
**PUSH AND PULL FACTORS
TOWARDS AND AGAINST A COMMON
EUROPEAN MIGRATION POLICY:
FRANCE, BRITAIN, AND THEIR APPROACH TO
IRREGULAR MIGRATION**

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Introduction

The agreement on a European Pact on Immigration and Asylum¹, the vote of the “Return Directive”², the adoption of the Points Based System in the UK, and the six laws on immigration and asylum in France³ all put forward a managerial approach to immigration, that openly attracts skilled workers and investors, whilst filtering less attractive candidates to immigration (like family-related migrants, asylum seekers and, of course), and the fight against irregular immigration⁴.

In relation to migrants in an irregular situation, selective migration policies pose two main problems, that are intertwined. Firstly, current approaches do not take irregular migrants as a starting point for reflection. Instead, two main logics influence French, British and European immigration policies: security and profit. Significant numbers of deaths and violations of human rights –and notably, the right to asylum– directly resulted from such rationale. Secondly, the adoption of the “Return Directive” showed that in spite of the new role of the Parliament in immigration matters,⁵ intergovernmental policies

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1 On 25 September 2008, in Cannes, the Justice and Home Affairs Council agreed on the final version of The European Pact on Immigration and Asylum. The European Council formally adopted the Pact on 16 October 2008 in Brussels.

2 (COM(2005)0391 – C6-0266/2005 – 2005/0167(COD)) ‘on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals’. The draft directive was adopted by Parliament by 369 votes to 197 with 106 abstentions, on June 18, 2008.

3 Law on asylum, of 10/12/2003; Law on residence permits and citizenship, of 26/11/2003; Law on the expulsion of irregular migrants, of 26/07/2004; Law on immigration and integration, of 24/07/2006 Law on the management of immigration, on integration and asylum of 20/11/2007.

4 In the background of selective migration policies are population ageing projections showing that from 2030 in Europe, the lack of a work force will have to be counterbalanced by immigration, to ensure that taxes are paid, that the ageing population is cared for, and that European countries remain competitive on the world scene. The first report published on the matter was a 2000 UN Population Division of the Department of Economic and Social Affairs (DESA) report titled ‘Replacement Migration: Is it a Solution to Declining and Ageing Populations?’

5 In the case law C-133/06 opposing the European Parliament and the Council, the Court of Justice decided, on the 6th of May 2008, in favour of the European Parliament. The Court annulled clauses contained in the EU directive 2005/85/CE dealing with the minimum standards on procedures in member states for granting and withdrawing refugee status. Whilst the European Parliament used to only be consulted according to the previous directive, this judgement granted him a

and practices are still being pushed forward, under the cover of “common immigration policies”. Intergovernmental migration policies rest on –and reinforce, through the co-development approach notably– the basic distinction between “third-countries” and EU Member States. Third-countries are fixed into the role of “sending states”, whilst EU Member States are presented as “receiving states”.⁶ Intergovernmental policies also contribute to perpetuate the essential disparities between Member States. Essential disparities are in turn presented as inescapably blocking any further step towards a common migration policy. Whilst new Eastern European Members are countries of emigration (apart from Slovenia)⁷, Southern European countries actually need migrant workers to fill employment gaps in certain sectors (like the health and aged care sector, construction work, or the agricultural sector). However, are these formal, quantitative differences really insurmountable? Do they really hinder the creation of a common migration policy? Divergences amongst Member States were illustrated over the Summer, when the President of the Spanish Government Jose Luis Rodriguez Zapatero opposed the “integration contracts” and the ban on large-scale regularisation that were proposed by France⁸. Is it that integration issues, that are methodically set aside by governments, are actually the corner stone of current debates on irregular migration?

real co-legislator power, on equal footing with the Council. The establishment of the list of ‘safe countries of origin’ now falls under the co-decision procedure.

6 See for example, the President of Bolivia, Evo Morales's discourse. Available at: www.mediapart.fr/club/blog/la-redaction-mediapart/120608/la-directive-retour-est-une-directive-de-la-honte-par-evo-mo.

7 Since 2004, the rate of increase in the number of foreigners moving to Slovenia has been at around 50% per year. In 2007, Slovenia saw a 127.4% net migration growth in comparison to 2006 figures. Slovenia ranks third amongst the 27 EU member states in terms of net migration growth, after the Czech Republic (141.8%) and Denmark (131.7%). Amongst the 29.193 people who migrated to Slovenia in 2007, only a minority (1,689 people) was Slovenian citizens. Most migrants (27,504 people) were foreigners coming from the countries that emerged from the former Yugoslavia, mainly Bosnia-Herzegovina and Serbia. See, Republic of Slovenia, Government Communication Office, Available at: www.ukom.gov.si/eng/slovenia/publications/slovenia-news/6976/7010/

8 See: *Le Monde*, 29 June 2008, ‘Faux départ pour le Pacte sur l’immigration à Saragosse’.

What irregularity?

Following the Italian Interior Minister, Roberto Maroni's proposition that an irregular immigration status be considered an aggravating circumstance when being judged for a crime,⁹ and considering the latest version of the European Pact on Immigration and Asylum, which opposes "legal migration" (which is to be "organised") to "illegal immigration" and "illegal immigrants" (that are to be fought), it is very important to deconstruct discourses on "illegality".

The administrative construction of irregularity

Amongst the different routes that may lead to an irregular status, irregular modes of entrance (a person may be smuggled or trafficked into a country) are the most talked about by politicians and in the media. However, irregular stay (for example, overstaying a visa, working on a tourist visa, working longer hours than permitted on a student visa, being a migrant worker from an EU accession country and not signing up to the Worker Registration Scheme when working in the UK) is the most common route to living/working "illegally" in France or in the UK.

Therefore, it is obvious that most migrants in an irregular situation have not committed a criminal offence, but rather an administrative in-fringement. Furthermore, some workers arriving with valid work permits can fall into undocumented status because of their employer's confusion or inaction, or because of discretionary decisions by national Immigration Services. Many migrants might be unaware of their unauthorised status, notably because of complex rules of procedure, or for example, because they are unaware that they have crossed a border (for example, this has been the case with the free travel area between Northern Ireland and the Republic of

9 The proposal was raised over the summer 2008 and immediately condemned, notably by the Spanish government, the UN and the Vatican. The emergency decree issued by the Berlusconi government proposes that whilst being in Italy illegally is not a crime in itself, it should be considered an aggravating circumstance if a crime is committed. In that sense, the decree introduces parallel legislation for illegal immigrants. "The question of whether this infringes European law is currently being examined in Brussels" (Parliamentary Assembly, Doc. 11756, 14 October 2008. 'The situation of immigrants and asylum seekers in Southern Europe' Motion for a resolution presented by Mr Wodarg and others. Available at: assembly.coe.int/Documents/WorkingDocs/Doc08/EDOC11756.pdf >).

Ireland). Immigration status is not static, and the terminology chosen to talk about migrants in an irregular situation should illustrate this fact.

Terminology matters

The use of the term “illegal” has been criticised by several organisations (amongst which the ILO and the Council of Europe) as implying the commitment of a criminal offence¹⁰. The term “undocumented” (used for example by the International Organisation for Migration-IOM) has also been criticised as some of the migrants in an irregular situation do have documents allowing them to be in a country whilst not being entitled to work (MRCI, 2007). “Irregular migrants” is seen as the most politically correct term, and is used by most NGOs working with migrants. However, the Migrants Right Centre Ireland (MRCI) did emphasise that “an individual person cannot be irregular, but rather be in an irregular situation” (MRCI, 2007:17). Because it implies that immigration status is not static, Ruhs and Anderson’s concept of a “spectrum of compliance” seems to be the most appropriate to talk about migrants in an irregular situation: “Compliant migrants are legally resident and working in full compliance with the conditions of their immigration status. Non-compliant migrants are those without the rights to reside in the host country. Semi-compliance indicates a situation where a migrant is legally resident but working in violation of some or all of the conditions” (e.g. the spouse-dependant of a work permit holder -legally entitled to residence- who works without a permit) (Ruhs and Anderson, 2006:2).

Indeed, “irregularity” is a social construct: “migration only becomes irregular because politics and law declare certain migration undesired and irregular (...). Irregular migration ultimately is a legal, political and social construct” (Duvel, 2008). To explain the persisting problem of irregular migration, it might therefore be a good idea to shift the focus from irregularity to migration policy, and ask whether migration policy itself is a root cause of the problem?

Indeed, irregular migration policy both builds such a construct, and rests on it to legitimise restrictive measures. In particular, such a construct is used to justify no-regularisation policies, as it seems more obvious to return “stocks”¹¹ of migrants frozen into “illegality” than to regularise them, which would imply creating once more a new legal category.

10 See UN Special Rapporteur on the Rights of Non-Citizens (E/CN. 4/Sub. 2/2003/23 Para. 29).

11 Koser (2005:6) noted that, “Irregular flows pose challenges of control and management, as well as concern for the safety and dignity of migrants on the move. In contrast the political response to irregular stocks tend to focus either on channels for their regularisation or their removal”.

Numerical significance vs. political significance?

Official data on irregular migration is way outdated and often underestimated.¹² Above all, estimates can usually *not* accurately be compared between states or over time (Koser, 2005). They do confirm, however, that most migration is regular.

In 2007, an estimated 5.5 million irregular migrants were living in the **European Union** alone, and a further 8 million irregular migrants were living in the Russian Federation.¹³ During that same year, around 51,000 migrants were thought to have arrived by boat in Italy, Spain, Greece and Malta. This represented a massive increase from 2000, when it was estimated that between 400 000 and 500 000 illegal migrants entered the EU each year, and that around 3 million persons were residing irregularly in Europe, and especially in southern Europe (Italy, Greece, Portugal, Spain) and Germany.¹⁴

In **France** in 2006, between 200,000 and 400,000 irregular migrants were living on the territory. This meant that each year, “inflows” of irregular migrants amounted to 80,000-100,000 people (Sénat, 2006). These figures roughly corresponded 1998 estimates.

In the **UK**, official data on irregular migrants is more outdated, and it does not include the number of asylum seekers whose application was at the time being processed. It shows that in April 2001, between 310,000 and 570,000 “unauthorised migrants” (including foreigners who entered the country clandestinely, people who overstayed visas, and failed asylum-seekers who had not left) were living in the UK (The Home Office, 2005).¹⁵ At the end of March 2005, Migration Watch estimated that the unauthorised migrant population “stock” amounted to 515,000 - 870,000 people, with a central estimate of roughly 670,000.¹⁶ More recent figures were

12 The European Migration Network was established in 2002-2003 to provide ‘a common analysis of migratory phenomena in all their aspects’. Its mission was extended in 2008 (Council decision of 14 May 2008, JOUE of 21/05/2008).

13 Council of Europe, Resolution 1568 (2007), ‘Regularisation programmes for irregular migrants’.

14 Council of Europe, Recommendation 1467 (2000), ‘Clandestine immigration and the fight against traffickers’.

15 These figures were obtained using the Residual Method. At the time, the central estimate (a total of 430,000 unauthorised migrants) represented 0.7% of the total UK population of 59 million (Woodbridge 2005).

16 As opposed to the Home Office, Migration Watch took into account UK-born dependent children of unauthorised migrants, and adding to previous data the

provided on the number of failed asylum seekers in the UK. In 2007, an estimated 16,800 people became failed asylum seekers (including dependants). Numbers had decreased since 2006, when 20,900 people were refused asylum. In 2007, a total of 13,705 asylum seekers (including dependants) were removed or departed voluntarily. This was 25% less than in 2006 (Home Office, 2007).

Ongoing debates on the return of irregular migrants have obscured a very important fact: irregular migrants represent only about 0.8% of the total number of migrants entering the European territory. As explained by Koser (2005:10), “wrapped up in the argument that irregular migration threatens state sovereignty is the perception that states are, or risk, being “flooded” or overwhelmed by enormous numbers of irregular migrants. In reality (...) the political significance of irregular migration generally outweighs its numerical significance.”

Allowing that policy makers use certain types of figures to legitimise their policies, some NGOs working with migrants decided to produce data on the number of deaths and disappearances of migrants in an irregular situation, rather than on the estimated number of irregular residents or workers. A list of the documented deaths and disappearances that can be put down to implementation measures of ongoing immigration policies (“border militarization, asylum laws, accommodation, detention policy, deportation, carrier sanctions...”) showed that between 1 January 1993 and 6 May 2008, a total of 11,105 people died or disappeared throughout Europe (UNITED, 2008)¹⁷. Amongst the causes of death, drowning seems to be the most frequent. Segregated figures showed that between December 2003 and December 2006, around 3,000 people died at European external borders and in Europe, which compares to 3,777 deaths between 1993 and 2004.

number of failed asylum seekers for the period May 2001- March 2005 (+190,000 to 218,000).

17 See: <www.unitedagainstracism.org/>

How is irregular migration addressed currently?

Migration policy expresses the will of a state to control-, and ultimately benefit from the phenomenon of migration. Unlike legal migration policies that are still decided at the national level, irregular migration policies are common to Member States of the Schengen Area.¹⁸ Up until now, irregular migration has been addressed through an intergovernmental prism, which seems to be conducive to a particular securitarian perspective.

Security-based approach

Whilst the First Action Plan (for 1999-2004) that was agreed at the Tampere European Council (14-15 October 1999) focused on “integrating” immigrant populations, the Second Action Plan (for 2005-2009) set out during the Hague European Council (2004) focused on the control of migration flows, and on the fight against transnational crime and terrorism. Such a shift from integrative to restrictive policies was analysed as a counterpart to the high numbers of asylum applications that were made throughout the 1990s, and as a direct reaction to 9/11 (Wihtol de Wenden 2007; Guiraudon 2008; Carrera and Guild 2008¹⁹). Restrictive policies against migrants in an irregular situation consist in border control programmes, “voluntary return”, and detention practices rather than regularisation campaigns that imply investing in heavier and longer-term integration policies.

18 The Schengen Agreement was signed 14 June 1985, and was implemented through the Schengen Convention of 19 June 1990, and subsequent implementation measures. These texts together are known as Schengen ‘acquis’, which any state willing to enter the EU must adopt as a whole.

19 Carrera and Guild (2008) quote the Hague Programme section on ‘Strengthening Freedom’ (2004), adding emphasis: “the European council requests the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border controls as well as the management of these systems on the basis of a communication by the Commission on the interoperability between the Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC to be released in 2005, taking into account the need to strike the right balance between fundamental law enforcement purposes and safeguarding the fundamental rights of individuals.”

Information and border control measures

Following the Schengen agreement, a series of common control and information systems were put in place. These included: the Schengen Information System (SIS I and II); the European Agency for the Management of Operational Co-operation at the External Borders (Frontex), which organises external border management through border guards training, risk analysis, and joint return operations, as well as Rapid Border Intervention Teams (Rabit)²⁰; the Eurodac system, which enables Member States to “determine whether an asylum applicant or a foreign national found illegally present within a Member State had previously claimed asylum in another Member State, or whether an asylum applicant entered the Union territory unlawfully”, by comparing fingerprints using a computerised central database²¹.

In addition, and most controversially, “differentiated border controls” have created lists of “safe countries” and “safe travellers”, following a country-by-country risk assessment. “High-risk” countries are imposed visa requirements, although ultimately it belongs to immigration officials to make the decision for entry.²² The aim being to decrease the number of applications, it seems the measures were successful as numbers decreased from 11% of global demands in 2005, to 5% in 2007 (Delouvin, 2008).

Therefore, the European Pact on Immigration and Asylum only blows in the same direction when requesting to generalise biometric visas before 2012, and to reinforce Frontex. Furthermore, although the UK and Ireland never signed up to Schengen, they share the

20 Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

21 Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. The Regulation states: “In addition to fingerprints, data sent by Member States include in particular the Member State of origin, the place and date of the asylum application if applicable, sex, reference number, the date on which the fingerprints were taken and the date on which the data were for-warded to the Central Unit. Data are collected for anyone over 14 years of age and are entered directly into the database by the Central Unit. In the case of asylum applicants, data are kept for ten years unless the individual obtains the citizenship of one of the Member States, in which case their particulars must be immediately erased. Data relating to foreign nationals apprehended when attempting to cross an external border unlawfully are kept for two years from the date on which the fingerprints were taken. Data are immediately erased before the end of the two years if: the foreign national receives a residence permit; the foreign national has left the territory of the Member States; the foreign national has obtained citizenship of a Member State.”

22 EU member states were declared ‘safe’ by the Aznar protocol complementing the Amsterdam treaty of 1997 (entry into force 1999). An additional list of ‘safe’ countries was established by the OFPRA board of directors (Decision of 30 June 2006.) Benin, Bosnia Herzegovina, Capo Verde, Croatia, Georgia, Ghana, India, Mali, Maurice, Mongolia, Senegal, Ukraine were declared safe. A Decision of 3 May 2006 declared Albania, Macedonia, Madagascar, Niger, Tanzania safe countries, although a Decision (CE) of 13 February 2008 cancelled the inclusion of Albania and Niger.

main aspects of the Schengen “Acquis”²³ –police and judicial co-operation in criminal matters, the fight against drugs, and the Schengen Information System²⁴–, and have done so almost from the beginning.²⁵ It was also under the UK presidency that the Global Approach to International Migration (adopted in December 2005 by the European Council) was launched. The Global Approach sets out a series of measures to organise legal migration and prevent illegal migration from Africa (under the “co-development” rhetoric), that the European Pact on Immigration and Asylum clearly echoes. In the UK, the use of e-border technologies and biometric data is hoped to allow for “early risk-profiling against immigration, customs, serious organised crime and counter-terrorism risks”, before the traveller reaches the UK (COSU, 2007: 41). The e-border programme that is currently being tested through Project Semaphore “processes 27 million passengers per annum, has issued 16,000 alerts to date, and resulted in 1,300 arrests” (COSU, 2007: 41).

Return and detention

The “Return Directive”²⁶ adopted in June 2008, sets out EU-wide rules and procedures on the return of irregular immigrants. According to the text, irregular migrants can be put into custody for an initial period of 6 months, which can be renewed for up to 12 months under certain conditions (for example, if the country of origin is not willing to co-operate and take back “its” national; or if the person found to be in an irregular situation is not “voluntarily” accepting to return to his or her country of origin²⁷). In total, migrants in an irregular situation could remain in custody for 18 months. They could also be subjected to a 5-year interdiction to return to European countries, in case of non-co-operation during the return process. In terms of rights, there is an obligation for states to provide legal assistance to irregular migrants who have been evicted. There is also a right to appeal the decision of eviction.

23 See the Amsterdam Treaty, Protocol on Ireland and the United Kingdom, detailing the modalities of the ‘opting in- opting out’ system.

24 Whilst Europol focuses on investigations into organised crime, the Schengen Information System (SIS) I and II focuses on the prevention and detection of threats to public order and security.

25 UK’s request of March 1999, to be associated to police and judicial co-operation in criminal matters, the fight against drugs and the Schengen Information System was approved by Council Decision of 29 May 2000 (Official Journal L 131 of 1 June 2000).

26 (COM(2005)0391 – C6-0266/2005 – 2005/0167(COD)) ‘on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals’. The draft directive was adopted by Parliament by 369 votes to 197 with 106 abstentions, on June 18, 2008.

27 In that respect, it should be noted that IOM representatives conceded that several migrants who had returned to their home country through one of IOM’s Voluntary Return Programmes, had expressed the will or had actually gone back to European territories.

The “Return Directive” follows up previous developments emphasising the need for a common return programme: a Commission Communication of 15 November 2001 already presented a common return policy as an integral part of the fight against illegal immigration. The Green Paper on a Community Return Policy of 10 April 2002 elaborated further on the issue, but Member States failed to agree on the question, and it was raised again during the European Council in Seville; the informal Justice and Home Affairs Ministers meeting in Copenhagen (13-14 September 2002); in a Commission proposal (adopted in September 2005) for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals; and in the Commission Communication of July 2006 on policy priorities in the fight against illegal immigration of third-country nationals (COM (2006) 402), which had a human rights protection focus.

Similarly, the European Pact on Immigration and Asylum re-emphasises the common return policy. Controlling “illegal immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit” is one of the “five basic commitments” of the European Pact on Immigration and Asylum.²⁸ This is to be done through:

- Prevention: “greater co-operation between Member States and the Commission and the countries of origin and of transit in order to control illegal immigration under the Global Approach to Migration”;
- Mutual Recognition of Return decisions: “illegal immigrants on Member States' territory must leave that territory. Each Member State undertakes to ensure that this principle is effectively applied with respect for the law and for the dignity of the persons involved, giving preference to voluntary return, and each Member State shall recognise the return decisions taken by another Member State”;
- Facilitated Return through “co-development” tides: “all States are required to readmit their own nationals who are staying illegally on the territory of another State”.²⁹

28 The four others, however, also have links with fighting irregular migration: making ‘border controls more effective’; constructing ‘a Europe of asylum’; creating ‘a comprehensive partnership with the countries of origin and of transit in order to encourage the synergy between migration and development’; and organising ‘legal immigration to take account of the priorities, needs and reception capacities determined by each Member State, and to encourage integration’.

29 The Pact is not legally binding. It is a political document, which aims at influencing policy developments on immigration before the adoption of the third Five year Plan (that will follow the Hague Programme during the second half of 2009, under Swedish Presidency).

Regularisation

The drafting of the European Pact on Immigration and Asylum illustrates further the restrictive turn taken by common irregular migration policy. The first version of the European Pact on Immigration and Asylum simply forbid mass regularisation campaigns. The latest version of the Pact, which was agreed upon on 15-16 October, states that the European Council agrees “to use only case-by-case regularisation, rather than generalised regularisation, under national law, for humanitarian or economic reasons” (section II.a).

“Regularisation” is commonly understood as “any process by which a country allows aliens in an irregular situation to obtain legal status in the country” (IOM, 2004). In Western Europe, around 4 million foreigners have been regularised throughout the last three decades, and almost 85% of them obtained their entitlement to stay in either Greece, Italy or Spain (Pastore, 2006).

There are indeed essential differences between European countries in the nature and in the scale of the regularisation programme they would favour. Whilst France and the UK mainly implemented “permanent” regularisation, the Netherlands, Germany, Spain, Italy and Greece favoured “one-shot” programmes (De Bruycker et al., 2000). Another main distinction, opposes regularisation for “humanitarian” reasons to regularisation based on “economic” motivations.

There is, in that respect an essential difference between France and the UK. Whilst France, along with the Netherlands and Germany, tends to “recognise rights”-or regularise for humanitarian motive-, the UK, along with Spain, Italy and Greece, mostly “recognises political realities”³⁰ (such as residency or employment practices) (De Bruycker et al., 2000).

Since the closing of European countries to work-related migration (1962 in the UK and 1974 in France), regularisation campaigns have been much more frequent in France than in other European countries. In France most regularisation schemes took place under a left wing government. Each time, quite a high number of people saw their status regularised (130,000 in 1981; 15,000 in 1991; 150,000 in 1997; though 6924 in 2006).

The latest measures taken in relation to regularisation in France are Article 40 of the Immigration Law of 20 November 2007, and the Ministerial Circular of 7 January 2008. These measures allow employers to ask for the regularisation of migrant workers that they want to employ, under the conditions that employers seal at least a one-year contract, and in a sector affected by high unemployment rates.

Quite distinctly, so far, no large-scale regularisation has taken place in the UK. If in June 2006, Immigration Minister Liam Byrne said that he would not rule out regularisation (JCWI, 2006), to date nothing has happened in that direction.

30 ‘Recognising rights, Recognising political realities’ is the title of a JCWI Policy Paper that argues for the regularisation of irregular migrants. See: JCWI (2006).

The European Pact on Immigration and Asylum, does not challenge national-level decision making in relation to regularisation.

Intergovernmental approach

The fact that the UK did not “opt in” the Return Directive is the most obvious sign that the Europe “à la carte” consecrated with the Amsterdam Treaty is still ruling. The UK –as well as other EU Members- favours bilateral co-operation rather than being bound through common policies (see for example UK-France co-operation on the Sangatte case). Furthermore, although the Directive does imply a common policy, the decision to expulse irregular migrants still belongs to governments.

Similarly, the European Pact on Immigration and Asylum has been criticised for not bringing anything new to the common immigration policy. Its previous version did not even acknowledge the common “Acquis” in the field. Again, this confirms the prevailing intergovernmental logic that has been recurrently mocked by researchers and NGOs: “Typically, the country that holds the Presidency of the Union uses this platform to push its pet projects to satisfy its domestic electoral interests” (Guiraudon, 2003:271).

Power competition

According to Guiraudon (2003), power competition amongst political actors, and notably between Interior and Justice ministries and ministries of Foreign Affairs has up to now explained the development of migration policy.³¹ Because the Parliament had been known as a fervent protector of the rights of third country nationals³², the recent extension of its power in the field of immigration opened hopes that the “Return Directive” would be amended. As explained by Lavenex (2006): “Since they are not exposed to the same competitive electoral pressure as member states’ governments, and have a broader mandate, supranational actors, in particular the Commission and Parliament, pursue a more comprehensive approach to migration management than the Justice and Home Affairs (JHA) Council. Whereas, internally, the move towards the Community Method of policy-making tends to intensify reluctance towards transfers of

31 Adopting a sociological approach, Guiraudon (2003:263) showed that: “Law and order officials in charge of migration control seeking to gain autonomy in intergovernmental settings linked their action to the single market and transnational crime. NGOs providing expertise to Commission units seeking competence in non-economic areas jumped on the ‘social exclusion’ bandwagon by proposing anti-discrimination legislation. These developments – superimposed on policies regarding free movement of workers and services – are thus often contradictory and adhocatic.”

32 See for example the Vetter Report of 1987, the action of the Member of Parliament Glyn Ford against racism, and the position of the Civil Liberties, Justice and Home Affairs (LIBE) Commission.

sovereignty, externally it creates an impetus for co-operation without compromising national asylum and immigration systems.”

In the UK, immigration policy, which was traditionally under the remit of the Home Office, is now understood as having cross-departmental ties. The UK Border Agency now combines within a single border force what used to be the Border and Immigration Agency, Customs at the border, and UK Visas.

Migrants as an asset

Taking a slightly different approach, one could argue that the UK, France, and EU policies rest on a conception of migrants as an asset. The European Pact on Immigration and Asylum explains migration – and consequently, irregular migration– through the increasing gap between the rich and the poor: “International migration is a reality that will persist as long as there are differentials of wealth and development between the various regions of the world (...) The European Union, however, does not have the resources to decently receive all the migrants hoping to find a better life here.”

Although the “return on investment” logic is most obvious in relation to legal migration (with the selection of profitable migrants-based on skills, country of origin, financial means and knowledge), it also applies to irregular migrants. For example it is at stake in “voluntary return” programmes of the International Organisation for Migration (IOM), who attributes financial aid under the condition that migrants have thought of a business project. It is even at stake in the activities of IOM, which is a private organisation financed by States.

Another facet of this approach is the externalisation to the private sphere of the management of irregular migrants. Private companies have been charged to transfer migrants in an irregular situation from detention centres to airports and tribunals (e.g. Palaiseau, in France); charter flights assure the return of migrants to their country of origin or to a transit country. The French Ministry of Immigration recently contested the “monopoly” of the organisation Cimade, which has been up until now in sole charge of inspecting “Administrative Retention Centres” (CRA).³³ Cimade has just brought the case to the Council of State, arguing that “third country nationals” rights could not be assimilated to a market³⁴

33 Decree of 22 August 2008

34 See: www.lemonde.fr/societe/article/2008/10/22/centres-de-retention-la-cimade-attaque-en-justice-mais-repond-a-l-appel-d-offre81110004_3224.html

At what cost are current irregular migration policies implemented?

The only way for Member States to depart from a directive is to adopt softer measures than the ones put forward in the text. In the case of the Return Directive however, the maximum of 18 months custody period is already much higher than the maximum allowed in most EU countries.³⁵ In France, the Minister of Immigration Brice Hortefeux assured that the maximum 32 days would not be raised.³⁶ However, Michel Rocard and Jacques Delors demonstrated that in practice, in France, the actual amount of time needed to organise the return of an undocumented person is about 10 days.³⁷

An early assessment of recent immigration policy developments showed that the French government was taking steps towards opening up the protection of migrants to service provider competition, whilst the Italian government had doubled the number of detention centres and had allowed the military to join police and national guard forces in these detention centres (Migreurop, 2008). The financial cost of restrictive policies is huge. For example, the HERA I and II border control programmes for the Canary Islands, that were allocated a €3.5 million budget in 2006, saw that budget increased to a total €47.6 million for the period 2006-2008, and an additional €13 million was allocated in 2008. All this in spite of very low “return on investment”: over four months (from 11 August 2006 to 15 December 2006), only 3,500 people had been intercepted through the HERA programme (Bertossi, 2008).

35 In Denmark, Estonia, Finland, Lithuania, the Netherlands, the UK and Sweden, the detention period is illimited. In France, migrants in an irregular situation who have been refused asylum can only be detained for 32 days. In Luxembourg, the maximum is 3 months, and in Belgium the maximum detention period is of 5 months that can be extended to 8 months. However in practice, detention is extended to a further 22 days if the return decision is contested. See : European Parliament, 12 June 2008. ‘Retour des clandestins : vers des normes communes minimales .

36 See for example, the European Association for the Defense of Human Rights (AEDH), Available at: www.aedh.eu/IMG/pdf/Communique_sur_la_Directive_Retour-_19_juin_2008.pdf

37 *Le Monde*, 18 June 2008. ‘L’Europe doit respecter la dignité des sans-papiers’.

Costs for migrants

Victims of trafficking

Trafficking is one of the irregular modes of entrance of a person on a foreign territory. Usually, trafficked persons do not possess any ID document, either because these have been confiscated by traffickers, or because they never had any. As a result, trafficked persons are residing and working illegally, for example in France or in the UK. However, under article 3 e) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, trafficked persons are defined as victims and are to be protected as such³⁸.

In spite of legal protection, victims of trafficking are in practice often assimilated to “illegal migrants”. Limanovska (2002:152) observed that in South Eastern Europe, law-enforcement agencies did not automatically refer victims to support programmes and shelter, but rather sent them to detention centres and prisons “in order to subsequently deport them”. Therefore part of the problem lies in identification mechanisms and the lack of training of law enforcement officers to identify victims of trafficking (OSCE/ODIHR, 2004).

Another aspect of the problem is linked to quota-like policies. Already in 2005, the anti-trafficking unit of the OSCE/ODIHR opened a conference on the repatriation of victims of trafficking to their country of origin, by expressing concerns that “trafficked victims will increasingly become the victims of expedited deportation processes. Measures to ensure the rapid removal of “illegal migrants” can obscure the need to identify trafficked victims and may lead to their detention and summary deportation, sometimes within hours. Consideration for the safety of trafficked persons in these circumstances are rarely taken into account.”³⁹

Against that background it should be reminded that under international law, the repatriation of a victim of trafficking is only to take place “with due regard to the safety of that person”.⁴⁰ Furthermore, the EU Council Directive *on the residency permit issued to third country nationals who are victims of trafficking in human*

38 The crime of trafficking itself is defined in the Convention on Transnational Organised Crime and its complementary Protocols; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (known as the Palermo Protocol because it was adopted in Palermo); and the Protocol Against the Smuggling of Migrants by Land, Sea and Air; adopted by General Assembly Resolution 55/25 on 15 November 2000.

39 See: Organisation for the Security and Co-operation in Europe (OSCE)/ Office for Democratic Institutions and Human Rights (ODIHR), Anti Trafficking Unit, 2005. Is the return of trafficked victims always safe? Side Event for Trafficking, Warsaw, 27 September 2005. Available at: www.osce.org/documents/odihr/2005/09/19177_en.pdf

40 See: UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, adopted by General Assembly Resolution 55/25 on 15 November 2000.

beings or who have been the subject of an action to facilitate illegal immigration, who co-operate with the competent authorities (2004/81/EC – 29 April 2004) states that only if during the period for reflection the victim's clear intention to co-operate with authorities is established, he/she can be issued a temporary residency permit for a period of at least 6 months. Whilst the Republic of Ireland transferred the Directive into national law with the entry into force on 7 June 2008 of the Criminal Law (Human Trafficking) Act 2008, the UK have opted out of the EU Council Directive.

Asylum seekers and refugees

The European Pact on Immigration and Asylum, along with measures organising the return of migrants, still presents asylum as an immigration question.⁴¹ The French government is currently attempting to support the Pact by asserting that France will remain a country of “refuge”⁴², whilst at the same time emphasising the need to fight abuses of asylum legislation. Although the Minister of Immigration emphasised that asylum seekers were not part of the “suffered” (*subie*) immigration (MIINCD, 2007), the administration in charge of the treatment of asylum claims has been reorganised, and procedures that deal with asylum claims have been accelerated. Since 2005, it takes the French Office for the Protection of Refugees (OFPRA) only a few months to deal with asylum claims, whilst it used to take more than two years.⁴³ The number of “returned” people has also tremendously increased. As a direct result, the number of asylum claims declined from 50,547 in 2004, to 26,269 in 2006. The number of asylum applications only started increasing again in 2007, following the war in Iraq. In 2007, France was the third country with the highest number of asylum applications (29,200), after the US (49,200) and

41 Previous measures adopted since Tampere (1999), in application of the common asylum policy, included: the Council Regulation Dublin II (EC) No 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; and replacing the Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Official Journal C 254 , 19/08/1997); the Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (2001/55/EC of 20 July 2001); the Council Directive laying down minimum standards for the reception of asylum seekers (2003/9/EC of 27 January 2003); Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004/83/EC of 29 April 2004).

42 Brice Hortefeux, discourse of October 2, 2008.

43 Vie Publique, 23 June 2005. ‘Contrôle de l’immigration: vers une immigration choisie?’ Dossier d’actualité. Available at: www.vie-publique.fr/actualite/dossier/controle-immigration/controle-immigration-vers-immigration-choisie.html

Sweden (36,200). The UK was the fifth, with 27,900 applications (UNHCR, 2008).

The right to asylum is a personal fundamental right. It is protected under the UN Universal Declaration of Human Rights, article 14.1 (1): “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. Its recognition cannot depend on States’ discretionary power, and any restriction to the right to asylum would violate the 1951 Geneva Convention Relating to the Status of Refugees. Furthermore, and in relation to the “return trend” discussed above, it should be noted that article 1, A2) of the Geneva Convention defines a refugee as: (any person) “owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, *is unable or, owing to such fear, is unwilling to return to it.*”

Costs for the EU

The European Pact on Immigration and Asylum is presented as a groundbreaking instrument for setting up a common immigration policy. However, when focusing on one aspect of the programme it puts forward -namely regularisation, it becomes obvious that policy making still takes place at the national level. On the one hand, by choosing to push for return programmes rather than regularisation, the French-led Pact confirms that European States representatives are not ready to establish fully common policy making in the field of migration and asylum, and thereby to abandon part of their power to supra-national institutions.

Instead, the Pact places emphasis on security as usual, and externalises missions of regulation through co-operation with third country governments. Even the very decision of return is abandoned to migrants, thanks to the “voluntary” return rhetoric. Tighter filtering at EU external borders suits the UK’s agenda, and acts like a second ring around the already fortified island, which is attempting to become “one of the toughest barriers in the world”⁴⁴.

It is undeniable that regularisation programmes do have limitations as well as strengths. The problem is that these are almost not discussed. Whilst “critics claim that regularisation programmes reward lawbreakers and create a pull effect for irregular migration (and that) many persons who are regularised lapse back into irregularity”; “those in favour of regularisation programmes argue that

44 Home Secretary Jacqui Smith’s Discourse, 19 August 2008. Available at: www.bia.homeoffice.gov.uk/sitecontent/newsarticles/hitelectricborders. See also Home Office (2008).

they provide a solution for the human rights and human dignity concerns of migrants in an irregular situation. They also claim that such programmes reduce the size of the undocumented population, encourage circular migration, decrease the likelihood of exploitation of migrants, reduce the size of the underground economy and have a positive impact on tax revenues and social security contributions.”⁴⁵

Most studies on the impact of regularisation programmes have shown that these are generally well-received by the whole spectrum of people affected by them. For example the 2005 Spanish regularisation of over 570,000 irregular migrants was welcomed by all “irregular migrants, civil society, employers and trade unions, as well as by the majority of politicians in Spain”⁴⁶. Furthermore, the main argument of a spill-over effect has not been verified (Migration Policy Institute, 2004).

On the other hand, the type of regularisation programmes that the Pact is pushing for (case- by-case rather than generalised, under national law, for humanitarian or economic reasons) equally demonstrates an interest in maintaining intergovernmental policy-making. Irregular migration is only viable because there are possibilities for shadow-economy employment once in Europe. Therefore, “there is a clear link between illegal migrants and the labour market” (Frattini, 2007). And regularisation is the bridge between irregular migration and labour migration. Common regularisation programmes would imply common legal migration policies, and the creation of actual common labour markets: the common fixation of legal channels for entry as much as the common determination of integration models and policies. With the UK still reluctant to become a full-time Schengen member, Member States are avoiding getting into common integration policy discussions. Language prerequisites and the integration contract wanted by the French government (MIINCD 2007), resort to national characteristics rather than to common ones. In both France and the UK, integration is often promoted as a one-way process,⁴⁷ and the position defended by the French Presidency seems to suit both UK and France national interests: the blue card system, the French card system and the UK points system all go in the same direction.

45 Parliamentary Assembly of the Council of Europe, Resolution 1568 (2007) on Regularisation programmes for irregular migrants.

46 *Idem.*

47 See for example, in France, MIINCD (2007).

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