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CEPS WORKING DOCUMENT NO. 179
DECEMBER 2001

SHAPING EUROPE'S MIGRATION POLICY

NEW REGIMES FOR THE EMPLOYMENT OF THIRD COUNTRY NATIONALS: A COMPARISON OF STRATEGIES IN GERMANY, SWEDEN, THE NETHERLANDS AND THE UK

JOANNA APAP

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ISBN 92-9079-361-9
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Shaping Europe's Migration Policy

New Regimes for the Employment of Third Country Nationals: A Comparison of Strategies in Germany, Sweden, the Netherlands and the UK

CEPS Working Document No. 179, December 2001

Joanna Apap*

Abstract

During the 1990s, Justice and Home Affairs moved, in an unexpected way, to centre stage in the European debate. Concern had been growing about immigration policy since the Maastricht Treaty institutionalised the third pillar of the European Union. This concern had been stimulated by several factors – the persistence of irregular migration and tragic incidents, such as the one in Dover in July 2000 in which 58 Chinese nationals lost their lives trying to enter illegally into the United Kingdom, the need for immigrant workers in some sectors, and the spectre of an ageing European population. More generally, the Treaty of Amsterdam, since its entry into force in 1999, represents a major development in overall Justice and Home Affairs policy, and the implementation of the treaty provisions in Justice and Home Affairs was described as the next major EU initiative after the single currency.

Moreover, the Conclusions of the European Council in Tampere (15th and 16th October 1999); gave an additional push for the adoption of the measures considered necessary for the realisation of an area of Freedom, Security and Justice, reaffirming traditional and integrating new principles in these fields.

In March 2000, a very controversial report of the United Nations based on demographic considerations has been published (UN Secretariat ESA/P/WP.160). Resting on the analysis of the current population trends in the world and projections for the period 1995-2050, this report pleaded for "replacement immigration" in order to compensate for the inevitable population decline in Europe and in other parts of the world. The "provocative" observations of the report stimulated an intense public debate in the European press on this question, but they also contributed to re-open the issue on immigration in the European institutions and member states at a time of reflection on how to implement the new Amsterdam provisions.

A proposal for a Directive dealing with the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities has been published on 11 July 2001, the same day as the publication of a Commission Communication on an open method of co-ordination for the Community immigration policy.

Migration alone is unlikely to be the answer to Europe's demographic problem. Policies for legal migration of labour can also be coupled with other less politically sensitive ways, which could reduce the governments' costs of an ageing population, such as increasing labour force participation among older people and women.

Some EU member states have already developed concrete policy initiatives to address on one hand labour market shortages as well as the increasing demographic issue. This paper examines the evolving laws in the field of labour immigration in four countries: UK, Germany; Sweden and the Netherlands, situating the policies being developed in the overall European context.

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NEW REGIMES FOR THE EMPLOYMENT OF THIRD COUNTRY NATIONALS: A COMPARISON OF STRATEGIES IN GERMANY, SWEDEN, THE NETHERLANDS AND THE UK

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1. Introduction: An Historical Overview

During the 1990s, Justice and Home Affairs moved, in an unexpected way, to centre stage in the European debate. Concern had been growing about immigration policy since the Maastricht Treaty institutionalised the third pillar of the European Union. This concern had been stimulated by several factors – the persistence of irregular migration and tragic incidents, such as the one in Dover in July 2000 in which 58 Chinese nationals lost their lives trying to enter illegally into the United Kingdom, the need for immigrant workers in some sectors, and the spectre of an ageing European population. More generally, the Treaty of Amsterdam, since its entry into force in 1999, represents a major development in overall Justice and Home Affairs policy, and the implementation of the treaty provisions in Justice and Home Affairs was described as the next major EU initiative after the single currency.

Moreover, the Conclusions of the European Council in Tampere (15th and 16th October 1999); gave an additional push for the adoption of the measures considered necessary for the realisation of an area of Freedom, Security and Justice, reaffirming traditional and integrating new principles in these fields.

In fact, the debate at European level on immigration and free movement had commenced in the early 1980s and developed in the run-up to the Schengen Agreement of 1985. A general formula was agreed in the Single European Act Art. 7a (Art 14), which stated:

> The internal market shall comprise an area without internal borders in which the free movement of goods, persons, services and capital is ensured in accordance to the provisions of this Treaty.

This article gave rise to different interpretations of who has freedom of movement rights, and on the methods, including the compensatory measures involved, of implementing free movement of persons. The Single European Act did not clarify the question of the institutional framework of the compensatory measures for free movement of persons. Whilst the programme of the Commission in this area had to be carried out according to Community standards and by the Community method, some member states considered that only the

intergovernmental method was acceptable in matters at the core of national sovereignty. Progress has been made, however, in that member states have agreed on a common approach to foreigners' rights.

Omissions and ambiguities in the Single European Act led to conflict between the Commission and certain member states on the competence of the Community Institutions with the result that member states decided policy by the intergovernmental method; a good example of the latter was the Schengen Agreement of 14 June 1985, followed by a Convention of 19 June 1990. Various episodes of the conflict about competence even provoked disagreement between Community Institutions. Worn down by these disputes and the systematic blocking by the Council of Ministers, the Commission for the most part conceded the intergovernmental method in the field of Justice and Home Affairs, in the hope that a pragmatic stance would make progress possible in this sensitive field. The European Parliament suffered most because it was for the most part excluded from the decision-making process.

The Maastricht Treaty signed in 1992 gave comfort to the partisans of the intergovernmental method over those who were in favour of a more communitarian/supranational approach. The new Title VI called Cooperation in the fields of Justice and Home Affairs was nothing other than the formalisation of very slightly modified intergovernmental cooperation. The policy sectors covered by Title VI were referred to simply as "matters of common interest" (Art. K.1). This weak statement of intent was scarcely developed by Art. K.3, which only stated that "Member States shall inform and consult one another within the Council with a view to coordinating their action". There was no clarification of whether Justice and Home Affairs cooperation is intended to provide for and/or encourage *legislative initiatives*, or whether practical, *operational cooperation* was the objective (Den Boer, 1996). Rather than a clear distinction between supranational or intergovernmental cooperation, the Third Pillar occupied (and, what remains of it, still occupies) a half-way house, struggling to reconcile two very different institutional patterns, neither with primacy.

In the Maastricht Treaty, member states seemed happy to have included a reference to the principle of subsidiarity (Art. 3b[now Art. 5]). It reads that the EC shall act:

> only if … the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action be better achieved by the Community.

With the Amsterdam Treaty (1998); the transfer of competence of the third pillar towards the first pillar seemed impressive: all the matters listed under Art. K.1 of the Maastricht Treaty were transferred to Pillar 1, except for the police and judicial cooperation in penal matters which remains in the third pillar. The new Title IV "Visas, asylum, immigration and other policies related to free movement of persons", which brings together the most important provisions, is subject to a special institutional mechanism providing for derogation on numerous points from the supranational approach (Art. 67) and allowing for a transition period - 5 years after the entry into force of the Treaty before majority voting is introduced. Policy towards third country nationals until Amsterdam was one clear example of the limits of European integration. Amsterdam tries to address the various lacunae by assigning to the Community objectives to be achieved within a fixed timetable. Parliament may eventually be involved if the Council of Ministers accepts the co-decision procedure. Furthermore, the transfer of competence to the Pillar 1 implies recognising the authority of the European Court of Justice (ECJ) in the new areas of Community competence.

2. Supranational and National Competencies and the Status of Third Country Nationals

In the provisions of the Treaty of Amsterdam, third country nationals have finally found their place in Community law. Certain categories of third country nationals already benefited from the protection of Community law. These are:

- members of the family of an EU national;
- nationals of states connected to the EU by an association or cooperation agreement;
- workers of a company on whose behalf they carry out services in another member state (according to the Vander Elst principles).

These three categories of third country nationals were privileged – the provisions of Community law did not cover other third country nationals until the entry into force of the Amsterdam Treaty.

The heading of the new Title IV is significant. It does not mention a common immigration policy, but provides a partial inventory of elements of such a policy: "visas, asylum, immigration and other policies connected with free movement of persons". Whereas Art. K.1.3 of the Maastricht Treaty aimed at "immigration policy and policy with regard to third country nationals" before listing "measures concerning immigration policy within the following areas". In three sectors (Art. 63.3), the more detailed specification of these sectors

and the level of competence accorded to the EU in migration matters do not live up to the statement of the intent to introduce a comprehensive and coherent immigration policy. Also the second subparagraph of Art. 63 indicates that:

> Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.

The tendency in recent years by the member states to interpret restrictively the competencies of the European Union, contributes to a genuine doubt about when the European level of decision-making applies. Only recourse to Art. 308 (ex Art. 235) of the Treaty makes it possible to avoid a purely intergovernmental approach, by transferring the provisions concerning immigration policy from the third to the first pillar (Hailbronner, 1998).

Despite the significant progress that the Treaty of Amsterdam represents for the European Union, it is only the beginning of a move towards a genuine European immigration policy. It remains uncertain whether, at some time in the future, it will become a supranational competence. Art. 61 stipulates that the Council will adopt «within a period of five years after the entry into force of the Treaty of Amsterdam the measures aiming to ensure free movement of persons in compliance with Art. 14 »; this illustrates the resistance of the member states to further European integration in this field. Art. 14 is a re-statement of Art. 7 A of the (1986) Single European Act, which instituted an area without internal borders and with free movement of persons by 1st January 1993. The Treaty of Amsterdam complements the Single Market by security and justice supports for free movement. The compensatory measures intended to complement free movement of persons, alluded to in the Single European Act, became explicit in Art. 61 (a) (Amsterdam Treaty).

3. The Current Post-Amsterdam Debate

In March 2000, a very controversial report of the United Nations based on demographic considerations has been published (UN Secretariat ESA/P/WP.160). Resting on the analysis of the current population trends in the world and projections for the period 1995-2050, this report pleaded for "replacement immigration" in order to compensate for the inevitable population decline in Europe and in other parts of the world. According to this report, the number of immigrants necessary to avoid a *decline of the total population* of the EU in the 50

years ahead is approximately comparable with the immigration rate of the 1990s, i.e. average annual net migration of 857000 persons. However, the report stipulates that, in order to prevent to prevent a *labour force decline*, the number of migrants entering each year should double.

The "provocative" observations of the report stimulated an intense public debate in the European press on this question, but they also contributed to re-open the issue on immigration in the European institutions and member states at a time of reflection on how to implement the new Amsterdam provisions.

One of the first post-Amsterdam initiatives proposed by the Commission on the ground of migration is the draft Directive on the right to family reunification, submitted to the Council on 1 December 1999, but which has not been approved yet. This initiative is the first of a series of draft Directives on the admission of third country nationals for various purposes, which represent the "communitarisation" of the draft Convention on the admission submitted by the Commission to the Council before the entry into force of the Treaty of Amsterdam. This project was followed by a draft Directive on the status of third country nationals who are long-term residents in the Union, presented on 13 March 2001.

A proposal for a Directive dealing with the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities has been published on 11 July 2001, the same day as the publication of a Commission Communication on an open method of coordination for the Community immigration policy. Furthermore, the Commission has prepared a draft Directive on the admission of third country nationals for study and vocational training purposes. Two other directives approved by the Council, respectively in June and November 2000, are closely connected with the questions of migration, but deal more specifically with the fight against discrimination, racism and xenophobia.

With respect to the fight against illegal immigration and to the management of migratory flows, a particularly important instrument is the draft framework-decision of the Council on the fight against the trafficking of human beings that the Commission presented in December 2000. In addition, a Communication proposal from the Commission to the Council and to the European Parliament covering the common fight against illegal immigration is currently being prepared. Several proposals have also been submitted by the member states, which share with the Commission a right to take initiatives in this field (Art. 67.1 TCE). The French

Presidency, in particular, presented several initiatives in the second half of 2000 covering primarily the means of preventing and of fighting illegal immigration. These initiatives that have been approved by the Council comprise:

Proposals of directives include:

- the definition of the assistance at the entry, residence and the irregular stay,
- A Framework Decision on the reinforcement of the penal framework for the prevention of facilitation of unauthorised entry and the stay of third country nationals;
- a draft Directive relating to the harmonisation of the legislation of the member states as regards liabilities imposed to the carriers for the territory of the member states of the nationals of third countries stripped of the documents required to be allowed there; and
- a draft Directive relating to the mutual recognition of the orders of expulsion.

Moreover, the French Presidency was particularly active to revive the general debate on immigration which had been started by the above-mentioned report of the United Nations: discussions on this subject were held at the informal ministerial meeting in Marseilles (in July 2000) and at three conferences on Co-developments and Migrants (6-7 July), on Illegal Migration Networks (20-21 July) and on the Integration of Immigrants (5-6 October).

The Commission intervened in this discussion in November 2000 with a Communication analysing the state of the debate on immigration. In this Communication on a Community immigration policy, the Commission states as a starting point that "there is a growing recognition that the "zero immigration" policies of the past thirty years are no longer appropriate" in the current economic and demographic context of the European Union and of the countries of origin, and argues for a "new approach" of immigration, according to which channels for legal immigration should be made available, especially for labour migrants.

However, the Communication takes clearly its distance from the adoption of a policy of replacement migration as proposed by the UN report on Replacement Migration as a possible scenario to counteract demographic decline. The Commission believes that "while increased legal immigration in itself cannot be considered in the long term as an effective way to offset demographic changes, since migrants once settled tend to adopt the fertility patterns of the host country".

Nevertheless, it considers that many "economic migrants have been driven either to seek entry through asylum procedure or to enter illegally. This allows for no adequate response to

labour market needs and plays into hands of well organised traffickers and unscrupulous employers". It stresses the need for an approach "based on the recognition that these migratory pressures will continue". Moreover, it stresses the fact that "the opening up of channels for immigration for economic purposes to meet urgent needs for both skilled and unskilled workers has already begun in a number of Member States".

In this context, the Commission underlined the need to have a "proactive" immigration policy, i.e. a policy which instead of focusing on vain attempts aiming to prevent and stop immigration by creating a 'Fortress Europe', would try to control immigration according to needs of the European labour market. (see the proposal of directive of 11 July 2001).

Moreover, the Tampere Council itself stressed the need for an "approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin".(paragraph 20 of the Presidency conclusions).

The Commission does not propose any quota system on a European scale, which would be "impracticable", but rather some "indicative targets", a system based on periodic reports of the member states, re-examining the impact of their immigration policies during the past period and making projections on the number of economic migrants they would need in future (including their qualification levels). These indicative objectives would not only take into account the labour market needs of each member state, but also take into consideration the agreements in place with countries of origin of the migrants, the public acceptance of additional migrant workers in the country concerned, the resources available for reception and integration, the possibilities of cultural and social adaptation, etc…

This process should take into account the development of the general employment situation in the EU, and in particular the progress achieved in the implementation of the European Strategy for employment, defined by the European Councils of Luxembourg (1997) and Lisbon (March 2000). The mechanism proposed by the Commission leaves therefore to the member states the last word on the admission of the migrants, but the various migration policies will however be coordinated at European level.

It is obvious that the approach defended in these texts represents a clear rupture with former immigration policies on EU-level. The question is to know if member states will follow the Commission on this way, considering the sensitivity of the question at the national level as well as the differences of approaches and policies in this field.

In presenting its proposals, the Commission intends to establish a coherent framework that would determine the basic conditions and procedures to be applied. This framework approach would be based on the following principles:

The granting of a work permit should be simple, rational, flexible, on the basis of verifiable and objective criteria, delivered within a short time and the procedure should be transparent.

Applicants should preferably have an employment contract or a recruiting promise. However, this should not be an obligation.

- Member states should have the possibility of establishing quotas responding to their specific needs.
- The response on the request for the work permit should be delivered in a 180-day maximum delay. (although this period is certainly not optimal for industry).
- The reason for refusals should be clear.
- The work permit should not be limited to only one employer, but should be related to the sector of specialisation of the migrant worker or even to the region of his/her residence for a 3-year duration, with a possibility of prolongation.

The question of competence to grant or refuse a permit arises then: according to the principle of subsidiarity; this one should be delegated to the member states. This will give more coherence between the employment and immigration policies.

The objective would be to give a secure legal status for temporary workers who intend to return to their countries of origin, while at the same time providing a pathway leading eventually to a permanent status for those who wish to stay and who meet a certain number of criteria.

The proposal for a Directive of 13 March 2001 on the status of third country nationals who are long-term residents supplements the other initiatives. The idea is a differentiation of the rights according to the length of stay. The principle that the length of residence has an influence on the rights of persons has a long tradition in the member states and is referred to on the Tampere conclusions. Within five years, they will be allowed to move freely on the territory of the Union with the aim of seeking employment in another member state.

Migration alone is unlikely to be the answer to Europe's demographic problem. Policies for legal migration of labour can also be coupled with other less politically sensitive ways which

could reduce the governments' costs of an ageing population, such as increasing labour force participation among older people and women (OECD, 2001).

4. A Comparison of Strategies in Germany, Sweden, the Netherlands and the UK to Promote Selective Labour Migration of Third Country Nationals

In the countries, there are clear signs that they recognise a labour shortage, particularly in specialised sectors. The four countries have tried to develop attractive packages to attract specialised labour. However, in all four cases, prior to granting the necessary permits for skilled candidates from outside the Union, it is normally necessary to show that attempts have been made to fill the position from the resident and EEA labour markets. These attempts should include advertising and the local employment service, which will run searches using the European Employment Services placement network (EURES). Usually the training of existing employees should also have been investigated.

In this section, I attempt to answer the following questions:

- Which are the main legal provisions governing the entry and residence of foreigners under the new evolving schemes?
- What are the main aims of the new provisions on employment of third country nationals?
- What are the criteria for eligibility?
- How is the country making the scheme attractive both to the employers and to the potential employee?
- Which is the competent authority issuing/dealing with such permits?

4.1 Germany

In Germany, the law of 9 July 1990, governs the entry and residence of foreigners. The Ordinance Governing stays for Employment Purposes was adopted on 18 December 1990 is the main regulatory text for recruitment of foreigners.

Recently it was recognised that despite the general policy to limit immigration of unskilled workers, however there is a distinct need for qualified workers in specific areas of industry, particularly IT companies. By a decision of the Federal Government on 1 August 2000, the Green Card regulation, which is made up of ordinances regulating residence and work permits, was introduced to admit IT specialists for businesses and to address the emerging need for specialists in other industries. This marked the beginning of a new policy to regulate

migration. These ordinances allow companies to employ up to 20,000 IT experts from non-EU states, to which end a fast-track procedure is applied. The foreigners concerned are also given more favourable conditions in terms of foreigners law.

According to this regulation (2000), foreign experts who have been promised or granted authorisation to work are given a residence permit for a maximum of five years – together with their spouses and minor children, as the case may be.

Apart from applications from abroad, young and upcoming foreign IT experts who have successfully obtained a degree in the field of information and communications technology, from university or higher technical colleges may also benefit from the Green Card regulation. The receivers of the Green Card, could also change employers once in Germany.

This Green Card mechanism is modelled on the US green card. To qualify, the applicants must fulfil the following criteria:

- Successfully obtained a degree in the field of information and communications technology, from university or higher technical colleges may also benefit from the Green Card regulation, *or* received a job offer with a gross salary of at least DM 100,000 (51,200 €),
- Reside outside the European Union or the European Economic Area, and
- Have a good grasp of the German language or be able to speak English well.

On 3 August 2001, Germany's interior minister, Otto Schilly, announced an overhaul of the German immigration regulations. This revision of the regulation is designed to relax the rules for immigration for skilled staff, especially those in the IT and telecomm industries. However this was counterbalanced with a tightening of regulations for unskilled workers as well as a proposal to introduce tougher measures for asylum seekers and those under deportation orders.

The main points of this revision of the German Green Card system are as follows:

1. Immediate permanent residency for IT professionals and other highly skilled staff with valid job offers (to replace the 5 year Green Card).
2. Points-based system for skilled immigrants without job offer (similar to the Australian system).
3. Immediate granting of work permit for dependents of skilled immigrants.

4. Combined residence and work permit.
5. Automatic one-year residence permit for graduates of German universities (to be extended if the applicant finds work in this time).
6. Compulsory integration courses for new migrants.

The competent authority dealing with all immigration aspects is the Independent Commission on Immigration set up by the Federal Minister Schilly in September 2000. This will eventually become a Foreigners' bureau at the Federal level

A total of 8,556 foreign computer experts have come to Germany and become green card holders so far, below the expected number of 10,000 for the planned first green card-year that began on August 1, 2000. Among the green card holders, *Indians account for one-fifth, totalling 1,782. Some 14 percent, and 1,198 computer experts are from the former Soviet Union countries*. On the third place are experts from *Romania, amounting to 736.* The government decided early last year to launch the Green Card project to make up for the domestic shortfall of computer personal. Germany had some 75,000 vacant computer positions before the launch of the project.

4.2 UK

Independent migration to the UK is moving a step closer.

New Home Secretary David Blunkett announced that one of his priorities will be to introduce a scheme for independent migration to the UK (Green Cards). Although no more detail has been announced, this is expected to resemble the Australian 'points based' migration scheme.

The Green Card scheme is expected to go ahead, but its details are still unresolved and will be subject to a lot of consultation and many reviews. We anticipate that the scheme will be rolled out in 2003/2004.

This scheme is a proposed new category of permits which will allow certain individuals to be granted a permit in their own right without the need for there to be a supporting employer, provided the individual *meets three out of the four criteria set out below.*

Their leave will be for one year in the first instance, extendible by a further three years providing the criteria continue to be met. The scheme is a pilot one, lasting for six months in the first instance. The scheme was to be launched this year, but as of August 2001 it has not.

To get a "full" work permit, one would need to meet one of the following criteria:

1. hold a PhD or equivalent qualification;
2. have five years recent graduate experience (or three years if a PhD is held), two years of which should have been at senior level;
3. have been earning at least £40,000.00 (64,000€) in the previous year or an adjusted salary which was equal to the top 5% of the wage earners in the country in which the last employment took place;
4. be able to demonstrate a significant achievement in their field.

The sectors experiencing labour shortages in the UK are IT, health (doctors and nurses), higher education academic staff.

The current work permit scheme

The work permit system aims to strike a balance between enabling employers to recruit or transfer skilled people from non-EEA member states and protecting job opportunities for resident workers. The procedure is roughly as follows: Employers apply for permits which are granted if the criteria are met: there are no limits or quotas on the number of permits issued the criteria are based around jobs requiring relatively high level skills the employer needs to show there is no suitable EEA worker. But this is waived in many circumstances, including known shortage areas, intra-company transfers, board level posts and posts associated with inward investment the immigration authorities generally accept a work permit as evidence for a decision to admit an overseas national to the UK there is relatively little post-entry control on the type of work that work permit holders actually do, or on switching between jobs (especially within the same company).

The foundation of the UK immigration law continues to be the Immigration Act of 1971. However, the work permit regime was subjected to a thorough review announced in November 1999 of UK - Immigration and Asylum Act 1999 (c33) - 3/4/99 main provisions.

As a result, a range of measures to streamline and simplify the system were published in the Budget, in March 2000. A number of these measures came in force on 2 October 2000, including changes to the skills threshold required for a work permit, and simpler procedures for extending a permit. Thus, it is now possible for graduates to be eligible for work permits with no work experience for skills in high demand, and the key worker category has been replaced with simpler procedures for workers with intermediate skills.

In addition, the maximum length of a work permit has been increased from four to five years, and a number of new approaches will be piloted (including a self-certification scheme for multinational companies piloted from October 2000).

Around 100,000 work permit applications are expected this year, up from about 80,000 applications in 1999 (of which over 90% were approved). Numbers of applications have been rising steadily since the early 1990s. After four years, work permit holders have been entitled to apply for settlement but, in practice, a relatively small proportion appears to settle permanently in the UK. For example in 1998, 3,160 work permit holders settled in the UK (although we do not know how many settled via other routes – for example by marrying a UK citizen).

The dependents of work permit holders are entitled to remain in the UK during the period for which the permit is valid, providing they can be supported without recourse to public funds.

They have full entitlement to work (if their spouse's work permit is for more than a year), even if the job that they then fill would not meet the work permit criteria. In 1998 20,200 dependants entered with work permit holders.

The competent authority in charge of issuing such permits is the Immigration and Nationality Department of the British Home Office. The Home Office/ FCO Joint Entry Clearance Unit administers entry clearance

4.3 The Netherlands

The Netherlands has experienced sustained growth over the past few years partly due to its favourable position within Europe and its flexible labour force. It remains an attractive country for investment and for foreign nationals to work.

Due to a recent acknowledgement by the Netherlands authorities of the shortages in some types of IT and Telecomm skills, work permit applications can be made for relevant IT / Telecomm positions without showing details of the above detailed recruitment search.

The Law governing legal residence in the Netherlands is the recent - Vreemdelingenwet (Aliens law) of 2000 which came into force on 1 April 2001. Art. 13 is the most important in this respect.

Unfortunately, the application process for Netherlands work permits often means that candidates cannot even visit the Netherlands to attend meetings while the Netherlands work permit application is being processed.

To be suitable to hold a Netherlands work permit, the candidate should be a professional and have the skill set necessary to fill a post that has already been unsuccessfully advertised in the Netherlands, or which is subject to recognised shortages. There is a legal requirement that the candidate is between 18 and 45 years of age, however it is unlikely that a candidate below 23 would have attained a skill set necessary to fill a professional position.

For nationals of all other, countries not exempt from requiring a residence visa, the candidate should apply for a residence permit (MVV) at the Netherlands Embassy in their normal country of residence before a work permit application is made. The candidate is then prohibited from travelling to any Schengen state until a decision is made on the application.

NB A Netherlands work permit is employer-specific. If a candidate has a permit to work for one company, and they want to work for another Dutch company, this would not be possible – unless/until the new company has obtained another work permit.

Unless the candidate is exempted from the MVV requirement (i.e. is a national of: Norway, Iceland, Liechtenstein, Switzerland, Japan, New Zealand, Australia, Canada or the United States), the first stage of the process involves the candidate to making an application for a temporary residence permit (MVV) through his/her local Netherlands embassy. The application goes then to at the Regional employment board (RBA) who approve it initially and pass it to the national employment board (AFB) who make the final decision, taking into account the national and EU labour markets. When the work permit is approved, the residence permit is issued by the embassy and the candidate may travel to the Netherlands and start work.

One attractive aspect of employing foreign nationals in the Netherlands is that many *will qualify to receive 35% of their income tax free.* The effect of this is to make the overall tax burden similar to that faced in the UK.

The Dutch Embassy has to obtain approval for the issuance of a temporary residence permit from the immigration authorities in the Netherlands. It is important that one applies for the temporary residence permit at least three months prior to one’s intended stay in the Netherlands.

After 3 years in the Netherlands on a work permit, it is usually possible for an individual to obtain permanent residence. Thereafter they are free to take up any lawful employment and no longer require an employer-sponsored work permit.

The Netherlands Embassy has to obtain approval for the issuance of a temporary residence permit from the immigration authorities in the Netherlands. It is important that you apply for the temporary residence permit at least three months prior to your intended stay in the Netherlands.

If one is working and holding a valid work permit and holds a temporary residence visa (MVV) for 3 years, then one can automatically gain permanent residency in that country.

The competent authority is the Immigration and Naturalisation Service (IND) in the Ministry of Justice

4.4 Sweden

Swedish regulation on employment of third country nationals and labour related immigration has traditionally been restrictive. One task of migration policy is however at times to enable migration to supply additional labour to the national labour market**.** National regulations as well as international agreements on the free movement of persons may help to even out imbalances of labour supply and demand in the labour market. Among those seeking to move to the EU, there are many that are mainly looking for work. In Sweden, it is believed that the forthcoming enlargement of the EU will alter the balance of labour supply and demand which need to be taken into consideration. In a longer perspective, the ageing population in Europe will require additional labour force.

The principles for labour immigration, mainly regulated in the Aliens Ordinance and only to a lesser degree in the Aliens Act, are based on a government bill of 1968. It was then established that as a general rule, it should not be possible in the Swedish labour market to use foreign workers to regulate the demand for labour. This should be done instead mainly through labour market policy measures such as training of the unemployed, relocation within the country etc. The bill also proposed that labour immigration should only be allowed in exceptional cases. The extensive immigration of labour that took place after the 1950s ceased at the beginning of the 1970s when the Swedish economy deteriorated. Since then permanent residence permits for employment purposes are only granted if the need for labour cannot be satisfied within Sweden or from the EU/EEA area.

Permanent residence permits purely for labour market reasons are granted in principle to other non-Swedes only if the need for manpower cannot be satisfied within Sweden or the EU/EEA. In 2000, 433 permanent residence permits were granted for labour market reasons. The largest groups for such permits were citizens from China, Russia and the United States. In addition, about 19,400 temporary work permits were granted in 2000. This represented a considerable increase from 15,000 the previous year. These permits are mainly granted with reference to temporary shortages of labour force and international exchange. Permits are granted mainly to experts and key people in industry, research, culture and sports in the cases where it is not possible to find equivalent competence in Sweden or within the EU/EEA area.

People in the professions and self-employed business people may also be granted such permits, if they fulfil certain conditions. In addition, a far greater number of *work permits for limited periods are granted for such people as fitters, various specialists, artists and sportsmen.*

For all categories of employment, the permit may only be granted on condition that there is an offer of employment and housing arranged beforehand. The permit must be issued before entry into Sweden. Permits are granted for the duration of between 1 day (e.g. artists and athletes) and up to 18 months regarding labour shortage and up to 48 months regarding international exchange.

The Migration Board handles and decides on work permit cases and permits regulated in the EEA agreement. The Board determines whether the applicant may have other reasons than labour market reasons for being granted or refused a residence permit (e.g. family ties). The Labour Market Board (AMS) carries out a labour market examination and the Migration Board must in principle consult with the county employment boards in all cases. AMS may also issue general guidelines. Before AMS issues guidelines the labour market parties (employers and employee organisations) must be given the opportunity to state an opinion.

The government recently requested from the Migration Board and Labour Market Board that such an analysis should be carried out and reported to the government by the end of April 2001. The report which the government received was based on *inter alia* a seminar with the labour market parties. The government is currently in the process of reviewing this report in order to arrive at a decision what next steps are needed. A special investigation is planned which would analyse those aspects, which are linked to the enlargement of the EU (and the

mobility of labour), and the current and planned directives presented by the Commission in this field.

The demographic changes will cause shortages of teachers and health-care personnel in the future, sectors where shortages exist already today. The population gets older and the number of children of school age continues to increase at the same time as other skills enhancement courses also have a need for teachers. Many more persons need to be trained in these areas in order to meet the future needs.

Other future needs are more difficult to estimate. Some labour market experts claim that occupations are no longer the proper basis for the estimation of future skill shortages. Structural changes in the labour market, in the work environment and within occupations are expected to generate requirement profiles that are much broader than today. Everybody seems to agree that the requirements for higher education will be raised in the future.

There are today regional differences in skill shortages and differences will exist also in the future. Measures to increase the mobility of the work force, geographically and occupationally, are therefore of great importance.

Competence and responsibilities of the Migration Board

The Migration Board is the central authority for aliens affairs with among other cases responsibility for cases concerning work permits based on an offer of employment. In this matter the Migration Board in its competence is very much dependent of the general guidelines drawn up by the Swedish National Labour Market Board (AMS). According to the Swedish Aliens Ordinance (1989:547) the Labour Market Board is to decide on guidelines for the assessment of cases relating to work permits. Associations of employers and employees respectively are to be given the opportunity of a hearing before guidelines are issued.

According to the above mentioned facts the Migration Board in most cases only have to follow the statements from the AMV. This does not mean that the Migration Board is not entitled to decide against these statements in cases of certain natures.

Group of persons concerned

Applicants in the cases related to job-finding can be divided into different groups.

- If the work is part of an international exchange between i.e. an international company or the like the applicant is entitled to stay in Sweden for a total of four years at the most.

- Permits can also be granted to persons for a maximum of 18 months altogether if the employment is due to a temporary labour shortage.
- Also can be mentioned the group of persons who participate in an organised exchange programme within the framework of different countries (trainees).
- One can also mentioned work permits for seasonal employment which can be granted for three months at the most.

Procedures (differences between applications lodged from abroad and applications filed by foreigners already presents in Sweden)

The initial application should be submitted to a Swedish embassy or consulate in the country of origin or the country of domicile. The permit thus must be granted before entry in to Sweden. To obtain an extension of the permit one must show that he/she still is employed.

One has also the possibility to change status of the permit while being in Sweden, i.e. from permit for studies to permit based on an offer of employment.

Determination of labour demand

The proper authority with responsibility for the determination of labour demand is the National Labour Market Board. Obtaining a Swedish work permit is no easy matter. Swedes, foreign citizens already living in Sweden and EU/EEA citizens have preference over others in obtaining work here.

Note that foreign labour only can bee granted work permit for a limited period. It is just a few rare cases that could be granted an unlimited permit such as persons with certain skills and key positions.

Prerequisites

To obtain a work permit the applicant must have:

- a written offer of work and employment in Sweden within the above-mentioned categories,
- the employer must guarantee a minimum salary of SEK 13.000 =1,311.64 EUR (15,740€ annually),
- per month before tax or a salary in accordance with a Swedish collective wage agreement,

- accommodation must have been arranged in Sweden before entry.

Beside this, as already stated, the National Labour Market Board always should give their approval.

Legal remedies

When the Migration Board is considering expelling someone their need of a lawyer is assessed and a decision is taken in this respect. It is always up to the Migration Board to decide whether legal aid should be provided or not.

It should be noted that a decision to deny an application of work permit can't be appealed against if the decision not is connected to a decision of expulsion.

To make the package more attractive, as in the case of the Netherlands:

- the tax reform lowering marginal taxes continues,
- employer-related bureaucracy is being simplified, and
- benefits (board and lodging) received by household employees are favourable.

A Government appointed special investigator has recently presented a report on prerequisites on Swedish citizenship and related legal issues. The investigator has analysed the relevance of existing prerequisites and proposed changes in the legislation. An important issue in this context is the different rules and regulations, which exclude non-citizens from certain governmental employment and commissions. A bill is planned during the spring 2002.

Further the Government, in February 2001, presented a national action plan against racism, xenophobia, homophobia and discrimination (2000/2001:59) to the Riksdag. It was declared in the plan of action that a committee would be appointed to study the possibilities for a general legislation against discrimination, which would include all or most of the grounds for discrimination and areas of society. Furthermore, the government announced that it is going to work in the direction of making real use in public procurement of the so-called anti-discrimination clauses.

5. What can one deduce from the above four cases?

As we can see from the four cases above, the policy evolution in these countries is certainly pointing towards an explicit recognition of shortages of specific skills in the labour markets. Germany and the UK seem to favour the Australian system of points, which would lead to a

relatively more independent status for the potential candidate. Those applicants who score sufficient points – on the basis of an accumulation of the criteria to be met, will have a permit in their own right independent of the employer, which allows them the possibility of changing employment.

Sweden and Netherlands have both reviewed their regulations related to the employment of foreigners to make the labour market more accessible to persons with required skills, however, they emphasise that their policy remains restrictive, even though they could also be moving towards the 'green card system' and their priority is to first recruit their own nationals, other EU/EEA citizens or third country nationals already residing on their territory. On the other hand, both these two countries promote interesting expatriate tax status to attract potentially suitable candidates.

In these four countries, policies for entry and residence seem to place a lot of emphasis on the need of the applicant to be integrated. The four countries recognise that the greater the possibility of integration and eventual accumulation of rights, the more they would manage to attract the specialised labour they require. They recognise that integration is promoted if the family of the worker can join the applicant and if the applicant can obtain more secure residence rights after a certain period of time on the territory, with a possibility to naturalise if s/he so wishes. Apart from offering a structured package of rights, which eventually could bring the status of the specialised third country national workers very close to that of EU citizens, language courses and information about the host country's culture are also offered.

Studies have shown that the greater the integration of the persons participating in the host country's labour market, the more beneficial it is for the economy of that country.

It would be interesting to compare the situation in North Europe with the type of labour demands in South Europe.

6. The Paradox between the Debate about a More Open Immigration Policy for Labour Reasons and the Provisions Underway for Freedom of Movement of Workers from the CEECs

On the other hand, a clear demonstration of the reserve of the member states in this field is the attitude towards the separate but related question of the extension of freedom of movement for the workers coming from the Central and Eastern European countries (CEECs) after enlargement.

On this topic, which one cannot develop fully here, a plethora of studies and reports were already produced, presenting rather different (and sometimes contradictory) figures, forecasts and scenarios.

The German government for instance, proposed a seven-year transitional period before extending to the nationals of the CEECs the right to freedom of movement for the workers, although the Commission had submitted an 'information Note' in March 2001, which concluded that there would be no spectacular increase in East-West migration and that the overall impact on the European labour market would be limited, even if certain member states could be affected more than others.

This document suggested five possible options to deal with this issue:

- a total closure of the Community labour market for a limited period to the workers of the CEECs;
- a complete liberalisation from the adhesion onwards;
- three intermediate approaches: a quota system; a safeguard clause and a flexible system of transitional schemes.

The option retained ultimately by the Commission envisages a general transitional period of five years, with a possible individual extension by each member state for a period of maximum two years. However, after the first two years, an automatic review is envisaged, resting on a report submitted by the Commission to the Council: at that moment, it would be possible to decide to shorten or raise the transitional period, while leaving to the member states the possibility of maintaining a more restrictive procedure if they wish to. The discussions on the question remain open and the result of the debate will depend without any doubt on the overall agreement on the package deal of adhesion.

One must bear in mind that the end of the Cold War precipitated a new liberalised era for the free movement of people: not only between Eastern and Western Europe, but within Central and Eastern Europe itself. Open borders policy within CEE has helped to break down stereotypes and hostilities in the region, as between Poland and Russia, has helped foster contacts between national minorities, such as between Hungarians in Ukraine, and has generated spheres of economic activity and cooperation within the region. The EU accession of Baltic and Central European States threatens this. In February 2000 the Czech Republic

announced visa regimes for citizens of the Ukraine, Russia and Belarus, with Slovakia following suit. In September Estonia introduced full visa regimes for Russian citizens, following the termination in March of the two countries agreement on simplified border crossings. Lithuania has warned that it may have to rule out it's agreement allowing for visa free travel of Kaliningrad citizens by 2003. And while the implementation of the Schengen acquis creates tensions along between candidate countries and their eastern neighbours, candidate countries will only be able to reap the benefits of freedom to take up employment in present member countries after a 'transition' period of several years.

It is clear that the present implementation of the Schengen criteria will have an adverse effect on the free movement rights of citizens along the EU's future border: both in the freedom to travel and the freedom to reside and work. Meanwhile the question of whether visa regimes could have the effect of not curbing crime while making travel and work difficult for most normal citizens remains unanswered. Moreover, the new security agenda in the wake of September 11th will in all likelihood make the process of obtaining a Schengen visa even more difficult, and could exacerbate existing tendencies in the lack of transparency in the administration of visas. Increasingly the obtaining of a visa could become a privilege, not a right. Keeping in mind that the border regions are not only linked through economic ties, but often of family and national identity- as with the Russian population living on both sides of the Narva-Ivangorod border between Estonia and Russia – it is clear that a hostile visa regime could infringe on the basic rights of citizens.

These opposing tendencies have highlighted an existing contradiction in the EU's eastern policy. On the one hand EU external relations have focused on encouraging cooperation between the EU and its future Eastern neighbours, on the other, the logic of EU enlargement and the demands made on candidate and accession countries to adopt the Schengen criteria lead to an exclusionary situation on the EU's future border. The incorporation of Central European and the Baltic States in to the EU has the marked potential of drawing new dividing lines across Europe: undoing the progress which has been achieved over the last decade.

One must not forget either that the future members of the EU have also started to experience similar demographic problems as the current EU members. Therefore, they too will be thinking of participating in a controlled open immigration policy addressing their own needs.

7. A Common European Policy on Immigration: The Way Forward

The topic of immigration is very sensitive, as it has an impact on a wide range of areas (social, cultural, economic and legal). It is therefore difficult to reach an agreement on this debate. Although the latest developments and the partial change of attitude on European level can give rise to moderate optimism on the future of a European policy on immigration, the principal following points remain highly controversial.

The EU should publish a declaration espousing the principle that the territory of the EU is a common immigration area, which needs to be endorsed by the member states

Europe should not back into future. If we really want to stop with the "zero immigration policies" of the early 1990s, which did not work well or address the current demographic situation and labour market needs, then we should not be afraid to declare our objective of defining Europe as an area of immigration. We need to bear in mind that the definition of an area of immigration does not necessarily involve the granting of free and generalised access to the labour markets, as the examples of the United States and Australia show. However, it would probably be the first step towards a clear and coherent policy of management of migratory flows, which should supplement the measures intended to fight against illegal immigration, smuggling and the draft of human beings.

The European Union must grant rights to third country nationals who reside legally on the territory of one of the member states that are "as near as possible" to those enjoyed by EU-citizens

The importance of fair treatment of third country nationals has been underlined by the European Council in Tampere, in which the need of an "approximation of the legal status of third country nationals to that of the member state's" was acknowledged (paragraph 21), and the objective that "long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident" was endorsed. However, E U immigration policy has not, so far, incorporated steps to ensure that migrants benefit from comparable living and working conditions to those of nationals. We must think very clearly before defining a status for long-term third country nationals which falls short of the objectives set out in Tampere as otherwise we risk institutionalising discrimination.

By way of conclusion…

It is undeniable that the EU is advancing towards a common migration procedure. However the question is to know when and, one could add, how, such a system will be set up. Although the Treaty of Amsterdam, the Vienna Action Plan and the Tampere Conclusions fix precise deadlines for the adoption of the majority of the measures, this process knew some delays and encountered a number of difficulties. One can only hope that the new attitude towards the immigration of third country nationals combined with the new competencies of the Community in the field of immigration will reflect the "good intentions" expressed in several documents and action plans in policies that would be at the same time concrete, effective and human.

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ABOUT THE CEPS-SITRA NETWORK

CEPS, with financial assistance of the Finnish SITRA Foundation, embarked at the end of 2000 on a programme to examine the impact of Justice and Home Affairs *acquis* on an enlarged European Union, the implications for the candidate countries and for the states with which they share borders.

The candidate states are adopting or are preparing to adopt EU systems such as Europol, Schengen (the totality of the *acquis* have to be accepted according to Art. 8 of the Schengen Protocol to the Treaty on European Union), the European Police College, measures to combat organised and financial crime, Eurojust, mutual recognition of judgements, uniform sentences for fraud against the EU budget, etc. In this process the candidate members can be represented as passive recipients of EU arrangements – no modification of matters such as the Schengen *acquis* is available to them. But the arrival of the new members in the EU will modify the character of JHA cooperation by increasing the numbers of actors involved in the framing and the implementation of policies, changing the pattern of the problems confronted and shifting the location of the external frontier.

The basic aim of this project is to produce policy recommendations that will promote these qualities in EU JHA cooperation and for institutional developments for the medium- to long-term in areas such as a European Public Prosecutors Office, re-shaping Europol and a developed system of policing the external frontier (Euro Border Guard). These must be made within a balanced framework. The CEPS programme will propose policy directions adapted to an enlarged Union that would avoid:

- conflict with other objectives of policy;
- the inevitable public disillusionment if few practical results flow from general declarations of policy;
- erroneous policies based on some widely believed but grossly exaggerated external threat (e.g. 'floods' of immigrants 'international' terrorism) to the internal security of the EU;
- a rigid distinction between a 'safe' region inside the EU (freedom through effective law enforcement) and an 'unsafe' outside (the source of criminal threats, terrorism, corrupt law enforcement and political disorder).

The CEPS-SITRA programme brings together a multi-disciplinary network of 20 experts drawn from EU member states, applicant countries as well as neighbouring states: the European University Institute in Florence, the Stefan Batory Foundation (Warsaw), European Academy of Law (ERA Trier), Academy of Sciences (Moscow), London School of Economics, International Office of Migration (Helsinki), Fondation Nationale des Sciences Politiques (CERI) in France, Universities of Budapest, Université Catholique de Louvain-la-Neuve, University of Lisbon (Autonoma), University of Nijmegen, University of Pau, University of Burgos, CEIFO in Stockholm, University of Tilberg and University of Vilnius, as well as members with practical judicial and legislative backgrounds

A Note about SITRA (Suomen itsenäisyyden juhlarahasto

Sitra is the Finnish National Fund for Research and Development. It is an independent public foundation under the supervision of the Finnish Parliament. The Fund aims to promote Finland's economic prosperity by encouraging research, backing innovative projects, organising training programmes and providing venture capital.

ABOUT CEPS

Mission

The Centre for European Policy Studies is an independent policy research institute founded in 1983:

- To produce sound policy research leading to constructive solutions to the challenges facing Europe.

Goals

- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the European policy process.
- To build collaborative networks of researchers, policy-makers and business across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets and Achievements

- Quality research by an international staff of 30 drawn from fifteen countries.
- An extensive network of external collaborators, including some 35 senior associates with extensive experience working in EU affairs.
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