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THE PARADOXES OF EUROPEAN UNION IMMIGRATION POLICY AND ITS REPERCUSSIONS ON TURKISH-EU RELATIONS

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THE PARADOXES OF EUROPEAN UNION IMMIGRATION POLICY AND ITS REPERCUSSIONS ON TURKISH-EU RELATIONS

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ABSTRACT

THE PARADOXES OF EUROPEAN UNION IMMIGRATION POLICY AND ITS REPERCUSSIONS ON TURKISH-EU RELATIONS

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In thesis, the way wended by European Union immigration policy is addressed under the light of historical background. Essentially, the arguments regarding immigration and free movement aroused and gained momentum in EU in 1980s. During 1990s, the justice and home affairs subjects obtained a central point among EU policies abruptly. However, despite all the efforts since then, it is still early to say that there emerges a uniform European immigration policy. In fact, it is quite hard to reach such a common policy, due to the unique structural requirements, different priorities and expectations of the Member States. It is examined in dissertation then why the Member States' policymakers still insist on a common EU immigration policy in spite of this. The researcher asserts that some aspects of the common EU immigration policy serve as a new migration control mechanism in order to be able to take additional measures limiting third country nationals' access to the rights of EU citizens by transferring restrictive national approaches and legislation into a supranational venue. It is also scrutinized in thesis in what ways Turkish citizens composing considerable population within Community borders and Turkey as a candidate state conducting negotiations on the membership process are affected from these efforts for a common EU immigration policy. It is examined whether this process generate any new breaking point in Turkish-EU relations or not.

Keywords: European Union Immigration Policy, Member States, Turkish-EU Relations

ÖZ

AVRUPA BİRLİĞİ GÖÇ POLİTİKASININ PARADOKSLARI
VE TÜRK-AB İLİŞKİLERİNE YANSIMALARI

Arslan, Mehmet İnanç

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Bu tezde, Avrupa Birliği'nin göç politikasının katettiği yol tarihsel bir arkaplan ışığında ele alınmıştır. Esasen, göç ve serbest dolaşıma dönük tartışmalar 80'li yıllarda ortaya çıkmış ve ivme kazanmıştır. 90'lı yıllar boyunca Avrupa Birliği politikaları arasında adalet ve içişleri konuları beklenmedik bir şekilde merkezi bir noktaya gelmiştir. Ancak, o dönemden bu yana gösterilen tüm çabalara rağmen, yeknesak bir Avrupa Birliği göç politikası oluştuğunu söylemek için halen erkendir. Aslında, üye ülkelerin kendilerine özgü yapısal şartlarının, farklı önceliklerinin ve beklentilerinin olması sebebiyle bu tür ortak bir politikaya ulaşmak oldukça zordur. Tezde, buna karşın, üye ülke politika belirleyicilerinin ortak bir Avrupa Birliği göç politikasında neden halen ısrar ettikleri ele alınmaktadır. Araştırmacı, AB ortak göç politikasının bazı unsurlarının, kısıtlayıcı ulusal yaklaşım ve mevzuatları uluslarüstü düzeye taşıyarak, üçüncü ülke yurttaşlarının AB vatandaşlarına tanınan haklara ulaşmasını sınırlayan ilave önlemler alabilmek amacına hizmet eden yeni bir göç kontrol mekanizması oluşturduğunu ileri sürmektedir. Tezde ayrıca, birlik sınırları içerisinde önemli bir nüfusu oluşturan vatandaşlarımızın ve üyelik sürecinde müzakereler yürütmekte olan aday ülke konumundaki Türkiye'nin AB ortak göç politikası girişimlerinden ne şekilde etkilendiği irdelenmiştir. Sözkonusu sürecin Türk-AB ilişkilerinde yeni bir kırılma noktası oluşturup oluşturmadığı incelenmiştir.

Anahtar Kelimeler: Avrupa Birliği Göç Politikası, Üye Devletler, Türk-AB İlişkileri

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
CIS	Commonwealth of Independent States
COM	European Union Commission Communication
DG	Directorate General
EASO	European Asylum Support Office
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EDU	Europol Drugs Unit
EEA	European Economic Area
EEC	European Economic Community
EP	European Parliament
ETF	European Training Foundation
EU	European Union
EU-27	27 Member Countries of the European Union
EURODAC	EU-wide electronic Fingerprints Database for the Effective Application of the Dublin Convention
EUROPOL	European Police Office
EUROSTAT	Statistical Office of the European Union
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GAM	Global Approach to Migration
GDP	Gross Domestic Product
HLWG	High Level Working Group on Asylum and Migration
ICMPD	International Centre for Migration Policy Development
IGO	Intergovernmental Organization
ILO	International Labour Organization

IOM	International Organization for Migration
JHA	Justice and Home Affairs
MEP	Member of the European Parliament
MERCOSUR	Mercado Común del Sur (Southern Common Market)
NAP	National Action Plan
NPAA	National Programme for the Adoption of Acquis
OAS	Organization of American States
OSCE	Organization for Security and Cooperation in Europe
QMV	Qualified Majority Voting
SIS	Schengen Information System
TCNs	Third Country Nationals
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
UK	The United Kingdom
UN	United Nations
UNCAT	United Nations Convention against Torture
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commission for Refugees
US	The United States of America

1. INTRODUCTION

The increased movement of people all over the world and migration are inevitable results of globalization. Migration, as the human face of globalization, has immense impacts on the demography, culture, economy, and politics of the states. People are leaving their countries of origin and migrating to others for various reasons and no country can isolate itself from the challenges posed by the migration phenomenon. Today, 196 countries around the world have been affected either that way or another from migration issues, as *immigration (destination), emigration or transit country*.

The United Nations Population Division projected that there were 214 million international migrants[1] in the world in 2010, up from 156 million in 1990. International migrants account for 3.1 per cent of the world population in 2010, comparing to 2.9 per cent in 1990. This means one in every 33 persons migrates today. Between 2005 and 2010, the global migrant stock grew by 19 million persons. Because the size of the migrant stock is affected not only by the difference between immigration and emigration, but also by deaths, net migration exceeds the net increase of 19 million occurred during 2005-2010 at the world scale. After adjustment for mortality, the estimated net migration during 2005-2010 is 24 million. About one in every 10 persons living in the more developed regions is an international migrant, whereas among people living in the less developed regions, only one of every 70 persons is an international migrant. In 2010, the more developed regions hosted about 18 per cent of the world's population, but 60 per cent of the world's migrant stock. Europe hosts the largest number of international migrants (70 million in 2010), followed by Asia (61 million) and Northern America (50 million). With 43 million migrants expected in 2010, the United States is the host of nearly one in five international migrants in the world. It is followed by the Russian Federation with 12 million, Germany with 11 million, Saudi Arabia and Canada with 7 million each. The number of countries with more than one million inhabitants where international migrants constituted more than 10 per cent of the total population rose from 29 in 1990 to 38 in 2010. Countries with the highest proportion of

[1] The United Nations Population Division here uses the term "international migrant" as foreign-born person residing in a host country.

international migrants in 2010 are Qatar (87 per cent), United Arab Emirates (70 per cent) and Kuwait (69 per cent). On the other hand, refugees constituted an important share of the global migrant stock. It was estimated that by 2010 the global refugee stock reached 16.3 million persons, up from 15.6 million in 2000, but lower than the 18.5 million estimated in 1990. The recent increase in the refugee population, especially in less developed countries, was due to inclusion of persons in refugee-like situations. The proportion of refugees among the global migrant population declined from 12 per cent in 1990 to 9 per cent in 2000 and further to 8 per cent in 2010.[2]

Immigration is now the key demographic factor responsible for population growth in most Western societies. In the future, the importance of immigration in demographic terms will further increase. Immigration also has effects on the composition and culture of the countries of destination. Europeans are attempting to cope with the transformation brought about by immigration, from relatively homogenous to multicultural societies. Cultural conflicts with regard to the position of Muslims in predominantly Christian societies have further intensified following the September 11, 2001 terrorist attacks. [3]

During the past two decades, immigration has become a prominent political issue in most Western democracies. The growing economic and demographic disparity between North and South, the civil war in the former Yugoslavia, the collapse of communist regimes in Eastern Europe, and wars and natural disasters in other parts of the world have sent hundreds of thousands of asylum seekers into Western Europe. They have joined millions of foreign residents already living in Western Europe, many of them former migrant workers with limited political rights, which undermines European ideals of democracy and equality. In addition, an estimated 500,000 foreigners a year enter the EU illegally, and there are believed to be three million unauthorized foreigners living in Europe. While the numbers of immigrants increase, the xenophobic tensions and extreme-right anti-immigrant

[2] The UN Department of Economic and Social Affairs Population Division defines a migrant as someone outside his country of birth or citizenship for 12 months or more. These migrants include refugees and asylum seekers, foreign students, and other long-term visitors, unauthorized foreigners, and naturalized foreign-born citizens of Australia, Canada, and the United States (United Nations Population Division, 2002; Population Newsletter No.87, June 2009, pp.11-12; Report of the 8th Coordination Meeting on International Migration, November 2009, p.27).

[3] Eytan Meyers, International Immigration Policy: Theoretical and Comparative Analysis, Palgrave Macmillan, The USA, 2004, p.1.

parties have spread throughout Europe.[4] The growing immigration also became a source of friction as well as of cooperation in the international arena. For example, fear of Turks pouring into the EU in search for jobs has been one of the main reasons for the delays in accepting Turkey into the Union. But the shared immigration pressures have also contributed to the gradual movement toward a common EU migration and asylum policy.[5]

However, despite all the efforts, it is still early to say that there is a uniform European immigration policy due to the unique structural requirements, different priorities and expectations of the Member States, and the paradoxes of the EU immigration policy may bring about new tension points on Turkish-EU relations.

The researcher asserts that some aspects of the common EU immigration policy serve as a new migration control mechanism in order to be able to take additional measures limiting Third Country Nationals' (TCNs) access to the rights of EU citizens by transferring restrictive national approaches and legislation into a supranational venue.

Member States' actions within the scope of EU law are subject to the supervision and judicial control carried out by the European Commission and the European Court of Justice (ECJ). However, by inserting integration measures and conditions into the articles of supranational provisions, Member States delegate some of their national policies and programmes concerning immigration into EU law. This is particularly apparent in the introduction of integration conditions and measures, which allow the national authorities to utilize derogative clauses when determining the allocation of rights and procedural guarantees to TCNs.

The thesis starts with the elaboration of the facts, concepts and data behind the phenomenon of migration and continues with the comprehensive theoretical discussions in the first chapter.

After the overview of historical background, the paradoxes and defects of the

[4] In France, Le Pen reached the second round of the 2002 presidential elections, where he won 18 percent of the vote. The Pim Fortuyn party received 18 percent of the vote in the May 2002 Dutch elections, and became the second largest party in Parliament. In Austria, Haider's Freedom Party won 26.9 percent of the vote in the October 1999 national elections, and joined the ruling coalition. And the Swiss People's Party (UDC), headed by Christopher Blocker, gained 22.5 percent of the vote in the October 1999 Swiss national elections.

[5] Eytan Meyers, et.al, p.2.

EU immigration policy harmonization process are presented in details in chapter two.

Within the third chapter, the repercussions of immigration policy harmonization efforts on Turkish-EU relations are analyzed by handling the major issues concerning the migration.

In the final chapter, the researcher summarizes his main conclusions and recommendations.

1.1 Concepts and Terminology

There are roughly two considerable factors, known as *push* and *pull*, influencing the decisions of people to migrate. Push factors are the circumstances forcing people to leave, such as famine, drought, poverty, armed conflicts, epidemic diseases, unemployment, human rights violations, etc. Pull factors, on the other hand, are the incentives making destination attractive for migrants, such as better life standards, more job opportunities, higher payments, political freedom, joining to family members or relatives who have been already abroad. The above-mentioned factors and the motives of migrants together lead four different types of immigration, i.e. *permanent immigration, temporary labour migration, asylum seekers/refugees and irregular immigration*[6].

The term "permanent immigration" corresponds to those immigrants who are accepted as settlers in the country of destination and expected to become citizens

[6] Instead of the term "illegal", the researcher prefers deliberately to use the term "irregular" migration and "irregular" migrant(s). The term "irregular" is also used by the most of the international organisations with a competence in migration, including the Council of Europe, International Labour Organisation (ILO), International Organisation for Migration (IOM), the Organisation for Security and Cooperation in Europe (OSCE) and UNHCR. Indeed, the European Union (EU) is the only international actor insisting on using the term "illegal". The term "irregular" may be conceptually problematic, nevertheless, considered preferable to the other term most commonly used in this context – "illegal". The use of the term "illegal" can be criticized in three ways: Firstly, it connotes criminality, although most of the irregular migrants are not criminals. Secondly, labelling persons as "illegal" may bring about also denying their humanity. It should not be forgotten that whatever the status they have, such migrants are only human beings with their fundamental rights. Thirdly, defining them as "illegal" may probably further jeopardize the application of asylum seekers to get refugee status. On the other hand, the researcher avoids the other term "undocumented", due to its vagueness. Although, "undocumented" is utilized frequently to cover both the migrants who are not recorded into the system of the country of destination, and the migrants without official documents such as passports, neither situation can be applied to all irregular migrants. For, there may be various other reasons of being irregular.

eventually. After residing, permanent migrants compete for social services and affect the social, economic and political character of the receiving society. Particularly, their impact is more remarkable when they have a different racial or ethno-cultural background than the native population.

The term "temporary labour migration" refers to those who are supposed to work in the host country for a limited period and then turn back to their own country. Contrary to the permanent immigrants, temporary migrant workers do not have generally a lasting effect on the ethno-cultural or political character of the receiving society. Therefore, attitudes toward these immigrants are only influenced to a limited degree by their racial and ethnic characteristics.

Asylum seeker denotes category of immigrants fleeing their country of origin and apply to the government of another country for protection as a refugee. According to the United Nations Convention (1951) and Protocol (1967) Relating to the Status of Refugees, a refugee is someone who is outside their own country and cannot return due to a well-founded fear of persecution, because of their race, religion, nationality, membership of a particular social group and political opinion. The term "asylum seeker' refers to all people applying for refugee protection, whether or not they are allowed officially to be refugees. During the period while their asylum claims are processed, asylum seekers are generally bestowed very limited rights -both legal and social- and housed in isolated camps. In many countries they are not allowed to work and even where they are permitted to work, the conditions are very limited.

Lastly, irregular migration may occur in many different ways, but it is commonly used for the people who enter to a country without the permission of competent authorities (namely, through clandestine or fraudulent means), and the people who enters to a country legally but stays contrary to the legislation (for instance, by staying after the expiry of a visa or work permit).

Immigration (control) policy is the crucial element determining immigration patterns. Given the large number of people who would like to emigrate to the industrialized countries for economic or political reasons, and the strictly limited opportunities to do so, it is immigration policy that mainly determines the scope of

global migration.[7] It usually comprises a set of legal measures that regulate the entry and stay of foreigners in the country as well as their deportation and exclusion. It also specifies their rights and obligations and it may include provisions on border control, internal security, illegal immigration, sanctions, support and assistance.[8]

Immigration policies may differ from one country to another due to some set of structural factors (political, economic, social, demographic, ethnic, cultural, geographical, historical, etc). These structural factors of a given state -*independent variables*- influence and determine its type of immigration policy -*dependent variable*.

1.2 Stream of Migration in Europe

Till the Second World War, the Western European countries had tended to be the countries of emigration rather than immigration for two centuries. However, since after the War there has been a significant rise in immigration towards the EU. And by the end of the Cold War, net migration became a common reality for almost all of the industrialized countries of Europe and especially those which constitute the EU-15.

In a broad sense, two periods of immigration to Europe can be distinguished since the Second World War. Until the oil crisis, labour migration into Northern and Western European countries was almost unrestricted; whereas after 1973 the recruitment of foreign workers particularly through bilateral labour agreements between countries was stopped. Nevertheless, immigration itself continued despite the policy of "zero immigration". During the first period, Southern European countries were characterized by net emigration; while later on, and notably by the end of the 1990s, these countries became also attractive for immigrants.

Global political changes induced a substantial number of immigrants or, more precisely, repatriates to move back to Western Europe. The most important of these

[7] Eytan Meyers, et.al, p.2.

[8] Fabio Franchino, Perspectives on European Immigration Policies, European Union Politics, Vol.403, 2009, p.407.

movements was repatriation of nearly 15 million expellees and refugees after the Second World War, including the return of German prisoners of war and the German-speaking civilian population from former German Eastern European regions. Moreover, decolonization caused the return migration of white settlers, officials and soldiers along with their families, as in the case of British and French colonials. Endenizening former colonial subjects, as in the case of British citizenship, facilitated immigration. Settlers returned from Indonesia during 1950–60s and from Surinam and the Antilles during 1970s to the Netherlands. About five hundred thousand Portuguese settlers returned from Angola and Mozambique in the middle of the 1970s. Belgium and Italy experienced similar influx. As a result, significant numbers of Indians, Pakistani, Bangladeshi and Caribbean (West Indians) moved to Great Britain, while North and West Africans came to France, and Indonesians and Surinamese immigrated to the Netherlands. The re-settlement of displaced persons and repatriation of expellees and refugees substituted certain amount of the labour shortage in Western European countries, which had experienced post-war economic reconstruction and growth.

From the 1950s onwards, the economic growth in the majority of Western and Northern European countries accompanied heavy demand for additional labour force. Some countries partly alleviated their demand by inviting migrant workers from the less developed neighbours –such as Irish workers in England and the Finnish ones in Sweden. Nonetheless, many of the Western and Northern European countries, even if there was an inflow of former colonial subjects, like in Great Britain, France and the Netherlands, reacted to the sharp increase in labour demand by signing bilateral agreements with Southern European and Mediterranean countries. Thus, they found the opportunity to recruit Italian, Spanish, Portuguese, Greek, and later Turkish, Maghrebian and Yugoslavian workers in an organized way. In principle, the idea was to permit foreign workers to enter only on a temporary basis without any obligations regarding their settlement or integration as social inclusion. The jobs for guest workers were usually unskilled and low-skilled ones within the manufacturing and construction sectors, with poor working conditions, in which the native-born refused to be employed.

Unrestricted inflow from former colonial territories and foreign labour

recruitment reached its peak at the beginning of early 1970s. However, following the oil crisis, sharp decrease emerged in economic growth and therefore in demand for labour force. As a result, the recruitment of foreign workers was ended in many of the European countries. The new barriers for foreign workers culminated in a growing tendency among once "temporary" workers toward permanent settlement. Reacting to structural unemployment, former recruiting countries started setting limits on the permanent entry of foreign workers. Hence, family reunification remained as one of the most important means of permanent immigration into Europe.

Recently, temporary labour migration appears to be making a comeback and is found in two forms. Firstly, despite relatively high unemployment in some European countries, there still exists a demand for unskilled, seasonal and temporary labour, which attracts immigrants predominantly to Southern European countries –but also to Western Europe. These, often irregular immigrants, are commonly employed as temporary workers in agriculture, construction, manufacturing and the service sector. Italy and Spain in particular, both being on Europe's southern border, might well have attracted higher proportions of illegal workers than other countries. Secondly, in the 1990s it was the immigration of highly skilled, managerial workers and entrepreneurs that was and still is of growing importance. The migration of elites includes migration of managers and technicians of international firms, representatives of international organisations, scientists, diplomats, journalists, sportsmen and artists. As a rule these arrive from other developed countries and are usually recruited by companies before they move, and thus make a move or successive moves from one country to another within the structure of a single transnational company or international organisation. They are often highly qualified specialists, and are almost never objects of hostility from the local population. They are often reluctant to assimilate into host societies. Another recent trend in Europe is the immigration of highly qualified specialists from Asian and Eastern European countries to fill the lack of specialists in hospitals, the biotech industry, and information technologies.[9]

The inflow of asylum seekers and refugees is another striking element of recent migration to EU. Indeed, this kind of immigration already knocked on the doors of

[9] Irena Kogan, Working through Barriers: Host Country Institutions and Immigrant Labour Market Performance in Europe, Springer, The Netherlands, 2007, pp.27-28.

Western European countries during the Cold War years. The political refugees from the communist regimes of Eastern Europe generally welcomed with sympathy in the West. Thus, nearly 200.000 Hungarians escaped from their homeland in 1954; similar numbers of Czechs and Slovaks moved to the West after the events of 1968–69; and large numbers of Poles fled in 1980–1981. Asylum seeking rose by the 1980s and reached its zenith in the early 1990s. After the fall of the iron curtain, dramatic increase happened in the numbers of asylum seekers coming from Central and Eastern Europe. This was the case also for the victims of wars in Bosnia and Herzegovina, Croatia, Vojevodina and Kosovo. Along with the millennium, the number of asylum seekers decreased substantially. The main reason for this fall can be attributed rather to more restrictive asylum policies of EU, such as stricter visa requirements and processing of asylum claims, than to the positive developments in world political or socio-economic system. Faced with the growing numbers of asylum seekers, the majority of European countries tightened asylum laws. Yet, migration under the case of asylum seeking to EU countries still continues by largely stemming from Iraq, Afghanistan, Iran, Somalia, Syria, Sri-Lanka, Turkey.

Consequently, in 21st century, Europe is still one of the most considerable magnets for immigrants from developing countries, because of its welfare and stability. Therefore, people who suffer under the poverty line or war conditions seek to flee from their countries and to live in Europe. According to Eurostat data; the total population of EU-27 is 499.7 million and the number of third country nationals (TCN) within the Union is 19.8 million in 2009, i.e. nearly 4 % of all the population.

1.3 The Theoretical Dimension

An English geographer, *Ernest Ravenstein's "Laws of Migration" (1889)* is widely recognized as the first study on migration theory. He gathered census data from England and Wales to develop his theory. He stated that "push-pull" factors led the migration process. According to him, unfavourable conditions in a location such as oppressive laws, heavy taxation, etc. "push" people out, and favourable conditions in another place "pull" them in. Ravenstein's laws argued that better external

economic opportunities were the primary reason behind the migration; the volume of migration decreased in direct proportion to the distance; and the differentials like gender, social class, age affected a person's mobility.

After these initial steps, many studies have started to analyse the notion of citizenship and immigration (control policies). The academic literature on these issues has expanded quite fast and generally tried to explore the immigration policies of individual countries. But unfortunately, the well-defined debates among various schools of immigration policy theories on the subject are rare. Here, the study will strive to elaborate the major approaches in the field of immigration control policy, by highlighting their main assumptions and shortcomings.

Theories explaining immigration (control) policy can be categorized into three major groups: *1) theories focusing on the economic competition between the native-born citizens and the immigrants; 2) theories emphasizing the difference in culture and identity of these two groups; and 3) studies handling the impact of international relations, international institutions and multilateral agreements on immigration control policy*.

1.3.1 The Economic Competition Theories

The first group of theories focuses on the economic competition between the native-born and the immigrants. According to Husbands, theories of this kind explain racism by competition between ethnic groups for a scarce resource, for example jobs, housing, private and public welfare benefits. According to Money, theories of economic interests view immigration policy as an outcome of the preferences of economic actors within the host society. These preferences are attributed to the differential economic impact of immigrants on groups in the host society. And according to Fetzer, theories of "class politics" or "economic self-interest" point to immigration's supposed threat to natives' economic well-being.[10]

Theories of economic competition include; a) Marxist and b) non-Marxist/pluralist variants. The Marxist approach argues that economic factors and a

[10] Eytan Meyers, et.al, p.5.

class-based political process shape immigration policies.[11] It asserts that capitalists import migrant workers in order to exert a downward pressure on wages and thereby increase their own profits, and in order to divide the working class. They achieve the latter by encouraging racism among the working class. Likewise, pluralist/domestic politics models assume that the state serves as a neutral arena for societal interests: interest groups and parties. Policymaking is the result of bargaining as well as of compromises between these interests, or sometimes it reflects the fact that one or more of these actors has succeeded in capturing the state. In this sense, it is worth explaining the neo-classical political economy, as exemplified in the work of Gary P. Freeman.

His model assumes that migration policy is essentially determined by the content and relative power weighting of organized interests in a given society. Policymakers are conceptualized as brokers who have an interest in producing policies that mollify (influential) organized interests. In line with most political economy accounts, Freeman argues that the more strongly a group's interests are affected by immigration, the greater incentive it has to organize. Thus where the costs or benefits of migration are concentrated on a particular group or groups, they are likely to organize more effectively and thus have a greater influence on policy.[12] Freeman argued that the availability of cheap foreign labour brings concentrated benefits to employers and immigrant groups; while the costs for the native workforce or those living in neighbourhoods where foreign workers will live are diffuse. This implies that employers and immigrant groups will have incentives to lobby more intensively to promote a liberal immigration policy, while those negatively affected by the policy will have fewer incentives to lobby against.

In the context of economic competition, the two prominent interest groups are the employers and the unions. Both the Marxist and the pluralist approaches argue that employers' demand for labour, and fluctuations in the economy and in the labour

[11] Beard, Bovenkerk, Castells, Castles and Kosack, Gorz, Marshall, Miles, Nikolinakos use the Marxist approach to explain the immigration policies.

[12] Christina Boswell, Theorizing Migration Policy: Is There a Third Way, International Migration Review, Vol.41, No.1, 2007, p.77.

market influence immigration control policy.[13]

1.3.2 The Culture-Based National Identity Theories

The second group of theories emphasize the difference in culture and identity between the native-born citizens and the immigrants. According to Husbands, such theories see racism as a spontaneous response to what is strange and unfamiliar, and in later stages as based upon negative responses to customs and habits of the arriving groups.[14] Another variant of that theory explains racism as based on moral and symbolic challenges to the racial status quo in society generally. For Money, these theories emphasize the primacy of cultural values, and often consider national identity a primary determinant of immigration policy.[15] Fetzer, on the other hand, analyzes the marginality and contact approaches, which emphasize the impact of cultural differences between immigrants and natives of dominant ethnicity. Contrary to the economic competition theories, marginality theory argues that recessions decrease the opposition to immigration and immigrants.[16]

Some variants of the culture-based theories explain changes in immigration control policy as a response to the size of immigration and to the cultural differences between immigrants and natives. Another variant -the national identity approach- argues that the unique history of each country, its conceptions of citizenship and nationality, as well as debates over national identity and social conflicts within it, shape its immigration policies.[17] In comparison to the other theories, the "national identity" approach downplays the importance of external and "situational" factors.

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[13] Eytan Meyers, et.al, p.5.

[14] Christopher T. Husbands, "The Dynamics of Racial Exclusion and Expulsion: Racist Politics in Western Europe," European Journal of Political Research, Vol.16(6), 1988, p.702.

[15] Jeannette Money, Fences and Neighbors: The Political Geography of Immigration Control, Ithaca: Cornell University Press, 1999, pp.6-7.

[16] Joel S. Fetzer, Public Attitudes towards Immigration in the United States, France and Germany, New York: Cambridge, 2000, p.5.

[17] National identity approach is presented by some scholars such as Brubaker, Herbert, Higham, Jones, Kurthen, Leitner.

Instead, it explains the timing of immigration policies on the basis of social conflicts and debates over national identity. It relates variations in immigration and citizenship policies between countries of destination to their different conceptions of national identity or different characteristics. Three such distinctions, which partially overlap, are (a) between settler societies, which accept large-scale immigration, and ethnic states, which tend to reject such immigration; (b) between homogeneous and heterogeneous countries; and (c) between countries whose citizenship laws tend toward jus sanguinis and those countries whose citizenship laws tend toward jus soli.[18]

1.3.3 Theories of International Relations

The comparative analysis and assumptions of economic competition theories and culture-based national identity theories within the context of post-World War II years were brought into question by the economic crisis of 1970s, and then by the end of the Cold War in the 1990s. As it turned out, the large immigrant-worker populations had become ethnic family populations by the 1990s, and had become objects of politics. Unlike previous waves of immigration which were controlled by national law and administration, this wave would be more difficult to control. In addition, the new immigration was a challenge to the more conventional notions of citizenship. These new patterns of "post-national" citizenship would be characterized by dual citizenship, or residence in one country and citizenship in another. Finally, because both immigration controls and citizenship standards had become more transnational, integration too would become weaker as a result.[19]

Therefore, scholars argued that the dynamics of immigration control and the notion of citizenship had changed, and they began to focus on the changing patterns of international relations. This was the harbinger for the emergence of a third group of studies. Some scholars, who adopt the realist approach, argued that actual or

[18] Eytan Meyers, et.al, p.7.

[19] Martin A. Schain, The State Strikes Back: Immigration Policy in the European Union, The European Journal of International Law, Vol.20, No.1, 2009, p.94.

potential conflicts among states, including military ones, influenced immigration policies. Others, under the roof of neoliberal institutionalist approach dealt with the impact of international relations, institutions and agreements on immigration control policy.[20]

They argued that international institutions and regimes facilitated cooperation between countries with regard to immigration control policies. They were tended to explain these changes by neo-liberal assumptions. According to them; because of the constraints imposed by international agreements, institutions and judicial authorities, controls would be embedded in international institutions and law that were assumed to be inclined to be less restrictive than national institutions and law. Also, they were on the opinion that these controls would be less restrictive than national institutions and law.

In 1992, James Hollifield developed a highly pessimistic thesis on the ability of liberal democracies to exercise control over the large-scale immigration from outside the European Community ("third-country nationals") that had grown in Europe since the 1960s, despite efforts of most European countries to impose draconian controls, even to develop policies that would lead to "zero immigration". The puzzle was that European borders had been closed in the early 1970s, but legal immigration had continued. Moreover, what had been a pattern of immigration for work had now developed into a pattern in which family immigration for settlement was dominant. Even when their stated goal appears to be strong and restrictive, immigration control policies may be difficult to enforce, Hollifield has concluded. Control over frontiers – that essential aspect of sovereignty – he argued, has been weakened by legal and judicial controls, both on the national and the international levels. What has been referred to as "embedded liberalism" in the legal and political systems –values that protect individual and collective rights– makes it difficult to pass legislation that restricts immigration, and makes it even more difficult to enforce legislation.[21]

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[20] Bach, Hartigan, Hollifield, Koslowski, Loescher, Miller, Mitchell, Papademetriou, Salomon, Scanlan, Skran, Soysal, Teitelbaum, Tucker, Weiner, Zolberg are the followers of the neoliberal institutionalist approach.

[21] James Hollifield, Immigrants, Markets and States: The Political Economy of Postwar Europe, Cambridge, MA: Harvard University Press, 1992, p.7.

Likewise, Yasemin Soysal argues:

> "This new model, which I call postnational, reflects a different logic and praxis: what were previously defined as national rights become entitlements legitimized on the basis of personhood. The normative framework for, and legitimacy of, this model derives from transnational discourse and structures celebrating human rights as a world-level organizing principle. Postnational citizenship confers upon every person the right and duty of participation in the authority structures and public life of a polity, regardless of their historical or cultural ties to that community … It is such postnational dictums that undermine the categorical restraints of national citizenship and warrant the incorporation of postwar migrants into host polities."[22]

In this analysis, the logic of personhood supersedes the logic of national citizenship. The same human rights previously secured by national constitutions and national institutions are now globally sanctioned norms, protected by international agreements and institutions. In this context, non-nationals advance claims and achieve rights in a state not their own.[23]

Saskia Sassen shares similar point of view and presents even stronger case for international norms and post-national citizenship. "The state finds itself caught in a broader web of rights and actors that hem in its sovereignty in decisions about immigrants", she writes. Indeed, "[t]here is an emerging de facto regime often centered in international agreements and conventions as well as in various rights gained by immigrants, which is limiting the state's role".[24]

Although above-mentioned scholars have made somewhat convincing case for neo-liberal assumptions and post-national citizenship argument, others have some criticism regarding this literature. For instance, Peter Schuck states that post-national citizenship rights possess only a limited institutional status, protected mostly by judicial institutions, and can be easily swept away by tides of tribalism and nationalism. Since rights and claims –even if they are judged by international courts– are still enforced within bounded national systems, advantages of national citizenship

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[22] Yasemin Nuhoğlu Soysal, Limits of Citizenship: Migrants and Postnational Membership in Europe, The University of Chicago Press, USA, 1994, p. 3.

[23] Martin A. Schain, et.al, p.98.

[24] Saskia Sassen, Guests and Aliens, New Press, New York, 1999, p.54.

may very well remain.[25] Miriam Feldblum has also demonstrated that postnational citizenship has run up against what she calls "neo-nationalist" tendencies to reassert bounded national citizenship requirements.[26]

Terri Givens and Adam Luedtke focus on the immigration policy-making at the EU level. Contrary to neo-liberal arguments, they maintain that state actors actively develop their strategic opportunities through proactive process at the European level to control and restrict immigrant entry. The point is that constraints on restriction at the national level have been evaded by actors through one particular strategy called "venue shopping" in which state actors use EU level organization to pursue national policy goals.[27]

Virginie Guiraudon supports this analysis in a comprehensive study of the development of this arena. She links national and EU politics by analyzing the movement of the immigration issue to the EU level as initiated by key national ministries in search of an arena within which they could gain more autonomous action. Guiraudon explains:

> "The incentive to seek new policy venues sheltered from national legal constraints and conflicting policy goals thus dates from the turn of the 1980s… It thus accounts for the timing of transgovernmental cooperation on migration but also for its character: an emphasis on nonbinding decisions or soft law and secretive and flexible arrangements. The idea is not to create an international regime, i.e. a constraining set of rules with monitoring mechanisms, but rather to avoid domestic legal constraints and scrutiny."[28]

Thus, it appears what began as a scholarly discussion of the restrictions on national policies concerning immigration because of international constraints (neo-liberal view) has developed into a discussion of the use of international relations to strengthen the effectiveness of national restrictionist policies (neo-nationalist view).

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[25] Peter Schuck, The Reevaluation of American Citizenship, Georgetown Immigration Law Journal, Vol.12, 1997, p.17.

[26] Miriam Feldblum, Reconstructing Citizenship: The Politics of Nationality Reform and Immigration in Contemporary France, State University of New York Press, USA, 1999, p.71.

[27] Terri Givens & Adam Luedtke, EU Immigration Policy: From Intergovernmentalism to Reluctant Harmonization, The State of the European Union, 6, Vol. 1, No. 9, p.298.

[28] Virginie Guiraudon, The EU Garbage Can: Accounting for Policy Developments in the Immigration Domain, Paper presented at the 2001 Conference of the European Community Studies Association, Madison, Wisconsin, 29 May – 1 June 2001, p.7.

While liberal democratic infrastructure and global dynamics have put constrains to some extent on European states regarding immigration policies, Christian Joppke argues that international constraints on the state's ability to control immigration into the EU are highly overrated, either because they are based on erroneous assumptions of strong sovereignty that never was, or because the limits on frontier controls are more obviously domestic than international.[29] Although notions of state sovereignty have been linked to control over frontiers since the 16th century, effective control of borders through military and administrative mechanisms goes back only to the late 19th century. Ever since state capabilities began to catch up with theories of sovereignty, the struggle to maintain the frontier has been a balance between what the state is capable of doing and contradictory interests that support a more open or closed border.[30]

On the other hand, neo-nationalist scholars claim that eventually the states themselves decide whether and how abide by international norms. It is through the domestic institutions that transnational ideas and understandings are interpreted and implemented. Thus, the nation-state still remains as the core structure.

1.3.4 The Critique of the Theories of Immigration Policy

Principally, there seems fair amount of literature on the topic of immigration policy. However, one of the most important problems of the scholars working on immigration (control) policy is that they do not refer to any theoretical framework. Much of the literature tries to reveal the immigration policy of a single destination country during a limited period of time. There are scarce systematic theoretical studies exploring the rules and methods of states or supranational organisations regarding their provisions on access, stay, exclusion, deportation, sanction of immigrants. Notably, the interaction between domestic and international perceptions and considerations is overlooked, either. Myron Weiner notes: "High on a list of

[29] Christian Joppke, Immigration and the Nation-State: The United States, Germany and Great Britain, Oxford, London, 1999, p.72.

[30] Didier Bigo and Elspeth Guild (eds.), Controlling Frontiers: Free Movement into and within Europe, Ashgate, London, 2005, p.55.

priorities for future research should be the study of determinants of exit and entry rules."[31] Zolberg also states that immigration policy literature tends to focus on specified periods and particular countries, and constitutes an array of discrete bits.[32]

Essentially, each of the above-mentioned theories contributes to our understanding of immigration policy. The economic competition theories correctly shed light on the short-term correlation between the economic situation and immigration policies. To some extent, it clarifies the notion laying behind the policies on migrant workers and irregular immigrants. The culture-based national identity theories, on the other hand, highlight the importance of the cultural differences between immigrants and native citizens. Likewise, theories of international relations and institutions especially help us to perceive the immigration and refugee policies of the EU. However, it seems also each of these approaches has certain shortcomings.

With regard to the Marxist approach: (a) Its prediction of long-term growth in immigration as a structural part of capitalism is debatable. It may be argued that 'illegal' migration and asylum seekers have replaced the traditional labour migration in terms of its role in the labour market. But it is not clear why the capitalists would resort to such replacement given their alleged control of the state. (b) The Marxist approach fails to explain the tendency to impose restrictions on immigration of dissimilar ethnic origin. According to the Marxist approach, the state (in the service of the capitalists) encourages the importation of immigrants of dissimilar racial and ethnic composition in order to expand the labour force and cause racial tensions between immigrants and local labour. In practice, however, immigration policies have discriminated against immigrants of dissimilar racial and ethnic composition. (c) The exclusive focus of the Marxist approach on the economic motive lessens its ability to explain refugee policies and other permanent immigration policies that are influenced by foreign policy considerations. (d) The Marxist focus on the economic motive also prevents it from explaining restrictions on permanent immigration,

[31] Myron Weiner, The Global Migration Crisis: Challenge to States and to Human Rights, New York: Harper Collins College Publishers, 1995, p.446.

[32] Aristide R. Zolberg, "The Next Waves: Migration Theory for a Changing World," International Migration Review, Vol.23(3), 1989, p.427.

passed in various countries during major wars (e.g. World War I), despite a growing demand for labour.[33]

Likewise, neo-classical political economy models embrace a form of methodological individualism that attempts to reduce explanation to a series of generalizable propositions and deductions about the behaviour of individuals. It implies commitment to a view of human agency as following universalizable and thus predictable patterns of behaviour. This theory of agency has been the object of sustained attack from philosophers and sociologists for at least the past hundred years. The possibility of predicting human behaviour based on some objectively observable pattern of costs and benefits is not easy. The prerequisite for certain rationality of human behaviour can be questioned. Freeman's theory assumes that the degree of influence of interests is determined by the level of organization within a group. Yet this overlooks the role of institutions in mediating the relative influence of different interests. This has in fact been a major source of critique of Freeman's theory: commentators have argued that the theory is best applicable to pluralist interest group systems, such as that of the United States. It is less descriptive of European countries, with their more corporatist structures and higher degree of politicization of migration issues. Another crucial weakness of the theory is its characterization of the state as a broker. The neo-classical political economy account sees the state as passively reacting to different interests. Its role is confined to that of finding a utility-maximizing compromise between organized interests. This overlooks the fact that the state plays an active role in defining new policy alternatives capable of securing compromise. Some theorists have gone further, claiming that states display considerable autonomy in the formulation and implementation of preferences that are independent of societal interests. Hence, Freeman's account comes at the cost of a simplified theory of societal interests, institutions, and the state.[34]

The primary weakness of the culture-based national identity theory is its ambiguous definition of independent variables. The approach is vague with regard to identifying social conflicts and debates over national identity. Additionally, it is

[33] Eytan Meyers, et.al, p.8.

[34] Christina Boswell, et.al, p.78-79.

unable to explain the resemblance of immigration policies in different countries and the attempts of some group of countries to adopt an integrated immigration policy. The adoption of such kinds of similar immigration policies by various states undermine the assumption that immigration policies are shaped by each country's unique history, social structure, and the notion of national identity.

Finally, with regard to theories of international relations, neither realist nor neo-liberal institutional approaches have significantly contributed to the study of immigration control policies. With regard to realism: (a) The theory emphasized security, while viewing social issues as less important. Consequently, realist works tended to neglect the issue of immigration. (b) Realism defines the state as a unitary rational actor. But such a perspective cannot explain why some scholars (notably economists) criticize immigration policy for being inefficient or irrational. (c) Realism focuses on power as a key concept; but global power relations usually do not determine immigration policy. With regard to the neo-liberal institutionalist approach, most studies conclude that supranational organizations and international regimes have had little impact on the immigration policies of individual countries, with the partial exception of the EU and the refugee regime.[35]

Especially by the end of the Cold-War, neo-liberal scholars hold the new patterns of international relations responsible for the changing dynamics of immigration control and the notion of citizenship. They assume that international agreements, international institutions and international judicial authorities have imposed constraints on national bodies from now on, as a natural result of global developments. These scholars imply that control starts to shift to the international institutions and this would be less restrictive than the one in national institutions and law.

Yet, it appears that neo-liberals are too assertive in their assumptions. It is true that there are essential challenges for the traditional models of the international politics and at the same time for the nation-state. The political structures of modernity are under the pressure of the global changes. However, it does not necessarily mean the dissolution of the nation-state as a political entity. Being far

[35] Eytan Meyers, et.al, p.9.

from extinction, the nation-states are still capable to offer solutions to the global issues. For the moment, it seems there are two world political systems; the state-centric world, in which the national actors play the primary role, and a multi-centric world consisted of various actors. Far from being secondary or obsolete, the nation-state, nationalism and the idea of national interest are central elements in the politics of the contemporary world. In sum, the nation-state is still important in our world and remains the principal unit of political organization.

On the other hand, neo-nationalist school argues that at the end of the day, the nation-states themselves decide to what extent abide by international norms. It is by means of the domestic institutions that transnational ideas and understandings are interpreted and implemented. For instance, from time to time Member States develop their strategic opportunities through proactive process at the European level to control and restrict immigrant entry. In other words, actually state actors use EU level organization to exert their national policy goals.

Nevertheless, neo-nationalist assumptions seem also partly correct without considering the dynamics of "embedded liberalism". In other words, this postulation brings about the shortcoming and deficiency of ignoring the comprehensive role of international regime, comprised of binding accords, courts and institutions. In this respect, it seems more convenient to utilize the assumptions of both neo-liberals and neo-nationalists to some extent in order to shed light on EU immigration policy in balanced way.

Consequently, the theoretical framework of this study strives not to stick in any certain group of theories, but rather to combine elements from all three groups. In other words, it adopts a pragmatic hybrid theoretical model by paying attention to the certain assumptions of different migration theories, instead of taking a sole theory for granted. Therefore, when appropriate, it uses the economic competition theories to express the effects of economic recessions on immigration, or it utilizes the culture-based national identity theories to reveal the impacts of racial or ethnic composition and liberal/racist ideological trends. And lastly, it gives place to the international relations literature to explore the influence of external threat perception, considerations of foreign policy, regional integration schemes and supranational actors on immigration policy. However, the stance of the researcher is still nearer to

the neo-nationalists. He shares the neo-nationalist opinion that the national political units and policymakers seek to legitimise certain national immigration policies by transferring them into the level of international organisations, which is named as "venue shopping".

Especially after the Tampere Summit in 1999, it is more apparent that the Member States started to manipulate the EU intergovernmental policymaking platforms to legitimise or promote restrictive national policies and programmes. This relatively new attitude shall be examined by using the neo-nationalist perspective in the following chapters of the thesis.

1.3.5 The Debates on the Impacts of Regional Cooperation/Integration Associations

The regional cooperation/integration associations are likely to influence the immigration control policies of their Member States. On the one hand, such integration schemes may liberalize the policies of its members toward immigrants from the other members. The regional integration may help to reduce the level of border controls among its members by facilitating freer movement of labour. But on the other hand, it is also likely to make external immigration policy more restrictive against the immigrants from outside the region, by putting pressures on the states so as to prevent the immigrants from moving to other member countries without control.

The ongoing attempts for European cooperation in the field of immigration policy have been welcomed by some scholars. For instance, Ghosh notes that migration is a global issue and the fair regulation of migration can only be realized on a supranational level. If states want to grant a safe haven to those who need it in an effective and efficient way, cooperation is inevitable.[36]

Similarly, Noll argues that in taking restrictive measures, individual states easily become competitors. To avoid a race to the bottom in immigration regulations,

[36] Bimal Ghosh, Managing Migration: Time for a New International Regime, Oxford: Oxford University Press, 2000, p.7.

cooperation is thus called for.[37] Bigo and Kostakopoulou, furthermore, have high expectations of a 'post-national' Europe. The pan-European political community can surmount nationalistic reflexes and it is expected to be more cosmopolitan, guided exclusively by principles of individual freedom and equality. The Europeanization of migration policy promises an end to privileging and discriminating measures in migration regulation.[38]

Nevertheless, others are less optimistic regarding the attempts for European cooperation in this field. They doubt that these efforts aim to realize the disguised agenda on immigration policy. Groenendijk and Minderhoud question that the way decision making is organized on EU level seems to allow states – stimulates them even – to use their discretion for more restrictive measures. Europeanization, in fact, is not a remedy against a race to the bottom but, on the contrary, an instrument for it. The critics of Byrne, Chimni and Lavenex maintain also that European cooperation did not bring an effective and efficient realization of safe refuge, but an effective and efficient realization of migration restriction. Likewise, some like Guild and Vink even suspect that the actual European policies are indeed less cosmopolitan than many think them to be.[39]

1.3.6 The Dichotomy between Intergovernmentalism and Supranationalism

The realisation of an EU immigration control system is closely related to the establishment of free movement of persons. Favell and Geddes state; in recent years the somewhat artificial division of powers between free movement and immigration has been blurred.[40] Therefore, the guidelines of EU integration process may also give

[37] Gregor Noll, Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection, The Hague: Martins Nijhoff, 2000, p.22.

[38] Didier Bigo, Security and Immigration: Towards a Critique of the Governmentality of Unease, Alternatives, Vol.27, p.67 and Dora Kostakopoulou, Is There an Alternative to "Schengenland"?, Political Studies, Vol. 46, p.890.

[39] Berry Tholen, Privileging the Near and Dear?: Evaluation Special Ties Considerations in EU Migration Policy, 2009, at http://etn.sagepub.com/cgi/content/abstract/9/1/32.

[40] Adrain Favell and Andrew Geddes, "European Integration, Immigrations and the Nation State", Working Papers of the Robert Schuman Centre, 1999, p.3.

the clues regarding the background of EU immigration policy.

By the 1980s, the debates started over the organization model of the European integration process. The role of institutions, the division of competence between Member States and supranational institutions, and the way of decision-making have crucial importance on the subject of integration. In general, two major approaches, namely intergovernmental and supranational approach, dominated these debates.

Stanley Hoffman, whose main argument was that the European integration was not unavoidable, promoted intergovernmentalism as a theory of European integration since the 1960s. According to the intergovernmental model; without taking consent of its Member States, the EU will not be a democratic polity. Therefore, Member States should be dominant power in the integration process.[41] Andrew Moravcsik appreciates the impact of domestic structures in the process of integration and foreign policy. Likewise, Werner Link suggests that the European integration is an outcome of the policy designed to reach a balance of power resulting from the anarchic system of states. According to him, such a balancing policy can be either cooperative or integrative, and it is always subordinated to the nation-state actors.[42]

On the other hand, initiated by David Mitrany and Ernest B. Haas, supranationalism envisages that the supranational organizations should make policies and rules which bound the Member States. These scholars consider that modern society is generally dominated by problems belonging to the so-called *low politics*, such as the citizens' welfare or the economic growth. In their view, the basic reason of the integration is not related to the relations among the political communities, but to the lack of the nation-states' ability to ensure proper conditions for their citizens. And, once the integration process is initiated, the Member States are under the pressure to limit their sovereignty by transferring some competencies to the supranational level (*spill-over effect)*. Moreover, under the globalization conditions, states reach the conclusion that they cannot face global competition but within the

[41] Sionaidh Douglas-Scott, Constitutional Law of the European Union, Pearson Education-Longman, Edinburg, 2002, p.20.

[42] Dacian Duna, The CSFP in the European Integration Theories: From Intergovernmentalism to Consociationalism, Romanian Journal of Security Studies, Vol.1, No.1, 2010, p.40.

EU.[43] Wayne Sandholtz, Alec Sweet Stone, Kenneth Armstrong and Simon Bulmer argue that the European institutions are themselves increasingly powerful motors driving integration forward. According to these scholars, the key to the European Union's success is Brussels and the fate of the EU appears to rest increasingly on the central institutions and the equality of the people who lead them. As Stone and Sandholtz made clear, the theory stands in sharp contrast to the liberal intergovernmentalism of Andrew Moravcsik.[44]

Intergovernmental cooperation is the oldest form of cooperation between different states. The Luxembourg Accord[45] has increased the intergovernmental characteristics of EU to the detriment of supranational tendencies. Intergovernmental cooperation has the following characteristics:

- An intergovernmental organization needs decision-making by unanimity to take binding decisions. So intergovernmental bargaining is the key for European integration.
- The organs of the organization which are taking decisions are composed of persons who are government representatives.
- Domestic considerations are important in formulating preferences.

On the other hand, the most important characteristics of supranationalism are:

- There is a transfer of sovereign competences of the Member States to the institutions of the EU. Therefore, the institutions of governance and their policy-making activity are above the nation-state.
- The organs of the supranational organization take decisions by qualified majority voting (QMV).
- Compliance of the Member States about the laws made by the organs of the supranational organization is subject to judicial review by an

[43] Dacian Duna, ibid, pp.43-44.

[44] Sam-Sang Jo, European Myths: Resolving the Crises in the European Community/European Union, University Press of America, USA, 2007, p.16.

[45] French-initiated agreement of 1966 that a decision of the Council of Ministers of the European Community (now the European Union) may be vetoed by a member whose national interests are at stake.

independent court of justice.[46]

Like all intergovernmental organizations (IGOs), the European Union was created by treaties, and it exists today by virtue of successor treaties among its Member States. The Union is distinctly intergovernmental whenever unanimous voting is required on the Council, and the requirement that all Member States approve a treaty amendment is the hallmark of any IGO. The EU's ability to act in areas such as budget, defence, police, cultural, educational and social policies is limited by unanimity requirements, and thus its actions in these fields, if any take place at all, are hardly different from those of a classic international organization. More than merely recognizing the Union's origins as an IGO, the true intergovernmentalist believes that the EU must remain as such, thus ensuring that the Member States retain their essential sovereignty. The British strongly identify with this position and are said to champion a "club of sovereign nation-states." The difficulty with the intergovernmental ideal is that the EU has in fact moved beyond its roots.[47]

Despite its origins as an IGO, the European Union possesses a number of characteristics that are distinctly state-like, resembling those of a national government. Included among these is its status as a permanent entity that has legal personality, legal capacity, and privileges and immunities. It has legislative, executive, and judicial institutions quite like those found in a national government. It possesses its own budgetary resources, a right not enjoyed by most IGOs. In addition to its internal activities, it engages in external relations with other countries.

European supranationalism does have its limits, however. Even its ardent proponents stop short of calling for an EU resembling the American model with the central government possessing virtually unlimited powers. The deeply entrenched national identities of the European people and their rich cultural (and often national) histories suggest that the EU must look "European."[48]

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[46] Celal Polat, The Immigration Policy and Process of European Integration: Supranationalism versus Intergovernmentalism?, Ankara Review of European Studies, Vol.6, No.1, 2006, pp.71-72.

[47] Stephen C. Sieberson, Inching toward EU Supranationalism? Qualified Majority Voting and Unanimity under the Treaty of Lisbon, Virginia Journal of International Law, Vol.50, Issue 4, 2010, pp.924-925.

[48] Ibid, pp.926-928.

The reality of the EU is that it is a system containing both intergovernmental and supranational elements. Like an IGO, the Union is treaty-based and is characterized by voluntary membership and unanimity requirements for treaty amendments and other key decisions. Like a vertically stacked national federation, the EU has an independent and multi-institutional central government, its laws have primacy over Member State law, and many of its legislative enactments are approved by a form of majority vote.[49]

Fabbrini emphasizes that the boundary between the supranational and intergovernmental models is not necessarily fixed and insurmountable, as the EU home affairs and justice policy was gradually transformed from an intergovernmental to a supranational policy by the Lisbon Treaty coming into force on 1 December 2009.[50]

The Treaty of Lisbon provides new instances in which the EU's senior legislative body, the Council, will make decisions by a qualified majority vote (QMV). Additional majority voting has been a feature of all major amendments to the treaties during the Union's first half century, but the extension of QMV into new fields has always aroused controversy. To its proponents, further use of majority voting provides necessary efficiencies in EU lawmaking. To its critics, the addition of majority decisions threatens the Member State sovereignty that unanimous voting would protect. Even more, skeptics view the extension of QMV as a key component of the Union's movement toward supranationalism.[51]

Due to the general intergovernmental tendencies of the pre-Lisbon treaties, it seems pretty hard to adopt a common EU immigration policy. Additionally, the unique structural requirements, different priorities and expectations of the Member States complicate the situation. Nevertheless, a more supranational approach on immigration and asylum policy may pave the way for a consensus, which has not been reached until now on the Union level.

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[49] Ibid, p.930.

[50] Sergio Fabbrini, Intergovernmentalism and its Outcomes: The Implications of the Euro Crisis on the European Union, Background Paper for the Lectures on "The Euro Crisis and the Lisbon Treaty: Collapse or Transformation of the European Union?" Institute of European Studies, University of California at Berkeley, 2012, p.8.

[51] Stephen C. Sieberson, et.al, p.922.

Doubtlessly, the Union did not become totally supranational after Lisbon Treaty. The Treaty was not designed against the sovereignty or national competences of the Members, and it did not change the Union's basic identity. Rather, it made some technical amendments in order to find a reasonable balance between intergovernmentalism and supranationalism. For instance, with the entry into force of it, the EU immigration policy and common European asylum system have been permitted to be approved by a qualified majority vote, instead of being subject to the unanimity provisions of EC Treaty. Therefore, the Lisbon Treaty is worth being taken into consideration as a step forward for common European immigration policy through its supranational connotations.

2. PARADOXES OF THE EU IMMIGRATION POLICY HARMONIZATION EFFORTS

2.1 Historical Baseline

National policies and strategies to manage immigration flows differ greatly from country to country depending on the specific kind of immigration each country attracts and the way in which the political-constitutional values underpinning the social consensus conceive of the idea of integration of foreigners. These values are influenced by both historical and economic factors and by the geographical collocation of every state.[52]

Hence, given that immigration and asylum are considered as the fundamental aspects under the sovereignty of states, The Treaty Establishing European Economic Community (*The Treaty of Rome*) signed in 1957 by six Western European countries (Belgium, France, Germany, Italy, Luxembourg, Netherlands) did not grant any competence for a supranational body in the field of immigration policy. However, the intention to achieve a common immigration policy began in late 1980s as a response to the changed nature of migration to EU countries and as a consequence of free movement of persons under EU integration. Facing with the fact that Western Europe became a magnet for the migrants and the asylum-seekers from Central and Eastern European countries, the Member States needed to harmonize the regulations on visa requirements and asylum policies. However, they were still not eager to transfer sovereignty to the Community institutions over these matters. Therefore, they continued to cooperate on immigration issues in an intergovernmental way.

The first result of intergovernmental cooperation on immigration was *the Schengen Agreement*, signed by 5 members of the European Communities (Belgium, France, Germany, Luxembourg and the Netherlands) in 1985. The agreement would gradually abolish controls at the common borders of signatory states, while

[52] Maria Teresa Bia, Towards and EU Immigration Policy: Between Emerging Supranational Principles and National Concerns, European Diversity and Autonomy Papers, Vol.2, 2004, p. 5.

strengthening the controls on the external frontiers.[53] According to Lahav, the establishment of the Schengen Group can be seen as an early attempt to reinforce frontiers and restrictions against immigration.[54]

Abolition of control on the internal borders highlighted the safety issues, which resulted in compensatory measures taken in the areas of visa issuing, asylum, police, custom and judicial co-operation and the exchange of information (Schengen Information System). A by-product of the liberalisation of movement rights for the parties to the agreement was tightening and complicating the same rules for citizens of non-Member States ("fortress Europe"), seemingly due to security reasons. Schengen agreement referred solely to the issue of short-term border crossings. It standardised rules concerning issuing short term stay permits among signatory states, but the long term residence permits or matters of granting citizenship were left to responsibility of national authorities.[55]

The establishment of common set of standards and procedures in the immigration field derives its logic from the development of the EU as an internal market. Particularly, *the Single European Act* in 1986 set the primary objective for the European Economic Community (EEC) to form the internal market as an area without frontiers in which free movement of goods, persons, services, and capital was ensured. This also provided an impetus to cooperate in migration issues.

Immigration started to become a matter of common interest for the EU owing to *the Maastricht Treaty* (the Treaty on European Union) in 1992. It established the EU and formalised intergovernmental cooperation in the field of justice and home affairs, including immigration and asylum, by creating the so-called third pillar of the EU. The cooperation within this pillar remained its intergovernmental character. The main forms of cooperation were the consultations and the exchange of information. The roles foreseen for the Commission, the Parliament or the Court of Justice were

[53] Yet, the full implementation of the convention was postponed until 1995, partly due to the enlargement process to include new Member States (Italy, Spain, Greece and Portugal) with more permeable external borders.

[54] Gallya Lahav, Immigration and Politics in the New Europe: Reinventing Borders, Cambridge: Cambridge University Press, 2004, p.35.

[55] Anna Kicinger & Katarzyna Saczuk, Migration Policy in the European Perspective – Development and Future Trends, CEFMR Working Paper, Vol.1, 2004, p.11.

modest in comparison to their roles in the European Community activities. One of the Union's objectives set in the Treaty was the achievement of "balanced and sustainable development, in particular through the creation of an area without internal frontiers". As the EU countries were not ready for transferring their competences in these delicate matters to the Community level, the intergovernmental cooperation became prevailing in the third pillar and consequently unanimity in decision-making was required for practically all important issues. This resulted in the situation when vast majority of instruments agreed on in this field took form of Council's resolutions and recommendations which were legally non-biding. However, important changes were introduced in the field of visa policy, which was partially submitted to the Community legislation. The overall effect of cooperation in the field of asylum and immigration policy within the framework of the third pillar was the diversity of subjects on which the cooperation was concentrated combined with efforts to harmonize them across the EU. However, decision on the pace and scale of this harmonisation was left to the specific country. In result, the diversity of legislation and practice in the area of migration in European countries was maintained and it became clear that creation of the real and effective European migration policy was impossible without the introduction of Community competence in this area.[56]

Partly as a result of these institutional constraints, progress over the next few years was fairly limited. A number of measures were adopted in the area, including resolutions on asylum procedures and concepts of 'safe' countries to which asylum seekers could be returned (1992), minimum guarantees for asylum procedures (1995), and a joint position on the interpretation of the definition of 'refugee' (1996). In the area of immigration policy, states attempted to harmonize measures for combating 'illegal' immigration and employment (1995), and on long-term residents (1996). However, the instruments lacked legal weight. Moreover many commentators criticized Member States for adopting a "lowest common denominator" approach to harmonization, with instruments reflecting the minimum

[56] Ibid, pp.12-13.

standards of 12 (subsequently 15) different policies.[57]

It was *the Amsterdam Treaty* in 1997 that laid down for the first time the current foundations at the EU level in immigration policy regulations. Substantially, by the time the treaty was under negotiation during 1996-1997, most of the Member States were recognized the need for reinforcing cooperation. There was also a general conviction concerning the inadequacies of third-pillar institutional arrangements.

The Article 61, under the Title IV of the Amsterdam Treaty, transferred immigration and asylum policies as well as other measures relating to free flow of persons from the third pillar of EU based on intergovernmental cooperation to the first pillar where policies were carried out by European Community Treaty. This "communitization" predicted greater role for the Community institutions. Nonetheless, despite bringing immigration and asylum issues under the first pillar, the Amsterdam Treaty did not foresee automatic transition from unanimity to qualified majority voting in the decision-making of these issues. As a result, the issues were only communitized, but not supranationalized. Only the Commission would be able to make proposals along with the Member States. The Articles 62 and 63 of the Treaty set forth a transitional five-year long period. In the first five years following the ratification of treaty (i.e. between the years 1999-2004), the Council would decide unanimously on asylum, refugees, for controls on persons while crossing the internal borders (both EU citizens and third country nationals) and external borders (for visas which are issued for less than three months), on measures regarding immigration policy, including common conditions of entry and residence and common rules on illegal immigration and repatriation, on measures defining the rights and conditions under which third country nationals can work and reside anywhere in the EU.[58]

Shortly after the entrance of the Amsterdam Treaty into force, a list of objectives for EU asylum and immigration policies were prepared by EU leaders under the heading of *the Tampere Programme* in 1999. The programme outlined the

[57] Christina Boswell, EU Immigration and Asylum Policy: From Tampere to Laeken and Beyond, The Royal Institute of International Affairs Briefing Papers, No.30, 2002, p.2.

[58] Deniz Genç, Europeanization of National Immigration Policies, Bahçeşehir University, at http://www.ecprnet.eu/databases/conferences/papers/436.pdf

framework for common migration and asylum policies with four main elements; a) partnership with countries of origin, b) development of a common European asylum system, c) fair treatment of third country nationals, and d) management of migration flows. All of these priorities had favorable connotations. Nevertheless, the outcomes of Tampere Implementation Process (1999-2004) seem rather mixed. One of the positive results is that the most basic standards of a common immigration and asylum policy, stipulated by the Amsterdam Treaty, have been implemented.[59] Likewise, Union elites started to approach on managing immigration and its causes in more detailed way. Hence, they tried to establish closer relationship with the countries of origin. The Cotonou Agreement, signed in 2000 between the EU and 77 African, Caribbean and Pacific countries, may serve as an example of practical implementation of this attitude.[60] On the other hand, trade and development programmes which had provisions including migration issues were signed with other partners like Russia, Ukraine, and the countries of Mediterranean basin. Moreover, a special Community programme, with a budget of 250 million Euros, was generated for the years 2004-2008. The programme targeted especially for those contracting states engaged in preparing or implementing readmission agreements with the European Community.[61]

As the second component of the programme, in the area of asylum and temporary protection, the Council had agreed on the following: a) adoption of common minimum standards concerning criteria and mechanisms for examining and granting refugee status, b) establishment of EURODAC (a centralised European system for exchanging fingerprints), c) minimum standards for reception conditions for asylum seekers, d) minimum standards for granting temporary protection in the

[59] Albert Bauchinger, EU Policy Regarding Asylum and Immigration: An Assessment of the Post-Amsterdam Period, MA Thesis (submitted to the Webster University), 2007, p.166.

[60] The Cotonou Agreement replaced the Lomé Convention which had been the basis for the African, Caribbean and Pacific Group of States (ACP)-EU development cooperation since 1975. It aimed at the reduction and eventual eradication of poverty while contributing to sustainable development and to the gradual integration of ACP countries into the world economy. The revised Cotonou Agreement is also concerned with the fight against impunity and promotion of criminal justice through the International Criminal Court.

[61] Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS) (OJ L 80 of 18.03.2004).

event of mass influx, e) formation of the European Refugee Fund, with a budget of 216 million Euros, for the years 2000-2004 to support Member States financially on reception, integration and voluntary return of asylum seekers and refugees.

The fair treatment of TCNs was the third aim pointed in Tampere. It was supposed to provide them with the rights and obligations comparable to maximum extent to those of the Member States' nationals. The twofold activities were to be developed in this area, namely legal measures decreasing the inequalities and schemes intended to combat against discrimination, racism and xenophobia.

The management of migratory flows was the fourth component in the Tampere guidelines. The primary objective was the achievement of regularly organised migration through clarifying the legal channels for immigration and strengthening efforts to fight against irregular immigration, smuggling and trafficking in human beings. This aspect of migration regulation has taken high attention, particularly after the September 11 terrorist attacks. Relevant legislation was negotiated and adopted to combat against irregular immigration on the EU level.

As it is understood from the above-mentioned elements, the Common Immigration and Asylum Policy envisaged in Tampere Programme would eliminate the inabilities of the Amsterdam Treaty and it would improve the rights of the TCNs. However, in a couple of years it became obvious that "rhetoric did not result in policy shift and Tampere failed to make substantive institutional changes" that might pave the way for reforms in the rights and conditions of the TCNs.[62] Despite its ambitious goals, the Tampere Programme could not meet expectations. The major reasons for this were the reluctance of the Member States to implement these legal provisions, the limited scope of the QMV in the Council, which slowed down the decision making process significantly, as well as the limited application of the co-decision procedure, leaving the Council as the only legislative decision making body most of the time. As a result, the European Council reacted to this slow integration process by urging the Member States and EU institutions to speed up the implementation process at the Summits of Laeken (2001), Seville (2002) and Thessaloniki (2003).[63]

[62] Gallya Lahav, et.al, p.47.

[63] Albert Bauchinger, et.al, p.166.

When one takes a look at the big picture, this period of time seemed to be rather diffuse and complex. Besides the Tampere Implementation Process, which aimed at implementing the provisions of Amsterdam, the Treaty of Nice (2000) and the preparatory work for the Convention on the Future of the European Union (starting in 2002) were running parallel. Instead of reforming the entire system of the EU already at Nice and postponing the implementation process until Nice had been ratified, one treaty (Amsterdam) was being implemented and two other reforms (Nice, Constitutional Treaty) were being agreed upon. To add to the confusion, this all happened in the time period just before the EU East Enlargement of 2004. In a nutshell, the reformation process in the post-Amsterdam period was rather confusing, not transparent and not thoroughly planned from the beginning.[64]

Similarly, in negotiating the EU immigration and asylum measures, Member States have shown a reluctance to divest national administrations of discretion over these issues and to commit to unequivocal standards, fully compliant with their international obligations. The views of the European Parliament have not always been listened to, and thus the democratically directly elected voice of European citizens has seemed sadly muted in this process.[65]

With respect to the law on borders and admission, residence and status of third country nationals, Member States have subjected the right of free movement of third country nationals to barriers and in many cases excluded them with regard to Union citizens. Guild identifies such barriers for instance in the lower threshold for their expulsion and in the additional requirements to access social security benefits. The result is that the developing concept of EU citizenship is premised upon discrimination between classes of citizens and that for third country nationals enjoying free movement rights the dividing line between citizenship rights and discrimination against the alien remains rather blurred.[66]

In addition to these, the attitudes of Member States were unfortunately far from conferring comparable rights to TCNs. The scope of "equal treatment" was defined

[64] Ibid, p.167.

[65] Helen Toner & Elspeth Guild & Anneliese Baldacinni, Essays in European Law : Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy, Hart Publishing Ltd, Oxford, GBR, 2007, p.5.

[66] Ibid, p.6.

too narrowly. Initial expectations of TCNs for the fair access to the socio-economic rights and benefits such as employment, payment, working conditions, trade unions, social security, health insurance, education facilities, etc. soon turned into disappointment.

In 2004, additional goals were added by the governments and a new programme, i.e. *the Hague Programme*, constituted the general framework for policy on immigration and asylum over the next five years following the expiration of the Tampere Programme. The programme outlined the actions of the EU in security, freedom and justice areas for the period 2005-2010 and it called for a common European asylum system on legal immigration; integration measures; partnerships with third countries; a fund for the management of external borders and the Schengen information system.

The Hague Programme represented a significant and surprising institutional change for the EU's governing organizations. Firstly, it granted the "sole right of initiative" to propose new laws to the European Commission, which is the EU's executive body. Secondly, it mandated majority voting in the European Council, which is the EU legislative body where national governments are represented. The institution of majority voting -as opposed to unanimity- meant that the "national veto" was lost; reluctant Member States could now be outvoted. Finally, the Hague Programme gave "co-decision" power for the European Parliament, meaning that the directly elected European Parliament could propose amendments and veto legislation. These represented important steps for supranationalism over national power, and they applied in all policy areas except one: legal migration. This caveat is vital, given that legal migration covers a wide range of important immigration policy aspects, such as labour migration, family reunification, and the rights and duties of legally resident TCNs. Thus, The Hague Programme only extended majority voting and co-decision to the areas of political asylum, refugees, and 'illegal' immigration. Most scholars speculate that the reason for this "division of labour" was the fact that coordinating exclusion of unwanted immigrants (i.e., asylum seekers and illegal immigrants) is a less controversial role for the EU than coordinating the inclusion of

legal immigrants.[67]

In 2005, the tragic events of Ceuta and Melilla[68] highlighted the emerging need to address these issues as priority at EU level. In this context, at *the Hampton Court Summit* of 2005, the European Council adopted the Global Approach to Migration which is introduced as *the external dimension of the EU's migration policy*. It tried to combine three main dimensions: the management of legal migration; the efforts to combat irregular migration; and the synergies between migration and development. Although it was initially designed to contract readmission agreements with African countries, the Global Approach's geographical scope has been extended since then by the European Council to east and south-east Europe.

Consequently, the first stage of the Common European Asylum system is complete. The Commission is invited to adopt second phase instruments of the Common European Asylum System by the end of 2010.[69] This second stage (included the Lisbon Treaty and Stockholm Programme) and the future expectations regarding it shall be handled next sections of the study.

2.2 Idiosyncratic Factors Stemming from the Member States

International cooperation on migration is a major challenge for sovereign states due to their inherent structural dissimilarities. The same cooperation when tried to be developed by a supranational organization like the EU is even more complex, as there are quite strong obstacles to cooperation on supranational level such as,

[67] Adam Luedtke, Uncovering European Union Immigration Legislation: Policy Dynamics and Outcomes, Journal of International Migration, IOM Journal Compilation, 2009, p.3.

[68] At the nights of 28 and 29 September 2005, the mankind watched dramatic events unfolding as thousands of migrants from all over Africa tried by ladders to crest over the 3 meter-high barbed wire fences surrounding the Spanish enclaves of Ceuta and Melilla (in Morocco) in a desperate attempt to enter Europe. In several incidents migrants were shot dead, leading to six deaths at the border to Melilla, while five migrants were killed trying to get into Ceuta. Both Spain and Morocco denied responsibility for the fatalities. Spain returned many of the irregular immigrants to Morocco, but after increasing international pressure, it stopped the deportations. Meanwhile, Morocco rounded up the migrants, returned those with whose countries of origin Morocco has a readmission agreement, such as Senegal and Mali. However, those without readmission agreement were put in trucks and left in Sahara desert without food, water, or shelter.

[69] Esengul Ayaz, An Assessment of the EU's Role in the Developing World in Relation to Migration, Journal of Global Analysis, Vol.1, No.1, 2010, p.81-82.

different historical experiences on immigration, asymmetric migrant flows, diverging interests, distinct particularities and priorities of the states, domestic politics on policy definition, etc.

Historically, experiences with international migration have differed from country to country within the European Union, and continue to do so. The traditional north-south division among the European countries on the levels of economic development led them to own disparate immigration experiences and consequently to live through different phases of immigration. This diversity in the nature of the problems associated with immigration represents a substantial obstacle to the development of a common European migration policy. Whereas on the one hand former colonial states such as Belgium, France or the United Kingdom were already immigration countries in the 19th century, other European states, such as Germany and Austria, did not become countries of immigration until after the Second World War. In contrast with the colonial states, which granted the citizens of their colonies extensive immigration and residency rights, the guest worker model –whereby foreign workers were always intended only to be temporary immigrants– dominated in the latter countries. However, many former guest workers settled permanently and brought their families to join them. By contrast, the southern member states, such as EU founding member Italy, but also Portugal, Spain (both of whom joined in 1986) and Greece (joined in 1981), did not become attractive to immigrants until the 1980s. For a long time they regarded themselves as transit countries at the gates of Europe. The new member states in the east and southeast of the EU had essentially been emigration countries since the fall of the Iron Curtain, but since joining the EU in 2004 and 2007 they have rapidly developed into receiving countries, even though some of them currently still record more emigrants than immigrants.[70]

The present immigration situation among EU member states is highly heterogeneous. European Statistical Office (Eurostat) data for 2007 indicate the continuation of highly differing forms of immigration, with a clear shift in the relationship between "old" and "new" immigration countries. Thus countries on the southern border of the EU (Spain and Italy) are experiencing the highest level of immigration, and even the Czech Republic, a new member, has already overtaken the

[70] Sandra Lavenex, Focus Migration Country Profile: European Union, No.17, March 2009, pp.1-2, at http://focus-migration.hwwi.de/uploads/tx_wilpubdb/CP_17_EU_01.pdf.

traditional receiving countries of central and northern Europe. Only the Baltic States, Bulgaria and Poland now show negative immigration balances, although even the Netherlands recorded more emigration than immigration in 2007. The percentage of foreign population in the EU member states extends from less than 1% of the total population (Slovakia) through to 39% (Luxemburg).[71]

Not only the percentages vary from one member state to another, but also the types of immigration flows differ basically among them. Hence, although labour migration comes into prominence in the United Kingdom, Ireland, the Czech Republic and Denmark, another type of immigration called the family reunification prevails in France and Sweden.

The geographical origin of the biggest immigrant groups also varies conspicuously from one member state to another and reflects primarily historical experiences and geographical proximity. Thus, for example, in Germany, Denmark and the Netherlands, Turkish citizens make up the biggest group of foreigners. By contrast, citizens of former colonies are numerous in Portugal (Cape Verde, Brazil and Angola) and in Spain (Ecuador and Morocco). For historic reasons, and for reasons of proximity, the majority of foreigners in Greece are from Albania, the majority in Slovenia from other parts of the former Yugoslavia, and citizens from the former Soviet Union are most significant among the foreign populations of Estonia, Latvia and Lithuania. Finally, immigrants' levels of qualification play an increasing role in political debate. At the present time, all Western states have become anxious to increase the number of people with a good education or university degree among their immigrants. Nonetheless, in most of the member states immigration is dominated by the low skilled. Only the United Kingdom records almost equal percentages of highly and low-skilled migrants. In Italy, Austria and Germany, by contrast, immigration is dominated now as ever by the lower skilled.[72]

Regarding the refugee and asylum flows, there are also differences among the Member States. While for instance, there is a sharp decrease in Germany -compared with the peak of 438.190 in 1992, the number of asylum applicants has fallen into 20.000 annually since 2006- the countries on the borders of the EU such as Greece,

[71] Ibid, p.2.

[72] Ibid, pp.2-3.

Italy, Spain, Malta and Hungary come up against increasing numbers of refugees and asylum seekers.

On the other hand, the existence of common EU citizenship, however, in no way affects the highly heterogeneous nature of citizenship regulations within the individual states. And this distinction between ethnic and civic nationalism is also important for immigration policy implementation. For instance, whereas the UK and Italy has the principle of awarding citizenship to persons born within their territories (jus soli), Germany and Greece grant the right to citizenship based on parentage (jus sanguinis).

In Italy and UK, the conception of the nation is based mainly on civic and territorial features with a large degree of regional and national autonomy and variation. A large part of the ethnic minorities and immigrants residing in the UK enjoys citizenship rights and is regularly integrated into the domestic population even though racial and ethnic discrimination is not completely eradicated. After decades of racial tension and clashes Britain adopted a multi-cultural, multi-ethnic national identity... In Italy too, the recent facilitation of permanent resident status and naturalisation for aliens shows a certain degree of openness to a fuller integration of immigrants and the concession of political rights to them.[73]

Greece and Germany, in contrast, are characterised by a predominantly ethnic view of the nation, where citizenship is attributed according to the jus sanguinis principle. Thus, diaspora members maintain their right to citizenship even after residing abroad for a few generations and without request for proof of language or cultural competence. In contrast, immigrants who reside in the country and probably are fluent in the language and well acquainted with the national culture, are refused political rights because ethnically alien.[74]

Greek and German nationalism have produced social systems that emphasize national identity as a framework of civil existence, which has proved more as a straight-jacket for minorities and immigrants. Moreover, since neither country recognises itself as a "country of immigration", their policies aim at temporality,

[73] Anna Triandafyllidou, Migration Pathways: A Historic, Demographic and Policy Review of Four European Countries, RSCAS, European University Institute, 2000, p.111.

[74] Ibid, p.112.

flexibility and the establishment of a legal framework that allows for the presence of a cheap labour force in the country, while integration may take place only upon assimilation of the dominant cultural framework and, in some cases, rejection of the immigrant's country of origin citizenship.[75]

The particular nation building and citizenship formation experiences of each EU Member State directly affect their approach and practice on the issue of migration, too. Hence, naturally there are different points of views regarding the common European immigration policy. Similarly, the socio-economic legacies of each Member State and the type of immigration they attract contribute to the development of their integration policies.

Two controversies have determined the development of [integration] policy area to date: firstly, the tension between standardisation based on supranational regulations and the desire to safeguard sovereignty; and secondly, the tension between the priority nations attribute to internal security and universal human rights, humanitarian values and economic priorities.[76]

When it comes to their individual national migrant integration regimes, each Member State of the EU is indeed 'different' –each reflecting a unique combination of national history, cultural ties, geography, political economy, welfare system and citizenship regime. These cross-cutting dynamics directly affect 'migration management' in practice, and result in differential integration of migrants across Europe. The term 'differential integration' is designed to capture how migrants enter a country on particular terms –as a worker, student, asylum seeker– and that these terms shape the relative privileging of some migrants over others, although sometimes in unexpected ways.[77]

For example, a Ghanaian software engineer has a different pathway to integration if they migrate as a worker to France (which, hypothetically, has a special agreement with Ghana, which eases entry but makes permanent residence more or less impossible) than if they apply to the Netherlands (where entry is very restrictive,

[75] Ibid, p.112.

[76] Sandra Lavenex, et.al, p.8.

[77] Emma Carmel, Migration Governance in the European Union: A Theme and its Variations, Journal of Poverty and Social Justice, Vol.20, No.1, 2012, p.36.

but access to permanency can be gained relatively straightforwardly) or to Sweden (where entry as a high-skill migrant is straightforward, and policies for welfare access are liberal). But they might also have access to a different pathway to integration if they apply as the spouse of an EU citizen, or a citizen of the destination country. We might also find that a Sierra Leonean software engineer, with precisely the same background in other respects, is treated differently, or has alternative options for entry or residence, not available to the Ghanaian. The variety in differential integration observable across the EU as a whole [can] be explained by reference to the diversity of policy mechanisms, political preferences and institutional arrangements that establish the selection, and exclusion, of migrants in practice.[78]

The Community's difficulty in adopting the measures necessary for adopting a common action in immigration and asylum has to do with the tensions between the Member States over dealing with these policies. As has clearly been pointed out by the European Commission, "the thrust of discussions in the Council on a number of individual legislative proposals concerning immigration reveals a continuing determination by Member States to ensure that any common policies should involve the least possible adjustment to each one's existing approaches." This leads to the paradoxical result that although discussions are being undertaken at the supranational level to sustain the emerging EU authority in immigration and asylum, as long as the EU lacks binding legal instruments in this area, Member States will keep on constructing their own policies "with mainly national considerations in mind and without reference to the European context".[79]

Another paradox is closely connected with the demographic challenge that Europe confronts. Although the European Union has embarked upon an ambitious programme of becoming the most competitive and dynamic knowledge-based economy in the world capable of sustained economic growth with more and better jobs and greater social cohesion at Lisbon European Council in March 2000, the human factor for reaching these goals has been ignored substantially. Essentially,

[78] Ibid, p.36.

[79] Maria Teresa Bia, Towards an EU Immigration Policy: Between Emerging Supranational Principles and National Concerns, European Diversity and Autonomy Papers (EDAP), 2, 2004, pp.8-9, at www.eurac.edu/edap.

human factor -even if being an immigrant- generates growth, fills and creates jobs, and contributes to social security systems. The size and age of population determine to what extent Europe can achieve its long-term Lisbon strategy. Thus, social and economic progress in Europe depends on demography and demographic changes.

The average number of children per woman of childbearing age in the EU in 2000 was 1.53, as against 2.1 needed to replace the population. Because of increased life expectancy, the proportion of those aged 65 and over will reach 22 % in 2025, having risen from 16 % in 1998. The result is that the population of working age will have fallen by about 40 million in 2050 and the ratio of workers to pensioners will have declined from four to one, to two to one. Notwithstanding regional variations, this demographic arithmetic has stark implications for the future of pensions and health care systems in European welfare states.[80]

While the current population growth trends are considered, there is a serious decrease of population in some regions of Germany, the Baltic countries, Spain, Italy and in most of the new EU Members. Conversely, the decline is not expected in Greece or the south of France, for instance. Besides taking precautions to scale up the fertility rates and labour force participation rates, encouraging the immigration may contribute in the short term to reverse the negative trends in labour market. Actually, net migration has been the major factor of annual population change in the EU countries since 1989.

In spite of the deteriorating demographic statistics and assertive economic goals for the next decades, insisting on the restrictive immigration policies seems another paradox in EU countries. In a situation of steady population decline and worsening demographic imbalances, immigrants could contribute to reversing these developments. Immigration should be considered as an option in the policy debates on strategic economic and social goals and fundamental values that underpin Europe's social market economy. However, concerns expressed in the debates are about the real and feared consequences of uncontrolled migration and the perceived or real unsuccessful integration of immigrants. In response, governments design and

[80] David Turton & Julia Gonzales, Immigration in Europe: Issues, Policies and Case Studies, 2003, Bilbao: University of Deusto, p.15.

refine policies that tighten the admission of immigrants.[81]

2.3 Challenges Stemming from the EU level

The immigration policy has become more supranationalised due to the recent institutional and legislative changes on the EU level. Now the mechanisms such as qualified majority voting and co-decision between the EU Council and the Parliament are used in migration policy issues. However, the governance of EU immigration policy has been still the area of tension between the Member States and the EU supranational institutions.

[Despite the process of supranationalisation], there is no EU level framework on migration that could be compared to fully-fledged national policies. The underdevelopment of this policy field is a direct consequence of the division of competences at the EU level: migration matters have been perceived as a field where state sovereignty should not be surrendered (together with such issues as labor-market regulation, social-security systems and taxation) and the common approach has been undesirable. The EU Member States have certainly been wary of ceding too much of their powers up to the EU, creating a de facto European space of 27 different approaches to migration policy, allowing only for minimum harmonization.[82]

The lack of coherent and integrated focus has complicated the immigration policy on the EU level from the very beginning. The migration issue has been perceived as a border management or security issue rather than a human factor in labour economics. Thus, the policy has been handled within Justice and Home Affairs under the title of intra-EU migration, organized crime and terrorism for a long time by the intergovernmental groups at the EU level such as Trevi Group or the Ad Hoc Group on Immigration. The efforts for the harmonisation of visa policy,

[81] Jan Niessen & Yongmi Schibel, The Consequences of Demographic Change: Is There a Role for Immigration? In David Turton & Julia Gonzales (Eds.), Immigration in Europe: Issues, Policies and Case Studies, 2003, Bilbao: University of Deusto, pp.49-50.

[82] Agnieszka Weinar, EU Cooperation Challenges in External Migration Policy, EU-US Immigration Systems, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole: European University Institute, 2011, pp.1-2.

asylum policy and the rights of immigrants have speeded up only since the entry into force of the Schengen Convention.

Moreover, there are some other challenges on common EU immigration policy which stem from the EU level by itself, such as the actors defining the policy or the instruments for implementation.

First of all, at the EU level the competence of the stakeholders in the external dimensions of the migration policy are not neatly defined. The European Commission with its power to legislate and steer the debate at the EU level plays the role of policy entrepreneur more in some areas (external dimension of borders, visas, asylum) than others (external dimension of legal migration). In this specific case, several parts of the Commission are involved: DG Home Affairs, DG Development and Cooperation -EuropeAid, and also DG Trade and DG Education and Culture. Another institution involved, involving the Commission and the EU Member States, is the European External Action Service, together with EU Delegations in the target countries. DG Home Affairs has a leading role on migration issues, but in terms of external action it is hamstrung: it has no exclusive programming power over a budget line that would be used to support the external dimension of migration policies. It relies heavily on the co-programmed Thematic Programme on Migration and Asylum and on other services and their financial instruments (e.g. the European Development Fund or European Neighborhood Policy Instrument). Such a situation may possibly lead to internal tensions as regards perceived priorities on various parts of the Commission.[83]

Additionally, two more actors, namely FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) and ETF (European Training Foundation) are involved into the field of immigration. Although FRONTEX is dealing with the border management issues, it cannot perform operations on its own. It totally depends on the authority and resources of Member States for its implementations. ETF is also acting only as an agency to organize the vocational education, recognition of professional qualifications and training in the neighbourhood countries.

[83] Ibid, p.7.

The Global Approach to Migration (GAM) is not under the exclusive competence of EU, that's why the European supranational institutions have limited role in forming it. On the other hand, the Member States keep a firm grip on the policies of Commission and shape the legal framework (e.g. on visa issues, readmission agreements, mobility partnership agreements) and new policy goals actively. They also impose policy objectives in the Council by utilising their powers in the High Level Working Group on Asylum and Migration (HLWG).

The Commission has been active in 'upgrading the common interest' in migration policy. Already in 1991 it was linking the issue of migration to the completion of the internal market and subsequent free movement of persons. Through its many communications, reports and recommendations, the Commission tries to act as an agenda-setter. However, the Member States have been quick to check the Commission when they feel that it has acted beyond its mandate. In 1985, for instance, five Member States took legal action against the Commission, claiming that its Decision 85/381/EEC (on prior communication and consultation on migration policies) violated the division of competences. In response to the sensitivity of migration policy for Member States, the Commission has adopted a pragmatic approach, for instance being willing to accept a watering down of its proposals when negotiations in the Council are difficult. In 2001, the Commission proposed the application of the open method of coordination to immigration policy. This suggestion 'evidences a calculating Commission, aware of the parameters that states will insist upon in drafting immigration policy. The Commission has shown sensitivity toward the Member States' sovereignty concerns and eschewed attempting to assume direct legislative authority'.[84]

The role of the European Parliament in migration policy has historically been rather limited, but has increased over time due to the expanded use of co-decision for legislation in the area of migration. Generally, the Parliament (like the Commission) has argued for a more liberal migration policy, bringing it into conflict with Member States' preferences for a more restrictive policy. The Parliament has been active in migration policy, producing reports, asking questions of the Council and the Commission, holding debates and public hearings, and preparing working papers.

[84] Natasja Reslow, Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships, Journal of European Integration, Vol.34, No.3, 2012, pp.225-226.

Nevertheless, Member States have continuously attempted to exclude the Parliament from the policy-making process. Under the consultation procedure, for instance, the Council often reached a position without waiting for the opinion of the Parliament.[85] And although with the entry into force of the Lisbon Treaty, the European Parliament seems to have a stronger voice in legally binding agreements; it is only informed or consulted in all other issues. Therefore, it is too early to claim that the EU Parliament is an influential actor in EU immigration policy.

Member States have continuously sought to limit the role of the ECJ in the area of migration. The court is traditionally seen as advancing integration, and it has interpreted provisions on the free movement of workers expansively. Member states have attempted to limit the court's role in various ways. Firstly, EU migration policy is biased towards soft law due to Member States' reluctance to adopt binding measures –the multi-annual programmes on JHA (adopted by the European Council), for example, are not legally binding but only give policy guidelines and general timetables for achieving objectives. The ECJ therefore has no jurisdiction over these policies. In terms of legal migration, a 'safeguard clause' has been inserted into the treaties [Article 79 (5) of the Treaty on the Functioning of the European Union (TFEU)]. Finally, several legislative texts contain vague and open-ended wording, allowing Member States more flexibility in their implementation of legislation and thereby limiting the jurisdiction of the ECJ.[86]

The weak position of the EU as an international actor has had a direct impact on its cooperation on migration. In many cases, it is still the Member States and their bilateral relations that can move the cooperation forward (especially in the case of old colonial ties). The rare instance when the EU is perceived as an important player worth cooperating with has taken place in the context of enlargement and EU integration. In all other cases 'EU' means the few old Member States who are seen as the real negotiating powers.[87]

There are two main challenges to cooperation on policy implementation in the EU context: the limited capacity of the EU and its Member States to implement all

[85] Ibid, p.226.

[86] Ibid, p.226.

[87] Agnieszka Weinar, et.al, p.14.

ideas and tools; and the limited absorption capacities of partner countries in implementing concrete actions.[88]

A sovereign state, when aspiring to establish cooperation on migration policies with another sovereign state, has a whole array of policies at its disposal. To meet the contrasting interests of the other side it can use trade policy tools, development aid, labor-market policies, or, indeed, any other incentive that is desired by the partner. EU-level possibilities are limited in comparison. The main challenge is the weakness of EU competence in the area of external political action. The reforms introduced after the Lisbon Treaty have not necessarily improved the situation: the EU is a broker of deals in the name of its Member States, and a manager of financial aid. The objectives of the deals are laid down by the Member States (if 27 manage to agree on a common line) and the EU: thus the tension between priorities and competences at the supranational and national levels persists.[89]

The EU has no capacity at the supranational level to implement all its policies in the field of migration. In the case of migration there are only two bodies for implementation: FRONTEX and the European Asylum Support Office (EASO – for asylum policy, not yet operational). There is no EU body to support policy-making on migration and development or legal migration. The technical part is in the hands of other actors: most commonly the Member States and implementing partners. Thus far it is the International Organization for Migration (IOM), United Nations High Commissioner on Refugees (UNHCR) and International Centre for Migration Policy Development (ICMPD) who play a prominent role in the implementation of the external dimension of EU policies, and who receive a prominent share of EU funds for this area.[90]

As a key partner of EU, UNCHR has a well-structured international legal framework and mechanism to define and implement asylum regulations. In contrast, the role of IOM on the EU level is not precisely specified due to the fact that it is not a UN organisation. However, as the immigration issues have come into prominence on the EU level, the importance of IOM has risen, too. Since the end of 1990s, the

[88] Ibid, p.10.

[89] Ibid, p.3.

[90] Ibid, p.10.

number of EU countries participating in the activities of IOM has increased especially after the introduction of Assisted Voluntary Return Programs by IOM. Thus, IOM started to get significant amount of funds from the EU Members and found the opportunity to boost its implementation capacity on the field with deportation centres and temporary centres for migrants. Comparing to UNCHR and IOM, ICMPD is rather small organisation which was founded in 1993 to cooperate on border management and irregular migration issues. Its members are not only EU countries, but they are rather from geographically wider Europe. It has special modus operandi in which expertise and technical support are shared with the partner countries by means of projects. However, due to the fact that ICMPD is only able to serve with donations, EU Member States -as the major donors- have the opportunity to implement their external migration policies on partners through ICMPD.

Reliance on non-state actors to implement state policies raises several issues related to policy control, monitoring and outcomes. There is no guarantee that implementing actors will follow detailed policy intentions. In the case of EU policies it is even more acute: policy defined at the EU level can be implemented with variations by IOs but also by the Member States.[91]

Cooperation on migration issues labelled as 'European' has developed on a quadruple track: the bilateral cooperation of individual Member States with partner countries (e.g. bilateral agreements on readmission or on migration management); multilateral cooperation of an intergovernmental character between several Member States and chosen partner countries (e.g. Regional Consultative Processes like the Budapest Process); EU-level cooperation between the EU and partner countries (e.g. technical and political cooperation in the context of Enlargement or short-stay visa facilitation for specific categories of persons); and the EU and its Member States on one side and the partner country on the other (e.g. mobility partnerships). The challenges of this cooperation patterns lie exactly in its complexity and the difficulty of managing policy at the EU level. As long as a partner country is faced with a 'quadruple track' of cooperation, the EU's impact will be limited. Establishing an efficient monitoring mechanism of cooperation between the EU, its agencies, the EU Member States and third countries is the only way of building the credibility of the

[91] Ibid, p.13.

EU as a coherent partner. This approach faces important obstacles: the state of foreign policy at the EU level, the blurred competences, not to mention the underdeveloped capacities on migration issues in EU delegations. For the moment, these obstacles make it impossible to envision such a development.[92]

The employment and social welfare system, which are closely connected to the national sovereignty, are actually under the direct effect of the migration policies. Therefore, the more the EU integration and supranational institutions touch on this sore point, the harder it becomes to get support from Member States for legally-binding EU-level legislation. For, Member States perceive the migration issues at their domain reservée and are unwilling to renounce their sole competence. They have been still inclined to restrain the possible active role of the EU supranational authorities. Hence, there are occasions that some Member States prefer to cooperate by excluding the treaty framework, such as in the Schengen Agreements. Similarly, the United Kingdom, Denmark and Ireland have opted out of the area of freedom, security and justice. In addition to this, the 'may clauses' in many EU-level legislative documents enable Member States to use derogations from the common principles, to the detriment of supranational consensus. It is inevitable that the migration policies shall gain further importance in the future, as it may serve a remedy for demographic problems in the EU countries. Thus, the Member States are wary of leaving this issue only to the hands of EU supranational organisations and rather try to limit the capabilities of these organisations.

However, despite their desire to maintain control over migration policy, Member States do sometimes choose to cooperate at the EU level. How can this paradox be explained? Member States cooperate at the EU level where this can help them to achieve their nationally formulated preferences. Member States look for ways to limit the role of the supranational institutions in EU migration policy-making, but that Member States nevertheless choose cooperation at the EU level when this enhances their national policies. Cooperation at the EU level is thus instrumental in that Member States 'use' this to achieve their national preferences.[93] In the decision-making process on the Mobility Partnerships, for instance, Member

[92] Ibid, p.14-15.

[93] Natasja Reslow, et.al, pp.227-228.

States demonstrated their determination to remain in control, resulting in a limited role for the Commission and no role at all for the Parliament and Court of Justice.[94]

The Mobility Partnerships as policy instrument have rising importance now for the EU. Although they have been signed only with few countries such as Moldova, Georgia and Cape Verde since 2006, the EU Member States plan to utilize them as one of the primary long-term strategic tools in the management of migration with third countries in the future. On principle, the Member States give the nationals of a partner country easier access and movement in their labour market in exchange for cooperation and dialogue on prohibiting irregular migration.

The Commission plays a role during the negotiation of the Mobility Partnerships. Specifically, Commission officials suggest potential partner countries, gauge the level of interest of the Member States, conduct exploratory talks with partner countries, and have a coordinating role in the negotiations between Member States and partner countries. However, the Commission is first mandated by the Member States to carry out these functions. Member States also exercised significant control over the choice of partner countries for Mobility Partnerships. The form of the Mobility Partnerships (with implementation taking place through the projects proposed) has also given Member States significant influence over the final shape of the partnerships. Whereas the Commission envisaged projects being proposed jointly by three or four Member States, Member States have instead tended to propose individual projects.[95]

The legal form of the Mobility Partnerships has had a significant impact on the roles of the European Parliament and the ECJ. The partnerships are signed not as legally binding international treaties, but as joint declarations between the partner country, the European Community and the participating Member States. However, this legal form has completely excluded the European Parliament and the ECJ. It is striking to see that the European Parliament was completely absent in the process leading to the conclusion of the mobility partnerships with Moldova and Cape Verde. In addition to this clear democratic deficit, the extent to which these partnerships can

[94] Ibid, p.223.

[95] Ibid, p.229-230.

be subject to any judicial control exercised by the ECJ is also doubtful.[96]

Participation by the Member States in the Mobility Partnerships is voluntary. Certainly there are differences between Member States in terms of their preferences on the Mobility Partnerships. Countries such as the UK and the Netherlands were in the beginning somewhat sceptical due to the inclusion of legal migration. Dutch government officials point out that migration is an 'explosive political subject' and make it clear that the Netherlands will not be offering legal migration opportunities as part of the Mobility Partnerships. In cases where there is an outright contradiction perceived between national policy and the Mobility Partnerships, Member States are opposed to participation. This is certainly the case with regards to Austria, which does not operate circular migration schemes at the national level, due to past experience with guest-workers who stayed on in Austria. In the Mobility Partnerships, the Austrian government, particularly the minister for the interior, saw a repeat of such circular migration schemes. It therefore strongly opposed participation in any partnerships. In addition, there was concern about the impact on the Austrian labour market of participation in a Mobility Partnership. With the transition periods for new EU Member States coming to an end in 2011, it is feared that there will be pressure on the labour market due to increased EU immigration, and so offering legal migration opportunities to citizens of Mobility Partnership countries will not be feasible. Finally, there is significant public opposition to increased immigration, so that participation in the Mobility Partnerships would be 'difficult for the government to sell'. Austria was so vehemently opposed to the Mobility Partnerships that government officials directed a letter to the Commission, stating that the intent of the Mobility Partnership idea is to undermine the competences of the Member States. This clearly shows the strength of opposition where a proposed measure is in conflict with the national policy of a Member State.[97]

At the time that the Mobility Partnerships were being discussed at EU level, there was a policy discussion ongoing within the Dutch ministries on migration and development. Officials recognised that this overlapped with the EU's Global Approach to Migration, and the ministry of foreign affairs saw in the Mobility

[96] Ibid, p.230-231.

[97] Ibid, p.232-233.

Partnerships a chance to stimulate projects on migration and development. In this case, then, participation can be understood in terms of the enhancement of national policy objectives. There was a fit between national policy and EU policy, and the Dutch government saw an opportunity to achieve its national policy preferences at the EU level. However, even in such a case, the prioritisation of national policy over EU-level cooperation remains clear: the Netherlands was rather sceptical of the Mobility Partnership instrument in the beginning because it believed that the choice of partner countries was not relevant in terms of Dutch policy priorities. In addition, the discussion about migration and development at the national level was still ongoing, and the Dutch government was reluctant to take part in initiatives at the EU level until the national policy had been clarified. [Thus] some Member States (such as the Netherlands) have seen in the partnerships a chance to enhance their national migration policies and therefore decided to participate. Others (such as Austria) have instead identified an outright contradiction between the Mobility Partnerships and their national policy, and have opposed this new policy instrument. The case of the Mobility Partnerships demonstrates that an understanding of the domestic political context and policy priorities of the Member States is crucial to an understanding of EU migration policy measures.[98]

As a result, the mixture of interests and various geographical and thematic priorities are difficult to build upon. A comprehensive approach at the EU level is in fact 'Europe à la carte' and cannot be fully controlled, nor even planned for at the supranational level.[99] And as the neo-nationalist approach foresees that the national political units and policymakers seek to legitimise certain national immigration policies by transferring them into the level of EU intergovernmental platforms and try to manipulate these policy-making platforms to promote restrictive national policies and programmes.

[98] Ibid, p.234-235.

[99] Agnieszka Weinar, et.al, p.14.

2.4 Securitization of EU Immigration Policy and the Impact of September 11

In the early years of the European project, migration was seen neither as an important issue for the European Communities nor as a threat. After the Second World War, migration was considered a vehicle of economic reconstruction for the European economies. However, due to historical circumstances, following the oil crisis of 1973-1974 and the growth in unemployment rates, Western European governments began to adopt more restrictive migration policies. As immigration and asylum policy entered to the Community political agenda, the national fears were transferred to the European Communities that inherited the Member States' suspicion and fear of the "aliens".[100]

As the Europeanization of migration gained momentum, so did the security logic that went with it. The treaties of Maastricht and Amsterdam amalgamated the security continuum, reflecting the same logic that characterized previous intergovernmental initiatives on internal security. According to Anderson, this happened in three ways: first, through an institutional merging of previous intergovernmental bodies, such as "Trevi" and the Ad Hoc Group of Immigration with the Maastricht Treaty, and the incorporation of the Schengen acquis in the framework of the European Union with the Treaty of Amsterdam; second, through an instrumental merging, which involved the proliferation of security practices that associated terrorism to migration within established intelligence channels, such as the Schengen Information System (SIS); and third, through an ideological merging, which reproduced the view that migration, terrorism and crime are interrelated issues.[101]

The milestone for the securitization of migration is the adoption of the Single European Act in 1986 which paved the way to an internal market by ensuring the free movement of goods, persons, services, and capital. The gradual abolition of internal frontiers signified tightening the external border control measures on the other hand, particularly concerning the TCNs. As a result, two parallel processes

[100] Georgios Karyotis, European Migration Policy In The Aftermath of September 11, The European Journal of Social Science Research, Vol.20, No.1, 2007, p.3.

[101] Ibid, p.6.

emerged: the gradual "Europeanization" of internal security policies and the "externalization" of security threats.[102]

Since 1923, many European states had been already engaged in police cooperation under the roof of "Interpol" to a certain extent. However, due to the intention to cope with rising terroristic activities better, they decided to establish another regional forum. Thus, *the Trevi Group* was established in 1975. The officials from the ministries of internal affairs and from the internal security services of Member States met twice a year to exchange information regarding internal security issues until the entry into force of Maastricht Treaty which dissolved Trevi. The primary objective of Trevi was to increase the mutual assistance among Community members in fighting against terrorism.

Trevi was crucial at shaping the attitudes and norms of the participant state delegates, as the first regular forum of cooperation on internal security issues. For Carl Levy, the Trevi group was the precursor and the prototype for the intergovernmental structure instituted under the Schengen Agreements and the Third Pillar of the Maastricht Treaty.[103]

During the 1980s, the Member States of the European Community gradually extended the scope of intergovernmental cooperation to other issues. Thus, although the original remit of the Trevi Group covered terrorism and internal security, its scope was extended in 1985 to include illegal immigration and organized crime. In October 1986, the Trevi Ministers decided to also set up an Ad-Hoc Group on Immigration, in order to coordinate national asylum and immigration policies. The Ad-Hoc Group on Immigration consisted mostly of the same officials that were meeting in Trevi and its tasks included the coordination of visa policies and national rules on granting asylum. The group was also in charge of preparing *the Dublin Convention on Asylum* in 1990, which was 'designed to allocate responsibility for examining asylum applications to that Member State that played the most important part in the entry or residence of the person concerned'. The Dublin Convention rules

[102] Ferruccio Pastore, Reconciling the Prince's Two ''Arms'': Internal-External Security Policy Coordination in the European Union, Institute for Security Studies -Western European Union: Occasional Paper 30, 2001, p.1.

[103] Carl Levy, European asylum and refugee policy after the Treaty of Amsterdam: the birth of a new regime?, in Bloch, A. & Levy, C. (eds), Refugees, Citizenship and Social Policy in Europe, Basingstoke, Macmillan, 1999, p. 53.

meant that asylum seekers, once rejected from one Member State, are rejected from all and sent back to the country from which they came. In 1989, "Trevi 92" was set up to deal specifically with the security implications of the Single European Market and to improve cooperation in order to compensate for the consequent losses to security and law enforcement. The activities of "Trevi 92" included harmonizing visa application procedures, facilitating the exchange of information and determining a common list of undesirable 'aliens'.[104]

Another key development in European cooperation on internal security occurred with the Schengen Agreement in 1985. The signatory states came to terms with granting the right of free movement for each other's citizens within the so-called "Schengen area" by abolishing controls at the common internal borders. Similar to Trevi, the agreement also involved the provisions and cooperation with respect to irregular immigration, criminality and terrorism, i.e. compensatory measures. For example, in compliance with the provisions in Schengen Agreement, a liaison officer has served in each signatory state to coordinate the exchange of information about terrorism, drugs, organized crime and irregular immigration, since 1995.

The experiences of Trevi and Schengen was followed by a new initiative; *the European Police Office (Europol)*. This time the EU officials aspired to achieve cooperation among transnational police activities. Europol was established in the 1992 Maastricht Treaty. Yet, the agency was able to start limited operations at the beginning of 1994, through the Europol Drugs Unit (EDU). Although the raison d'être of the EDU was to struggle against drugs within the borders of the EU, its tasks were broadened to money laundering, motor vehicle theft, human trafficking and terrorism, as the time went by. Finally in 1998, the Europol Convention was ratified by all the Member States and came into force. Hence, Europol became fully operational on 1 July 1999.

Armed forces of the Member States are still responsible for protecting the Union's external borders. However, due to the "weak" coordination among these forces, EU members decided to take closer cooperation. In 2005, *the European Agency for the Management of Operational Cooperation at the External Borders*,

[104] Georgios Karyotis, et.al, pp.4-5.

known as *Frontex*, was established in Warsaw, according to the Council Regulation (EC) 2007/2004. By means of the Council Regulation 2007/2004 and then the amending Council Regulation 863/2007, the Rapid Border Intervention Teams could be deployed at all major border crossing points.

Now, Frontex is vested with the functions for directing the operational cooperation between Member States in managing the external borders, assisting when they need special technical and operational support at the external borders, carrying out risk analyses and controlling the external borders by using the latest research relevant for surveillance. Shortly, while it remains the task of each Member State to control its own borders (regarding also the entry of irregular immigrants), the Agency is responsible to provide that they all do so with the same high standard of efficiency.

In 2007, EU governments decided to grant more responsibility and resources to Frontex, so they agreed to boost its budget by 30 million Euros. Now, Frontex has a list of military supplies including 20 airplanes, 30 helicopters and over 100 boats, on paper.[105]

The Trevi Groups, the Ad-Hoc Group on Asylum and Immigration, the Schengen Treaties, Europol and Frontex seriously institutionalized the emphasis of security on the EU immigration policy and steered into a way in which immigration had negative connotations with drug and human trafficking, crime and terrorism. The institutionalization of security dimension meant at the same time the domination of immigration policies by the defensive and inhibitive logic of security maintenance within a unitary security area. With the terminology of Monar; all these fora served as "effective laboratories" within the European migration policy, and they also reinforced the externalization of internal security threats, with the EU frontiers as the dividing line between a 'safe(r) inside' and an 'unsafe(r)' outside.[106]

On the other hand, the EU's response to the terrorist attacks of September 11 reflected and further reinforced the security logic of migration. Migration appeared prominently in the discussion of the campaign against terrorism. The measures

[105] Yet, this is only a record to indicate what could be available in future missions of Frontex. These outfits actually belong to the Member States and the Agency has to pay for the deployment of them.

[106] Jörg Monar, 'The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs', Journal of Common Market Studies, Vol. 39, No. 4, 2001, pp.748-749.

adopted by the EU after September 11 and the rhetoric used in reference to immigrants and asylum seekers touched on migration as an issue directly linked to terrorism. The fact that the 19 perpetrators of the September 11 attacks were foreigners increased the feeling of insecurity towards immigrants, who were more than ever coupled with terrorist activities. Thus, it became almost unthinkable to refer to the fight against terrorism without special reference to the threats posed by migration.[107]

Indeed, in its Communication issued in November 2000 just after the Tampere Summit, the EU Commission pointed out: "It is clear from an analysis of the economic and demographic context of the Union and of the countries of origin, that there is a growing recognition that the 'zero' immigration policies of the past 30 years are no longer appropriate".[108] The Commission tried to justify his stance within the Communication by referring also to the growing shortages of labour at both skilled and unskilled levels, the declining and ageing populations in Europe and the rising problem of racism and xenophobia directed particularly towards migrants and asylum seekers. The Communication confirmed: "While immigration will never be a solution in itself to the problems of the labour market, migrants can make a positive contribution to the labour market, to economic growth and to the sustainability of social protection systems".[109] This was a considerable rupture from the old policy which was symbolised by the Council Resolution of 20 June 1994 on Limitation on Admission of Third-Country Nationals stating: "Member States will refuse entry to their territories of third-country nationals for the purpose of employment."[110]

Nevertheless, the traumatic reverberations of the September 11 attacks dispersed the nascent positive (at least neutral) atmosphere. The attacks not only brought the above-mentioned libertarian trends suddenly to a standstill, but also made many Member States retreat to more restrictive policies in order to fight against terrorism which was associated with migrants. All categories of immigrants

[107] Georgios Karyotis, et.al, p.6.

[108] European Commission, "Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy", COM(2000) 757 Final, Brussels, 22 November 2000, p.3.

[109] Ibid, p.21.

[110] Official Journal C 274, 19/09/1996, p.3.

were adversely affected from this restrictive u-turn. For instance, two proposed directives with regard to family reunification and the extension of a long-term status to third country nationals were re-written after the attacks in order to try to give the Member States maximum discretion on whom they allow to enter their territory and in the way they judge who could be a threat to public order as well as to allow them to decide who could be liable to integrate well in their societies.[111]

Furthermore, the Extraordinary Justice and Home Affairs Council Meeting of 20 September 2001 invited the Commission to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments. In response to the Council's request, the Commission issued a Working Paper on 5 December 2001, which encouraged states to scrupulously and rigorously apply the exclusion clauses. It also presented legal ways for the Member States to refuse admission of third country nationals for reasons of public policy or domestic security, including in cases of economic immigration, family reunification, long-term residency status and visas for students. The Commission paper pictured migrants and refugees as potential terrorists and proposed strict measures and amendments to European laws so that there is no avenue for those supporting or committing terrorist acts to secure access to the territory of the Member States of the European Union. According to the Working Paper: "Pre-entry screening, including strict visa policy and the possible use of biometric data, as well as measures to enhance co-operation between border guards, intelligence services, immigration and asylum authorities of the State concerned, could offer real possibilities for identifying those suspected of terrorist involvement at an early stage."[112]

At the same time, the Spanish Presidency's open equation of combating against irregular immigration with the war on terrorism, as one of its highest priority made the situation worse. A plan to form a joint border police force to patrol shores, ports and crossing points against irregular immigrants was adopted during the Seville Summit in June 2002.

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[111] Joanna Apap & Sergio Carrera, Towards a Proactive Immigration Policy for the EU?, CEPS Working Document, No. 198, 2003, p.42.

[112] Georgios Karyotis, et.al, p.7.

Unfortunately, all these EU official documents implied that immigrants and asylum seekers are perceived as threat and high-risk group for terroristic activities, so they should be addressed with particular attention. Similarly, the externalization of internal security threats –i.e. the political discourse identifying the terrorism as being imported to the EU from foreigners- forced the EU leaders to find solutions to strengthen the external border controls. In sum, the hostility against asylum seekers and immigrants deepened both on the policy and societal level. Therefore, racism and xenophobia are accompanied by restrictive policies.

Fear and the belief that migration poses existential threats to the Member States appear to be the driving forces behind the EU's new restrictive policies. All this suggests that after, September 11, the security-migration nexus has been reinforced and the security discourse of migration remains unchanged, despite the current demographic and economic needs that call for a more liberal EU policy on asylum and immigration.[113]

To sum up, the traumatic reverberations of events (such as the September 11 attacks, Madrid and London bombings in 2004 and 2005, the massive protests and riots in France in 2005 led by the citizens of North African origin) as well as the conservative perceptions and stereotypes in European community dispersed the nascent positive (at least neutral) atmosphere. The attacks not only brought the libertarian trends suddenly to a standstill, but also made many Member States retreat to more restrictive, xenophobic and discriminative policies in order to fight against terrorism which was associated with migrants. This is called the externalization and securitization of immigration.

Now the immigration does not simply mean anymore dealing with asylum applications, irregular migration or managing the movement of people in and out of the Union. It has become a hard core security issue involving efforts to prevent potential acts of violence, organised crime and terrorism within the Union borders.

This exclusionary, restrictive, selective, labour market demand-driven and unparticipatory control-based immigration policy causes paradoxes and negative circumstances. For instance, migrants take the risk of more dangerous and longer journeys by falling into the hands of human traffickers and smugglers, and they pay

[113] Ibid, p.8.

less attention to their human rights due to the fear of deportation. This stance also boosts the economic burden on EU Members through increasing border control measures (such as establishing central databases of SIS, EUROPOL, or the patrolling activities of FRONTEX).

2.5 Defective Samples of the EU Acquis Communautaire on Immigration Policy in Past Decade

Following the stimulation given by the Tampere Summit in 1999 requesting rapid decisions by the Council on the basis of proposals by the Commission, European legislation on immigration began to develop. As a result, numbers of directives were adopted, of which the following are the key ones:

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof,
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers,
- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification,
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities,
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,

- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service,
- Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research,
- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status,
- Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals,
- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment
- Council Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

The following samples of the Acquis Communautaire not only give us the clues on the paradoxes of EU immigration policy, but also help to understand why the Member States' policymakers still insist on a common EU immigration policy, although there are unique structural requirements, different priorities and expectations of the Member States. As it is shown different parts of the dissertation, the next part also maintains that some aspects of the common EU immigration policy serve as a new migration control mechanism in order to be able to take additional measures limiting TCNs' access to the rights of EU citizens by transferring restrictive national approaches and legislation into a supranational venue.

As neo-nationalist perspective defends the national political units and policymakers seek to legitimise certain national immigration policies by transferring them into the level of international organisations, which is named as "venue shopping".

Member States' national applications within the scope of EU law are subject to the supervision and judicial control carried out by the European Commission and the European Court of Justice (ECJ). However, by inserting integration measures and conditions into the articles of supranational provisions, Member States delegate some of national attitudes and measures concerning immigration into EU law, at the expense of being at odds with other international legislation on migrants' human rights adopted by the UN, ILO, Council of Europe, etc. This is particularly apparent in the introduction of new integration conditions and measures –under the Council Directives, for instance- which allow the national authorities to utilize derogative clauses when determining the allocation of rights and procedural guarantees to TCNs.

2.5.1 The Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

The right to family reunification[114] is closely linked with the general right to respect for family life, which is taken under the guarantee in many international official documents. The right to family reunification is of vital importance, when it is considered the vulnerable position of migrants and refugees. The preliminary report of ILO in 1973 was the first international document handling the issue. It stated: "Uniting migrant workers with their families living in the countries of origin is recognised to be essential for the migrants' well-being and their social adaptation to the receiving country. Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevents them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the receiving community create many well known social and psychological problems that, in turn, largely determine community

[114] Family reunification means that the presence of one family member in a destination country allows also the rest of the family members to immigrate to that country officially. It is one of the most common reasons for immigration in today's world.

attitudes towards migrant workers".[115]

Here, the ILO observes correctly that the right to family reunification is in favour of the well-being of both individual and the receiving country. According to the United Nations High Commission for Refugees (UNHCR), the family unit has a better chance of successfully integrating in a new country rather than individual refugees. In this respect, protection of the family is not only in the best interests of the refugees themselves but is also in the best interests of states.[116]

After the Second World War, the issue of migrants' rights to family reunification has come up in various international fora. However, in all the international instruments adopted, states have opposed any recognition of a right to family reunification that might be considered to substantially curb states' sovereign right to control who may enter or settle in its territory. The first example of this is the ILO's Recommendation No. 86 concerning Migration for Employment (Revised), paragraph 15(1) of which reads: "Provision should be made by agreement for authorization to be granted for a migrant for employment introduced on a permanent basis to be accompanied or joined by the members of his family". The text is not only narrow in scope, but also falls well short of recognising any concrete right to family reunification. Article 13(1) of the Migrant Workers (Supplementary Provisions) Convention 1975 (C143) may have a broader scope yet still leaves states a very wide discretion, stating that: "A Member *may* take all necessary measures which fall within its competence and collaborate with other Member States to facilitate the reunification of the families of all migrant workers legally residing in its territory". C143 has indeed been described as being "weak on family reunification". Paragraph 13(1) of Recommendation No. 151 Migrant Workers Recommendation 1975 (R151) takes a more forceful view on family reunification, stating that "All possible measures *should* be taken both by countries of employment and by countries of origin to facilitate the reunification of families of migrant workers *as rapidly as possible*". Nevertheless, R151 still falls short of explicitly recognizing that migrant workers have an inalienable right to be reunited with their families in their country of

[115] International Labour Conference, 59th Session, 1974, Report VII (I), *Migrant Workers* (Geneva, International Labour Office, 1973).

[116] UNHCR Note on Family Protection Issues, EC/49/SC/CRP.14, June 1999, point 16.

settlement.[117]

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is the main UN treaty dealing with the rights of migrant workers. The Article 44 of the Convention lays down a duty upon states to "take measures they deem appropriate" and "facilitate" the reunification of workers with their spouses or partners. Likewise, the right to family reunification is nominally recognised in 1985 on Article 5(4) of the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country they live in. The Article 10(1) of the Convention on the Rights of the Child in 1989 has been the only text where the fundamental right to family reunification is expressly recognised. Additionally, the Article 16(1) of the Universal Declaration of Human Rights, the Articles 8 and 14 of the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) case law, the Article 19 of the European Social Charter, as well as the European Convention on the Legal Status of Migrant Workers of 1977 are current international legal resources contributing both for a family's right to live together and for the preservation of family unity.

After the 1997 Amsterdam Treaty and the following 1999 Tampere Summit, the directive on the right to family reunification generated the first set of measures presented by the European Commission on TCNs. Before finding a possible ground to reach an agreement and adopting it formally on 22 September 2003, the discussions on the proposals continued for four long years. The topic of family reunification may provide a good example to clarify the disparity between the rights conferred on TCNs and the nationals of the Member States. Here, it is not sought to discuss all the provisions contained in the Directive, but merely to take a look at the core aspects of it.

Initially, the Directive has suffered from many of the compromises the Commission was forced to accept to prevent its proposal from being rejected and from the fact that national interests and prerogatives have barely budged on matters of legal migration. One of its major weaknesses is the fact that it limits family reunification to spouses and minor children. For other members of the family -for instance first-degree relatives in direct ascending line who are dependent, the adult

[117] John Arturo, Family Reunification For Migrants And Refugees: A Forgotten Human Right? pp.6-7, (http://www.fd.uc.pt/hrc/working_papers/arturojohn.pdf)

unmarried children as well as unmarried partner- Member States have the right to authorise residence at their discretion.[118]

Under Article 4(1) of the Directive, among those entitled to family reunification are the children of the sponsor[119], spouse or both. The children entitled to reunification must be below the age of majority set by the law of the Member State which may be as low as 16. This differs from the Council Directive 2004/38/EC and its predecessor Regulation (EEC) No.1612/68 on the right of EU citizens for exercising their freedom of movement, under which the age requirement for children is 21. Similarly, according to the European Committee of Social Rights, the notion of family covered by Article 19(6) of the European Social Charter is held to cover at least the spouse and dependent children under 21, dependency covering not only reasons of health but also economic reasons such as when children are undertaking further studies. The Directive not only falls short of meeting these standards, it also allows for further restrictions if present in Member States' legislation on the date of the Directive's implementation.[120] Additionally, the Article brings the family reunification under the interpretation of the Member States' national legislations by stating "capacity" and "condition for integration".

The provisions of Article 6 also allows Member States to reject an application for entry and residence and to withdraw or refuse to renew a residence permit of family members on the grounds of public policy, public security or public health. Undoubtedly, denial of the right to family reunification due to these reasons seems quite subjective and severe. Moreover, uncertainty of what constitutes "public security" may mean that it is totally at the discretion of Member States to reject family reunification applications.

Under the amended Regulation (EEC) No.1612/68, the sponsor must have had housing considered "normal" for the region in which he was working. This requirement was revoked by the Council Directive 2004/38/EC on the right of EU citizens for exercising their freedom of movement. However, the Council Directive

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[118] Stefano Bertozzi, Integration: An Ever-Closer Challenge, CEPS Working Document, No.258, 2007, p.6.

[119] "Sponsor" means a third country national residing lawfully in an EU Member State and applying or whose family members apply for family reunification to be joined with him/her.

[120] John Arturo, et.al, p.45.

2003/86/EC on the right to family reunification still includes the accommodation requirement and it also requires the sponsor to be able to provide for himself and his family sickness insurance as well as stable and regular resources which are sufficient to maintain himself and the members of his family, without recourse to the social assistance system of the Member State concerned. The inclusion of these conditions merely serves to deny the core of family reunification to those TCNs who are too sick or poor to meet these requirements, although they are actually most in need of the presence and support of their families. While EU citizens working and residing in another Member State have the right to claim the same social advantages as a national of the Member State, the 2003 Directive requires that the sponsor and family have no recourse to public funds. Many families will even fail to claim those benefits to which they would still be entitled and which might not come under the scope of the Directive, such as child benefits, for fear of jeopardizing the family's unity. One might even question whether the provisions could be held to be compatible with Article 33 of the 2000 Nice Charter of Fundamentals Rights of the European Union that states that the family shall enjoy "economic and social protection". Since Member States may also limit the employment activities of family members such as the adult children and parents of the sponsor, these members of the family may have to go into unofficial work which cannot then be declared in assessing the family's income. As regards housing, according to the European Committee of Social Rights, Article 19(6) of the European Social Charter actually imposes an obligation upon States to *aid* migrants in finding suitable accommodation for the purposes of family reunification.[121]

Another aspect of the Directive that may be criticised is the period of time allotted the Member States to take the decision. At the present time, Member States may take between two and three years between the receipt of the application for family reunification and the issuing of the pertinent residence permits for the family. This provision may contradict, among other international and European legal instruments, the European Social Charter, because by specifying such a long period of time, the main substance and aim of the right of family reunion, which is to make family life possible, would be clearly undermined. To allow Member State

[121] John Arturo, ibid, pp.50-51.

authorities to spread the decision taken over several years constitutes a restrictive measure, which should be addressed by reducing the period of time to one year, as the initial proposal from the Commission recommended in its Explanatory Memorandum.[122]

The next contested point is the Article 13 entitled as "entry and residence of family members". It stipulates that after the application for family reunification has been accepted, the Member State may grant to the family members a residence permit whose duration "shall in principle not go beyond the date of expiry of the residence permit held by the sponsor". This constitutes inevitably total dependency on the sponsor for other family members -even if they get residence permit.

On the other hand, the Article 18 of the Directive points out "the Member States shall ensure that the sponsor and/or the members of his/her family have the right to mount a *legal challenge* where an application for family reunification is rejected or a residence permit is either renewed or is withdrawn or removal is ordered". Nonetheless, it seems that the precise limits of the "legal challenge" are not fully clarified and the Member States avoided deliberately granting "the right to appeal" to the sponsor or other family members. Thus, unsurprisingly the Member States remain the sole competent authority to decide on the meaning and the scope of that concept.

The Article 3(2)(b) of the Directive also expressly excludes asylum seekers from its application. While the 1997 Dublin Convention allows for the reunification of an asylum seeker with a member of his family who has been already been granted refugee status under the 1951 Refugee Convention, it does not cover the reunification of family members who are all seeking asylum and who may be scattered among various Member States having been separated during flight. At present, no Member State allows for the family reunification of asylum seekers. Nevertheless, asylum seekers often wait many years to have their asylum applications decided. This separation will naturally cause distress to the family members and weaken family bonds.[123]

After all, exercising the right to reunification of the members of the family of

[122] Joanna Apap & Sergio Carrera, et.al, p.11.

[123] John Arturo, et.al, p.55.

immigrants seems subject to insurmountable conditions regarding resources and rules in matters of accommodation, medical insurance and waiting periods of up to three years between members of the families of immigrants submitting a request for reunification and the residence permit being issued. Persons benefiting from the status of temporary or subsidiary protection in a Member State are also excluded from the scope of this directive. Many analysts therefore detect a contradiction between the political commitment to granting immigrants equal and comparable treatment to EU nationals, as confirmed in Tampere, and the actual discrimination that exists.[124]

The final text of the 2003 Directive has attracted widespread criticism also from civil society and bodies such as the EU's Economic and Social Committee. While the Commission's first proposal represented a positive harmonisation of third-country nationals' right to family reunification and narrowing of discrimination between third country nationals and EU citizens, the final text adopted by the Council neither harmonises family reunification rights across the EU nor substantially narrows the differences between third-country nationals and EU citizens. The Directive, in many respects, fails to meet the standards required by the European Social Charter and the European Convention on Human Rights, as well as the goals of the 1999 Tampere European Council Summit calling for the approximation of the legal status of TCNs to that of EU nationals. This state of affairs is made worse by the limitations of the ECJ's role in the interpretation and oversight of the Directive.[125]

The Directive will therefore have very little effect upon the right to family reunification of third-country migrants. Some small changes in domestic policy may occur, such as Austria having to shorten the waiting period imposed on third-country nationals from five years to three. Nevertheless, most present Member State policies will remain unchanged, with most states already having policies more favourable than those obligatory in the Directive. Also, the failure to include a "standstill clause" in the Directive means that Member States with more favourable measures may restrict these and bring their policies into line with the minimum standard set in

[124] Stefano Bertozzi, et.al, p.6.

[125] John Arturo, et.al, pp.56-57.

the Directive. The Commission, in fact, refused to include a standstill clause requested by the European Parliament for the exact purpose of not impeding harmonisation. This would suggest that the Commission would rather see the harmonisation of family reunification rules through the lowest common denominator approach than to protect family reunification rights wherever possible. Also indicative of the true nature of the Directive is the change made to Article 1. While this originally stated that the purpose of the Directive was to "establish a right to family reunification for the benefit of third-country nationals", this was eventually amended to "the purpose of this Directive is to determine the conditions for the exercise of the right to family reunification". This highlights the extent to which the Directive has been adapted to serve economic needs rather than humanitarian principles.[126]

As a result, it is not that much ironic that the European Parliament brought the provisions of Council Directive 2003/86/EC to the European Court of Justice by alleging the Directive did not comply with the obligation to protect fundamental rights.[127]

2.5.2 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

At Tampere Summit in 1999, the EU Council had acknowledged the need to ensure fair treatment of TCNs who reside legally on the territory of the Member States. It stated that a more sound integration policy should aim at granting certain rights and obligations comparable to those of EU citizens. According to these goals, the Commission declared its proposal for a Long Term Residents Directive in 2001. At last, the Directive 2003/109/EC was adopted in November 2003, after long discussions within the working groups of the Council and after being undergone significant changes from the original proposal.

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[126] John Arturo, ibid, p.57.

[127] The ECJ dismissed the case C-540/03 in its judgement on 27 June 2006. (The summary of the judgement can be reached at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0540:EN:HTML)

Apart from the Directive 2003/86/EC, the Directive 2003/109/EC has also vital impacts on the integration processes of immigrants into the receiving societies. Yet, it should be elaborated whether it truly contributes towards a fair and equal treatment of them and their inclusion processes inside the EU, or not.

The subject matter of the Directive is twofold. First, it determines how a third country national residing legally in the territory of a Member State can acquire long-term resident status. Secondly, it establishes the requirements to enjoy residence in a second Member State other than the first one that has already granted the long-term residence status.[128]

The Article 1 provides that the Directive determines "the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto". On the other hand, the former Article 1 of the Commission Proposal concerning the status of third-country nationals who are long-term residents [COM(2001) 127 Final] provided that the Directive would determine "(b) the terms on which third-country nationals enjoying long-term resident status have the right of residence in Member States other than the one which conferred that status on them". It is striking to see how the former reference to a "right to reside" in other Member States has been omitted in the last version of the measure.[129]

The Article 3 sets the scope of the Directive as "third-country nationals residing legally in the territory of a Member State". One of the positive elements originally contained in the 2001 proposal was the broad scope of persons who could qualify and benefit from that secure status. The final text stipulates, however, that the Directive will exclusively apply to those migrants legally residing in the territory of an EU Member State for at least five years. Therefore, it excludes the following categories of non-nationals, who:

- reside in order to pursue studies or vocational training;
- are authorised to reside in a Member State on the basis of temporary

[128] Diego Acosta Arcarazo, Directive 2003/109 or the Legal Exclusion of the Long-Term Resident "Other", submitted at UK IVR Conference "New Directions in Legal and Social Theory", Edinburgh, 2008, p.5, (http://www.law.ed.ac.uk/festivaloflegaltheory/files/acosta.pdf)

[129] Sergio Carrera, 'Integration' as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU, CEPS Working Document, No.219, 2005, p.12.

protection;

- are authorised to reside in a Member State on the basis of a subsidiary form of protection;
- are refugees or have applied for recognition as refugees;
- reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited;
- enjoy legal diplomatic status.

The persons to whom the Directive may apply are fewer in number than what may initially appear at the first sight. Including refugees among those who fall outside the personal scope may be considered an unfortunate choice. [130]

Moreover, the Directive adopted a clause regarding those whose residence permit had been formally limited. The importance of this clause rests on the fact that not a single Member State in the European Union grants third-country nationals an unlimited residence permit. On the contrary, they are usually limited by the economic activity, time, or both. This sentence was added on a proposal from Belgium without any clarifying explanation. This is lamentable as it could exclude many third-country nationals from the scope of the directive, which would make a mockery of the Tampere Council Meeting's statement of intention.[131]

In Article 5 the requirements for acquisition of the rights associated with the long-term status are defined. Additional to the original conditions (stable income at least equal to the minimum wage and a health insurance), the EU members inserted another one initiated mainly by Austria, Germany and the Netherlands: compliance with the integration conditions provided for in the national law. This requirement is one of the strategic amendments to the initial version of the Directive proposed by the EU Commission in 2001. For, the wording "to comply with integration *measures*" was replaced during the negotiations by "to comply with integration *conditions*" which allows Member States to require immigrants to pay, either fully or partially, the costs of the integration measures rather than requiring them to attend

[130] Sergio Carrera, ibid, p.13.

[131] Diego Acosta Arcarazo, et.al, pp.10-11.

courses organised and financed by the authorities of the receiving country.[132] This wording has been the subject to heated discussions and criticism all over the EU. There seems to be no clarification about its real limits, leaving wide room for discretion for each of the Member States to freely determine, through their respective national immigration laws, the real scope and content of these conditions.[133]

A similar but not identical clause was added in Article 15(3). Once a third country national with the status wants to move to another Member State, he may be required to comply with the integration measures in accordance with the national law of the second Member State, unless he has already complied with integration conditions in the first Member State in order to obtain the long-term residence status. Even if the migrant has complied with the integration conditions in the first EU state he may be required to attend language courses in the second Member State. These integration amendments were proposed by also the same troika: Austria, Germany and the Netherlands. Especially the second integration requirement was hotly disputed in the Council working groups, as it could become an effective barrier to freedom of movement of long-term residents within the Union. Moreover, this condition made the long-term resident status clearly different from Union citizenship. EU citizens were never required to follow integration measures before moving to another Member State nor were they obliged to follow language courses in the second Member State. In the national integration schemes EU citizens are always excluded from the obligation to attend the course.[134]

These integration conditions seem really startling. Since, in 1999 only Germany required knowledge of the language to obtain a permanent residence permit. Until 2008, 14 Member States started to apply some kind of integration conditions. These conditions vary from country to country and they can be divided between language requirements and civic knowledge requirements.[135]

As it was expressed before, the Article 5 establishes the obligation for the

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[132] Kees Groenendijk, Legal Concepts of Integration in EU Migration Law, European Journal Of Migration and Law, Vol.6, 2004, p.122.

[133] Sergio Carrera, et.al, p.14.

[134] Kees Groenendijk, et.al, pp.122-123.

[135] Diego Acosta Arcarazo, et.al, pp.13-14.

immigrants to prove that they have for themselves and for dependent family members stable and regular resources. They are obliged to prove that they are in possession of sickness insurance without becoming a burden for the Member State. Moreover, they must present evidence of appropriate accommodation. Nevertheless, the introduction of economic conditionality to be granted for the rights linked with the long-term status may undermine the prohibition of discrimination and equal treatment. Particularly, they are incompatible with the provisions of the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[136], the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[137], and the European Convention of Human Rights (ECHR) of 1953.[138]

After meeting these above-mentioned obligations, an immigrant shall be granted the long-term residence permit. Yet, in contrast to the Commission Proposal [COM(2001) 127 Final] pointing out that the permit shall be valid for *ten years*, the period of validity of the residence permit was generously decreased to *five years* within the Article 8(2) of Directive. Likewise, Article 11 grants a wide discretion unsurprisingly again to Member States to restrict equal treatment of TCNs with EU nationals in some grounds such as;

- education and vocational training, including study grants;
- supply of goods and services made available to the public and to procedures for obtaining housing;
- employment or self-employed activities in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens;

[136] Article 1 points out: "The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment."

[137] Article 1 states: "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

[138] Article 14 provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

- social security, tax benefits, social assistance and social protection;
- freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations.

Another modification is contained in Article 6, which foresees the possibility for the Member States to refuse granting long-term resident status on the grounds of public policy or public security. The Member States will examine the "severity or type of offence against public policy or public security, or the danger that emanates from the person concerned". In this way, the scope of this provision has been extended considerably. It is worrying to see the flexibility given to the Member States' authorities to determine whether a particular person may or may not constitute a threat or danger to public security and policy.[139]

The security of residence is one of the most important aspects of the Directive and of the integration of third-country nationals. In the absence of that kind of security there is no incentive for the society to invest in the individual or for the individual to seek to become part of the society. If the immigrant fears that he could be expelled, that fear will reinforce the orientation towards the country of origin. The relevance of a secured status is hence evident.[140]

The Article 9 of Directive determines the withdrawal or loss of status: detection of fraudulent acquisition, adoption of an expulsion measure under the conditions provided for in Article 12[141] and absence from the territory of the Community for a period of 12 consecutive months. Once again in this matter, the Commission Proposal was far more generous than the Directive adopted. The following important features were excluded from the final version.

Firstly, in the Proposal EU members could only take a decision to expel a long-term resident based on his *personal conduct*, when the threat impinged on a *fundamental interest of society*. These two requirements are hold for EU nationals

[139] Sergio Carrera, et.al, p.14.

[140] Diego Acosta Arcarazo, et.al, p.27.

[141] Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security.

within Article 27(2) of Directive 2004/38/EC. There is some case law on its exact meaning, too.[142] The omission of these two requirements from the Directive 2003/109/EC is inauspicious.

Secondly, the Commission's Proposal stating "Personal conduct is not considered a sufficiently serious threat when Member States do not take severe enforcement measures against its own nationals who commit the same type of offence" was not upheld at the final version of the Directive. However, it is important to mention that this applies to EU nationals as it is approved by the ECHR.[143]

Finally, although the criminal convictions do not automatically bring about an expulsion decision, the challenges to expulsion decisions should have a suspensive effect and emergency expulsion proceedings are forbidden against long-term residents, none of these warranties found place in the Directive.

Furthermore, some other factors have to be taken into account concerning the adoption of an expulsion measure such as; the duration of the residence of the long-term resident in their territory, the age of the person concerned, the consequences for the person and family members, the links with the country of residence or the absence of links with the country of origin.

These factors are set out in Article 28 of Directive 2004/38/EC. In that Directive, an extra protection is granted to those who have the right of permanent residence and to those who have resided in the host Member State for the previous

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[142] The *personal conduct* was defined in ECHR Case 67/74 Bonsignore v Köln in 1975. In this case, an Italian national was facing deportation as a measure of a general preventative nature. The Court decided: "Measures adopted on grounds of public policy and for the maintenance of public security against the nationals of Member States of the Community cannot be justified on grounds extraneous to the individual case… (and) only the personal conduct of those affected by the measures is to be regarded as determinative."

Regarding the *fundamental interest of society*, the Court stated in its injunction about a French citizen convicted several times in the UK at Case 30/77 Regina v Pierre Bouchereau in 1977: "In so far as it may justify certain restrictions on the free movement of persons subject to Community Law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence … of a genuine and sufficiently serious threat affecting one of the fundamental interests of society."

[143] For instance, in Cases 115/81 and 116/81 Adoui and Cornaille, which concerned two French prostitutes in Belgium, the Court gave decision that: "Conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct."

ten years or who are minor. This last group can only be expelled on imperative grounds of public security. This differs from the Long-Term Residence Directive. Similarly, in many EU countries, a third-country national with a long-term residence status can be expelled even after many years of residence in that country, in some cases even more than 20 years, or many European countries –including Denmark, Estonia, Finland, France, Greece, Ireland, Italy, Slovakia- allow for the expulsion of long-term residents born in their territory.[144]

The last but not the least, Article 10 covers the procedural safeguards that may be exercised against a decision rejecting the issue or withdrawal of the status. The rights to appeal against a decision of expulsion and the procedural safeguards in general for the migrant involved as well as his respective family members are not as strong as those available to EU citizens. Article 10 expressly states that the person concerned shall have the right to mount a legal challenge in the Member State concerned. Yet the real meaning behind the concept of legal challenge is not clarified by the Directive. A clear statement on the possibility of having access to appeal (or a right to legal remedies as originally proposed by the Commission in the first version of the initiative) should have been expressly included in the articles of the Directive, and not only inside its Explanatory Memorandum, which lacks legal effect.[145]

It is true that there are some positive elements incidental to the Directive. The situation of long-term residents has improved in some EU Member States as a consequence of this Directive. For example, in some Member States, a long-term residence status was only granted after many years, like in Greece (10 years), Portugal (8 years), or the Czech Republic (10 years). However, the analysis of Directive 2003/109, concerning the status of third-country nationals who are long-term residents, has shown how a legal "other" is being constructed at a European legal level. Third-country nationals are viewed with suspicion even when they have lived legally in Europe for more than five years. This suspicion is also present in Directive 2003/109/EC. By comparing the final Directive with the Commission Proposal, it is clear that the Tampere goal of granting comparable rights to those of EU citizens has not been realised. Finally, by seeing the different implementation in

[144] Diego Acosta Arcarazo, et.al, pp.30-31-32.

[145] Sergio Carrera, et.al, p.17.

the Member States, it is proven how the common immigration policy is far from a reality in many aspects. A third-country national can have a completely different legal path towards the long-term resident status depending on the Member State in which he resides. Moreover, the lack of standstill clauses in many articles signifies a future downgrading of the long-term resident status.[146]

Considering the points above, if it is not desired to criticize this Directive harshly as Sergio Carrera does: "The Directive 2003/109 on the long-term resident status could in these ways undermine, instead of facilitate, an open process of inclusiveness and integration of migrants in the receiving societies. The values of multiculturalism and the respect of fundamental rights of third-country nationals may also suffer from its practical implementation"[147], then at least it should be agreed with Halleskov that this Directive accords long term residents an absolute right of equal treatment with nationals in very few areas of life. The status of long-term resident provides comparable rights to those of a European citizen, however there are many grounds on which Member States can restrict them.[148]

2.5.3 Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

The particular sensitivities of Member States within the area of legal immigration showed itself as the retention of unanimous voting in the Council, which meant de facto veto right for them over proposed legislation. However, the Amsterdam Treaty, entering into force on 1 May 1999, set out new decision-making procedures. It envisaged a first five-year-period during which any legislation would be initiated by the Member State or the Commission with consultation of the EU Parliament and unanimous voting in the Council. After five years, following the harmonisation of Member States' immigration and asylum laws, the second phase

[146] Diego Acosta Arcarazo, et.al, pp.36-37.

[147] Sergio Carrera, et.al, p.18.

[148] Diego Acosta Arcarazo, et.al, p.26.

was to begin. Thus, some matters under the title of asylum and immigration policy moved automatically, or by own decision of the Council, from unanimity and consultation to qualified majority voting and co-decision with the EU Parliament, as from 1 January 2005.

The Directive 2008/115/EC -more widely known as the "Returns Directive"- was agreed in June 2008, after nearly three years of intensive negotiations and entered into force in January 2009. In the field of immigration and asylum, the Returns Directive constituted the first important legislative document adopted under the co-decision procedure.

At the outset of shaping a common policy on "illegal" immigration, the Commission identified two principles on which a Community return policy was to be based: the priority of voluntary return over forced return and the strengthening of the obligation under international law for countries to readmit their own nationals. Indeed, the principle that voluntary return should be encouraged over forced removal has been repeatedly endorsed by the Council, most notably in the Justice and Home Affairs Council Conclusions on voluntary return, adopted in October 2005. However, translating this principle into detailed rules in the context of the Returns Directive proved difficult: State practices diverge widely on this matter and authorities were unhappy to have a bridle placed on their power to enforce removal.[149]

The Directive deals with a number of issues regarding the return procedure. Among its most controversial provisions are the following: the exclusion of some irregular migrants from its scope, the possibility to detain a migrant for a period up to 18 months, the possibility of a re-entry ban into the EU for a period of 5 years and the chance to detain and return unaccompanied minors.[150]

The scope of the Directive is determined within the article 2(1) stating that it applies to third-country nationals staying "illegally" on the territory of a Member State. According to the article 3(2) "illegal stay" means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer

[149] Anneliese Baldiccini, The EU Directive on Return: Principles and Protests, Refugee Survey Quarterly, Vol.28, No.4, 2010, p.128.

[150] Diego Acosta Arcarazo, Latin American Reactions to the Adoption of the Returns Directive, CEPS Working Document, at http://www.ceps.eu/book/latin-american-reactions-adoption-returns-directive, 2009, p.2.

fulfils the conditions of entry as set out in article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State. Primarily, the Directive appears at first sight to embrace any TCNs regardless of the reason for irregular situation, such as due to the unauthorized entry, expiry of visa or residence permit, revocation of residence permit, rejection of asylum claim or refugee status. However, article 2(2)(a) sets forth that Member States may decide not to apply this Directive to third-country nationals who are subject to a refusal of entry or who are apprehended or intercepted in connection with the irregular crossing of the external border and who have not subsequently obtained an authorisation or a right to stay in that Member State. Thus, it allows Member States to exclude large number of TCNs from the scope of the Directive.

The practical effect of this exclusion is that these irregular migrants can be returned or removed without the complete set of minimum legal guarantees provided for in the Directive, i.e. coercive measures must be proportional and not exceed reasonable force; removal has to be postponed in circumstances of physical or mental incapacity; emergency health care must be provided and special needs of vulnerable persons taken into account; and detention must be subject to the same safeguards and conditions. There is also a prohibition on the refoulement of persons who are apprehended or intercepted in connection with an illegal border crossing or refused entry at the border.[151]

The second category of migrants whom Member States have discretion to exclude from the scope of the Directive concerns those who "are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures". This provision reflects the different legal position pertaining to people who have been convicted of a criminal offence and whose expulsion is ordered for reasons of public order or public security. However, it may also have the unintended consequence of severely limiting the scope of the Directive in jurisdictions where the irregular entry and stay is treated as a criminal offence and where migrants are liable to expulsion as a result of the offence. One such jurisdiction is Italy, which has recently amended its immigration law to introduce the crime of irregular stay and entry, involving a fine of €5,000 –

[151] Anneliese Baldiccini, et.al, p.127.

€10,000 and immediate expulsion. It has been noted that, in this way, the Italian Government will be in a position to virtually elude its obligation to implement the Returns Directive.[152]

While its wording is highly ambiguous, the rationale behind this provision seems to be that of making a distinction between those third country nationals who have entered the territory regularly, for example by being in possession of a visa, and those who have not managed to do so because they have been apprehended in crossing the border irregularly... [Yet], there is no objective justification as for why these groups of persons should be treated differently. The inclusion of such exception indicates that the Directive, which in principle was intended to regulate the situation of those third country nationals staying irregularly in the Member States, has been developed into a non-entry tool to complement EU border management instruments. Most importantly, while refugees are often forced to enter the EU irregularly and without valid documents, according to the 1951 Refugee Convention they should not be penalised for this.[153]

The rules on duration of detention are outright harsh: a six-month detention period is permitted, with a possible twelve-month extension if the person concerned is uncooperative with the removal process or if delays are incurred in obtaining documentation (articles 15(5) and (6)). This is an extremely long period for depriving irregular migrants, who have not even committed a crime, of their liberty. It will undoubtedly lead to a significant deterioration of practices across Europe. At the time the Directive was adopted, only Germany had a maximum eighteen-month detention regime, some Member States did not have a statutory limit, and the majority of Member States had a significantly briefer maximum pre-removal detention period (as low, for example, as thirty-two days in France and Cyprus). The deterioration of pre-removal detention practice can already be seen as Member States are amending

[152] Anneliese Baldiccini, ibid, p.127.

[153] ECRE Information Note on Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, at http://www.ecre.org, p.8.

domestic legislation to increase detention periods for up to the maximum amount of time allowed under the Directive.[154]

Moreover, as it is pointed out under Article 3(3)(3) the country of return may not be necessarily the country of origin, but it can be another third country, such as the transit one. These countries are likely to be reluctant to admit non-nationals, even if they may have readmission agreements with EU members. In any case, punishing immigrants or asylum seekers by extending detention period owing to the "delays in obtaining the necessary documentation from third countries" seems quite unfair. Since, this situation may happen entirely beyond their intention or control. The prolonging conditions of detention have also paved the way for several incidents of uprisings and self-harm activities (suicides, hunger strikes, etc.) among detained immigrants in Europe. For instance, hundreds of immigrants waiting to submit asylum applications rioted in Greek capital city Athens in December 2008. Likewise, they burnt down the detention camp at the Italian reception centre on the island of Lampedusa in February 2009.

Although international legal standards further constrain the use of detention for the enforcement of immigration policy by subjecting it to the principles of necessity and proportionality[155], Article 16(1) of the Return Directive provides that detention should be carried out as a rule in specialised detention facilities, but nevertheless allows Member States to resort to prisons when specialised premises are not available. Furthermore, under Article 18 Member States will be able to derogate from the general rule concerning detention conditions in "emergency situations". [There is] opposition to the use of prisons for the detention of third country nationals within the context of return procedures. It is clearly unacceptable to detain in the same facilities two groups of people whose needs are likely to differ so widely. Such a measure would amount to the criminalisation of persons detained for migration reasons, contribute to the stigmatisation of asylum seekers and reinforce the growing tendency in public opinion to fuse together immigration and asylum with security

[154] Anneliese Baldiccini, et.al, p.130.

[155] For example, the Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and European Court of Justice (ECJ) Cases 374/87 Orken v. Commission; C-249/96 Grant v. South-West Trains.

issues.[156]

Article 11 sets another contentious aspect of the Returns Directive. It specifies that Member States shall issue re-entry ban for those who have been removed, if no period for voluntary departure has been granted or if the obligation to return has not been complied with. In other cases, the re-entry ban is optional. The Paragraph 2 of the same Article states that the re-entry ban may in principle not exceed five years. Yet, longer ban can be imposed if the third country national represents a serious threat to public policy, public security or national security. Since the notion of "serious threat" does not have any certain definition, there are concerns about imposing a permanent entry ban on returned third country nationals by Member States.

On the other hand, entry bans can be very blunt instruments. They are attractive from a public policy point of view, because they are believed to be a major deterrent to irregular stay. It is arguable, however, that the opposite might be the case, namely that the lack of any prospect of coming back as legal entrants might push people into prolonging their irregular stay for as long as detection can be avoided (or regularization achieved), while those who are deported and banned are likely to swell the numbers of illegal entrants in the future. The Directive's provisions on entry bans will also make it difficult for someone who is subsequently persecuted to seek asylum in the EU.[157]

Unaccompanied children may have escaped human rights violations or serious socioeconomic deprivation in their countries of origin, and may have been trafficked for sexual, labour or other exploitative purposes. Their particular vulnerability is explicitly recognised in Article 20 of the UN Convention on the Rights of the Child (UNCRC), which provides that children deprived of their families are entitled to special protection and assistance on the part of the state. Likewise, Article 3(1) of UNCRC states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Nevertheless, Article 10(2) of the Returns Directive allows Member States to return

[156] ECRE Information Note, et.al, p.22.

[157] Anneliese Baldiccini, et.al, p.133.

unaccompanied or separated children to a third country -not necessarily the country of origin- as long as they are satisfied that adequate reception facilities are in place. The ambiguity of such a wording may potentially have very negative implications for the rights of children. For example, nothing in this provision prevents Member States from considering that a camp in a transit country represents an adequate reception facility. Unaccompanied children's best interests are only likely to be met if their return is to the legal guardianship of a family member or foster parent in the country of origin. Member States should never return an unaccompanied child without ensuring that proper care and custodial arrangements are in place. Similarly, while Article 10 of the Directive grants unaccompanied children the right to receive assistance by appropriate bodies other than the authorities enforcing return, they are not ensured access to basic legal representation in the EU, which is critical for the protection of their rights.[158]

Another critical point is related to the systematic monitoring mechanism. It can provide useful feedback about the outcome of return, such as the safety and welfare of returnees and the compliance of Member States to international obligations, as well. Without such a kind of mechanism, it is nearly impossible to know whether the immigrants returned are under threat or whether they are able to reintegrate into the receiving community. Yet, unfortunately the Returns Directive lacks any provisions guaranteeing that returns shall be properly followed up for assessing whether they live in secure, decent and sustainable conditions.

Lastly, the Returns Directive's provision for voluntary return is not realistic, as most will choose to stay even while facing the prospects of forced return. Migrants will face hard choices in assessing the opportunity cost of staying 'illegal' or returning to uncertain condition back home, and many will most likely stay underground. Even a recent offer by the Spanish government to give unemployment legal migrants a welfare package in exchange for returning to their countries was not well received (the government estimated that tens of thousands of migrants would choose to return but, in fact, only 2000 have chosen to do so). Those undocumented migrants who choose to stay will face becoming increasingly marginalised migrant ethnic communities that are often discriminated against, whose conditions will make

[158] ECRE Information Note, et.al, pp.14-15.

them vulnerable to poor health, lack of education, and crime. As the social conditions of these communities deteriorate, this in turn will reinforce prejudices, often with racial connotations, against migrants.[159]

Overall the Directive on Return, which was adopted in December 2008, falls short of a principled policy on the return of migrants, which fully respects their dignity and human rights. It leaves considerable discretion to Member States to follow different national approaches on each aspect of the return process, from voluntary return and enforced removal to detention and bans on re-entry; second, it leaves intact the national rules on entry or residence, with the concomitant circumstances which determine irregularity of status under national law.[160]

The Directive has generated unprecedented protests worldwide and tarnished the EU's reputation on human rights. Particularly by sanctioning a prolonged pre-removal detention regime, the EU – which is often at the forefront of debates around human rights – has set a particularly inappropriate example for the rest of the world. Such a provision is difficult to reconcile with the founding principles of the Union and should never have entered the realm of an acceptable standard under Community law. The Bolivian President, Evo Morales, reminded Europeans in an open letter that the vast majority of migrants in Europe contribute to the prosperity of the EU, while at the same time contributing to the development of their countries of origin through the remittances they send, which in Bolivia amounts to more than ten per cent of its GDP. He did not miss the opportunity to point out the irony of an EU policy that pressures other regions of the world to accept demands for liberalization of trade, financial services, intellectual property rights and public works, while enacting legislation that constitutes a barrier to the global movement of people. Similarly, at a special session held on 26 June 2008, the Permanent Council of the Organization of American States (OAS) approved a resolution expressing concern about the legislation and instructing the OAS Secretary General to accompany a high-level mission of OAS Member States to the EU in order to discuss the implications of the

[159] Manuel Orozco & Elisabeth Burgess, EU Returns Directive: impact on migrants and remittances, E-Finance & Payments Law & Policy, February 2009, at http://www.thedialogue.org/PublicationFiles/EU%20Returns%20Directive%20-%20Impact%20on%20migrants%20and%20remittances.pdf p.15.

[160] Anneliese Baldiccini, et.al, pp.124-137.

Returns Directive and to seek practical solutions through dialogue. At the MERCOSUR Summit, held in Argentina on 2 July 2009, the Presidents of the South American countries released a declaration condemning the Directive and noting their regret that European countries, which themselves generated migration currents now fail to acknowledge the shared responsibility between countries of origin, transit, and destination. The worldwide protests over the "shameful Directive" have highlighted that, with respect to migration, the EU is pursuing a policy that is expedient and short-sighted, criminalizes people who contribute to the well-being of the European society and weakens the Union's standing on human rights.[161]

At a time of greater global European integration, the Directive contradicts realities dealing with family reunification, European population decline, reliance on low-cost foreign labour, trade and investment. With its rapidly ageing population, Europe has relied on migrant labour to fuel its economic growth. As its native population continues to follow a steady pattern of below-zero growth rates, without the ability to achieve self-reproduction, EU Member States will need to bring in foreign labour. For example, Germany's population will drop from 80 million to 60 million in 30 years, and will need to increase its demographic growth levels to maintain its productivity.[162]

The Returns Directive has wide-reaching implications beyond the understanding of EU members, who have based policy on assumptions and anti-immigrant feelings, rather than on facts or empirical understanding of the intersection between labour migration and economic development. This policy will increase pressure on replenishing rapidly falling demographic growth among EU members, push migrants further into an underground subculture, force people to return during times of global economic downturn, and there will likely be a decline in migrant remittance flows.[163]

[161] Anneliese Baldiccini, ibid, pp.124-136-137.

[162] Manuel Orozco & Elisabeth Burgess, et.al, p.15.

[163] Manuel Orozco & Elisabeth Burgess, ibid, p.16.

2.5.4 The Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment

The process of developing a balanced approach on migration management generated a discussion which ended up with the presentation of the Commission's *Green Paper on an EU approach to Managing Economic Migration* in 2005. It aimed "to launch a process of in-depth discussion, involving the EU institutions, Member States and civil society, on the most appropriate form of Community rules for admitting economic migrants and on the added value of adopting such a common framework".[164] While acknowledging that admission decisions for migrants are under the competency of the Member States, the Commission stimulated "transparent and more harmonised common rules and criteria at EU level for admitting economic migrants".[165]

Hence, the Commission intended to take control of immigration policies for the longer terms, most particularly the economic migration strategy by adopting the *Policy Plan on Legal Migration* for the period of 2007-2009. The Policy Plan listed the actions and legislations that the Commission aimed to adopt so as to follow a consistent development of the EU legal migration policy.[166] It envisaged the adoption of five legislative proposals including a general Framework Directive and four specific directives on labour immigration. This package of legislative measures aimed, on the one hand, at laying down simplified admission procedures and conditions for specific categories of migrants (highly qualified workers, seasonal workers, remunerated trainees and intra-corporate transferees) and on the other hand, securing the legal status of third-country workers already residing in Member States.[167] There has been some discussion about the wisdom and desirability of

[164] European Commission, Green Paper on an EU Approach to Managing Economic Migration, COM(2004) 811 Final, 11.1.2005, p.3.

[165] European Commission, ibid, p.4.

[166] European Commission, Towards a Common European Union Immigration Policy, http://ec.europa.eu/home-affairs/policies/immigration/immigration_intro_en.htm

[167] European Commission, Memo on Attractive Conditions for the Admission and Residence of Highly Qualified Immigrants, MEMO/07/423, 23.10.2007, p.2.

dividing up the area into sectors on the basis of type of work. The main concern is that highly qualified workers will receive more generous treatment than other workers which will institutionalise discrimination on the basis of skill level in the acquisition and enjoyment of labour rights.[168] Yet, the Policy Plan is still a noteworthy document because it "defines a road-map for the remaining period of The Hague Programme (2006-2009) and lists the actions and legislative initiatives that the Commission intends to take, so as to pursue the coherent development of EU legal migration policy".[169] Eventually, the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (*EU Blue Card Directive*), which the EU Commission published in October 2007, seems a part of the Policy Plan's actions and legislative initiatives. The proposal was also amended by the EU Parliament two times in November 2008 and approved although there were divisions between the political party groups. Finally, the Blue Card Directive was adopted in May 2009.

The central principle of the [Directive] is the enhanced freedom to access labour markets that comes with Blue Card status for TCNs. It aims to improve the EU's ability to attract and where necessary retain third-country highly skilled workers. The increase of legal labour migrants would enhance the competitiveness of the EU economy and complement the set of measures that the EU is putting in place to achieve the goals of the Lisbon Strategy. Furthermore, the Blue Card scheme aims to create a common fast-track and flexible admission procedure as well as favourable residence conditions for TCNs. The EU as a whole is not considered attractive by highly skilled workers in comparison to countries such as the US, much due to the fact that at present highly qualified migrants have to face 27 different admission systems and do not have the possibility of easily moving between Member States. Also, lengthy and cumbersome procedures make these migrants opt for non-EU countries. In short, the objectives are to develop a coherent approach and common immigration policy concerning third-country highly skilled workers, to increase the numbers of third-country highly skilled workers immigrating to the EU on a needs-

[168] Elspeth Guild, EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative, CEPS Policy Brief, No.145, 2007, p.2.

[169] European Commission, Policy Plan on Legal Migration, COM(2005) 669 Final, 21.12.2005, p.3.

based approach and to promote highly skilled workers social and economic integration by granting them and their family favourable conditions of residence, without prejudice to EU nationals.[170]

With the exception of the UK, Ireland and Denmark, the Member States had to transpose the Directive into national law by 19 June 2011 (Article 23). However, it is important to note that the Blue Card will only complement rather than replace national policies for the admission of highly-skilled labour (Article 3(4)). Put it differently, the implementing provisions will supplement rather than replace national legislation on highly-skilled migrants. Even though, the relationship between the Directive and national rules is not entirely clear, Peers has pointed out that Member States remain free to adopt higher or lower standards than the Directive or a combination of both. This raises the question on whether the introduction of the Blue Card can be expected to lead to facilitated admission procedures or extended rights of third-country nationals.[171] Similarly, Article 4 of the Directive allows the Member States maintain their own domestic rules and bilateral agreements, while preventing them from implementing more favourable provisions in order to avoid competition for highly qualified workers.

The eligibility conditions of the Blue Card Directive, on the other hand, are excessively demanding. Potential applicants for admission have to comply with many sets of requirements envisaged on Articles 2 and 5. Firstly, they must be in possession of higher professional qualifications, either by acquiring at least a higher educational qualification diploma granted after a recognised three-year programme, or five years of professional experience comparable to higher education qualifications, when provided for by national law. Secondly, they must present a contract/job offer for at least one year, of which salary threshold shall be at least 1,5 times the average gross annual salary in the Member State concerned. Thirdly, they must comply with the requirements of valid travel documents, sickness insurance (for the whole family) and the address in the territory of the Member State. Lastly,

[170] Johanna Sofia Nielsen, The Blue Card: EU's Race for Talent, MA Thesis (submitted to the University of British Columbia), 2009, pp.34-35-36.

[171] Anja Wiesbrock & Metka Hercog, The Legal Framework for Highly-Skilled Migration to the EU: EU and US Labour Migration Policies Compared, Maastricht Graduate School of Governance Working Paper, MGSoG/2010/001, February 2010, pp.15-16.

the individual must not pose any threat to public policy, security or health. However, Article 6 still permits the Member States to restrict the volumes regarding the admission of highly-skilled employees, by means of quotas. Thereby, the eligibility and admission procedures under the Blue Card Directive seem inconceivably more difficult than the ones under the national schemes of many Member States. Moreover, the sickness insurance requirement may result in troubles for Member States which are parties to international legislations. For, Article 6 of ILO Convention No.97 concerning Migration for Employment, besides the Articles 12 and 19 of Council of Europe Convention require equal treatment between immigrants and citizens in this area, by excluding sickness insurance on the grounds of family reunification.

Also with regard to the validity of the permit and access to permanent residence rights, the Blue Card adds little, if anything at all, to national admission schemes. The Blue Card will be valid for a period of between one and four years, according to a standard period of validity set by the Member States and provided that the work contract has an equivalent duration (Article 7(2)). The Directive does not mention anything about possibilities of renewal. This means that highly-skilled migrants will be dependant upon national law in order to attain access to a permanent residence status. Rules are significantly more favourable [even] in the national legislation of Germany, the Netherlands and the UK, all of which allow for access to permanent residence either directly upon arrival or after the initial residence permit has been renewed. An aspect that might come to the benefit of highly-skilled migrants applying under Directive 2009/50/EC is the possibility to accumulate periods of residence in different Member States in order to fulfil the five-year residence requirement to obtain long-term residence status. In addition, highly-skilled migrants are permitted longer periods of absence from EU territory than other (potential) long-term residents. However, these benefits are partially undermined by the fact that the Blue Card will only be valid for up to four years, falling short of the necessary residence requirement for obtaining long-term residence status.[172]

When it is concerned the employment rights, the Directive is less favourable than the national schemes of many Member States on highly-qualified immigrants.

[172] Anja Wiesbrock & Metka Hercog, et.al, pp.16-17.

For instance, although the Article 8 of the Council of Europe Convention inhibits binding an employee to a specific employer after the first year, Article 12 of the Directive restricts the Blue Card holders to the exercise of paid employment activities and to the initial employer during the first two years in order to let them free to change their job. Even after this initial period, free access to labour market can be available only upon discretion of the host country. In this point, the only advantage of the Blue Card scheme seems the possibility of taking up employment in a second Member State. However, the same requirements as for entry have to be fulfilled by the highly-qualified immigrants, besides that the Member States may even impose quotas which make this chance fairly uncertain. These constraints decrease to a significant extent the value of the free movement provision of Article 18 of Blue Card Directive.

Likewise, the right to look for another job in the event of unemployment is restricted with only three months, even though Article 9 of the Council of Europe Convention gives the worker five months to find a new job. Indeed, EU nationals have the right to reside to look for employment in another Member State for at least six months and longer if there is a real prospect of them finding employment. The three-month limit on looking for work once unemployed causes problems with other international instruments. There are good reasons for allowing a person a longer period to find work. The labour market can change rapidly. The individual who has made the decision to move with the whole family to a Member State deserves fair treatment in the event that he or she becomes unemployed. That fair treatment includes a reasonable period of time in which to find a new job in the event of unemployment. The threat of expulsion as soon as or shortly after an individual becomes unemployed plays into the hands of unscrupulous employers as it gives the employer too strong a position in the immigration status of the individual after he or she moves to the state. The employee who wants to remain in a Member State may be coerced into accepting worse conditions or keeping quiet about breaches of labour (or company) law on the part of the employer because the individual's immigration position depends too heavily on continued employment.[173]

As regards the right of family reunification, the provisions of the Blue Card

[173] Elspeth Guild, et.al, p.6.

Directive are more favourable than those applicable to "ordinary immigrants" under the Family Reunification Directive (2003/86/EC). Under the terms of Article 15, they may neither be subjected to a waiting period nor to integration requirements, by benefitting from a faster decision making procedure. Nevertheless, fundamentally the Directive does not add any additional benefits to existing national schemes of EU countries. For, many of the Member States have already removed the waiting periods or integration requirements for the family members of highly-skilled migrants and taken under the guarantee of direct access to their national labour markets. Therefore in this respect, the Blue Card holders are privileged over the ordinary immigrants ultimately, which means the Directive adopts a discriminative approach between the newcomers (highly-skilled immigrants) and the long-term resident TCNs, by proposing better rights for the initial ones.

Actually, the Directive 2009/50/EC aimed to attract highly qualified immigrants to EU labour market with a view to meeting the incremental demand for skilled workforce and to compete especially with the US which appeals nearly half of the total mobile highly qualified labour from all around the world through its famous Green Card scheme. During the negotiations for the Blue Card Directive in 2007, the President of EU Commission José Manuel Barroso admitted: "At the moment, most highly skilled workers go to Canada, the United States and Australia. Why? Because we have 27 different and conflicting procedures in the EU."[174] By bearing in mind this situation, the EU Blue Card was supposed to allow its holders to reside and work legally in the territory of the issuing Member State and at the same time to move to another one for highly skilled employment. However, the original idea was considerably watered down both in the subsequent Commission proposal and in the negotiations between the Member States, such that its original purpose was hard to identify.[175] Eventually, unlike to the US Green Card, the EU Blue Card neither provides for a right of entry and residence, nor for a right of access to the labour market.

On the other hand, the Directive is intended to promote "circular migration".

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[174] http://www.time.com/time/world/article/0,8599,1674962,00.html?xid=feed-cnn-topics (accessed on 30.04.2011)

[175] Roderick Parkes&Steffen Angenendt, After the Blue Card: EU Policy on Highly Qualified Migration, Heinrich Böll Stiftung Discussion Paper, 2010, p.3.

This is an objective to encourage people to come and go between their country of origin and their country of employment. It has been criticised as an attempt to turn the clock back to the *gastarbeiter* (guest worker) programmes of the 1960s in Germany, Austria and the Benelux. Those programmes – which were based on the principle that no migrant worker would stay any substantial period in the host country, but would return and his or her place would be taken by another migrant worker – was of limited success. It was unpopular with employers who inevitably invest in the training of workers therefore prefer stability of their work force rather than endless change. It was also of limited success with migrant workers who once they got established in a job were reluctant to pick up stakes again and move back to their country of origin.[176]

The Blue Card initiative sought to compete with the US, Canada and Australia on their own terms by using access to a large labour market. Yet, the aspiration to match these successful third countries and open access to the EU labour market was neither practically nor politically realistic given the Union's structure as a conglomeration of still relatively autonomous states. The Blue Card approach ran counter to practical and political realities. There are numerous barriers and hurdles to immigrants' mobility within the EU labour market, which are not practically to be altered: language and cultural diversity, for example. And where there is scope to remove barriers, there is little political will: differences in access to citizenship or differences in levels of taxation, for example, are not matters upon which the Member States happily cooperate. In short, highly qualified migrants could not be offered access to the pan-EU labour market in a way comparable to the labour market access they might enjoy in the US.[177] Consequently, the world-wide competition for talents is hard-fought as the US, Canada and Australia are leading actors in attracting highly-skilled workers. Europe aims to catch up in this race, but the final version of the EU Blue Card does not provide it with a strong position.[178]

The last but not the least, the distinction between high and low skilled labour in

[176] Elspeth Guild, et.al, p.3.

[177] Roderick Parkes&Steffen Angenendt, et.al, p.6.

[178] Katharina Eisele, Making Europe More Competitive for Highly-Skilled Immigration – Reflections on the EU Blue Card, Maastricht Graduate School of Governance Migration Policy Brief, No.2, 2010, p.4.

[EU countries] can be criticized from a human-rights perspective. It underlines the utilitarian approach to labour migration dominant in migrant receiving countries, allowing for the entry and residence of third-country nationals only and as long as they are considered "useful" for the national labour market.[179]

2.5.5 Three Major Directives on Asylum Policy

a. The Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

In 2003 the EU adopted legislation imposing minimum standards concerning the conditions in which asylum seekers live while they present their applications for asylum. Known as the Reception Directive, this law requires Member States to provide asylum seekers documents attesting to their status during the asylum process and to inform them of individuals and organizations that can assist them.[180]

The Article 3 determines the scope of the Directive by stating that it shall apply to all third country nationals and stateless persons who make an application for asylum at the border of the territory of a Member State, as long as they are allowed to remain on the territory as asylum-seekers as well as to family members, if they are covered by the application for asylum according to national law. Yet, the Directive seems to exclude the EU citizens who may seek asylum in another Member State, due to the expression of "third country nationals".

According to the Article 11, Member States may inhibit access of asylum seekers to the labour market for up to one year. If the competent authorities have not yet decided about the asylum application after this period, the applicant can have conditional access to job market, as long as the delay was not attributed to him.

Most countries covered in the European Council on Refugees and Exiles (ECRE) report are in conformity with the provisions relating to employment, with

[179] Anja Wiesbrock & Metka Hercog, et.al, p.18.

[180] Maryellen Fullerton, A Tale of Two Decades: War Refugees and Asylum Policy in the European Union, Brooklyn Law School Legal Studies Research Papers, No.175, 2009, pp.18-19.

the exceptions of France, Lithuania, and Luxembourg which, according to the ECRE report, deny access to the labour market indefinitely for unrecognized asylum seekers. The denial of access to the labour market may raise human rights considerations. Depending on the circumstances of the case, such denial might amount to interference with a person's dignity, which has been interpreted by the European Court of Justice (ECJ) as a general principle of law and finds its place in Article 1 of the Charter of Fundamental Rights to which the preamble to Directive 2003/9 makes express reference.[181]

The Article 13, on the other hand, contemplates the "material reception conditions" for asylum seekers such as housing, food, clothing and access to health care facilities.

The impetus for the Reception Directive was to eliminate incentives for "forum-shopping" among Member States and its goal is to harmonize standards throughout the EU so as to avoid creating "magnet" locations for filing asylum claims. No empirical work has assessed whether this goal has been achieved, but it appears unlikely that the Reception Directive has had much impact on asylum seekers' decisions about where to apply for asylum. First, the harmonization achieved is probably small. The minimum standards are not stringent, which means that many of the national asylum systems already complied with the new law. Inertia would likely keep the prior reception arrangements in place. Second, to the extent that asylum seekers have choices about where to file asylum claims, factors other than reception conditions are more powerful determinants. For example, the presence of individuals from their home land or their region of origin is often a major draw. The language spoken in the asylum country can be the key. The success rate of asylum applications is another positive factor. The opportunities for regularization outside the asylum process are yet another. The ability to obtain work, authorized or not, plays a role. The reception conditions are unlikely to be a decisive factor in attracting asylum seekers to a country.[182]

The standards provided in Directive appear designed, as Handoll states, "as

[181] Richard Plender, EU Immigration and Asylum Policy – The Hague Programme and the way forward, ERA Forum, Vol. 9, 2008, p.311.

[182] Maryellen Fullerton, et.al, pp.20-21.

much to discourage future asylum seekers as to satisfy the basic needs of the already arrived". There are two concepts at play that risk being mutually exclusive: harmonisation and dignity. The Directive's minimum standards of reception aim to achieve that support does not act as a pull factor. But there is much leeway in the provisions for Member States to set standards so low as to make them the most unattractive of destinations. This is the case, for instance, in relation to provisions that allow restrictions on the freedom of movement of asylum seekers, or outright detention, prohibition on employment, and the withdrawal of support to sanction "negative" behaviour when the support provided is designed to meet needs that are no more than basic. Whether this is compatible with the principle of human dignity will be for the courts to ascertain.[183]

b. The Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

Indeed, the initial draft of the Council Directive 2004/83/EC (hereinafter the "Qualification Directive") presented by the Commission dates back to 2001. However, the political compromise and formal adoption of the Directive took time till the spring of 2004. It determines those who qualify for asylum protection within the borders of EU, by elaborating the minimum legal standards that Member States afford to refugees and those in refugee-like situations.

The Qualification Directive brought an innovation called as "subsidiary protection". According to Article 2, the person eligible for subsidiary protection means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm.

[183] Helen Toner & Elspeth Guild & Anneliese Baldacinni, et.al, p.9.

Furthermore, the Qualification Directive requires Member States to grant three-year renewable residence permits to those determined to be refugees and one-year renewable residence permits to those with subsidiary protection status. Refugees must receive employment authorization, social welfare, education, and have access to travel documents. In contrast, those granted subsidiary protection status have the right to work, but the state may limit employment opportunities based on the national labour situation. Subsidiary protection includes the right to social welfare and education, but states may reduce welfare to -core benefits. Subsidiary protection entitles individuals to receive travel documents only -when serious humanitarian reasons arise that require their presence in another state.[184]

The Directive constitutes a major step forward in the recognition of the rights of refugees and other persons protected by international law. Its criteria for refugee status include the possibility of persecution by non-state agents. It recognises gender and child-specific forms of persecution. It creates a system of subsidiary protection for those at risk of "serious harm".[185] The Directive firmly acknowledges that those persecuted by non-state actors are entitled to protection, so long as the state or parties controlling the state are unable or unwilling to prevent the persecution. The Qualification Directive also defines acts of persecution broadly. They include acts of physical or mental violence, including sexual violence; disproportionate or discriminatory legal, administrative, police, judicial, or penal measures; gender-specific or child-specific acts; and prosecution for refusing to perform military service in certain circumstances.[186] Prior to the Qualification Directive, no European treaty or legislation prohibited refoulement of victims of indiscriminate violence or required Member States to grant them legal status. Article 15(c) expands the right of asylum in the European Union to civilians facing serious and individual threats from armed conflict.[187]

Nevertheless, the Qualification Directive has given rise to some difficulties. Perhaps the most troublesome aspects of it are the provisions on exclusion,

[184] Maryellen Fullerton, et.al, p.25.

[185] Helen Toner & Elspeth Guild & Anneliese Baldacinni, et.al, p.9.

[186] Maryellen Fullerton, et.al, p.26.

[187] Maryellen Fullerton, ibid, p.42.

revocation and non-refoulement. The drafting history of this instrument testifies how, in the post-9/11 climate, security concerns became preeminent. The Directive now includes possible revocation where "there are reasonable grounds for regarding the refugee as a danger to the security of the Member State" or "the refugee having been convicted of a particularly serious crime constitutes a danger to the community of that Member State". Gil-Bazo suggests that these constitute de facto provisions on exclusion, which arguably, fall short of existing and evolving international law and standards. Again, it is the case that the legality of the Directive's security provisions, and those enacted in national legislations to implement the Directive, remain subject to the scrutiny of national courts and the ECJ. There is moreover a discretion conferred on Member States to introduce more favourable rules which could reasonably lead them to grant protection to excludable individuals whom they are not allowed to remove under international human rights law. By doing so, Member States would defy the objective of harmonisation of their asylum laws.[188]

On the other hand, there are differences regarding the rights awarded to beneficiaries of subsidiary protection. This relatively new category has been used in practice by a number of European authorities, but it is seen by critics as a deliberate attempt to avoid the bestowal of refugee status guaranteed in the Geneva Convention. Not all Member States are prepared to concede formal rights and associated pecuniary benefits to this category. This conflict reflects national practices to use the absolute level and even the form of welfare transfer payments as a mechanism to "deter" applicants by reducing payment, as is the case in Germany and the UK. Other Member States have no or only rudimentary previous regulation governing eligibility for welfare transfer payments by refuges and asylum seekers (for example, Poland, Italy and Ireland). The difficulty of attaining consensus on this point is reflected in paragraph 34 of the preamble, which defines "core benefits" as constituting "minimum income support, assistance in the case of illness, pregnancy and parental assistance", but immediately modifies them by making them dependent on the extent to which they "are granted to nationals according to legislation". Beyond this core, the "modalities and detail of the provision of core benefits should be determined by national law". Indeed, Article 28 explicitly permits Member States to limit the

[188] Helen Toner & Elspeth Guild & Anneliese Baldacinni, et.al, pp.9-10.

provision of benefits to beneficiaries of this subsidiary protection to this minimal core.[189]

Likewise, many have criticized the hierarchy created by the Qualification Directive and the differences in the scope of protection afforded refugees and those granted subsidiary protection status. The European Parliament, the House of Lords Select Committee, Amnesty International, UNHCR, and others argued that the distinctions are arbitrary because they are not tied to differences in need, are likely to result in fragmentation of international protection, and will probably increase the numbers of appeals by those refused refugee status yet granted subsidiary protection. Moreover, the assumption that those entitled to subsidiary protection are likely to need protection on a more temporary basis than refugees was strongly disputed.[190] Moreover, in principle, those qualifying as refugees and those qualifying only for subsidiary protection are treated equally. For instance, beneficiaries of subsidiary protection and Convention refugees have the same access to employment, but they are treated differently with respect to health care. The basic standard to be applied in determining whether a person qualifies under the directive is a threat of serious harm. The term "serious threat" is left undefined.[191] Similarly, the last contentious point is the exclusion of the provision placing the burden of proof for the cessation of refugee status on the Member State authorities from the final version of the Directive.

c. The Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

As the third main pillar of the Common European Asylum System, the Directive 2005/85/EC, also known as the "Asylum Procedures Directive", is the most controversial and difficult to reach a consensus.

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[189] Georg Menz, Stopping, Shaping and Moulding Europe: Two-Level Games, Non-state Actors and the Europeanization of Migration Policies, Journal of Common Market Studies, 2010, p.14.

[190] Maryellen Fullerton, et.al, pp.25-26.

[191] Richard Plender, et.al, p.311.

During the negotiations on the Directive in 2005, MEPs [Members of the European Parliament] were only consulted. In the end the Council adopted standards which were lower than those proposed by the Commission and supported by the EP. As a result, disparities in asylum procedures across the EU remain and the chance of being granted international protection varies depending on the Member State in which an asylum application is lodged. Exceptions and derogations are such that, in practice, minimum safeguards do not necessarily apply to all asylum-seekers in the EU.[192]

The Directive aims to harmonize procedural guarantees given during the asylum procedure and to uphold the quality of asylum decision-making in the Member States. The Directive confirms certain basic procedural guarantees such as the right to a personal interview, the right to receive information and to communicate with UNHCR, the right to a lawyer, and the right to appeal. However, some provisions in the Directive have the potential to lead to breaches of international refugee law, including to the *refoulement* of persons in need of international protection.[193]

Indeed, there are more contentious points of the Directive, particularly regarding the accelerated procedures and the notion of safe country. Yet, before addressing them, it might be useful to outline some of the articles receiving negative comments.

Article 2(d), for instance, fails to include decisions on subsidiary protection within the definition of a final decision. Had the Council included subsidiary protection within the definition of a final decision, it would have helped to avoid the risk of deporting individuals whose applications for refugee status have been rejected before their need for subsidiary protection has been examined. That would have been in accordance with Member States' obligations under Articles 3 and 13 of the European Convention on Human Rights.[194]

Article 2(f) has also negative repercussions as it excludes EU citizens from the

[192] UNCHR-ECRE Information Note on Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, at http://www.unhcr.org/4a9d12ef9.pdf (accessed on 24.09.2011).

[193] UNCHR-ECRE Information Note, ibid.

[194] Richard Plender, et.al, p.316.

refugee definition by limiting it for only TCNs and stateless persons. This restriction seems not only inconsistent with the obligations of the Member States under Article 1A and 3 of the 1951 Geneva Convention, but it may also pave the way to potential risks as the EU enlarges.

Similarly, Article 7 provides that the right to remain in the territory of the Member State only lasts until the first instance decision has been taken. A right of appeal becomes meaningless if the asylum seeker has already been sent to the country where they face persecution, torture, or inhuman or degrading treatment. Applicants for asylum should have an absolute right to remain in the territory of the asylum state until a final decision on their application has been made; anything less than such a right represents a risk of *refoulement* contrary to the 1951 Geneva Convention, and/or to torture or inhuman or degrading treatment contrary to Article 3 ECHR.[195]

The Directive sets minimum procedural guarantees during the asylum procedure such as the right to have a personal interview to explain reasons for fleeing, or the right to an interpreter. However, the Directive includes many exceptions to these minimum standards, which significantly undermine the fairness of procedures and accuracy of decisions. For example, the competent authority considers the application unfounded where the circumstances in Article 23(4) (a), (c), (g), (h) and (j) apply (Article 12(2)(c)). The grounds mentioned are respectively where the applicant raises little relevant evidence (23(4)(a)); safe country of origin/safe third country cases (23(4)(c)); the claim is "clearly unconvincing" due to the applicant's "*inconsistent, contradictory, unlikely or insufficient representations*" (23(4)(g)); the applicant has made a subsequent application raising no new issues (23(4)(h)); the application is made "*to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/ her removal"* (23(4)(j)). This section potentially renders the guarantee to an interview meaningless. In this context it should be reiterated that the Directive does not guarantee that an asylum seeker would typically receive any independent advice, legal or otherwise, when filling out the initial application, which generally takes the form of a long and complicated

[195] ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, at http://www.ecre.org, 2006, pp.9-10.

questionnaire. The interview is necessary in order to allow the applicant to provide all relevant information and to clarify any discrepancies, inconsistencies or omissions in his/her account. Fact-finding is a crucial element in the consideration of an asylum application, and the personal interview provides the primary opportunity to establish facts. A requirement for a full transcript of the interview is therefore essential for a fair and efficient asylum procedure. Instead, the Directive appears to provide that such applications can be regarded as "clearly unconvincing" and thus no interview need be provided. This would signal the end of reliable asylum determinations.[196]

In addition, as a fundamental safeguard during the asylum procedures, the right to legal assistance and representation is of vital importance. Legal aid is also formulated in Article 47 of the Charter of Fundamental Rights of the EU, as an aspect of EU fundamental rights law. Given that the refugee law has become extremely complex nowadays, it is almost impossible for applicants to make their case without legal assistance. However, unfortunately Article 15 confines the free legal assistance to the appeals stage by disregarding "accelerated procedures" and thus renders the right to legal assistance meaningless. It is strongly recommended that applicants should have the right to free legal assistance at every stages of the process, especially for those who cannot afford.

Moreover, Article 17(2)(a) allows states to make an exception to appoint a representative when the child is likely to reach the age of maturity before a first instance decision is taken and Article 17(3) allows for exceptions when the child is 16 years or older. Article 17(2)(a) only serves to encourage unnecessary delays, which will extend the case until the age of maturity has been reached. Both Articles contravene the UN Convention on the Rights of the Child, which defines a child as any person under the age of 18. Article 17(2)(c) also allows for exceptions if the minor is married or has been married. Whether a child is or has been married has no bearing on his or her maturity, and as such, need for special treatment. This is particularly the case given that children are able to marry at a young age in some countries. There is also a possibility that the marriage may be linked to the child's fear of persecution, in the case of a forced marriage for example.[197]

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[196] Ibid, pp.13-14-15.

[197] Ibid, p.17.

Article 32(3) provides that subsequent applications for asylum be subject to a preliminary examination to decide whether they should be further examined. The Article does not create an obligation for states to examine subsequent applications, instead providing that Member States *"may examine these further representations"*. There can be numerous legitimate reasons why an asylum seeker might not fully disclose relevant facts and circumstances during an initial application, therefore requiring a subsequent application even if it does not raise 'new' facts that had arisen since the original application. This is supported by studies on memory, and the particularly difficulties traumatised individuals or victims of rape or torture may have in recounting their experiences. In particular, the European Convention on Human Rights (ECHR) and the United Nations Convention against Torture (UNCAT) case law underline the need for flexibility in dealing with late submissions in cases of traumatised or tortured victims.[198]

As a matter of principle, border procedures cannot provide all necessary procedural guarantees and safeguards due to the limited facilities (housing, qualified examiners, interpreters, legal assistance). Despite the provision in Paragraph 1 that Member States may provide for border procedures in accordance with the basic principles and guarantees of Chapter II, Paragraph 2 allows Member States to maintain procedures derogating from Chapter II. Article 35(2) goes against the principle of non-discrimination, which provides that all asylum seekers should benefit from the same basic principles and guarantees. Furthermore, under Article 35(4), such applicants may be confined at the border without the possibility of judicial review for up to four weeks. According to the decision of the European Court on Human Rights in *Amuur* [Amuur v France – 19776/92 [1996] ECHR 25 (25 June 1996)], confinement at the border can constitute 'detention' and may amount to a deprivation of liberty under Article 5 ECHR. There is no justification for applicants who submit their claims at the border to be treated differently, and indeed, it is a norm of international law that states are equally responsible for applicants at the border as they are those who are in the country. This provision also risks encouraging asylum seekers to circumvent border controls and enter the country 'illegally', or to

[198] Ibid, p.29.

delay making an application in order to ensure they are subject to higher standards.[199]

In compliance with the Procedures Directive permitting special border procedures, many Member States have established accelerated asylum procedures at the ports of entry, including airports. The Article 23 of the Directive allows Member States to resort expedited proceedings within their territory in different situations. For instance, Member States may accelerate procedures for an applicant that clearly does not qualify as a refugee or for refugee status; is from a safe country of origin or safe third country; has misled the authorities by presenting false information/documents or by withholding relevant information/documents with respect to identity and nationality; has made inconsistent, contradictory, improbable or insufficient representations which make his claim clearly unconvincing; has failed without reasonable cause to make his application earlier; entered the territory of the Member State unlawfully or prolonged his stay unlawfully and has either not presented himself to the authorities or filed an application for asylum as soon as possible. The list seems obscurely long and each of these circumstances bestows the EU members to implement short deadlines for preparing cases and filing appeals, which result in negative process due to the lack of legal assistance and a thorough examination.

More drastic than the Procedures Directive‘s imprimatur on expedited proceedings is the Directive‘s perspective on inadmissible claims. Claims deemed inadmissible can be refused without any examination -not even an expedited one- of the merits. The Directive specifies seven types of asylum applications that can be rejected as inadmissible. Some of the grounds are likely to have wide support: claims by individuals previously granted refugee status in a Member State and applications filed by individuals who already have the right to remain in a Member State with protections equivalent to refugee status. Other grounds have released torrents of criticism, particularly the provision that deems inadmissible applications filed by asylum seekers the authorities believe have a safe country to which they can go.[200]

On the other hand, according to the concepts of “safe country of origin” and “safe third country” under the Directive, Member States may decide not to give

[199] Ibid, pp.30-31.

[200] Maryellen Fullerton, et.al, p.33.

protection to a asylum seeker and may deny access to the asylum procedure on the assumption that he is unlikely to face serious threats of persecution or harm in his homeland or another country through which he transited before coming to the EU. This generates particular concerns especially when the security forces on the borders apply this rule directly based on a list of safe countries.

The safe third country concept is very expansive; an individual typically has only one country of origin and one country in which an asylum application has been filed, but the asylum seeker may have passed through or had prior dealings with many third countries... Under the Procedures Directive, the Member States can shunt an asylum applicant into accelerated proceedings based on the notion that the application is unfounded because there is a safe country to which the applicant can go. Even more drastically, Member States can declare a case inadmissible and refuse to examine it at all. These measures create major risks for asylum seekers. When a Member State sends an asylum seeker to a third state for adjudication of the claim, the third state might fail to examine the merits of the claim. The third state could ship the asylum seeker to a fourth country that allegedly has responsibility to decide the request for asylum. Alternatively, the third state might review the claim, but examine the application pursuant to inadequate asylum procedures. Or the third state might be poor, unstable and unable to provide adequate protection.[201]

As a conclusion, unfortunately the Asylum Procedures Directive possesses quite wide range of grounds for accelerated, inadmissible procedures with exceptions and derogations, and contains in itself the potential risk of generalising the asylum procedures instead of determining the individual applications case by case.

2.5.6 The Lisbon Treaty (Constitutional Treaty)

It can be claimed that one of the most dramatic changes in the structure of migration regulations on the EU level occurred with the introduction of Lisbon Treaty (previously named Constitutional Treaty), which is signed by Member States on 13 December 2007 and entered into force on 1 December 2009.

[201] Ibid, pp.34-35.

The Amsterdam Treaty transferred the "visa, asylum, immigration" issues from the intergovernmental to the EC pillar by making them subject to EU decision-making procedures and the scrutiny of the European Court of Justice. With the entry into force, the Lisbon Treaty abolished the Maastricht Treaty pillar structure and renamed the Treaty establishing the European Community (TEC) as the Treaty on the Functioning of the European Union (TFEU).

The Lisbon Treaty changed the existing structure of TEC. The issues of immigration, visas and asylum were handled in the TEC by articles 61-69 under Title IV. With a view to removing the dispersion in the Justice and Home Affairs (JHA) domain between asylum, immigration, border controls and judicial cooperation in civil matters that were falling under Title IV of TEC (first pillar), and the judicial cooperation in criminal matters and police cooperation falling under Title VI of Treaty on European Union (TEU) (third pillar), the Lisbon Treaty replaced the current three pillars with one single legal framework in a single legal text. It handled the asylum, immigration and border checks under Title V of TFEU called "Area of Freedom, Security and Justice".

Unlike before, the Lisbon Treaty sets the objective of common immigration policy. The Article 79 expresses that the Union shall develop a common immigration policy aimed at ensuring, at all stages, the *efficient management of migration flows*, *fair treatment of third-country nationals* residing legally in Member States, and the *prevention* of, and *enhanced measures to combat, 'illegal' immigration and trafficking in human beings*.

Trafficking in persons was mentioned in Article 29 TEU that dealt with police and judicial cooperation in criminal matters and was considered to be the third pillar. Lisbon Treaty places the 'trafficking in persons' under Article 79 (1) in order to develop common immigration policy. Although also Article 83 of the Lisbon Treaty is dealing with "trafficking in persons" from the crime point of view, the issue of trafficking is not any more considered only a matter of police cooperation but part of the common immigration policy that has to be legislated under EU framework.[202]

On the other hand, under the Treaty of Lisbon, Qualified Majority Voting (QMV) and co-decision (which would be renamed the "ordinary legislative

[202] Lehte Roots, The Impact of Lisbon Treaty on the Development of EU Immigration, Croatian Yearbook of European Law and Policy, Vol.5, April 2009, pp.2-3.

procedure") are extended to measures concerning legal migration. The ordinary legislative procedure is also applied to measures concerning visa lists and visa formats, which enhances the European Parliament's (EP) current powers on these matters. By way of exception, unanimity in the Council, with consultation of the EP, is applied as regards passports, residence permits, identity cards and other such documents. In addition to these major changes to the decision-making rules, each current legal base conferring competence to adopt immigration or asylum measures are amended to a greater or lesser degree.[203]

While immigration still remains a shared competence of the EU and its Member States, the wording of the new provisions suggests that it is easier to justify more intensive EU action pursuant to the principles of proportionality and subsidiarity, and harder to argue that any particular area would be outside EU competence. However, the impact of the new decision-making rules is limited by the new Article 79(5) (ex-63a(5)) TFEU, which reserves competence of Member States over volumes of third-country nationals coming from third countries to seek work, including self-employed work. Arguably, this is a new restriction on competence.[204] Thus, it seems that Member States are still too envious to share their power with EU bodies on immigration quotas.

Likewise, the special powers are given to the Council in the case of emergency in the situation of sudden inflow on nationals of third countries. In this case on the proposal from the Commission, the Council may adopt within the consultation of the European Parliament provisional measures for the benefit of the concerned Member States. This procedure though seems to be very complicated and makes one wonder if the decisions or measures can be made within a reasonable period of time by involving all the EU institutions to this decision making process. The idea of transparency and involving all parts is definitely welcomed and might be seen important, but it seems to lack efficiency that is mostly needed in these kinds of emergency cases.[205]

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[203] Steve Peers, Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon, European Journal of Immigration and Law, Vol.10, 2008, p.221.

[204] Ibid, pp.239-241.

[205] Lehte Roots, et.al, p.4.

Under the Article 68 of previous TEC, the jurisdiction of the European Court of Justice (ECJ) was more limited over the matters of immigration and asylum comparing to other areas of Community law. And it was not possible for a national court or tribunal of first instance or an ordinary appeal court to bring the case in front of ECJ for interpretation of Community law and for preliminary ruling. The claimant was obliged to exhaust all national remedies before the ECJ could be asked to interpret the relevant law. By all means, this system complicated to develop common European principles on immigration and asylum legislation which are applied uniformly throughout the Union. Practically, it also deprived a wide range of people - such as asylum seekers, applicants for family reunification, third country nationals challenging the order of refoulement or discriminatory treatment- of efficient judicial protection. The Lisbon Treaty extended the jurisdiction of ECJ to review and interpret EU immigration law. This can be welcomed as a delayed but positive development for the normalisation of the jurisdiction of the ECJ in the Area of Freedom, Security and Justice (AFSJ) issues.

In addition, the Lisbon Treaty makes the Charter of Fundamental Rights, proclaimed at Nice in 2000, legally binding by granting the same legal value as the treaties. It means the duty for Union Members to respect human rights is further recognised. Since, the Charter acknowledges the rights emerging from the constitutional traditions and international obligations of the Member States, the European Convention on Human Rights (ECHR), the Social Charters of the EU and the Council of Europe, besides the case law of the European Court of Justice and the European Court of Human Rights. It also includes number of socio-economic rights which apply not only to nationals of EU Member States but to "everyone". This is one of the most significant achievements in the area of asylum and immigration in the European Union.

Despite all the legislation, there is still no genuine European immigration policy to date, but it can be accepted that the Lisbon Treaty is a step in that direction.[206] The rules in the Lisbon Treaty constitute a further step in the ongoing development in the field of Justice and Home Affairs that some decades ago were

[206] Alliance of Liberals and Democrats for Europe (ALDE) Background Note, at http://www.alde.eu/fileadmin/docs/documents/Background_notes/FT-ADLE-Immigration-en.pdf (accessed on 08.10.2011)

treated as sole and sovereign matter of a Member State.[207] Even, in the medium to long term, the shift to QMV in this area may encourage the Commission to propose additional and more ambitious measures, including amendments to existing legislation.[208]

2.5.7 The Stockholm Programme

After the Tampere Programme of 1999 and the Hague Programme of 2004, the third multi-annual programme on AFSJ -named Stockholm Programme- was adopted by the European Council in 2009 for the period 2010-2014. There were two crucial documents which formed the background of the Stockholm Programme: a) The European Pact on Immigration and Asylum, b) The Commission Communication on an Area of Freedom, Security and Justice for the Citizen (COM (2009) 262).

The French presidency of the EU, which took place in the second half of 2008, aimed at having "early input" into the Stockholm Programme on immigration and asylum. The European Pact on Immigration and Asylum, adopted by the Council in October 2008, outlined various political priorities intended to guide the future shape of the EU's immigration policy. The Pact was subject to concerns owing to its narrow coverage of migrants' rights as well as its predominantly nationalistic and intergovernmental approach, which sought to legitimise certain French immigration policies at (and transfer them to) the EU level and emphasised member states' competences over those of the Union. The spirit of the Pact mainly revolved around migration controls and common actions "against illegal immigration". It identified the need "to control illegal immigration by ensuring that all illegal immigrants return to their country of origin or transit" as one the five political commitments underpinning the future EU immigration policy and the Stockholm Programme. After underlining its reaffirmation "to control illegal immigration" and stating that "illegal immigrants on Member States' territory must leave that territory", the Council set out the following specific proposals: to use "only" case-by-case regularisation ("rather

[207] Lehte Roots, et.al, p.12.

[208] Steve Peers, et.al, pp.240-241.

than generalized regularisation"); to conclude readmission agreements at the EU or bilateral level; to develop cooperation among member states on common arrangements for expulsion (biometrics, the identification of irregular entrants and joint flights); to provide incentives for "voluntary" return; to take employers' sanctions; and to put into effect mutual recognition of expulsion decisions.[209]

The European Commission's contribution to the Stockholm Programme arrived in June 2009 with the publication of a Communication entitled "An area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment". The Commission highlighted as one of the "challenges ahead" for the EU's AFSJ that "there are 8 million illegal immigrants in the Union. Tackling the factors that attract clandestine immigration and ensuring that policies for combating illegal immigration are effective are major tasks for the years to come." Apart from the fact that these statistics proved later on to be completely wrong, the personal scope of the Communication was said to be too concerned with (and limited to) "the citizens", and to a more limited extent, "legally residing TCNs". Undocumented immigrants remained (yet again) excluded from its scope. The messages sent by the Commission in its contribution included "building a citizens' Europe" and "put[ting] the citizen at the heart of its project". A specific section of the document, entitled "Better controls on illegal immigration", covered the domain of irregular immigration. Among the measures put forward to feed the Stockholm Programme, priority was given to evaluating the transposition by EU member states of the Directives on Employers' Sanctions (2009/52/EC) and Returns (2008/115/EC); developing European guidelines for the implementation of regularisations; setting up common standards for taking care of "non-removable" persons (irregular immigrants who cannot be deported); and adopting an action plan on unaccompanied minors.[210]

On 16 October and 23 November 2009, the Swedish presidency published the first official drafts of the Stockholm Programme, entitled "An open and secure Europe serving and protecting the citizen". The drafts very closely follow the

[209] Sergio Carrera & Massimo Merlino, Assessing EU Policy on Irregular Immigration under the Stockholm Programme, CEPS Working Document, 2010, pp.2-3.

[210] Ibid, pp.3-4.

priorities and official discourse put forward by the Commission's Communication.[211]

It is notable that the final version of the Stockholm Programme adopts seven policy actions: a) Monitoring the transposition of the Directives on Returns and on Employers' Sanctions. The Action Plan foresaw the publication of reports on the implementation of these two Directives by 2014, b) Putting into effect mutual recognition of return decisions by EU member states, c) Increasing practical cooperation among member states on the return of irregular immigrants by chartering joint flights, d) Fostering the external dimension of Europe's irregular immigration policy by developing information on migration routes, promoting cooperation on border surveillance and border controls, and facilitating readmission and capacity building in non-EU countries, e) Concluding "effective and operational" readmission agreements and a common EU approach against non-cooperative countries. f) Developing an action plan on unaccompanied minors, focused on prevention, protection and assisted return, g) Amending Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence by merging with Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.[212]

Although the Stockholm Programme is welcomed as a necessary road map for immigration policy planning, it brings insufficient framework and new paradoxes with itself. It is striking that the Programme emphasizes the citizenship in an exclusive manner which ascribes only to the nationals of the Member States and puts them at the top of its priorities. Using the concept of "citizen" has the risk of creating a dividing line between citizens and TCNs. The EU has to be committed the principles of non-discrimination, and the fair and equal treatment. The benefits of the EU in terms of rights must not be unique to the citizens by excluding those who acquired work and residence rights and live within borders. Otherwise, such an AFSJ would be too narrow and at odds with a Europe of fundamental rights of all individuals living in diversity, solidarity, equality and liberty.

Moreover, the Stockholm Programme insists on criminalising severely the non-

[211] Sergio Carrera & Massimo Merlino, Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme? CEPS Working Document, 2009, pp.4-5.

[212] Sergio Carrera & Massimo Merlino, et.al, pp.4-5.

documented mobility by using the jargon of "illegal migrants". Hence, it gives particular importance to control-oriented measures, such as those focuses on return and readmission.

The European Commission and Council's insistence on using the term "illegal" to refer to people is objectionable and discouraged in international fora. People are not illegal; their presence on a territory may not be authorised or their status as an immigrant may lack proper documentation, but that does not put them in a category where their very existence constitutes illegality. The EU should refrain from using this term. As the Council of Europe's Parliamentary Assembly stated in Recommendation 1509 (2006): "the Assembly prefers to use the term 'irregular migrant' to other terms such as 'illegal migrant' or 'migrant without papers'; (para.159) This term is more neutral and does not carry, for example, the stigma of the term 'illegal'. It is also the term increasingly favoured by international organisations working on migration issues." This has been confirmed by the European Parliament Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, in which it called upon EU institutions and Member States to stop using the term "illegal immigrants" and instead to refer to "irregular/undocumented workers/migrants".[213]

The Programme addresses immigration under the commitments to develop "effective policies to combat illegal immigration". Despite setting out a clear objective in achieving the development of a forward looking and comprehensive European migration policy, the Stockholm Programme is still focusing too much on illegality, rather than the more difficult question of providing access to European shores for labour migrants and asylum seekers. A more holistic approach should also assert the need to embedded rights and citizenship in the thinking and policy on immigration, and simultaneously distance it from the security agenda. The impression is [also] that the new approach introduced with the Stockholm Programme seems to be less about protecting vulnerable people than ensuring that people can be legitimately returned to their regions of origin. This raises concerns about the abandonment of the "principle of non refoulement" and serving de facto

[213] Elspeth Guild & Sergio Carrera, Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposals for the Stockholm Programme, CEPS Working Document, No.196/20, 2009, p.4.

the purposes of EU states to drastically reduce immigrant and potential refugee flows.[214]

[It seems that] the forthcoming EU policy agenda is thus one greatly inspired (and expected to be driven) by Member States' immigration legislation and policy priorities, which broadly follow a selective and demand-driven logic. A majority of EU member states' labour immigration policies are based on the "perceived" needs and labour market demands/gaps, and too often argue for the treatment of TCNs as economic units rather than as human-rights holders and/or workers in need of protection, security of residence and inclusion.[215]

As a consequence, there are widespread concerns about whether the Stockholm Programme manages to bring more democratic, participatory and uniform EU immigration policy process in comparison to its predecessors - the Tampere and the Hague Programmes.

[214] Jacob Papini, The lack of a common EU policy on asylum and immigration: Is the Stockholm programme the answer? The Migrants' Rights Network (MRN), May 2010, http://www.migrantsrights.org.uk/migration-pulse/2010/lack-common-eu-policy-asylum-and-immigration-stockholm-programme-answer, (accessed on 22.10.2011).

[215] Sergio Carrera & Anais Faure Atger & Elspeth Guild & Dora Kostakopoulou, Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020, CEPS Policy Brief, No.240, 2011, p.7.

3. THE REPERCUSSIONS OF IMMIGRATION POLICY HARMONIZATION EFFORTS ON TURKISH-EU RELATIONS

By all means, Turkey and Turkish citizens stand in the very centre of the picture concerning the efforts of EU to develop and apply a common immigration policy.

The researcher shall examine below that in what ways Turkish citizens composing considerable population within Community borders and Turkey as a candidate state conducting negotiations on the membership process are affected from these efforts for a common EU immigration policy. It shall be argued whether there are current or potential tension points between the Parties with regard to immigration policy, and this process generate any new breaking point in Turkish-EU relations or not.

3.1 In respect to the Turkish Citizens Living in EU Countries

European decision-makers have usually exclusionary, preventive and selective attitudes concerning the phenomena of migration and immigrants. Concordantly, EU immigration policy is tried to be formalized within the framework of "temporary migration, high-skilled immigrants, etc." Thus, needless to say, Turkish nationals living within EU borders are affected by these policies. According to Eurostat data; the total population of EU-27 is 499.7 million and the number of third country nationals (TCNs) within the Union is 19.8 million in 2009, i.e. nearly 4 % of all the population. The largest group of TCNs is composed of Turkish nationals, corresponding to 2.4 million.[216]

Turkey's long journey for full membership to the EU goes back to 1959 when the negotiations between the Parties started with a view to signing an association agreement. After four years of negotiations, the six founder States of the EEC at that time and the Turkish government signed the Association Agreement in Ankara on 12 September 1963. The aim of the Ankara Agreement is to establish continuous and

[216] By adding the people of Turkish origin who have dual citizenship, the number of Turks living legally within EU countries reaches approximately 3.5 million.

balanced strengthening of trade and economic relations between the Contracting Parties. Therefore, it includes progressive securing of the free movement of workers (Article 12), the abolition of restrictions on freedom of establishment (Article 13) and the freedom to provide services (Article 14). The Member States and Turkey agreed to follow the relevant provisions of the EEC Treaty in order to establish these three freedoms. The Agreement would be achieved in three stages: a preparatory stage of 5 years in which Turkish economy would be strengthened with tariff quotas and loans, a transitional stage of not more than 12 years during which a customs union would be progressively established between the Contracting Parties and a final stage.

In 1970 the Parties signed a Protocol to the Agreement with more detailed rules. The Protocol provided in Article 36 that the freedom of movement for workers between the EEC Member States and Turkey would be secured by progressive stages between the end of the twelfth and the twenty-second year after the entry into force of the Agreement, i.e. between 1976 and 1986. The Association Council should decide on the necessary rules. Indeed the Council agreed on three occasions on more detailed rules on the status of workers from the parties: in Council Decision 2/76, Council Decision 1/80 and Council Decision 3/80. However, the free movement of workers was not established in 1986. With regard to the right to establishment and the provision of services the Protocol in Article 41 only provided for a standstill clause: "The Contracting Parties shall refrain from introducing between themselves any new restriction on the freedom of establishment and the freedom to provide services." So far, the Association Council has not used its competence to determine the timetable and rules for the progressive abolition of restriction on those freedoms.[217]

With the enlargement of the EU, the new Member States -on the moment of their accession- were also bound by the provisions of the Association Agreement with Turkey, due to its being part of the Acquis Communautaire.

On the other hand, the ECJ has also played an important role in interpreting and improving individual rights applicable to Turkish immigrants stemming from the above-mentioned legislation. Hence, the Court has provided the application of

[217] Kees Groenendijk & Elspeth Guild, Visa Policy of Member States and the EU towards Turkish Nationals after Soysal, Economic Development Foundations Publications, No:232, 2010, pp.11-12.

various provisions of these legal arrangements regarding Turkish immigrants in numerous cases up to now, such as Demirel, Sevince, Kuş, Eroğlu, Bozkurt, Taflan-Met, Tetik, Kadıman, Eker, Suat-Kol, Günaydın, Ertanır, Akman, Birden, Sürül, Nazlı, Koçak, Ergat, Savaş, Eyüp, Kurz, Abatay, Veli-Tüm, and Soysal.

Another progress in Turkish-EU relations within the context of Ankara Association Agreement came with the entry into force of the Full Customs Union in January 1996. The Customs Union has basically removed all barriers to trade between the EU and Turkey, enhancing the free movement of goods, and obliges Turkey to adopt similar international trade policies as the EU. But, significantly, it does not include freedom of movement for persons. With the entry into force of the Customs Union, barriers to freedom of movement of goods are to be removed, but not of persons. This inevitably puts Turkish citizens and entrepreneurs in jeopardy because of, to say the least, already too strict application of admission requirements in the EU, i.e. visa regulations. This, of course, has an adverse effect on the full implementation and proper functioning of the Customs Union. [218]

The critical turning point came when the Helsinki European Council Summit in December 1999 granted Turkey candidate status. Then relations between Turkey and the EU entered a new stage in October 2005 when the decision to start accession negotiations was finally taken. The Helsinki European Council decision in December 1999 to declare Turkey as a candidate country for membership precipitated a massive process of political transformation in Turkey. This culminated in the European Commission's decision in October 2004 that Turkey had met the Copenhagen political criteria sufficiently. The Commission recommended to the Council to start negotiations with Turkey "without delay". The European Council in December subsequent to an acrimonious debate on Turkey concurred with the Commission's decision and selected October 2005 for the beginning of negotiations. During the summer of 2005 there was a bitter round of debate on Turkish membership in Europe. In spite of an extremely negative discourse and considerable public opinion resistance the EU succeeded in adopting a Negotiation Framework for Turkey in October. Subsequent, to the decision a process of "screening" Turkish legislation in

[218] Bülent Çiçekli, Legal Integration of Turkish Immigrants under the Turkish-EU Association Law, The Journal of Turkish Weekly, 2004, p.2, http://www.turkishweekly.net/article/22/legal-integration-of-turkish-immigrants-under-the-turkish-eu-association-law.html (accessed on 30.10.2011).

the area of 35 chapters to be negotiated began. However, so far only one chapter was opened and closed. The opening of a second chapter was blocked by [the Greek Cypriot Administration of Southern Cyprus] and Greece. At the 14-15 December 2007 summit of the European Council the decision to suspend negotiations on eight chapters with Turkey in response to the Turkish insistence not to open harbours and airports to Cypriot vessels was taken.[219]

It is obvious that unlike the other TCNs, the Turkish nationals within EU borders have different and advanced status under the framework of vested rights derived from EU Acquis Communautaire. Besides the Ankara Agreement and Additional Protocol concluded between European Union and Turkey, particularly the Association Council Decisions and the judgments of European Court of Justice are determinative regarding the rights of Turkish citizens within EU borders. Nevertheless, it is common that either the Member States act reluctantly to allow Turkish immigrants to exercise their acquired rights, by disregarding the legal provisions of community, or there are various attempts to degrade the rights of Turkish citizens onto the level of those other TCNs, particularly through the Council Directives and a prospective readmission agreement. Especially, there is a deliberate tendency and effort among EU policy makers to take also Turkish nationals under the scope of the Family Reunification Directive (Council Directive 2003/86/EC) and the Long-Term Residence Directive (Council Directive 2003/109/EC) which stipulate new economic and integration-oriented requirements -such as fees for application, sickness insurance, housing, money in bank account, language exams, civic knowledge exams, etc.- by ignoring their privileged position comparing to other TCNs residing within EU borders. Inevitably, this brings about another potential tension point on Turkish-EU relations.

3.2 In respect to the Visa Regime

According to Council Regulation No.539/2001 listing the third countries whose

[219] Kemal Kirişçi, Border Management and EU-Turkish Relations: Convergence or Deadlock, CARIM Research Report, 2007/03, Robert Schuman Center for Advanced Studies, San Domenico di Fiesole: European University Institute, p.1.

nationals must be in possession of visas when crossing the external borders, Turkish nationals require a visa to travel to the EU. Turkish nationals encounter cumbersome procedures and grave problems in order to obtain Schengen visas. An exhausting list of necessary documents is demanded by the Consulates or intermediary agencies for visa application. The list contains documents that harm business secrecy and commercial ethic such as letter of invitation from the corresponding company, updated documents showing original income of the applicant as well as financial strength of the company, full transcript of bank account; other documents such as details of bank accounts, credit cards, real estate ownerships, land registries and vehicle licenses infringe privacy and confidentiality of personal information. While the task is difficult for Turkish citizens, businessmen from Member States visit Turkey either without a visa or with a visa which can be easily obtained on the border for 15 Euros.[220]

Although the public at large and various professional groups such as academics, students, journalists, artists, sportsmen are affected negatively by the visa application, Turkish business community is perhaps the first and foremost group, which experiences the negative impact most directly. While the goods circulate freely, the business people, who produce and trade these goods, have to overcome the visa barrier. Usually goods are sent to trade fairs or exhibitions on time without a problem, but the businessman and their co-workers often receive their visas after the closure of the event. Therefore, the visa barrier in respect to certain Member States not only violates Article 41(1) of the Additional Protocol, it creates unfair competition within the framework of the Customs Union in all Member States as well. Looking at the problem from a legal point of view, visa requirement is clearly in breach of the principle of free movement, which constitutes the basis of the Customs Union established by the Association Council Decision 1/95 and also Article 41 of the Additional Protocol. [221]

During the period starting with the case *Demirel* of the European Court of Justice (ECJ) in 1987, a great number of court judgments regarding the legal rights of Turkish citizens have been produced. An important step concerning the free

[220] Kees Groenendijk & Elspeth Guild, et.al, p.3.

[221] Ibid, pp.3-4.

movement of services was taken with the case *Savaş* in 2000, whereas the case *Soysal* in 2009 paved the way for a visa-free Europe. These judgments essentially made it clear that Article 41 of the Additional Protocol, effective from January 1st, 1973, has direct effect, in other words the principle of standstill has grown to be an undeniable issue in conjunction with the free movement of services. Consequently, the ECJ found that the objection to the application of visa at the first entry being at the sole discretion of member states is in breach of the concept of the uniform application of the Schengen visa.[222]

To sum up, Turkish citizens Mehmet Soysal and İbrahim Savatlı, residing in Turkey and working as lorry drivers for a Turkish company engaged in international transportation, were rejected to be given visa to drive to Germany by the Germany's Consulate General in Istanbul. Beforehand, they had been given visas many times, while they were driving lorries registered in Turkey. However, when the German authorities noticed that the plaintiffs were driving lorries registered in Germany, they refused to issue visa.

They appealed against the refusal to the Berlin Administrative Court. After the dismissal of their application by the Court, they brought the case before the State Court in Berlin. The State Court asked for a preliminary ruling from the Court of Justice of the European Communities (ECJ), due to the linkage of case to the community law.

In its ruling dated 19.02.2009, the ECJ decided that visa requirement as such constitutes a new restriction due to the additional and recurrent administrative and financial burdens contrary to the wording of Article 41(1) of the Additional Protocol which elaborates the standstill clause. Therefore, if the Member State in question did not require such a visa at the time of the entry into force of the Additional Protocol on 01.01.1973, then Turkish citizens do not have to obtain a visa, while travelling to that Member State for provision of services.

The objection of German authorities claiming that the visa requirement for Turkish service providers was a requirement of the EU's Visa Regulation 539/2001 was not accepted by the ECJ, because of the jurisprudence that international agreements of the EU take priority over secondary Community legislation. Hence,

[222] Hamdi Pınar, Hizmetin Serbest Dolaşımı Kapsamında Türk Vatandaşları için Vizesiz Avrupa, Gazi Üniversitesi Hukuk Fakültesi Dergisi, Cilt: XIII, 2009, p.77.

the Additional Protocol precedes the Visa Regulation regarding Turkish service providers.

The persons covered by this decision are citizens, who fall into the scope of Additional Protocol 41(1). Notably businessmen, lawyers, sportspeople, doctors, academics, students, artists and indeed all Turkish citizens, who wish to travel to EU countries for business, touristic, study-related or medical purposes, are covered in this regard. Hence, views expressed by some experts and academics from Turkey and EU Member States, most particularly Germany, which argued that *Soysal* decision only concerns lorry drivers and/or service providers do not completely reflect the reality. The ECJ has stated more than once that the provision of the Agreement which states that its interpretation is to be guided by the similar rules in the [Article 57 of] TFEU must be given effect. Assuming this is the case then the judgment applies not only to "service providers" but also to "service recipients".[223]

This is another crucial point while taking into consideration that none of the 12 Member States had visa requirements for Turkish nationals during their touristic visits (as service recipients) up to 2 or 3 months, in 1973.

Moreover, the EU Council abolished the visa obligation for three neighbouring Balkan countries, namely Macedonia, Montenegro and Serbia, in December 2009 by transferring them from the black to the white list of EU Visa Regulation. Nevertheless, although the accession negotiations are under way, EU authorities are still far from the idea of visa-free travel for Turkish nationals. That's why, the Turkish Minister of Foreign Affairs Ahmet Davutoğlu declared "it is unacceptable that certain Balkan countries that are in the initial stages of the membership process and have not begun negotiation have been given the Schengen privilege, while Turkey, considering the level that Turkish-EU relations have reached, has not."[224]

Clearly, Turkey is being treated quite differently regarding visas from the other countries with continuous land borders with the EU and specifically with the other countries in the Balkan region. This is notwithstanding the fact that Turkey is the

[223] Kees Groenendijk & Elspeth Guild, et.al, p.4.

[224] http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=fm-davutoglu-urges-eu-to-grant-turks-visa-free-travel-2009-12-20 (accessed on 05.11.2011).

country with the longest standing candidature to the EU.[225]

On the other side of the coin, EU urges Turkey to change its visa policy by adopting the standards of the Schengen visa regime.

Essentially, the third country nationals can enter to Turkey in regular terms through one of the three ways. The first category of foreigners enters and stays in Turkey for a pre-determined length of time, usually three months, without visa. A second group of foreigners are obliged to obtain visa before their arrival. And the last category of third country nationals must pay fee to get a sticker visa, called as "bandrol" in Turkish, on the border gates. This practice was developed in the early 1990s, as a kind of reciprocity against the visa requirements imposed by EU Member States on Turkish citizens. It also aimed at facilitating the nationals of Russia and the new Turkic Republics to travel to Turkey, after the Cold-War.

Yet, the sticker visa practice is invariably criticised by the EU authorities. The EU considers this practice as one that seriously undermines effective border control. Instead the EU requires Turkey either to adopt a visa-free regime for those countries that are not on the negative list of the EU or alternatively introduce the practice of obtaining visas from Turkish representations in the country of origin.[226]

Although, the EU calls Turkey to replace its visa policy with the Schengen visa regime and to adopt the Schengen negative list, Turkish authorities are still reluctant to terminate the visa-free arrangements or sticker visa practice. There are some reasons behind of this reluctance.

Firstly, in Turkey, there are considerable complaints and resentments against the Schengen visa regime which is implemented vis-a-vis the Turkish citizens. And it is perceived very absurd that Turkey will become the only country applying the negative list while at the same time being on the list itself, unless EU changes its policy. Secondly, the adoption of the Schengen visa regime means immense administrative and financial burden for Turkey. Every year, millions of tourists from Russia, Middle Eastern countries and the Turkic Republics are visiting Turkey. Likewise, labour migrants from CIS and Eastern European countries meet the low-skilled service labour demands of the Turkish urban middle classes, especially in

[225] Ibid, p.41.

[226] Kemal Kirişçi, et.al, p.35.

housing and nursing sectors. Additionally, Turkey's flexible visa policy paves the way for easier business contacts and reciprocal business investments with neighbouring countries. Strict application of Schengen visa regime may affect negatively Turkish economy and its social relations with these countries. Thirdly, Turkey has close historical and cultural ties with some of the countries which are on the Schengen negative list, such as Azerbaijan, Bosnia&Herzegovina, Turkish Republic of Northern Cyprus, Iran, Russia, etc. These countries are either Turkic origin, or they have Turkish minorities. Lastly, Turkey is surrounded by the countries experiencing economic hardships. The nationals of these countries (Caucasian countries, Iran, etc.) enjoy a kind of protection by travelling to Turkey for their economic needs without visa restriction. Yet, introducing a visa requirement may lead to a problem of increase in the irregular migration and asylum applications in Turkey.

Especially, by taking into consideration the uncertainty over Turkish full membership to the EU, all these factors result in a reluctance to harmonise the Turkish visa system with the Schengen visa regime and creates another deadlock point in Turkish-EU relations.

3.3 In respect to the Asylum Regime

In the world, the main legal regime applied to asylum seekers is the 1951 Geneva Convention, which provided ratifying states with time and geographical limitation options. By utilizing given option, Turkey preferred to maintain the geographical limitation in its asylum policy. Therefore, Turkish asylum policy has a two-tiered structure.

The first tier of Turkish asylum policy is shaped to a large extent by its role as a member of Western Bloc neighboring the Soviet Union during the Cold War. During that period, Turkey received refugees from the Communist Bloc countries of Europe and the Soviet Union, in close cooperation with the United Nations High Commissioner for Refugees (UNCHR). Although only limited number of refugees was allowed to settle in Turkey, they benefitted from all the rights provided in the

Geneva Convention. Hence, the overwhelming majority of the refugees left Turkey.

The second tier of Turkish asylum policy is related to the people from non-European countries. Instability at surrounding regions of Turkey caused a dramatic growth in the number of asylum seekers coming from outside Europe. Thus, the policy was shaped during 1980s due to the unfavorable events in the Middle East, Africa and Southeast Asia. At first, Turkish government allowed the UNCHR to shelter these asylum seekers in a temporary base, with the tacit understanding that either they would be directed outside of Turkey, if the UNHCR recognized them as refugees, or they would be deported, if their claims were rejected. However, the increase in the number of irregular entries into Turkey and the mass influxes of Kurdish asylum seekers amounting to almost half a million in 1988 and 1991 aggravated the situation. The perception of Turkish officials also changed, when militants of the terrorist organization PKK started to try to enter Turkey from Northern Iraq among these asylum seekers.

Therefore the 1994 Asylum Regulation, as the first national legislation on asylum, was adopted against such a background of national security concerns with rigid regulations on asylum procedures and with little reference to the rights of asylum seekers and refugees. For instance, asylum applications are required to be filed within maximum five days of entry into Turkey.

Due to Turkey's geographical limitation to the 1951 Geneva Convention, the terms "refugee" and "asylum seeker" are defined differently in the 1994 Asylum Regulation than in international law. According to the 1951 Geneva Convention; [an *asylum seeker* is a person who has made an application for asylum and is waiting to hear the decision on their application], and *refugee* is an individual who owing to well founded fear of persecution for reasons of political opinion, race, religion, nationality or membership in a particular social group, is outside his/her country of nationality and is unable or, as a result of such fear, unwilling to return to it. In the Turkish 1994 Regulation, the refugee is defined as a foreigner or stateless person of European origin that has been recognised according to the criteria of Geneva Convention; whereas an asylum seeker is defined as a foreigner or stateless person of non-European origin whose status as an asylum seeker has been recognised by a

decision of the Ministry of Interior that s/he meets the same criteria.[227]

However, through the introduction of some reforms, the situation commenced improving slightly by the late 1990s. Primarily, the right to judicial appeal against deportation decisions was granted in 1997. Then, the Turkish government amended the 1994 Asylum Regulation on two occasions. The first amendment was realized in 1999, when the five day limitation for filing in an application was enhanced to ten days, which resulted in reducing the cases of violations of the non-refoulement principle. The second occasion came in 2006, when the time limit was completely abolished by changing the wording into "within a reasonable period of time".

On the other hand, the EU issued consecutive Accession Partnership documents in 2001 and 2003 with a view to inducing Turkey to comply with the EU Acquis on Justice and Home Affairs in the field of migration and asylum. Turkish government acknowledged the abolition of the geographical limitation in National Programme for the Adoption of Acquis (NPAA). However, it is also noted in NPAA that the issue of geographic limitation will be addressed during the progression of EU accession negotiations of Turkey. The geographic limitation will be lifted in the accession process, on the condition that it should not encourage large scale refugee inflows to Turkey from the East, upon the completion of the necessary legislative and infra-structural measures and in line with the sensitivity of the EU Member States on the issue of burden-sharing.[228]

Additionally, Turkey prepared a new NPAA in 2008. With regard to asylum, the new NPAA contains a priority objective which is the "continuing efforts of Turkey to implement the National Action Plan on Asylum and Migration including the adoption of a roadmap and preparations for the adoption of a comprehensive asylum law in line with the EU Acquis with the establishment of an asylum authority and increased capacity for combating illegal migration in line with international standards. As rightly pointed out by the new NPAA, this priority has been prepared on the basis of Turkey's National Action Plan (NAP) for Migration and Asylum which was approved and brought into force by the Turkish Prime Ministry, on the 25th of March 2005. The NAP contains information on what and when to do in order

[227] Cavidan Soykan, The Migration-Asylum Nexus in Turkey, ENQUIRE, Issue 5, June 2010, p.10.

[228] 2003 Year NPAA, http://www.abgs.gov.tr/index.php?p=196&l=2, p.655 (accessed on 13.11.2011).

to comply with the EU Acquis in the field of asylum. The NAP states that an Asylum Law is needed and that it should be enacted by 2012. No draft bill on asylum has been submitted to the Parliament so far. Nevertheless, a new deadline is a very positive step, accelerating the realization of the objectives of the NAP.[229]

The practices of Turkish asylum policy receive criticism not only from international human rights organizations, but also EU institutions and Member States. They claim that Turkey ignores the rights of asylum seekers and refugees by impeding their access to asylum procedures and violates the principle of non-refoulement.

Apart from its rigid provisions, another deficiency of the Turkish asylum legislation is that there is no such national definition of an asylum seeker as it is defined in international law. As a result, authorities argue that those who enter the country without documents might only be "illegal" migrants. This is confirmed both in legal context and national practice since there is no facility to submit an asylum application at the borders of Turkey, including the international airports.[230]

Even if an asylum seeker is not found to be a refugee, s/he cannot be returned to her country of origin if she would be in danger of torture, inhuman or degrading treatment or punishment in that particular country. This is called the principle of non-refoulement which is a fundamental responsibility of states in international law. Although this principle is not equal to a right to admission, states should not reject individuals at the frontiers and should admit them at least temporarily for determining their status.[231]

Inarguably, Turkish asylum policy falls short of providing adequate rights of asylum seekers and refugees. Yet, as it is elaborated and exemplified in earlier parts of this study, the rate of the EU regarding the asylum policy is not higher than Turkey that much, unfortunately.

Turkish decision makers are fully aware that previous candidate countries had to go through a similar "rule adoption" process. They are also aware that there were a

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[229] İbrahim Kaya, Reform in Turkish Asylum Law: Adopting the EU Acquis? CARIM Research Reports, 2009/16, Robert Schuman Center for Advanced Studies, San Domenico di Fiesole: European University Institute, pp.9-10.

[230] Cavidan Soykan, et.al, p.11.

[231] Ibid, p.11.

number of countries that had to lift their geographical limitations such as Hungary, Latvia and Malta and that the first two countries did so well before their accession negotiations started. They realize that they have to follow suit. However, they face a major dilemma provoked by their mistrust of the EU's credibility in respect to the ultimate "reward" of membership. The greatest nightmare scenario for them is one in which they would find themselves lifting the "geographical limitation" without Turkey's membership being taken seriously by the EU.[232]

Another issue that marks the cost calculation of Turkish officials is burden sharing. Owing to its geographical location, Turkish officials are conscious that Turkey risks becoming a buffer zone or a dumping ground for the EU's unwanted asylum seekers and refugees. The adoption of the current acquis would make Turkey a typical "first country of asylum" responsible for status determination with membership and a "safe third country of first asylum" before then. This raises considerable concerns among officials in terms of the economic, social as well as political implications. This fear of becoming a buffer zone is also aggravated by Turkish officials' perception of a growing EU tendency to externalize its asylum policies and its efforts to create a "fortress Europe".[233]

The mood of Turkish officials is that as long as there remains great uncertainty over the prospects of Turkish accession, progress towards harmonization in areas that brings obvious financial costs and administrative burdens on Turkey will be very limited. In turn the absence of progress in putting a fully fledged asylum system is inevitably going to frustrate the pre-accession process as European Commission officials and member governments will complain of Turkish resistance towards adopting and implementing the acquis. This in turn might further aggravate the mistrust and doubts of Turkish officials towards the EU leading to a stalemate or deadlock between the two sides.[234]

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[232] Kemal Kirişçi, et.al, p.16.

[233] Ibid, p.17.

[234] Ibid, p.19.

3.4 In respect to the Readmission Agreement

Readmission agreement is one of the methods that Member States have used since mid-1990s to expel the undesired immigrants from their territories. On those years, either Member States individually signed bilateral readmission agreements with third countries, or the European Community used to insert provisions inside of the cooperation agreements with these countries so as to induce them to accept their nationals back, when any Member State asks. Then, with the entry into force of Amsterdam Treaty in 1999, the EC has had the authorisation to act on behalf of all Members to conclude readmission agreements and expel these immigrants from the whole EU territory.

As one of the natural reflections of tight immigration control policy, the EU has tried to sign as many readmission agreements as possible with third countries recently, by using sometimes carrot (e.g. financial incentives) or sometimes stick (e.g. threat of sanctions) instead.

However, these policies are found unbalanced, inhumane, and internally contradictory for many. As Peers alleges:

> "First of all, it might damage human rights, because the EU is encouraging third states to violate human rights law or to participate in its own breaches of that law, in particular by sending rejected asylum-seekers to 'safe' countries of origin which are not really safe for those persons, or to 'safe' transit countries which might then breach human rights obligations in the same way. In the absence of any procedure in the EU for examining the human rights record of a country, particularly relating to these issues, before agreeing a readmission agreement and during the operation of that agreement, these risks are hugely increased.
>
> Secondly, the EU is not giving sufficient attention to a more realistic 'root causes' approach to migration. People usually decide to leave a country due to limited economic opportunities (poverty) or the threat posed by conflict or human rights abuses. To address these issues, the EU needs to ensure a fairer trade policy, including a radical reform of the Common Agricultural Policy; further development assistance; and major debt relief.
>
> Thirdly, the focus on migration control in the EU's external relations is just as unbalanced as the focus on control in the EU's internal migration law. In the absence of a fuller commitment by the EU in most cases to allow easier travel to

> the EU, fairer rules on migration of further workers and family members or effective rules on equal treatment of migrants living in the EC in return for migration control commitments, the EU is simply reproducing the profound flaws in its current internal policy.
>
> Finally, a 'punishment' policy is inherently contradictory, even in its own terms. If the EU cuts off or reduces trade, aid, investment or diplomatic relations with a developing country, that country will have fewer resources to control migration toward the EU and no reason to do so. Also if that country becomes poorer and/or more troubled as a result of the EU's actions, more of its population is likely to migrate to the EU."[235]

So far, the European Commission has been able to sign readmission agreements with only 11 countries, such as Albania, Bosnia and Herzegovina, Hong Kong, Macao, Macedonia, Moldova, Montenegro, Serbia, Sri Lanka, Russia and Ukraine.[236] It is a fact that the negotiation of so many agreements simultaneously is burdensome. Nevertheless, considering the resources in the service of the European Commission, this is not an impressive performance. Essentially, it indicates that the EU has had difficulties to persuade the third countries which are not so much keen on negotiating and signing such agreements.

Turkey has been also expected to sign readmission agreements with the third countries, in the context of the fighting against irregular migration. Till now, Turkey has concluded agreements with 8 countries, such as Syria, Greece, Kyrgyzstan, Romania, Ukraine, Pakistan, Russian Federation and Nigeria. Additionally, Turkey is in the process of negotiation on readmission agreements with more than 20 countries, such as Afghanistan, Azerbaijan, Algeria, Bangladesh, Belarus, China, Egypt, Ethiopia, Georgia, India, Iran, Iraq, Israel, Jordan, Kazakhstan, Lebanon, Libya, Macedonia, Mongolia, Morocco, Sri Lanka, Sudan, Tunisia and Uzbekistan.[237]

On the other hand, Turkey itself was required to negotiate on a readmission agreement with the Union in 2002. Actually Turkish authorities long resisted this, by

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[235] Steve Peers, Readmission Agreements and EC External Migration Law, Statewatch Analysis, No.17, 2003, p.5.

[236] http://cadmus.eui.eu/bitstream/handle/1814/14957/EP_ReadmissionPolicy_en.pdf?sequence=4 (accessed on 17.11.2011).

[237] http://www.egm.gov.tr/icerik_detay.aspx?id=125 (accessed on 17.11.2011).

expressing instead that Turkey would already readmit its own citizens due to the constitutional liabilities and Turkey was ready to accept back any third country irregular migrants as long as they were returned without delay. Yet, Turkish government was agreed reluctantly to start negotiations with the EU on such an agreement in 2004. Needless to say, the progress has been very slow and limited. A series of meetings were held in order to reach a jointly agreed text finally on 27 January 2011. Yet, the readmission agreement has not been signed by the Parties. For, during the negotiation process of the agreement, Turkish side declared not to sign it till the official talks start with EU Commission on visa facilitation for Turkish citizens.

There are numerous reasons for this lack of progress. Most important one is the uncertainty over Turkey's prospects for EU membership. This is deeply impacting on the motivation of Turkish officials as well as their cost-benefit calculations. In many ways, they are unable to discount the costs of a readmission agreement against the benefits that would accrue from membership. This is also complicated by the issue of burden sharing and financial aspects of implementing a readmission agreement reminiscent of similar problem in respect to border control and asylum issues. Furthermore, European Commission [officials] who are engaged in the negotiations may inadvertently be aggravating the problem by proposing the possibility of visa facilitation in return for speeding the drawing of an agreement. Turkish officials are very aware that visa facilitation was important to the negotiations between the EU and Russia as well as Ukraine. [238] However, the EU acts in such a manner that the visa issue for Turkish nationals should be addressed not during the negotiations of readmission agreement, but within the framework of Turkish accession negotiations.

Principally, the main problem behind the drawing up a readmission agreement with the EU stems from the very fact that it involves third country nationals. The problem is not Turkish citizens at all. Turkey has a well established record of accepting its own nationals who are irregularly present in EU countries. In the light of the difficulties that the Turkish government has faced in negotiating and signing readmission agreements with third countries, there is the fear that Turkey could easily become a kind of a dumping ground for the unwanted in the EU. This concern

[238] Kemal Kirişçi, et.al, p.27.

and fear is repeatedly highlighted by Turkish officials and becomes particularly aggravated when accompanied by the uncertainty over Turkish membership. This frustration experienced from the absence of progress in negotiating agreements with third countries reminds Turkish officials of another similar problem in EU-Turkish relations. In accordance with Turkey's Customs Union agreement with the EU, Turkey is obliged to accept the entry of goods without custom duties from third countries with which the EU signs free trade agreements. Yet, these free trade agreements do not oblige these countries to grant similar exemptions for Turkish goods. The Turkish government has long had difficulties in signing agreements with such third countries to enable fairer trade. Turkish officials have drawn parallels between this particular problem and the one stemming from readmission agreements. They have argued that the EU's disinterest in pressurizing third countries, with which they sign readmission agreements, to negotiate and sign agreements with also Turkey aggravates the problem of distrust between the EU and Turkey. They argue that such disinterest becomes another factor that reinforces the uncertainty over Turkey's prospects of membership and shows that the EU does not see Turkey as a country that is on the way to joining the Union.[239]

Moreover, the crisis of confidence between Turkey and Greece exacerbates the situation. These two countries signed a bilateral readmission agreement in 2001 with a view to combating against human trafficking and irregular immigration. The agreement is still in force, but it has been confronted many problems regarding the implementation. Both Turkey and Greece accuse each other of contravening the provisions of the agreement. Greek side charges Turkey with not performing adequate patrol duties against irregular migrants on the borders. On the other hand, Turkish officials frequently protest Greece by claiming that Greek authorities force small vessels full of irregular migrants into Turkish territorial waters in the Aegean Sea. Tragic accidents have occurred due to this practice, when these small boats capsize by leaving injured or even drawn victims behind.

Turkish allegations were verified when the Amnesty International Branch Office recorded the stories of a group of Iraqi, Lebanese, Palestinian and Tunisian immigrants who were rescued in September 2006 by Turkish officials in the Aegean

[239] Ibid, p.27.

Sea. The survivors of the incident told that they had been brought to the Turkish waters by Greek coastal guard boat and were dumped into the sea. On the heels of this event, a video record taken by a Turkish coastal guard helicopter in July 2004 emerged both in Turkish and Greek televisions. In the record, a Greek coastal guard boat was seen while towing and releasing a small fishing vessel carrying irregular migrants into Turkish waters.

These events not only aggravated the trust problem between Turkish and Greek officials who were supposed to work together in combating against human trafficking, but also led many Turkish officials to question the reliability of the EU in general. They have argued that if an EU Member can resort to such methods despite an existing agreement, who could give guarantee that other EU Members would not repeat similar practices in their relations with Turkey.

In order to better understand the Turkish public opinion regarding this issue, it can be useful to refer the words of Mehmet Özcan: "The EU forces Turkey to accept the readmission agreement that is crucial for itself. The EU, which offers 'Europe without a visa' to the Western Balkan countries in return for readmission agreements, is acting in a much more tight-fisted manner when it comes to Turkey. Although there is a chance to send the 'illegal' immigrants in Macedonia, Serbia and Montenegro to a European country on the route, like Greece or Bulgaria, Turkey would be forced to host(!) the vast majority of these 'illegal' immigrants. Turkey does not want any privilege; rather it demands the same conditions as the Western Balkan countries for the readmission agreements... If all member countries agree, steps on the lifting visa requirement can start after the readmission agreement. But, how will we rely on the countries and their leaders, who offered Turkey 'privileged partnership' before, after everything is done and the agreement is signed? Or how can we trust that the Greek side of Cyprus, which dictates everything on Turkey about Cyprus and mortgage every step of Turkey, will not use its veto right to forestall the visa exemption in the future? Why would EU countries say 'yes' to visa exemption after the readmission agreement was signed in exchange for visa facilitation? How many promises have been kept until now? And what happened to the promises given to Northern Cyprus? Where is the direct trade or direct

flights?"[240]

This mentality coincides also with the stance of Turkish high bureaucracy, just like the speech of Turkish Minister for EU Affairs and Chief Negotiator for Turkey's accession negotiations Egemen Bağış: "Turkey expects the EU to begin serious discussions on the lifting of entry visas into the EU for Turkish nationals... Remote countries such as Paraguay and Uruguay enjoyed visa-free travel status and that negotiations on the same matter had already begun with Moldova, Russia and Ukraine, but not Turkey... When our citizens are insulted on a daily basis in the consulates of EU States (when they apply for visas), one may ask the question as to why we should help the EU with their problems, when we are treated this way. Turkey is not an emirate; public opinion does matter. We need to see some good will from the side of the EU... The solution to the problem was not to be found by tackling the issue as one of border security but rather by combating poverty. When people are desperate and hopeless in their own country, they will do anything to get out. If we stop them, they will go to Ukraine and Belarus. In the end, they will find a way to get into the EU." The Turkish Foreign Minister Ahmet Davutoğlu speaks also in parallel tone of voice by emphasizing: "We expect the EU to make the necessary decisions and take the necessary steps so that talks on visa liberalisation can begin immediately... The final signing of the readmission agreement depends on whether the EU is prepared to grant visa-free travel status to Turkish nationals."[241]

Turkish officials are likely to continuously test their European counterparts on whether they approach Turkey as simply any other third country or a country that is prospective member of the EU and hence deserves solidarity. The difference will be critical to whether progress towards convergence occurs or whether these issues become marred in a deadlock.[242]

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[240] Mehmet Özcan, Readmission Agreement: In Exchange for What? 2010, pp.1-2, http://www.usak.org.tr/EN/makale.asp?id=1410, (accessed on 20.11.2011).

[241] http://www.migrationnewssheet.eu/eu-substantial-progress-towards-readmission-agreement-with-turkey (accessed on 20.11.2011).

[242] Kemal Kirişçi, et.al, p.29.

3.5 In respect to the Border Management

Finding a right balance between the diverse trends of international movement of goods, services and labor in the age of economic globalization and the threat of terrorism and organized crime faced by nations becomes a concern point for the EU authorities, likewise the rest of the world. Nowadays, satisfying the security needs of the citizens without disrupting the trade activities between the states is of vital importance. Therefore, the challenges such as the enlargement process and the growing migratory pressures have brought the justice and home affairs issues to the foreground in external relations of the EU.

After signing of the Schengen Agreement in 1985 which aimed to create the borderless area among EU Member States, the entry into force of the Amsterdam Treaty in 1999 burst into prominence the border management related issues in the agenda of EU. In this context, the EU has tried to form an "integrated border management" policy among the Member States, which means adopting and implementing the Union acquis on external borders, visa policies, migration and asylum. The harmonization of candidate countries' legislation and practice with that of the Schengen Agreement before their joining into the borderless Schengen area has been paid special attention.

The EU also expects from Turkey to adopt certain measures to enhance the control and management of its borders. Yet, there are conflicts between the border management policies of EU and Turkey's border management approach.

Turkey is generally thought as a typical country of emigration, due to the Turkish workers migrated during 1960s to foreign countries –particularly to the European countries- and settled there. Nonetheless, Turkey is subject to all types of international migration pressures due to the reasons like its geographical position over the east-west and north-south routes, the lasting wars and instability in its neighbourhood, its transboundary kinship relations, and hardship of the control over its eastern and south-eastern borders. As an origin, transit and destination country at the crossroads of Eurasia, Turkey has experienced all the complexity of migration flows of people searching for better life standards or protection, especially by the end of the Cold War. These migration movements have been exploited mostly by human

traffickers or migrant smugglers.

Turkey is a transit country for the nationals of Afghanistan, Pakistan, Iraq, Iran and Bangladesh on their way to Europe, while being at the same time a destination country for the nationals of former Eastern Bloc countries such as Moldova, Romania, Belarus, Georgia, Uzbekistan, Russian Federation.[243] On the other hand, it should be kept in mind that large numbers of migrants especially from the Balkans and Caucasus came and settled in Turkey over the last hundred years.

As mentioned before, Turkey has been on various migration and transportation routes along centuries due to its geography. The natural geography that joints Asia to Europe also has a political importance in view of the region's strategic situation and relationships among the countries nearby. Turkey's border security should be assessed from a special perspective because of conflicts, domestic warfare, and regime changes in neighbouring countries and terrorist activities in the region. Turkey's border security also has a strategic significance since its territory serves as a favourite passage or destination location at the external borders of the EU for immigrants, refugees and persons involved in various trafficking activities.[244]

In Turkey border management and controls are performed by the following bodies: First; duties related to the entry and exit of the persons at border gates are performed by the General Directorate of Security (Police). Second; duties related to the entry and exit of the goods at border gates are performed by the Undersecretariat of Customs. Third; duties related to border (between the border gates) surveillance at 125 km part of the Iran border and all of 384 km Iraq border are performed by the Gendarmerie General Command (17%). Fourth; duties related to border surveillance at other land borders are performed by the Land Forces Command (83%). Fifth; surveillance duties at maritime borders (between the border gates) are performed by the Coast Guard Command.[245]

The EU authorities approve that Turkey already devotes considerable resources to border management. Nevertheless in many official documents such as the

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[243] Adem Akman & İsmail Kılınç, AB'de Entegre Sınır Yönetiminin Gelişimi ve AB Sürecinde Türkiye'nin Entegre Sınır Yönetimine Geçiş Çalışmaları, Türk İdare Dergisi, Sayı:467, 2010, p.18.

[244] İlker Temel, The Border Management Issue In Relation Between Turkey And EU, MA Thesis (submitted to Hacettepe University), 2007, p.66-67.

[245] Ibid, p.76.

Accession Partnership documents, they emphasize that many aspects of Turkish border management are not in line with EU practices; for example, border management is currently split between the army, gendarmerie, police and coastguard, although Schengen best practices require a single professional authority to be responsible for border management.[246] Hence, they urge Turkey to replace its current border control and management system with professional non-military (civilian) units.

EU recommends that Ministry of Interior undertakes the principal responsibility in establishing close coordination/cooperation among relevant bodies to enable an effective border management even in case other offices are competent for border management, and the coordination of all border security and control activities carried out by a specialized non-military law enforcement/border guard.[247]

Therefore, the number of problems emerges. According to the EU side, one of the biggest problems is the lack of a general will among Turkish officials regarding the structure and the schedule for the formation of a new and centralized national border agency. On the other hand, the Turkish side has concerns about whether a civilian institution would actually manage to control and protect such difficult borders as the ones with Iran and Iraq. Additionally, the fact that the military is still an important stakeholder in Turkey and the uncertainty of Turkey's prospect for EU membership aggravate the situation more.

Another difference between EU and Turkey arise from the emphasis that the Turkish side has put on the actual physical protection of the borders as opposed to the management of these borders. Here too the fact that Turkey's eastern borders are vulnerable to infiltration by terrorist groups, in particular the PKK, as well as the instability and the violence reigning in Iraq has been a critical factor. Under these circumstances inevitably the priority becomes national defense in the narrowest sense of the word, such as preventing infiltration and militarily confronting such infiltration, rather than broader issues of public security and control, such as intercepting irregular migration, detecting forged documents and pre-empting

[246] Commission of the European Communities, Issues Arising From Turkey's Membership Perspective, COM(2004) 656 final, 06.10.2004, p.42.

[247] İlker Temel, et.al, p.65.

smuggling, as well as the enforcement of law, especially the Schengen acquis, that is of more immediate concern to the EU. One other difference stems from a disagreement over the cost of aligning Turkey's policy and practice with that of the European Union. The Turkish side has argued that if Turkey is expected to protect and manage its borders to benefit the European Union there should indeed be substantive financial support extended to Turkey. The EU on the other hand forces only a limited amount of financial assistance and expects Turkey to meet the cost as part and parcel of Turkey's aspirations to join the EU. [248]

It should be taken into consideration that Turkey's borders are different from the EU borders in terms of geographic structure of Turkey. In addition to its border's geo-strategic position, Turkey's neighbours have different political situations which make many world countries engaged. Because of these specialties, Turkey has unique features that are so different from the ones in any other European country. Border protection and control duties in Turkey are not limited with the efforts to prevent small scale trafficking and irregular migration or to identify the asylum seekers among the irregular immigrants, as in the EU countries. To prevent the entry of the terrorist groups especially in east and southeast borders, and to fight against the terrorist attacks are among the principal objectives of border protection. [249] Moreover, the border security is not considered as an important issue for the countries bordering eastern and southern of Turkey; so Turkey provides border security by itself in the region. The unfavourable weather conditions in such mountainous regions force to monitor and control these regions by satellite systems. However, to establish such a satellite border control system is beyond Turkey's financial capability.[250] Therefore, a unique border management model needs to be developed for Turkey.

In essence, Turkey's success to control and protect its physically difficult and long land and sea borders serves also to the interests of EU particularly regarding the issues of migration and asylum. In other words, stronger Turkish borders directly mean safer external borders for EU Member States. That's why, instead of leaving all

[248] Kemal Kirişçi, et.al, p.21.

[249] İlker Temel, et.al, p.121.

[250] Ibid, p.69.

the administrative and financial responsibility on the shoulders of Turkey, EU had better support one of its candidate country by any means necessary, by taking into consideration its specificities.

It is obvious that without burden sharing and the real prospect for full membership, the border management issue looms as another challenge point in Turkish-EU relations.

CONCLUSION

Migration as an international multidimensional social phenomenon has substantial impacts on the socio-economy, politics and culture of a country. It is one of the main demographic factors for population growth in many Western societies. Occasionally, it emerges as a reason for transformation from relatively homogenous to multicultural societies. Many European policymakers define immigration flow as one of the biggest domestic challenges facing their nations. Therefore, migration has also caused to the efforts to develop a common EU immigration and asylum policy.

The dynamics of the migration depend on several push and pull factors, such as economic and social uncertainty, authoritarian political regimes, unemployment in home country, or expectations for better and decent life standards, family reunification, etc. The factors like wars, poverty, famine, drought, diseases and instability exacerbate the problems and affect frequently the people's decision to migrate.

This study adopts a pragmatic hybrid theoretical model by paying attention to the certain assumptions of different migration theories, such as the economic competition theories, culture-based national identity theories, neo-liberal and neo-nationalist theories, instead of taking a sole theory for granted. Nevertheless, the researcher leans towards the neo-nationalist approach. He adheres to the neo-nationalist assumptions that the national political units and policymakers seek to legitimise certain national immigration policies by transferring them into the level of international organisations, which is named as "venue shopping". The Member States manipulate the EU intergovernmental policymaking platforms to legitimise or promote restrictive national policies and programmes. This relatively new attitude can be better examined by utilising the neo-nationalist perspective. Therefore the thesis puts forth that the possibility for a genuine cooperation and consensus among EU Member States on immigration issues is poor, due to their different priorities on the issue of labour migration. The fact that Member States are often only concerned with short term political gains and that even some of them (the UK, Ireland and Denmark) are uninterested in a collaborative migration policy makes a positive outlook difficult, leaving interim measures the only strategy on the ground. The

current economic uncertainty in Euro zone deteriorates the situation.

The lack of coordination in the field of immigration encourages human rights abuses, smuggling and trafficking networks and trans-border crimes. The EU has mismanagement problems on integration and discrimination attitude towards immigrants. There are still social, economic and political barriers to provide necessary recognition and inclusion for them.

To get stuck into the narrow nationalist anti-immigration political discourse of the irregular immigration on the one hand and of refugees problematic on the other blur the much larger picture of international labour migration in an era of economic globalisation in demographically aging Europe. The current EU official policies focus on highly skilled immigrants, while less skilled workers are admitted in very limited numbers, on a temporary basis and for specific sectors only. Thus governments tacitly turn a blind eye on refugees and undocumented migrants so as to appease the rising demand in labour market, without publicly admitting the need for unskilled migration and a cheap labour force. This aggravates de facto national taboos and vulnerabilities.

The harmonisation process on the EU level seems to take a long time because of the attempts lack of coherence, cooperation and courage. Even though the discussions and debates have not started new and even three five-year programmes have been accepted up to now under the title of the Tampere Program 1999, the Hague Program 2004 and the Stockholm Program 2009, it is still difficult to imagine 27 countries discussing around the same table about an efficient, strong and common European immigration policy. Indeed each of them faces different socio-economic priorities and approaches related migration issues: need for skilled-labour, need for cheap less-skilled labour, border security, migratory flows as a consequence of the revolutions and wars in North African states, economic crisis, etc.

Additionally, there are certain paradoxes originating both from Member States and EU-level organisations, such as different historical experiences on immigration, asymmetric migrant flows, diverging interests, distinct particularities and priorities of the Member States, domestic politics on policy definition, heterogeneous nature of citizenship and integration regulations, the rigid perception of sovereignty, the lack of clearly defined competences of EU level stakeholders, the relatively weak position

of the EU as an international actor, the securitization of migration issues, etc. And all these paradoxes seriously complicate the EU common immigration policy efforts. Yet, as Samuel Boutruche remarks "probably the most striking paradox of the EU immigration policy is that by giving the highest priority to the combat against illegal migration, it fostered the problem it was initially supposed to tackle."[251]

In recent years, the EU Member States have pushed for a tougher control-focused stance against immigration, particularly against the irregular immigration. The rises of international terrorism and attacks in the USA, Spain and the UK during the last decade have left their marks. Now the immigration does not simply mean anymore dealing with asylum applications, irregular migration or managing the movement of people in and out of the Union. It has become a hard core security issue involving efforts to prevent potential acts of violence and terrorism within the Union borders. The situation got further complicated by the defective association of violence and terrorism with Islam and Muslims in general. Needless to say, Muslim immigrant communities in the EU affected from this stance in negative terms. The massive protests and riots led by young French citizens of mostly North African origin in 2005 have aggravated this sense of insecurity. It is due to this background that since the late 1990s, the gradual externalisation and securitization of migration issues have emerged through the restrictive regulations (such as the Council Directives), increasing border control measures (such as visa "blacklists", central databases of SIS, SIS II, EURODAC, or the patrolling activities of FRONTEX), the readmission agreements with third countries, etc.

At this point emerges a critical question: If the European countries have different priorities, unique structural problems and jealousy on their sovereignty with sharp desire to maintain control over migration policy, then why do they still insist on a common EU immigration policy? Or for which reason do they prefer to cooperate at the EU level? How can this paradox be explained? Actually, the answer is illustrated in many sections of the dissertation. Member States cooperate at the EU level where this can help them to achieve their nationally formulated preferences. Member States look for ways to limit the role of the supranational institutions in EU migration policy-making, but that Member States nevertheless choose cooperation at

[251] David Turton & Julia Gonzales, et.al, p.24.

the EU level when this enhances their national policies. Cooperation at the EU level is thus instrumental in that Member States use this to achieve their national preferences. The common EU immigration policy serves as a new migration control mechanism in order to be able to put conditions or exceptional measures limiting TCNs' access to the rights of EU citizens by transferring restrictive national approaches and legislation into a supranational venue. Now, it is an instrument for legitimising and promoting certain Member State policies and programmes, which impose integration in a conditional manner.

Member States' actions within the scope of EU law are subject to the supervision and judicial control carried out by the European Commission and the ECJ. However, by inserting integration measures and conditions into the articles of abovementioned Directives for instance, Member States delegate some of their most criticised conservative attitudes and measures concerning immigration into EU law. This is particularly apparent in the introduction of integration conditions and measures within all three Directives on asylum policy, and the Directives 2003/86/EC and 2003/109/EC, which allow the national authorities to utilize derogative clauses when determining the allocation of rights and procedural guarantees to TCNs.

It is observable that the liberal democratic countries of Europe conceive of heterogeneity and diversity as threats to their social coherence and as deviations in need of correcting. That's why they use the process of developing a common immigration policy to legitimise their restrictive national practices on the integration of TCNs rooted in traditional perceptions and stereotypes.

A persistent control-based approach to migration leads to circumstances in which migrants take more dangerous and longer journeys by falling into the hands of human traffickers and smugglers, and they pay less attention to their human rights due to the fear of deportation. Thousands of them have been died or injured up to now as the direct result of "Fortress Europe" understanding. It is really ironic that in modern times travelling around the world to maximize profits for businesses is encouraged, while travelling to survive is condemned.

In the context of the new international situation and the new wave of immigrants, it is obvious that old approaches and principals are useless and a new

policy is required for the EU. Even though the adoption of the Lisbon Treaty gives hope to many, the third five-year plan under the title of Stockholm Programme still insists on the outdated policies on immigration unfortunately. The new policy should be based on a balanced and comprehensive approach for the management of migratory flows considering both humanitarian and economic aspects as well as respecting all relevant international human rights regulations. The EU should actively promote the UN, Council of Europe and ILO instruments and conventions protecting migrants' human rights. It should employ a new perspective and principals such as antidiscrimination and multiculturalism. The well-known motto of the EU "unity in diversity" should embrace not only citizens, but everyone living within the Union borders, even though they are immigrants. And, the scope of the migration legislation should not only be limited to those labelled as legally residing immigrants, but should also address the rights and status of vulnerable groups such as undocumented TCNs.

A more holistic view including the immigrants to the host societies as potential participants, residents and citizens is required instead of perceiving them in purely economic terms as short term labour force sellers. Treatment of migration as an (in)security issue, as a threat to the cohesion of society or as a phenomenon that needs to be tightly controlled complicates to understand the reality of human mobility in globalizing world.

The EU authorities should not connive at the rising discriminatory, populist, xenophobic, anti-immigration discourses of European politicians and leaders who make the immigrants scapegoat as a threat to security and social cohesion by accusing them unjustly with all kinds of criminality. Security needs of the Member States should not breach the freedoms of immigrants, who are human-beings at the last instance.

A key policy priority should be to fully embrace the role of migration in enhancing Europe's competitiveness, stimulating growth and responding to the challenges of ageing populations and a shrinking labour force in the EU. As employees, self-employed persons, consumers and investors, migrants make significant economic contributions, while also boosting productivity, acting as a job-market safety valve, reducing pay pressures and raising the economy's long-term or

"trend" rate of growth. In addition, owing to their age profile, they generally pay more in taxes than they receive in welfare services.[252]

The selective utility-based regime on labour migration should be abandoned and a transparent, compatible, flexible and efficient rights-based strategy should be adopted. This new strategy should assure the equal treatment and interests of the immigrants such as family reunification, access to residence and citizenship, political participation by eliminating the vulnerabilities and exploitation.

The civil society and social partners, especially the migrants' organisations, should be more incorporated into the official platforms of EU by taking into account their possible contributions during the process of legislation making. And the Member States should not manipulate the revision of fragmented migration legislation as an opportunity to reduce the current rights, freedoms and standards already enjoyed by TCNs and their families within the Union territory.

Moreover, it is vital that the EU authorities should take into account the drivers of migration in the countries of origin and the labour shortage in the EU. The measures including restrictive legislation, multilateral administrative bodies or physical security systems may not stop migration flows at the Union borders permanently. A lasting solution may be reached by addressing the source of the problem: the socio-economic and political inequalities between the countries of origin and the countries of destination. For instance, the hypocrite policies which appeal irregular migration for the cheap labour needs on the one hand and strive against it on the other seem inconsistent. Only after such a robust diagnosis, the conclusive treatment through the implementation of sustainable development strategies or establishing a just world order can be possible.

Eventually, all the foregoing proposals signify a major mental change in the mindset of EU decision-makers.

When examining Turkey's current position within the European migration policy, as it is elaborated in section three of the study, it seems that Turkey is quite central to the efforts of EU to develop and apply a common immigration policy.

As a big Muslim country trying to enter to the EU, Turkey has the largest immigrant community in Europe. Therefore, there is a common concern among the

[252] Sergio Carrera & Anais Faure Atger & Elspeth Guild & Dora Kostakopoulou, et.al, p.11.

EU authorities on the integration of current Turkish immigrant stocks as well as the potential arrival of a vast number of new Turkish immigrants after full membership.

The Ankara Agreement, Annex Protocol, Council Decisions 2/76, 1/80 and 3/80 concluded between European Union and Turkey, particularly the Association Council Decisions and the judgments of European Court of Justice are determinative regarding the rights of Turkish citizens within EU borders. Nonetheless, it is common that either the Member States act reluctantly to allow Turkish immigrants to exercise their acquired rights, by disregarding the legal provisions of community, or there are various attempts to degrade the rights of Turkish citizens onto the level of those other TCNs, particularly through the Council Directives and a prospective readmission agreement. Such kinds of attitudes of Member States are not only detrimental to the efforts for harmonizing the EU immigration policy, but also incompatible with the "pacta sunt servanda" and "standstill" clauses of agreements cited above. Consequently, individual immigration policies of Member States also fuel the tension between Turkey and EU relations concerning the immigration issue.

Additionally, Turkey is situated in a critical geographical region in respect to the migration issues. The instability, civil wars, violence and economic problems in the broader Middle East boost the migration flows. People try to enter to Turkey from its eastern and southeastern borders through clandestine ways in order to pass into the EU territories as asylum-seekers and irregular migrants. Turkish borders with this region are very long and difficult to control. The situation is further complicated by the fact that Turkey has its own problems concerning the protection and defense of these borders, due to the infiltration by the militants of terrorist organization PKK. This leads Turkey to control and protect its borders by the military forces rather than by a civilian authority that EU prefers and urges.

The acrimonious and bitter debates that have preceded each critical decision concerning Turkish pre-accession has negatively marked Turkish public opinion as well as the government and public policy makers. An important consequence of this experience has been that support for eventual Turkish membership to the EU and trust in the credibility of the EU has significantly dropped. This has adversely influenced the transformation process of Turkey and significantly undermined the process of "rule adoption". Public policy makers have become reluctant to adopt and

implement the acquis, as perceived prospects of Turkish membership in their mind steadily fall. This is symbolized for example by the reluctance of the public policy makers to adopt the Schengen visa regime, the acquis on asylum and in particular support the "lifting of the geographical limitation" to the 1951 Geneva Convention Relating to the Status of Refugees and put into place a fully fledged national status determination process for asylum seekers coming from outside Europe. Similarly, Turkish authorities have also been reluctant to negotiate and conclude a "readmission agreement" with the Commission as well as put into place a "border agency" that would replace the current institutional set-up in respect to controlling, securing and managing Turkey's borders. [253]

As a matter of fact, Turkey seems willing to reform its visa, asylum and border control systems besides to sign a readmission agreement with EU. However, the economic, political, administrative burdens and the lack of confidence to the EU due to the unpleasant experience deter Turkey from taking these actions on its own. In turn, the EU authorities and the Member States criticize the reluctance of Turkey on the ground of defective harmonization process. This adversely affects the negative attitudes towards Turkey's accession process to the EU and provokes resistance to Turkish membership. Unfortunately, this vicious circle undermines the trust between the sides and generates inevitably another Achilles' heel in Turkish-EU relations.

[253] Kemal Kirişçi, Border Management and EU-Turkish Relations: Convergence or Deadlock, CARIM Research Report, 2007/03, Robert Schuman Center for Advanced Studies, San Domenico di Fiesole: European University Institute, p.2.

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APPENDICES

A. JUDGMENTS OF THE ECJ ON ASSOCIATION AGREEMENT EEC-TURKEY & SECONDARY LEGISLATION

Case Name	*Date*	*Case Number*	*ECR Reference*
Demirel	30.9.1987	12/86	1987, 3719
Sevince	20.9.1990	C 192/89	1990, I-3461
Kuş	16.12.1992	C 237/91	1992, I-6781
Eroğlu	5.10.1994	C 355/93	1994, I-5113
Bozkurt	6.6.1995	C 434/93	1995, I-1475
Tetik	23.1.1997	C 171/95	1997, I-329
Kadıman	17.4.1997	C 351/95	1997, I-2133
Eker	29.5.1997	C-386/95	1997, I-2697
Kol	5.6.1997	C-285/95	1997, I-3069
Günaydın	30.9.1997	C-36/96	1997, I-5143
Ertanır	30.9.1997	C-98/96	1997, I-5179
Akman	19.11.1998	C-210/97	1998, I-7519
Birden	26.11.1998	C-1/97	1998, I-7747
Nazlı	10.2.2000	C-340/97	2000, I-957
Ergat	16.3.2000	C-329/97	2000, I-1487
Savas	11.5.2000	C-37/98	2000, I-2927
Eyüp	22.6.2000	C-65/98	2000, I-4747
Bıçakçı	19.9.2000	C-89/00	OJ 2000 C 95/4
Kurz (Yüze)	19.11.2002	C-188/00	2002, I-10691
Birlikte	8.5.2003	C-171/01	2003, I-4301
Abatay & Şahin	21.10.2003	C-317+369/01	2003, I-12301
Commission/Austria	16.9.2004	C-465/01	2004, I-8291
Ayaz	30.9.2004	C-275/02	2004, I-8765
Çetinkaya	11.11.2004	C-467/02	2004, I-10895
Dorr & Unal	2.6.2005	C-136/03	2005, I-4759
Aydınlı	7.7.2005	C-373/03	2005, I-6181

Doğan	7.7.2005	C-383/03	2005, I-6237
Gürol	7.7.2005	C-374/03	2005, I-6199
Sedef	10.1.2006	C-230/03	2006, I-157
Torun	16.2.2006	C-502/04	2006, I-1563
Güzeli	26.10.2006	C-4/05	2006, I-10279
Derin	18.7.2007	C-325/05	2007, I-6495
Tüm & Darı	20.09.2007	C-16/05	2007, I-7415
Polat	4.10.2007	C-349/06	2007, I-8167
Payır	24.1.2008	C-294/06	2008, I-203
Er	25.9.2008	C-453/07	2008, I-7299
Altun	18.12.2008	C-337/07	2008, I-10322
Soysal	19.02.2009	C-228/06	n/a
Şahin	17.9.2009	C-242/06	n/a
Bekleyen	21.1.2010	C-462/08	n/a
Genç	4.2.2010	C-14/09	n/a
Toprak	09.12.2010	C-300/09 C-301/09	n/a
Bozkurt	22.12.2010	C-303/08	n/a
Ünal	29.09.2011	C-187/10	n/a
Kahveci & İnan	29.03.2012	C-7/10 C-9/10	n/a

B. TEZ FOTOKOPİSİ İZİN FORMU

ENSTİTÜ

Fen Bilimleri Enstitüsü	
Sosyal Bilimler Enstitüsü	X
Uygulamalı Matematik Enstitüsü	
Enformatik Enstitüsü	
Deniz Bilimleri Enstitüsü	

YAZARIN

Soyadı : ARSLAN
Adı : MEHMET İNANÇ
Bölümü : ULUSLARARASI İLİŞKİLER

TEZİN ADI (İngilizce) : THE PARADOXES OF EUROPEAN UNION IMMIGRATION POLICY AND ITS REPERCUSSIONS ON TURKISH-EU RELATIONS

TEZİN TÜRÜ : Yüksek Lisans [X] Doktora [ ]

1. Tezimin tamamından kaynak gösterilmek şartıyla fotokopi alınabilir. [X]
2. Tezimin içindekiler sayfası, özet, indeks sayfalarından ve/veya bir bölümünden kaynak gösterilmek şartıyla fotokopi alınabilir. [ ]
3. Tezimden bir (1) yıl süreyle fotokopi alınamaz. [ ]

TEZİN KÜTÜPHANEYE TESLİM TARİHİ: 04.10.2012