



Building a Common Policy on Labour Immigration

Towards a Comprehensive and Global Approach in the EU?

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Abstract

This paper addresses the building of a common EU policy on labour immigration. It reviews the latest policy developments concerning the harmonisation of the rules for admission and residence of third-country workers in the EU. In November 2006, the European Commission published a Communication entitled "Global Approach to Migration one year on: Towards a Comprehensive European Migration Policy", which re-emphasises the need to develop a transnational policy on regular immigration facilitating the admission of certain categories of immigrant workers through "a needs-based approach" and especially taking into account the case of the "highly skilled". By September 2007 the Commission intends to present two proposals for directives dealing respectively with the conditions for entry and residence of highly skilled workers and a common general framework of rights for all immigrants in legal employment. The main questions evoked by the EU's 'global and comprehensive' approach and these two proposals are considered along with the essential weaknesses that current policy and legal trends in the national arena may pose to any eventual Europeanisation as a result of following their patterns too closely.

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BUILDING A COMMON POLICY ON LABOUR IMMIGRATION TOWARDS A COMPREHENSIVE AND GLOBAL APPROACH IN THE EU?

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Introduction

The EU's evolving policy strategy on migration is now calling for the implementation of an EU-wide 'global approach' that intends to provide a multifaceted response to the challenges posed by this phenomenon. In November 2006 the European Commission published a Communication, which, as indicated by its title "Global Approach to Migration one year on: Towards a Comprehensive European Migration Policy",¹ aims at putting forward a series of policy guidelines that would enable improved comprehensiveness of Community action in this contested area. In its Communication, the Commission also identified the development of a common policy dealing with the conditions for admission and residence of third-country nationals for economic purposes – labour immigration – as one of the priorities for building the global approach to migration.

While the establishment of a harmonised framework on labour immigration has been constantly re-emphasised at the official level as a priority for the EU, the member states have practised a fierce strategy of resistance in relation to any sign of 'communitarisation' or liberalisation in this field at the transnational level. That notwithstanding, the European Commission is once more taking on the role of promoter of European integration processes. On the basis of the 'global approach', the Policy Plan on Legal Migration of 2005² and its Legislative and Work Programme for 2007,³ it will present by September 2007 two proposals for directives dealing respectively with the conditions of entry and residence of highly skilled workers and a common general framework of rights for all immigrants in legal employment.

As regards the first of the proposals, the official justification grounding the prioritisation given to the development of a European scheme favouring the entry and stay of those qualified as 'highly skilled workers' appears to be based on the predominant positions and experiences of the member states. An alternative horizontal regime that would cover without distinction all the categories of immigrant workers would be considered too far from the existing patterns in the national legal systems. Too much distance from domestic legal regimes would make it very difficult to find consensus inside the rooms of the Council. The current decision-making process

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¹ European Commission, Communication, The Global Approach to Migration one year on: Towards a Comprehensive European Migration Policy, COM(2006) 735 final, Brussels, 30.11.2006.

² European Commission, Communication, Policy Plan on Legal Migration, COM(2005) 669, Brussels, 21.12.2005.

³ European Commission, Communication, Commission Legislative and Work Programme 2007, COM(2006) 629 final, Brussels, 24.10.2006.

applicable to the area of legal immigration still gives the member states the final voice in the adoption of any related proposal calling for harmonisation. This situation forces the European Commission to take duly into account their actual legislative settings and common trends while elaborating the 'Community approach'. As we argue in this paper, however, it would be a mistake to base the renewed European labour immigration strategy on the current political and economic policies and laws of key member states. Although this would facilitate political agreement in the Council, it could on the other hand put at risk a coherent, global and long-term common EU immigration policy.

In fact, the national arena shows a very heterogeneous and changing picture concerning political priorities, policy responses and laws on labour immigration. Among some shared tendencies, we can see the influence and expansion of a utilitarian, selective and economically-oriented approach. This tendency is mainly characterised by a profit-oriented doctrine of selection, which favours the economic interests of the state and provides special employment schemes with a facilitated administrative system for entry and residence only for the kind of labour force categorised as 'highly skilled', 'profitable' or 'talented'. The use of these policies raises a number of questions and enhances the legal insecurity of the immigrant worker. If transferred to the realm of the European Community, such policies would negatively affect the overall comprehensiveness of the Community approach. There are three main reasons why the prevalence of national trends may undermine a common immigration policy.

First, a policy based purely on selection and the 'needs' of the state may lead to situations where the immigrant is de-humanised and treated solely as an economic unit. It also institutionalises an unacceptable disparity in the treatment of those workers defined as highly or not highly skilled.

Second, when comparing the different national legal systems we can see that the definition of 'highly skilled immigrant' is unclear, too diverse in nature and at times not purely dependent on the educational and professional qualifications of the immigrant worker, but on other rather discreet factors that rest in the hands of the state. These determining factors include for instance the salary level that the immigrant worker is expected to obtain as well as the level of independence from the state's social welfare system. The label of 'highly skilled' therefore does not intrinsically relate to the level of knowledge or professional competences attained, but to the actual degree of profit that the immigrant will bring to the receiving state.

Third, the concept of highly skilled is too malleable a category to be left to the dynamism and constant evolution characterising the economy and labour market shortages. This close interrelationship weakens the guarantees and legal security that the status of highly skilled confers to the immigrant worker.

This paper addresses the building of a common policy on labour immigration. It reviews the latest policy developments in the EU concerning the harmonisation of the rules for admission and residence of third-country workers.⁴ The main questions presented by EU's 'global' approach to this policy area are studied along with the essential weaknesses current policy and legal trends in the national arena may pose to any eventual Europeanisation by following their patterns too closely. In particular, section 1 looks at the key legislative proposals as part of the new Community approach to immigration related to employment. Section 2 studies the general tendencies that may be perceived in the national arena in the field of labour immigration. Section 3 continues by identifying some of the vulnerabilities that the predominance and reinvigoration of existing national regulations would bring to the ongoing construction of a comprehensive and global EU immigration policy. The final section concludes.

⁴ This paper does not cover rules on admission and residence for the purpose of self-employment activities.

1. Globalising the EU's policy strategy on labour immigration

The programme of the German EU presidency entitled *Europe – succeeding together* has identified as one of its priorities a focus on “the global approach to migration issues” and on a “coherent immigration policy”, having the forthcoming European Commission’s proposal for a directive for highly skilled immigrant workers as one of its most important features.⁵ But what have been the key policy steps that have led the Union to adopt this apparently renewed strategy on migration, and the special focus on highly qualified personnel?

The European Commission has been one of the main promoters of the Europeanisation and the continuous reinvention of the European strategy in the area of regular immigration.⁶ The obstacles that it has encountered while doing so have been numerous and sometimes not easy to circumvent. There was an apparent official consensus with the Tampere Programme of 1999 about the need to develop a common approach approximating the laws on the conditions for admission and residence of immigrants for employment purposes.⁷ In light of this consensus, the Commission took a first, decisive step forward and in July 2001 presented a proposal for a directive laying down the basic conditions and rules of admission concerning migrants for employment purposes.⁸ The main goal of this initiative was to facilitate regular immigration and simplify entry and residence procedures for reasons of employment and self-employment in the Union. After years of high-level discussions, the European Commission was forced to withdraw the proposal.⁹ Political agreement was impossible among the member states’ representatives.¹⁰ Since then, the official discourse and positions put forward by particular member states have too often advocated the overarching importance of the principle of subsidiarity and the national competences and regulations over this policy area.¹¹

Yet, while trying to keep with the Community objectives and previously-acquired political commitments related to the establishment of an area of freedom, security and justice, and after reconsidering the strategy to be followed, the Commission did not stop there and in 2004 it presented a Green Paper on an EU approach to managing economic migration (COM(2004) 811).¹² The Green Paper aimed at fostering the debate among EU institutions, member states and civil society about the ‘added value’ of and the most appropriate form for Community rules for admitting third-country nationals for employment purposes. It was coupled with a public

⁵ The Federal Government of Germany, *Europe – succeeding together*, Presidency Programme, 1 January to 30 June 2007 and also the background paper for the Informal Meeting of Justice and Home Affairs Ministers, “Initiative concerning the European migration policy”, held in Dresden on 14-16 January 2007 (both documents are retrievable from <http://www.eu2007.de/en>).

⁶ S. Bertozzi, *Legal Immigration: Time for Europe to Play its Hand*, CEPS Working Document No. 257, CEPS, Brussels, forthcoming (2007).

⁷ European Council, Presidency Conclusions of the Tampere European Council of 15-16 October 1999, SN 200/99, Brussels, para. 20 (1999).

⁸ European Commission, *Proposal for a Council Directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities*, COM(2001) 0386 final, Brussels, 11.07.2001.

⁹ European Commission, *Withdrawal of Commission Proposals following screening for their general relevance, their impact on competitiveness and other aspects*, 2006/C 64/03, OJ C64/3, 17.3.2006.

¹⁰ For an overview of the main reasons for the failure see S. Carrera and M. Formisano, *An EU Approach to Labour Migration: What is the Added Value and the Way Ahead?*, CEPS Working Document No. 232, CEPS, Brussels October (2005).

¹¹ Art. 5 of the EC Treaty.

¹² European Commission, *Green Paper on an EU approach to managing economic migration*, COM(2004) 811 final, Brussels, 1.11.2005.

hearing organised by the European Commission in June 2005, in which the contributions submitted by all the main stakeholders involved were discussed. A new political momentum was hence found to re-launch the debate on an EU labour migration policy. In their contributions to the consultation process a majority of member states expressed their support for a policy that would offer ‘fast-track procedures’ for attracting highly skilled migrants. In the submissions presented by some of them it was stated that this category of immigrants should be preferred over others “in order not [to] fall down in the competition for the most highly skilled workers with comparable economic regions (USA, Japan and China)”.¹³

The increasing reluctance shown by some of the member states to reach a common framework offering a harmonised legal position towards labour immigration was also revealed in the second multiannual programme on policies dealing with freedom, security and justice – The Hague Programme.¹⁴ In particular, the Council stressed that the actual determination of volumes for the admission of labour migrants remains an “exclusive competence” of the member states, and only called upon the Commission “to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005”.¹⁵

In parallel, at an informal meeting at Hampton Court on 27 October 2005 the European heads of state and government called upon the European Commission to develop “a list of priority actions for improving global migration, with a special focus on the African region”.¹⁶ In November 2005, the European Commission adopted its first response to this request and published a Communication providing a set of “priority actions for responding to the challenges of migration”.¹⁷ This Communication offered a list of short-, medium- and long-term actions to deal with “the management of migration in relation to the Mediterranean area and Africa”. Although it did not specifically focus on the question of regular immigration for economic purposes, it paved the way for the consequent expansion of the global approach to the phenomenon of labour immigration. The need to ensure a response covering all the dimensions relevant to migration was officially adopted at the European Council meeting of December 2005.¹⁸ There the Council defined “the global approach” as consisting of a package of priority actions intending “to reduce illegal migration flows and the loss of lives, ensure safe return of

¹³ See for instance the contribution presented by the Federal Republic of Germany, *The Federal Government's Response to the Green Paper on an EU approach to managing economic migration*, European Commission, DG for Justice and Home Affairs, Brussels (2005), (retrieved from http://europa.eu.int/comm/justice_home/news/consulting_public/economic_migration/news_contributions_economic_migration_en.htm).

¹⁴ Refer to European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, OJ C 2005/C 53/01, 3.3.2005. For a critical assessment of The Hague Programme see T. Balzacq and S. Carrera, “The Hague Programme: The Long Road to Freedom, Security and Justice”, in T. Balzacq and S. Carrera (eds), *Security versus Freedom: A Challenge for Europe's Future*, Aldershot: Ashgate Publishing (2006).

¹⁵ See point 1.4 of The Hague Programme entitled “Legal Migration and the Fight Against Illegal Employment”, which begins by stating “Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy. It could also play a role in partnerships with third countries.”

¹⁶ See the press release by the UK Prime Minister's office at 10 Downing Street, “Press conference at EU informal summit Hampton Court” (retrieved from <http://www.number-10.gov.uk/output/Page8393.asp>).

¹⁷ European Commission, *Communication, Priority Actions for Responding to the Challenges of Migration: First Follow-up to Hampton Court*, COM(2005) 621 final, Brussels, 30.11.2005.

¹⁸ European Council, *Presidency Conclusions of the Brussels European Council of 15 and 16 December 2005*, SN 15914/01/05, 30.12.2005.

illegal migrants, strengthen durable solutions for refugees, and build capacity to better manage migration”.¹⁹

This new approach to migration has therefore been presented by the Council as the most adequate “solution” because of its full coverage of migration from a wider series of policy fronts, including not only ‘freedom, security and justice’, but also development, external relations, employment and the European neighbourhood policy. This new EU strategy has reinvigorated political momentum under the ‘added-value’ argument to develop a common European response dealing with, first, the sort of mobility by third-country nationals qualified as ‘regular’ or ‘irregular’, and second, its internal as well as external dimensions. The European Commission has in this way profited from this new political contextualisation and has since identified as one of the key ingredients substantiating the global approach the so-called ‘better management of migration’, which among others includes those policies intending to develop a common European regime on labour immigration.

A Policy Plan on Legal Migration (COM(2005) 669) was published by the European Commission in December 2005 presenting the list of actions and legislative initiatives that it intends to adopt until 2009 in the area of regular immigration.²⁰ The Policy Plan focused on immigration for employment-related purposes. In particular, it explained that the Commission would submit in 2007 a proposal for a directive aiming at establishing a common general framework of rights for all immigrants who are in legal employment and who already have been admitted to the EU territory. Furthermore, the Plan advocated a “fragmented or selective approach”, which will be consolidated through the presentation of four specific proposals dealing respectively with the following categories of third-country nationals: highly skilled or qualified workers, seasonal workers, intra-corporate transferees and remunerated trainees.²¹ In the words of the Commission, this package of initiatives would mainly address the conditions and procedures of admission for this small selection of “economic immigrants”.

The Commission’s plans for 2007 as regards the area of regular immigration have been fine-tuned by its Legislative and Work Programme for 2007, which was adopted in November 2006.²² The Programme foresees the presentation of a proposal for a directive on the conditions of entry and residence of highly skilled workers that would establish a “common special procedure to quickly select and admit such immigrants, as well as attractive conditions to encourage them to choose Europe”. The Work Programme also explains how it would aim at presenting an EU green card system that would allow a “swifter response to react to changing needs”. In addition, “A European regime for economic immigrants would give them a secure legal status making clear the rules attached and the rights they should enjoy.” In light of this, the European Commission will couple the proposal for a directive on highly skilled immigrants with another one offering a common general framework of rights for all immigrants who are in legal employment, which is now commonly termed ‘the general framework directive’.²³

¹⁹ Refer to European Council, Note from the Presidency on a Global Approach to Migration: Priority Actions focusing on Africa and the Mediterranean, 15744/05, Brussels, 13.12.2005.

²⁰ See the Policy Plan on Migration (European Commission, 2005a, op. cit.).

²¹ The first two proposals are expected to be presented between 2007 and 2008, and the last ones by 2009. It seems likely that the highly skilled directive will be the only legal instrument that member states will consider at the EU level. See also European Commission, Communication on Implementing The Hague Programme: The Way Forward, COM(2006) 331 final, Brussels, 28.6.2006.

²² Commission’s Legislative and Work Programme (European Commission, 2006b, op. cit.).

²³ The objective of this directive will be “to promote better integration of economic immigrants in the labour market and to establish fair and clear rules and rights for them. A secure legal status for economic immigrants – where their rights both as workers and as members of the host society will be clearly

The Commission's Communication on a Global Approach to Migration (COM(2006) 735 final) of November 2006 has represented a step forward in the current debate. It re-emphasises the need to develop a common policy on regular immigration that would facilitate the admission of certain categories of immigrant workers on "a needs-based approach" and especially take into account the case of the "highly skilled".²⁴ On this theme the Finish Presidency Conclusions adopted in December 2006 at the Brussels European Council placed at the centre of the political agenda the development of "well-managed migration policies, fully respecting national competences, to assist Member States to meet existing and future labour needs".²⁵ The Conclusions also referred to the forthcoming Commission proposal on highly skilled immigrants as an important step in that direction. No comment was added concerning the general framework directive. The inclusion of the phrase "fully respecting national competences" shows, however, that the Council, and some particular member states, still feel very uncomfortable at times about shifting an ounce of national sovereignty over the competence related to entry and residence for employment purposes to Community governance.²⁶ Member states' precise hesitations towards the Europeanisation of labour immigration will surely emerge during the negotiations of the upcoming proposals for directives. They are likely to surface even in relation to the supposedly less controversial one on highly skilled immigration. Independent of having duly considered that the proposed Community approach on the latter does not present a picture fundamentally alien to current national developments, it will anyhow be subject to heated debates and competing strategies by the different representatives of the member states within the Council.

Along with the ongoing doubts of certain member states as to the added value of the common policy on labour immigration, a major difficulty that these two proposals for directives will face in the Council is the current decision-making mechanisms applicable to the area of legal immigration. While all the other areas covered by Title IV of the EC Treaty were transferred to the co-decision procedure and qualified majority voting at the end of 2004,²⁷ the area of legal immigration remained marginalised, still being subject to the unanimity voting rule. The operability of unanimity makes the adoption of any legislative measure a rather complicated goal in an EU of 27 member states. This situation is exacerbated if, as the other EC directives have also experienced, the member states try to push their own national approaches, political agendas and current legislation during the negotiations. It is also likely that they will be rather hesitant concerning a directive on rights. An improved procedural setting is urgently needed in order to circumvent these current inefficient and obsolete structures, and to prevent settlement

identified and recognized – will protect them from exploitation, therefore increasing their contribution to the EU's economic development and growth", as provided in the Commission's Legislative and Work Programme (ibid, p. 13).

²⁴ European Commission (2005a).

²⁵ Refer to the Presidency Conclusions of the Brussels European Council (European Council, 2005b, op. cit.).

²⁶ E. Guild, "Mechanisms of Exclusion: Labour Migration in the European Union", in J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Cheltenham: Edward Elgar (2004), pp. 211-34. See also E. Guild, "Primary Immigration: The Great Myths", in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law*, Oxford: Hart Publishing (2001), pp. 65-94.

²⁷ Refer to European Council, Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Art. 251 of that Treaty, OJ L 396/45, 31.12.2004. See also S. Peers, "Transforming decision-making on EC immigration and asylum law", *European Law Review*, Vol. 30, No. 2, April (2005), pp. 285-96.

on a level of harmonisation that would fundamentally go against any proactive immigration policy.

In addition to the institutional obstacles the initiatives face, there are also some open questions about the approach the European Commission has finally chosen for establishing a European scheme for the entry and residence of a few selected categories of immigrant workers (highly skilled workers, seasonal workers, intra-corporate transferees and remunerated trainees). The regime will give preference to the instauration of a transnational juridical regime providing for the fast-track selection, entrance and stay of those immigrants falling within the categorisation of the highly skilled. These facilities and freedoms (including the one of mobility) will not be included as part of the general framework directive.

One of the core arguments that have been put forward by the European Commission to justify this narrow and fragmented approach has been that in this way the common European policy will go in line with the positions, political priorities and legal regimes that currently exist in a majority member states.²⁸ The proximity with the state of affairs in key member states therefore becomes a fundamental factor for the success of any proposal for a directive in the field of labour immigration. Such proximity may facilitate the achievement of political agreement in the Council. Yet it might also endanger the overall approach of the Community and the building of a comprehensive immigration policy rooted in the principles of solidarity and openness – whose long-term effects would bring efficiency in terms of the security of employment and a high level of protection for the legal employability and working conditions of immigrant workers. Moreover, if the proximity rationale is the one prioritised, there are then few expectations as to the success of the proposal on a common general framework of rights for all immigrants who are in legal employment. In fact, member states' practices these days show the degree to which conferring rights to non-nationals is clearly not a priority. A common policy on labour immigration that follows current economic needs, labour market shortages and political priorities of the member states cannot have any transnational coherency.

The risks of a lack of coherence and comprehensiveness finds expression in the varying trends that may be ascertained when looking at the nature of policies and laws practised in some member states of the EU.²⁹ The positive influence of European Community law on regular immigration is increasing in scope and importance. Nevertheless, the complete discretion exercised by states on the entry and admission of economic immigrants – and the rules applied before the latter can meet the criteria to become a 'long-term resident Other' or any other EC-privileged category of immigrant – are too diverse. The criteria vary according to the particular needs and labour market gaps that define who is 'a profitable Other' and thus should be privileged over the rest. The diversity that also reigns in the definition of who is and who is not highly skilled renders a common European policy dependent on national rules positioning the immigrant worker in a situation of instability, insecurity and vulnerability.

²⁸ The Policy Plan on Legal Migration states, "The public consultation drew the attention to possible advantages of a horizontal framework covering conditions of admission for all third-country nationals seeking entry into the labour markets of the Member States. However, the Member States themselves did not show sufficient support for such an approach" (European Commission, 2005a, op. cit., p. 5).

²⁹ S. Carrera, *Legal Migration Law and Policy Trends in a Selection of Member States*, Briefing Paper prepared for the European Parliament, Policy Unit, Citizens Rights and Constitutional Affairs, July, Brussels (2006b). See also S. Carrera (2006d), *Programas de integración para inmigrantes: una perspectiva comparada en la Unión Europea*, Revista Migraciones, Num. 20, Universidad Pontificia de Comillas, Madrid, pp. 37-73; and also S. Carrera, "Integration of Immigrants versus Social Inclusion: A Typology of Integration Programmes in the EU", in T. Balzacq and S. Carrera (eds), *Security versus Freedom: A Challenge for Europe's Future*, Aldershot: Ashgate Publishing (2006a), pp. 87-114.

Finally, the European Commission's decision to adopt a policy granting a "secure legal status" and facilitated mobility to only a restricted group of third-country workers goes against any global approach to migration. By regulating the entry, residence and mobility of a limited set of legal categories of immigrant workers, the common immigration policy will lead to a piecemeal and sectoral regulatory framework that will be far from offering a global response to the phenomenon of labour immigration. This approach sets aside all the rest of the third-country nationals who may be 'legal workers' but who are not considered by the national immigration laws of the member states as falling within one of these narrow categories. Overall, the EU policy pattern of globalising the Community's approach will in fact be based on one that uses fragmentation and selection as the guiding principles.

The national level offers a very diverse and plural picture as regards the policy and law on labour immigration. The renewed European labour-migration strategy appears to be mostly based and inspired by the trends and apparent commonalities emerging among the member states. So what then are the main tendencies that may be identified in this policy area?

2. Some national trends on labour migration at the national level

The experiences and responses pursued by the EU member states in the field of labour immigration are characterised by wide diversity, which is inherent in their respective regulatory, political and institutional settings. The priorities and policy responses differ greatly from one state to another according to the perceived economic needs in their labour markets. Two general tendencies can be discerned, however. First, there is an increasing impact of European Community immigration law concerning access to employment by third-country nationals, for instance in relation to equality of treatment in working conditions and access to employment for those qualifying for or holding the EC status of long-term resident.³⁰ On the other hand, there is a second trend consisting of the expansion of the selection approach in the rules on first admission and residence for reasons of employment, which follows a utilitarian and economically-oriented rationale that mostly takes into account the needs of the state, and wherein the member states retain important room for manoeuvre.

As regards the first of the patterns, the EC law on regular immigration is already provoking a dense cascade of effects in the area of employment at the member state level. In the last few years the member states have reviewed their domestic frameworks using as official justification the obligation to transpose common European rules into their traditional juridical systems. In fact, the state's obligation to implement EC immigration law involves a difficult realisation in some member states that much competence has since been transferred to the EU. As Groenendijk (2006) has rightly pointed out,

[T]he application of the new EC migration law at the national level...will diminish the 'exceptional' nature of immigration law...and will make national authorities and others aware that many special administrative techniques and barriers applied only in immigration law, such as extremely high fees, exclusion of judicial control, or excessively one-sided interpretations of general rules of administrative law...are no longer possible.³¹

³⁰ Refer to European Council, Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000. See also European Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

³¹ K. Groenendijk, "Citizens and Third Country Nationals: Differential Treatment or Discrimination?", in J.Y. Carlier and E. Guild (eds), *The Future of Free Movement of Persons in the EU*, Collection du Centre des Droits de L'Homme de la'Université Catholique de Louvain, Brussels: Bruylant (2006), pp. 79-101.

Although it may be true that some of the existing Council directives may present some critical elements in need of improvement,³² the European regulatory setting does offer a transnational level of protection to ‘the Other’, independent of the at-times restrictive, ever-changing and nationally-oriented interests of the member states. And this is the case for the very first time in the history of European integration. The minimum juridical protection that is provided³³ prevents the member states from going below these Community standards of protection in their respective national arenas. Moreover, as has been shown in the legal proceedings of Case C-540/03, *European Parliament v. Council* of 27 June 2006,³⁴ the proactive role played by the European Court of Justice (ECJ) in the interpretation of Community law on immigration is increasingly limiting national discretion over questions related to regular immigration.³⁵ This ruling has substantially reduced “the exceptions” that the Council Directive on the right to family reunification offered to the member states at times of national implementation.³⁶ It has also strengthened the principle of respect of fundamental rights while applying EU immigration laws at the national level.³⁷ The member states will therefore be unable to circumvent or attempt to undercut the degree of protection and legal security included in the level of harmonisation that has been achieved so far by the European Community.

Nevertheless, the stable guarantees already offered by EC immigration law do not apply to the conditions of entry and residence of immigration for labour purposes, which remain under the *de facto* exclusive competence of the member states. In this context, there appears to be a restrictive, utilitarian and economically-oriented trend, which is revealed in the application of a selective immigration approach that offers far more attractive conditions and facilitated procedures to those falling within the immigrant categories designated as ‘profitable’.

A substantial number of member states currently practise a policy of selective labour immigration consisting of schemes that simplify administrative procedures applicable to the admission and residence for employment purposes of those defined as highly skilled, talented or well-educated.³⁸ This profit-oriented rationale institutionalises the state distinction between

³² T. Balzacq and S. Carrera, *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy*, CEPS, Brussels, July (2005).

³³ P. Boeles, “What rights have migrating third country nationals?”, in J.W. de Zwaan and F. Goudappel (eds), *Freedom, Security and Justice in the European Union: Implementation of The Hague Programme*, The Hague: T.M.C Asser Press (2006), pp. 151-63.

³⁴ Refer to Case C-540/03, *European Parliament v. Council*, 27 June 2006.

³⁵ Para. 106 of the ruling states, “Implementation of the Directive is subject to review by the national courts...If those courts encounter difficulties relating to the interpretation or *validity* of the Directive, it is incumbent upon them to refer a question to the Court for a preliminary ruling in the circumstances set out in Articles 68 EC and 234 EC” (emphasis added).

³⁶ Refer to European Council, Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.

³⁷ This is the first case where the ECJ uses the Charter of Fundamental Rights. See Para. 38 of the judgement, which stipulates, “The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, *the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights’*” (emphasis added).

³⁸ For an overview of national measures targeting highly skilled workers see N. Diez Guardia and K. Pichelmann, *Labour Migration Patterns in Europe: Recent Trends, Future Challenges*, Economic Papers

those non-nationals who are deemed useful, and are therefore wanted and most welcome, and all ‘the Others’ who are viewed as a potential threat, a burden on state welfare resources and an enemy of the economic stability and social cohesion of the country. Exclusion and expulsion are hence justified in order to offer protection to a supposedly threatened domestic labour market and social welfare system, and in the interest and safety of the citizen.³⁹

Among the EU member states that have specific labour schemes fostering the admission and residence of highly skilled immigrants are the Netherlands, Germany, Belgium, Austria and France. The Netherlands practises a selective and demand-driven immigration policy that is rooted in economic considerations.⁴⁰ Dutch immigration law offers highly skilled or “knowledge immigrants” (*kennismigranten*) a more open, rapid and simple administrative procedure than the one applicable to other immigrant workers.⁴¹ Highly skilled immigrants will not need to experience the long and tedious bureaucratic procedures of applying for a work permit.⁴² Similarly, the Residence Act in Germany⁴³ provides that highly skilled migrants are directly eligible for a permanent settlement permit upon entering the German territory.⁴⁴ Section

No. 256, European Economy, DG for Economic and Financial Affairs, European Commission, Brussels, September (2006). For a study of states’ strategies for admitting foreign workers see D.G. Papademetriou and K. O’Neil, *Efficient Practices for the Selection of Economic Migrants*, Paper prepared for the European Commission, DG Employment and Social Affairs, Migration Research Group, HWWA, Hamburg, July (2004).

³⁹ For an exploration of “the boundary issues and tensions” posed by immigration to the European welfare state see A. Geddes, “Migration and the Welfare State in Europe”, in S. Spencer (ed.), *The Politics of Migration: Managing Opportunity, Conflict and Change*, Ames, IA: Blackwell Publishing (2003a), pp. 25-38. See also A. Geddes, “Europe’s Border Relationships and International Migration Relations”, *Journal of Common Market Studies*, Vol. 43, No. 4 (2005), pp. 787-806.

⁴⁰ Section 13 of the Aliens Act states, “an application for the issue of residence permit shall be granted only if: (b) the presence of the alien would serve a real interest of the Netherlands”. See V. Marinelli, “The Netherlands”, in J. Niessen, Y. Schibel and C. Thompson (eds), *Current Immigration Debates in Europe: A Publication of the European Migration Dialogue*, Migration Policy Group, Brussels/Warsaw (2005).

⁴¹ The general conditions for admission to the country are established in Chapter 2, “Entry”, Section 3 of the Aliens Act of 2000. See the website of the Immigration and Naturalisation Service of the Ministry of Justice (<http://www.ind.nl/EN/index.asp>).

⁴² The first phase for admission in the country will consist of making an application for an authorisation for temporary stay (MVV), which is a special entry visa. The following categories of persons, among others, are exempted from that obligation: EU and EAA citizens, as well as citizens from Australia, Canada, Japan, Monaco, New Zealand, Vatican City and the United States. See Justitie, Immigratie- en Naturalisatiedienst, *Residence in the Netherlands*, Rijswijk, May (2006).

⁴³ The Immigration Act consists of the Residence Act, the Act on the General Freedom of Movement for EU Citizens and amendments to additional legislation. Moreover, a series of ordinances have been passed that complement and develop this legislative package, more specifically the Employment Ordinance – Foreign Countries (*Beschäftigungsverordnung*, 2004). This legislation was passed by the Bundestag on 1 July 2004 and was officially adopted by the Bundesrat on 9 July 2004. The Residence Act (*AufenthG*) regulates the entry and stay of immigrants in Germany. See D. Schmidt, “The New German Immigration Law”, in J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Cheltenham: Edward Elgar (2004), pp. 225-58. See also H. Kolb, “Covert Doors: German Immigration Policy between Pragmatic Policy-Making and Symbolic Representation”, in A. Böcker, B. de Hart and I. Michalowski (eds), *Migration and the Regulation of Social Integration*, Special Issue, IMIS-Beiträge, 24/2004 (2004).

⁴⁴ In addition, Section 18 states that labour migration may take place taking into account “the requirements of the German economy, according due consideration to the situation [in] the labour market”.

19.3 of the Act (Settlement permit for highly qualified foreigners) identifies highly qualified persons as scientists with special technical knowledge, teaching or scientific personnel in prominent positions, or specialists and executive personnel with special professional experience who receive a salary corresponding to at least twice the earnings ceiling of the statutory health insurance scheme. Also the Federal Employment Agency does not need to give its consent to these categories of desired immigrants to ensure a quick response to the application by the Foreigners Office.⁴⁵ The new Art. 9 of the *Arrêté Royal modifiant l'Arrêté Royal du 9 juin 1999 relatif à l'occupation des travailleurs étrangers* in Belgium gives preferential treatment to the category of persons falling within the status of highly skilled workers by allowing them to renew their work permit for a period of four years.⁴⁶ In the same vein, Art. 41 of Austria's Settlement and Residence Act⁴⁷ stipulates a special settlement–key worker permit that will be granted in an accelerated procedure in the case of qualified personnel (*Schlüsselkräfte*).⁴⁸

In France, immigration is regulated by the perceived economic needs of the country.⁴⁹ The main principle seems to be that nobody should become a public burden, and hence any applicant needs to have sufficient income and health insurance coverage. The new *Loi relatif à l'immigration et à l'intégration* No. 2006-911⁵⁰ presents a new residence permit, *La carte de séjour portant la mention compétences et talents* [the residence permit mentioning competences and skills].⁵¹ This permit shall be granted to those immigrants who, because of their special competences or skills, may contribute significantly and durably to the economy or the intellectual, scientific, cultural, humanitarian or sportive development of France and of the country of his/her nationality. The validity of this type of residence permit is for three years and

⁴⁵ Those categories of employment where the Federal Employment Agency (*Bundesagentur für Arbeit*) is required to give its favourable consent are provided in Sections 17-31 of the Employment Ordinance – Foreign Countries.

⁴⁶ Art. 9.6, *Arrêté Royal modifiant l'Arrêté Royal du 9 juin 1999 relative à l'occupation des travailleurs étrangers*, 6 Février 2003 (AR 2003-02-06/41). See also S. Gsir, M. Martiniello, K. Meireman and J. Wets, “Belgium”, in J. Niessen, Y. Schibel and C. Thompson (eds), *Current Immigration Debates in Europe: A Publication of the European Migration Dialogue*, Migration Policy Group, Brussels/Warsaw (2005).

⁴⁷ The new Aliens Act Package entered into force on 1 January 2006 and consists of the Settlement and Residence Act (*Niederlassungs-und Aufenthaltsgesetz*), Federal Law Gazette No. 100/2005 in the version Federal Law Gazette No. 31/2006, the Aliens Police Act, as well as the Alien's Employment Act (*Ausländerbeschäftigungs-gesetz*) of 1975. The Settlement and Residence Act (NAG) contains the main rules on immigration in Austria.

⁴⁸ Special legal rules also exist for the health sector. See International Organisation for Migration, *Immigration and Integration in Austria, Reference Period 1 July 2004 to 31 December 2005*, Policy Report for the European Migration Network, IOM, Vienna (2005).

⁴⁹ See R. Blio, C. Wihtol de Wenden and N. Mekkache, “France”, in J. Niessen, Y. Schibel and R. Magoni (eds), *EU and US Approaches to the Management of Immigration*, Migration Policy Group, Brussels/Warsaw (2003).

⁵⁰ See the Law on the control of immigration and residence of foreigners in France, *Loi relative à la maîtrise de l'immigration et au séjour des étrangers en France et à la nationalité* (MISEFEN), no. 2003-1119, 26 November 2003, Journal Officiel de la République Française, No. 170, 25 July 2006, p. 11047. This law presents a series of restrictive amendments to the Code de l'entrée et du séjour des étrangers et du droit d'asile, and transposes the new EC Directives on legal migration into the French legal system. See also Collectif Uni(e)s contre une immigration jetable, *Nouvelle analyse du projet de loi modifiant le code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA), (2006) (retrieved from <http://www.contreimmigrationjetable.org/>); and also the website <http://www.legifrance.gouv.fr>.

⁵¹ Art. 15 of the new law (which modifies Art. 315 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile*).

may be renewed once if the holder is a national of one of the countries having special historical ties with France (*zone de solidarité prioritaire*).⁵² The holders belonging to one of the countries of the *zone de solidarité prioritaire*⁵³ shall participate in an action of development cooperation or economic investment as defined by the French authorities and his/her country of origin.⁵⁴ The grant of the residence permit mentioning competences and talents is conditioned on the content and nature of the project proposed by the immigrant and the interest that this project represents for France and his/her country of origin.⁵⁵ The permit allows the individual to carry out a professional activity of his/her choice under the framework of the project.⁵⁶ Additionally, top executives and specialists (*cadres de haut niveau*) of international groups will be considered highly skilled if they can show a labour contract, evidence of having worked for at least six months in a branch of the multinational company and having a monthly salary of €5,000.⁵⁷

What are the vulnerabilities that could emerge from transferring the common national trend – the selection approach with its utilitarian and economically-oriented rationale – to the European arena and a common immigration policy? In the next section we study the main weaknesses inherent to the principle of national predominance in relation to the construction of a harmonised Community approach on labour immigration.

3. The predominance of national trends: Vulnerabilities for a common EU immigration policy

The prioritisation of national trends (principle of national predominance) would lead to a number of severe weaknesses undermining the coherency, comprehensiveness and the global nature of any common EU approach to labour immigration. Among others we highlight the following three.

First, a policy based on special schemes selecting those immigrant workers who are labelled ‘highly skilled’ may lead to situations where the Other is dehumanised and regarded as an economic unit that can be used at the discretion of the state according to its needs. Only those deemed profitable, talented or highly skilled will be offered a path of facilitated administrative procedures for admission and residence. This experience will contrast with that of all the Others who do not fall into this privileged distinction. The choice of admitting one particular category

⁵² The new version of Art. 315.3 states “*La carte mentionnée à l’article L. 315-1 est attribuée au vu du contenu et de la nature du projet de l’étranger et de l’intérêt de ce projet pour la France et pour le pays dont l’étranger a la nationalité. « Lorsque l’étranger souhaitant bénéficier d’une carte “compétences et talents” réside régulièrement en France, il présente sa demande auprès du représentant de l’Etat dans le département. Lorsque l’étranger réside hors de France, il présente sa demande auprès des autorités diplomatiques et consulaires françaises territorialement compétentes. L’autorité administrative compétente pour délivrer cette carte est le ministre de l’intérieur.*”

⁵³ The countries included are listed on the websites of the French Ministry of Foreign Affairs (retrieved from <http://www.diplomatie.gouv.fr> and <http://www.diplomatie.gouv.fr/fr/IMG/jpg/Cartezsp02.jpg>).

⁵⁴ Refer to Art. L. 315-6 of the Code.

⁵⁵ See X. Vandendriessche, *Le Droit des Étrangers*, Connaissance du droit, Paris: Éditions Dalloz (2005), p. 79.

⁵⁶ Regarding family reunification, Art. L. 315-7 establishes that those persons eligible for reunion are spouses over 18 years old and minor children.

⁵⁷ GISTI, *Le guide de l’entrée et du séjour des étrangers en France*, 6^e éd., Paris : Editions La Découverte (2005). See also Uni(e)s contre une immigration jetable, *Analyse du projet de loi modifiant le code de l’entrée et du séjour des Étrangers et du droit d’asile (CESEDA)*, 11 April (2006) (retrieved from www.contreimmigrationjetable.org).

of worker instead of another creates disparities in the treatment of third-country nationals.⁵⁸ A common European policy legitimising and harmonising this state practice at the transnational level puts the immigrant worker in an unacceptably vulnerable position in respect of employers, ‘citizens’ and the state. In this way, a harmonised EU scheme for the highly skilled will not follow a rights-based approach, but one in which the financial needs of the state will prevail.

Second, there is a lack of clarity on what the member states really mean when referring to ‘highly skilled immigrants’. Looking comparatively at the national arena, the legal definition of who is and who is not highly skilled is far from clear or transparent, where such definition exists. At times the status is not even granted according to the qualifications or professional competences of the immigrant at hand, but in relation to the salary level that the immigrant is going to receive or the degree of independence from the social welfare system. In other words, the status of highly skilled is not dependent on the level of knowledge or professional competences of the immigrant worker, but on the actual degree of profit the latter will bring to the receiving state. Only those conceived as beneficial for the development of the national economy will be attracted and denominated as ‘highly qualified’. Furthermore, the legal requirements for moving from the category of ‘undesirable economic immigrant’ to ‘highly skilled Other’ are at times incoherent and subject to huge discretion by the state’s administration.

In the European Union we may point to five member states that use salary level as the main criteria to qualify an immigrant as highly skilled. These are Austria, Belgium, France, Germany and the Netherlands. As Table 1 shows, the level being required ranges from €84,600 gross annual salary in Germany to €7,000 in Austria. In the case of the Netherlands, an immigrant qualifies as highly skilled if s/he is in possession of a contract and proves that s/he will be earning at least €45,495; for those under the age of 30 the figure is €33,363.⁵⁹ In Austria, highly skilled immigrants (qualified personnel or ‘*Schlüsselkräfte*’) are also defined according to income threshold.⁶⁰ Workers are qualified as such if they earn more than 60% of the income threshold for social security contributions (*Höchstebeitragsgrundlage*).⁶¹

In Belgium law, for the purposes of immigration highly qualified personnel (*personnel hautement qualifié*) are equally defined according to the level of annual salary that the immigrant will obtain. According to Art. 67 of the law concerning labour contracts of 3 July

⁵⁸ European Economic and Social Committee, Opinion of the European Economic and Social Committee on the Green Paper on an EU approach to managing economic migration (COM(2004) 811 final), SOC/199, Rapporteur: Pariza Castaños, Brussels, 9 June (2005).

⁵⁹ J. Apap, “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”, *European Journal of Migration and Law*, Vol. 4 (2002), pp. 309-28. The Aliens Act establishes different kinds of residence permits. These include a residence permit for a fixed period of five years maximum (Sections 14-19) and a residence permit for an indefinite period, which may be granted subject to a series of conditions after five consecutive years of lawful residence and has to be granted unconditionally after having lawfully and continuously resided in the Netherlands for ten years (Sections 20-22).

⁶⁰ Austrian law on immigration is characterised by a double quota system for admission and access to employment. In fact, a federal quota is established at the national level and there is another one corresponding to the provincial realm (province employment quotas). Applicants for first-time settlement permits are subject to the quota, which is determined by a Settlement Regulation adopted by the Austrian Federal Government on an annual basis. The Austrian system of quotas mainly focuses on the selection and admission of key professionals.

⁶¹ Any worker or employee in Austria has to contribute to the compulsory social security system up to a certain income threshold (*Höchstbeitragsgrundlage*); no social security contributions are deducted from a proportion of the income above this threshold.

1978 (*loi du 3 juillet 1978 relative aux contrats de travail*),⁶² the salary level will be calculated and adapted annually.⁶³ As previously noted, in Germany Section 19.3 of the Residence Act⁶⁴ defines “highly qualified persons” as those who receive a salary corresponding to at least twice the earnings ceiling of the statutory health insurance scheme.⁶⁵

Table 1. Salary levels defining the highly skilled in EU member states (euros)

	Gross annual salary level required
Austria	27,000
Belgium	33,082
France	60,000
Germany	84,600
The Netherlands	
<i>Over age 30</i>	46,945
<i>Under age 30</i>	33,363

Source: Author’s compilation.

Third, each member state defines the profitable economic immigrant in a completely different manner depending on its perceived economic needs and labour market shortages. In this regard, member states present diverse and sometimes opposing concerns. For instance, Germany, the UK and to some extent France appear to be primarily in need of highly skilled labour, particularly in IT and medical occupations. Italy, Spain and Greece mainly present shortages in the low-skilled sectors, such as housekeeping, tourism-related services, nursing care for the elderly and construction. The category of highly skilled/profitable immigrant is thus too malleable a juridical label that depends on the dynamic needs existing in a particular timeframe at the national level. The status evolves according to the rapid evolution of the financial demands and labour market gaps of the receiving state. Such an approach is therefore not a long-term solution. It encapsulates those particular sectors that may be in need of labour at a given time, but which in the long run may vary drastically according to the ever-changing nature of the economy. As economic needs or labour gaps change, so too does the ‘high’ usefulness and categorisation of the Other. The temporary degree of protection and the actual legal employability of the immigrant worker might too easily shift his/her status from being a profitable asset to being a ‘non-profitable Other’.

⁶² See the database of Belgium legislation at the website <http://www.belgiumlex.be>

⁶³ *Titre III, Le contrat de travail d'employé, Chapitre 1, Dispositions générales, Art. 67, “§ 1er. Le contrat peut prévoir une clause d'essai. Cette clause doit, à peine de nullité, être constatée par écrit, pour chaque employé individuellement, au plus tard au moment de l'entrée en service de celui-ci. § 2. La période d'essai ne peut être inférieure à un mois. Elle ne peut être supérieure respectivement à (six mois ou douze mois) selon que la rémunération annuelle ne dépasse pas ou dépasse ((19 300) EUR). L 1985-01-22/30, art. 62, 009 AR 1984-12-14/33, art. 2, 008 AR 2000-07-20/66, art. 1, 046; En vigueur: 01-01-2002. (NOTE : Le montant de 19.300 EUR est porté par indexation à 33.082 EUR <DIVERS 2005-12-02/30, art. M, 061; En vigueur : 01-01-2006>).”*

⁶⁴ Section 19 of the Residence Act “Settlement permit for highly qualified foreigners”.

⁶⁵ The Immigration Act originally intended to provide a more liberalised system for labour migration; however, the stated position that Germany is not a country of immigration was unfortunately maintained and the ban on recruiting migrant labour (or ‘Recruitment Stop’) was kept along with a regulation that offers some specific exceptions regarding certain occupational activities (‘Recruitment-Stop Exception Policy’). New legal immigration continues to depend on family reunification and the exceptional procedures for economic immigrants.

Taking into account these vulnerabilities, any policy based on an EU green card system allowing the mobility of the highly skilled will not be very easy to implement effectively in practice. A person treated as highly skilled in one member state in fact may be considered a non-profitable Other in another. Furthermore, while the philosophy behind the second proposal for a directive to establish a common general framework of rights for all immigrants in legal employment would contribute, depending on its final shape, towards a rights-based approach in the EU's immigration policy, it is not clear how it will be able to prevent the other three vulnerabilities from materialising. The challenge of doing so will increase should this proposal for a directive, if ever adopted, end up being a common set of minimal standards of protection offering the possibility for member states to water down the existing guarantees and rights third-country workers currently have at the national and European levels.

Conclusions

The European Union needs to consolidate the building of a common policy on labour immigration for the accomplishment of its own historical commitments towards the creation of an area of freedom, security and justice and in order to provide a comprehensive answer to the dilemmas posed by the phenomenon of immigration. The principle of subsidiarity constitutes a narrow and blinded approach towards these goals. It also falls below the expectations of citizens in terms of the results the EU is supposed to deliver. Yet, when constructing an EU immigration policy careful attention is needed. This paper has argued that a common policy needs to balance the consideration of the current positions of the member states (the principle of national predominance) with the need to develop a strategy that has as its very bases the principles of coherency, comprehensiveness, openness and solidarity.

Although proximity to the state of affairs in a majority of member states may ease the achievement of political consensus in the Council, it may also undermine the Community approach and the construction of a comprehensive immigration policy. Trends in the national arena show that the implications of EC immigration law are positively expanding and limiting the discretion of the state on labour immigration. In terms of admission and residence for employment purposes, however, we can discern an approach of selection guided by a utilitarian and economically-oriented rationale favouring the interests and needs of the state over the protection of the immigrant worker. This trend materialises in the use of schemes targeting the highly skilled, which grant facilitated administrative procedures for entrance and residence to those labelled as 'highly skilled/profitable Others'. As we have argued, the principle of national predominance brings about a number of vulnerabilities related to disparities of treatment inherent to this policy of selection. Most notably these include a huge diversity and lack of clarity about the very concept of 'highly skilled immigrants' as well as a connection to the constant evolution of financial demands and labour market gaps of the receiving states. All these elements make the status of the immigrant worker in relation to the employer, the citizen and the state even more vulnerable.

A way to solve some of these dilemmas would be to reinforce the Europeanisation process by ensuring an institutional consolidation of the Community method in the field of labour immigration. The Community's interests, and not those of key member states, need to guide the common approach to be followed. Also, an improved decision-making procedure is urgently needed. The marginalisation of this policy from the co-decision procedure and qualified majority voting represents a serious obstacle towards the realisation of a proactive immigration policy. Ensuring 'more Europe' in the area of labour immigration through the increasing use of the mechanisms of democratic and judicial accountability is fundamental for the respect of liberty and human rights in the EU. The principle of subsidiarity is an obsolete tool for solving these new European realities and building a European area where freedom, security and justice are promoted, consolidated and developed.

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