorities of the Slovenian Presidency (first six months of 2008) include reaching a political agreement on this text. That is a tall order, given the likely implications of the text's transposition on legislation relating to foreigners. Similarly, it is a tall order from a democratic point of view, given the European Parliament's tendency to adopt texts subject to parliamentary co-decision in a single reading. The Union has already equipped itself with an array of instruments in the field of return policy, financed by the European Return Fund to the tune of €676 million for the period 2008-2013 (European Parliament and Council of the EU, 2007d). One such instrument is Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals, which would be replaced by the new directive if it were adopted. One may well wonder whether such a harmonisation initiatives might be premature.

The equally controversial second text, which firms up the legislative side of the 2006 EU Action Plan on illegal immigration, is a draft directive providing for sanctions against employers of illegally staying third-country nationals (CEC, 2007f). The Commission wishes to tackle one of the main causes of illegal immigration, namely the opportunity to find work. It acknowledges the difficulty of obtaining precise statistics in this area and refers to recent estimates. The number of immigrants staying illegally in the Union is thought to lie somewhere between 4.5 and 8 million. Between 7 and 16% of EU GDP is estimated to come from the parallel economy, although the workforce employed in this sector is not entirely made up of illegal immigrants. The Commission identifies the building, agriculture, domestic work, cleaning, restaurant and hotel sectors as those most likely to draw on undeclared employment in general and to attract illegal immigrants in particular.

The principle behind the proposal is a general prohibition on the employment of third-country nationals who do not have the right to be resident in the EU. It is accompanied by various penalties (including criminal penalties in the most serious cases) aimed at making this

prohibition effective and efficient. As has been pointed out by the European Trade Union Confederation (ETUC), the purpose of the directive is clearly not to combat the exploitation of migrant workers, but to solve the problem of migrants who have no residence permit. The ETUC bemoans the lack of social partner consultation (on this proposal and others) and expresses 'serious doubts about whether the proposed instrument is the right one, proposed at the right moment in time, and in the right order of legislative proposals' in respect of legal migration by medium- and low-skilled workers (ETUC, 2007: 11). The United Kingdom, under pressure from the employers, has already announced its intention to use its opt-out and decline to adopt this text ⁽⁴⁾. The directive is regarded as problematical in other countries too (especially France and Belgium) on account of the excessive burden on Member States, obliged to inspect at least of 10% of all companies established on their soil once a year. Furthermore, the Commission explains that: 'Legally employed third-country nationals may be posted to another Member State in the context of the provision of services. In such cases it is the service provider, as employer, that would be responsible for complying with the prohibition in the proposed Directive on employing illegally staying third-country nationals. Accordingly it is the authorities in the Member State in which the service provider is established that would be responsible for enforcing the prohibition' (CEC, 2007g: para. 13). Hence we are returning in no uncertain terms to the country of origin principle, even though that principle has been removed from the directive on services in the internal market.

7. The Green Paper on the future European asylum system

According to figures published by Eurostat, the number of asylum seekers has halved in five years (Eurostat, 2007). In 2006, 192,000 applications were lodged in the European Union. The United Kingdom registered the

⁴ 'Victory for CBI over opt-out of draft EU law on illegal workers', *Financial Times* (on line), 24 September 2007.

largest number of applications (27,850), ahead of France (26,300), Sweden (24,300) and Germany (21,000). In 2007, in keeping with the Hague Programme, the Commission launched a consultation in the form of a Green Paper on the future Common European Asylum System. After the initial phase, the plan is to explore ways of establishing a common asylum system by 2010 (Barbier, 2005; CEC, 2007a). In terms of external policy, the Green Paper revisits the regional protection programme strategy (two pilot projects have been launched with the Western Newly Independent States and in Tanzania) and promotes resettlement schemes. The consultation was originally scheduled to close at the end of August 2007 but was extended by a month; a hearing was held in November.

The Commission's initial haste is all the more incomprehensible in that there were not yet any readily available analyses serving to gauge the degree of Europeanisation achieved, i.e. the way in which the European minimum standards adopted during the initial phase have been converted into national legislation. Thus, only the Dublin system (the Dublin II and EURODAC regulations) – on how to determine which Member State is responsible for examining an application for asylum on EU territory – has been evaluated (CEC, 2007h). The evaluation therefore looks at a method of distributing asylum seekers and not at an essential building-block of harmonisation. This does not however mean no difficulties arise out of the basic principle behind the regulation, namely that the first country of access is the Member State responsible for processing an asylum application. This principle prevents an asylum request from being processed in the country where it has been lodged. More recently, some countries of first access, such as Cyprus and Malta, have been confronted by more applications than they can handle. In response to the state of affairs in the Maltese refugee camps, the European Parliament has called for an initiative overturning this principle and establishing a fair method of distributing responsibilities among Member States (European Parliament, 2007c). While awaiting the outcome of the consultation, the Commission has proposed extending the status of long-term resident (Directive 2003/109/EC) to refugees and beneficiaries of temporary protection who are currently not eligible for that status (CEC, 2007i). Since the variable geometry of the status of long-term resident will stand

in the way of any real harmonisation, the preconditions for devising a common asylum system would seem rather a long way off.

The Europeanisation resulting from the implementation of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers in Member States (the 'reception' directive) was not made known until late November 2007. It should be pointed out that this directive is not in force in either Denmark or Ireland. The report notes that 'serious problems exist in terms of the applicability of the Directive in all premises hosting asylum seekers. As many as seven Member States (UK, BE, IT, NL, PL, LU, CY) do not apply the Directive in detention centres' (CEC, 2007j: 3). It also states that 'the adequacy of reception conditions provided to asylum seekers in detention (...) may be questioned only in a few Member States (HU, LT, SI, EL, BE, IT, MT)' (CEC, 2007j: 6).

Notwithstanding that, the Commission concludes that, on the whole, 'the Directive has been transposed satisfactorily in the majority of Member States'. But the report does highlight the low level of Europeanisation achieved in respect of social rights, as a result of 'the wide discretion allowed by the Directive in a number of areas, notably in regard to access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons'. This power of discretion 'undermines the objective of creating a level playing field in the area of reception conditions' (CEC, 2007j: 10). The Commission therefore deems it necessary to await the outcome of the public consultation on this Green Paper before proposing any amendments to the directive.

The deadline for transposing Directive 2005/85/EC on asylum procedures (Council of the EU, 2005b) expired on 1 December 2007. This directive, implemented in all Member States except Denmark, allowed for a number of derogations. Here too, it is difficult to gauge the quality of the European standards produced. By 1 December 2007, only six Member States (Germany, Austria, Bulgaria, Luxembourg, Romania and the United Kingdom) had forwarded to the Commission the legislation transposing the directive into national law. Four Member States (Belgium, Estonia, France and Lithuania) had notified partial

transposition. Slovenia incorporated the European directive into national law in early January, thereby making it less likely that asylum seekers will be afforded protection in Slovenia.

Conclusion

The European Union is anything but a uniform area, in terms of both its purpose and its policy making and implementation. Migration policies constitute a cross-over point for several EU policies – development, trade, external relations, neighbourhood policy and competitiveness (the ‘blue card’) – giving the impression of a lack of consistency, with the exception of the security-based approach to managing flows of ‘competitive’ migrants and others.

The Union is seeking to incorporate migration into its external policies, but without an overall vision of immigration and asylum. Its policies are geared to border security, while offloading responsibility for surveillance and ‘managing flows’ onto its so-called partners. Borders are a long way from disappearing in a world where mobility for highly skilled individuals is the object of everyone’s desire, while the fate of more vulnerable people is looked at purely in terms of combating illegal immigration. At the behest of the European Council, the economic immigration policy proposed by the Commission seeks – externally – to make the EU as attractive as its main competitors (the United States, Canada, Australia etc.) for the purposes of highly qualified immigration. Internally, this policy risks turning into yet another tool for boosting the flexibility of the European labour market, at the expense of the trade unions and their prerogatives over the rights of all workers – whatever their skills or vocational training – and the pursuit of a wage policy in the EU. Even if the policy is adopted, it will not extend to all the EU Member States. This is its principal weakness, but also its principal contradiction. European citizens falling under the special arrangements derogating from the rules on freedom of movement for workers are still dependent on national decisions. Meanwhile, certain Member States are introducing competing migration policies in response to their own requirements. What is more, even though unemployment in the Union is declining, it still affects 17 million people. Consequently, the common

approach on immigration ought to begin by defining the rights of individuals and then, when deciding which sectors to open up, operate with due respect for the principle of subsidiarity.

Besides, the EU's desire to impose its primarily trade-related approach on others is encountering resistance from African countries. Given the new geopolitical situation, and in this era of climate change, population ageing and the spread of AIDS in Africa, will the Union ever realise that the time has come for cooperation rather than the dogged pursuit of competitiveness, where Europe will never be a match for the emerging countries? The EU can be an important partner for many countries or regional groups as long as it scales down its free-trade, security-minded aspirations and prioritises partnerships based on cooperation with sustainable development as their main goal. This includes the right of the poorest countries to high-quality, sustainable agriculture, which is a key element of food security but also of development. The harmonisation and Europeanisation achieved and proposed by the Commission raise many questions but offer few guarantees for the rights of the people concerned, first and foremost asylum seekers – be they within or outside of the Union – as well as other people awaiting a status or without documents. To this extent, such policies merely respond to the demands of the European Council, that misnamed 'collective head of State' of a Union which, in these sensitive fields, represents anything but a uniform area for the purposes of tackling the challenges of the 21st century – and that applies both before and after the Treaty of Lisbon.

It is therefore evident that asylum and immigration issues go well beyond the question of determining who may enter the EU, who may move freely within it and who may work here. Asylum and immigration policy takes the European Union back to its fundamental choices and proclaimed values: freedom, security and justice, but also cooperation, development, solidarity, cultural diversity, integration, refuge and protection. There is no certainty that the Member States are prepared to ensure this consistency.

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