THE EU FIGHT AGAINST ILLEGAL MIGRATION AND

THE EASTWARD ENLARGEMENT:

TO WHAT EXTENT IS THE EU POLICY ON ILLEGAL MIGRATION CONSISTENT WITH THE FORTHCOMING

EASTWARD ENLARGEMENT?

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Abstract

This paper examines to what extent the developing European policy on illegal migration is compatible with the forthcoming eastward enlargement. After a short section about definitions, it examines the current state of the fight against illegal migration in the Central and Eastern European countries (CEECs), showing their recent progress and their remaining problems. Then, it considers the measures already agreed or still under discussion at the EU level to combat illegal migration. The next section analyses to what extent this EU policy is compatible with the next eastward enlargement. It shows that the EU has not seriously taken into account the impact of the CEECs' accession when developing its common policy on illegal migration. Among all the tools used to combat illegal migration, only border management seems to have been elaborated while taking account of enlargement. All the other instruments are being developed without considering the likely impact of the CEECs' accession on them. Therefore, if such a trend persists, the efficiency of the EU fight against illegal migration after enlargement may be seriously called into question.

1. Introduction

The fight against illegal migration has been ranking very high on the EU policy agenda for several months. After the Sevilla European Council (June 2002) largely devoted to this issue, the Thessaloniki European Council (June 2003) has described migration, and particularly illegal migration, as a 'top priority' in the Presidency Conclusions. At the same time, the EU is also on the verge of the biggest and, arguably, most challenging enlargement of its history. The eight CEECs which are going to join the EU in May 2004 are still substantially different from the current EU Member states in several respects. This is particularly the case as regards the fight against illegal migration, despite numerous bilateral and multilateral programmes designed to help the CEECs 'catching up' with their western neighbours. Firstly, the CEECs have little (and recent) experience of illegal migration and, therefore, of fight against illegal migration. Secondly, they are situated in a more difficult environment, neighbouring the poorest and/or most unstable countries on the European continent (the former Soviet republics, Albania and the

former Yugoslav republics). Those countries have become important immigrant sending and transit countries, increasingly used by smugglers and traffickers in human beings. Thirdly, the CEECs are still undergoing a political, social, and economic transition from communism. For this reason, they have relatively less money to allocate to the fight against illegal migration, as their more limited financial means – compared to the current EU Member states - are needed in a lot of other sectors than illegal migration.

Therefore, it is interesting to examine whether, and, if yes, how and to what extent, the EU has tried to accommodate those differences when developing its policy against illegal migration. In other terms, is this developing EU fight against illegal migration compatible with the forthcoming enlargement? To answer this question, the paper will start by defining illegal migration and presenting the main instruments used by liberal-democratic countries to combat it, namely visas regimes, border controls, return policies, carriers' sanctions, employers' sanctions, and the fight against smuggling and trafficking in human beings. It will then consider how the CEECs are currently combating illegal migration, before examining the same question with reference to the EU. On this occasion, both the measures that have already been agreed and those which are still under discussion will be analysed. The next section will examine to what extent the expanding EU policy is compatible with the next eastward enlargement, and more precisely the specificities of the new Member states, before drawing some conclusions.

2. Illegal migration and the instruments used to combat it

'Illegal migration' refers to inter-country movements that do not abide by national laws and regulations. More precisely, the illegality of non-nationals can result from several causes: irregular entry, irregular residence, and/or irregular activity or employment (Ghosh, 1998: 1-4; Jahn and Straubhaar, 1999: 18-19). This multi-faceted character of illegal migration is reflected in the variety of instruments used by liberal-democratic countries, such as the EU Member states and the candidate countries, in their fight against illegal migration, individually or in co-operation with other states.

Indeed, in recent years, the fight against illegal migration has become increasingly complex (Guiraudon, 2001). Once a quasi monopoly of central state authorities, it now involves a growing number of actors, such as private actors (carriers, employers, and ordinary people), decentralised actors (local and regional authorities), and external actors (third countries, the EU, intergovernmental forums like the 'Budapest Process'). This means that new instruments to combat illegal migration have been added to the more traditional visa regimes, border controls, and expulsions of illegal aliens. This paper only considers the most important of them, *i.e.* penalties against smuggling and trafficking of human beings, carriers' sanctions, and employers' sanctions.[1] Let us now briefly examine each of those instruments in turn.

a) Visa regime

A complete and non-contradictory visa regime is considered a basic requirement of an efficient fight against illegal migration. However, visa policy alone cannot counter illegal migration related, for example, to third-country nationals who enter legally, but 'overstay'.

b) Border controls

Another obvious way of curbing illegal migration is to enforce border controls. Those encompass both controls at the crossing-points and the patrolling of the entire border. However, they only address the issue of illegal entry and are powerless as regards illegal residence and employment.

c) Return policy

A cornerstone of the fight against illegal migration is that those entering or residing in a state illegally should be removed from it, voluntarily or, if necessary, by a formal procedure of deportation to their country of origin or last residence. This usually requires the co-operation of the transit and sending countries, which is best secured by

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[1] The paper does not deal with controversial instruments such as regularisation policies.

the signing of readmission agreements (Schieffer, 1997: 100). As explained later, those have played a pivotal role in the fight against illegal migration in the EU Member states as they have allowed them, since the early 1990s, to return substantial numbers of illegal migrants, including rejected asylum-seekers, to their eastern neighbours (Collinson, 1996; Lavenex, 1999; Wallace, 2001).

d) Carriers' sanctions

Carriers, and especially airlines, have played an increasingly important role in the fight against illegal migration (Guiraudon, 2002). They are responsible for verifying the travel documents of their passengers. They risk being fined if they bring into a country any person who lacks a visa or other requisite documentation for entry. Such developments have led to substantial cost increases for transport companies, most notably airlines (Guiraudon, 2001: 40).

e) Employers' sanctions

Employers have also been increasingly dragged by law into the fight against illegal migration. They have to check the documents of their would-be employees and cannot hire those who are not legally authorised to work. This provision is enforced through controls of the employees and possible penalties.

Combating illegal work is an important part of a comprehensive policy against illegal migration as it tends to act as a 'pull factor' for illegal migration.

f) Penalties against smugglers and traffickers in human beings

The expressions 'smuggling' and 'trafficking' are often considered interchangeable. However, the United Nations Convention against Transnational Organised Crime and its two accompanying Protocols on Smuggling and Trafficking (UN Doc. A/55/383 of 2 November 2000) make a distinction between both terms. 'Smuggling' means helping with illegal border crossing and illegal entry, whilst 'trafficking' involves the intent to

exploit a person, irrespective of the existence of border crossings. However, it is sometimes extremely difficult to distinguish between both in practice.

Targeting smugglers and traffickers has become crucial in Europe, since more and more would-be immigrants to Europe rely on their services. This is an unfortunate effect of the measures aiming at controlling migration. The tighter the visa regimes and the border controls become, the more migrants are incited to resort to smugglers and traffickers.[2]

3. The fight against illegal migration in the CEECs: progress and problems

3.1 Visa regimes

In the field of visas, the main challenge for the CEECs has been the obligation to adopt the list of third countries whose nationals must be in possession of visas to cross the Union's external borders as part of the *acquis communautaire* in the view of enlargement. Contrary to the Nordic countries which joined the EU in 1995, the CEECs were not able to negotiate any special visa arrangements. This is bound to have a detrimental effect on their relations with their eastern neighbours, as will be shown later.

Moreover, the efficiency of visa-issuing procedures is still considerably reduced by the lack of staff and computerised system. This might become even worse after accession to the EU since foreign representations will have to issue more visas as a consequence of the new visa regime. There may also be important problems of corruption, *i.e.* state officials accepting briberies to deliver visas, though it is obviously very difficult to obtain precise data on this phenomenon. This is all the more likely since many embassies in the world – even embassies of countries where corruption is supposed to be considerably more limited than in the CEECs - are involved in visa trafficking (Leman, 2002: 45-48).

3.2 Border controls

During the nineties, EU Member states have implemented increasingly tighter controls at their external borders. The current 'frontline' Member states, especially Germany and Austria, have reiterated the importance of this issue in the enlargement negotiations. Consequently, the candidate countries have given a relatively high priority to the upgrading of their eastern borders as it became a necessary condition to fulfil for membership. Despite numerous improvements, there are still problems in several areas. Firstly, the borders of some countries, namely the Baltic countries, are still controversial, and therefore, have not been demarcated yet (European Commission, 2001c: 93). This makes the implementation of border controls exceedingly difficult, if not impossible.

Secondly, the CEECs still need to put into place the adequate organisational structures needed to cope with the increasing number of border crossings that they have experienced since the collapse of communism (Wallace and Stola, 2001: 17). Though most candidate countries have evolved towards a professional non-military guard, they are still affected by more or less serious deficits in staff, training, modern equipment, and inter-agency co-operation (House of Lords, 2000: 8). This adds to a lack of tradition and experience in *immigration* border controls as those countries, under the communist regimes, used to focus on preventing *emigration* of their own nationals and neglected immigration which was an extremely limited phenomenon. Another important challenge relates to the fact that some candidate countries, such as Poland, have had to shift a large share of their border control operations from the traditionally strongly guarded western borders to their eastern or south-eastern borders, to which far less attention was devoted in the past (Anderson, 2000: 15-16). Newly independent states, such as Slovenia, have also had to invest substantial amounts of money to provide their new borders with all the necessary infrastructures very quickly (Government of the Republic of Slovenia, 2001: 3).

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[2] This is also an effect of the increasingly restrictive asylum regimes of the EU Member states.

Thirdly, an important problem is that of the corruption of border guards in the CEECs. Every year, there are cases of border guards accepting briberies and allowing illegal immigrants to enter into the country though there are, of course, no detailed data on this phenomenon. However, the CEECs have taken several measures to cope with this issue, such as the creation of internal investigation units, rotation of staff, and increases in the border guards' salaries (GRECO, 2002a: 8; GRECO, 2002b).

Fourthly, the CEECs have not been able to fully develop the co-operation with neighbouring countries which is necessary to ensure efficient border controls. They are increasingly co-operating with their western neighbours (e.g. joint patrols), but they have encountered several problems with some of their eastern neighbours, particularly Belarus and Ukraine.

Finally, and it is an issue beyond the CEECs' influence, it is noteworthy that some of their borders are very difficult and expensive to police in terms of surveillance and administration of frontier controls, due to their length and the topography (Anderson, 2000: 20). In some of those countries, especially the Baltic countries, controls are still considered inadequate to deal with illegal migration because of the lack of adequate surveillance equipment (European Commission, 2002a: 103; IOM, 2000: 5).

3.3 Return policies

Despite the fact that official statistics are generally incomplete and inaccurate, the overall picture in the CEECs is quite clear: relatively few illegal aliens who could be returned are actually removed from those countries (Laczko, 2001). This is due to a series of challenges that the CEECs face in the implementation of their return policies.

Firstly, the most obvious explanation for the low number of returns in the CEECs is the low number of apprehended irregular immigrants. This is especially the case in countries that are still sending countries like Romania. This is notably due to the lack of an effective set of procedures and/or sufficient means allocated to tackle this problem.

Another major impediment to effective return policies is the impossibility to locate a large number of illegal migrants. Indeed, many aliens maintained in reception centres who should be expelled disappear before their forced return can be implemented. It is also reported that a lot of asylum-seekers 'disappear' after the rejection of their asylum application or even before this has been considered. A lot of them continue their journey trying to cross into Austria or Germany, whilst others disappear in the 'underground' local economy.

Those 'disappearances' are notably due to the widespread lack of reception facilities in the CEECs, which is mainly due to the high costs involved (Government of the Republic of Slovenia, 2001: 4). However, those have steadily increased across the region, notably thanks to the financial assistance of the EU PHARE Cross-Border Programme. The 'disappearances' may also result from legal provisions restricting the length of detention of undocumented migrants. Indeed, the authorities do not have enough time to obtain the travel documents necessary to implement the returns. Thus, illegal immigrants are released and fail to report regularly to the police, as they are supposed to do.

Another important challenge facing the CEECs in the implementation of their return policies is the issue of co-operation with transit and sending countries. This is highly important in order to obtain the travel documents necessary to implement the returns, as many irregular immigrants do not have any travel documents. In that regard, the CEECs face particular difficulties when they have no diplomatic or consular presence in the countries concerned. This is an increasingly salient issue, as a growing number of irregular migrants in the candidate countries originate from Third World countries.

At the moment, the CEECs are also disadvantaged compared to the EU Member states because they cannot rely on the same network of readmission agreements and readmission clauses that the EU now includes in all its association and cooperation agreements with third countries. Indeed, the CEECs have relatively less historic and economic ties with sending countries and cannot exert the same kind of leverage on them either. Consequently, so far, none of the CEECs has been able to conclude

readmission agreements with some important transit and sending countries such as Russia and Belarus. Moreover, it must be noted that those eastern neighbours cannot be considered 'safe third countries' or 'safe countries of origin' for asylum-seekers. Therefore, it prevents the CEECs to resort to the pre-asylum procedure return that is largely used by the EU Member states.

Another major impediment to the implementation of returns in the CEECs is their cost. It is cheaper to expel illegal migrants than to maintain them in centres for longer periods. However, the transportation costs are on the increase as illegal migrants come from more and more distant countries, with which the CEECs seldom have direct air connections. Therefore, the authorities have to organise charter flights in order to expel groups of illegal aliens. For example, the Romanian government chartered planes to Sri Lanka, Bangladesh, and Pakistan in 1998 (Laczko, 2001: 162). Nevertheless, those measures are very expensive to implement, which explains why a large number of expulsion orders are never implemented.

Finally, another problem affecting the return policies of the CEECs is the lack of voluntary assisted return programmes. Among them, only Hungary has operated such a programme (the Hungarian Assisted Return Programme (HARP)) with the collaboration of IOM since 1994. However, IOM has recently started co-operating on this issue with other candidate countries, notably the Czech Republic, Romania, and Slovakia.
The emphasis in the region thus remains on forced returns. Potential returnees generally receive relatively little information and counselling about voluntary returns. Yet such programmes allow financial savings and a return home in dignity for the migrants (Ghosh, 1998: 152-4).

3.4 Carriers' sanctions
The CEECs have adopted legislation laying down the obligation for the carriers, especially airline companies, to control their passengers' travel documents.

This is particularly difficult for the carriers due to their lack of experience. However, some governments have offered them considerable help. For example, in Romania, a co-operation protocol was signed in May 2001 between the General Inspectorate of Border Police and the national airline (TAROM) to make controls of travel documents and visas more effective (European Commission, 2001b: 85). At the Prague airport, airline companies running UK-bound flights also benefited from the help of British immigration officers in 2001, following a sharp increase in the number of Czech Roma asylum-seekers in the United Kingdom (*Migration News*, 2001).

3.5 Employers' sanctions

The transitional nature of the economy in the CEECs has offered unique opportunities to illegal workers, especially those from Eastern European countries. Statistics show that all the candidate countries are characterised by the existence of a substantial and growing informal economic sector, employing notably illegal residents (Wallace and Stola, 2001a: 10; Tamas, 1999: 282). The CEECs have taken measures to combat this phenomenon, but the challenge is considerable.

Indeed, in the early 1990s, the CEECs did not have any regulation to combat illegal employment, which was largely tolerated under the communist regimes. Consequently, they have had to adopt numerous measures and plans quickly. In most applicant countries, the legislation in this field is still affected by shortcomings. For example, in Poland, the Executive Order of 30 June 1995 of the Council of Ministers states that 'inspectors must show inspection warrants specifying the name and exact address of the company inspected'. This makes it impossible to inspect both unregistered companies and those which change their name. The vagueness of the regulations can also often be exploited by illegal workers and their employers (FECL, 1999). However, the CEECs are gradually adopting stricter provisions in this field.

An even more important issue is that of the effective implementation of those regulations. In that regard, there have been numerous difficulties in the CEECs. Firstly,

the candidate countries are characterised by a widely shared 'beating the system/bending the law' mentality inherited from the communist period (Morawska, 2001: 174). A lot of CEECs' nationals do not consider illegal work reprehensible, which makes combat it extremely difficult. Secondly, the procedures concerning the issuing of work permits are generally very complicated, expensive and time-consuming for both the employer and the prospective employee. In Hungary, for example, the completion of the whole process takes about ninety days, requires the submission of numerous documents, and amounts to one month's wage of a skilled construction worker, excluding the cost of corruption that is commonplace (Juhasz, 1999: 24-25). This explains why a lot of workers do not even apply for the necessary documents and choose to remain in the illegal sector.

Thirdly, labour inspectors are confronted to a growing illegal sector which is increasingly well-organised. Beside the traditional 'slave markets' for the recruitment of foreign workers, agencies and other intermediaries in sending and receiving countries now play a major role of mediators between employers and workers. Fourthly, controls are particularly difficult to carry out because of the very high numbers of micro-enterprises and self-employed workers. In Hungary, for example, some 400 labour and occupational safety inspectors are responsible for the control of 700,000 enterprises. They are only able to carry out some 22,000 inspections a year (Tamas, 1999: 283). The number of apprehended illegal foreign workers can thus be considered derisory compared to their total number. For example, in 1999, the National Employment Office (KUP) in Poland estimated that there were some 200,000 foreign illegal workers in the country, among which only some 5,000 were expelled (RFE/RL Poland, Belarus and Ukraine, 1999).

Fifthly, even when inspectors suspect that a foreign worker is illegally employed, it is very difficult for them to take action. Generally, the workers pretend that they are not in a working relationship, but are merely helping a friend (their employer, in fact) in

exchange for food and boarding during their stay in the third-country. If they regularly leave the country and do not break the residency rules, there is very little legal basis for taking action against them. Finally, the sanctions imposed on employers in case they hire illegal labour have been strengthened over the years in most candidate countries, but their dissuasion effect remains rather low. Indeed, such measures are seldom applied given the staff shortages in the labour inspection forces.

3.6 Penalties against smugglers and traffickers of human beings

Smuggling and trafficking of human beings are serious issues for all the candidate countries. However, they affect more particularly some countries, like those situated on the famous 'Balkan route' such as Slovenia and the Czech Republic (Campani, 2002: 284-5; Dusch, 2002: 76-89). Among the Baltic States, it is Lithuania that faces the greatest challenge, with criminal rings smuggling and trafficking people mainly from Belarus.

Most of the CEECs have adopted legal provisions repressing smuggling and trafficking of human beings through the nineties. They have also modified their administrative structures to improve the fight against trafficking in human beings. For example, most of them have created special units within their police forces to provide sensitive information to the border guard services in order to enhance the efficiency of border controls. Moreover, some CEECs have signed bilateral agreements that constitute the legal basis for information exchange in combating trafficking in human beings. An example of such an agreement is that concluded between Lithuania and Germany that allows the Lithuanian Police, Tax Inspectorate and Border Police to apply directly to the German law-enforcement institutions for information and assistance in crime investigation (European Commission, 2001a: 91). Nevertheless, and despite such improvements, smuggling and trafficking in human beings still constitute an important challenge for the CEECs, given the increasing professionalism of the criminal rings involved in those activities.

4. The EU fight against illegal migration

Let us now examine how the same instruments are being developed at the EU level.

4.1 Visa regime

As far as the visa regime is concerned, the Council has adopted Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. The Member states have agreed that these lists should be reviewed annually in order to take into account the changes in migratory flows. Indeed, illegal immigration is one of the criteria used to determine the third countries whose nationals are subject to the visa requirement, beside other criteria such as public policy and security, the Union's external relations, regional coherence and reciprocity. As a consequence, the Member states decided to transfer Ecuador to the negative list in March 2003.

Member states have also increasingly co-operated regarding the security of documents. The Council Regulation (EC) No 1683/95 of 29 May 1995 laid down a uniform format for visas, which aimed at preventing counterfeiting and falsification. In 2002, the Council adopted new provisions regarding both visas and residence permits for third-country nationals. They were designed to make those documents more secure through the obligatory integration of a photograph produced according to high security standards. Member states are now examining the possibility of adding biometric identifiers to facilitate the verification of those documents (European Commission, 2003a).

However, the European Commission and the Member states consider that the improvement of the security of documents is not sufficient to fight efficiently against illegal migration. Indeed, it is not infrequent that illegal aliens hide or throw their travel documents away, in order to conceal their identity, their travel route, or the expiry date of their visa. Consequently, the Member states agreed to set up a European Visa Identification System in their Action Plan on Illegal Migration of 28 February 2002. This

online common database should store details of the visas issued and of the visas applied for and refused, as well as the electronic photos, the biometric data, and the scanned travel documents of the visa applicants. This system would have, according to the Commission, two main advantages. Firstly, it would be easy to detect falsification of travel documents by comparing them to the image of the original documents. Secondly, the stored image of the travel documents could be used to speed up the process of obtaining new travel documents, if necessary, for people who have to leave the country. In total, such a system would 'reduce significantly the time and the costs incurred as a result of illegal residence, including the detention time for the returnee pending removal' (European Commission 2002c: 14).

In June 2002, the Council adopted the guidelines for the introduction of the common Visa Information System. This should comprise a Central Visa Information System (C-VIS) and a National Visa Information System (N-VIS) in each Member state. As far as biometric identifiers are concerned, the feasibility study carried out by the Commission examined three options: iris scanning, facial recognition, and fingerprints. It recommended the latter as primary biometric identifier for identification purposes.

It is important to underline the technical and financial challenges entailed by the implementation of this system. In its feasibility study, the Commission estimated that the costs of the central system and all the national systems, including the communication infrastructures, would range between 130 million to nearly 200 million Euros. Even if those would be spread over a period of ten to twelve years, those costs are still substantial and they mainly relate to the national components of the VIS (equipment of consular posts, world-wide connections, shipping and training). Therefore, the Commission has proposed to try to integrate SIS II (the second generation of the Schengen Information System) and the central component of the VIS to make budgetary savings.

EU Member states have also tried to create common administrative structures. Information exchange on visa-issuing practices and trends in document forgery, as well as mutual assistance in the training of staff, has been organised. The idea to establish common EU visa issuing offices has also been aired, but no concrete result has been reached so far because of legal, practical, and cost sharing difficulties. The idea is that the money saved in visa issuance could be used to improve technical equipment (detection of counterfeit or forged documents, access to online databases of sample travel documents, secured storage conditions for blank visa stickers, etc.).

4.2 Border controls

The Commission and the Member states are convinced that high standard external border controls play a crucial role in the prevention of illegal migration. They are especially important in an area like the Schengen area, where internal border controls have been suppressed. However, European co-operation and harmonisation in this area have been rather modest so far. Article 6 of the Schengen Convention provides that border checks are to be carried out in accordance with uniform principles. However, each Member state can entrust checks and surveillance at external borders to the authorities of its choice and according to its own national structures. Moreover, and despite the above mentioned provision, working methods, staff and resource deployment, as well as management rules, still differ considerably from one Member state to another (Council of the European Union, 2002b).

Therefore, Member states have been recently discussing a large number of measures aiming at increasing their co-operation. Their purpose is to improve the management of the EU external border, and more precisely, 'to ensure that an equivalent level of control and surveillance is exercised everywhere at the external borders' (Council of the European Union, 2002b). Those measures, enumerated in the 'Plan for the Management of the External Borders of the Member States of the EU' and further developed in a recent Communication of the Commission (European Commission, 2003a), can be gathered under five different headings: 'common operational co-ordination and co-

operation mechanism', 'common integrated risk analysis', 'personnel and inter-operational equipment', 'common corpus of legislation', and 'burden-sharing between the Member states and the Union'.

a) Common operational co-ordination and co-operation mechanism

The Member states have decided to establish an External borders practitioners' common unit, tasked with the co-ordination of all the measures analysed in the Plan. This started its work as SCIFA+ during the second half of 2002. They have also carried out joint operations at external borders, such as the Ulysses, Rio IV, Pegasus, Triton, Orca, and Neptune joint operations at the sea borders (Council of the European Union, 2003g: 3). Several *as hoc* centres have also been set up, such as the Centre for Land Borders in Berlin, the Air Borders Centre in Rome, the Maritime Borders Centres in Pireaus and Madrid, the Risk Analysis Centre in Helsinki, and the Centre for Border Police Training overseen by Austria and Sweden. Recently, Member states have also started discussing a Commission proposal to establish a European Agency for the Management of Operational Co-operation at the External Borders (European Commission, 2003c). This would 'exercise day-to-day management and co-ordination tasks and […] respond in time to emergency situations', while the Common Unit would retain 'more strategic co-ordination tasks' (European Commission, 2003c: 3-4).

In the medium term, the Member states are also envisaging a 'wholly interconnected system', comprising the SIS, various electronic databanks on travel documents, and an encrypted Intranet in order to exchange information in real time. They are also examining the possibility of creating a 'rapid response unit' to intervene in cases of illegal immigration crises at the external borders of the Union. Finally, they are discussing the development of common units of border guards drawn from more than one EU Member state. A further step could even be considered later, namely 'the setting up of a European Corps of Border Guards, composed of joint teams, which would have the function of supporting the national services of the Member states, but not replacing them' (Council of the European Union, 2002b: 27).

b) Common integrated risk analysis

The Member states have asked the External borders practitioners' common unit to collect information in order to evaluate the immediate operational needs. The Common Unit set up an *ad hoc* body, the Risk Analysis Centre, which is responsible for recommending possible joint operations (Council of the European Union, 2003h).

In the medium term, the Member states aim at developing common indicators which will be continuously monitored in order to 'draw operational conclusions for action on the ground' (Council of the European Union, 2002b: 23). This will notably take account of technological innovations that could be used to improve border controls.

c) Personnel and inter-operational equipment

In the short term, and in order to decrease quantitative and qualitative disparities in the border controls, Member states have decided to adopt a common syllabus for the training of border guards and a common core curriculum. They have also agreed to share common mobile surveillance equipment. A Centre for Border Police Training has been set up, but the tasks it performs might be taken over by the European Agency currently under discussion. In that regard, the European Agency would also 'follow up on developments in research relevant for the control and surveillance of the external borders' (European Commission, 2003c: 6).

d) Common corpus of legislation

After having revised the Common Manual on Checks at External borders in April 2003, the Member states are envisaging, in the short term, to adopt measures on 'local border traffic', 'particularly with a view to enlargement' (Council of the European Union, 2002b: 26). In the medium term, a handbook compiling all the rules governing border checks and surveillance will be made available for the border guard services.

e) Burden-sharing with the Members states and the Union

In the short term, the Commission and the EU Member states want to lay the bases of a 'genuine sharing of the financial burden' relating to border management. National budgets would remain the main source of investments and planned spending, but there would also be a specific Community budget. This would be used to establish a redistributive mechanism between Member states and, in the longer term, to finance the acquisition of common equipment. After having gathered information from the Member states, the European Commission has established the four main criteria needed to evaluate the burden of each Member state. However, it has underlined that '[t]he main question still remaining is that of the availability of financial resources for an instrument addressing the structural needs identified' (European Commission, 2003a: 16). None of the options put forward so far, such as revising ARGO or using the margins available from 2004 to 2006, is entirely satisfactory.

4.3 Readmission and return policy

The purpose of European co-operation in this field is to establish 'a coordinated and efficient policy based on common principles and standards, and respectful of human rights and human dignity'. Such a policy is needed 'in order to safeguard the integrity of the legal and humanitarian admission system', but also to send powerful signal effects (European Commission, 2002c: 3).

So far, the *acquis* on return issues is relatively modest. Beside the Article 23 of the Convention implementing the Schengen Agreement, only initial standards for expulsion decisions have been set in the Directive (EC) No 2001/40 on the mutual recognition of decisions on the expulsion of third-country nationals. In particular, the Directive underlines the importance of mutual recognition of return decisions among Member states, but it does not establish any binding framework.

The Council adopted a Return Action Programme in November 2002. It notably emphasised the need for immediate enhanced operational co-operation, the

development of integrated return programmes, and the intensification of co-operation with third-countries on return.

As far as *co-operation among Member states* is concerned, a handbook of best practices on return and readmissions has been produced under the Greek Presidency. The Member states are also considering developing a series of measures such as statistics and information exchange, the development of a web-based Information and Coordination Network (ICONet), joint training schemes, and co-operation regarding travel documents.

Member states have been particularly active as regards readmission and transit cooperation within the EU. Progress has been made on the German initiative for assistance in cases of transit for the purpose of removal by air. The Italian Presidency has also tabled a drat initiative for a Council Directive on assistance in cases of transit by land in the context of removal measures taken by Member states against third-country nationals (Council of the European Union, 2003a). Concerning the issue of readmission among Member states of illegally resident third-country nationals, it should be put on the agenda again once the Regulation Dublin II has been adopted.

Moreover, Member states are examining how to extend their co-operation to return operations. Indeed, removals are increasingly carried out with charter flights, which are very expensive. Consequently, Member states are developing a legal framework concerning joint charter flights in order to 'rationalise' repatriation operations and decrease the costs of the removals.[3] Following the bilateral discussions initiated by France with, respectively, Germany and the United Kingdom on this issue, the Italian Presidency has recently tabled a 'Draft initiative for a Council Decision on the shared organisation of joint flights for group removals of third-country nationals illegally present in the territory of two or more Member states'. This lays down that the Member

state which organises a joint flight will inform the other Member states about it, indicating the number of seats available on board the plane used. The other Member states would then notify the Member state which organises the flight whether or not it wishes to take part in the joint flight. The costs would be shared among all the Member states participating in this joint flight (Council of the European Union, 2003b and 2003d). On the same occasion, the Italian Presidency has also proposed to develop a manual for the shared organisation of joint flights, which would set out the operational and security provisions for organising such operations (Council of the European Union, 2003c and 2003d).

Member states are also considering setting up practical arrangements for the compensation of the financial imbalances resulting from the application of the above mentioned Directive on the mutual recognition of expulsion decisions. In this framework, the issuing Member state would reimburse the enforcing Member state transport costs, administrative costs, mission allowances for the escorts, accommodation costs for the escorts and the returnee, as well as medical costs (Council of the European Union, 2003i).

However, enhanced cooperation can only be successful if Member states share common minimum standards. Those will have to be set up regarding removals, expulsion decisions, measures terminating legal residence, conditions of detention pending removal, and proofs of exit and re-entry. Even more importantly, Member states will have to agree on mutual recognition of return decisions. In other terms, an expulsion order issued by one Member state should be enforced in another Member state without the latter having to issue a new expulsion decision.

Moreover, the EU Member states have decided to develop *integrated return programmes*. Those are programmes covering all the phases of the return process and tailored to

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[3] According to Statewatch (2003), bilateral removal flights have already taken place, such as that organised by Spain and France to Romania in March 2003, as well as the return operation carried out by Britain and

specific countries. Those are chosen by taking 'the specific situation, the case load and the needs of the countr[ies]' into account (European Commission, 2002c: 23). A financial instrument could be created to cover voluntary return, forced return, and support for return of irregular migrants in transit countries.

As regards the intensification of *co-operation with third countries*, the Commission and the Member states are considering enhancing administrative and technical co-operation for the reception and reintegration of returnees (European Commission, 2003b). They also want to sign readmission agreements with a series of countries, which also include transit provisions. So far, such an agreement was only signed with Hong Kong in November 2002, whilst negotiations are still under way with Russia, Pakistan, Macao, Morocco, Sri Lanka, and Ukraine. The Council has also decided to start negotiations with Albania, Algeria, China, and Turkey.

Moreover, it has been decided to include readmission clauses in all the association and cooperation agreements to be negotiated by the EU in the future, as is already the case in the Cotonou Agreements signed with the ACP countries.

4.4 Carriers' sanctions

EU Member states have gradually enhanced their cooperation regarding carriers' liability, but the *acquis* in this area is still fairly limited. Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 lays down the carrier's responsibility for returning those aliens who are refused entry. Carriers are also obliged to check that their passengers possess valid travel documents. The Directive EC No 2001/51, adopted in June 2001, establishes three optional modes of penalties for the carriers who do not fulfil their obligations.

However, the European Commission considers that other provisions are necessary to attain proper harmonisation at EU level. Indeed, the Directive covers passenger (and not

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France to Afghanistan in April 2003.

goods) transport and only partially rail transport. Moreover, Member states have retained discretionary powers regarding the implementation of those provisions.

Moreover, at the moment, Member states are discussing a Spanish initiative with a view to adopting a Directive on the obligation of carriers to communicate passenger data. According to this, carriers would have to transmit to the authorities (1) information concerning the third-country nationals they will carry to a European Member state and (2) information concerning the third-country nationals who will not have used their return ticket by the date it expires (Council of the European Union, 2003e and 2003f). Those personal data would then be saved temporarily by the authorities in charge of border controls. The carriers who do not comply with those regulations would be sanctioned (fines or other sanctions).

4.5 Employers' sanctions

Illegal employment seems to be on the increase within the EU, though it is, by definition, difficult to evaluate this accurately. However, measures to fight against it have remained modest at the EU level, since it is a very sensitive issue in most Member states.

The Council adopted a Recommendation in 1996 on combating the illegal employment of third-country nationals. The Commission, in its Communication on illegal work in 1998, called for a harmonisation of sanctions against illegal employment in order to eliminate 'competitive advantages'. Moreover, in its Communication on a Common Policy on Illegal Immigration (European Commission, 2001a), the Commission proposed to raise the cost of hiring illegal migrants by 'a number of measures with financial impact on employers'. It also suggested that employers of illegal workers should be obliged to reimburse all costs related to the return of illegal residents. However, the Council has not tackled this specific issue since the Recommendation of 1996. This has only been dealt with indirectly, as in the Employment guidelines which, since 2000, have committed Member states to combat undeclared work in general.

4.6 Fight against smuggling and trafficking in human beings

Combating smuggling and trafficking in human beings has become crucial in the fight against illegal migration. Indeed, more and more migrants use the 'services' of smugglers or traffickers to enter into the Member states. Therefore, the EU has adopted an increasing number of provisions in this field.

As far as smuggling is concerned, Article 27 of the Schengen Convention already obliged its signatories to 'impose appropriate penalties on any person who, for financial gains, assists or tries to assist an alien to enter or reside on the territory of one of the Contracting Parties in breach of that Contracting Party's law on the entry and residence of aliens'. In November 2002, the Council also adopted a Directive defining the facilitation of unauthorised entry, transit and residence, as well as a Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence.

Regarding trafficking, in July 2002, the Council adopted a Framework Decision on combating trafficking in human beings. It provides a common definition of trafficking and a common level of penalties, which are quite severe, *i.e.* up to eight years of imprisonment if the offence has been committed in specifically defined circumstances. Such a crime also falls within the scope of the European arrest warrant as adopted by the Council.

However, dismantling the criminal networks involved in smuggling and trafficking requires precise and sensitive information. Therefore, it is crucial to encourage the victims to co-operate with the law enforcement authorities in their fight against smuggling and trafficking in human beings. This is why the Commission has tabled a proposal on a short-term residence permit which would be issued to those victims of smuggling and trafficking who co-operate with the authorities.

Furthermore, Member states are also examining whether Europol could be given more operative powers to enable it to work with national authorities on trafficking and

smuggling of human beings (Council of the European Union, 2002a). It could provide more operational support with intelligence bulletins, as well as support joint investigations and operations. More generally, a series of legal and practical instruments gradually introduced by the EU in closely related matters, such as police and judicial cooperation, could also be mobilised to combat smuggling and trafficking in human beings (European judicial network, liaison magistrates, Eurojust, Convention on Mutual Legal Assistance).

Finally, the Commission has also stated that criminal punishment alone is not sufficient. It has proposed to raise the cost of illegal immigration by several measures, such as the freezing and confiscation of the assets gained in smuggling and trafficking activities, as well as the confiscation of the means of transport used for the smuggling and the trafficking. Member states are also considering obliging traffickers and smugglers to reimburse all the costs relating to the return of illegal aliens, including costs for social welfare and other public expenditure during the stay (European Commission, 2001b; Council of the European Union, 2002a).

5. Is the EU fight against illegal migration compatible with the forthcoming accession of the CEECs to the EU?

Having considered the fight against illegal migration in both the candidate countries and the EU, it is now time to examine more closely to what extent the CEECs' accession to the EU is compatible with the way the EU is developing its own policy against illegal migration. First of all, it is important to underline the conspicuous absence of the issue of enlargement in the debates about illegal migration. A lot of documents relating to illegal migration do not contain one single reference to the forthcoming accession of the CEECs and their specific problems in this area. In that regard, a noteworthy exception is border management.

In this area, there have been regular references to the CEECs, and the fact that they will soon be in charge of controlling large sections of the external borders. This has been

accompanied by the discussion and introduction of a series of general measures at the EU level, aiming explicitly or not, at strengthening the CEECs' control and surveillance capacities at the EU external borders. Among them, one can cite personnel exchange, common standards of training for border guards, setting up of joint operations, common purchase of material, setting up of an External borders practitioners' common unit, development of a burden-sharing system, etc. Such measures are likely to improve the fight against illegal migration in the CEECs – and therefore, in the EU in general-, as they can, at least partially, remedy their shortages in experience, equipment, trained staff, and budget allocated to this issue.

However, as mentioned earlier, border management is an exceptional case. The other instruments used to fight against illegal migration have largely been developed by the EU without taking seriously into account the challenge represented by the CEECs' accession. This becomes clear when considering the main characteristics of the EU policy on illegal migration.

a) An increasingly sophisticated and expensive policy

The EU is developing an increasingly sophisticated and, therefore, expensive policy. This is notably the case as regards its common visa regime. The EU Member states have decided to adopt high security standards for visas and residence permits for third-country nationals. Those must already include a photograph produced to high security standards and they may soon have to include biometric identifiers as well. Moreover, Member states have decided to develop the European Visa Identification System. This online common database will contain details of all the visas applied for and refused, as well as the electronic photos, biometric data, and scanned travel documents of the visa applicants. In the European Commission's own words, 'the use of biometric data at such an unprecedented scale will bear a significant impact on the system, both in technical and financial terms' (European Commission, 2003a: 4-5). Indeed, according to its feasibility study, the whole system should cost between 130 and nearly 200 million euros, depending notably on the biometric identifier chosen.

The same trend can be identified as far as border controls are concerned. The Member states regularly underline the importance of developing and using new technologies - such as radars, satellites, electronic databases, digitised biometric data and remote sensing techniques – in order to improve border checks and surveillance. Nevertheless, such technologies are very expensive, as confirmed by the Commission which talks of 'the very substantial size of the investments and operational costs arising from the management of external border surveillance' (European Commission, 2003a: 15).

The problem is that the CEECs are still struggling to acquire the - sometimes even- basic material needed to combat illegal migration up to EU standards and to train their staff to use it. In such conditions, one can expect them to have a lot of difficulties to keep up with the last technological innovations as suggested by the Commission and the current EU Member states.

This could only be possible with highly substantial amounts of help from the EU. So far, the CEECs have benefited from the European Commission's PHARE Programme of financial and technical assistance, but regularly complained that the level of help was inferior to their needs. At the Copenhagen European Council (2002), the EU Member states also agreed on a 'Schengen facility' for 2004-2006, *i.e.* a budget to prepare the new Member states to take over the Schengen *acquis*. Whilst, in total, the eight CEECs were requesting at least 1,747 million Euros[4], they were only granted 970 million Euros (*Uniting Europe*, 2002: 2).

Once they have joined the EU, the CEECs will also have access to the new burden-sharing mechanism that the EU Member states are currently discussing in the field of border management. However, such a mechanism might not be established in a near future, if Member states do not easily reach an agreement. The long-lasting negotiations over burden-sharing in the field of asylum have shown how difficult and cumbersome such negotiations can be. Moreover, though they will undoubtedly benefit from the burden-sharing mechanism, the help actually provided may be very modest compared

to the total costs the CEECs will have to bear, because of the constraints affecting the Community budget.

b) A policy neglecting the fight against illegal employment

So far, the EU has not made much progress in developing common measures to combat illegal employment in general, including the employment of illegal residents. As recognized by the European Commission, this remains a very 'sensitive' issue for several Member states. Consequently, in the EU fight against illegal migration, employers' sanctions remain only a 'key flanking measure' of visa regime, border management, and return policy.

This is an important impediment for any policy aiming at fighting against illegal migration, given the role of 'pull factor' played by any labour black market allowed to flourish. This is all the more so when the labour black market reaches an important size and is still growing, as is the case in most of the CEECs. Furthermore, those countries do not have any tradition of combating illegal employment. Therefore, this is a field where strong EU incentives to do so would be very useful.

c) A policy which does not take into account the CEECs' external relations

The European Commission has regularly underlined the importance of the Union's external relations as one of the criteria used to determine the third countries whose nationals are subject to the visa requirement. Nevertheless, the current EU Member states have considered that such an argument does not apply to the candidate countries. Those have not been able to secure any special arrangements preserving their relations with some countries which are not going to join the EU in 2004. Therefore, they have had to align themselves on the EU visa and border management regimes.

However, those are going to disrupt cross-border economic links, political relations with neighbouring countries, and links with ethnic minorities residing on the other side of the border. This is especially the case for Hungary – which worries about the fate of

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[4] Figure taking only Poland, the Czech Republic, Hungary, Slovenia, and Latvia into account.

thousands of Hungarians living in Romania and Serbia – and Poland – which has developed strong cross-border links with Ukraine (Vachudova, 2000: 153-54; Morawska, 2001; Grabbe, 2002: 99-101). This raises the question of the CEECs' willingness to implement strict visa provisions and border controls after their accession to the EU. They have all tightened their visa and border regimes in order to qualify for EU membership, but it remains to be seen whether they will not become more lenient once they have gained accession (Monar, 2001: 43-44).

d) A policy not sustained by sound asylum and legal labour migration policies

Besides resorting to increasingly sophisticated and expensive instruments to detect illegal migrants, prevent their entry or expel them, another way of fighting against illegal migration is to try to decrease the number of people using illegal channels to migrate. This can be done by providing other alternatives: legal labour migration channels for economic migrants and asylum regimes for persons fleeing their country and in need of international protection.

This strategy would be particularly timely for the EU. Indeed, it is about to enlarge to countries confronted to increasing illegal immigration flows, which means that the total numbers of illegal migrants the EU will have to deal with will substantially grow. Therefore, the system put into place by the EU to fight against illegal migration risks becoming 'overloaded'. There will be more high security standards travel documents to issue, more border controls to carry out – using increasingly sophisticated material to counter the ingenuous means used by the smugglers and traffickers -, more controls to carry out on the labour market, more illegal aliens to return, etc. Therefore, the EU policy against illegal migration would gain in efficiency by being accompanied by sound legal alternatives. However, this has not been the case so far and there is no strong indication that it is likely to evolve in the near future.

Regarding the EU asylum regime, it has been depicted by most scholars as increasingly restrictive. From the mid-80s onwards, asylum had become a 'competitive market' in

Europe, each Member state tightening strategically its legal provisions in order to dissuade people from seeking asylum on their territory (Barbou des Places, 2002). Once the EU Member states started co-operating on this matter, they reinforced this exclusionary trend by transferring to the EU level principles such as 'safe third-country', 'safe country of origin', and 'manifestly unfounded application'. Moreover, their common list of countries whose nationals must be in possession of a visa to enter the EU includes countries such as Afghanistan, Iraq, and Sri Lanka, which are amongst the countries sending the highest numbers of asylum-seekers to the EU Member states. Therefore, Barbou des Places (2002: 26), like several other scholars, argues that 'none of the norms enacted since 1999 gives hope for the definition of a more generous asylum policy'. Therefore, the growing restrictiveness of the asylum channel incites more and more people, including people fleeing persecution in their country, to turn to the illegal channels of migration when trying to enter into the EU.

The legal labour migration channel is not less restrictive. Though there are some national schemes allowing for temporary labour migration in some EU Member states – such as the so-called 'Green Card' scheme in Germany -, there is still no labour legal migration channel at the EU level. Following the United Nations, the European Commission has argued, notably in its Communication on a Community Immigration Policy, for a 'comprehensive migration policy, which takes account of the changing economic and demographic needs of the EU'. Indeed, there is a growing need for both high skilled workers and low skilled workers on the legal labour market of most EU Member states. However, some Member states are still very reluctant and little progress has been made on this issue.

Even if the Commission is right when underlining that 'opening or re-opening legal channels for migration cannot be seen as a panacea against illegal migration' (European Commission, 2001a: 6), it can nevertheless play a substantial role. It would prevent a lot of third-country nationals from migrating illegally, and, therefore, ease the burden of controlling illegal migration in terms of staff and equipment required.

6. Conclusion

Looking at the recent developments of the EU policy on illegal migration, it appears that the EU has taken the eastward enlargement into account when developing its border management strategy. This is understandable as the change in the EU external border is one of the most obvious consequences of enlargement. It is also in line with the high importance generally attributed to border controls in the fight against illegal migration, though this instrument is actually powerless in a substantial number of cases – *i.e.* all the persons entering a country legally, but either 'overstaying' after the expiry of their visa either starting working though there are not allowed to.

However, in doing so, the EU has neglected to pay enough attention to the consequences of enlargement on the other instruments used to combat illegal migration. Consequently, it has developed some instruments (*e.g.* visa regime) in an inadequate way or has failed to seriously develop some instruments (*e.g.* employers' sanctions) which could have played a crucial role in an enlarged EU, given the specificities of illegal migration in the CEECs. Consequently, one can conclude that the EU fight against illegal migration, in its current developments, is only partially compatible with the next eastward enlargement. This also raises serious doubts about its future efficiency.

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