

The open method of co-ordination in immigration policy: a tool for prying open Fortress Europe?

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ABSTRACT The European Union's immigration policy develops cautiously. Nation-states view immigration control policy as critical to maintaining sovereignty and are slow to relinquish their policy monopoly. This paper analyses the Commission's 2001 communication on an open method of co-ordination in immigration policy, which proposes the creation of a European immigration regime of co-ordination, lacking the imposition of binding external conditions or quotas. Upon tracing the development of EU immigration policy and discussing the OMC and its soft law character, the 'Communication' is reviewed. A survey of its main tenets shows that while security thinking remains prominent, there is equal emphasis upon liberalization and co-ordination. 'Fortress Europe' is far from inevitable. However, though the OMC appears to be an appropriate mechanism for effecting co-ordination leading to a common regime, the member states have not embraced the format to avoid the further introduction of new ideas and actors into the process.

KEY WORDS EU governance; EU immigration policy; open method of co-ordination.

I. INTRODUCTION

The Europeanization of immigration policy is not as advanced as many outsiders might assume. North Americans or Japanese arriving in a European Union (EU) member state could be deceived by their ability to travel within the EU for up to three months on a single visa. While EU citizens enjoy the freedom to live and work where they choose within the EU, the immigration perspectives for third-country nationals remain the province of national policy-making. The development of EU immigration policy has been notoriously incremental and cautious (Klos 1998: 75; Huysmans 1995). In a bid to stimulate more dynamic change, the Commission has proposed introducing the open method of co-ordination (OMC) in the realm of immigration policy to encourage countries to advance their levels of national policy experimentation and co-ordination through a non-binding yet common governance mechanism. However, this offer to integrate the states in a less threatening framework shows little sign of being accepted by the states.

This proposed application of the OMC evidences a calculating Commission aware of the parameters that states will insist upon in drafting immigration policy. The Commission has shown sensitivity toward the member states' sovereignty concerns and eschewed attempting to assume direct legislative authority for fear of their veto powers. Recognizing that states are interested in the economic benefits that could accrue as a result of co-ordination, the Commission's proposal highlights these aspects. The broad, non-binding guidelines of the OMC offer the Commission the opportunity to steer the debate over immigration policy, yet the actual pressure to legislate remains within the community of member states, rather than being imposed from above.

Section II begins with an examination of international immigration, explaining why economic thinking remains central for the nation-state and considering whether this task is best accomplished at the domestic level. Section III surveys current EU immigration policy and questions whether security thinking predominates. Section IV presents the OMC as manifested in other policy realms, with an eye toward uncovering which aspects may be valuable in advancing immigration policy. With these conceptual tools in hand, Sections V and VI survey the terms of the proposed policy and argue that while this is a less formalized version of the OMC, it introduces initiatives extending beyond security-thinking that speak to common economic challenges. The article concludes by arguing that there seems to be a miscalculation as to the degree of anxiety that member states feel toward unilateral Commission legislation in this field. Unless these conditions change, the stalemate is unlikely to be resolved, meaning that the OMC in immigration will have difficulty advancing beyond the proposal stage.

II. IMMIGRATION AND NATION-STATE RESPONSES

National policy at the forefront

Immigration policy-making since the Second World War reflects an international economic catalyst as well as a domestic political economic rationale. The globalization of markets which has intensified in the last twenty years has triggered higher levels of labor migration since the 1960s (Sassen 1988; Zolberg 1989; Avcı and McDonald 2000). In response, the immigration regime of western industrialized nations was born of a realist policy to regulate labor markets through the use of foreigners (Hollifield 1992a).

The attempt by these industrialized nations to use foreign workers to restructure domestic labor markets was constrained by existing and developing liberal democratic norms and principles that limit the ability of the state to merely turn the supply of labor on and off like a water faucet (Hollifield 1992b: 41; Joppke 2001). National courts and other societal actors were able to introduce considerations such as family reunion and the acceptance of refugees within the national debates of Germany and France (Hollifield 1992a:

583). Nevertheless, these market pressures remain the primary impetus behind changes within domestic labor immigration regimes even when the liberal character of the societies leads to an ever-increasing catalogue of rights for foreigners.

International agreements and standards of treatment have evolved concerning refugees, asylum, and family reunion, yet the further aspects of immigration policy remain beholden to the economic self-interest of the nation-state. In the provocatively titled *Challenge to the Nation-State* (1998), Christian Joppke argues that while it might appear that globalization instigates nation-states to draft convergent immigration policies in response to their common diminished capacity to prevent the free flow of capital and labor, this is not reflected empirically. In Western Europe the demise of the nation-state's ability to determine policy has been grossly exaggerated. Policy remains in the hands of nation-states whose responses still reflect a multiplicity of domestic cultural and legal traditions (Joppke 2001: 364). In particular, the nation-state has benefited from relative autonomy in formulating labor immigration policy, where the process is characterized by its de-politicized and technocratic nature (Hammar 1985; Freeman 1995: 885). Given this privileged position, why would the state welcome other actors into the policy-making process?

International solutions?

While the importance of economic thinking in immigration policy is undisputed, some scholars are pessimistic about the capacity of the nation-states to determine policy independently from global market pressures. Declining transaction and transportation costs have reduced the ability of the nation-state to control migration flows, so several have resorted to multinational solutions to their perceived migration problems (Morris 1997: 196; Guiraudon and Lahav 2000; Märker 2001: 7). The premier example is the Schengen Agreement, which existed independently from EU law before being integrated into the European Community (EC) through the Treaty of Amsterdam in 1998. Not only were passport examinations between the signatories eliminated, but Schengen simultaneously sought to enhance the signatories' ability to patrol external borders and impose more rigorous controls against countries outside the agreement.

Owing to their high level of interdependence, the EU members face an additional risk in failing to co-ordinate their immigration policies. Migration policy can be characterized as an international public good, where in the absence of an international government the effects of national rules threaten to spill over into other countries (Straubhaar 2000: 11). Straubhaar argues that 'independently designed and performed national migration policies are more and more unfeasible for economies that are opened up for international transactions in goods, services or financial markets' (2000: 11). In the case of the EU, tolerating different regimes invites competitive policy-making that can impose externalities upon fellow member states (see Borrás and Jacobsson

2004). This is most clear in the case of asylum policy, where restrictive policies in certain countries can transfer an increased burden upon those neighbors whose standards are more lenient. Under this scenario, countries are well advised to keep their immigration policies at a low, restrictive common denominator level (Märker 2001: 9). The potential side effect with such a strategy is that fear of exposure to increased immigration can prevent national laws from addressing certain economic needs that can only be met through foreign labor. An EU-wide immigration system could prevent disruptive policy competition by presenting member states with a common standard upon whose adherence fellow member states could rely.

Further, the freedom of movement that adheres to EU citizens is likely to be conferred upon non-EU nationals in the future. If the reason for encouraging the elimination of national borders within the EU was to ensure allocational efficient equalization of the marginal factor products, the presence of a segment of the labor force (namely foreign workers) who are immobile and subject to different rules would allow for the proliferation of pockets of inefficiency (Straubhaar 2000: 13). Once third-country nationals are free to move and work within the EU, the policy of the most liberal member effectively becomes the policy for the entire union. Before this occurs, it would be prudent to bring national policies into sufficient accord to prevent certain countries from opening the borders of all fellow member states as well as to establish a common system for managing migration flows.

Despite these incentives, member states are generally loath to surrender policy-making power to the Commission (Pollack 1997; Wendon 1998: 345). Only in issue areas where the presence of an external legislator and adjudicator is deemed necessary to prevent shirking will policy be 'communitarized'. Otherwise, there is a sense of distrust toward the Commission on behalf of the member states who are cautious of divesting their agenda-setting prerogative (Smyrl 1998: 81). This caution is likely to be most pronounced in issue areas where well-developed constituencies of subnational institutions and interest groups are capable of placing pressure on member governments and introducing their ideas into the debate (Pollack 1997: 127).

The EU offers a case study of how immigration policy, though still determined by the nation-state, has come under pressure to become transnationalized through the parallel liberalization of capital and goods flows. Beyond addressing the question of which components of immigration policy are most easily delegated to supranational authority, the case of the EU also leads us to question the extent to which policy convergence is actually necessary (Hailbronner 2002: 83).

III. IMMIGRATION POLICY IN THE EUROPEAN UNION

The absence of a comprehensive European immigration policy is a reflection of the reserve of member states when called upon to adopt common policies on matters they deem as non-economic in nature. Prior to the Single European

Act, there was no EC policy toward third-country nationals, and even in its wake, co-operation with regard to visa recognition and border controls remained ad hoc and voluntary in nature (Kostakopoulou 2000: 498). After Maastricht and the Treaty on European Union, immigration policy was limited to co-operation in the areas of asylum and reciprocal recognition of transit visas, located in the 'third pillar' of Justice and Home Affairs, where decisions require member state unanimity, and the European Court of Justice could not rule on the validity of provisions or act to enforce them. Several commentators believed that if any policies were moved to the first pillar, it would only be those concerned with controlling Europe's external borders (Huysmans 1995; Leitner 1995; Morris 1997: 202). This imputed bias on the part of the EU was dubbed the 'securitization' of immigration policy, in reference to the fact that the debate over a European immigration policy appears primarily security-motivated rather than viewing it as an economic issue that should be contained within the first pillar (Huysmans 1995).

The Treaty of Amsterdam introduced Title IV on 'Visas, Asylum, Immigration and Other Policies Related to the Free Movement of Persons' to the first pillar in 1997. In particular, this includes external border controls, visas and other rights of third-country nationals, as well as immigration and asylum. However, for the first five years, member states are still ensured a joint power of initiative together with the European Commission, whereupon final decisions by the European Council must be taken unanimously. After five years, the member states will decide whether any of the areas in Title IV will be further 'Europeanized' and subjected to the qualified majority voting procedure. Therefore, as of yet, there has not been a profound qualitative break from the previous EU immigration paradigm (Kostakopoulou 2000: 514), though choices looming in the future could yet bring greater supranationalization of immigration policy (Stetter 2000: 95).

Even with this move to the first pillar, Huysmans contends that 'discourses and government technologies reifying immigrants, asylum-seekers, refugees and foreigners as a dangerous challenge to societal stability play a prominent role in connecting these different issues', facilitating the continued securitization of immigration (2000: 770). Such behavior would reflect a realist mindset, in which the state is concerned foremost with ensuring its own security, so that its initial response to greater migration activity is to secure its national borders (Lavenex 2001). Ironically, it is not only the vaguely defined pressures of globalization that have triggered this fixation with secure borders. Rather, the very success of the removal of barriers between the members of the Common Market has created a heightened concern for controlling the borders on the periphery.

This has led national governments to allow third-party actors to become increasingly involved in the regulation and implementation of immigration policy (Guiraudon and Lahav 2000). Beyond those competences delegated to the EU, other powers have passed to private actors such as employer groups or airlines, or to local government, as in the case of municipalities, who issue

housing permits and dispense social services (Lahav 1998: 682). Rather than paint a picture of the nation-state jealously guarding its powers, relinquishment of immigration control authority in certain areas indicates a readiness to divest itself of some of its capacities.

Beyond the securitization tendency in the development of EU immigration policy, one must acknowledge those areas where the EU has served as fertile ground for migrant and immigration policies (Geddes 2000: 134). Several scholars have concentrated on the role of the Commission in attempting to create a forum for elements of civil society to voice concerns over the potential marginalization of third-country nationals (*vis-à-vis* the mutual recognition of the rights of EU member citizens). This work is primarily occupied with uncovering the potential for transnational political organization in the EU and tends to be highly programmatic. Often linking its arguments to the more general challenge of the democratic deficit,¹ it insists that the creation of a European citizenship status is discriminatory since it further distinguishes between the rights of member state citizens and nationals from non-EU third countries (Soysal 1994; Guild 1998; Preuss 1998).

This literature documents the development of public interest groups at the European level and the efforts of EU initiatives such as the Starting Line Group and the European Union Migrants' Forum which field the concerns of immigrants and foster further debate as to the need for a European immigration policy (Guiraudon 2000; Ireland 1996). These groups are active proponents of immigrants' rights and are principal contributors in formulating initiatives to combat xenophobia. They remain more concerned with social integration and counteracting discrimination than with actual entry policies (beyond family re-unification), and even within that limited domain their record for success makes for sober reading (Ireland 1996: 142; Favell and Geddes 2000: 420; Koopmans and Statham 2000). This is understandable for two principal reasons. First, the decision to subject a particular policy area to the Community's supranational jurisdiction has historically pursued the market-building logic of the economic community (Geddes 2000). Geddes argues that future European immigration policy will have to develop in accord with those labor market mechanisms that are established and are being further developed within the EU. Second, because policy is still determined at the national level, there is little as yet to be gained by lobbying at the European level. The imbalance in mobilization focus in favor of the domestic policy arena is an accurate indicator of the level at which policy-making authority still resides.

At the conclusion of the Tampere European Council in 1999, the Presidency announced that creation of the EU's new 'union of freedom, security and justice' would require a common asylum and immigration policy.² The policy was mapped out into four separate elements: partnership with countries of origin, a common European asylum system, fair treatment of third-country nationals, and management of migration flows. However, this document was agnostic as to how the goals were to be pursued. The answer was less than a

year in coming and employs a policy innovation that is only beginning to make its mark on the EC policy landscape.

IV. THE OPEN METHOD OF CO-ORDINATION

Origins, the process, and actors

Conceptually the OMC finds its roots in the European monetary union (EMU) convergence criteria that set a common goal for macroeconomic performance without delineating specific policy mechanisms for achieving it. Beyond these fiscal constraints, the Broad Economic Policy Guidelines involved non-binding recommendations from the Council to member states to monitor the consistency of national economic policies with those of the EU. De la Porte argues that particularly important in the case of the EMU was the existence of the German monetary system around which the current guidelines were able to 'isomorphize' (2002: 41). This 'successful' model enjoys a great deal of legitimacy, which is not necessarily the case in the other policy areas where the OMC has been introduced. Instead, the open procedure is frequently employed in the hope that by allowing for the comparison of different national programs, consensus as to the desirability of a particular policy (or at the least, a certain trajectory) might eventually emerge.

On the heels of the Treaty of Amsterdam's introduction of a chapter on employment, the 1997 European Council of Luxembourg on Employment brought this Treaty provision to life through what is now referred to as the 'Luxembourg process'. It envisioned the Council setting guidelines as to the number of unemployed that should receive active assistance, but at that time the Council shied away from setting specific targets for unemployment rates (Trubek and Mosher 2003: 11). This illustrates a key frustration in European policy-making: agreement in principle that fails to blossom into obligation. This tension is addressed by the OMC, which attempts to foster policy focused on a common European-wide goal rather than a pre-established quantitative outcome.

This approach was formalized at the Lisbon European Council in March 2000 where the 'new open method of co-ordination' was introduced as an appropriate policy tool for engaging policies as diverse as the creation of an information society, the furtherance of research, education reform, and combating social exclusion (Rodrigues 2001: 5). This instrument is expected to spread 'best practices' and achieve greater convergence toward common EU goals via an iterative process incorporating the following steps:

- allowing the EU to set common guidelines along with specific timetables;
- establishing a system of common quantitative and qualitative indicators that allows the member states to compare and benchmark their practices and policy performance;
- allowing the member states to translate these guidelines into national and

regional policies that set specific targets and implementation procedures, yet allow for diversity and flexibility in each individual case;

- periodic monitoring and evaluation through a peer review process whose primary goal is educative.

The OMC is both multi-level and multi-actor (Trubek and Mosher 2003: 12). At the European level the key actors are the Council, the Commission, the relevant committee(s), and the European level social actors. As in the traditional Community method, the Commission is the policy initiator – hardly surprising since the process was conceived by the Commission. To ensure that any proffered program is politically palatable, the European Council retains a strong role as co-ordinator, devoting a part of its spring meeting to the monitoring of OMC strategies (Rodrigues 2001: 3). For instance, in the case of the European Employment Strategy (EES), the Council, upon consultation with the Social Affairs Committee and the Economic and Finance Committee, adopts a series of guidelines, which are to be translated into National Action Plans (NAPs) by the member states. The Council and Commission subsequently evaluate these NAPs and issue public recommendations to the individual countries that in turn respond with a new cycle of NAPs (Goetschy 2003: 64).

National governments are entreated to solicit the input and involvement of non-governmental organizations, the social partners and relevant representatives of civil society in the formulation of NAPs (de la Porte 2002: 45). Though this participative approach appears designed to stimulate interaction between national governments and civil society, it can prove an obstacle in reaching a working consensus in countries where such interaction is less institutionally developed. For this reason, the EES encourages enlargement candidate countries to already submit NAPs that are jointly reviewed by the Commission and that country's own government (Hodson and Maher 2001: 725). Since involvement of the social partners in designing employment policy is made explicit, this can only lead to a strengthening of these interest groups.

Indicators are established by sub-committees composed of nationally designated experts who are nevertheless expected to integrate national political aims when devising appropriate primary and secondary indicators to fairly represent a particular phenomenon (de la Porte 2002: 42). However, the creation of common indicators does not entail the adoption of common targets and the monitoring and evaluation focus on evidence of progression and relative, rather than absolute, achievements (Rodrigues 2001: 9). Since the logic behind the OMC is to create a learning process, in contrast to an identifiable ranking order, the indicators are European, while the targets are predominantly nationally determined (Sundholm 2001: 23).

The OMC does not operate in a policy vacuum. An OMC in one area may be linked to those in other relevant policy fields. However, even when thus intertwined, the configuration of the OMCs differs according to the particular issue area (de la Porte and Pochet 2002: 28). Since it was the first to emerge,

scholars often treat the EES as something of an OMC template, but direct comparison exposes subtle differences. This variation is not simply a by-product of the absence of an OMC provision for social inclusion policy under the Treaty, but it also stems from a relative lack of member state consensus concerning the desired outcomes of such a policy. Hodson and Maher argue that the OMC developed in the realm of economic policy thanks to a dominant theoretical framework (monetary stability) and a set of agreed principles or goals (2001: 721). In the realm of employment policy, this framework was the common perception that structural labor market rigidities must be reduced. Beyond consensus as to the goal of the project, there was also agreement that activation policies were the appropriate mechanism for achieving this goal. There does not appear to be a similar level of agreement on policy mechanisms in the area of social inclusion; rather, it is the OMC process itself that is called upon to incrementally generate a series of mechanisms to complete a vague yet common framework.

Evaluation

A principal hope for the OMC is that its iterative nature will reduce the traditional intergovernmental dependence on great moments, and achieve incremental change along a policy-learning continuum where the issues can be de-politicized (Hodson and Maher 2001: 739). The benchmarking technique foresees the definition of a European dimension through the issuance of explicit guidelines (Rodrigues 2001: 9). This can lead to the creation of a common principle derived from collective learning even in the absence of a previously existing cultural frame such as the context of single market initiatives (Hodson and Maher 2001: 738). By seeping into the individual domestic discourses, the guidelines may lead to changes in beliefs and expectations of domestic actors that in turn could result in greater policy convergence in the long term (de la Porte 2002: 39; see Borrás and Jacobsson 2004).

The OMC has been hailed as a 'panacea for speeding up European decision making' (de la Porte 2002: 39) since it aims to avoid much of the negotiation and horse-trading that is part and parcel of intergovernmental policy-making. Despite the fact that part of the OMC rationale is to foster transparency and democratic participation, one must question whether the procedure might not appear overly complex and opaque to certain domestic actors (Rodrigues 2001: 10). Democratic participation is also far from certain. The OMCs generally spell out the need for involving civil society, yet the *Joint Employment Report 2001* criticizes nearly every member state for isolating the social partners from the policy formation process (Commission 2001e: 22).

The root criticism of the OMC is that leveled at all 'soft law' mechanisms. Not only is there less incentive to meet stated goals let alone enforcement (Downs *et al.* 1996: 397), but there is little assurance that the goals being set are either realistic for or truly challenging to a particular state. If an OMC process is to achieve success in a given area and not merely constitute a form

of lip service, there will have to be a genuine belief that it is in the state's best interest to follow a particular guideline. There is a danger of creating a catch-22 scenario in which governments are reluctant to set high standards in NAPs until they see positive results, but where such results can only be attained by accepting some initial risk. Success hinges upon the ingenuity of countries to use the OMC as a tool for setting themselves challenging goals, secure in the knowledge that failure to meet these goals will not be penalized.³

A final danger identified by scholars and civil servants is the temptation to overuse the OMC. Enthusiasm for the new method and its low political costs could lead to an abandonment of the traditional legislative and contractual regulatory methods (Devuyst 1999: 118), or the OMC could become the only approach for addressing new areas of EU competence (Goetschy 2003: 83–4). The OMC is but one of several established governance tools. In addition to the principle of co-ordination between OMCs, there is an understanding that OMCs can be combined with other methods of governance when there is a Treaty basis for their use (Rodrigues 2001: 9). In certain areas harmonization remains critical (i.e. corporation and tax law), while in others, countries only desire that their fellow member states share responsibility. As the Belgian Minister for Social Affairs and Pensions declared, it is the objectives and not the policy instruments that must remain central (Vandenbroucke 2001). With this in mind, one can be optimistic about the prospects for the OMC because it can ensure subsidiarity through an approach that does not privilege particular mechanisms as much as results.

V. THE OMC IN IMMIGRATION POLICY

Origins

The first major palpable response to the Tampere conclusions in the area of immigration was the 'Communication on a Community Immigration Policy' (COM (2000) 757). At the heart of this communication was the declaration that 'the existing zero immigration policies which have dominated thinking over the past 30 years are no longer appropriate' within the new economic and demographic context (Commission 2000: 6). Nevertheless, the diversity of national attitudes toward the admission and integration of third-country nationals convinced the Commission that the first step must be the open discussion of the issues with an attempt to reach a consensus over objectives. Such a discussion would also be aided by recourse to coherent and reliable data, so the monitoring of migration flows was identified as a further necessary component prior to setting any substantive objectives.

The Tampere framework addresses four areas that the Commission views as interrelated (Commission 2000: 7–12). First, a comprehensive approach to immigration begins by establishing a partnership relationship with the countries of origin and transit. Second, there should be a common European asylum system that engenders the consistent application of the Geneva Convention

on refugees. Third, the Commission wants to ensure fair treatment of third-country nationals in legal residence by granting rights and obligations comparable to those of EU citizens. Finally, the management or regulation of migrant flows should take into account political, human rights, and development issues that would again involve the countries of origin. The Commission explicitly declares that this approach is not an adoption of the tenets of the United Nations' replacement migration strategy that seeks to combat demographic aging in the industrialized world with a more open stance toward the developing world. Instead, the Commission recommends that the EU apply a 'controlled approach which is based on a common assessment of the economic and demographic development of the Union, and of the situation in the countries of origin, and takes account of its capacity of reception' (Commission 2000: 14).

In accepting it to be true that immigrants have a positive effect on economic growth and do not disproportionately burden the welfare state, this policy targets a particular subset of immigrants, namely the highly skilled, who stand less of a chance to be competing for jobs with national skilled workers than with their low-skilled compatriots. The Commission's goal is to create a flexible yet encompassing scheme based on a limited number of immigrant statuses that would facilitate the admission process for economic migrants (Commission 2000: 17). If one employs the image of a 'fortress Europe' whose gates now swing open, one must concede that admission yet remains by invitation only.

Policies

The Tampere framework has been followed up through multiple initiatives. A revision to Regulation No. 1408/71 on the co-ordination of social security systems that includes third-country nationals was followed by a proposal for a directive on the treatment of third-country nationals (Commission 2001a). It seeks to promote transparency and rationality in the conditions governing the application for and receipt of residence and work permits, preferably through a single, simple national application procedure. Such permits are to be issued with the caveat that the domestic labor market must be respected (i.e. qualified domestic applicants must be employed first). Once economic need is shown, the primary concern is to provide industry with a practical tool for demonstrating concrete shortages in the EU labor market (Commission 2001a: 2).⁴ The Commission has also issued two communications to the Council setting out separate OMC procedures for both asylum policy and general immigration policy.⁵ The OMC on immigration policy is to be implemented for an initial six-year period, and is meant to support and complement EC legislation while providing a framework for reviewing the implementation of these instruments together with the member states.

The Commission lays out six guidelines within four areas that the Council is requested to draw from in issuing its first guidelines. First, to manage migration flows, it is necessary to develop a comprehensive and co-ordinated

approach at the national level. For instance, it would be valuable to understand the effect of opening up economic migration upon asylum applications and illegal migration. The Commission recommends making information available on the legal possibilities for admission to the EU and the consequences of illegal migration. Further, the battle with illegal immigration, smuggling and trafficking is to be concretized by tracking such movements from their origin via transit countries to destination countries.

Second, the admission of economic migrants reprises the goal of the proposed directive on the admission and entry of third-country nationals: establishing a coherent and transparent procedure for accessing the labor market allied to the EES. The third area proposes a partnership approach for the EU in its relations with third countries that covers the political, economic, and social dimensions of migration issues. Clearly conscious of the perceived brain drain of the developing world, suggested policies in this realm include reforming legislation that currently restricts migrants' ability to travel freely between their country of residence and their country of origin, as well as encouraging emigrants to take an interest in development projects, business ventures and training institutions in their countries of origin. The fourth area addressed in the Communication is the integration of third-country nationals. Here, the suggested guideline identifies the need to establish a comprehensive policy framework to ensure both the initial and continued involvement of local and regional actors, the social partners, civil society and migrants themselves in developing and implementing the national strategy.

Actors

In order to implement the guidelines, member states are required to prepare NAPs that will be reviewed and adapted on an annual basis. NAPs are to begin with a review section that comments on the co-operation achieved between the various actors and provide demographic statistics on third-country nationals admitted in the previous year. In particular, there should be an evaluation of how different measures correlate with the ratio between legal and illegal flows. The second section requires the member states to delineate their proposed implementation, indicating whether particular measures will be instituted at the national, local or regional level. Further, this section would document projections of labor demand for migrants as provided for in the NAPs for employment.

In addition to its initial role in preparing guideline proposals for the Council, the Commission monitors the practical application of EU immigration legislation, with an eye toward ensuring consistency between member states. The Commission also seeks to assume an active role in promoting the exchange of information, experiences and best practices between member states (Commission 2001b: 13). It is further envisioned that other European institutions be intimately involved in the development and implementation of the Community immigration policy. In addition to the European Parliament,

the Economic and Social Committee and the Committee of the Regions are also named, while civil society (the social partners in particular) is to be represented at the European level through the social dialogue process (Commission 2001b: 14). Additionally, the Commission has floated the idea of creating a European Observatory on Migration to assume the task currently being accomplished by formal and informal information exchange networks between countries (Europe Information Service 2001).

VI. A PRELIMINARY EVALUATION OF THE OMC IN IMMIGRATION POLICY

This proposed advance in Community immigration policy will be analyzed along two dimensions. First, I consider the particular configuration of the OMC in the case of immigration. Second, I evaluate whether these policies constitute a solidification of security thinking as some critics predict, or whether another logic can be detected behind this expansion in policy.

Situating the OMC

The OMC in immigration makes a conscious effort to work in conjunction with other types of legislation that already exist in the subject area, while also addressing areas where no directives have yet passed into law. The guidelines are less concrete than those set out in the case of employment policy. The emphasis is upon monitoring the implementation of legislation already in place, rather than using the iterative guideline process as a means for distilling new legislative initiatives. Unlike the OMC in asylum where the Commission targets a harmonization between national policies (Commission 2001d), the OMC in immigration is more focused on co-ordinating and monitoring how the existing legislation is being implemented (Romano 2002: 17).

This reflects that, with respect to asylum policy, countries seek assurance that their fellow member states will not act as passive conduits, but process asylum claimants according to common criteria. Here, uniform obligations provide a common safeguard. In the case of immigration generally, mere monitoring and co-ordination can be sufficient to prevent major changes in migration flows. Being aware of policy changes among fellow EU members allows the countries to adjust their domestic labor market and social policy to compensate for possible shortages or surpluses that could result if a fellow member facilitates or curtails immigration. The guidelines under the immigration OMC are intended to provide a framework within which national legislation should situate itself and are not necessarily expected to yield similar quantitative results across the countries. At most, the Commission is hoping to encourage some policy experimentation through the diffusion of information and practices among member states.

The OMC in immigration explicitly refers to the employment strategy in the fourth guideline, identifying it as the proper framework for introducing

foreign workers into sectors with identified labor shortages (Commission 2001b: 9). This proposal has been criticized for failing to concretely delineate the relationship between the proposed immigration policies and the existing EES (House of Lords 2001). Nevertheless, some of the information and common indicator data gathered in reference to the labor market would also be utilized under the immigration OMC when member states are asked to assess the state of the domestic and European job market or estimate possible sectors with labor shortages. Pooling the information between the immigration and employment OMCs would better identify areas where the domestic labor market is under-supplied and where activation of the unemployed could potentially reap immediate success. True to form, the European Economic and Social Committee does not believe that pooling of information is sufficiently ambitious, and as part of its vision that encourages a form of mainstreaming of integration and immigration concerns in EU policy, it recommends that national employment action plans explicitly include 'criteria that are helpful in managing migration flows' (Economic and Social Committee 2001: 7). Given that a labor market rationale is central to the OMC on immigration, co-ordination with the employment strategy would present both policy areas with greater reach and efficacy.

While the case has been made for binding, harmonized international immigration laws (Wöhlcke 2001: 32), one potential strength of the OMC is that it does not press for harmonization. A joint appraisal by the central German business associations praised the labor market impetus of the OMC, but warned that co-ordination is only welcome in the form of best practices and benchmarking. They advised that policy should not advance to the level of setting common goals or controlling migration streams, since this is best regulated at the individual nation-state level where particular needs and circumstances can be accounted for (BDA, BDI, DIHK and ZDH 2001: 5). Hailbronner also criticizes a harmonization approach for its inflexibility and difficulties in respecting national traditions (Hailbronner 2002: 83).

This emphasis on flexibility has also been the key sentiment voiced by the member states during previous negotiations on EU immigration policy. During the Maastricht Treaty negotiations the opposition of the UK, Ireland, Greece and Denmark blocked a proposal to incorporate immigration policy into the law of the EC (Wakamatsu 1997: 22). During the negotiations on the Treaty of Amsterdam, the Netherlands, Belgium, Italy and Spain supported the full incorporation of a binding, uniform Community immigration policy, and a core consisting of Germany, Italy, Greece, Ireland, Spain and Portugal wanted to see immigration and asylum policy moved to the Community pillar subject to qualified majority voting rules (Hix and Niessen 1996: 58). The fact that the final draft only provides for the possibility of Community legislation upon unanimous member state consent can be traced to the unwillingness of the UK and Denmark to sanction further co-operation in immigration matters, as well as the remaining countries' desire to preserve the intergovernmental character of immigration policy that would exclude Community institutions

from the decision-making process. Commenting before the final negotiations, Hix and Niessen surmised that the heterogeneous preferences of the member states made harmonization unlikely, so that a suitable solution would have to promise greater flexibility (1996: 59). Germany's request at the Nice Conference to keep immigration and asylum policy outside of qualified majority voting until 2004 (Märker 2001: 9) and the UK's and Ireland's decision to opt out of all visa and immigration proposals (Peers 2001: 231) are further testaments to a lack of consensus behind a harmonization approach and accentuate that a feasible solution should respect the member states' flexibility concerns.

Heightened security concerns in the wake of the terrorist attack on September 11, 2001 have led to the suspicion that international obligations and safety measures might be circumvented (Europe Information Service 2001). A discussion of how these two interests might best be balanced would be aided through European co-ordination and the sharing of experiences. However, it remains to be seen whether the recent heightened involvement of local authorities in the control of immigrants and information-gathering will lead to similar advances in the levels of co-operation with other non-state actors. Such activity would positively influence the 'open' character of policy implementation, paving the way for broader societal involvement in overall immigration policy formulation.

The attempt to introduce the OMC in the immigration context is still rather recent. As mentioned earlier, the Treaty of Amsterdam foresees a five-year waiting period during which immigration policy can remain fairly unchanged; thereafter, legislative solutions are to be considered. If such legislation takes a back seat to the looser, co-ordinated approach of the OMC, this should not be seen as a negative. The OMC embodies a concrete plan and impetus whereas further legislative efforts might still be yoked with a unanimity requirement. As it stands, the proposed OMC in immigration is a tentative step forward in an area where member states are cautious about surrendering control (Klos 1998: 75).

Fortress Europe?

A review of the six suggested guidelines in the Communication on Immigration evidences continued concern for security issues, but this tells only half the story. The guidelines also reflect a major effort on the part of the Commission to make the EU more accessible to foreign workers – if the business community signals that particular types of labor are in demand. On balance, a greater number of guidelines possess a liberalization component than are concerned with restricting immigration. A brief evaluation of each guideline confirms that despite the capacity of some member states' restrictionist rhetoric to garner the attention of the media, the Commission is advancing an additional agenda.

The first guideline on the development of a comprehensive national migration program is primarily an attempt to expand immigration, while the second

guideline concerning improved information contains both liberal and restrictive elements. Improved information on legal possibilities for admission can only increase the number of successful immigration applications, yet the other element aims to reduce illegal migration by advising potential immigrants of the legal consequences upon apprehension. This sentiment is buttressed by the third guideline that mandates the institution of formal sanctions for both illegal aliens and those who profit from their trafficking. However, the fourth guideline is concerned exclusively with attuning immigration to the EU's labor market demands and assuring that businesses possess a rapid recourse in the sectors and areas where shortages are particularly acute. Partnership with third countries, the fifth guideline, should also be categorized as a measure satisfying both logics: co-operation can enhance recruiting efforts, but improving the socioeconomic conditions in sending countries is primarily motivated by the hope that future illegal immigration flows will wane. By pooling their resources, EU members' joint actions are more likely to successfully combat the causes of emigration 'push' at their sources (Fischer and Straubhaar 1996: 36). Finally, initiatives furthering the integration of third-country nationals also embody both logics. Receiving equal treatment and toleration in a host country is an important incentive for continued immigration, but integration measures can also be drafted so as to perpetuate established lines of ethnic and cultural division through the designation of a central *Leitkultur* whose adherents enjoy a more complete membership in society. This simple tabulation reveals that five of the six guidelines promote immigration liberalization, while only four contain a security component. While only the third guideline can be characterized as exclusively security-minded, both the first and fourth are motivated primarily by liberalization concerns.

An important reason why this OMC is not dominated by security concerns is that the more security- and human rights-oriented realm of asylum is contained in a separate framework (Watson 2001: 48). As the Economic and Social Committee points out, asylum and refugee law are already determined to a large degree through international conventions (Economic and Social Committee 2002: 3), so a higher degree of uniformity can be expected among member state laws. Thus, any harmonization goals of an OMC in immigration should be less ambitious than those for asylum. By further disaggregating immigration policy into separate policy strands, the Commission has identified the areas in which the member states are more prone to co-ordinate closely (i.e. security), while preserving their freedom to develop issues with labor market-oriented concerns independently (Hailbronner 2002: 83). This would help the member states to link immigration policy directly or indirectly to economic and social policies – such as the development of the labor market – as they were originally encouraged to do in the 2000 Communication on Immigration Policy (Commission 2001c). This strategy holds promise because countries can trust that they are retaining the necessary control while profiting from both the labor market and the security benefits attendant to closer co-ordination.

VII. CONCLUSION AND PROGNOSIS

Those who argue that EU immigration policy is merely the extension of a protectionist nation-state mentality have not adequately considered the dual aims of this new policy proposal. While the issue of controlling immigration flows and preventing illegal migration remains central, the other major emphasis of the OMC is on creating a coherent system for addressing the needs of the European labor market. Immigration policy has been segmented into several components, as evidenced in the separation between asylum and immigration policy and the use of both legislative and soft law approaches. This reflects a perceived greater desire among member states for binding conditions in the area of asylum and secured borders.

Despite what appears to be a policy framework addressing their primary interests, the member states as represented by the Council have not been enticed by the entreaties of the Commission. When the Council emphasized the need for a more structured immigration policy at the recent conference at Thessaloniki, the subject areas viewed as requiring immediate attention were asylum, illegal immigration and external borders.⁶ The integration of legally residing third-country nationals was also deemed a necessary target for the elaboration of a comprehensive policy, but the Council remained silent on the issue of labor migration. One explanation for this absence is that European economic slowdown has lessened the need for using immigration to fill gaps in domestic labor markets. In particular, recruiting information technology experts is no longer identified as such a glaring priority. A further explanation lies in the desire of national policy-makers to re-evaluate the general immigration debate in the aftermath of the terrorist attacks of September 11. Security concerns are once again being pushed to the fore in an atmosphere of heightened international tension.

Yet, the Council's lack of enthusiasm should primarily be traced to the tension discussed in Section II, under 'International solutions?': the predisposition of the member states to withhold delegating authority from the Commission. The Commission reasons that the member states would prefer to be involved in a process of policy co-ordination without formal obligations rather than face legislation penned by the Commission. However, such a legislative prerogative only inheres in the Commission in areas that the member states unanimously agree to subject to the EC.

Apparently, member states trust in a continued mutual solidarity – based upon common sovereignty concerns – that generally prevents policy from advancing at a pace that is uncomfortable for any single member. They can afford to sidestep the OMC where the Commission would have such a central initiative role and where civil society and sub-national governmental units can potentially be empowered. Western European states historically enjoyed the freedom to develop labor immigration policy in a fairly closed and depoliticized manner. However, in the last few years, new actors in the form of extreme right parties have been able to politicize the issue in countries such as

Austria, Denmark, France and the Netherlands. In Spain, Italy, France and Germany, trade unions and business interests have formed coalitions in favor of liberalizing immigration policy (Haus 2002; Watts 2002). The established parties currently in power are therefore aware that permitting the introduction of new ideas and debates could further wrest away the primary policy authority from the government, despite the ostensible absence of 'European' pressures and obligations.

The present failure of the Council to adopt the Commission's proposal on a European immigration policy should not be read as a verdict on the innate unsuitability of the OMC in the immigration setting, but as a testament to the perceived discursive power of the OMC process. Being forced to compare and evaluate immigration policy in an open forum together with civil societal and international actors, whose views on immigration are often quite liberal, involves a risk of losing control over the agenda-setting process. This soft law learning process constitutes a greater threat to sovereignty in policy-making than an inchoate Community legislative competence in which the members still designate which areas are incorporated into Community law. The OMC certainly has the potential to be utilized as a mechanism for policy coordination (and as such seems more likely to be applied in areas such as asylum policy or combating illegal immigration⁷), but in an issue area such as labor market-based immigration, characterized by a multitude of divergent policy goals and mechanisms, the OMC constitutes a greater obligation than the member states are currently prepared to accept.

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ACKNOWLEDGEMENTS

I would like to thank Jonathan Zeitlin, Martin Rhodes, Dermot Hodson, Susana Borrás and Bent Greve for their engaged comments and encouragement on earlier drafts of this paper.

NOTES

- 1 Democratic deficit refers to the fact that the major decision-making organs of the EU, the Council and the Commission, are both non-elected bodies, whose policy decisions are isolated from the wider public. This widens the perceptual gap between citizens of the member states and Brussels and is seen as a major cause of public indifference toward the EU and its institutions.
- 2 SN 200/99 (Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999).
- 3 However, see Borrás and Jacobsson (2004), who show that the OMC creates firmer obligations and sets clearer criteria than agreements that are usually termed 'soft law'.

- 4 The directive is rooted in article 63(3) of the EC Treaty that entreats the Council to adopt measures on the 'conditions of entry and residence, and standards on procedures for the issue by member states of long-term visas and residence permits'.
- 5 COM (2001) 710 on asylum and COM (2001) 387 on immigration.
- 6 SN 200/03 (Thessaloniki European Council, 19 and 20 June 2003, Presidency Conclusions).
- 7 Interestingly, these two areas, which attracted the attention of the EU Presidency at Thessaloniki, are areas where the social partners would play a lesser role in determining policy. The 'interested parties' would more likely be government entities such as departments of the interior or law enforcement agencies which have direct contact with migrants. Perhaps they are viewed as less likely to contradict the interests of national governments than the social partners if their input and assent became a standard element in the policy-making process.

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