Preventing Illegal Immigration: Reflections on Implications for an Enlarged European Union[1]

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Summary

This paper reflects the implications of enlargement for the EU's migration policy, particularly for the fight against illegal immigration, the management of external border controls, and the application of the Schengen acquis after accession. Structural and procedural problems that might be aggravated after enlargement are also analysed.

I.   The Framework

The fight against illegal immigration has been a priority for previous Presidencies of the Council of the EU, as it also is for the Greek Presidency. Illegal immigration is a matter of major concern for most Member States of the EU; Greece, with its particular geographical situation and its maritime landscape dotted with thousands of islands, has a justifiable interest in the management of external border controls and the fight against illegal immigration.[2]

Recent polls of EU citizens[3] have shown that freedom and security rate high in their concerns. Immigration involves both freedom of movement (in the area without internal border controls of the so-called Schengen Member States) and security (due to the fact that immigration as a whole, and particularly illegal immigration, is still seen today by many as a security issue). Immigration used to be tackled as a technical problem, to be discussed between the Governments of the Member States, but has evolved a global perspective that takes into account its legal, political and social aspects, as well as its strong connection to the Union's external action.

For example, at the Seville Council, held during the Spanish Presidency, immigration was a priority on the agenda; the Presidency and the United Kingdom proposed that economic "sanctions" should be taken against third countries which would not comply or co-operate with the EU's policy on the prevention of illegal immigration.[4] However, other Member States strongly opposed this proposal, arguing that it would affect human rights issues and that it would be difficult to impose it on third countries; the final text approved makes reference to a possible review of relations with third countries which don't co-operate with the EU on migration issues.[5] Following the Seville Council Conclusions, the European Commission presented on December 2002 a Communication on the integration of migration issues in the EU's relationship with third countries.[6] Another interesting illustration of this evolution was the proposal to create an inter-pillar[7] high level group to discuss migration and to address its root causes and implications in a horizontal, comprehensive way: not only concentrating on repressive measures, but also on integration, information, external policy, co-operation with third countries and development aid.[8] Well-intentioned though this initiative was, it had limited practical results due to difficulties in implementing the measures approved; in fact, those measures implied that migration policy should be integrated into the Union's foreign policy and development policies. In addition, the co-operation of third countries in implementing the proposed action plans was vital, but was rather difficult to accomplish, since the target countries of the action plans regarded this as a unilateral application by the EU.

To understand the phenomena of the fight against illegal immigration and the EU's immigration policy today, we have to bear in mind that Europe was traditionally an *emigration* area. Today most Member States still have very large national communities living abroad, either in other Member States or in other continents of the world, notably North America and Australia. This traditional culture of emigration might explain how difficult it has been in recent decades for EU countries to recognise, acknowledge and adapt to the fact that they are indeed, today, countries of *immigration*. In historic terms, this phenomenon is relatively recent and quite dramatic, due to the steady increase of large numbers of immigrants and asylum seekers, and to the problems of illegal immigration and, more recently, trafficking in human beings. However, if the traditional culture of immigration can explain some reluctance to adapt to being a host country, it does not explain very well the difficulties in tackling legal migration and the integration of legal immigrants which, in a coherent migration policy that encompasses the dynamics of inclusion and exclusion, have to be seen as a counterpart of the fight against illegal immigration.

Many still see immigration as a security issue, which must be dealt with through repressive measures and the

strengthening of border controls, and through exchange of information and close co-operation between the Member States. However, many changes have recently taken place in the EU's policies: following a report from the United Nations on world demographic tendencies and projections,[9] a discussion was opened on the need to have a more open immigration policy in Europe, rather than a zero policy, which is no longer justifiable or desirable. This remains valid although a report from the European Commission stated that immigration alone can't correct the effects of an ageing population.[10] Even recognising this much, harmonisation at EU level on this matter is scarce, and the majority of the Member States still maintain restrictive immigration policies and limited measures for the active integration of third country nationals legally as residents in their national territories.[11]

The approach of the EU to the fight against illegal immigration includes measures on border controls, on preventing illegal residence and illegal employment in the territory of the Member States, and on penalties for those who provide aid for illegal immigration and facilitation of unauthorised entry, as well as on a policy for the return of illegal immigrants, based on the conclusion of readmission agreements with several countries of origin and transit.[12] The conditions of entry and residence, the issuing of visas, including family reunification and integration measures, constitute an important part of the EU's migration policy, that should involve a balanced approach between repressive and integration measures.[13]

Further, immigration matters are closely connected with the fight against serious crime, organised and transborder crime, and the fight against terrorism. EU Member States are parties to the United Nations Convention against Transnational Organised Crime that features two additional Protocols, one against the Smuggling of Migrants by Land, Sea and Air and another to Prevent, Suppress and Punish the Trafficking in Persons, especially Women and Children.[14] At the EU level, the strong determination of Member States to fight these forms of crime raised concerns from the United Nations High Commissioner on Refugees (UNHCR) as to the situation of asylum seekers caught in situations of smuggling or trafficking, and the protection of victims of trafficking.[15]

It is in this light that the challenges of **enlargement** vis-à-vis the fight against illegal immigration at EU level have to be analysed.

II.   The Challenges
Several factors may indeed have an influence on the current European strategy for tackling illegal immigration after enlargement; they include formal, structural and legal factors, all of which have some bearing on the matter:
1. co-ordination difficulties (in a Europe of 25 national systems, after 2004)
2. shifting of external borders to the east
3. future changes in decision making procedures.

1.   Co-ordination after Enlargement
Immigration and the policies of admission and exclusion from the national territories are acutely sensitive issues for the Member States. It is quite paradigmatic that, even though immigration is included, since 1999, in Title IV of the EC Treaty, decisions still have to be taken by unanimous voting on most issues.[16] The difficulty in co-ordinating the extremely different systems that currently exist in the Member States has to be recognised. All Member States have different national systems and structures for analysing asylum requests, for issuing visas and residence permits, for the management of borders and for co-ordinating and exchanging information amongst their national authorities. The need for harmonisation at EU level, for the creation of common systems, common standards and a common approach, has been in some ways curtailed by national difficulties in changing legislation and structures, by pressure from public opinion and by the cumbersome decision making procedures on immigration issues at EU level.

If co-ordination and harmonisation face insurmountable difficulties today, how will work progress in a Europe of 25?.[17] Candidate Countries have been changing their legislation, structures and procedures in line with the complex 'acquis communautaire', in order to adapt them to EU standards – but will it be enough?.

Let's take as an example the management of external border controls, an area where good coordination and exchange of information is vital: border control authorities in the Member States range from military bodies to civil services, from paramilitary structures to police forces. In some countries, different entities are in charge of land, maritime and air borders. In others, several entities are involved and competencies are divided between immigration controls and border patrols. The complexity of the structures, procedures and entities involved might have contributed for the delay in creating a European Border Guard: a proposal that was, after initial enthusiasm, left for the longer term.[18]

Another problem of co-ordination concerns the exchange of information. The Member States cooperate closely on exchanging information on migration flows, specifically through the Council working group CIREFI (Centre d'information, de réflexion et d'échanges en matière de franchissement des frontières et d'immigration) – this will become even more complex with 10 new countries joining, making it essential to have thorough analyses of the information gathered.

2.   External Border Controls to the East
The second factor which could influence the EU's migration policy after enlargement is the shifting of external border controls to the east. The Schengen Agreements gave a new perspective to immigration policies by abolishing internal border controls, creating an area of freedom of movement, and by introducing a system of compensatory measures to cope with a possible increase in organised crime; consequently, external border controls were strengthened, uniform short visas were created and police and judicial co-operation was

stepped up with the introduction of the Schengen Information System. Schengen functioned as a laboratory for the EU Member States and constituted a form of closer co-operation for those who wanted to move more quickly towards the objectives of achieving an area without internal borders and common immigration policies. Also, fines were stepped up for carriers transporting people without appropriate documents, and for aiding illegal immigration.

But Schengen harmonisation is far from perfect: uniform visas only allow for short stays, national visas can be issued for longer periods (making it difficult to control the movement of those citizens holding national visas, since there are no internal border controls), and the situation of long term residents and their rights was not regulated.

The Schengen space pushed away external border controls to an exterior belt, that should be so much stronger as it weakest link.[19] Abolishing the borders altogether would put in peril the whole concept of the State as we know it; this makes the area of freedom of movement an even greater achievement, by managing to push out, to an exterior belt, the immigration border controls of the Member States, and by allowing each one of them to control the entry of third country nationals to the whole Schengen space. It functions as a "ring", whose role is to protect and to divert pressure from the centre to the exterior ring.

On the other hand, the tightening of border controls might lead to an even greater desire to avoid them. In fact, the strengthening of border controls and a strict immigration policy on admission might be a key pull factor for immigrants (if the doors are closing, something worthwhile must be inside), for aid to illegal immigration and trafficking in human beings (the development of organised criminal networks which profit from immigrants desire for a better life) and for the difficulties of the return process (immigrants will be reluctant to leave, since they'll know it will be virtually impossible to return).

As regards enlargement, Member States concerns have been identified primarily as:
- On the one hand, that the freedom of movement and the lifting of internal border controls will lead to a migration flow from candidate countries to current Member States, swamping the labour market.

From an historical perspective, and analysing previous enlargements, there is apparently little justification for this fear; there was no massive influx to other Member States in the past – indeed, quite the contrary. Added to the fact that economic conditions improved in the new Member States, an important psychological factor for citizens of the new States is acknowledging their right to freedom of movement and establishment, rather than actually exercising this right. The European Commission confirmed that the effect would be limited and more cross-border mobility can be expected initially, from east to west, even if some countries will be more affected than others.[20]

- On the other hand, concerns of an influx of illegal immigration from third countries to the east are connected with the need for integrated border management, for teams of joint border controls and also for burden sharing, both financial and operational.

The Candidate Countries will in the future also apply the Schengen "acquis", in full, and have been preparing for the lifting of external border controls through legislative, operational and technical measures. Internal border controls will not be automatically removed after accession; this depends on the evaluation of the standards and the compliance with the "acquis" by the Schengen Evaluation Committee[21]. Enlargement can also bring additional complexities to this area due to geographical factors (neighbouring countries, the extent of the candidate countries' land borders), structural factors (decision making, voting) and solidarity (the burden sharing proposed for border control measures).

3. *Decision Making Procedures*
The restructuring of this area of complex decision making, where decisions taken are not applicable to all Member States (there are opt outs from Title IV for the UK, Ireland and Denmark) and where different legal instruments apply,[22] not all of them legally binding and not all with direct effect, is urgent.[23] Even if, in principle, the co-decision procedure will apply after the five-year transitional period, this will not be automatically effective and will need a decision taken unanimously by the Council, in each and every area. Therefore, it is not yet known to which areas the codecision procedure and qualified majority will apply. The Treaty of Nice, which recently entered into force, anticipated the application of co-decision and qualified majority voting for some areas.[24]

Another important element is the fact there there will be no opt outs for the candidate countries, as regards Title IV TEC or the application of the Schengen acquis – both will apply fully and without exceptions such as those which are currently valid for three Member States, according to the respective Protocols annexed to the Treaty of Amsterdam.[25]

The Convention on the Future of Europe (Working Group X, on Freedom Security and Justice) studied in detail the problems involved, both at the level of simplifying the instruments and integrating the area into a "pillarless" structure that would take into account some particularities, and at the level of reviewing decision making procedures and the underlining principles of this policy area. The final report from Group X (CONV 426/02, of 2 December 02) revealed divisions on some controversial proposals, which were left for the European Convention to decide upon and address in a wider context.[26]

However, the results that will come out of the European Convention are directly relevant to this area: if the pillar structure is abolished, migration policy as well as police and judicial cooperation in criminal

matters will be integrated into a coherent structure. It remains to be seen whether co-decision will apply, and what exceptions and specific conditions will be taken into account for some policy areas.

Conclusions

The accession of the Candidate Countries (10 in the near future) will certainly have an impact on the EU's migration policies, as it will undeniably have in other areas of Community action. The most visible impact will be the shifting of border controls to the east (when Schengen is applied), as well as the increased external land border of the EU.

A problem might arise if neighbouring Candidate Countries start applying Schengen at different times, and consequently remove internal border controls at different moments in time, which might call for a co-ordinated regional approach, in order to save efforts and resources.[27, 28]

In general, the impact of enlargement should be considered positively, taking into account the considerable efforts put into place, on one hand, by the Candidate Countries in order to be ready and comply in full with the acquis, and on the other hand by the EU (both the Commission and the Member States) through several training and twinning programmes[29] in support of those efforts. Further, the reforms that are taking place at EU level and through the European Convention and its Forum lead to expectations of improvement on the clarity, efficiency and restructuring of the decision-making procedures.

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NOTES

[1] Paper adapted from a speech on "The EU's response to illegal immigration as a potential factor of instability in the enlarged European Union", given at an advanced training seminar for the members of 'Team Europe' (European Commission) on "Justice and Home Affairs in the European Union: towards the creation of a common area of freedom, security and justice", Brussels, 29 November 2002.

[2] The Greek Presidency's message starts with a mention to the right to security ("Our message reflects our objective of promoting a community of values which recognises the citizen's right to security, democracy (…)") and further refers to "The Union's policy on immigration, asylum and the management of external borders (…)" as "one of the most important priorities of the Greek Presidency.". Immigration figures as the 3rd priority in the Presidency's list, with a focus on the social and economic integration of legal immigrants, as well as on the control of illegal immigration. Link to the Presidency's website: www.eu2003.gr

[3] Link to Eurobarometer's website: http://europa.eu.int/comm/public_opinion/

[4] This would particularly affect countries of origin and of transit of immigrants and asylum seekers.

[5] The Seville Council's Conclusions nºs. 33 to 36 refer to the Integration of immigration policy into the Union's relations with third countries. The Council urged that any agreement between the EU/EC and any country "should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration." It highlighted "the importance of ensuring the cooperation of countries of origin and transit in join management and in border control", adding that the "Union is prepared to provide the necessary technical and financial assistance". Further, the European Council considered necessary "to carry out a systematic assessment of relations with third countries which do not co-operate in combating illegal immigration" and emphasised that "inadequate co-operation by a country could hamper the establishment of closer relations between that country and the Union". Finally, in case of unjustified lack of co-operation, the Council may adopt measures under its external policy and other policies.
Link to the Seville Council's Conclusions: http://europa.eu.int/

[6] Link to the text in http://www.ecre.org/eu_developments. The Commission is also planing to present a proposal for a regulation establishing a legal base regarding cooperation with third countries in the area of migration (in "Biannual update of the scoreboard to review progress on the creation of an area of "freedom, security and justice" in the European Union", COM(2002) 738 final, 16.12.02).

[7] Inter-pillar in the sense that it did not only pertain to Third Pillar issues (Justice and Home Affairs), but also to Second Pillar (External Policy) and even First Pillar (for example, development aid). This approach focuses on the overall root causes of migration pressure and presents global inter-pillar proposals for solutions.

[8] The High Level Working Group on Asylum and Immigration, created in December 1998, by the General Affairs Council of the EU, initially drew up action plans for five countries: Afghanistan and the region, Iraq, Morocco, Somalia and Sri Lanka.

[9] United Nations Secretariat – Department of Economic and Social Affairs – Population Division, *Replacement Migration: Is it a Solution to Declining and Ageing Population?,* 21 March 2000. According to this report, an average annual net migration of 857.000 persons would be needed in order to prevent the decline in EU's population, in the next 50 years.

[10] The Commission's Report on "*The Social Situation in the European Union 2002",* http://europa.eu.int/comm/

[11] The European Council of Tampere, specially dedicated to Justice and Home Affairs and held under Finish Presidency, in 15/16 October 1999, called for the fair treatment of third country nationals who are legally residents, in particular long term residents, stating that a "more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens" and acknowledging the need for approximation of national legislations on the conditions for admission and residence (numbers 18 to 21 of the Presidency's Conclusions)

[12] Vide the European Commission's Green Paper on a Community Return Policy on Illegal Residents, COM (2002) 175 final, 10.04.02 and the recent Council Directive 2002/90/EC of 28 November 02, defining the facilitation of unauthorised entry, transit and residence, OJ L328/17, 5.12.02.
Link to the document: http://europa.eu.int/eur-lex/

[13] The Council recently reached an agreement on a Directive on the right to family reunification for third country nationals who reside lawfully in an EU Member State, the first community legal instrument to be adopted in the area of legal migration (28.02.02); see site www.europa.eu.int

[14] The Convention and its Protocols were adopted by resolution A/RES/55/25 of 15 November 2000, of the UN General

Assembly, signed in Palermo, and is not yet in force. More information on the texts, background and signatory states in website http://www.undcp.org/

[15] In this context, the EU approved Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [Official Journal L 203, 01.08.2002]. Link to the document: http://europa.eu.int/scadplus/
See also the proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (COM(2002) 71 final, 0043/CNS).

[16] With the exception of certain aspects of visa policy, to which qualified majority already applies (article 67 TEU). The Nice Treaty, that entered into force on 1 February 2003, amended article 67 TEU and introduced qualified majority for other areas, under certain conditions (OJ C 80/1 of 10.03.01).

[17] Reference to 25 members based on the "green light" given by the Commission to 10 candidate countries for accession in 2004.

[18] Vide the Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, COM (2001) 672 final, 15.11.01 and the Communication from the Commission to the Council and the European Parliament of 7 May 02, Towards integrated management of the external borders of the Member States of the EU (COM (2002) 233). See also the final report of the feasibility study for the setting up of a European Border Police, under italian leadership, on www.statewatch.org/news/2002/sep/Euborderpolice.pdf.

[19] "The European Union's external borders are still sometimes seen, rightly or wrongly, as the week link in the chain, affecting the member states' domestic security, particularly in an area without internal frontiers. And in all the opinion polls concerning the prospect of enlargement, the public are reminding us of the need to preserve or better still raise the level of domestic security in the EU. As I see it, the time has come to adopt a consistent common approach in close cooperation with future member states." – António Vitorino, Justice and Home Affairs Commissioner, in New Europe – The European Weekly, Nº 509, February 23 – March 01, 2003, http://www.new-europe.info/May2002.htm.

[20] See note 10 above.

[21] This Committee was set up by the Schengen Executive Committee "to establish whether all the preconditions for bringing the (Schengen) Convention into force in a candidate State thereto have been fulfilled and secondly to ensure that the Schengen acquis is properly applied by the States already implementing the (Schengen) Convention, notably by pinpointing problems and proposing solutions." (Decision

of the Executive Committee of 16/09/98, setting up a Standing Committee on the evaluation and implementation of Schengen, SCH/Com-ex (98)26 def., published as part of the Schengen acquis as defined by Council Decision 1999/435/EC of 20/05/99, in OJ L239, 22/09/00). The Evaluation Committee will verify that "all of the preconditions for the practical application of the Schengen Convention and the abolition of checks at the internal borders have been fulfilled."

[22] Although migration policy is now communitarised, some issues like for example trafficking in human beings are relevant both to the fight against organised crime (under the Third Pillar, having it's legal basis in Title VI of the TEU) and to the prevention of illegal immigration (under the First Pillar, having it's legal basis in Title IV of the TEC); instruments approved under the remaining Third Pillar (Police and Judicial co-operation in criminal matters) are Decisions, Common Positions, Framework Decisions and Conventions.

[23] The positions of Denmark, and of the UK and Ireland are detailed in the respective Protocols annexed to the Amsterdam Treaty, as well as in the Protocol that integrated the Schengen acquis in the EU.

[24] See note 16 above.

[25] See note 23 above.

[26] Link to the Final Report at http://register.consilium.eu.int/ and to other documents produced by Working Group X at http://european-convention.eu.int/

[27] The removal of internal borders controls is not automatic after accession, but depends on the verification of the conditions associated with the Schengen "standards" and the full compliance with the acquis, which will be accessed by the Schengen Evaluation Committee in each Candidate Country (see note 21 above).

[28] In practice, a former border of a Candidate Country with another Candidate Country may become an external border of the EU and, after a period of time, become an internal border, when the other Candidate Country is also ready to apply Schengen and remove internal border controls. This involves costs for equipment and human resources alike. The Nordic Countries, for example, applied Schengen at the same time, in March 2001, in order not to disrupt the Common Travel Area that already existed between them.

[29] As the PHARE programme (http://europa.eu.int/comm/enlargement/pas/phare/), a pre-accession instrument financed by the European Communities to assist the applicant countries of central Europe in their preparations for joining the European Union, and the ARGO programme (Council Decision 463/EC of 13 June 2002, OJ L161, 19/06/02), an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration, that supports projects in which Candidate Countries participate. ❑