

## Migration Policy in Ireland Reform and Harmonisation



NCCRI

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## **Migration Policy**

### Reform and Harmonisation

Ireland in the broader European Context And Issues arising from the  
Common Travel Area With Britain

National Consultative Committee on Racism and Interculturalism  
Advocacy Paper One: December 2002

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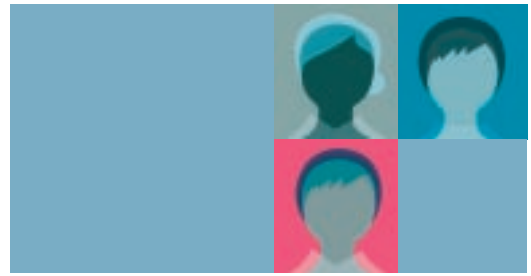
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## Preface

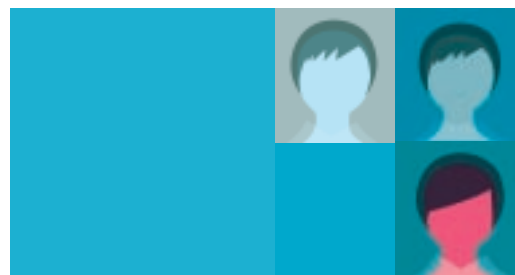
This is the first of a new series of Advocacy Papers published by the National Consultative on Racism and Interculturalism (NCCRI). The focus of this paper is on the revision of immigration policy in Ireland in the context of forthcoming legislation in Ireland; harmonisation of immigration policy at EU level; and policy issues arising from the Common Travel Area (CTA) with Britain.

The origins of this report are from a roundtable seminar organised by the NCCRI in partnership with the Joseph Rowntree Charitable Trust, and the Migration Policy Group in Brussels, which took place in Dublin in May 16th 2002. The roundtable involved a range of key non-government and statutory organisations concerned with migration policy from Ireland and Britain.

This publication is part of a series of initiatives and strategies focussing on migration policy, cultural diversity in the workplace and related anti racism strategies developed by the NCCRI.

The NCCRI would like to thank all those who participated in the original migration roundtable and in particular the speakers who contributed to this report, including Sarah Spencer an advisor on migration policy in the UK, Jan Niessen of the Migration Policy Group based in Brussels and Piaras Mac Éinrí of the Centre for Migration Studies in NUI Cork. The NCCRI would like to thank and acknowledge the support of Stephen Pittam and his colleagues from the Joseph Rowntree Charitable Trust whose support and encouragement made this initiative possible. Finally to thank and acknowledge the role of Philip Watt, Director of the NCCRI who coordinated the roundtable and who edited this report.

**Anastasia Crickley**  
**Chairperson, NCCRI, December 2002.**



## Introduction and Overview

Philip Watt, NCCRI

The decision by the Irish Government to review and revise immigration and residence policy in Ireland coincides with a period of dramatic socio-economic and demographic changes in recent years. Emigration levels have declined significantly since the late 1980's and Ireland has become a country of net inward migration for only the second period since the foundation of the State in 1921 (see Table One)<sup>1</sup>.

**Table One:**

Average Annual Estimated Net Migration (Inward Less Outward)  
Per 1,000 Population 1926-2002 (CSO)<sup>1</sup>

Intercensal Period	Per 1,000 Population
1926-1936	-5.6
1936-1946	-6.3
1946-1951	-8.2
1951-1956	-13.4
1956-1961	-14.4
1961-1966	-5.7
1966-1971	-3.7
1971-1979	4.3
1979-1981	-0.7
1981-1986	-4.1
1986-1991	-7.6
1991-1996	-0.5
1996-2002	6.8

In the period up to 2001 Ireland's economic growth rate was more than double any other member state in the EU and unemployment fell from 10% in 1997 to less than 4% in 2001. This resulted in significant labour and skills shortages across many sectors of the Irish labour market.

The pattern of inward migration into Ireland in relation to the origin of migrants has also changed significantly in recent years and is continuing to change. Returning Irish nationals (former emigrants) still account for almost half (46% in 2002) of all immigration into Ireland in recent years, although this proportion has declined from a highpoint of 55% in 1999.

A significant emerging trend in recent years has been the increase in the share of migrants coming to Ireland from the rest of the world<sup>2</sup>. Immigration from the rest of the world accounted for 35% of total immigration in 2002, compared with 11% in 1996.

Concomitant with the increase of migrants from the rest of the world, there has been a parallel decrease in the share and number migrants from the UK and the USA over the same period. The 'rest of the European Union's' share of inward migration into Ireland has remained almost static at 13% between 1996 and 2002.

During this period, there has been active recruitment of workers from both EEA<sup>3</sup> and non-EEA countries. Labour force surveys and work permit/visa applications reveal that there has been a strong increase in inward migration from EU accession countries and the former USSR and countries such as the Philippines.

A Government report completed in 2001 predicted that 12,600 migrant workers, amounting to 88,000 over the next six years would be needed to fill jobs. Despite the economic downturn at global, European and national levels and a re-tightening of accessibility criteria for work permits available to non-EEA workers, the demand for migrant labour actually increased in the first half of 2002. Between January and July 2002, approximately 20,000 permits were issued<sup>4</sup>, which involved 2,000 people changing employers, 8,000 renewals and 10,000 first time permits<sup>5</sup>.

1 Central Statistics Office (5 September 2002). Population and migration Estimates. April 2002.

2 This category defined in the census as all countries in the world, excluding the US and the EU.

3 The European Economic Area (EEA) consists of the EU, Norway, Iceland and Liechtenstein.

4 This compares with 36,000 work permits that were issued in 2001.

5 Irish Times, July 23 2002.

## The Revision of Immigration and Residence Policy

In May 2002, following the general election, the Irish Government renewed its promise to review immigration and residence policy to manage some of these changes<sup>6</sup> which were originally outlined in a published consultation document<sup>7</sup>.

The Government's intention to revise immigration and residence legislation was further restated by the Minister for Justice, Equality and Law Reform, Michael McDowell in July 2002, when he stated:

*'Comprehensive immigration legislation in line with best international practice is essential for any policy to operate effectively. This is particularly important if we are to meet the future needs of our economy in relation to both skilled and semi-skilled labour given the anticipated decline in the population of working age in Ireland based on present demographic trends'<sup>8</sup>.*

It is likely that labour and skill shortages balanced against concerns about an economic downturn and national security issues will be the most important factors in shaping Ireland's immigration policy in the forthcoming years.

However there are concerns by many that immigration policy should also seek to take into consideration the socio-economic concerns of migrants and that increased cultural diversity in Ireland should be given a significantly higher public policy priority than at present.

NGO's, equality and human rights bodies and social partner organisations have also expressed concern about the adequacy of some existing labour protections such as the resources available to the Labour Inspectorate and concerns about the work permit system. The need to ensure that temporary migrants are not treated simply as economic entities, without social and cultural rights has been highlighted in policy submissions by the NCCRI<sup>9</sup>, and supported by the Council of Europe watchdog on Racism, the European Commission on Racism and Intolerance (ECRI). In its Second Report on Ireland ECRI stated,

*'ECRI feels that more attention needs to be paid to non citizen workers as members of Irish society rather than just as economic entities and that measures should be taken to reflect this approach, such as, for example, the introduction of a wider range of work permit types to meet different situations, and wider possibilities for family reunification'<sup>10</sup>.*

6 Department of Justice, Equality and Law Reform., (2001). Public Consultation on Immigration. Available on the website [www.justice.ie](http://www.justice.ie)

7 Fianna Fáil and the Progressive Democrats, (2002). An Agreed Programme for Government. P28.

8 Mr. Michael McDowell, T.D. Minister for Justice, Equality and Law Reform to the MacGill Summer School, 30 July 2002

9 NCCRI, (2001) The Review of Immigration and Residence Policy in Ireland

10 *ibid* p17.



The NCCRI has further contended that immigration and residence legislation should be ‘proofed’ to ensure that it is non-discriminatory across the range of grounds identified in the equality legislation, in particular, on the grounds of ‘race’ including colour, ethnic origin and nationality and the specific needs of women migrants should also be taken into account. The need for a more flexible approach to the current system of work permits to cover the range of situations of non citizens seeking employment in Ireland, which was advocated by the NCCRI, has also been supported in ECRI’s second report on Ireland.<sup>11</sup>

The practice of promoting/enabling immigration from ‘favoured states’ or regions such as applicant countries to the European Union should be treated with caution to ensure that such policies are not discriminatory in effect. Policy and practice associated with ‘favoured state’ practices have been found to be discriminatory in countries such as Australia and Canada. The development of a policy that seeks to draw labour solely from EU accession countries has to be carefully considered in this context.

Groups have further contended that the formulation of Irish legislation must seek to incorporate international human rights standards and fundamental freedoms. These include the European Convention on Human Rights (ECHR), the Council of Europe Social Charter, the Universal Declaration on Human rights (UDHR), the International Covenant on Civil and Political Rights, United Nations Rights of the Child, the Framework Convention on National Minorities and the International Convention on the Elimination of All Forms of Racial Discrimination.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted by General Assembly resolution 45/158 of 18 December 1990, but is not in force because it has not been ratified by a sufficient number of countries, including Ireland. Even if the Convention does not come into effect, it includes a number of important concepts that could be considered and incorporated within the reform of Irish legislation. These are as follows:

- Migrant Workers are more than just economic entities. They are seen as social entities with families and have rights accordingly;
- They are seen as an unprotected population whose rights are often not addressed by receiving or sending states, and so the responsibility to provide measures of protection becomes that of the international community, through the UN.
- The Convention provides for an international definition of a migrant worker and the standards of treatment.
- Fundamental Human Rights are extended to Migrant Workers and also

additional rights recognising their unique situation.

- The Convention has the potential to play a role in preventing and eliminating the exploitation of migrant workers and their families.
- Migrant workers and members of their families should have equality with nationals of the state concerned before courts and tribunals
- The Convention seeks to establish minimum standards of protection for migrant workers and their families that are universally acknowledged and serve as a tool with which to encourage those states lacking national standards to bring their legislation in closer harmony with recognised international standards.

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## Bilateral and Multilateral Harmonisation of Policy

As a consequence of Title IV of the Amsterdam Treaty and the conclusions of the Tampere Council, there will be increased harmonisation of immigration policy at an EU level, even though Ireland and United Kingdom have an opt-out right. There is concern raised in this report that although the project to harmonise policy at European level started with a focus on both security and human rights, the agenda at present is very heavily weighted towards the security agenda, particularly in the wake of the events of '9/11' in the United States.

In this report Jan Niessen contends that the debates on migration in Europe are primarily those of admission of people at member state level, and policies are more responses to national situations than they reflect the reality of harmonisation of policy arising out of increased and increasing European integration. He further contends that the migration debate must also broaden from a narrow admission policy focus to other concerns such as integration policy. He concludes that 'it is time to set new terms for the migration debate'.

Ireland and the UK are in a unique position in the European Union because on one hand they need to ensure bilateral harmonisation of immigration policy in order to preserve the Common Travel Area between Britain and Ireland and on the other hand they need to ensure multilateral harmonisation with the other EU States in order to preserve existing commitments arising from EU Treaties. Even with 'opt out' rights preserved under the Amsterdam Treaty, it is unlikely that there will be much latitude for Ireland and the UK to stray too far from other EU states in the European harmonisation project. This creates a range of challenges and tensions in respect of the reform of Irish immigration and residence policy.

Harmonisation at EU level will likely result in a range of important policies and standards on issues such as family reunification, employment, social protection, housing, education and training.

Harmonisation should be approached with caution for example in the consideration of Ireland's participation in the Schengen Acquis<sup>12</sup>. Piaras Mac Éinrí contends in this report that if Ireland joins up to Schengen in its present form there is potential for an erosion of civil liberties, which could, for example, result in the introduction of identification cards for everyone in Ireland and the acceptance of a pan European list of excluded people.

Because of the need to preserve the Common Travel Area there will be a need for continued bilateral harmonisation of policy between Ireland and the United Kingdom. In this report, Sarah Spencer contends that there has been a radical shift in UK labour migration policy in recent years, which like Ireland has seen a significant increase in the number of work permits issued to skilled workers and seasonal agricultural workers. The UK is also in a similar position of trying to upgrade its immigration legislation to cope with significant changes in migration in recent years, especially those related to skills and labour shortages.

Migration she contends, will increasingly be a feature of the global economy and brings with it considerable economic benefits, marked the replacement of the language of immigration 'control' with immigration 'management' and opened up the possibility of the UK developing a more consistent, positive and holistic approach to migration policy.

She further contends that much needs to be resolved not least because:

*"A dearth of research during the earlier immigration period has bequeathed a poor evidence base on which to develop policy. Many basic questions about the economic and social impact of immigration...are as yet unanswered".*

## Policy Reform in Ireland

Minister for Justice, Equality and Law Reform, Michael McDowell TD recently indicated that Ireland will bring a 'green card' system, similar to the United States and that Ireland supported in principle the concept of a single European asylum and migration policy based on the provisions in the Amsterdam Treaty. He stated

*'The challenge for Ireland and the EU is to find humane, effective and efficient responses to the dramatic increases in this movement of people, both legal and illegal. There will be no easy or quick solution to these*

<sup>12</sup> Signatories to Schengen agree to remove border controls between member states and to adopt a joint approach to immigration from outside of the EU. In short, Schengen is viewed as a precursor and a major step towards harmonisation of immigration policy.

*issues and international co-operation especially at EU level, is absolutely essential'*<sup>13</sup>

A further factor that has entered the discourse in recent times is the issue of public opinion. The NCCRI<sup>14</sup> were concerned at some of the alarmist arguments put forward during the second referendum on the Nice Treaty by a minority of those involved in the 'No' campaign who contended that EU enlargement would inevitably result in an immediate and unsustainable increase in immigration from central and Eastern Europe into Ireland.

This contention was also refuted by many of those in the 'Yes' campaign, including David Begg, the General Secretary of the Irish Congress of Trade Unions, who stated,

*'I want to state emphatically that Congress does not believe this to be the case.... there are surveys that show that in central Europe the wish for short-term and medium term migration is much more common than the intention to emigrate for good'.*<sup>15</sup>

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## The workplace

There is a growing awareness of the need to address racism and support cultural diversity in the employment arena in Ireland. Key stakeholders within the workplace, including employer bodies are anxious to both attract and retain staff recruited from abroad to fill skill and labour shortages. There is an increasing recognition by employers and the Government of the importance of the diverse customer base both at home and internationally. Trade unions are anxious to prevent migrants being exploited, particularly in low and semi skilled jobs in industries such as hotel, tourism and catering, agriculture and food processing.

Workplace equality is supported by the law, principally the Employment Equality Act, 1998, and the development of equality infrastructure, in the form of the Equality Authority and the ODEI- the Equality Tribunal. The Employment Equality Act prohibits discrimination and harassment in the workplace on nine grounds, the most relevant to this report being 'Race'. Next to 'Gender', 'Race' is the most common ground for referred cases to the ODEI-The Equality Tribunal under the Employment Equality Act.

It is to be welcomed that the rights of migrant workers was also a strong focus of the Equality Authority, IBEC, Congress and the CIF 'Anti Racist Workplace Week' in 2002, supported by 'Know Racism' the national anti racism public awareness programme.

13 Irish Times, July 31 2002

14 Irish Times, July 31 2002.

15 Irish Times, July 31 2002.

The NCCRI has also developed a strong focus on the rights of migrant workers in relation to policy discussions and submissions, training and awareness raising linked to International Day Against Racism, including partnership initiatives with the Equality Commission for Northern Ireland.

Most migrant workers are employed in the service sector; hotel and catering; agriculture and fisheries; industrial; and medical and nursing sectors. They are an invaluable part of the general Irish labour force.

One of the biggest employers of non-EEA workers in Ireland is the health care sector. Recent headlines in Irish newspapers reflect the increasing demand on the Irish healthcare sector to recruit and retain staff and the development of policies to attract workers from both within and outside the European Economic Area.<sup>16</sup>

*'Number of foreign nurses steadily increasing'.<sup>17</sup>*

*'Calling all medics. The health boards are paying increasing attention to human resources issues in their attempts to attract and hold onto staff'<sup>18</sup>*

*'£6,000 grant scheme to attract UK nurses'<sup>19</sup>*

*'Hospital hit by shortage of productive young doctors'<sup>20</sup>*

*'Chinese nurses for Dublin'<sup>21</sup>*

Recognised refugees have the same employment rights as Irish nationals and are now entering the Irish labour market in increasing number. However, research has shown that refugees experience a number of barriers to obtaining employment, of which racism ranked as the most important by those surveyed. Asylum seekers are for the most part prevented by law from working in Ireland, despite considerable lobbying on this issue by NGO's.

There is some anecdotal evidence of asylum seekers dropping out of the formal direct provision system for asylum seekers and working in the informal economy as undocumented workers. However most are concerned not to engage in employment, partly out of concern that it may jeopardise their application for refugee status.

16 NCCRI, IHSMI, Cultural Diversity in the Irish Health Care Sector: Towards the Development of Policy and Practice Guidelines 2002, p. 11

17 Irish Times, April 30 2001

18 Sunday Tribune, March 5 2001

19 Irish Times, March 12 2001.

20 Irish Independent, January 4 2001

21 Irish Times, February 25 2002

## Conclusion: A Market led, a Control or a Management Approach?

Irish policy on immigration has developed in a rather piecemeal way over several decades. In effect, in recent years the admission of immigrants has moved away from an almost zero immigration control policy to a largely market-led approach, with a relaxation and liberalisation of the rules taking place in 2000/2001, followed by a retightening of the rules in 2002 as a result of fears and forecasts of a significant downturn in the Irish economy.

It is becoming increasingly evident however, that both a market-led and practically zero immigration policy approaches are now proving inadequate to deal with the dramatic changes in the pattern of inward migration in recent years. Despite increased resources and the flexible responses of government agencies and departments involved, visible signs of a policy under strain include continuing labour and skill shortages; queues/delays in the application and renewal of permits and increased concern that existing labour protections need to be more robustly enforced, particularly for migrant workers in lower paid employment.

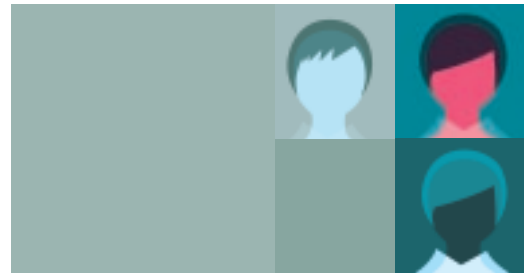
All this is taking place against a backdrop of the need to ensure that Irish and British policy development is sufficiently consistent to preserve the Common Travel Area; the rapidly approaching deadline for harmonisation of policy at EU level (2004); and the national security and control concerns continue to dominate the policy agenda at both EU and member state level.

The most consistent message coming from this report is that immigration policy should be about long term planning and management and that both a control fixated approach or a market led approach are inadequate responses to the complexity of the issues involved. In short, immigration policy needs to take into account long-term (as opposed to event driven) national security concerns; the broad socio economic concerns of migrants and broader human rights/equality concerns, (while realising that many migrants will not want to take up permanent residence in Ireland and others will) and the medium to long-term needs of the economy (as opposed to annual fluctuations).

The forthcoming reform of immigration and residence policy, the legislative framework for work permits, and the harmonisation of policy at EU level all afford opportunities for a long term strategic approach to inward migration and the accommodation of cultural diversity. The forthcoming National Action Plan against Racism and the development of an Intercultural Forum advocated by the NCCRI also provide significant opportunities to discuss and to take account of increased and increasing cultural diversity in Ireland arising from recent trends in migration policy.

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## New terms for the migration debate in Europe



Jan Niessen, Migration Policy group

In many European countries and at European level, migration is locked in the refugee debate and the terms of that debate are primarily those of admission<sup>22</sup>. Furthermore, policies are more responses to national situations than a reflection of the reality of increased and increasing European integration. Both governmental and non-governmental actors are caught in an 'admission logic' and seem to prefer to deal with migration first and foremost at national level. It is time to set new terms for the migration debate and to identify issues and actors that are relevant for that debate<sup>23</sup>.

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### 1. The admission logic

Admission of third-country nationals has served and still serves as a perfect case to be used in the almost endemic institutional struggles between Member States on the one hand and, on the other, the European Commission and the European Parliament on the powers of the European institutions. Most, if not all, Member States insisted on preserving their sovereignty on matters related to the admission of non-EU nationals to their territory, refusing to *share* it with the supranational European institutions. Where governments did reach an agreement at European level it concerned mostly restrictive measures. For a long time, many NGOs simply ignored the European Union, but other NGOs agreed with their governments by pointing at 'Brussels' as being responsible for the introduction of restrictive admission policies at the national level, although NGOs usually disapproved of these policies whereas governments welcomed them. NGOs, however, changed their attitude of 'no news or only bad news from Brussels' and are now actively monitoring and seeking to influence European Union policies.

In the absence of serious shortages on the labour market from the 1970s onwards, there was no pressure from the private sector to recruit foreign labour, and labour mobility was considered to be sufficiently facilitated by promoting free movement of

22 Notably in North West Europe, whereas in South European countries such as Italy and Spain (irregular) migration is dominating the debates.

23 This paper focuses on the expanding European Union. Similar observations could be made on the Council of Europe's activities in the migration field, although traditionally the emphasis of the Council is on the protection of migrants' rights and their integration into receiving societies.

nationals of Member States. Governments declared categorically that they were not immigration countries and focussed their attention on putting in place an efficient admission mechanism with a view to limiting immigration as much as possible (zero immigration). Migration control came to mean restricting immigration for (self-) employment (from the mid-seventies onwards), limiting family reunion and giving a less liberal interpretation of the Geneva Convention (from the mid-eighties onwards), and targeting irregular migration and trafficking in human beings (from the mid-nineties onwards).

As a consequence, migration was disconnected from the debates on the completion of the internal market and the developing social policy agenda, resulting in a situation of migration being almost exclusively in the domain of Justice and Home Affairs ministries. Many NGOs were, and still are, to a great extent caught in the 'admission logic', in the sense that they argue against restrictive governmental policies and plead for liberal policies. When in the nineties, for example, governments labelled many survival migrants as economic refugees who therefore should not be admitted, human rights organisations maintained that these persons qualified for protection under the Geneva Convention and who therefore should be admitted.

European countries mostly react to migratory pressures. The continuous violation of civil, political, economic, social and cultural rights in many countries in the world produces refugees, asylum seekers and persons who migrate as a means to survive. Migration was not only disconnected from the socio-economic agenda: it was neither connected, in a meaningful way, with the EU foreign policy agenda and with development co-operation. When references were made to foreign policy aspects of migration, they focussed almost invariably on migration prevention, which has come to mean more "keeping people out" than "reducing the need to move". From this perspective foreign policy instruments are expected to support restrictive policies. When opposing these kinds of policies NGOs followed a similar logic. These organisations argued in favour of more liberal admission policies and the full implementation of international human rights obligations. Reports on the living conditions and the political situation in the countries of origin are used to demonstrate that people have valid reasons to claim protection or to migrate. Most NGOs are still very reluctant to become engaged in debates on migration prevention precisely because it has come to mean keeping people out.



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## New terms for the migration debate

Many European countries are currently experiencing high economic growth and job creation, leading to pressures on governments, mainly from the side of employers, to adopt more effective and transparent immigration policies. In addition, the issue of demographic imbalances and how to address them has been pushing migration higher up on the agenda since the publication of the UN report on replacement migration. Consequently, we can witness that governments are reconsidering their zero immigration policies and are slowly moving away from the 'admission logic' (despite 11 September and the current political prominence of extreme right-wing political parties in some European countries).

Since the entry into force of the Amsterdam Treaty, there has been a clear mandate and a framework in place for the design and adoption of common European policies. Nevertheless, the official debates are still very much dominated by Justice and Home Affairs Ministries. This entails the danger that no progress will be made at all, as can be demonstrated by the fact that of all the legislative measures on migration presented at European level, only those that fit into the old 'admission logic' were adopted.

To change this situation and find a possible way forward, *migration must again be made part of the overall social and economic policies of the European Union and its Member States*. For that to happen a few steps must be taken.

First, we must underline that refugee policies are based on human rights considerations, whereas migration policies are based on socio-economic considerations. Refugee policies are about the protection needs of people and migration policies are about addressing the socio-economic needs of societies. In other words, the starting point of the refugee debate and that of the migration debate are entirely different from each other. As long as there are persons in need of protection, governments must be generous and their admission policy liberal. Migration policies, as part of an overall policy to promote sustainable socio-economic development, are about economic goals and social values.

Second, we must be perfectly clear about survival migration and how to address the root causes of forced migration. The uprooting of millions of people cannot be solved by liberal immigration policies but requires a comprehensive approach to development. When migration is linked with development and foreign policies, the Development and Foreign Ministries' and not the Interior Ministries' agenda must be the starting point. The relatively limited input of migration specialists in the development debate should focus on the question whether migration undermines or furthers the development of

developing countries, and on how foreign policy instruments can be used to create alternatives for migration or to make migration (more) beneficial for developing countries. This is the discussion on, among other issues, brain-drain/gain, circular migration, remittances and other ways of migrants contributing to the development of their country of origin.

Third, we have to find the right language for convincing a wider public that Europe is an area of immigration, that immigration can be beneficial for our societies as a whole (and not only for the business sector) and that immigrants are economic actors and potential citizens<sup>24</sup>. Successful integration proves that immigration can work, which could help to increase popular support for immigration. Equal access to services such as health, housing and education, should avoid that various groups in society have to compete for those services where they are scarce.

Fourth, we have to find out how socio-economic needs are best assessed and what issues are relevant for the migration debate, and we have to identify key actors in that process and establish a dialogue or partnership with them.

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## 2. Policy areas and stakeholders

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### Global mobility and GATS

European economies are among the motors of globalisation. While globalisation is far from being a new phenomenon, it is presently characterised by accelerating and intensifying human mobility involving more economies and people than ever before. Such mobility occurs through temporary and circular migration, permanent settlement, cultural exchanges, scientific co-operation and international tourism.

Human mobility was and still is an issue in the ongoing GATS negotiations. The developing countries are pushing for the inclusion of provisions to liberalise the movement of natural persons, which would allow these countries to make use of their comparative advantages: labour surplus and skills in sectors such as information technology. In developed countries, departments of government responsible for migration issues are extremely reluctant to include such provisions, but they are under pressure from other departments of government (such as Trade and Industry) and from multi-national companies wanting to be able to move their skilled personnel around the globe.

<sup>24</sup> It is precisely in this area that the work of the Council of Europe is highly relevant

The European Communities, along with individual Member States, are party to the GATS. The EC in March 2001 issued a Communication calling for harmonised definitions, objective and verifiable criteria, clear and simple procedures, and swift decisions on individual applications. It declared that the EC's aim was to allow the necessary mobility of service suppliers on a temporary basis without compromising immigration policy. The question is, of course, how that can be achieved.

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### Free movement and mobility

Free movement rights for EC-nationals made intra-Community *migration* into internal *mobility of European citizens*. Community action in the field of free movement became steadily relevant for an increasing number of people. First, through the expansion of movement rights to categories other than workers. Students, pensioners and other non-active (or non-economically active?) persons acquire residence rights, provided that they are not dependent on the receiving state for their income and possess adequate health insurance. Second, successive enlargements have taken the Union from six to fifteen Member States and may take it to twenty-six Member States within the next few years. Governments must be convinced of the necessity and feasibility of a third extension. Through the removal of internal borders third-country nationals residing in one Member State can travel, but not move, freely to another Member State. Given the principles of equal treatment, these persons should acquire the same free movement rights as EC-nationals.

Scholars and policy-makers are increasingly recognising that a more complete extension of national labour markets to a European level would lead to a better allocation of the work force and would help to balance out shortages and surpluses of labour. The low levels of EU mobility imply inadequate utilisation of the European jobs pool and the relatively low degree of labour mobility in the EU is one of the main reasons why Europe lags behind the US in terms of long-term employment performance.

At the EU level, efforts to increase mobility have attempted to break down barriers to mobility through a variety of measures. The Commission has proposed a Directive on freedom of movement. It has also launched a 'Strategy on Building New European Labour Markets by 2005', which includes mobility as a key goal. A High Level Task Force on Skills and Mobility presented further policy recommendations in December 2001, and an Action Plan was presented in February 2002. While removing obstacles to the mobility of Union citizens remains important, recent texts recognise that 'current demographic and employment trends suggest a greater dependence in many Member States over the coming years on the skills and labour of third country nationals' and call

for the adoption of pending immigration legislation. The Action Plan announces that the Commission will examine the interaction between immigration and employment and social policies in the EU and issue a report in 2003.

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### Labour market and the European Employment Strategy

Immigrants have always been a part of European labour markets. Even during the years of publicly declared zero-immigration policies, governments tolerated documented and undocumented migration to satisfy the demand for workers of all skill levels. This demand continues and employers are now more vocal in calling for a proactive immigration policy that can facilitate the recruitment and mobility of temporary or permanent workers through a single and simplified procedure. Like many other advanced countries, EU Member States are facing the problem of decreasing labour supply, as new technologies create a demand for skilled labour and as ageing populations and affluent lifestyles require servicing by unskilled or low-skilled workers. Moreover, employers increasingly recognise diversity as an economic asset. Migration is an option for meeting socio-economic challenges and a complementary labour market strategy that can shape the economic and social futures of European countries. It should be developed alongside strategies for the participation of women in the labour market, the re-adjustment of the retirement age and the inclusion of marginal groups (such as young people with an immigrant and refugee background) in the economy.

At the EU level, the European Employment Strategy was initiated in 1997. The strategy seeks to strengthen co-ordination of national employment policies, and to commit Member States to an integrated set of common objectives, and targets grouped under four headings or 'pillars'. The pillars are named employability, entrepreneurship, adaptability and equal opportunities. The Strategy functions through an annual mechanism comprising guidelines for employment and national reports on their implementation; recommendations to the Member States; and a Joint Employment Report by Council and Commission to the European Council. The Strategy includes broad consultation with social partners as well as regional and local authorities. Until now, the Employment Strategy has hardly dealt with immigration and does not seem to consider immigration as a complementary labour market strategy. The 2000 and 2001 Joint Employment Reports do note labour shortages and skills gaps in several countries but still lack an in-depth treatment of immigration, concentrating instead on ways of increasing the labour market participation and skills of the resident population. Measures for the labour market inclusion of disadvantaged groups under the employability pillar, 'life long learning' issues under the adaptability pillar, and gender mainstreaming policies under the equal opportunities pillar are all part of this effort. However, there are signs that the Employment Strategy will take on board the migration option to a greater degree than has been the case so far.

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## Demographic developments and social policies

Demographic projections show that Europe's population is diminishing in size as well as becoming older. This means that a growing number of people above retirement age will need to be supported by those in employment. Concerns about the sustainability of pension systems and of health care and other social services are growing in most Member States and accession states, although the pace of ageing differs between countries and regions. Academic and policy attention has centred on keeping the ratio between the economically active and the retired as favourable as possible. Policies to increase the size of the working population, as set out under the Employment Strategy pillars, will require significant incentives and societal changes without redressing demographic imbalances in the long term. An increase in fertility would have a profound impact, but it is hard to achieve and would need a 20-25 year time lag to have an effect on labour supply. Immigration can (and already does) offset declines in the size of population and declines in the population of working age. It would, however, be both difficult and questionable to aim for an immigration intake narrowly selected on the basis of age structure characteristics. Moreover, there will still be significant population ageing even if migration levels increase. Migration, then, should be considered a complementary demographic strategy and an option to be considered alongside policies on family, labour market participation and pensions.

At the European level, the migration option has so far not been at the centre of the demographic debate. The European Commission aims to address the demographic challenge under the three headings of family, ageing and pensions. In the fields of family policy and ageing, legislative competence rests almost exclusively with Member States, with important decision-making powers at the regional and local level as well. The Commission considers that 'its essential role is as catalyst, facilitator and communicator in promoting exchange of knowledge and experience. Rather than leading, the Commission essentially responds to and supports initiatives from partners at all levels throughout the EU.' On pensions, it likewise remains a matter for Member States to determine their own policies. However, the European institutions are more active in this field and especially in areas such as portability of pension rights, where the EC Treaty's Article 42 on free movement establishes Community competence.

Family policy is explicitly framed as addressing the pressures created by demographic change, expressing the notion that social policy is a 'productive factor' with significant economic impact. However, the extent of public intervention in this area is a matter of debate, especially concerning the issue of low fertility. Moreover, traditional family policies such as cash benefits for couples to help them cover the cost of raising children have not been successful. In decisions about having children, the prospects for

reconciling work and family life seem to play a larger role than direct cash transfers. In particular, fertility may depend on the degree of gender equity in employment conditions, family services, the tax system, social security and the family itself. Women may be more likely to have children if this will not severely curtail the opportunities they have attained in the area of education and employment.<sup>25</sup> In fact, fertility is higher in Scandinavian societies than in Italy and Spain, where traditional family structures dominate. In order to analyse further the impact of family policies and the diverse development of family forms in Europe, the European Commission has established a European Observatory on the Social Situation, Demography and Family. This is a multidisciplinary network, which will address the topic of 'immigration and the family' at its annual seminar in June 2002.

'Active ageing' features in the 'employability' related guidelines of the Employment Strategy. The Commission encourages a range of practices including life long learning and retiring later and more gradually. It also calls for a change in the social attitudes towards older workers and for improved working conditions. More broadly, ageing policies aim to reduce dependency burdens by promoting an 'active retirement' and the social inclusion of older people. However, the Commission has not been successful in advancing its proposal for a Council Decision on Community Support for Actions in favour of Older People, which has not been adopted since its introduction in 1995. A less socio-economic and more rights-based approach has been more successful, with discrimination on the grounds of age included in the 2000 Directive outlawing discrimination in employment. Despite these advances, ageing policies do not appear vigorous enough to meet the challenge of a shrinking labour force.

Activity on pensions has been more intense, driven by worries that pension spending could lead to higher deficits and endanger the sound public finances required by the Stability and Growth pact. As the ratio of workers to pensioners will decline from 4 to 1 to less than 2 to 1 by 2040, Commission and Member States are aware that pension systems are in a precarious state. The Commission has issued two Communications on 'safe and sustainable pensions' and suggested the introduction of an 'open method of co-ordination' in this area. These plans were adopted by the Council of Ministers in December 2001. Pensions remain a national responsibility, but Member States agree on common objectives and annual policy review along the lines of the Employment Strategy. The first national reports on pensions are due in September 2002, and the first Joint Report on pensions is expected for the European Council meeting in Spring 2003. While the modernisation of pension systems themselves is an important objective, the Commission points out that beyond such reforms coherent employment, social and economic policies are needed to safeguard the long-term sustainability of pensions. In this context, immigration re-enters the debate as a way of increasing the

25 Peter McDonald, *The 'Toolbox' of Public Policies to Impact on Fertility – a Global View*, paper presented at the seminar 'Low fertility, families and public policies', organised by the European Observatory on Family Matters in Seville, September 15-16, 2000

working population and thus easing the pressure on pension systems. The Commission's 2001 Communication on pensions states that 'immigration can [...] make a significant contribution to stabilising total population and employment figures', although it maintains that no 'realistic level of immigration' can halt the decline in the ratio of workers to pensioners.

In conclusion, social policies on family, ageing and pensions fail to promise a decisive turn in the demographic trends affecting European societies. Migration needs to be discussed seriously as an option for ameliorating demographic imbalances and relieving pension systems, as it needs to be discussed as an option for filling labour market shortages. As a complementary strategy, migration has a clear role in the debates about Europe's socio-economic prospects<sup>26</sup>.

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### Migration legislation and Justice and Home Affairs

The Amsterdam Treaty has empowered the European institutions to act on immigration and the related issue of immigrant integration. Measures are to be adopted within five years, i.e. before May 2004. The Justice and Home Affairs Commissioner and individual Member States, using their shared right of initiative, have proposed measures on almost all areas of immigration policy, including border control, family reunification, long-term residents, and admission for employment. Most of these proposals are still pending adoption in the Council, as Member States, Commission and Parliament are unable to agree on the extent and the modalities of harmonisation.

Clear immigration rules define who qualifies for immigration for employment or self-employment. Those who do not qualify may not be permitted entry and should leave a country voluntarily if they have already entered or be removed involuntarily. The enforcement of the law in immigration-related areas is an absolute necessity and protects the integrity of the immigration system.

Non-governmental organisations have consistently pointed out that the developing Community immigration policy needs to build on a high standard of rights. NGO proposals have sought to set this standard by offering draft texts for legislative proposals and by emphasising the need for compliance with international human rights rules.<sup>27</sup> This approach of setting standards in order to situate the debate at the highest possible level of rights has been taken up by a number of European foundations. At their initiative, a paper on 'Policy recommendations for EU immigration policies' was written by ten migration experts and presented around the October 2001 Belgian Presidency Conference on migration.<sup>28</sup>

26 This is further developed in Jan Niessen and Yongmi Schibel, *Demographic changes and the consequences for Europe's future. Is immigration an option?* (MPG Occasional Paper, to be published in December 2002 and available at [www.migpolgroup.com](http://www.migpolgroup.com)).

27 See, for example, the ILPA/MPG Amsterdam Proposals, Brussels 1999

28 German Marshall Fund of the United States, King Baudoin Foundation, Fundacion Jose Ortega y Gasset, Compagnia di San Paolo, *Policy recommendations for EU immigration policies*, October 2001



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## Migration management and the open method of co-ordination

As a complement to the legislative process, the Commission has proposed an open method of co-ordination in the field of immigration. In an adaptation of the Employment Strategy mechanism, the proposal envisages that the Council will adopt annual migration guidelines accompanied by specific targets. Member States will prepare national action plans on immigration, while the Commission will provide a synthesis report drawing attention to common problems and identifying areas where European solutions might be appropriate.

The proposed open method aims to develop common policy orientations among states whose policies in the area of immigration are still very diverse. Halfway between legislative action across all member states and purely intergovernmental co-operation, the open method seeks to create ongoing dialogues around specific guidelines and objectives. It aims to establish a common framework for policy discussion and review, and would essentially be a standard-setting activity. Regular exchange of information may lead to a learning process and a constructive 'testing' of different policy models. The strength of the open method mechanism is the extensive consultation envisaged during the drafting of the national action plans, which can engage different ministries and levels of government as well as social partners and non-governmental organisations. Member States looking for the right balance between national policies and Community policies may use the open method to explore the benefits of convergence without making legislative commitments. Consultation may also make clear that immigration is not the exclusive domain of justice and home affairs, but involves trade and industry, employment, education and welfare ministries. However, there is still a lack of clarity about the method's relationship with the existing Employment Strategy. For this and other reasons, its adoption is still pending approval in the Council.



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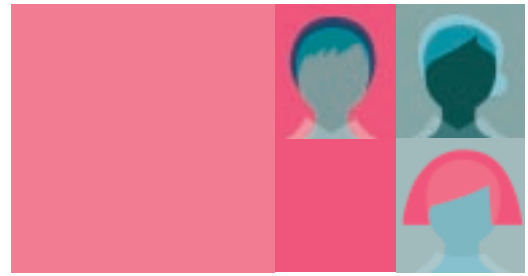
## Conclusion

I hope that I have shown that the new terms in the emerging migration debates are distinctly different from those being used in the refugee debates. The refugee debate is on the protection of those persons whose civil and political rights are violated to the extent that they have a well-founded fear of being persecuted. The migration debate is about socio-economic interests and values, and consequently on socio-economic rights including those of migrants.

I also hope to have shown that it is not really possible to design purely national migration policies in a unifying and expanding European Union: a Union that encompasses an internal market, a joint labour market strategy, an area without internal border control, a common social policy agenda and a shared set of human rights commitments (including those on equality and anti-discrimination).

Refugee movements are to a great extent unpredictable, making policy planning much more complicated with a high degree of instant or emergency responses. It is less complicated to assess labour market needs and to project demographic developments, despite the uncertainties of economic conjunctures and trends in population growth. On the basis of these assessments and projections an immigration policy can be designed not only to address current labour market shortages, but definitely those for the mid and longer term. The current political climate in a number of Member States may not be in favour of such an exercise, but the question as to how immigration can help shaping Europe's future is pertinent and cannot remain unanswered for too long a period.

## Recent Developments in Immigration Policy in the United Kingdom:



Sarah Spencer, Migration Policy Advisor.

The Labour Government elected in 1997 has overseen a remarkable shift in the UK's labour migration policy. Although formally announced by the Immigration Minister Barbara Roche in September 2000, relaxation of the rules restricting employers' access to overseas skilled workers had been quietly taking place during the previous year. Roche's speech, in which she recognised that migration will increasingly be a central feature of the global economy and brings with it considerable economic benefits, marked the replacement of the language of immigration 'control' with that of immigration 'management' and opened up the possibility of the UK developing a more consistent, positive and holistic approach to migration policy.

The new approach was driven by demands from employers for access to skilled workers (in which the UK 'must compete for the brightest and the best'), by recognition that labour market and demographic trends would increasingly necessitate a significant level of immigration, and the need to undermine the trade in illegal immigration by providing legal channels of access to work in the UK. Businesses are becoming increasingly international in their operation and individuals more willing to live abroad for periods of employment. The shortages are caused in part by excess demand for particular kinds of skills (including managerial) but also by failure to retain staff in the public sector because of non-competitive pay and conditions. (40% of nurses in a recent study said that they intended to leave the National Health Service within 3 years). In the long term, the size of the working age population in proportion to that of old people is in decline.

While the language of control still dominates the political discourse on asylum, the UK government has in other respects shifted its tone and approach. A series of reforms have been trailed over the past year in the build up to an Asylum, Immigration and Citizenship White Paper (published in February 2002).

The channels through which migrants from outside the European Union can gain entry to the UK are complex but in essence are:

- To take up employment: the work permit system and a series of other work-related categories
- As students
- As asylum seekers
- For family reunion or union

Migration policy is the responsibility of the Home Office (which took over responsibility for labour migration from the employment department in May 2001). Each government department has formally agreed 'Aims'. Reflecting the shift from a control, enforcement model to that of migration management to meet UK economic and social policy objectives, the Home Office's Aim 6 is:

*To regulate entry to, and settlement in, the United Kingdom effectively in the interests of **sustainable growth and social inclusion**. To provide an efficient and effective work permit system to meet economic and skill requirements, and fair, fast and effective programmes for dealing with visitors, citizenship and long-term immigration applications and those seeking refuge and asylum. To facilitate travel by UK citizens.*  
*{My emphasis}*

In relaxing controls on labour migration, the Government is concerned not to move ahead of public or press opinion. Roche's speech, focusing on skilled migration, received a favourable response from the press, with indications that even an unskilled channel might not be opposed if the case were well supported. An ICM poll published in the Guardian newspaper in May 2001 found 70% of the public supported immigration of workers with skills in short supply and 51% a quota for the unskilled. These figures are significantly more favourable towards immigration than polls in the 1970s-80s which showed that the overwhelming majority thought immigration too high. In contrast, however, public hostility to asylum seekers is considerable, most people believing the majority of asylum seekers not to be in genuine need of protection.

One consequence of the earlier focus on restricting migration was the rejection by successive governments of any need for research on the fiscal or labour market impact of migrants or their social outcomes. Accompanying the shift towards management of migration to meet the UK's economic and social objectives has been a recognition by government of the importance of research, not least on migrants' motivation, on the skills that they bring and factors influencing successful settlement. It published its first

study, 'Migration: an economic and social analysis', in 2001<sup>29</sup> and has since initiated a wider research programme. However, resources are limited and some significant areas, such as illegal working and asylum seekers' motivation to work, are inherently difficult for government researchers to investigate. More data is, however, likely to become available on the relationship between skill shortages and migration, and on economic and social outcomes.

## Foreign workers

The UK has the third largest foreign-born population and labour force in Western Europe (after Germany and France). But as a proportion of its total population, its stock of foreign citizens and labour is comparatively low. Since 1993, however, the annual rate of increase in the foreign population has been above average for Europe. The total inflow of migrant workers was three times higher in 1995-9 (492,000) than in 1975-9. Net migration is the largest element of the UK's population growth. Of those foreign born who are employed (slightly more than half), 60% are managerial or professional; 40% are women.

Two thirds of the inflow of foreign workers come from developed countries. Overall, the foreign workforce has risen by 28% since 1995 to over one million (but still only 4% of the workforce). 40% of the foreign workforce is from an EU country (one fifth of them, a declining proportion, from Ireland). The foreign born workforce is heavily concentrated in London and the South East.

Foreign workers are concentrated in labour intensive sectors such as hotel and catering, transport and services. A lower proportion of foreigners than UK citizens work in manufacturing. Non-EU nationals are more likely to work in this sector than EU citizens.

In total, over 200,000 labour immigrants arrive in the UK each year, including some 30,000 from the EU.

## Channels of Labour Migration

The principal means of entry to work in the UK is through the work permit system, the aim of which is to strike the right balance between enabling employers to recruit or transfer skilled people from abroad and protecting job opportunities for resident workers.

The system is employer-led: an employer is granted a permit for a named individual if

the job and individual meet the required criteria. The criteria include the skill level of posts which are eligible for permits, whether the employer must first 'test the labour market' (for instance by advertising the post) and that the pay and conditions are no less than those offered to a resident worker doing the same job. Special provisions are made for overseas entertainers and sports people.

There is no quota or limit to the number of permits and the number issued has risen significantly in recent years. The system was reviewed in 1999 and a series of measures implemented in 2000 to make it easier and quicker for employers to get a permit for a wider range of jobs. The skill threshold for posts eligible for a permit was significantly reduced (to graduates with no work experience) and the period of time for which a permit could be allocated increased to 5 years. The spouses of work permit holders in the UK for more than 12 months are themselves allowed to work (regardless of whether the job would fit work permit criteria) and their children can attend state schools. There are few checks on the outcomes of these arrangements nor research on its impact. Only one quarter of long term work permit holders apply for and receive permanent settlement.

35% of work permit holders are from the Americas, followed by India and the Philippines. Much of the recent increase in permits has been for jobs in the IT sector (20% of permits) and health care professionals (22.5%). Business, administration and management take 14%, the finance sector 11%.

#### Number of work permits issued<sup>30</sup>

1995	24,000	(87% approval rate)	
1998	38,000		
1999	42,000	(92% approval rate)	
2000	86,000	(94% approval rate)	(92,000 including dependants)
2001	104,000		

The Home Secretary appointed following the May 2001 election, David Blunkett, initiated an immediate internal review of the work permit system, letting it be known that he was willing both to consider alternatives to the employer led system for skilled workers, and opening up new legal channels for the low skilled.

At the top end of the labour market, a new 'Highly Skilled Migrants Programme' was launched on 28 January 2002 under which those with high level qualifications and specialist skills are able to come to the UK to seek work without a specific job offer from an employer, provided that they can support themselves in the meantime. The scheme operates a points system according to educational qualifications, work experience and previous earnings.

July 2000 had already seen the creation of the Innovators category that allows entrepreneurs with a viable business plan to enter to establish a company despite having relatively little to invest. This is a pilot scheme, the effectiveness of which is being monitored. The applicant's business plan must show that at least two full time jobs will be created and that there is sufficient finance to support the business for six months. The scheme joins the long existing Investors category for those who have a minimum of £1 million to invest in the UK; and Business Visitors who may come for up to 6 months to work as a consultant, perform a specific task (e.g. to install a product or run a conference). Training and Work Experience permits are issued to those training for a professional qualification or work experience (but not part of the employer's normal workforce).

Proposals to extend labour migration further are expected in the February White Paper. The press has speculated that up to 350,000 skilled workers will be allowed each year and that these opportunities will be advertised abroad. By opening up opportunities to come through the front door, government hopes to reduce the number of those entering (or over-staying) illegally by the back door.

The work permit system relies on employers identifying the worker they need and government being able to anticipate future labour shortages sufficiently accurately to be able to approve applications – a difficult task. The level of control it provides does (in theory) permit supervision of adherence to work permit conditions (e.g. payment of the minimum wage) and enable government to convince the public that each worker is needed. A key question is the extent to which the employer-led work permit system will continue to be the dominant means of entry, or gradually be replaced by a points system which, while more flexible, may be more difficult both to regulate (post entry) and to sell to the public.

Policy needs to take account of the fact that patterns of labour mobility are changing. Significant mobility takes place within companies as inter-company transfers, with the intention that the individual will remain only for a few months or years before moving on. Short term secondments, or repeat visits and even weekly commuting are part of a rich pattern of migration forms that includes but is not confined to one-way migration for permanent settlement.

Both government and employers need to anticipate future trends, future shortages, and the extent to which those shortages can and should be met by internal recruitment and re-training or through migration. The systems chosen need to be adaptable to times of economic downturn and rising unemployment, albeit that specific shortages will remain.

Government also needs to take into account the impact of skilled migration on the developing countries from which many workers come, for instance those working in IT and in health care. The impact is being researched in a joint study by the UK's Department of International Development and the ILO.

Britain is in competition with other EU states and beyond for skilled workers. We therefore need to understand the barriers to mobility, which employers and government can help to overcome. A recent survey across Europe by Price Waterhouse Coopers has identified that Europeans perceive the greatest barriers to mobility within Europe to be (in this order) family ties (e.g. children's education), lack of information on employment opportunities, limited employment opportunities for spouse, lack of recognition of professional qualifications, lack of language skills, transfer of pensions, housing and immigration restrictions, followed by the difficulty of adjusting to a different culture<sup>31</sup>. Employers identified differences in national policies on tax, social security, pensions, employment law and immigration as impediments, pointing to the need for greater EU harmonisation. A majority of firms expected their need for an internationally mobile work force to increase.

## Illegal Immigration

The Government believes that there are up to 500,000 people working illegally in the UK (although there is in practice no means of knowing how many people have entered or over-stayed without permission). It is concerned that firms that employ such workers are under-cutting those paying the statutory minimum wage, and that current means of control are inadequate. Prosecutions under 1996 legislation imposing sanctions on employers who employ illegal workers are extremely rare, with no regular inspection system to enforce the law.

The White Paper is expected to announce stronger penalties on employers, with those involved in bringing illegal immigrants to the UK facing up to 14 years in prison. The Government plans some high profile prosecutions and to increase significantly the rate of removals in order to send a message to people-smuggling gangs that it is no longer safe to work illegally in Britain. Immigration 'hit-squads' will concentrate on the hotel and catering sector, on construction, clothes manufacturing, agriculture, and information technology sectors<sup>32</sup>.

31 PWC (2001) European Labour Mobility-Outline White Paper.

32 TUC Press Release. (June 20, 2001)

It is clear, however, that those working in the UK illegally are meeting a demand for labour that is not being met by existing residents. An effective clampdown on illegal working could create severe difficulties for some employers, though in the absence of any research on the extent to which employers rely on illegal workers, or why, we cannot assess the impact. The representative body of the Hotel and Catering sector, for instance, denies that it employs illegal workers, as to do so would undermine its attempts to improve the image of the sector as a worthwhile career.

Nevertheless, we can assume that the clampdown will *either* create difficulties for employers who then suffer labour shortages or the demand will need to be met by the creation of a legal channel for unskilled/low skilled workers.

## Unskilled/Low Skilled Migration

The UK has not permitted the migration of low skilled people as workers on any significant scale since the 1960s. Family reunion has in practice permitted a significant number of both unskilled and skilled people to live in the UK and to work, but little is known about their contribution to the labour market.

Perhaps the most difficult question the Government now faces is on what scale to permit unskilled labour migration and under what conditions. The motivation to do so is two fold: To meet employer demand and to undercut the demand for illegal workers; and the Home Secretary recognised this when announcing his intention to open up discussions with employers and trades unions on an unskilled channel last October:

*'Where there are shortages I want to ensure that our economy can benefit from both skilled and lower skilled workers on a sensible and managed basis for those who wish to be employed legally in this country... A properly managed system of legal migration would be a body blow to the gangmasters and people traffickers who bring people to the country illegally. I want to move forward with urgency'.*

It had been expected that details of arrangements would be announced in the White Paper but differences of view within government may delay a decision. The priority of the Department of Work and Pensions is to meet its targets for reducing unemployment, particularly of those, such as ethnic minorities and disabled people, who find it more difficult to secure work. The prospect of increased competition from overseas workers is, in that context, unhelpful. In contrast, the Treasury and the Department of Trade and Industry are more likely to prioritise productivity and competitiveness criteria, and to give overseas labour a cautious welcome.



There are currently two schemes that allow mainly young people to come and work in the UK in unskilled or non-professional work. Around 46,000 working holiday makers aged 17 to 27 come to the UK each year from Commonwealth countries and are permitted to do 'non-professional' jobs for up to 2 years. Some of these people may in practice be working in teaching and nursing jobs, in which there are severe shortages. There is little effective post-entry control. Around 15,000 au pairs enter each year and some 15,000 domestic workers accompanying other immigrants.

There are a further 20,200 seasonal agricultural workers who will be able to come this year under a quota scheme, the quota having been increased in face of pressure from farmers (from 5,500 in 1997 to 15,200 in 2001). Recruits, who mainly come from Poland, Ukraine, Lithuania and Bulgaria, must be students aged 18-25.

The new unskilled scheme could, like that for agricultural workers, be a tightly controlled quota system, matching migrants to particular employers. It seems unlikely that it will operate on a points system, like the Highly Skilled Migrants Programme, as unskilled workers would be less likely to be able to support themselves while searching for work.

In deciding whether to extend or add to these schemes, the Government does not only need to consider the impact of unskilled labour on the labour market, however. Migration to the UK currently has a positive fiscal balance, contributing £2.5 billion more to government revenues than is drawn in welfare benefits or use of public services. That fact is helpful in the essential task of winning public support for immigration policy. Were a significant number of unskilled people to arrive, and to bring their families, it might be expected that reliance on social housing, on the National Health Service and on language tuition in schools, for instance, would increase.

Policy on entry to work thus cannot be separated from post-entry access to services, and raises questions about employers' responsibility for provision of housing, for instance. Moreover, should unskilled workers be allowed to bring their families, and to renew their permits for four years, after which they would be eligible to apply for permanent residence?

One of the significant shifts in UK policy over the past 18 months has been to recognise that policy on entry controls cannot be seen in isolation from policy on the integration of migrants and social cohesion. Migration policy must be designed to ensure that migrants contribute to both economic and social policy objectives. Policy cannot be designed to meet the needs of the labour market alone. Moreover, policy

must take into account the needs of the migrants themselves and their families, and international human rights obligations in relation to family reunion.

While it is feasible to create short term schemes, where migrants come without families to do seasonal work for up to six months and then return home, it is not desirable either for individuals nor for society to require migrants workers to come for longer periods without their families. Government thus needs to take a wide range of factors into account in deciding what arrangements to make for unskilled workers. Currently, its ability to make informed decisions is hampered by the lack of information about the nature of demand for and impact of unskilled migration.

The conditions under which permit holders work are also scarcely regulated and the existing examples of abuse – for instance of qualified nurses being tied to work in residential homes for low wages - would be likely to increase were controls on unskilled migration to be relaxed. In that case, some inspection system would undoubtedly be needed.

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### Overseas students

The first move towards encouraging people to come to Britain was not in relation to overseas workers but to students, a shift in policy driven by the needs of the economy. In June 1999 the Prime Minister launched a three-year strategy to attract more students to the UK, aiming to increase Britain's share of the English-speaking higher education market from 17% to 25% and to double the number of further education students<sup>31</sup>. It was estimated that this would boost the UK's export earnings by some £700m.

In addition to a £5m marketing campaign, immigration rules were relaxed to give automatic permission for students to work part-time and to make it easier for would-be students to obtain a visa. The bar on students subsequently applying for a work permit, thus requiring them to return home before applying to work in Britain, was effectively relaxed in 2000 (although the Rules are formally to be revised this year).

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### Asylum seekers and refugees

Asylum seekers have similarly been barred from working, although they can obtain permission to work if their application has not been resolved after six months, as is frequently the case. Once given permission to stay, however, whether with Refugee Status or Exceptional Leave to Remain, refugees can work but in practice find it

difficult to access jobs for a whole range of reasons including poor English, that their qualifications are not recognised in the UK, lack of documentation proving entitlement to work, and discrimination. Much concern has been expressed at the number of doctors and teachers among refugees and asylum seekers at a time when the government is recruiting heavily abroad for people with those skills.

Attention is now being given to ways in which refugees can gain access to appropriate employment or training, but the position of asylum seekers is more problematic as providing access to work could encourage more asylum seekers to target the UK as a destination. The intention is to speed up the determination process so that fast decisions make consideration of access to work unnecessary, but there currently remains a substantial backlog of cases.

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## Integration

With the exception of destitute asylum seekers, the UK has had no formal programme of induction or assistance for migrants, leaving it to employers and to families to provide the necessary information and support. When most work permit holders were skilled workers on high salaries, the majority of them from developed countries, the need for state support and guidance to facilitate integration was perhaps less than in relation to those arriving in the family categories or as refugees.

Difficulties experienced by earlier generations of ethnic minority immigrants, and by their British born children, led from the 1960s to a series of measures to tackle discrimination and to the provision of some services (such as language tuition for children). Most recently, the Race Relations (Amendment) Act 2000 requires all public authorities not only to avoid discrimination but to promote race equality and good race relations. A failure by public bodies in the past to consider the impact of their policies on ethnic minority residents has, combined with market forces, led to unintended segregation in housing and education in some areas, recently highlighted by disturbances in a number of northern cities.

Government policy is thus two fold: to address the disadvantage that ethnic minorities experience in key areas such as education, employment, housing and health provision; and to reduce segregation and promote social cohesion. In that context, the question of faith-based schools is a current focus of debate. In relation to employment, the aim is both to ensure that ethnic minorities are fully represented at all levels within companies and public services, including senior positions; and that the culture in workplaces is one in which minorities feel valued and can progress without discrimination.

Although the focus of this agenda is minorities already living within the UK (often second or third generation British), it is also the case that future migrants will not choose the UK to work if diversity is not welcomed by colleagues and discriminatory attitudes persist in performance assessment. Rather, the UK can make itself the employer of choice for migrants by ensuring that the conditions of work that they experience are better than those of its competitors. While contractual conditions, and the freedom allowed to spouses to work, for instance, are major considerations, migrants are also likely to take into account the country or employer's record on diversity issues.

The White Paper is expected to announce new measures of induction for new immigrants, providing them with information about the UK and easier access to English language tuition. It may include a scheme for British citizens to befriend an immigrant or refugee, to help them to integrate – an idea the government is known to have been exploring. This Canadian scheme involves paid coordinators to match volunteer 'buddies' to newcomers and not only helps immigrants to learn about Canada but enables Canadians to get a greater understanding of those who have come to live among them.

The UK has a relaxed attitude to granting citizenship, allowing applications after five years residence and permitting dual citizenship. Individuals born in the UK generally acquire citizenship automatically. While allowing relatively easy access to citizenship, however, the UK does not encourage applications nor has it used the granting of citizenship as an opportunity to welcome individuals or to stress the rights and responsibilities that citizenship entails. The White Paper is likely to announce a new approach in which prospective citizens (some 60,000 a year) are required to take classes in citizenship and pass an English test<sup>33</sup>, although whether English classes will be compulsory, and the extent to which this will be used to ensure new citizens are well informed or to stress their responsibilities as citizens, is not yet clear. New citizens may be given an identity card, the precursor of the first national identity card system that the UK has had since 1952.

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### UK approach to EU policy

The UK retains the right to opt in or out of EU directives on migration issues, opting out of those, which it considers would infringe its control of entry across its borders. It has opted in to the directives on temporary protection, for instance, but not into the draft directives on family reunion and long-term residents. It is sympathetic to the proposals relating to labour migration. Despite its partial withdrawal, the UK insists that it

<sup>33</sup> The Guardian. (October 26, 2001).

recognises the importance of a European response and wants to work closely and constructively with its European partners, keeping an open mind on its approach to each new legislative proposal. It sees Justice and Home Affairs as an area of EU activity that it can sell to the British public as a benefit of EU membership, and finds much of what the Commission proposes to be in line with UK thinking.

## Conclusion

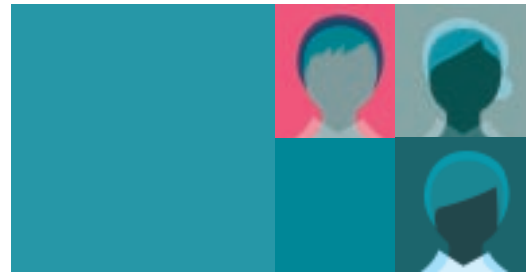
The last two years have seen a radical shift in UK labour migration policy with a significant increase in the number of work permits issued to skilled workers and in the quota for seasonal agricultural workers. Recognition that migration will be a central feature of the global economy and that it brings economic benefits has led to a shift in the Government's approach from that of immigration control to management in the UK's interests. Some 200,000 labour migrants come to the UK each year. The foreign born population is growing at a faster rate than the EU average but remains only 4% of the workforce. Only a quarter of work permit holders choose to take up permanent residence. The public is relatively supportive of the increase in labour migration, in contrast to significant levels of concern about asylum seekers.

Major policy questions remain to be resolved, some of which will be addressed in a Government White Paper to be published this month. Recent initiatives have begun to address the need for greater flexibility in skilled labour migration, but leave open the question whether the future system will remain employer led or be replaced by a more flexible but less controllable points system. The need to open up a legal unskilled channel and to reduce the demand for illegal immigration is more problematic. Government has to consider not only the implications for the labour market but also the fiscal impact, the need to retain public support, and the UK's international human rights obligations. Recent disturbances in Britain's northern cities have also served as a reminder of the need for effective measures to promote equality and ensure the successful integration of both immigrants and subsequent generations.

A dearth of research during the earlier immigration control period has bequeathed a poor evidence base on which to develop policy. Many basic questions about the economic and social impact of immigration, and about the impact of entry and post entry controls, are as yet unanswered. Little is known about the facts which encourage or discourage migrant mobility to work, or how businesses can compete more effectively for the staff that they need. Government and business are eager to rectify that information gap.

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## The Implications For Ireland And The UK Arising From The Development Of Recent European Union Policy On Migration



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### Abstract

After 2004, in accordance with the terms of the Treaty of Amsterdam, the EU and not the Member States will have primacy in immigration and asylum policy. A common EU policy is likely to emerge over time, accompanied by joint regulatory and enforcement machinery. A start to the implementation of this common policy has already been made through the incorporation of the Schengen arrangements, or *acquis*, previously intergovernmental in nature, into the Treaty of Amsterdam. It is already applied to a greater or lesser extent in 13 of the 15 existing member states and is a prerequisite for EU entry in the case of all applicant states. However, the ~~UK~~ opted out of Schengen via a protocol to the Treaty and Ireland, in order to preserve its Common Travel Area Arrangement (also known as the Common Travel Agreement) with the UK, chose to follow suit.

In the meantime, the post '9/11' climate is significantly influencing the direction and speed of emerging EU policy, with a greater emphasis on security-related measures and a slowing down in the agenda to achieve a common regime. In particular, this is likely to slow down, at least, the achievement of one of the European Commission's stated goals – a broad equivalence between the rights and entitlements of EU citizens and of third-country nationals legally resident on Union territory.

The likelihood is that those measures which emphasise a police- and security-related approach to immigration will be prioritised and fast-tracked at the level of policy, legislation and enforcement while other measures designed to bring about an ethical immigration policy and to facilitate the long-term integration of immigrants within a multi-ethnic Europe are likely to move far more slowly.

This short paper seeks to explain the background to EU initiatives in the field of migration policy and to explore what challenges such developments may present for UK and Irish policy. It should be borne in mind that whereas a wealth of documentation from various sources enables the UK situation to be addressed in some detail, sources in the Irish case (whether official, academic or the NGO sector) are inadequate in the extreme.

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### **Background: EU migration policy before Amsterdam.**

In postwar Europe, even when it was recognised that immigration was necessary to rebuild Europe's war-damaged cities and industries, and when the results of very specific forms of xenophobia were all too fresh in people's minds, the fiction was maintained that Europe was not a region of immigration. Gastarbeiter were economic production units, not people, and they could be required to return home when their services were no longer needed. Governments such as that of France recognised the need for immigration but sought to regulate it through the machinery of bilateral state-to-state agreements. Such approaches were based on the perceived needs of economies and took little account of the social consequences of immigration, either for immigrants or for host societies, while the treatment of individual non-nationals did not in general accord them the same rights as nationals.

To a greater or lesser extent these attempts at regulation had to be tempered in practice by a degree of realpolitik. Thus, employers did not necessarily want employees, trained at some expense and familiar with the language and culture of the host country, to be rotated home and replaced by new, untrained and inexperienced workers. Governments and societies found it increasingly impossible to maintain the fiction that Europe had no immigrants when they were to be seen in increasing numbers in all the major regions of northern Europe and more recently even in the south. As immigrants increasingly became long-term and in many cases permanent residents they inevitably became part of broader society, even if the welcome was not always warm. They married, had children, became visible as consumers of social, educational and training, health, housing and other state services, and asserted themselves.

Policy and practice gradually had to adapt themselves to these new realities, but this happened only up to a point. Thorny issues such as family reunification continued to prove difficult. Laws regarding citizenship varied widely. Racism and xenophobia increased as European countries, themselves no longer able to recruit sufficient workers within their own territories as economic and demographic change reached the formerly poor peripheries of Europe and intra-EU migration slowed, began increasingly to look

further afield for immigrant workers. To some extent they had always done so, arising from the prevalence of colonialism and imperialism in European relations with other parts of the world. But the new challenge of the mid to late 20th century was one of integrating large numbers of workers whose cultural backgrounds were markedly different from mainstream European society.

With the slowdown of economic activity after the Arab-Israeli war and the subsequent oil crisis of the early 1970s, new labour immigration virtually ceased, although family reunification remained a significant factor, allowing immigrants to continue to arrive from outside the EU. Moreover, in the 1980s and 1990s there was a growing flow of forced migrants, including those who chose the asylum route because no other was open to them, driven to Europe by war, famine, disease and economic hardship (even though the latter conditions did not qualify the would-be asylum seeker to apply under the terms of the 1951 Convention).

In the late 1990s the European immigration debate shifted in a radically new direction. We finally woke up to the fact that an ageing Europe with a diminishing workforce will face economic decline and hardship unless the labour force can be supplemented from outside. Moreover, it is increasingly accepted that immigration can no longer be seen as a temporary phenomenon with no implications for host societies. Yet the acceptance of the notion that permanent immigration is inevitable and even desirable flies in the face of strong traditions of nation-state identity, very frequently ethno-centric in nature. It also raises basic issues of citizenship and exclusion. As events in the recent past such as the assassination of Dutch politician Pim Fortuyn have shown, the issue is no longer constructed purely as a 'racial' conflict but is often portrayed as a clash between allegedly irreconcilable cultures. The substitution of a discourse of explicit racism by one of cultural exclusion and/or rejection has if anything further complicated the debate. The construction of a discourse of European identity has had the unfortunate result of displacing the border of 'otherness' beyond the nation-state to the very borders of Europe itself, so that immigrants are seen by some as the enemy, or at least the other, within.

The response to these issues, as will be noted below, was at first at national, not EU, level. However, the rhetoric and finally the practice of a 'citizens' Europe' realised with the 1992 Treaty of Maastricht and with the implementation of arrangements such as the Schengen acquis (more below), laid bare a series of central dilemmas. The EU of free movement was only for EU citizens, not for long-term resident immigrants or other third-country nationals. How was it going to be possible to empower one group and police the other, and was this compatible with an ethical approach to social citizenship and the mantra of a tolerant, multiethnic Europe? Could the EU advance without formulating migration policy at EU level?



Existing EU caselaw did offer some protection for immigrants but in many cases the definition of a term such as ‘worker’ was effectively limited to those workers who were also EU citizens. The EU’s Charter of Fundamental Human Rights (adopted at the same conference which agreed the terms of the draft Treaty of Nice) might have been the instrument through which general rights for EU citizens and third country residents could have been defined. Unfortunately the opportunity was lost. As the Commission’s own explanatory documentation points out,

*‘With regard to the free movement of persons, the Charter affirms the right of every European citizen to move and reside freely within the territory of the Member States. **It adds that these rights “may” be granted to third-country nationals** {my emphasis added}*

## 1985 Schengen Agreement and 1990 Schengen Implementing Convention.

Given that EU policy on freedom of movement for its own citizens advanced so slowly, it was perhaps inevitable that the first initiatives would be intergovernmental. In 1985 and 1990 the Benelux countries, France and Germany held conferences in Schengen, a border town in Luxembourg. They negotiated a series of new multilateral arrangements concerning cross-border movements of people, which took effect in 1995 and quickly included a number of other EU Member States. The best-known innovation was the gradual abolition of border checks. Other ‘flanking’ measures, especially in the field of security cooperation (e.g. the Schengen Information System or SIS), were also provided for. For those countries which adhered to these arrangements a common zone of free movement for EU citizens was opened up, so that in many cases there is little to tell the traveller, other than an occasional flag or change in road markings, that an international frontier has been crossed. Lest it should be thought that the impetus for major change was a purely progressive and people-centred one, it should be pointed out that it has been argued that Schengen really arose because of pressure from transport companies and that interior ministries were not especially happy with the proposal to remove border controls.

The legal implications of Schengen, in terms of the relationships between persons and borders, are far-reaching, literally and metaphorically. Guild points out that that ‘the border of the Netherlands for the admission of aliens is to be found at the edge of the frontiers of all the Schengen states. Thus Germany, France, Italy etc are part of Dutch sovereignty for the purpose of the borders for persons’. At the very least it may be said that this holds out the potential for a radical remapping of traditional assumptions

about nation states, citizens and aliens. Unfortunately the measures in place so far do not suggest that Schengen is a step forward in terms of civil liberties or the protection of migrants.

## Human rights and related objections to Schengen.

In spite of the positive aspects, there has been much criticism of aspects of the Schengen acquis from human rights organisations, lawyers, other concerned bodies (including the NCCRI) and academic researchers. Perhaps the over-riding point is that the freedom to cross internal EU borders without showing identity documents has been more than offset by a greatly increased use of other methods of identity control and surveillance within national territories, and that this has been accompanied by a particular focus on immigrants and ethnic minorities.

Criticisms may be summarised as follows:

- The abolition of most border controls in the Schengen area has been offset by an increase in other methods of identity controls, including stop and search, surveillance and raids on immigrant quarters.
- Schengen does not confer any right on non-nationals who happen to be long-term resident immigrants to travel freely within the EU.
- National parliaments played little or no part in the development of the Schengen acquis, much of which is still not open to public scrutiny.
- The European Parliament was excluded from the negotiation of Schengen and the European Commission's role was effectively limited to that of observer.
- The Schengen information system (SIS) is a set of shared databases which lie at the heart of the Schengen control system. An 'Article 96' entry of a third-country national's name into the SIS will lead to entry refusal to any Schengen country for that person. Moreover the precise terms under which a person's name may be entered, the information held and the duration of any such entry, as well as rights of discovery and appeal, are not clear. Terms such as 'threat to public order' and 'national security and safety' may be interpreted differently by different authorities.
- A data subject has the right to access to information concerning him/herself in the SIS but that right is restricted in certain circumstances. However, there is a right of correction of factually inaccurate data and the deletion of legally inaccurate data.
- The type of data held does not include 'personal data revealing racial origin,

political opinions or religious or other beliefs, as well as that concerning health or sexual life', but it does allow the registration of 'objective and permanent' physical features, leaving this to the discretion of the registering officer, so that such features as skin colour could be included.

- Access to data is available to wide categories of officials via about 48,000 terminals. It is alleged that cases have already occurred where sensitive personal data has been compromised.
- Article 99 of the Schengen Convention, on political surveillance, can be used by some governments for 'political surveillance on dissidents and other political opponents'. It is particularly feared that the provision may be used for surveillance against trade unionist, human rights and environmental activists'
- Data protection supervision is left to national administrations. There is a joint supervisory authority but its role is advisory and its staff is limited.
- A supplementary database SIRENE (Supplementary Information Request at the National Entries) is not regulated by the Schengen Convention.
- There is no mention in the Schengen Convention of international human rights legislation. It has been argued that both Articles 96 and 99 could lead to serious breaches of the ECHR.
- Schengen has a particularly negative impact on third country nationals in several respects. The 'white' visa list (no visa required) is far shorter (43 countries, 2 territories) than the 'black' list (131 countries, 3 territories). Carrier liability rules make it virtually impossible for would-be asylum seekers from 'black list' countries to travel to the Schengen area. Moreover persons whose visa request is refused are likely to have their names entered in the SIS, leading to exclusion from the entire Schengen zone, possibly indefinitely. It has been pointed out that almost 90% of all entries in the SIS are foreign nationals to be refused entry under Article 96.

It has been argued that the incorporation of Schengen into the Treaty of Amsterdam (see below) would at least lead to a greater degree of transparency and legal protection compared to the situation which obtained previously. However, the European Court of Justice has only limited jurisdiction and does not cover matters involving internal security and law and order.

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### **'Hot pursuit' rights.**

The following material, drawn from Austrian press reports, illustrates some of the rather unpredictable ways in which Schengen has already impacted on intra-EU relations. It should be mentioned that apart from the hot pursuit issue addressed below a common

EU-wide border immigration police service has also been mooted.

*At the "internal" Austro-Italian frontier crossing-point, customs checks at the border have been all but abolished. Instead, travellers are now often confronted with grim-faced, machine-gun toting Gendarmerie officers, posted on the road some hundred metres inside Austrian territory. Their task is to find so-called "passers" (smugglers of human beings), drug traffickers and wanted persons by carrying out random checks.*

*In March, the Austrian Government was negotiating with Italy on a reciprocal right of cross-border "hot pursuit" for the two countries' police forces, according to the Schengen provisions. The agreement would come into force at the moment of the entry into force of the Schengen Agreement in both countries. The bilateral agreement provides for the police forces of both countries to operate within a 10 km range inside the border of its neighbouring country.*

*A similar agreement between Austria and Germany is more "liberal": it contains no territorial restrictions on cross-border "hot pursuit". The "discrimination" against the Italians by Austria once again reveals the different levels of "prestige" various national police forces enjoy within the EU.*

It is unlikely that the PSNI and An Garda Síochána will traverse each other's jurisdictions with even an Italian degree of impunity anytime soon.

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## **From Member State to Union competence: the Treaty of Amsterdam 1997**

As suggested earlier, immigration issues, including admission and residence, asylum and humanitarian leave to remain, family reunification and economic migration, have traditionally been core policy fields to be regulated independently by national governments. Katrougalos quotes one French official in the 19960s, that, "a state ceases to be a state if it does not control the implantation of foreigners on its soil. Specific intra-EU cooperation on any substantive aspects of migration and related issues is relatively recent and was always intergovernmental in character – the Schengen *acquis* and the 1990 Dublin Convention on the treatment of asylum applications are cases in point.

In 1997 a significant change occurred when the Treaty of Amsterdam was adopted as a new instrument of EU law, with the aim of 'enhancing European integration and, in

particular, enabling the European Union to develop more rapidly into an area of freedom, security and justice'. The integration of the Schengen *acquis* into the framework of the European Union, by means of a protocol to this treaty, marked the creation of a significant level of Community competence in the field. It may be seen as first step towards the eventual development of a comprehensive Union approach, encompassing policy, law, implementation and enforcement machinery across the whole spectrum of immigration and asylum policy.

These are clearly major issues, yet the opt-out by Ireland and the UK effectively excludes them, not merely from the application of the full Schengen arrangements (including sections of the SIS such as Article 96 referred to above), but also from the application of any further measures in this area except insofar as either or both states choose to decide otherwise. It will be evident that this is precisely the type of *à la carte* approach to Union policy which is anathema to some pro-Europeans.

## --- The Treaty of Amsterdam now

The Treaty of Amsterdam came into effect on 1 May 1999. In immigration-related matters, as noted, the Council will take decisions unanimously on proposals put forward by the Commission or a member state (this last provision is most unusual) for the time being. Qualified majority voting (qmv) does not apply and the Parliament does not have a co-decision role, only the right to be consulted.

There has only been limited harmonisation already in free movement, common immigration and visa policies in the following fields

- The conditions and entry of third country nationals and the procedures for issuing visas and residence permits.
- Entitlements of non-EU nationals to family reunification, employment, social protection, housing, education and training.
- Measures related to the harmonisation of refugee and asylum policy across the European Union.

These developments are occurring in a changing environment at European level, which includes the recent economic downturn and an increased emphasis on security arising in part from September 11th.

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## 2004: a further major change?

After 2004 the Commission will have sole right of proposal but will still have to consider any request by a member state. It will be obliged to consult the Parliament but, again, qmv and codecision will only apply if the Council decides unanimously to do so – something which appears to contradict the entire concept of co-decision and qmv, as it ensures it will never be used in a contentious area. In reality, therefore, the 2004 deadline may mean not bring about a major shift.

The Treaty of Nice will further modify this process, although in relatively minor ways.

In the meantime the European Commission has been preparing for the changeover through the introduction of a wide range of new reports, position papers and proposals, although Member States have not exhibited any great enthusiasm for the new regime and progress has been very slow.

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## The UK/Ireland Common Travel Area /Common Travel Area Arrangement (CTA).

Measures comparable to the freedom of movement provided for in the Schengen acquis have been in place between the UK and Ireland from the early 1950s. UK subjects and Irish citizens have the right freely to travel between the two jurisdictions without having to carry a passport. For this very reason, it has never been viewed as practicable for Ireland to adopt the full Schengen arrangements in the absence of a British decision to do likewise, as the logical outcome would be the imposition of border controls between the UK and Ireland. In the case of the North/South land frontier this would be virtually unworkable, while enormous inconvenience would undoubtedly be caused to people in two societies which, in trading and labour market terms, are still highly integrated.

The fact that the freedom of the CTA only extends to UK subjects and Irish citizens is worthy of note, since it has led, following the increase in recent years in asylum seekers and other immigrants in Ireland, to a dilemma for immigration officials viz. how to know that a particular individual was entitled to benefit from the CTA and not simply trying to enter the country illegally. The obvious solution – a system of mutual recognition which would bestow the right of freedom of entry on anyone who was resident in the other CTA partner's territory, accompanied by a good-faith acceptance of that person's right to be there, has not been adopted. Instead, regrettably, a de facto practice of stopping anyone who looks visibly different has often been followed. Apart from being racist in effect if not in intent, this has led to various absurdities as black British visitors (and in a notable case a black Irishman from the distinctly un-British West Belfast) have been stopped and harassed.

The contrast with the Schengen arrangements is striking. There is nothing to stop persons who do not have the legal right to freedom of movement from crossing, for instance, from France to Germany, but the system of internal security controls, unlike those in place in Britain and Ireland, means that border monitoring is considerably less important than in the case of the CTA as a means of controlling such movements.

A little-noticed but significant side-effect of the CTA, which has been seen as an internal arrangement between the UK and Ireland, is that it has in practice largely aligned Irish policy concerning external immigration with that of the UK. Thus, the Home Office 'black book' of persons refused leave to enter the UK was circulated to the Irish authorities and Irish diplomatic missions and used to ban entry to such persons to Ireland.

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### **British and Irish immigration policy in recent years. High skills good; low skills a necessary evil?; asylum seekers increasingly unwelcome.**

There are a number of features common to the policies being followed in recent years by the UK and Ireland

- A reliance on national border controls rather than the mechanisms of the Schengen acquis
- Increasingly tough policies towards asylum seekers, including direct provision and dispersal
- Carrier liability to dissuade the carrying of asylum seekers and other would-be migrants (the legislation is not yet in place in Ireland)
- A growing recognition of the need for high-skilled labour migrants and a reliance on a largely market-driven approach to the management of such flows
- An increasing number of low-skills migrants are also needed and are being allowed to enter, but they have few rights and entitlements
- Family reunification continues to be a difficult and largely discretionary issue

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### **Irish policy**

In recent years Ireland, with a growing demand for labour immigration, has begun to modify its own immigration policies. These policies are still largely grounded in legislation dating back to 1935 but have increasingly reflected a pragmatic and market-led approach with the introduction of special work visa/authorisation programmes for certain high skills immigrants and the widespread use of short-term work permits (with

strong echoes of the Gastarbeiter regime of the 1960s) for other immigrant workers. However, the modalities of Irish policy, with strongly privatised elements, are at variance with the more statist approach followed in continental EU Member States, which emphasise the official management of migratory flows including the use of quotas. This again raises questions about future harmonisation. Draft new legislation is likely in the next year.

### **British policy: a period of major change**

The UK is one of the magnets within the EU for foreign workers. For those coming from outside the EU, an employer-led work permit system, as in Ireland, is the normal route. Interestingly, the number of permits issued by the UK authorities for non-EU workers is proportionately much less than the Irish figure (2001: 104,000 in the UK, 36,000 in Ireland).

UK policy has changed dramatically in recent years. As Spencer puts it, the UK has moved from a position of immigration 'control' to immigration 'management'. In essence, UK policy now recognises the need for managed labour immigration, reflecting employer demand, demographic change, skills shortages and the internationalisation of the market. Public opinion would appear to be well disposed towards skilled labour immigration and attitudes towards all would-be labour immigrants would appear to have shifted in a favourable direction. By contrast, attitudes towards asylum seekers continue to be very negative.

New initiatives have been launched in the recent past, including the Highly Skilled Migrants Programme (January 2002), which allows suitably qualified individuals to enter the country and look for work as long as they can support themselves.

On asylum seekers, the picture is a very different one. Measures introduced include direct provision, dispersal, carrier liability with heavy fines and detention centres. A speeded up determination process is being introduced. Asylum seekers no longer have the right to work if their cases have not been determined after six months. New arrangements for large scale accommodation centres and separate educational arrangements for the children of asylum seekers have been proposed.

On illegal immigration, the emphasis is on stronger penalties for employers and traffickers, with more frequent checks on those sectors where illegal immigrants are thought to be working.



## British and Irish views on Schengen

Although Ireland and the UK, (along with Denmark, which has signed but not applied certain aspects), opted out of Schengen in the context of the Treaty of Amsterdam (they do participate in certain data-sharing arrangements), their position must be seen as increasingly anomalous, a point noted by the European Parliament in its deliberations, when Ireland and Britain were urged to participate fully in Schengen. Moreover, acceptance of the Schengen acquis is a prior condition of entry for new applicant States. This requirement may be seen to have less to do with the provision of new freedoms for citizens of applicant States and more to do with the desire of existing EU Member States to ensure that as the borders of the Union shift eastwards there is an accompanying reinforcement of measures to prevent unauthorised migration across the Union's new frontiers.

An important concern for both the Irish and British governments arising from the development of EU policy on migration, although not the only one, will be to preserve the common travel arrangements between Ireland and the UK. For instance, the Irish Government has recently stated in a consultation paper that its general position is 'to participate in EU measures to the maximum extent compatible with the maintenance of the Common Travel Area with the UK'.

In contrast to the Schengen developments outlined above, it has been a cardinal principle of UK policy to control the movement of persons across its frontiers through its own legislative and administrative arrangements. In an island country which lacks an internal system requiring individuals to be registered and their addresses monitored, it cannot be surprising that the regulation of the movement of persons across the sea, air and land frontiers has come to be seen as a core issue of national policy and sovereignty. British policy therefore has insisted upon the necessity for the UK to retain its own border checks, making it impossible for them fully to sign up to the Schengen acquis. This is the main reason for the UK/Ireland opt-out. In effect, if the UK were to sign up to Schengen and border controls between the UK and continental Members States were to be removed, the control of entry of non-EU citizens into the UK would pass to whichever border administration such individuals first encountered in the EU Schengen area – e.g. Italy or Portugal. Moreover, a difficulty would also arise for a second category of persons whose freedom of movement within the EU has not yet been fully elucidated – those who have a right of residence within one Member State only, such as third-country citizens with residence rights, convention refugees and persons with humanitarian leave to remain.

Current UK policy concerns, as set out in '*Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum*' may be summarised as follows:

- Frontier controls are 'an effective means of controlling immigration and of combating terrorism and other crime'
- These controls 'match both the geography and traditions of the country and have ensured a high degree of personal freedom within the UK'
- This approach is different from that in mainland Europe, 'where because of the difficulty of policing long land frontiers, there is much greater dependence on internal controls such as identity checks'

Continental EU Member States would be unlikely to welcome a British and Irish adherence to Schengen and the resultant dropping of border controls without the introduction of comprehensive 'flanking measures' (including greater surveillance away from border crossings) to offset this diminution in surveillance and control. It is very likely that there would be strong pressure to introduce national identity card systems in both countries, a move which would present few technical problems (each of us leaves ubiquitous electronic footsteps already in any event) but which would attract very strong political opposition, as would any measures which might be seen as resembling the abandoned and unloved 'sus' laws in the UK.

It is noteworthy that there has been criticism in France of current UK policy in the aftermath of the events of 11 September, on the grounds, *inter alia*, that Britain's allegedly lax system of controls make it a 'breeding ground for terrorism'. The same criticism has been levelled at the UK in the context of the disproportionate number of asylum seekers trying to get to Britain. According to this viewpoint, a main pull-factor is the fact that it is relatively easy to 'disappear' once on British territory, compared to continental Europe.

In sum, Ireland and Britain have a different legal tradition, greater protections for the individual (including *habeas corpus*) and no requirement for national identity cards. But it may be difficult to maintain this separate regime in a pooled policy and regulatory framework and where the Union, not Member States, has primary competence.

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## Conclusions

It is likely that the UK and Ireland will come under increasing pressure to join up fully to Schengen. While there will probably be no change in the near future, such a move would end the opt-out which for the time being insulates the two states legally from all new policies in this field, except insofar as either or both states opt in to part or all of such policies. It would also effectively end the Common Travel Area Arrangement, which has governed the movement of Irish citizens and UK subjects between the UK and Ireland since the 1950s.

A move to adopt the Schengen acquis in the UK and Ireland would have radical civil liberties implications because of the very different legal systems found in common-law and continental codes. The protection afforded by habeas corpus is not the only factor, although not the least important either, which comes to mind. Measures which would be likely to be put forward include the introduction of national identity cards and continental-style policing of a more intrusive character, including stop-and-search, increased surveillance of immigrants and other police powers, ever closer cooperation in data exchange and more radical measures such as hot pursuit and cross-border surveillance, already in place in between some continental countries, and ultimately the development of a common border immigration police service. Unless accompanying measures guaranteeing civil rights and individual liberties are also introduced – and the omens are not favourable – the net effect will be to reinforce the creeping marginalisation of immigrants and of persons of immigrant origin born within the EU.

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