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WHY DID THE COMMUNITARIZATION OF IMMIGRATION AND ASYLUM POLICIES ALMOST FAIL AND HOW WE SHOULD REVIVE IT*

1. The Schengen model and the Tampere approach: from functionalism to “comprehensivism”

If we agree, as I think we should, that the communitarization of immigration and asylum policies in the EU has not worked properly (not until now at least; not as we hoped); if we agree that the Tampere programme was a partial failure, in this case, our central question has to be why?

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You may say that this is an obvious question - and it is, as a matter of fact - but I think that the answer is not. In order to find such answer, it is useful to go back rapidly to the origins of the communitarization project.

European cooperation in the field of immigration

* This is a slightly revised version of a paper presented by Ferruccio Pastore at the international seminar for experts organised by the Cicero Foundation on “European Migration and Refugee Policy: New Developments” (Rome, 15 November 2002).

and asylum is a relatively recent phenomenon. In the post-World War II period, European countries of immigration *competed* among themselves; *they did not cooperate*. And it was a competition aimed at securing the “best” immigrants, at signing the most advantageous labour immigration agreements with sending countries, both Southern European and non-European ones (most of the time, the latter were former colonies).

Even when traditional European immigration countries decided, in the early 70s to shut the door to new legal entries for economic purposes, that crucial decision was taken by each country in a uncoordinated, competitive way. National borders were closed without considering the possible impact of such closure on the neighbouring countries, not to speak of the impact on the countries of origin.

And yet there was such an impact. And it was a substantial, a powerful one. For instance, in the quick start of mass migration to Southern European countries, to Italy in particular, the sudden closure of the French borders did certainly play a role, and not a minor one.

So, the past of intra-European relations in the field of migration management is one of competition, rather than cooperation. The only convergence existed between Mediterranean labour-exporting countries and Continental labour-importers. But also that limited convergence ended early and did not last, however, after 1973-4.

European cooperation in the field of immigration management began only some years after. And it started as a very practical, down-to-earth, functionalist endeavour.

We know very well what it was all about. European leaderships believed in the need to accomplish the economic integration of the continent. This implied - as the European Single Act of 1986 put it - the construction of an area of free circulation, not only for goods and capitals, but also - as much as possible - for people.

There were at least two reasons for such strategic choice: the more structural one was the shared conviction that free circulation of workers would guarantee an optimal allocation of labour forces in the Single Market.

A more contingent reason was that, during the late 70s and all through the 80s, border controls (which were often hampered and slowed down by frequent strikes) proved more and more costly, in bare economic terms.

That was how - following a classic technocratic and functionalist European decision-making pattern - five governments decided in Schengen (1985) to suppress internal border controls among them.

But while that decision was being taken, security concerns started to spread among security professionals first, and among politicians next. If we abolish internal borders - this was the mantra - we need to adopt "compensatory measures" at external borders, in order to avoid that the completion of the internal market affects negatively the overall internal security of our borderless space. This was the techno-political logic below the Schengen convention signed in 1990, and it was basically the dominant paradigm during most of the 90s.

But that technocratic and functionalist paradigm, although apparently very pragmatic, soon showed its limits: *institutional limits*, due to the tight "unanimity jacket" typical of its purely intergovernmental nature; but also *political limits*, due to its weak democratic legitimacy (to say the least) and to its narrow strategic horizon.

The Amsterdam treaty created the *legal* possibility to go beyond that horizon. But it was only the Tampere summit - as you know - which really opened the *political* door.

Under the Finnish presidency, the European Heads

of State and Government pushed their political will and their rhetoric beyond functionalism. In the framework of a broad strategy aimed at building a European "Area of freedom, security and justice", a comprehensive approach to immigration and asylum was adopted.

The aim of common migration policy was no longer limited to compensate the potential negative impact of the suppression of internal borders. The ambitions grew dramatically: not only controlling efficiently common borders, but managing efficiently legal immigration, promoting social integration of migrants, combating discrimination, ensuring international protection to those in need, and also struggling against the causes of forced migration worldwide, and preventing illegal economic immigration through development cooperation.

All this (and more than this) was in the Tampere Conclusions of October 1999.

But this impressive expansion of the agenda - which we can summarize as a shift from functionalism to "comprehensivism" - was not the only innovation of the late 90s in this field.

While raising their ambitions, the governments of several MS developed a new discourse to legitimize European action in the migratory field in front of their constituencies. The common immigration and asylum policy was not presented any more as a compensatory strategy aimed at allowing the abolition of internal border controls. It was explained, on the contrary, as a direct response to the needs and preoccupations of European citizens and enterprises.

So, beside the shift from functionalism to "comprehensivism", we witness a parallel shift from an indirect/technocratic legitimation discourse towards a more direct and "democratic" (on certain occasions even slightly "populist") strategy of legitimation.

Besides conceptual and political innovation, the post-Amsterdam phase was also marked by a significant amount of methodological innovation in the European decision-making on migratory issues. I will not dwell upon this aspect and will just limit myself to pointing out the novelty of certain approaches by the Commission. I am thinking of that ambitious attempt at interinstitutional coordination which is the "Scoreboard" and also of the more targeted open coordination methods

proposed by Commissioner Vitorino both in the field of asylum and of immigration.

2. Laeken-Sevilla: the European pendulum swings backwards

What did all this bring as concrete results?

First of all, it must be recognised that the European Commission was very zealous and efficient in its propulsive function. On almost every item of the agenda, a legislative proposal was issued on time. It has to be acknowledged, though, that the quality of these proposals was not always the same and in some cases it was not totally satisfactory. These limits have to be acknowledged, but the main reasons for the disappointing mid-term assessment which was made in Laeken (December 2001) are certainly not on the Commission's side.

The most evident reason of the slow implementation of the Vienna Action Plan and of the Tampere manifesto certainly lies in the passive resistance opposed by national sovereignties to normative convergence and supranational harmonization. And it has to be reminded that such resistances existed in spite of the high degree of, so to say, "genetic" flexibility introduced in this field by the British, Irish and Danish opt-outs made in Amsterdam.

Besides such structural and encompassing explanation of the delays in the communitarization process, another explanation - a more contingent one - can be given. I am obviously thinking of the political changes which have taken place in many MS since the Fall 1999.

At the Tampere table - as we are all aware - there was a majority of progressive, or Centre-Left, government representatives. Since then the situation changed in many countries among which Austria, France, Italy, The Netherlands and Portugal.

We should be careful - I think - in not overstating the influence of the political/ideological variable in shaping actual migration policies of the States (I am talking here about actual policies, not about discourses, which is obviously something different). But certainly in some of the countries I just mentioned there were substantial changes, and especially on some of the topics being currently negotiated at the EU level.

This political evolution brought to a narrowing of the agenda and to the imposition of stricter guidelines to the Commission's right of initiative. I am thinking particularly of the explicit request by the European Council to the Commission to reformulate the directive proposals on asylum procedures and on family reunification.

The trend towards a much more severe selection of priorities was only reinforced by the September 2001 terrorist attacks which certainly affected the European policy-making, particularly in certain areas, such as visa policy.

One further explanation can be given of the obstacles met by the communitarization process. And it concerns once again the problematic relation between national and supranational decision-making circuits.

Migration legislation is a constant work in progress. The rapid evolution of migratory phenomena calls for frequent normative adjustments. Furthermore, the strong symbolical dimension of immigration policies in contemporary Europe often pushes new governments to make their own laws in order to show that they are different from their predecessors. All this was quite apparent in the last couple of years in Western Europe. Most MS reformed their national legislation. And so did, in particular, some of the crucial players in the communitarization game such as Germany, Spain and Italy.

At a certain point, the Commission tried to oppose such trend by invoking a standstill clause which would have imposed a legislative moratorium until European parameters were defined.

But unsurprisingly the opposite happened. On some key subjects, such as family reunification, it was the European decision-making process which was blocked, in order to allow national Parliaments to take their own decisions in an unrestricted way.

In other words, we witnessed very clearly the functioning of a domestic priority and of a "reverse standstill clause".

Now, only a year and a half separates us from the 1st of May 2004, when the transition period set in Amsterdam will expire. It is quite evident, by now, that communitarization will take place only to a limited extent. On some subjects, such as admission for economic purposes, it is quite unlikely that any communitarization will take place.

But what is even more important (and

disappointing) is the quality of such partial communitarization. It is very clear that on crucial issues, such as asylum procedures and family reunification, it will be a *poor quality* communitarization. It will be a convergence to the bottom, where the common minimum standards will very often coincide with the lowest common denominator.

This is very disappointing not only in itself, but even more in connection with enlargement, as the message sent to new members is one of great rigour on immigration controls and a different one, of a great flexibility, on migrants' rights.

3. Structural explanations of the crisis of the Tampere approach

Most of what I wrote until now reflects a set of knowledge and beliefs which is widely shared among academics, immigration and asylum NGOs, and also in many institutional circles. Now, I would like to try and go beyond that. I would like to try and go a little bit more in depth and ask: are we sure that the crisis of the Tampere approach can be explained only and entirely with the Member States' jealousy of their national sovereignty and with the recent electoral results in some European countries?

What I would like to suggest is that maybe there is also another possible explanation - a very basic one - which concerns the socio-economic foundations of migration policy and plays on the great diversity of such foundations among MS*.

The current Members of the EU have very different experiences and problems with international migration.

Some have been countries of emigration until very recently; others are receiving countries since more than one century.

Some are geographically very exposed to spontaneous and irregular flows. Others are more protected, at least against direct illegal entries through "blue" and "green" borders.

In some MS, the economy - both the official and the hidden economy - expresses a strong demand for unskilled foreign labour. In other MS, this segment

* These ideas are developed more in depth in F. Pastore, G. Sciortino, "Immigration and European Immigration Policies: Myths and Realities", in J. Apap (ed.), *Extending the Area of Freedom, Security and Justice through Enlargement: Challenges for the European Union* (provisional title), forthcoming.

of labour demand is either undeclared or covered by internal deposits of unexploited labour offer. In some cases, the second (and the third) generation of former immigration waves play an important role from this point of view, insofar as they are still relatively marginalized in national labour markets.

In some EU countries, there is a strong demand for skilled and high-skilled foreign labour, which is - on the contrary - much weaker in countries in which the knowledge-intensive sectors of the economy are still quite small.

And other important structural differences appear in the field of asylum. As a matter of fact, during the 1990s, asylum policies have emerged as one of the main, if not *the main* factor of imbalance in the European admission system conceived as a whole.

So, there was and there is a great amount of structural diversity among MS in the migratory field. The social, cultural and economic realities of international migration differ widely in each national context.

Consequently, also the political priorities differ: each country has its national debate and its material and symbolical political cleavages: regularisation in Italy, compulsory language courses as an integration tool and family reunification in today's Germany (it was double nationality, yesterday), vouchers or other kind of assistance for asylum seekers in the UK, and so on.

Obviously, some countries share analogous problems: for instance, the divide between "old" immigration countries - basically Continental Europe, the British Isles, Scandinavian countries to a certain extent - and "new" immigration countries - the Mediterranean ones - is a very substantial divide, which has not been focused early enough and clearly enough in EU policy-making.

In fact, what happened in Tampere is that the nature of immigration and asylum as *common* issues calling for *common* policies was strongly emphasized, maybe too strongly.

This was very understandable in the context of a shift towards "comprehensivism". As it is undisputable that, if the strategic aim is not only to manage actual flows, but also to tackle their "root causes"; well, in that case, a European common policy is certainly necessary.

But, in spite of the proclamation of the need for a comprehensive approach, the decision-making model remained the old one: separate proposals for

each item, and separate negotiations on each proposal.

And here is the trick! Here is where functionalism is back. A short-sighted functionalism which gives way only to those decisions which correspond to short-term interests of bureaucratic and/or political nature.

And in all those cases in which a real compromise among such diverging sets of interests cannot be established, it is very likely that communitarization will be but a photography of what already exists. A rigid codification of the minimum common denominator. An *outward*, or even worse a *regressive* harmonization.

4. Migration policy and the future of the European Union

One could then conclude: well, Tampere was just an exercise of wishful thinking. Now, we are back on earth, the good, old, solid earth of European, step-by-step functionalism.

No conclusion - I believe - could be more flawed and dangerous.

Certainly, Tampere was *also* a wishful thinking exercise. It was *also* a political show. But not just that. It was an epiphenomenon of a phase of a certain cultural growth in Western European attitude towards international migration. A phase of cultural maturation which followed years of irrational discourse, of induced fears, of "fortress syndrome".

And that sort of growing social and cultural maturity implied an expanding awareness of the magnitude of international migration as a political issue. An expanding awareness of the impossibility to "solve the immigration problem". Of the need to coexist with migration, to face it positively, although not naively, to make any effort in order to maximise its positive impact and to minimise its possible negative side-effects.

Unfortunately, cultural and social awareness are not conquered once and for all. And it seems that we are now, again, in a phase in which the pendulum of collective rationality on migration issues swings back.

But one should not be too pessimistic. There are some encouraging signs. One, and a major one, is EU enlargement.

As a matter of fact, enlargement is *also* a grandiose

migration management strategy. Shifting the common external border to the East and widening enormously the area of freedom of circulation. These are two spectacular policy moves.

It is true that both moves are conditioned by transition periods: a formal one for granting freedom of circulation for economic purposes to nationals of new MS, an informal waiting period for admitting fully the new Members in the Schengen space. But, also considering these questionable precautionary measures, the relatively easy closure of the relevant negotiation chapters with ten candidates is a significant success, although a temporary and partial one.

In order to go beyond, it is necessary to identify very clearly and surmount the factors of the partial failure of the Tampere approach.

One is the institutional factor, and particularly the straitjacket of unanimity, which almost killed the communitarization process.

The progress made on this specific ground with the Treaty of Nice is very limited. More recently, though, the awareness of the need to move towards co-decision and qualified majority voting in the immigration and asylum field emerged strongly within the WG on JHA of the Convention on the Future of Europe (see http://european-convention.eu.int/doc_register.asp?lang=EN&Content=WGX). The same direction comes, even more strongly, from the European Parliament, think tanks and associations (see, in particular, the *Joint Submissions* by the Standing Committee of Experts in International Immigration, Refugee and Criminal Law, the Immigration Law Practitioners Association, Statewatch, and the European Council of Refugees and Exiles to Working Group X of the Convention, issued on 14 November 2002 and now available on <http://www.statewatch.org/news/index.html>).

It will extremely interesting to see to what extent these strong and converging requests will finally be endorsed by the Convention and later by the IGC.

But besides the institutional factor, there is also a more substantial, *political* factor explaining the disappointing output of the communitarization process.

I am convinced that a comprehensive approach to migration management is necessary, but I also believe that the Tampere agenda was probably too wide. "More Europe" is certainly needed in order to

tackle the root causes of forced migration and to struggle in a just and sustainable way against illegal migration. From this point of view, not only a common migration policy is needed, but also a strong and courageous common foreign and security policy.

As a matter of fact, migration policy -if it is framed in a comprehensive way - is an overarching policy field, with large overlappings with foreign policy outside and with social policy inside.

But in other areas, I am thinking primarily of admission policy for economic purposes, the European Commission has probably been too ambitious or too optimistic.

Times are probably not yet ripe for harmonizing labour immigration policies alone. A real communitarization in that field will probably be possible only in parallel with a much more vigorous streamlining of national economic and social policies. This could be – it ought to be - the next great challenge for Europe.



Previous issues are available on CeSPI's website (www.cespi.it).

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MigraCtion is also managing an online observatory on migration from/through the Balkans (www.osservatoriobalcani.org/migraction/).

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