Berliner Online-Beiträge zum Europarecht
Berlin e-Working Papers on European Law

herausgegeben vom
edited by

Lehrstuhl für Öffentliches Recht und Europarecht
Chair of Public Law and European Law

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Nr. 4

26.04.2004

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The Immigration Policy of the European Union
– Paving the Way to Fortress Europe? –

Zitiervorschlag:
Verfasser, in: Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

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This article is published under the title "The Constitutional Framework of a Common European Immigration Policy" in: Bernd v. Hoffmann (ed.), Towards a Common European Immigration Policy, Frankfurt a.M., 2003, p. 89 ff.

The Immigration Policy of the European Union

- Paving the Way to Fortress Europe? -

I. Introduction

In the discussion about the developing European Immigration Policy there often can be heard the argument, that Europe is building a fortress against immigrants. This argument implies, that the EU is not willing to establish an open policy towards so called third country nationals, neither with regard to economically motivated immigration nor immigration for political reasons (asylum, refugees). Of course the Fortress-Europe-Argument is not new, last time it was brought up with regard to the 1992-Project, the completion of the Internal Market. My paper intends to examine, if the Constitution of Europe, EU- and EC Treaty, as well as its implementation in term of policies justify the Fortress-Europe-Argument. At the same time, my speech intends to look for a transparent model, which might establish a guideline, a framework for the developing European Immigration Policy. Only on the basis of a transparent model can be answered , if and in how far, the Fortress-Europe-Argument paints a true picture of European Immigration Policy.

II. The Model

If we look into the Treaties to find hints for a transparent model framing European Immigration Policy we discover hints in the system of the freedom of goods, especially in Art. 23 (2) and 24 ECT. In order to avoid any misunderstanding: referring to the freedom of goods does not imply the intention, that human beings can be compared with goods. With regard to human beings it is quite clear that any model hat to take into account the ethical background of any Immigration Policy, which is legally based on human rights, especially by the rights of refugees and asylum as well as family-rights and political rights. My only intention to refer to the freedom of goods is, that we can find here an established system, that is simple and transparent. Therefore it may serve as a model for European Immigration Policy. Not at least,

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the definition of the Internal market in Art. 14 (2) ECT is based on the freedoms of goods as well as the freedom of persons an capital.

1. The Idea of the Internal market

Already the notion “Internal Market” suggests an area determined by an internal dimension which in a way contrasts with its external aspects. This first etymological remark might somehow meet the idea of the fortress Europe. When we image a fortress we immediately think about big walls which delimit the world outside of the fortress from the life inside of it, those who are behind its secure walls and those who remain outside. Although it is true that the rules in and outside of the Internal market are different this does not reflect its primary intention. The Internal Market is basically a form of economic integration in which the degree of involvement of participating economies is very closed. The Member States have agreed to remove all customs and quotas on trade passing between them. Moreover they apply a common level of tariffs on all goods entering or leaving the common market. (This corresponds to a customs union in which goods can circulate freely.) The Internal Market additionally also guarantees the free movement of the factors of production namely labour, capital and enterprise. One of the consequences of the free movement of goods is that the best products in the eyes of the consumers are the most successful no matter where they are produced. Since labour and capital are two essential economic factors in the production of goods, it is important that their free movement is also guaranteed. The idea is to ensure the best possible allocation of resources within the Internal market by enabling factors of production to move to areas where they are most valued[1].

Art. 14 (2) ECT sums up the idea of the Internal Market which “ shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty“.

In many respects the Four Freedoms have similar characteristics and the case law has developed in a parallel way. Since the free movement of goods constitutes the basic principle of the Internal Market we will start by presenting the model of the freedom of goods and then discuss if this model can also be transposed on the other freedoms.

2. The Model of the Freedom of Goods

Arts. 23 ff. ECT deal with the freedom of goods. They prohibit customs duties and charges having equivalent effect, quantitative restrictions on imports and exports as well as measures having equivalent effect between Member States. All of these prohibitions concern goods which circulate within the Internal Market. It is important to notice that the scope of application of these prohibitions includes not only goods which were produced inside the EC

but also goods originating in third countries. Art. 23 (2) ECT explicitly states that "the provisions of Art. 25 and of Chapter 2 of this Title shall apply to products originating in Member States and to products from third countries which are in free circulation in Member States". This means that once foreign products have legally (see Art. 24 ECT: customs are paid; all due import duties are fulfilled) passed the common external boarder and entered the Community they are treated exactly the same way as if they had been produced within the EC. By virtue of Art. 23 (2) ECT they become more or less an EU-product.

This is the major difference between the free movement of goods and the free movement of persons and of services, with regard to this point the model of the free movement of goods can not be transposed on freedoms related to persons. Unlike EU citizens, third-countries nationals who are in the territory of a Member State are not allowed to move freely to another Member State. For them the frontiers inside the Union do still exist and represent a barrier not that easy to overcome. In a certain sense the Internal Market is - with regard to that point - not yet fully completed.

III. Constitutional Gates into the European Union

1. The Four Freedoms and Rights of Third Country Nationals

Our main question is: which constitutional gates can help third countries nationals to get into the EU. Since the Four Freedoms constitute the heart of the Community System we will start by discussing how they can by used by non EU citizens.

When we speak about the status of third country nationals in the context of the Four Freedoms we immediately think about those freedoms which directly concerned with persons, namely the freedom of workers as laid down in Art. 39 ff. ECT and the freedom of establishment (Art. 43 ff. ECT).

If we have a look at the wording of these provisions we notice that they either refer to "workers of the Member States" (Art. 39 (2) ECT) or to the "nationals of a Member State" (Art. 43 (1) ECT). This already indicates us that these rights were not designed for everybody but aimed to favour EU citizens.

Third-country-nationals actually benefit only from these freedoms if they are somehow related to a national of a Member State, they do not have a right on their own but derive their rights from the rights of one of their family member who is a EU citizen. Regulation 1612/68 on the freedom of movement for workers within the Community[2] grants parallel rights to

[1] Swann, The Economics of the Common Market, 1992, 11 in Craig/de Burca, EU Law, 1998, 548.
[2] Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on the freedom of movement for workers within the Community, O.J. 1968, L 257/2.

third-country-nationals. Art. 1 of Directive 73/148[3] grants rights of movement and residence with regard to the freedoms of establishment and of services.

This extension of rights in favour of the family of an EU citizen expresses the will to respect and to protect family life and follows from Art. 8 EHRC[4]. This fundamental right to family life was the main reason why the Community legislator introduced the above provisions. Besides, the ECJ also refereed to this fundamental right when it had to decide on the compatibility with Community law of certain national measures concerning third country nationals. The Court used a proportionality test and balanced the right of protection of the family with other interests like public security or burden on the public finances of the host Member State[5]. Moreover, one might mention several other purposes of the extension of the freedom of persons to the family members such as "the importance for the worker, from a human point of view, of having his entire family with him and the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that State"[6]. And last but not least, it is obvious that the effective exercise of freedom of movement of an EU citizen would be hampered if e.g. his wife, not being a national of a Member State, would not be entitled to apply for a job in this other Member State, where he was offered a new job.

2. Who are the family members who benefit from these Community rights?

a) *the spouse*[7]. In most of the cases it is easy to determine who falls within this category, there are however some cases where it is not easy to draw the boarder line.

   Separated couples who not longer live together and who intend to divorce[8] are officially still married and therefore benefit from the rights related to their marital status.

   On the other hand, former spouses of divorced couples do normally not have these rights, however, under particular conditions, they might indirectly still benefit from them. The *Baumbast* judgment which was delivered on 17th September of this year[9] deals with such a situation. A United States citizen got married to a Frenchman, they had two children. All of them live in the UK. Since the divorce the children have stayed with their mother but still have had regular contact with their father who works and lives in the UK. The ECJ basically stated that the British government had to grant their mother a residence permit although she was no longer the spouse of a Member State national because "to refuse to

[3] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, O.J. 1973, L 172/14.
[4] Case C-60/00, *Carpenter*, [2002] not yet published, para. 38.
[5] Cases C-259/99, *MRAX*, [2002] not yet published, C-413/99, *Baumbast* [2002] not yet published.
[6] Case 249/86, *Commission/Germany*, [1989] ECR 1263.
[7] Art. 10 (1) Regulation 1612/68 and Art. 1 (1) Directive 73/148.
[8] Case 267/83, Diatta, [1985] ECR 567, para. 20.
[9] Case C-413/99, *Baumbast.*

grant permission to remain to a parent who is the primary carer of the child exercising his right to pursue his studies in the host Member State infringes" the right "conferred by Article 12 of Regulation No 1612/68 on the child of migrant worker to pursue, under the best possible conditions, his education in the host Member State"[10]. In other words: the third country national derived her Community rights not from her former husband but from her children who themselves benefit from Community rights.

Another question which might arise in this context is the position of registered partnership since they have been introduced in several Member States. Is for instance a homosexual partner also covered by Art. 10 (1) of Regulation 1612/68? In a judgment from 1986 the ECJ decided that "Art. 10 (1) of Regulation No. 1612/68 cannot be interpreted as meaning that the companion, in stable relationship, who is a national of a Member State and is employed in the territory of another Member State must in certain circumstances be treated as "his spouse" for the purpose of that provision"[11]. However, since the Dutch law granted residence rights to the unmarried foreign companions of nationals it had to grant the same rights to the companion of a Member State migrant worker. This case answers only part of our question namely that if a Member States decided to treat marriage and other forms of partnership equally, the companion of migrant work living in such a partnership falls under the scope of Art. 10 (1).

What happens if such a couple moves to a Member State which does not recognise this form of registered partnership? There is no case law dealing with this specific problem but the ECJ would probably interpret the legal term "spouse" on the basis of social developments and take into account the situation in the whole EU and not in just one Member State[12]. In the context of a recent staff case concerning a household allowance the ECJ already considered the question of these new forms of partnership and came to the conclusion that "the fact that in a limited number of Member States, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term "married official" as used in the Staff Regulation"[13]. According to the ECJ it would be up to the legislator to take appropriate measures and amend the Staff Regulation if it wishes to include also other forms of partnerships. Would the ECJ decide in a similar way if it would have to interpret the term "spouse" of a migrant worker in the context of Art. 10 (1)?

b) Beside the spouse Art. 10 (1) of Regulation 1612/68 and Art. 1 (1) Directive 73/148 also covers their descendants who are under the age of 21 years or are dependant as well as

[10] *Baumbast*, para. 73.
[11] Case 59/85, *Reed* [1986], ECR 1283, para. 16.
[12] *Reed*, para. 13.
[13] Case C-122/99P and C-125/99, *P/Council* [2001], para. 39.

dependent relatives in the ascending line of the worker and his spouse. "Their descendants" should be understood as including not only the children of the migrant worker and his spouse but also the descendant of the EU citizen and those of his spouse stemming from another relationship[14]. Children under 21 are automatically covered whereas older relatives in the descending line and all relatives in the ascending line need to be dependant on the migrant worker. The decisive fact is that the migrant worker actually grants them maintenance, the existence of a claim to alimony is not important[15]. After the death of the migrant worker his relatives may remain in the host Member State but if a migrant workers dies before the accession of his State of origin to the EC, his family members then have no rights under Art 10 (1)[16].

In this context one should also mention the proposal for a family reunification directive which deals with the same type of family members but is supposed to concern only family members of third country nationals who have a valid residence permit or are refugees – we will come back to that proposal in a few minutes.

3. Which other conditions must be fulfilled in order to benefit from these Community rights?

a) It is actually not enough for a third country national to be a family member of EU citizen, this EU citizen has to exercise either the freedom of movement of workers or the freedom of establishment or the freedom to provide services. The family members of persons who never exercised one of theses rights do not fall under the scope of Art. 10ff. of Regulation 1612/68 and Art. 1 (1) Directive 73/148[17] and do therefore not benefit from these special Community rights. Although a Member State national has ceased to be a migrant worker his children still benefit from educational rights in this foreign Member State according to Art. 12 of Regulation 1612/68[18].

b) Moreover, it is worth underlining the necessity of a Community link. EC law does not grant any rights to third country nationals who are family members of EU citizen being in a purely national situation. This Community link might in some cases be easier to find than in others. It is easier for self-employed persons to pretend that they have business partners abroad than for workers to invoke a relationship to an other Member State.

   Even so-called reversed discrimination cases where somebody tries to benefit from Community rights in his own Member State might present such a Community link. In the

[14] *Baumbast*, para. 57.
[15] Brechmann in Calliess/Ruffert, Kommentar zu EUV und EGV², 2002, Art. 39, para. 23.
[16] Case C-131/96, *Romero* [1997], ECR 3659, para.17.
[17] *MRAX*, para. 39.
[18] The ECJ expressly confirmed this view in *Baumbast*, para. 54.

Singh case[19] an Indian national married to a British national wanted the British authorities to grant him indefinite leave to remain. Before coming back to the UK Mr and Mrs Singh were employed in Germany. The ECJ decided that "a national of a Member State might be deterred from leaving his country of origin in order to pursue an activity (..) in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there (..), the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State"[20]. In other words in some cases it might be enough that this Community link had existed in the past.

Beside the rights third country nationals can derive from their relatives who are EU citizens, non Member State nationals might in the future also benefit from Community rights on their own. A proposal for a directive concerning the status of third–country nationals who are long-term residents[21] is currently under debate. It aims to fulfil point 21 of the Tampere conclusions by granting to all third-country nationals who are long term residents in a Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens.

4. Freedom of Services

Since the free movement of services is closely linked to the person of the provider and of the recipient of the service, it also constitutes a gate through which third country nationals might benefit from Community rights. Art. 49 (1) ECT prohibits restrictions on the freedom only in respect of nationals of Member States, but Art. 49 (2) ECT opens the possibility for the Council to extend the provisions of the Chapter on services to third country nationals who provide services and who are established in the EC. Such an extension of the personal scope of Art. 49 ff. ECT has not yet been achieved, but in 1999 the Commission made a first proposal for a Directive[22] which was amended in 2000[23] and which is currently under discussion.

Until the adoption of such a text by the Council, third country nationals have already - under the current state of law -some possibilities to benefit from the free movement of services.

In a similar way to that for the free movement of persons, the relatives of EU citizens who exercise the freedom of services benefit from the rights of movement and of residence granted by Directive 73/148. We therefore have to deal first with the question: when does a Member

[19] Case C-370/90, *Singh* [1992], ECR 4265.
[20] *Singh*, para. 19.
[21] Commission proposal COM (2001) 127 final, O.J. 2001 C 240 E.
[22] Commission proposal COM (99) 3 final, O.J. 1997 C 67.
[23] Amended proposal of the Commission COM (2000) 271 final, O.J. 2000 C 311 E.

State national exercise the freedom of services, what is the personal scope of this freedom? Basically there are two possibilities: being a provider or a recipient of a service. In the first case the EU citizen can go to an other Member State in order to provide a service there. A recent case, *Carpenter*[24], illustrates such a situation: a national of the Philippines, married to a British national, applied for leave to remain in the UK. The couple lived in the UK but Mr Carpenter travelled on a regular basis to other Member States for the purpose of his business, he sold advertising space in scientific journals and offered various administrative and publishing services to the editors of those journals. Since the services provided abroad made up a significant proportion of his business Mr Carpenter was a provider of services within the meaning of Art. 49 ECT and his spouse had – according to Community law - the right to reside in the territory of the UK.

The other theoretical possibility of exercising the free movement of services is to travel to an other Member State in order to receive a service there; tourist would e.g. be included in that category[25]. Would therefore a third country national have rights under Community law just because her husband, a EU citizen, goes on a regular basis to the hair dresser in the neighbouring Member State? The Member State national is only very temporary a recipient of services, during this short period of time her spouse benefits from the right of movement laid down in Directive 73/148 and is allowed to accompany her abroad. The ECJ would probably however not deduce a permanent right of residence for him like in the *Carpenter* case just because his spouse is occasionally a recipient of services in an other Member State!

Art. 49 ff. ECT applies not only to an exchange of services between two EU citizens. Either the recipient or the provider of the service might even be a third country national. But if both are third country nationals the case does not fall within the scope of the freedom of services. Only the Member State national is entitled to rely on the free movement of service before a Court[26]. In this respect one could imagine an extension of the scope of the free movement of services in favour of third country nationals, if the ECJ granted them the right to refer to the freedom of services. Such a development of the case law would not impose an additional burden on the Member States and would lead to more effectiveness in the enforcement of the freedom of services since a larger number of persons will be entitled to take up infringements. Although such an extension of the scope of the free movement of services towards third country nationals might be quite sensible and tempting, this would infringe the Treaty since Art. 49 (2) ECT explicitly offers the possibility to do so but through the instrument of legislation and therefore not through case law[27].

A further aspect in this chapter on the freedom of services and third country nationals concerns the posting of employees from third countries by undertakings for the provision of

[24] Case C-60/00, *Carpenter* [2002], not yet published.
[25] Case 186/87, *Cowan* [1989], ECR 195.
[26] Randelzhofer/Forsthoff in Grabitz/Hilf, Recht der EU-Kommentar, Art. 49/50, para. 16.
[27] Randelzhofer/Forsthoff in Grabitz/Hilf, Recht der EU-Kommentar, Art. 49/50, para. 21.

cross-border services. A firm which acts within the Internal Market may second its personnel to another Member State with a view to providing services there. Its personnel might however, not only be composed of EU citizens who anyhow enjoy the freedom of movement. In the *Vander Elst* case, the ECJ decided that Art. 49 and 50 ECT preclude "Member States from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority"[28]. In the present case a demolition business established in Brussels carried out a demolition of a building in France. It therefore sent to France several of its continuously employed Moroccan nationals who held Belgian work permits. The French authorities held that short-stay visa of the Moroccan workers was not sufficient to enable them to take up paid employment in France, they would have additionally needed French work permits . According to the ECJ such a request is contrary to Community law because it infringes the free movement of services.

Although the case law of the ECJ pointed the way, it did not solve all problems with regard to the posting of employees originating from third countries. The national administration has e.g. no guarantee from the Member State in which the undertaking is established that the third country national is legally resident there and will return there after having completed the service. In order to clarify these practical problems linked to this topic the Commission made a proposal for a "Directive of the European Parliament and the Council on the posting of employees from third countries for the provision of cross boarder services"[29] which is currently under discussion. The Commission suggests among others to introduce an "EC service provision card" which would contain guarantees from the Member State in which the firm is established.

5. Freedom of Capital

In order to present the complete picture of the position of third country nationals with regard to the Four Freedoms we will finally deal in brief with the freedom of capital. Art. 56 ECT prohibits all restrictions on movement of capital between Member States and between Member States and third countries. The scope of Art. 56 ECT is larger than the territory of the EU. Third country nationals can also rely on this freedom, some authors even pretend that it is not necessary for them to be established in the Community[30]. In any case, we might conclude that the freedom of movement of capital is guaranteed irrespectively of the nationality of the owner. To some extent the freedom of capital goes even further than the freedom of goods

[28] Case C-42/93, *Vander Elst* [1994], ECR I-3803, para. 26.
[29] Commission proposal COM (99) 3 final COD99012, O.J. 1999 C 67, p.17.
Amended Commission proposal COM (2000) 271 final, O.J. 2000 C 311 E.
[30] Ress/Ukow, in Grabitz/Hilf, Recht der EU-Kommentar, Art. 56, para. 73, Kiemel, in Groeben/Thiesing/Ehlermann, EU-/EGV-Kommentar, Art. 73b, para. 13.

since capital - unlike products - does not need to overcome a barrier went it enters the EU. The image of the Fortress Europe is – at least with regard to capital – not true at all.

6. Rights from the Four Freedoms on the Basis of International Agreements

Until now we saw how a non Member State national – no matter from which country he is - might benefit from the Four Freedoms. The EU has also signed a couple of agreements with some of these third countries whose nationals were granted additional rights and we will focus in the following on the most important ones.

a) The European Economic Area Agreement and the EC-Swiss agreement on Free Movement of Persons

The EEA Agreement which entered into force in 1994[31] has the purpose of creating a free trade zone between the EU and the EFTA Countries (Norway, Iceland, Liechtenstein). After having rejected the agreement in a referendum, Switzerland started bilateral negotiations with the EC which lead to a separate agreement which has been in force since 2001. Both of these agreements grant EFTA and Swiss nationals almost the same rights of free movement within the EU as Community law grants to the nationals of its Member States. The nationals of these four signatory states have the same rights to work and to receive national treatment within the Member States as those guaranteed by the EC Treaty to EU citizens who are migrant workers, self employed or exercising the freedom of services[32].

b) The EC-Turkey Association Agreement

The main sources of rights concerning Turkish nationals are the "Ankara" Agreement of 1963[33], the Additional Protocol to the Association Agreement of 1970[34] and the Association Council's Decisions 1/80 and 3/80[35]. All of them are integral parts of the Community legal order[36]. The ECJ has without any doubt also played a decisive role in terms of developing the rights of Turkish nationals under these association agreements, its case law reflects nonetheless an ambivalent attitude since the ECJ interpreted some provisions rather restrictively[37].

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[31] O.J. 1994 l 1/3.
[32] Hedemann-Robinson, „An overview of recent legal developments at Community level in relation to third country nationals resident within the European Union, with particular reference to the case law of the European court of justice", 38 CMLRev. (2001), 537-538.
[33] EEC-Turkey Association Agreement, O.J. 1964 L 217, entered into force as from 1.12.73.
[34] O.J. 1972 L 293, entered into force as from 1.1.73.
[35] Decision 1/80 on the development of the Association, Decision 3/80 on the application of the social security schemes of the Member States of the EC to Turkish workers and their families, both entered into force as from 1.12.80.
[36] Case 12/86, *Demirel* [1987], ECR 3719, para.7, Case C-192/89, *Sevince* [1990], ECRI-3461, para. 9].
[37] Hedemann-Robinson, CMLRev (2001), 556.

In the *Demirel* judgment, the Court denied direct effect to Art. 12 of the Association Agreement and to Art. 36 Additional Protocol both concerning the free movement of workers[38]. These provisions have merely programmatic character and are not sufficiently clear, precise and unconditional in order to be directly effective. The same is also true for Art. 13 and 14 of the Agreement concerning the freedom of establishment and the freedom of services. Turkish nationals have therefore under EC law neither a right of establishment nor a freedom to provide services[39].

Nevertheless, the stand-still clause in relation to the freedom of establishment and to the freedom of services contained in Art. 41 (1) Additional Protocol is directly effective[40], which prohibits Member States to tighten immigration controls in relation to self-employed Turkish migrants. The Agreements do not grant Turkish nationals and their family members any rights of free movement between the EU Member States or any rights of residence, however, once a Member State has authorised the entry of a Turkish citizen and given him permission to engage in employment it necessarily has to grant an accompanying right of residence for the purpose of enabling him to exercise this employment right. Residence rights are also implicitly guaranteed for his family members[41].

Moreover, Decision 1/80 provides several important employment rights with direct effect for Turkish nationals. Art. 6 for instance grants them rights in graduated form: after one year legal employment they only have the right to renew their working permit for another year with the same employer but after four years of legal employment they have free access in that Member State to any paid employment of their choice. In the *Sürül* judgment the ECJ confirmed that Art. 3 (1) of Decision 3/80 had direct effect and that therefore any discrimination in relation to social security for migrant workers and their families is prohibited[42].

c) Europe Agreements

Since 1991, the EU has concluded Europe Agreements (EA) with Poland[43], Hungary[44], Romania [45], Bulgaria [46], the Czech[47] and Slovak Republics [48], Estonia[49], Latvia[50], Lithuania[51]

[38] *Demirel*, para. 25.
[39] Hedemann-Robinson, CMLRev (2001), 545.
[40] Case C-37/98, *Savas* [2000], ECR I-02927, para. 46 ff.
[41] *Sevince*, para. 29, case C-355/93, *Eroglu* [1994], ECR I-5113, para.20, case C-210/97, *Akman* [1998], ECR I-7519, para. 24.
[42] Case C-262/96, *Sürül* [1999], ECR I-2685.
[43] O.J. 1993 L 347/2, entered into force as from 1.2.94.
[44] O.J. 1993 L 348/3, entered into force as from 1.2.94.
[45] O.J. 1994 L 357/2, entered into force as from 1.2.95
[46] O.J. 1994 L 358/3, entered into force as from 1.2.95.
[47] O.J. 1994 L 360/2, entered into force as from 1.2.95.
[48] O.J. 1994 L 359/2, entered into force as from 1.2.95.
[49] O.J. 1998 L 68, entered into force as from 1.2.98.
[50] O.J. 1998 L 26, entered into force as from 1.2. 98.

and Slovenia [52]. These association agreements function as a first step towards towards the admission of these countries to the EU and are modelled upon the Four Freedoms. All of them contain provisions which concern the rights of their nationals living and working within the EU. However, Member States basicaly retain sovereignty over the question of migration, entry and stay in their territory.

In the area of employment the EAs contain only pretty modest provisions[53]. Subject to "conditions and modalities applicable in each Member State" the spouse and children of a migrant worker have a right to access the labour market of the host Member State as long as the migrant legally works and resides their. Therefore the last word in family reunion matters still remains with the Member States. The most important provision in the context of the freedom of workers are the non discrimination clauses contained in the EAs. They prohibit the discrimination of CEE (Central and Eastern European) nationals as regards working conditions, remuneration or dismissal. In the *Pokrzeptowicz-Meyer* judgment the ECJ held that such a provision had direct effect and that a German provision which in a prior case had already been considered to be inapplicable because of its discriminatory character towards Community nationals, could not be applied to a Polish national either[54]. The non discrimination clauses of the EAs establish in favour of legally employed CEE nationals a right to equal treatment as regards employment conditions of the same extent as that of Art. 48(2) ECT.

When it comes to self-employed workers, the EAs contain more far reaching obligations. The Member States have to grant nationals and companies from CEE countries the right of establishment on the same terms as granted to host companies and nationals. In several recent judgments the ECJ gave direct effect to the provisions of the Polish, Czech and Bulgarian EAs concerning the freedom of establishment[55]. The rights of entry and residence are conferred, as corollaries of the right of establishment, on CEE nationals. The exercise of these right may however, in some circumstances, be limited by national provisions of the host Member State. The EAs do not "preclude a system of prior control which make the issue by the competent immigration authorities of leave to enter and remain subject to the condition that the applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into employment or having recourse to public funds, and that he possesses , from the outset, sufficient financial resources and has reasonable chances of success"[56]. Moreover, the freedom of establishment also contains the right to bring key personnel of CEE countries that may work in the branches registered in a Member State. This right has to be interpreted in a narrow way, since the Member States

[51] O.J. 1998 L 51, entered into force as from 1.2.98.
[52] O.J. 1999 L 51/3, entered into force as from 1.2.99.
[53] Hedemann-Robinson, CMLRev (2001), 571.
[54] Case C- 162/00, *Pokrzeptowicz-Meyer*, ECR (2002], I-1049.
[55] Case C-63/99, *Gloszcuk* [2001], case C.257/99, *Barkoci* [2001], case C-235/99 *Kondova* [2001], ECR I-6427, ECR I-6369 case C-268/99, J*any* [2001]
[56] *Gloszczuk*, para. 86.

wished to reduce the mobility of CEE nationals into and within the EU to the minimum necessary to ensure the freedom of establishment[57].

The above mentioned agreements show how international agreements between the Community and third countries may open gates to third country nationals into the EU. A further source of law, the human rights, also secure their position within the Community.

7. Human rights - The Right of Asylum

The European Union Charter of Fundamental rights was adopted at the Nice Summit in December 2000. Even though it has for now no binding legal force it is still worthy of analysis since it might in future become binding and since also might be taken into account by the ECJ and through the case law have some effect[58]. Some of the Charter's rights are only intended for EU citizens others are granted to anybody and it would be a topic on its own to depict in detail which of these fundamental rights constitute additional benefits for EU foreigners. We will nevertheless briefly mention two articles which grant special protection to third country nationals. Art. 18 deals with the rights of refugees, it reads „The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the New York Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community". Unlike many other articles of the Charter, Art. 18 is not derived from the ECHR or the ECT but directly refers to the UN documents. Art. 18 corresponds Art. 63 No 1 ECT, although the wording of the Charter uses „ with due respect" to the Geneva Convention and to the Protocol whereas Art. 63 ECT entails the expression „in accordance with". Anyhow, the right to asylum must be exercised under the same conditions as the EC has to exercise it when adopting refugee law which means in accordance with these two pieces of international law[59].

Art. 19 of the Charter contains in its first paragraph the prohibition of collective expulsions and in its second paragraph the classic *non-refoulement* principle.

The Commission's Green Paper on a Community return policy on illegal residents[60] in the part „asylum and return" about accompanying rights also refers to the Geneva Convention, the Protocol and these Charter provisions. The Commission suggests an open co-ordination method for return issues relating to rejected asylum seekers, person who have been under protection regime or illegal residents and underlines that human rights should be fully respected by such an eventual European return policy.

[57] Hedemann-Robinson, CMLRev (2001), 576.
[58] Peers, „Immigration, Asylum and the European Union Charter of Fundamental Rights", European Jounal of Migration and Law (2001), 144.
[59] Peers, EJML (2001), 162.
[60] COM (2002) 175 final.

Having discussed the characteristics of the key constitutional provisions of EC Law relating to a Common European Immigration Policy and their effects on persons who are not nationals of a Member State, we will now, in a next step, examine the competences of the EU with regard to the development of an European Immigration Law.

IV. **Competences to "Maintain and Develop the Union as an Area of Freedom, Security and Justice, in which the Free Movement of Persons is Assured" and Taken Measures**

1. Introduction

With the entry into force of the Treaty of Amsterdam on 1 May 1999, the policies on immigration, visas, asylum as well as on other policies connected to the free movement of persons have become a full Community responsibility under Title IV. With a view to the progressive establishment of an area of freedom, security and justice, the EC Treaty stipulates a number of measures that are to be taken by the Council within five years from the above date. Within these five years, we should *not* speak of *communitarization in the proper sence* of the competences brought under the remit of the EC Treaty. We should rather refer to the procedural rules set out in Article 67 of the EC Treaty as a transitional regime of gradual communitarization[61], which provides for a legal regime slightly different from that of "classic" Community law.

According to this Article, the Council shall in most matters of Title IV – during the above five-year period – act unanimously on proposals from the Commission *or* on the initiative of a Member State; a method more closely related with intergovernmental forms of cooperation than with supranational legislation. After that period, the Commission will acquire sole right / the monopoly of initiative; it will however be obliged to examine any request a Member State makes for a proposal to be submitted to the Council [Art. 67 (2)]. With regard to the decision-making procedure, it is further laid down that the Council, acting unanimously after consulting the European Parliament, may take a decision with a view to making all or part of the areas covered by Title IV subject to the codecision procedure. As regards the procedures and requirements for the issue of visas by the Member States and rules on uniform visas, the Treaty provides for the codecision procedure to apply after the transitional period without the Council having to take a decision. And, there will then be a jurisdiction for the ECJ in Title IV matters, which currently is not the case.[62]

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61 See *K. Hailbronner* (fn.. 7) p. 1053.

62 See *K. Hailbronner* (fn. 7) pp. 1055 ss. for details on the current ECJ-regime applicable to Title IV measures.

This *hybrid* form of legislative competence within the EU-context [63] is described by some commentator as being one of a *continuum*, in which the orthodox distinction between supranationalism and intergovernmentalism has been given up, but Member States still retain key powers and, in fact, impose legislation. [64]

As for the legal instruments applicable to Title IV, so-called *framework decisions* and *common positions*[65] add to the standard Community instruments of the Treaty. Framework decisions are aimed at providing for an approximation of laws and shall be binding in the MS. Although similar, they do not have the same quality as directives, as there is no scope for them having direct effect and there is a unanimity requirement for their adoption (implementation, however, will take place on the basis of majority voting).

Within Title IV, a further special feature is the introduction of the open method of coordination. The idea lying behind this concept is to get away from hierarchical top-down structures and on to more cooperative methods.[66] In its Communication of July 2001 on this issue, the Commission states as the key element of that method the approval by the Council of multi-annual guidelines for the Union accompanied by specific timetables for achieving goals which they set in the short, medium and long term. These guidelines are then to be translated into national policy where specific targets need to be set, which take into account national and regional differences. Such guidelines are initially proposed in the areas of management of migration flows, admission of economic migrants, partnership with third countries and the integration of third country nationals[67]. Instruments and methods proposed include the drawing up of National Action Plans, the development and evaluation of a Community Immigration Policy, involvement of the European Institutions as well as of civil society. Supporting measures by the Commission are deemed to be complementary to these methods.

A final institutional remark concerns the extent of applicability of Title IV in the Member States. There are exceptional regimes in relation to this Title in three countries; the UK and Ireland are not bound by Title IV, unless they decide to opt in to the measure in accordance with the procedure laid down to that effect in the Protocol annexed to the Treaty. And as for Denmark, this Title will not apply to this country by virtue of the Protocol on its position, which is annexed to the Treaties.

In terms of policy, the special European Council meeting in *Tampere* of October 1999 played an important role. There, the political guidelines for the years to come in the AFSJ-field and especially in the field of asylum and immigration were adopted. The Presidency Conclusions to that Council Meeting are quite informative as to broad policy guidelines and to principles that should govern Title IV.

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63 See *K. Hailbronner*, Asylpolitik in der Europäischen Union, 8 ZAR 2002, 259.

64 *N. Walker*, lecture on the Institutional Structure of the Area of Freedom, Security and Justice, 02/07/2002, EUI, Florence.

65 the earlier *joint positions*

66 See COM (2001) 387 final.

These guidelines are put in more concrete terms by a Communication of the Commission on a *Community Immigration Policy* [COM (2000) 757 final][68] which addresses the aforementioned issues and deals with the separate but closely related issues of asylum and immigration, emphasising that the zero immigration approach of the preceding 30 years was no longer appropriate and that channels for legal immigration to the EU were to be made available for labour migrants, thus introducing an authentic change of paradigm in European immigration policy.[69] Describing immigration as a multi-dimensional phenomenon with legal, social, cultural and economic impacts, it calls for the definition of an appropriate policy mix, thus mapping out a broad scope for the debate in the asylum and the immigration field that was soon followed by further proposals.

Finally, the six-monthly scoreboard reports[70] which are prepared by the Commission in order to review progress on the creation of an area of "Freedom, Security and Justice" in the European Union deserve a mention. They provide a very detailed and systematic overview of the measures within the first stage and their status of progress, thus representing a valuable complement to the political process to be initiated, continued or concluded wit reference to Title IV.

Having discussed some of the elements accompanying the legal provisions relating to the creation of an Area of Freedom, Security and Justice, we will now examine the provisions relevant for measures to be adopted in the field of legal and of illegal immigration.

2. The Competence Issue – The Basic Question of Subsidiarity

Before we start our analysis of the substantive provisions of that Title and the measures taken or proposed under it, we need to ask the question to what extent Community action is permissible, necessary and beneficial in that field. This leads us to a fundamental principle of EC-Law, the principle of subsidiarity, which is set out in Article 5 of the EC Treaty.

Subsidiarity is often not explicitly mentioned in political discussions related to Title IV of the Treaty – some might say, because it is not as catchy a concept as it used to be back in 1992, when it was introduced with the Maastricht Treaty. However, its impact has, in fact, not lost any force yet, and, in the light of current discussions on the future of the Union, it becomes evident that a proper legal analysis of EC-Law in any field cannot take place without having regard to this principle.

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67 See fn. 13, pp. 6 s.

68 COM (2000) 757 final; Communication from the Commission to the Council and the European Parliament on a Community immigration policy.

69 For a critical view on the formulation of the new approach presented by the Commission see *K. Hailbronner*, "Migrationspolitik und Rechte der Drittstaatsangehörigen in der Europäischen Union", 3 ZAR 2002, 83.

70 See COM (2002) 261 final, COM (2001) 628 final, COM (2001) 278 final, COM (2000) 782 final and COM (2000) 167 final..

In this general context, *subsidiarity* implies the question whether, and if so, to what extent, competences exist at Community level to create rules dealing with issues such as immigration, be it legal migration or be it illegal immigration.

In general terms, the principle of subsidiarity is to be examined and evaluated in the *context* of the Treaty, where it heralds the group of fundamental principles of Community Law and in that way co-determines their scope and application.[71] The provision of Art. 5 EC-Treaty contains a duty to respect limits in competences, the core-principle of subsidiarity and the duty for the Community not to exceed the necessary extent of legislative activity, thus representing a *threefold limitation* of Community Law.[72] To put it in less abstract terms, before the Community can take action, the *three-level set of questions* that Art. 5 indirectly provides, needs to be answered in an affirmative way; i.e. the "*can*"-question of para 1 referring to the general admissibility of Community action in the field, the "*if*"-question of para 2 that serves to determine the question if Community action in an area where it has no exclusive competence is desirable under the circumstances and the "*how*"-question of para 3 dealing with the question how Community action needs to be designed in order not to go beyond what is necessary to comply with the objectives of the Treaty.[73]

Although these criteria do not appear all too permissive in nature, subsidiarity is indeed a *dynamic concept* that allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.[74]

In legal terms, para I of Art. 5 provides that the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. This implies that a legal act to be decided by the EC not only requires *a* competence, but the *adequate/right* competence basis – a requirement relevant in the context of Council voting as well as with problems related to vertical competence conflicts.[75]

Having said that, there can be no doubt that the *Community has a competence* in the field of *immigration* (visas and asylum) and other policies related to the free movement of persons, as the heading of Title IV of the EC Treaty clearly states. That is to say that the basic requirement of para 1 is fulfilled.[76]

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71 See *C. Calliess*, Art 5 EG-Vertrag in: Calliess/Ruffert, Kommentar zu EG-Vertrag und EU-Vertrag, p. 378 (380) at mn. 5 with further references.

72 See *C. Calliess*, (fn. 71) at mn. 6, with further references.

73 See *C. Calliess*, (fn. 71), p. 380.

74 See Protocol on the application of the principle of subsidiarity and proportionality annexed to the Treaty of Amsterdam, recital 3.

75 C. *Calliess*, (fn. 71), pp. 381-2, mn. 9.

76 See also COM (2001) 387 p. 5, which reads: "[...] the principle of subsidiarity […] is of particular relevance to the creation of an area of freedom, security and justice as is the need for solidarity among and between Member States and the European institutions in facing the transnational challenges presented by migration movements."

As to the *nature* of these *competences*, the Treaty only gives a hint in Art. 63 (we will come back to that provision at a later stage) to that effect by stating that measures adopted by the Council pursuant to immigration policy as well as to illegal immigration and illegal residence shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions that are compatible with the EC Treaty and with international agreements. This clause reflects the concession made to the Member States that were reluctant to give up parts of their sovereignty in immigration and asylum policy and – while not being easy to interpret – makes it quite clear that Community competences under Article 62, the provision setting out the measures to be taken by the Council in order to create an Area of Freedom, Security and Justice (AFSJ) within five years after entry into force of the Treaty of Amsterdam (ToA) cannot be interpreted as an exclusive competence of the Community.[77] Member States may therefore pass new legislation or change existing laws as long as no Community legislation has been passed in this field.

As Community competences are non-exclusive in Title IV, EC action needs to comply with the requirement of Art. 5 para II, which provides that such action is to be taken in accordance with the principle of subsidiarity if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and, by reason of the scale or effects of the proposed action, can be better achieved by the Community.

The following guidelines which are set out in the *Subsidiarity Protocol* annexed to the ToA serve as important reference criteria for determining whether the above conditions are fulfilled, i.e.

— the issue under consideration has *transnational aspects* which cannot be satisfactorily regulated by action by Member States;

— *actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty* (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) *or would otherwise significantly damage Member States' interests*;

— action at Community level would produce *clear benefits* by reason of its *scale or effects* compared with action at the level of the Member States.[78]

The importance of the subsidiarity provision in Art. 5 para II will fully come to bear after the five-year transitional period applicable to most Title IV measures is over and the unanimity requirement which is typical for that transitional period set out in the Treaty is abolished. Then the principle of subsidiarity will serve as a genuine limitation clause for Community

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[77] See *K. Hailbronner*, "European Immigration and Asylum Law under the Amsterdam Treaty", CML Rev. 35 1998, p. 1047 (1051).

[78] See Protocol (fn. 4) , recital 5.

action, with particular relevance especially in the development of European (illegal) immigration policies.[79]

We find references to the principle of subsidiarity (and proportionality) in almost all the current (and preceding) Commission proposals in the field of immigration. This indicates a great awareness by the Commission of the sensitive nature of that field previously lying at the heart of the concept of national sovereignty.

Finally, Article 5 para III of the EC Treaty, the "how"-provision concerning Community action, states that any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty. Here again, we find guidance as to the precise meaning of these terms in the *Subsidiarity Protocol* annexed to the ToA. In its *number 6*, we read that "[t]he form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement [and that] [t]he Community shall legislate only to the extent necessary." This implies that – other things being equal – *directives* would have to be preferred to regulations and *framework directives* to detailed measures. Directives should, while being binding upon each Member State they are addressed to as to the result to be achieved, leave to the national authorities the choice of form and methods.[80]

Number 7 of the Subsidiarity Protocol provides with regard to the *nature and the extent of Community action*, that Community measures should – while securing the aim of the measure and observing the requirements of the Treaty – leave as much scope for national decision as possible and draws attention to the respect of well established national arrangements and the organisation and working of Member States' legal systems. Finally, it states that where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.[81]

Title IV measures related to immigration have been proposed and adopted in more than one specific form. In the field of legal migration, most measures proposed have in fact been proposed as directives.

Having examined the mode of operation of the subsidiarity provision in Art 5 EC-Treaty and concluded that the Community may take action in the AFSJ-field, we will now turn to the provisions of Title IV that represent the bases for several acts of Community law, proposed by the Community or the Member States or already adopted by the latter.

This next step will serve to clarify the specific Community competences/powers in the context of the AFSJ, which serve as a basis for action in the particular field of Title IV. We will therefore take a brief look at what the provisions of the Articles dealing with immigration

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79 Hailbronner CML Rev. 35 1998, p. 1047 (1051).

80 Subsidiarity Protocol, no. 6.

81 Subsidiarity Protocol, no. 7.

within the EU-context set out in particular before we proceed to discuss the measures proposed or already taken.

3. Legal Immigration

The following constitutional provisions have served as a basis for a considerable number of proposals by the Commission in an area that could also be qualified as legal migration. It includes the traditional field of Community freedoms and related issues. Proposals cover – as indicated above – the issues of family reunion, long-term residents, economic migration, formats of residence permits, freedoms of EU-citizens, short-term residence permits. They will be outlined in brief.

a) Art. 2 EUT

A general provision within the framework of the legal provisions relating to the AFSJ-branch of legal immigration is Article 2 of the EU Treaty. That provision sets out in para I the objective for the Union to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the *creation of an area without internal frontiers,* and in para 4 to maintain and develop the Union as an *area of freedom, security and justice*, in which the *free movement of persons is assured* in conjunction with appropriate measures with respect to *external border controls*, asylum, *immigration* and the prevention and combating of crime; those two paras thus being complementray to the EC Treaty provisions of Title IV. And, in the last para, a – rather general – reference to the respect of the timetables, conditions and the principle of subsidiarity is made.

b) Art. 61 ECT

Legal immigration or migration has been an area dealt with in the framework of Community for a long time, however to varying degrees and with different effects on the persons concerned – mostly familiars of an EC or EU national sponsor. While we have seen the main lines of the development in traditional Community law in the previous section which dealt with the Constitutional Gates into the EU, we will now dedicate our attention to the analysis of the legal framework of Title IV. First, the legal provisions that serve as the basis for Community action will be outlined, then we will turn to the measures adopted or proposed on the basis of them.

Art 61 ECT sets out the tasks of the Community in the field of Justice and Home Affairs, transferred from the EU Treaty into Community Law as Title IV of the EC Treaty. The provision contains a programmatic obligation for the Council to adopt:

(a) measures aimed at *ensuring the free movement of persons*, in conjunction with directly related *flanking measures* with respect to *external border controls, asylum* and *immigration*, in accordance with the provisions of *Article 62(2) {in relation to the crossing of the external borders of the Member States} and (3) {freedom to travel for third country nationals for maximum periods of three months}* and *Article 63(1)(a) and (2)(a)*, and measures to *prevent and combat crime* in accordance with the provisions of *Article 31(e) of the Treaty on European Union* within a period of five years after the entry into force of the Treaty of Amsterdam,

(b) other measures in the fields of *asylum, immigration* and *safeguarding the rights of nationals of third countries*, in accordance with the provisions of *Article 63 {measures on asylum, on refugees and displaced persons, on immigration policy and illegal immigration and illegal residence, including repatriation of illegal residents an finally measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in another Member State [...]*.

These two paragraphs are of particular relevance in the area of immigration, as they provide a programmatic starting point. In fact, most measures in the field of legal migration do not make explicit reference to Article 61[82]

c) Art. 62 ECT

Art 62 ECT is more specific than the previous provision of Art. 61. It contains, as to its substance, in (1) provisions relating to the *free movement of persons* within the EU area, in (2) rules aimed at the *harmonization of border controls at external borders* and in (3) a provision relating to measures setting out the conditions under which nationals of third countries shall have the *freedom to travel* within the territory of the Member States during a period of no more than *three months*.

The five-year 'deadline' for these measures to be adopted is of programmatic character.[83]

The measures proposed under this Article relate to the Schengen acquis – in fact, in the field of legal migration, there have not been too many measures proposed or adopted; mostly it will be measures related to visa formats [COM (2001) 577] and other visa related provisions, a neighbouring area of legal immigration.

The proposal for a regulation on uniform format for residence permits[84] [COM (2001) 157] would 'communitarise' the 1997 Joint Action on residence permits, one of the few binding measures on immigration and asylum law adopted in the 'Maastricht period' of cooperation in

[82] See *W. Brechmann*, Art. 61 EG, in C. Calliess/M. Ruffert (Hrsg.), Kommentar zu EG-Vertrag und EU-Vertrag, p. 897, mn. 3.
[83] See *W. Brechmann*, Art. 62 EG, in C. Calliess/M. Ruffert (Hrsg.) p. 903 mn. 2.
[84] COM (2001) 157 final.

Justice and Home Affairs. This measure would be adopted on the basis of Article 62 (2) (b) (iii).

Maintaining in substance most of the provisions, changes can be found on the one hand in updates and in the restructuring of provisions, on the other hand, the fact that firstly, implementing measures would be adopted by the Commission, replacing the Council's implementing powers under the current Joint Action, secondly that the Regulation would not apply to visas or to permits that are issued while an application for asylum or for residence permits is pending, but would cover all other types of residence permits, implying a much wider scope of application for the uniform residence permit than under current rules, and, thirdly, the rules of the EC data protection directive would apply in the field of residence permits.[85]

d) Art. 63 (3) ECT

The provision most referred to in Commission proposals for legislation is Art 63 (3) ECT. This provision sets out obligations in the areas of asylum, refugees and displaced persons and *immigration policy*, this third area now being of central interest. Under the heading of (3) the development of a comprehensive immigration policy at Community level has become possible. Such a policy can be developed in the field of legal migration under the competence heading of (a), i.e. *conditions of entry* and *residence*, and *standards on procedures* for the issue by Member States of long term visas and residence permits, including those for the purpose of *family reunion*. On its basis the following (proposed) measures were based.

aa) *family reunification*

In the field of family reunification, the most recent measure is a Directive from 2 May 2002.[86] The initial proposal dates from 1 December 1999.[87] The European Parliament, while supporting the general approach of that proposal, called for a restriction in its scope. That request was followed by an amended proposal on 10 October 2000[88]; however, the subsequent negotiations in the Council did not bear any fruit. The current proposal follows the Laeken European Council conclusions, incorporating compromises reached in the Council over two years of negotiation.

The new approach taken by this proposal focuses on flexibility as to the substance and the time frame of measures to be taken. While providing for room for manoeuvre for the Member

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85 For details see *Peers* (fn. 13) 113.

86 **COM (2002) 225 final**, OJ 2002 C 203 E/136; Amended proposal for a Council directive on the right to family reunification/* COM/2002/0225 final - CNS 1999/0258 */ Official Journal C 203 E , 27/08/2002 P. 0136 - 0141

87 **COM (1999) 638** final; Proposal for a Council Directive on the right to family reunification / * COM/99/0638 final - CNS 99/0258 */

88 **COM (2000) 624 final**, OJ 2001 C 62 E/99; Amended proposal for a Council Directive on the right to family reunification (presented by the Commission pursuant to Article 250(2) of the EC Treaty)/* COM/2000/0624 final - CNS 99/0258 */; Official Journal C 062 E , 27/02/2001 P. 0099 - 0111

States in areas where deadlock situations are likely to arise, exceptions to allow adjustment to the current legislation of certain Member States in limited cases is allowed for. A stand-still clause on some derogations has been inserted to inhibit new divergences between Member States from arising. The deadline clause provides for a review of the provisions of the transposal of the Directive into national legislation with an eye on the rapid adoption of genuine 'common rules' in the field.

The main changes necessitated by the new approach comprise: deletion of provisions relating to family reunification of Union citizens – there, a new proposal has been made to deal specifically with this group of people; specific exceptions for certain for certain pieces of national legislation concerning the age up to which children may be reunified; possibility of checks on resources even after reunification; possibility for Member States to spread authorisations to enter to purposes of family reunification depending on the reception capacity of the Member States concerned to a maximum of period of three years; introduction of long-term resident status for reunification candidates on the basis of the same criteria as the person with whom they are reunified; setting of an upper limit of five years' residence for the grant of autonomous status of family members.[89]

In recital (8), family reunification is characterised as a necessary way of making family life possible, by helping to create socio-cultural stabiliy facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion as set out in Articles 2 an 3 (1) (k) of the Treaty.

Recital (15) on its part contains a detailed reference to the principle of subsidiarity, stating why Community action is permissible and necessary[90] to achieve the objective of "establishment of a right to family reunification for third-country nationals to be exercised in accordance with common rules" on the one hand, while mentioning that the Directive would need to be confined to the minimum required to achieve the objectives set out and does not go beyond what is necessary for that purpose.

bb) long-term residents

Based on Art. 63 para 3 an 4 ECT a proposal for a Directive has also been made by the Commission with respect to the status of third-country nationals who are long-term residents.[91] This legislation will provide, for the first time, a *common status* for long-term resident third country nationals. This status would in substance entitle long-term residents to

89 See (fn. 19) pp. 3 s.

90 " [...] [T]he objectives of the proposed action, namely the establishment of a right to family reunification for third-country nationals to be exercised in accordance with common rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved by the Community. This Directive confines itself to the minimum required to achieve those objectives and does not go beyond what is necessary for that purpose."

91 **COM (2001) 127 final**, OJ 2001 C 240 E/79; Proposal for a Council Directive concerning the status of third- country nationals who are long-term residents/* COM/2001/0127 final - CNS 2001/0074 */ Official Journal C 240 E , 28/08/2001 P. 0079 - 0087

equal treatment with nationals in a number or areas – such as the right to reside, receive education and work as an employee or self-employed person, as well as the principle of *non-discrimination* vis-à-vis citizens of the State of residence – and to enhanced, though not absolute, protection against expulsion (Arts. 12 and 13).

cc) economic migration

As well based on Art. 63 para 3 ECT is the proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities [COM (2001) 386][92], which relates to the ambit of economic migration.

The procedure for adoption of this proposal is laid down in Article 67 of the Treaty. Again, exceptions as to the applicability of these measures in the United Kingdom, Ireland and Denmark are provided for.

The primary objective of this initiative is to determine a harmonised legal frame at EU level concerning the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities and of the procedures for the issue by Member States of pertinent permits.

Eventually, this proposal is to create a single national application procedure leading to one combined title, encompassing both residence and work permit within one administrative act, and will thus contribute to simplifying and harmonising the diverging rules currently applicable in Member States.

4. Illegal Immigration

a) The Basic Decisions

Illegal immigration is the area complementary to 'legal migration' that the Community is to deal with in line with the relevant provisions of the Amsterdam Treaty and the Tampere Conclusions. While progress in the field of legal migration and of asylum law was faster to arrive, measures in this area have come to be proposed slightly later. The measures taken in this field include a Directive on the Mutual Recognition of Expulsion Decisions one Directive relating to the Implementation of the Schengen Convention as well as one Communication on Illegal Immigration and one Green Paper on a Common Return Policy. In this part we will mainly deal with *illegal immigration* but also point at the developments in *related areas* such as policy on borders, visas, implementation of Article 62 EC and conversion of the Schengen acquis.

[92] **COM (2001) 386 final**, OJ 2001 C 332 E/248; Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities/* COM/2001/ 0386 final - CNS 2001/0154 */ Official Journal C 332 E , 27/11/2001 P. 0248 - 0256

The legal provisions setting out the framework for measures to be taken in the field of illegal immigration consist to some extent of the same Treaty Articles we have discussed above, but do also contain the remaining third-pillar Articles of Title VI of the EU Treaty.

While measures proposed in the area of legal immigration can be regarded as enabling provisions for migration, the proposals under this heading do have a potential to restrict immigration, thus contributing to the creation of a 'Fortress Europe'.

In its Communication on a Common Policy on Illegal Immigration from November 2001[93], [COM (2001) 672 final], the Commission has identified six areas for possible action with the aim of preventing and fighting illegal immigration. These areas cover visa policy; infrastructure for information exchange, co-operation and co-ordination, border management, police cooperation, aliens law and criminal law as well as return and readmission policy.

The Commission is striving for synergies of national efforts by adding a European dimension to the issue. It proposes actions in and support of actions of countries of origin and transit, taking into account the EU policy on human rights.

Furthermore, the Commission stresses the importance of enforcement of existing common rules, while emphasizing the need for the EU to strengthen its monitoring efforts as to the common standards for visa issuance and border controls.

In the field of administrative co-operation, the development of a network of liaison officers and the promotion of joint teams for border controls are put forward. The information needed in that field could better be gathered, analysed and disseminated in cooperation with a permanent technical support facility that would need to be established to co-ordinate efforts and to manage common databases for migration management.

The Early Warning System on irregular migration flows would serve as a model for the efficient use/utilisation of all modern technologies available, while a European Migration Observatory could play a facilitative role in the exchange of statistical as well as analytical data on migration and would therefore be an interesting option.

Another crucial aspect in the field of that policy are sanctions against promoters of illegal immigration; while a further upgrade and harmonization of sanctions already in place is put forward, particular emphasis is put on the severe punishment of criminal activities and the seizure of illegally obtained financial advantages, the latter being identified as a key factor in the field.

Undeclared work of illegal residents is also addressed in the Communication, being characterized as an area where further action is needed in order to diminish the attractiveness for employers and the pull factor for potential irregular immigrants.

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93 **COM (2001) 672 final**; Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration/* COM/2001/0672 final */

The strengthening of police co-operation, leading up to an advanced role for Europol is identified as a necessary measure as well.

Finally, the development of a Community readmission policy is recommended to be pursued as is the finalisation in due course of the current negotiations with third countries.

b) Art. 61 ECT

In Art 61 (a) ECT, the catalogue of measures to be taken not only refers to legal migration movements, but also to illegal movements and the methods that EU the can deal with them. We have already seen that (a) also contains a reference to third pillar competences – the reference in that respect being therefore of declaratory nature.[94]

As to illegal immigration, it will be especially the *flanking measures* with respect to *external border controls*, *asylum* and *immigration*, in accordance with the provisions of *Article 62(2) {in relation to the crossing of the external borders of the Member States} and (3) {freedom to travel for third country nationals for maximum periods of three months}* and *Article 63(1)(a) and (2)(a)*, and measures to *prevent and combat crime* in accordance with the provisions of *Article 31(e) of the Treaty on European Union* within a period of five years after the entry into force of the Treaty of Amsterdam, that are of relevance – the design of the provision already indicates the link between free movement and security-related measures to safeguard the exercise of this right by preventing illegal activities in the field.[95]

The integration of the Schengen acquis into EU framework, provided for in the Schengen Protocol annexed to the Treaty of Amsterdam, is an essential but technically quite complex issue in that context – the instruments adopted under Title VI EU Treaty will remain unchanged in their legal nature until their content is replaced by new measures under Title IV.[96]

c) Art. 63 ECT

The norm of Art 63 III ECT is not only central with regard to legal but also to illegal immigration. In its paragraph (3) (b) it sets out a competence in the field of immigration policy for the areas of *illegal immigration and illegal residence, including repatriation of illegal residents*.

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[94] See *W. Brechmann*, Art. 61 EG, in C. Calliess/M. Ruffert (Hrsg.), Kommentar zu EG-Vertrag und EU-Vertrag, p.897, mn. 3.

[95] See *W. Brechmann*, Art. 61 EG, in C. Calliess/M. Ruffert (Hrsg.), Kommentar zu EG-Vertrag und EU-Vertrag, p. 901, mn. 12.

[96] For details see *K. Hailbronner* CML Rev. 35 1998, pp. 1059 ss.

The above mentioned Communication by the Commission on a common policy on illegal immigration [COM (2001) 672] was a first step in that field. Step by step this Communication is put in more concrete terms by the following measures.

aa) Green Paper on a Community Return Policy on Illegal Residents

The Commission Green on a Community Return Policy on Illegal Residents from 10th April 2002[97] approaches the issue of illegal integration in three sections, the first of which identifies *return* as an integral part of a comprehensive Community immigration and asylum policy, the second suggesting *approximation and improved co-operation on return* among Member States and the third one indicating the elements of a possible Common *readmission policy*.

The Green Paper builds on the elements defined in the Council's action plan following Conclusion No. 40 of the Laeken European Council calling for the integration of the policy on migratory flows into the European Union's foreign policy. As is stated in its foreword, it "[...] only intends to open a discussion on the return of illegal residents and should not be seen as an effort to cover all dimensions connected with the return of third-country nationals" and is as to its basic intention, in line with other Green Papers that in general strive to commence a broad debate on an issue in order to create a specific problem-awareness.

Some important issues being dealt with include the question of compatibility of a common return policy with the need for protection under international and European Law in the evolving European asylum system, the necessity for common standards for return procedures and the question whether they should be binding, the improvement of the Member States' services and the usefulness of a future financial instrument as well as the determination of the elements of a common readmission policy, that should encompass a balanced co-operation with the third countries concerned.[98] As to its *specific purpose*, the Green Paper describes the intention pursued as examining the complex return issues for people residing illegally in the EU and putting forward suggestions for a co-ordinated and efficient policy based on common principles and standards, and respectful of human rights and human dignity, the premise being that a return policy is needed in order to safeguard the integrity of the legal and humanitarian admission systems.[99]

In legal terms, reference is made to Article 63 (3) b EC Treaty and the Council competence emanating from this provision to adopt measures on illegal immigration and illegal residence including repatriation of illegal residents on the one hand and on the other hand to the Schengen *acquis* integrated into the European Union by the ToA, in particular Article 23 of the Convention implementing the Schengen Agreement.

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97 **COM (2002) 175 final** - Green paper on a community return policy on illegal residents/* COM/2002/0175 final */

98 COM (2002) 175 final, pp. 3 s.

99 COM (2002) 175 final, p. 6.

bb) Mutual Recognition of Expulsion Decisions

In the area of mutual recognition of expulsion decisions relating to third-country nationals, the proposal stage has been overcome and legislation been passed. Directive 2001/40[100] deals with the issues. It is based on Article 63 (3) of the EC Treaty and goes back to a French presidency proposal from mid-2000. Far from being uncontroversial, the final proposal was adopted after quite some changes were introduced following criticisms of the EP, which still rejected that final version despite the changes made.[101]

cc) Carrier Sanctions

Following the second French proposal in the field of irregular immigration, the Directive supplementing the provision of Article 26 of the Convention implementing the Schengen Agreement[102] (Directive 2001/51), was adopted by the Transport and Telecoms Council of 27/28 June 2001 and is due for implementation by 11 February 2003. The legal basis for this measure is Article 61 (a) and Article 63 (3) (b) of the EC Treaty. A reference to the aim of the Directive – curbing migratory flows and combating illegal immigration – is found in recital 2, the Schengen acquis on which this measure is based and in full conformity with is mentioned in recital 6.

dd) Short-Term Residence Permit

A proposal for a Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities[103] [COM (2002) 71] was presented by the Commission in early 2002.

The legal basis chosen for this proposal is Article 63(3) ECT, as for procedural requirements for adoption, it is again the procedure set out in Article 67 of the Treaty which is central.

The purpose of the proposed Directive is to introduce a residence permit with the aim of enhancing measures to combat illegal immigration. The text is not intended to incriminate networks of organised crime or to arrange protection for victims or witnesses. The proposal

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100 **Council Directive 2001/40/EC,** OJ 2001 L 149/34; Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals; Official Journal L 149 , 02/06/2001 P. 0034 - 0036

101 See *Peers* , EJML (2001),p. 117.

102 **Council Directive 2001/51/EC**, OJ 2001 L 187/45; Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, Official Journal L 187 , 10/07/2001 P. 0045 - 0046

103 **COM (2002) 71 final**, OJ 2002 C 126 E/393; Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities/* COM/2002/0071 final - CNS 2002/0043 */ Official Journal C 126 E , 28/05/2002 P. 0393 - 0397

does not regulate these aspects, even though they are to some extent related to the subject matter of the text.[104]

d) Third-Pillar-Measures based on Art. 29, 30, 31 EUT

With regard to illegal immigration, we also need to consider the provisions in *Title VI* of the *EU Treaty* on police and judicial cooperation in criminal matters.

In that context, we find a competence for the Union in Article 29 of the EU Treaty to develop *common actions* among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia with the aim of providing citizens with a high level of safety within an area of freedom, security and justice – without prejudice to the powers of the European Community. The Union's objective in the context of illegal immigration consists in particular in preventing and combating *trafficking in persons*. In order to achieve that, closer cooperation between police forces, customs authorities and other competent authorities is provided in (sub)para 1. This provision is of a general nature, the following ones, specify what police cooperation (Art. 30) and judicial cooperation (Art. 31) should include.

Article 30 lists a number of ways in which *police cooperation* can take place, mentioning in (a) operational cooperation in relation to the prevention, detection and investigation of criminal offences, in (b) the collection, storage, processing, analysis and exchange of relevant information (subject to the relevant provisions data protection), in (c) joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research and finally in (d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.

In fact the Communication by the Commission on integrated management of external borders [COM (2002) 233] encourages measures of this type to be taken.[105] It gives an assessment of the current political and institutional environment and draws attention on the challenges to be faced by the Union in order to be able to fulfil the objectives of enforcing co-operation and developing an integrated strategy for the management of EU-external borders.

The current legal framework for the management of external borders is set out at the beginning of the Communication. It comprises the *common uniform principles* which are established by the *Chapter 2 of Title II of the Schengen Convention*, the *Common Manual for External Borders*[106] which lays down and spells out the detailed rules of that Convention; the

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104 See COM (2002) 71 final, pp. 7 s..

105 **COM (2002) 233 final**; Communication from the Commission to the Council and the European Parliament - towards integrated management of the external borders of the member states of the European Union/* COM/2002/0233 final */

106 The Decision of the Schengen Executive Committee of 28 April 1999 adopting the Manual is in OJ L 239, 22.9.2000 (p. 317). It was given a European Union legal basis in accordance with Council Decision 1999/436/EC of 20 May 1999.

new legal basis for these provision being Title IV of the EC Treaty.[107] Article 3 of the Convention contains rules as to the crossing of the external borders, Article 5 lays down principles of Community legislation concerning foreign nationals' entry for periods not exceeding three months, Article 6 determines the obligations of the Member States as regards checks and surveillance at external borders, those referring to checks of persons crossing the border legally (they bring along relatively extensive obligations for Member States[108]); rules directly (inseparably) linked to the provisions on the procedures at external borders relate to carriers liability (Article 26) and the liability for assistance to unlawful immigration for lucrative purposes (Article 27 of the Schengen Convention) – these two provisions are complemented by legislation subsequently enacted to prevent illegal immigration[109]. Article 71.3 refers to the strengthening of checks on the movement of persons, goods and means of transport, "to combat the illegal import of narcotic drugs and psychotropic substances" and horizontal provisions such as the Schengen Information System (SIS)[110] which are also implemented at external borders. Access to all "*data entered* [in the SIS] *and the right to search such data directly*" for the "*authorities responsible for (...) border checks"* is regulated in Article 101(1)(a) of the Schengen Convention. The evaluation mechanism for the proper implementation of the common rules for crossing of external borders which is carried out by the Standing Committee on the Evaluation and Implementation of Schengen, now have a twofold basis – one in Article 66 of the EC Treaty, the other in Articles 30 and 31 of the Union Treaty.

While in the operational context, measures such as the *exchange of liaison officers* (provided for in Article 7 of the Schengen Convention[111]) [for purposes of assistance and permanent co-operation between Member States] and *bilateral police co-operation agreements* between Member States on the basis of Article 47 of the Schengen Convention[112] are already in place, the Commission identifies a number of new priority projects in the field, classifying them into short term and medium term actions and indicating whether or not a Treaty amendment would be necessary for that purpose.

The central proposals include[113]:

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107 See Council Decision 1999/436/EC of 20 May 1999, OJ L 176, 10 July 1999.

108 Systematic checking of identities is compulsory, including in the case of EU citizens and beneficiaries of Community Law. Surveillance is exercised in the spaces located between the permitted passage points in order to dissuade persons from crossing the external border illegally. Member States have the obligation to ensure that the level of surveillance is equivalent all along their external borders.

109 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 187, 10.7.2001, pp. 45-46).

110 See Articles 92 to 101 of the Schengen Convention.

111 Article 7 of the Schengen Convention was given a legal basis in Article 66 of the EC Treaty "to the extent that these provisions do not concern forms of police cooperation covered by the provisions of Title III of the Schengen Convention", by Council Decision 1999/436/EC of 20 May 1999 (OJ L 176, 10.7.1999).

112 The legal basis for this provision has come to be contained in Articles 34 and 30 (1) of the Treaty on European Union, in accordance with Council Decision 1999/436/EC of 20 May 1999. Article 47 of the Schengen Convention appears under "Police Cooperation", while Article 7 is under "Crossing external borders".

113 COM (2002) 233 final, pp. 22 ss.

- a common corpus of *legislation*, which would imply a recast of the Common Manual on Checks at the External Borders, the attribution of mandatory status to certain recommendations of the EU Schengen Catalogue of best practices, the production of a practical handbook for the use of border guards, the specification of the legal framework and practical procedures regarding "local border traffic" all of the former being envisaged as short-term measures, and, in the medium term (if necessary, following amendment of the Treaties, the specification of the institutional and legal framework of the staff of a future European Corps of Border Guards[114];

- a common *operational co-ordination and co-operation mechanism*, establishing an External borders practitioners common unit with a steering role in carrying out integrated risk analysis and projects on the ground, encouraging convergence as to staff and equipment, exercising an inspection function and putting forward emergency operational measures in short term an in the medium term (without Treaty amendment) the exploration of the feasibility and relevance of a security procedure at external borders, consisting of establishing exchanges and processing of information and intelligence between the competent border authorities, possibly setting up contact points;[115]

- a common *integrated risk analysis*, including the establishment for these purposes of a common risk analysis matrix by the an External borders practitioners common in the short term and the drawing up by that unit of conclusions for the deployment of personnel and equipment at external borders;[116]

- as to the development of *inter-operational personal and equipment*, a common basis for the training of border guards in the European Union should be developed, their use of mobile surveillance equipment could be encouraged – both in the short term, while a common radar or satellite-based external border surveillance network (drawing from the capacities of the Galileo system) could be established and a European border guards college on the basis of the national training institute networks could be considered in the medium term and without Treaty amendment;[117]

- with regard to *burden sharing* between the Member States and the Union, the organisation of the bases for Community financing of the policy on management of the external borders covered by Title IV of the Treaty (in the short term) and (most likely after amendment of the Treaties) the establishment of a European Corps of Border Guards the principal function of which would be the "common surveillance" of the most sensitive places (in particular maritime borders) and, also in the medium term, the establishment of a complementarity of action with the customs administrations to enhance efficiency in the community financing of the management of the external borders as far as possible according to the Treaties.

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114 COM (2002) 233 final, pp. 22 s.
115 COM (2002) 233 final, p. 23.
116 COM (2002) 233 final, p. 23.
117 COM (2002) 233 final, pp. 23 s.

The provision of Article 31 EU Treaty sets out the details of common action on *judicial and criminal matters*, referring to (a) the facilitating and accelerating of cooperation in relation to proceedings and the enforcement of decisions; (b) the facilitating of extradition; (c) the compatibility in rules necessary for cooperation; (d) the prevention of conflicts of jurisdiction between Member States and (e) the progressive adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

Especially the provisions of (e) are important in the field of illegal immigration, as the phenomena dealt with there are often 'bundled with' different forms of illegal immigration.

Within this legal framework we have just referred to, there are proposals for measures and measures already taken that deserve a mention. In particular we have a Communication on a common policy on illegal immigration, a Green Paper on a Community return policy for illegal residents, a Directive on the mutual recognition of expulsion decisions, a directive on carrier sanctions (supplementing Art. 26 of the Schengen Convention); furthermore, a proposal for a Directive on the short-term residence permit for victims of action to facilitate illegal immigration or trafficking in human beings, and a Communication on the integrated management of the external borders of the Member States – to name only the central initiatives in that field.

5. Accompanying Measures in the Field of Foreign- and Development Policy

Accompanying measures in the field of Foreign- and Development Policy have come to be regarded as a crucial complement to the measures proposed in the field of EU (im)migration policy. While not dealing with immigration in the strict sense, their importance for an effective immigration policy at the European level has been stressed on more than one occasion. In fact, the Treaties contain quite a number of provisions enabling the Union to take action in the field; action that has already been proposed by the Seville Council especially with regard to future agreements with third-countries. These provisions will be outlined in brief and then we will focus on the Council proposals.

a) Introduction

The Seville Council of last June dedicated considerable efforts to the field of asylum and migration in the European context, which is reflected in the fact that 14 out of 59 paragraphs of Seville Presidency Conclusions deal with aspects related to the Asylum and Immigration.[118] While reference is made to the timetable of measures, *general principles* of

[118] See Presidency Conclusions SN 200/02 11 **EN** *Presidency Conclusions – Seville, 21 and 22 June 2002, points 26 to 39.*

EU migration policy, of combating illegal immigration and of the necessity of a gradual introduction of coordinated, integrated management of external borders[119], a central issue of these Conclusions lies with the intention of the European Council to *integrate immigration policy into the Union's relations with third countries*[120].

A *targeted approach* to the problem of illegal immigration with the use of all appropriate instruments in the context of the European Union's external relations – i.e. the aforementioned instruments of the EC and the EU Treaties – is proposed as a constant long-term objective for the EU in point 33 of the Conclusions in order to tackle the root causes of illegal immigration. It is closer economic cooperation, trade expansion, development assistance and conflict prevention that are identified as effective means of promoting economic prosperity in the countries concerned, thus reducing the underlying causes of migration flows. In particular, the European Council urges for a *clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration* to be included in any future cooperation, association or equivalent agreement concluded by the EC or the EU with any other country[121]. That way, the EU is introducing a new "*stick and carrot – method*" in relation to third countries. While the Union stresses the importance of ensuring the *cooperation* of countries of origin and transit in joint management, in border control and on readmission and declares its readiness to provide technical and financial assistance to the countries concerned[122] (carrot) it also intends to draw up a (kind of) "*black list*" that is to contain (following systematic assessment) all those countries not cooperating in combating illegal immigration, inadequate cooperation by a country being a reason for the Union not to establish any closer relations with it[123] (stick). If such an insufficiency of cooperation persists with that one Member States despite the application of existing Community mechanisms, the Council may unanimously find that that (third) country has demonstrated an unjustified lack cooperation in joint management of migration flows and, in accordance with the relevant Treaty provisons, adopt measures or positions under the CFSP provisions of Title V EU Treaty or under other European policies, while honouring the Union's contractual commitments and not jeopardising development cooperation objectives.[124]

Beside the economic aspects of the issue, which clearly aim at streamlining the Union's asylum and immigration system, there can also be found a reference to fundamental rights in the Seville Presidency Conclusions. Point 29 sets out the principles for action by the Union in the field, declaring that the legitimate aspiration to a better life needs to be reconcilable with the reception capacity of the Union and its Member States and that immigration must pass through the legal channels provided for it; "the integration of immigrants lawfully present in

119 See points 26 to 32.
120 Points 33 to 36.
121 Point 33 of the Seville Presidency Conclusions.
122 Point 34.
123 Point 35.
124 Point 36.

the Union entails both rights and obligations in relation to the fundamental rights recognised within the Union; combating racism and xenophobia is of essential importance here"[125]; and further, that in accordance with the 1951 Geneva Convention, it is important to afford refugees swift, effective protection, while making arrangements to prevent abuse of the system and ensuring that those whose asylum applications have been rejected are returned to their countries of origin more quickly.

b) Legal framework

Title XX of the EC Treaty deals specifically with Development Cooperation and contains a number of provisions to that effect.

Article 177 ECT heralds these provisions and sets out the general *objectives* of Community policy in the field of development cooperation. The objective of fostering economic and social development of the developing countries contained in para 1, I is a well suited basis for the accompanying measures referred to above in the field of immigration.

Article 178 sets out an obligation for the Community to take account of the objectives referred to in the preceding provision when implementing policies that are likely to affect developing countries. This provision establishes a *link* between Development Cooperation and Title IV measures, especially those related to immigration; as immigration policies are very likely to (also) affect developing countries, the Community will need to take account of the objectives set out in Art. 177 ECT.

Article 179 contains an obligation for the Council (while acting in accordance with Art. 251 – the co-decision procedure) to take measures that are necessary to further the objectives referred to in Art. 177 – provided that these measures as to their central purpose essentially serve the objectives of Art. 177[126].

Article 180 in its first paragraph sets out an obligation for the Community and the Member States to coordinate their policies on development cooperation and to consult each other on their aid programmes, including in international organisations and during international conferences, providing for the possibility of undertaking joint action. In the second paragraph it provides a right for the Commission to take any useful initiative the coordination referred to in paragraph 1.

Finally, *Article 181* contains a provision entailing an obligation for the Community and the Member States to cooperate – within their respective spheres of competence – with third countries and with the competent international organisations; there, the arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article

125 Point 29.

126 See ECJ Case C-268/94 (Portugal/Council), ECR [1996] I-6177, no. 39

300, while Member States will still remain competent to negotiate in international bodies and to conclude international agreements. Art. 181, therefore constitutes an important basis for the *modes of elaboration of* any *agreement* concluded between the Community and third countries with a view to complementing the measures in the field of immigration.

The legal basis for the conclusion by the Community of so-called *association agreements*, i.e. agreements that involve reciprocal rights and obligations as well as common action and special procedure, is set out in *Article 310* of the EC Treaty. Therefore, this competence norm will be central for the Community when concluding agreements of association or cooperation with clauses on the joint management of migration flows, as envisaged in the Seville Presidency Conclusions[127], to which reference will be made below again.

All the above provisions refer to external action by the Community and are of central importance when the deployment of a comprehensive strategy in the field of immigration and asylum in cooperation with third countries, and, in particular developing countries, is at issue. They might be regarded as *external* complements to (or: complementary external components of) EU immigration policy.

The provisions on a Common Foreign and Security Policy contained in Title V of the EU Treaty, on the other hand, could then be referred to as *internal* complements to (the complementary internal components of) that policy, insofar as they refer to the security of the Union, security being regarded as a key-condition for the Community freedoms to be operable and for migration to be governed by a stable framework.

Article 11 of the EUT contains the *objectives* of the CFSP to be defined an implemented by the Union – here, we are in the field of public international law. The elements in paragraph 1 – safeguarding the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter (para I); strengthening the security of the Union (para II), of promoting international cooperation (para III) and of developing and consolidating democracy and the rule of law and respect for human rights and fundamental freedoms (para IV) – are relevant to any measure taken under the Third Pillar (public international law) with a view to enhancing security within the territory of the Union; that might well include measures against illegal immigration, trafficking in human beings.

The *methods and instruments* by means of which these objectives should be pursued are set out in *Article 12* EU Treaty which mentions the definition of principles and general guidelines for the CFSP; the decision on common strategies; the adoption of joint actions, the adoption of common positions and the strengthening of systematic cooperation between Member States in the conduct of policy.

[127] Conclusions of the Spanish Presidency, Seville, 21 and 22 June 2002, p.10 no. 33.

V. European Immigration Policy based on the Model of Freedom of Goods

From the above became quite clear, that at the moment the EU cannot described as a real fortress. This is first because there are a lot of open gates for *legal* immigration into the EU, which can be passed by the "community link", on the basis of special agreements with third countries or for reasons of humanity (asylum, refugees). And second there seem to be a lot of loopholes in the walls of the fortress with regard to *illegal* immigration. The EU is insofar not able to close the loopholes and to safeguard the fortress efficiently.

With regard to the future it seems therefore necessary, that Europe becomes a kind of "Open Fortress": In order to fight illegal immigration, Europe has to become a fortress, well guarded and without loopholes. This is the precondition for open gates concerning legal immigration. Establishing this kind of controlled legal immigration is for several reasons of importance for the EU: While Europe's population is growing older and many EU Member States are experiencing a continued shortage of labour in a number of sectors and at different skill levels, an increasing number of people have in recent years wanted to migrate to Europe either on a temporary or on a permanent basis. Insofar the EU has interests of its own. Moreover the EU has a certain ethical responsibility – flowing from its values (Art. 6 (1) EUT) – to open a gate for asylum-seekers, refugees, displaced persons and those in search of temporary protection as well as family members coming to join migrants already settled in the EU.

To a certain extent the mentioned aspects of a future immigration policy correspond the in the beginning outlined model of the freedom of goods: The strong walls of the fortress, which serve the aim of preventing illegal immigration, are similar to the quite efficient system of the customs-union as designed in Art. 23 (1) and 27 ECT. By Art. 23 (2) and 24 ECT is ensured that once a foreign product has legally (customs are paid; all due import duties are fulfilled) passed the common external boarder and entered the Internal Market of the Community it is treated exactly the same way as if it has been produced within the EC. By virtue of Art. 23 (2) ECT any third-country-product is consequently treated as an EU-product, that profits without any difference from the free circulation in the Internal Market. Since the Internal Market according to Art. 14 (2) ECT is based on the Four Freedoms, the non-discriminatory-principle (Art. 28 ECT) is applicable on the third-country product. Exactly this model might be a guideline for the framing of a transparent Immigration Policy: If a person has legally passed the gate into the EU, he or she participates in the Internal Market. With regard to Art. 14 (2) ECT and the freedom of persons, he or she has not only the right of free circulation in the EU, but also the right to be treated like an EU-citizen, the non-discriminatory-principle as laid down in Art. 39, 43 and 49 ECT becomes applicable. The third-country-national takes part in the Internal Market like an EU-citizen, he has all economic rights guaranteed by the Four Freedoms, including the connected family rights and social rights. Already now – as the

mentioned ECJ-decisions with regard to European-Agreements and Association-Agreements have shown - the non-discrimination-principle applies under certain conditions on third-country-nationals. This means at the same time that the third-country-national cannot enjoy the rights of EU-citizenship as laid down in Art. 17-21 ECT. This means moreover, since the Art. 23 (2) ECT-Model applies only for the entry into the Internal Market, that a third-country-national who is unemployed (and therefore cannot rely on the Four Freedoms) has – after a certain time-period of job-seeking – the obligation to leave the EU, except he has an asylum or refugee status.

It is quite interesting that the above mentioned aspects and (planed) measures in the context of EU-Immigration-Policy correspond to a large extent already the outlined model. This counts for the rules on family reunification as well as for some social rights. Actors at the EU-level now seem to be determined to treat immigration and asylum matters as priority issues, dedicating a great deal of efforts to develop a new consistent and effective policy in the field, paying due respect to the multi-dimensional nature of the field with its legal, social, cultural and economic impacts. Clear principles in economic and in human rights respects seem to be present in most measures proposed or already adopted. There is a good chance that at the end of the 5 year transitional period after the entry into force of the Treaty of Amsterdam, the full programme of measures will have been achieved and Title IV will have become – to the extent possible – fully communitarised.

Of course it is necessary to put the model in more concrete terms. For example it is to be decided under which conditions a third-country-national is allowed to pass the gate into the EU. This is not as easy as it is with Art. 23 (2), 24 ECT. With regard to the national labour markets there might be immigration-quotas as well as restrictions with regard to the free circulation in the Internal Market; with regard to asylum- and refugee-status there have to be developed common guidelines and criteria. For example there may be time limits with regard to the free circulation in the Internal Market, especially at the moment the third-country-national is unemployed. Next question to be answered is, who should decide on the conditions for entry, the EU or Member States? As we have seen from the above outlined aspects, European Immigration Policy is a complex subject and a big challenge for the EU and its Member States. But in order to establish a transparent and coherent system for the developing Immigration Policy all arising questions should be answered on the basis of the model, that refers after the entry into the EU (based on Art. 23 (2) ECT) consequently to the well established principles of the freedom of persons. In this context these principles are not necessarily direct applicable to third-country-nationals, they could also be a guideline for the community legislator in his efforts to establish a transparent and coherent system for European Immigration Policy.