

The Ambition of Extending the Scope of Protection to All Migrants

3.1 The Prelude to an Admission Policy: Coordination of National Positions on TCN Migration

By the time of the completion of the common market by the adoption of Regulation 1612/68, it was clear that the Community's workforce would not be enough to cover its labour needs and to ensure the productive capacity of Member States. Member States continued to employ workers from non-member countries at high rates to fill their vacancies. The First Medium-term Economic Policy Programme issued by the Commission in 1967 showed that recourse to workers from non-member countries would become necessary as the years passed.¹ Essentially, it was at this stage that the Commission started pushing for comparison of national recruitment policies to establish whether there existed common interests that could form the basis for closer cooperation in this field.²

The change in the economic situation and the declining need for labor forces in the 1970s did not alter the Community approach. In this regard, the first explicit articulation of the need for a Community migration policy appeared in the 1974 Action Programme in Favour of Migrant Workers and their Families.³ In this Programme, the Commission emphasized the benefits of migration for the economies of the Member States:

The influx of migrant workers on this scale has profound consequences for the economics of the Member States. First, their presence has contributed to a *faster rate of economic growth* than would otherwise have been attainable – least without much greater rates of capital investment.

¹ Programme de politique économique à moyen terme (1966–1970) [1967] OJ 79/1513; Bulletin of the European Communities (1969)6 23.

² Ibid; Bulletin of the European Communities (1970)3 39.

³ Action Programme in Favour of Migrant Workers and Their Families, COM(74) 2250 final.

Second, they have given the system a greater degree of *flexibility* than it would otherwise have had. The fact that migrants are available in such large numbers and are usually engaged in short term-contracts – typically one year – has facilitated the adjustment of the labour force, both in individual enterprises and in the economy as a whole, to short-term changes in demand, and has therefore, facilitated anti-cyclical policies. Third there is evidence that the ready availability of a relatively cheap source of unskilled manpower *has retarded the search for greater productivity* in Community industries.⁴

Despite the economic problems that co-occurred with migration during a period of stagnation, the Commission highlighted what should be the driver of a Community migration policy. In this, the 1974 Action Programme mentions that '[t]hese solutions must take account of the migrant workers' needs and their rightful place in a society to whose prosperity and well-being they contribute'.⁵ The contribution of the migrant workers to the economic development of the host society set the basis for the need to attribute rights. In this alignment between the treatment of Community and TCN workers, we see the implicit attempt of the Commission to frame a sustainable migration policy, that is, a migration policy that supports the economic development of the Community and attributes rights to migrants in view of securing their social progress and relatedly social cohesion.

Against this backdrop, this section presents and evaluates the first binding measure adopted by the Community on coordination of national migration policies in 1985, a measure that should be seen as the prelude to a Community policy on admission that was completed a lot later, in the new millennium. Subsequently, the analysis of soft-law instruments and legislative measures in Sections 3.2 and 3.3 will show that, in this early period, emphasis was placed on shaping a migration policy characterized by full extension of equal treatment to TCN workers and their families. Overall, this chapter shows the desire of the Community, as expressed via its institutions, to fully coordinate labour-migration policies and to assimilate the rights of migrant workers, so as to support economic growth in the Member States and to raise the living standards of the population legally resident in the Community, regardless of their nationality.

In 1979, the Commission started encouraging the coordination of national migration policies in order to ensure the better functioning of

⁴ Ibid 11, emphasis in the original.

⁵ Ibid.

the labour market, as well as the harmonious development of Member States. The attempt was initiated by presenting the coordination of admission of migrants from third countries as corollary to the Community free movement framework:

Insofar as the terms and conditions under which Third Country citizens are admitted to a State, the decision on admission is related fundamentally to labour market policy, at national as well as at Community level. It is, in fact, labour market policy which generally determines the conditions and terms under which a non-Community migrant is admitted or allowed to remain, and, in this regard, consultation on migration policies vis-a-vis Third Countries, constitutes a corollary to the Community policy of free movement of Community workers.⁶

In this light, the Commission presented the need for action to maximize the effects of migration for economic growth. As it suggested, the lack of coordination of national migration policies did not allow for the most effective use of workers, while at the same time the lack of central planning had led to the concentration of migration in the central industrialized areas of the Community and to the creation of economic and social problems for the periphery.⁷ The Council also recognized the need for a policy that would allow consultation between the Member States on their national migration policies with third countries.⁸

In a Resolution on the matter, the Council mentioned Article 117 of the EEC Treaty, which referred to the need to promote improved working and living conditions for all the workers in the Community as a legal basis for such action.⁹ Eventually, Commission Decision 85/381/EEC was adopted, which set up a prior communication and consultation procedure on national migration policies in relation to third countries.¹⁰ The legal basis used was Article 118 EEC, which provided that the Commission should promote the close cooperation of Member States in the social field and particularly with regard to employment and working conditions. The Decision required Member States to inform the Commission on draft measures and agreements related to migration from third countries and provided for consultations with the

⁶ Consultation on Migration Policies vis-à-vis Third Countries, COM(79)115 final, para 3.2.

⁷ Action Programme, COM(74)2250 final 22.

⁸ Council Resolution of 9 February 1976 on an Action Programme for Migrant Workers and Members of Their Families [1976] OJ C 34/2, Recital 6 and point 5(a).

⁹ Council Resolution of 16 July 1985 on Guidelines for a Community Policy on Migration [1985] OJ C 186/3, Recital 1.

¹⁰ Commission Decision 85/381/EEC.

Commission, to coordinate common positions and ensure that national action does not compromise the Community labour market policy.

This Decision was met with resistance from Member States for fear of encroachment on national competences. Several turned against it and requested that it be declared void. In *Germany a.o. v Commission*, five Member States claimed that the Commission did not have competence to adopt a binding decision in the field of migration, which field fell within the exclusive competence of States.¹¹ Matters related to migration from third countries were, they argued, part of their sovereign core and went beyond the social field mentioned in Article 118 EEC.¹² The Court found that

[M]igration policy is capable of falling within the social field within the meaning of Article 118 only to the extent to which it concerns the situation of workers from non-member countries as regards their impact on the Community employment market and on working conditions.¹³

In this finding, the Court aligned the rationale behind the Community competence with the points of Commission Communication of 1979, which mentioned that the coordination of migration policies is corollary to free movement.¹⁴ As AG Mancini noted on the same matter,

The admission of foreigners, which is haphazard and ill-planned and often implemented illegally, seriously risks jeopardizing that policy. A series of measures should therefore be studied jointly with a view to adopting a coherent approach to the immigration of workers from non-member countries by safeguarding and strengthening the 'priority for Community nationals' in the Community labour market.¹⁵

The Court confirmed the Commission's competence to legislate and held that national migration policies should take into account action at Community level and specifically in the context of the labour market policy in order to not undermine its results.¹⁶ It further held that such competence had the nature of procedural coordination. This means that

¹¹ Joined cases 281, 283, 284, 285, and 287/85, *Federal Republic of Germany and others v Commission of the European Communities*, ECLI:EU:C:1987:351.

¹² *Ibid*, para 8.

¹³ *Ibid*, para 23.

¹⁴ Consultation on Migration Policies, COM(79)115 final, para 3.2.

¹⁵ *Ibid*; Opinion of AG Mancini in Joined cases 281, 283, 284, 285, and 287/85, *Federal Republic of Germany and others v Commission of the European Communities*, ECLI:EU:C:1987:169, p. 3225.

¹⁶ Joined cases 281, 283, 284, 285, and 287/85, *Federal Republic of Germany and others v Commission of the European Communities*, para 16.

Community action had to be restricted in coordination and could not involve the adoption of substantive measures that would create obligations for Member States or rights for TCN workers. The Court upheld Article 118 EEC as the basis of the Decision; however, it declared the decision void as regards two specific provisions extending Community powers.¹⁷ The Commission then adopted Decision 88/384/EEC, which reproduced the provisions of Decision 85/381/EEC and included amendments to comply with the Court's judgment.¹⁸

In this early case-law, the Court confirmed both the Community competence on TCN migration and the rationale for such competence. In line with the Commission's reasoning for the need for such a Decision, it became clear that national migration policies were not only related to the sovereign core of Member States and their right to control population movement; they also played a significant function at Community level. That is, they served the economic objective of ensuring the harmonious development of economic activities in the Community through a functional Community labour market. Both the EU institutions, in preparing and adopting the Decision, and the Court, confirmed the corollary nature of migration to free movement. This is apparent in the need to ensure that Community workers are not in a less competitive position because of national (lack of) planning. But most importantly, it appears in the alignment of objectives between free movement and migration coordination; they are both necessary means to ensure the economic objective of the Community.

In what follows, we shall see how similar objectives appear in parallel with social considerations in a series of attempts to grant rights to migrant workers. Unlike Community workers, TCN workers who did not fall under Association Agreements did not enjoy rights under primary or secondary law. However, by looking at soft-law instruments issued at that time, we will see that the progressive achievement of equal treatment between Community workers and TCN workers as regards their working and living conditions was the constant goal of the Community migration policy before the Single European Act. TCN

¹⁷ One related to the scope of consultation extending to matters of cultural integration and one related to the objective of the consultation to ensure that draft measures are in conformity with Community policies.

¹⁸ Commission Decision 88/384/EEC of 8 June 1988 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries [1988] OJ L 183/35.

workers and Community workers were thought of as facing the same problems in their social and working life.¹⁹

3.2 The Case for Abolition of Discrimination between All Migrant Workers

As early as the 1974 Action Programme, the Commission had suggested that discrimination between TCN workers and Community workers as regards living and working conditions should be eliminated.²⁰ In the 1979 Communication that predated the Decision reviewed previously, the Commission stated that,

The social situation which arises from inequality of treatment, and the failure to insert migrant workers and their families into the economic and social life of the host country, leads to tensions and discriminations which are potentially dangerous.²¹

This shows the interdependence of economic and social considerations behind the Commission's approach. The demand for labour migration necessary to achieve economic growth would need to be paired with social rights to ensure what we would call today social sustainability. Relatedly, it was considered self-evident that TCN migrants who live and work in the Community should enjoy equal treatment.²²

The 1985 Commission guidelines for a Community Policy on migration set the goal of horizontal equality between Member States nationals, Community and TCN migrants, and required the extension of equal treatment to the social security field. In this regard, the Commission noted that '[f]rom the social standpoint, workers in the same objective situation cannot be treated differently on the sole basis of nationality'.²³ Even though the Commission realized that, especially as regards social security, this would also require the involvement of third countries (for aggregated periods of insurance and transfer of benefits), it still promoted the establishment of such agreements based on Community

¹⁹ Guidelines for a Community Policy on Migration, COM(85)48 final; Council Resolution (n 9); Commission Decision 85/381/EEC, para 3.

²⁰ Action Programme, COM(74)2250 final 13.

²¹ Consultation on Migration Policies, COM(79)115 final, para 2.3.

²² Vredeling Henk, Migrants and the EEC, Full Text and Summary of a Speech by the Vice-President of the Commission for the Conference of the National Council of Social Services, London, 27 March 1971.

²³ Guidelines for a Community Policy on Migration, COM(85)48 final, para 40.

principles.²⁴ Similarly to the Commission, the Parliament was also insistent on achieving full equality between Community workers and TCN workers.²⁵

Aside from the economic contribution of migrant workers as the basis for equal treatment, the need for active measures to advance their social position also appears in the relevant material. During the rapid economic development of the 1950s and 1960s, Community institutions focused solely on employment policy as means to ensure the social advancement of migrant workers. Nevertheless, in the context of the economic stagnation and unemployment that persisted throughout the 1970s and 1980s, it became clear that the social advancement of migrant workers would need to go further than employment policies to be successful.²⁶ In this context, more emphasis was put on equal treatment as a principle that should guide integration policies related to access to residence, education, vocational training, housing, and working environment.²⁷ Social advancement via integration was also connected to the civic rights of migrant workers. During the period under review, the Commission, the Parliament, and the Economic and Social Committee were demanding the granting of the right to vote in local elections for all migrant workers and their families living and working on the Community territory, regardless of nationality.²⁸

However, this ambition of securing equal treatment was met with resistance from the Council. Under a more restrictive approach, the 1985 Council resolution on the Guidelines for a Community Policy on

²⁴ Ibid.

²⁵ Parliament Resolution on Migrant Workers from Third Countries adopted on 14 June [1990] OJ C 175; Parliament Working Documents 1983–1984, Document 1-811/83, Report drawn up on behalf of the Committee on Social Affairs and Employment on the problem of migrant workers, Rapporteur: Mrs Tove Nielsen, PE 84.870/fin.

²⁶ Policies on Immigration and the Social Integration of Migrants in the European Community, SEC(90)1813 final, para 101.

²⁷ Ibid, para 19.

²⁸ Opinion of the Economic and Social Committee on Migrant Workers 84/C 343/07, point 3.2.9; Policies on Immigration and the Social Integration of Migrants in the European Community, SEC(90)1813 final, paras 76–79; Parliament Resolution Doc. B2–881/86 on Community Policy on Migration of 9 October [1986] OJ C 283; Report drawn up on behalf of the Committee on Social Affairs and Employment on the Communication (Doc. C2–6/85-COM(85)48 final) on Guidelines for a Community Policy on Migration Together with a Draft Council Resolution, Working Documents 1985–1986, Document A2–4/85, points 2, 3(b); Guidelines for a Community Policy on Migration, COM(85)48 final, para 19; Resolution on the Joint Declaration against Racism and Xenophobia and an Action Programme by the Council of Ministers (Doc. A 2-261/88) [1989] OJ C 69 point 9.

Migration confirmed the desire that ‘everyone within it [the Community] should have an equal opportunity of deriving advantages and making a contribution’.²⁹ A right of TCN migrant workers to equal opportunity is far from the Commission and the Parliament vision of full application of the free movement regime to TCN workers, voting rights in local elections, and equal access to the social security systems of Member States. The different approach of the Council can be explained by its proximity to national politics. After all, this was a time characterized by national bans on migration due to prevailing unemployment. The sensitivity of extending rights to migrants in such a national political climate will be seen more clearly in Chapter 6, where the analysis focuses on how national fears sealed the fate of many of the Commission’s plans to promote the rights of migrant workers.³⁰

In any case, a review of the relevant soft-law instruments shows that both economic and social objectives were tied to the demand of equal treatment for TCN workers. Equal treatment was linked to the contribution of the individual migrant to the project of growth. At the same time, we see an emphasis on the need to advance the living conditions of the population resident in the Community and to maintain social cohesion. The social considerations behind the promotion of migrant rights will become clearer in Section 3.3, which considers measures devised to ensure equal access to education for children of migrant workers.

3.3 The Social Imperative of Granting Access to Education to Migrant Children

Access to education for children of migrant workers was one of the first migration-related measures adopted at the Community level. The issue had been on the agenda since the 1960s, and gained the attention of Member States during the 1970s and 1980s. At this point it was becoming clear that migrant workers had set up family lives in the host countries, leading to a new generation of migrant children that had to be integrated in Member States to ensure their social advancement and avoid marginalization.

²⁹ Council Resolution (n 9), point 5.

³⁰ See David O’Keeffe, ‘The Free Movement of Persons and the Single Market’ (1992) 17 ELR 3, who criticizes the intergovernmental initiatives in the Council and acknowledges the political and nationalistic overtones migration was subject to during this period.

In 1975, the Commission published a proposal for a Directive on the education of children of migrant workers.³¹ The considerations behind the proposal were twofold. First, the 1974 Council Resolution concerning a social action programme prioritized actions related to the reception and education of children in order to improve free movement of workers.³² And second, in the same resolution, the Council set the objective of achieving equal treatment between EC and TCN workers and their families as regards their living and working conditions.³³ In this context, the proposed Directive would establish a right to tuition-free compulsory education in the host country, and promote the teaching of the language and culture of origin. The system was conceived to improve the living and working conditions in the Community, and it was suggested that the right to education provided in the proposal should cover all migrant children residing in the Community, regardless of their country of origin.³⁴ The Directive sought on the one hand to assist in the social and personal advancement and integration in the host country, and on the other to ensure the maintenance of the possibility of repatriation. Specifically, the Commission wanted to ensure that, by having access to courses in their mother tongue and their national culture, migrant children would maintain the possibility of reintegration into the country of origin.³⁵

This proposal was approved by the European Parliament, which considered it an essential part of the educational aspects of the Community's Social Policy.³⁶ Showcasing the interdependence of economic and social objectives behind the proposed instrument, the Parliament Committee on Cultural Affairs and Youth suggested that migrant recruitment to cover labour demands should also be followed by measures that ensure the social well-being of the migrants.³⁷ The European Economic and

³¹ Proposal for a Directive on the Education of the Children of Migrant Workers [1975] OJ C 213/2.

³² Ibid, Recital 1.

³³ Ibid, Recital 2.

³⁴ Ibid, Recital 7, Article 1(2) of the proposed Directive.

³⁵ Ibid, Recital 6.

³⁶ Resolution embodying the Opinion of the Parliament on the proposal from the Commission for a Directive on the education of the children of migrant workers [1975] OJ C 240/48, point 2.

³⁷ Parliament, Working Documents 1975–1976, Document 375/5, Report drawn up on behalf of the Committee on Cultural Affairs and Youth on the proposal from the Commission to the Council (Doc. 224/75) for a Directive on the education of the children of migrant workers, Rapporteur: Mrs T. Caretoni Romagnoli, PE 471.807 fin p. 12, para 6.

Social Committee (EESC) also welcomed the inclusion of all migrant children in the scope of the directive.³⁸

The initial proposal was based on Article 49 and Article 235 EEC. Article 49 EEC concerned the adoption of Directives or Regulations on measures necessary to ensure the realization of free movement of workers. Article 235 EEC, on the other hand, was a general clause providing for the adoption of measures necessary to achieve the objectives of the Community in cases where the Treaty did not provide necessary powers. Due to this, the Commission put forward Article 49 EEC as the legal basis for social measures concerning Community workers. Then, in line with the Council resolutions that provided for the objective of gradually establishing equal treatment for all migrant workers, the Social Action Programme, and the objective of Article 117 EEC to promote an improved standard of living of workers, the Commission argued that Article 235 EEC should be used as a legal basis to extend protection to TCN workers.³⁹

The proposal of the Commission was not welcomed by the Member States for various reasons. The Danish, Italian, and French delegations in the Council disagreed with the choice of legal basis. The Danish delegation insisted that the Community had no jurisdiction in matters affecting TCNs and that, as a result, no binding instrument could be adopted on the matter.⁴⁰ The Italian delegation objected to the joint use of Articles 49 and 235 EEC. The Italians did not contest the Community competence on TCNs. Rather, they suggested that the Directive should only cover EC nationals and be based on Article 49 EEC, whereas a different binding measure should be put forward under Article 235 EEC for TCN workers.⁴¹ Eventually, the French delegation joined the opposition, and

³⁸ Opinion on the proposal for a Directive on the education of the children of migrant workers [1976] OJ C 45/6, point 3.1.2.

³⁹ HAEU, CM2/1977-634.3, The Council, Note, Subject: Proposal for a Directive on the education of the children of migrant workers, Outcome of the discussions of the Working Party on Social Questions, Brussels, 31 March 1976 377/76 (SOC 97) 3; HAEU, CM2/1977-634.5; The Council, Note, Subject: Proposal for a Directive on the education of the children of migrant workers, Report from the Working Party on Social Questions to the Permanent Representatives Committee, Brussels, 18 May 1976 R/1230/76 (SOC 131), B. Statement by the Commission Representative.

⁴⁰ HAEU, CM2/1977-634.5 (n 39), C. Delegations' Position.

⁴¹ HAEU, CM2/1977-634.4, The Council, Note, Subject: Proposal for a Directive on the education of the children of migrant workers, Report from the Working Party on Social Questions to the Permanent Representatives Committee, Brussels, 26 April 1976 R/987/76 (SOC 116) Annex – Attitude of the Italian delegation.

suggested that Article 49 EEC could not serve as the basis for covering TCN workers, but that similar measures could be extended to TCN workers by means of a non-binding act.⁴² Besides these countries, Luxembourg, the UK, and Germany were in favour of a single instrument for both Community and TCN workers, but suggested that such an instrument should be non-binding.⁴³ Their disagreement did not relate to the personal scope of the instrument but with its material one. These states considered educational policy to be part of national competence.

Eventually, a compromise was reached: the Directive maintained Article 49 as its sole basis, and excluded children of TCN workers from its scope. At the same time, a declaration was added to the minutes of the Council Meeting of 25 July 1977. The declaration confirmed the Council's intention that the measures adopted in compliance with the Directive should also apply to children of TCN migrants. This would allow the delegations that were in favour of a single instrument for all migrant children to introduce higher standards of protection while implementing the Directive.⁴⁴

In the negotiation of this instrument, we see how national disagreements over the personal and material scope of Community law led to the exclusion of children of TCN workers from the text of the Directive. Despite this exclusion, it is worth reflecting on the intimate link between the social and economic objectives of measures attributing rights to migrant workers' families. As it appears in later documents of the Commission, the education of migrant children was a measure aimed at addressing the underachievement and marginalization of immigrant groups. On the economic side, education was connected to the growing realization on behalf of the Community that migrant communities would be necessary for future demands of the labour market and, as a result, education could play a central role in that.⁴⁵ The social advancement of

⁴² HAEU, CM2/1977-634.5 (n 39).

⁴³ *Ibid.* This related mostly to objections on education policy as part of national competence.

⁴⁴ HAEU, CM2/1977-634.7, The Council, Note, Subject: Proposal for a Directive on the education of the children of migrant workers, Outcome of the discussions of the Permanent Representatives Committee, Brussels, 24 June 1976 R/1555/76 (SOC 167); HAEU, CM2/1977-634.7 European Communities, The Council, Note, Subject: Proposal for a Directive on the education of the children of migrant workers, Outcome of the meeting of the Working Party on Social Questions, Brussels, 9 November 1976 1221/76 (SOC 253).

⁴⁵ Policies on Immigration and the Social Integration of Migrants in the European Community, SEC(90)1813 final, para 59.

migrant workers' families was set in the context of improving the living and working conditions of the people residing in the Community regardless of their nationality. At the same time, a utilitarian approach to their education was adopted to ensure that the labour market demands will be covered by the offspring of migrant workers, so there is no need to recourse to more migration.

3.4 The Double Economic and Social Objective of the Community Migration Policy

During this period, the growing percentage of TCN workers present in Member States created the impetus for the adoption of a first set of legislative instruments, as means to create an incipient Community migration policy. The projected economic and social objectives of the Community dictated a need for coordination of national migration policies and attribution of rights to migrant workers. These objectives have been presented previously in this chapter in the following way.

First, there was the economic objective of ensuring the proper functioning of the Community labour market. Member States were required to safeguard free movement for Community workers and respect their obligations towards the Community manpower before hiring TCN workers.⁴⁶ This is closely related to a liberal trade theory on international migration that presupposes that in the long term, economic growth will reduce the need for factor mobility.⁴⁷ Insofar as the Community had labour demands that could not be covered by the regional labour force, there was a preference to adopt measures that would make the TCN workers already resident on the Community territory more appropriate for the market, rather than opening the door to more TCN migration. The initiatives related to the education of migrant children and the coordination of national positions on migration, which were reviewed in Sections 3.1 and 3.3, can be seen to fall under this economic objective.

Second, there was the social objective linked with TCN workers' contribution to growth. Due to their status as workers, migrants had to be treated with respect and the Community had to take action for the improvement of their living and working conditions. The measures related to education of migrant children and the emphasis on equal

⁴⁶ Consultation on Migration Policies, COM(79)115 final, para 2.10.

⁴⁷ James Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe* (Harvard University Press 1992) 24.

treatment, as the central principle guiding integration were linked to the pursuit of this objective which is identical for all migrants regardless of their origin. At the stage of Community law under examination, the Commission envisioned a policy on labour migration that would cover both TCN workers and Community workers without discrimination. Both these categories of migration were necessary for the economic development of the Community, and both should be attributed rights to ensure social progress in the Community. This grounding of the Commission's approach on the parallel pursuit of economic and social objectives is essentially an attempt to ensure a system of sustainable migration.

This aspiration did not meet much resistance from the Council, as long as there were national labour demands to be filled. While the Commission consistently backed this aspiration in the years that followed, the economic effects of the oil crisis and the increase in unemployment gave rise to a more restrictive approach in the Council as we shall see in detail in Chapter 6. In the meantime, Chapter 4 investigates the regulation of migration in the context agreements concluded by the EU with third countries either with the aim of instituting closer cooperation (like Association Agreements) or with the aim of accession.